CTQ-2013-00005

**COURT OF APPEALS**

**STATE OF NEW YORK**



EXECUTIVE PLAZA, LLC,

*Plaintiff-Appellant,*

-against-

PEERLESS INSURANCE COMPANY,

*Defendant-Respondent.*

*On Question Certified by the United States Court of Appeals For the Second Circuit (USCOA Docket No. 12-1470-cv)*

# BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF THE PLAINTIFF-APPELLANT EXECUTIVE PLAZA, LLC

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Dated: November 7, 2013

**DISCLOSURE STATEMENT OF UNITED POLICYHOLDERS PURSUANT TO 22 N.Y.C.R.R. 500.1(f)**

Pursuant to Rule § 500.1(f) of the Rules of Practice of the Court of Appeals, United Policyholders advises the Court that it is a non-profit 501(c)(3) consumer organization and that it does not have a parent corporation, subsidiary, or corporate affiliate.

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## PRELIMINARY STATEMENT

United Policyholders respectfully submits this brief in support of the arguments made by Plaintiff-Appellant Executive Plaza, LLC ("Executive Plaza") set forth in its brief to the United States Court of Appeals for the Second Circuit. United Policyholders seeks to fulfill the role of *amicus curiae* by supplementing the efforts of Plaintiff-Appellant's counsel in a case of general public interest.

## STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

United Policyholders, a non-profit 501(c)(3) organization founded in 1991, serves as an independent information resource and a voice for insurance consumers in all 50 states. Donations, foundation grants and volunteer labor fuel the organization. United Policyholders' Board of Directors includes the former Chief Justice of the Arizona Supreme Court and the former Washington State Insurance Commissioner.

United Policyholders divides its work into three program areas: (1) the *Roadmap to Recovery* program provides tools and resources that help individuals and businesses solve insurance problems that can arise after an

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1 *See* Affirmation of William G. Passannante, Esq., dated November 7, 2013, filed herewith.

accident, illness, disaster, or other adverse event; (2) the *Roadmap to Preparedness* program promotes insurance and financial literacy as well as disaster preparedness; and (3) the *Advocacy and Action* program advances policyholders' interests in courts of law, legislative and public policy forums, and in the media.

United Policyholders participates in the proceedings of the National Association of Insurance Commissioners ("NAIC") as an official consumer representative. United Policyholders interfaces with the Insurance Division of the Department of Financial Services when providing disaster recovery and claim help to New York State residents through a "Roadmap to Recovery" program. United Policyholders maintains an extensive, publically-available library of publications, legal briefs, sample policies, forms, and articles on commercial and personal lines insurance products, coverage, and the claims process on its website, www.unitedpolicyholders.org.

In addition to serving as a resource on insurance claims for individuals and commercial policyholders throughout New York State, United Policyholders monitors legal and marketplace developments in the Empire State. United Policyholders has participated in legislative and other

public forums related to home, auto and title insurance rates and claim practices, and is currently working in partnership with the Touro Law Center on Long Island on Super Storm Sandy recovery.

United Policyholders seeks to assist courts throughout the United States by filing *amicus curiae* briefs in insurance cases. We have filed nine briefs in the New York Court of Appeals.[2] Most recently, United Policyholders filed an *amicus curiae* brief in *United States Fidelity & Guaranty Co. v. American Re-Insurance Co.*, 21 N.Y.3d 923 (2013). United Policyholders has also submitted eight *amicus curiae* briefs to the United States Court of Appeals for the Second Circuit,[3] as well as *amicus curiae*

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2 *U.S. Fid.& Guar. Co. v. Am. Re-Insurance Co.*, 21 N.Y.3d 923 (2013); *Bi-Economy Mkt., Inc. v. Harleysville Ins. Co. of N.Y.*, 10 N.Y.3d 187 (2008); *U.S. Underwriters Ins. Co. v. City Club Hotel, LLC*, 3 N.Y.3d 592 (2004); *Belt Painting Corp. v. TIG Ins. Co.*, 100 N.Y.2d 377 (2003); *Consol. Edison Co. v. Allstate Ins. Co.*, 98 N.Y.2d 208 (2002); *Travelers Cas. and Sur. Co. v. Certain Underwriters at Lloyd's of London*, 96 N.Y.2d 583 (2001); *A-One Oil, Inc. v. Mass. Bay Ins. Co.*, 92 N.Y.2d 814 (1998); *Am. Home Assurance Co. v. Int'l Ins. Co.*, 90 N.Y.2d 433 (1997); *Town of Harrison v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 89 N.Y.2d 308 (1996).

3 *Woodhams v. Allstate Fire and Cas. Co.*, 453 F. App'x 108 (2d Cir. 2012); *Schwartz v. Liberty Mutual Insurance Co.*, 539 F.3d 135 (2d Cir. 2008); *Harris v. First Unum Life Ins. Co.*, 202 App'x 479 (2d Cir. 2006); *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 411 F.3d 384 (2d Cir. 2005); *Allstate Ins. Co. v. Serio*, 261 F.3d 143 (2d Cir. 2001); *Shapiro v. Berkshire Life Ins. Co.*, 212 F.3d 121 (2d Cir. 2000); *United States v. Brennan*, 183 F.3d 139 (2d Cir. 1999); *Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp.*, 73 F.3d 1178 (2d Cir. 1995).

briefs in numerous cases before the United States Supreme Court.[4] The U.S. Supreme Court referenced United Policyholders' *amicus curiae* brief in its opinion in *Humana, Inc. v. Forsyth*, 525 U.S. 299 (1999).

United Policyholders has a vital interest in ensuring that insurance companies fulfill the promises they make to their New York policyholders. While insurance companies earn their profit through risk assumption, businesses and individuals rely on insurance to protect property and livelihoods. United Policyholders seeks to prevent insurance companies from shifting risk back to policyholders through schemes that are not authorized by insurance contracts or public policy. The organization works to counterbalance the widely-represented interests of insurance companies by serving as an advocate for large and small policyholders in forums throughout the country.

In this case, United Policyholders seeks to appear as *amicus curiae* to address a certified question before the Court concerning the availability of replacement cost coverage under insurance policies. This

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4 *See, e.g.*, *Fuller-Austin Insulation Co., v. Highlands Ins. Co.*, 549 U.S. 946 (2006); *Philip Morris USA v. Mayola Williams*, 547 U.S. 1162 (2006); *Aetna Health, Inc. v. Davila*, 542 U.S. 200 (2004); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *Rush Prudential HMO v. Debra Moran*, 533 U.S. 948 (2001), *aff'd*, 536 U.S. 355 (2002); *Humana Inc. v. Forsyth*, 525 U.S. 299 (1999).

question has significance well beyond the application of New York law to the specific facts of this litigation. This important issue will affect policyholders nationwide. Unpaid volunteer counsel performed all of the legal research and writing in this brief, and no party to this appeal participated in the drafting of this brief or funded this work.

## STATEMENT OF THE CASE AND STATEMENT OF FACTS

United Policyholders adopts the Statement of the Case and Statement of Facts of the policyholder, Executive Plaza, LLC ("Executive Plaza"), as set forth in its brief submitted to the Second Circuit. *See Appellant's Brief*, filed Aug. 31, 2012, at pp. 4-20.

## ARGUMENT

The following question has been presented to this Court by the United States Court of Appeals for the Second Circuit: "If a fire insurance policy contains

> (1) a provision allowing reimbursement of replacement costs only after the property was replaced and requiring the property to be replaced 'as soon as reasonably possible after the loss'; and
>
> (2) a provision requiring an insured to bring suit within two years after the loss;

is an insured covered for replacement costs if the insured property cannot reasonably be replaced within two years?" The Court should answer the certified question in the affirmative for the following reasons:

1. The average policyholder would not reasonably expect the replacement cost provision to require replacement of the property within two years;

2. Application of the suit limitations clause to a policyholder's claim for replacement costs would create an ambiguity that must be resolved in favor of coverage;

3. Allowing insurance companies to deny coverage for replacement costs when a policyholder acting reasonably cannot complete repairs within two years is against the purpose of insurance; and

4. If the policy were interpreted to require replacement of the property within two years, the policy would provide illusory coverage that is against public policy.

## I. THE AVERAGE POLICYHOLDER WOULD NOT REASONABLY EXPECT THE REPLACEMENT COST PROVISION TO REQUIRE REPLACEMENT OF THE PROPERTY WITHIN TWO YEARS.

Any interpretation of the fire insurance policy sold by Peerless Insurance Company ("Peerless") to Executive Plaza (the "Peerless Policy") begins with the plain and ordinary meaning of the replacement cost provision and the reasonable expectations of the average policyholder.

*Federal Ins. Co. v. Int'l Bus. Machs. Corp.*, 18 N.Y.3d 642, 646 (2012) ("In analyzing the meaning of an insurance policy provision, it is necessary to determine the 'reasonable expectations of the average insured.'") (quoting *Cragg v. Allstate Indem. Corp.*, 17 N.Y.3d 118, 122 (2011)); *Belt Painting Corp.*, 100 N.Y.2d at 383 ("We read an insurance policy in light of 'common speech' and the reasonable expectations of a businessperson.") (citations omitted).

In Section E.6(d)(1)(b), the Peerless Policy provides coverage for replacement costs in the event of a covered loss:

> (b) We will not pay on a replacement cost basis for any loss or damage:
>
> (i) Until the lost or damaged property is actually repaired or replaced; and
>
> (ii) Unless the repairs or replacement are made as soon as reasonably possible after the loss or damage.

Interpreting the provision in light of its ordinary meaning, the average policyholder would reasonably expect the replacement cost provision to contain only one temporal requirement—that repairs or replacement be completed "as soon as reasonably possible after the loss or damage." By including the temporal requirement that the policyholder complete repairs or

replacement "as soon as reasonably possible" without reference to any additional temporal requirement, such as the two-year limit now urged by Peerless, the replacement cost provision signaled to the average policyholder that replacement cost coverage would be available after the repairs or replacement had been made, so long as the policyholder completed those repairs "as soon as reasonably possible." Had Peerless intended to limit the availability of replacement cost coverage to situations where repairs or replacement were completed within two years of the date of the loss, Peerless should have done so clearly and unambiguously. Peerless did not. *Belt Painting Corp.*, 100 N.Y.2d at 383 (Where an insurance company seeks to limit coverage, it must do so in "clear and unmistakable language."); *see also Nat'l Football League v. Vigilant Ins. Co.*, 36 A.D.3d 207, 211 (1st Dep't 2006).

Recognizing these fundamental principles of insurance policy interpretation, the Fourth Department recently ruled that a similarly worded replacement cost provision in a homeowners insurance policy did "not impose any time limit on the reconstruction of the home." *Bakos v. New York Cent. Mut. Fire Ins. Co.*, 83 A.D.3d 1485, 1487 (4th Dep't 2011). The court held that "[c]ontrary to [the insurance company's] contention, the contractual provision imposing a two-year limitation on legal action does not

impose a time limit on reconstruction" of the property. *Bakos*, 83 A.D.3d at 1487. The Fourth Department's interpretation of the replacement cost provision in *Bakos* is correct because it mimics the reasonable expectations of policyholders based on the clear language of the replacement cost provision.

Notwithstanding the average policyholder's reasonable expectation for coverage, Peerless attempts to avoid coverage for Executive Plaza's loss by relying on the "Legal Action Against Us" provision in the Peerless Policy. That provision, found in Section E.4, states:

> No one may bring a legal action against us under this insurance unless:
>
> a. There has been full compliance with all of the terms of this insurance; and
>
> b. The action is brought within 2 years after the date on which the direct physical loss or damage occurred.

Peerless reasons that even if the policyholder dutifully repairs or replaces the property "as soon as reasonably possible," if the repairs or replacement have not been completed two years after the fire, the policyholder loses its right to make a claim for replacement costs under the policy due to the two-year suit limitations provision. *See, e.g.*, *Appellee's*

*Brief*, filed Nov. 29, 2012, at p. 25. Peerless ignores the ambiguity caused by conflicting provisions in the policy it drafted. Peerless draws this conclusion even though the replacement cost provision contains no reference to the two-year suit limitations provision. Peerless even pushes this interpretation notwithstanding that, under Peerless' interpretation, a policyholder like Executive Plaza, whose repairs could not be completed within two years of the date of the loss, would be time-barred from bringing a claim for replacement costs before such a claim had even accrued.

Peerless' strained interpretation is contrary to the plain and ordinary meaning of the language used and contrary to the average policyholder's reasonable expectations, because: (1) the only temporal requirement in the replacement cost provision is replacement "as soon as reasonably possible;" (2) the replacement cost provision makes no reference to the two-year suit limitation clause; and (3) repairs or replacement must be completed before a claim for replacement costs can be made, the average policyholder would conclude that the two-year suit limitation did not apply to claims for replacement costs.[5] The average policyholder certainly would

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5 Because no reasonable suit limitation period is provided for claims for replacement costs, the Court should apply the statutory six-year limitation period for breach of contract. *See, e.g. Becker-Fineman Camps, Inc. v. Public Serv. Mut. Ins. Co.*, 52 A.D.2d 656 (3d Dep't 1976); Roger G. Coffin, *Insurance Law § 3404: Failure to Provide for Shortened Limitation Period in Fire Ins. Policy*

not expect its claim for replacement costs to be time-barred before the policyholder's right to bring such a claim under the Peerless Policy had accrued.

## II. APPLICATION OF THE TWO-YEAR SUIT LIMITATIONS CLAUSE TO THE POLICYHOLDER'S CLAIM FOR REPLACEMENT COSTS CREATES AN AMBIGUITY THAT MUST BE RESOLVED IN FAVOR OF THE POLICYHOLDER.

At the very least, the Peerless Policy is ambiguous, and that ambiguity must be resolved in favor of the policyholder, Executive Plaza. As the Court of Appeals has previously articulated, insurance policy language is ambiguous where, "affording a fair meaning to all of the language employed by the parties in the contract and leaving no provision without force and effect, there is a reasonable basis for a difference of opinion as to the meaning of the policy." *Int'l Bus. Machs. Corp.*, 18 N.Y.3d at 646 (quotations, citations, and internal alterations omitted). When an ambiguity exists in an insurance policy, "[t]he burden of proof is on the insurer . . . [to] show that its construction of the policy is the *only* construction that can fairly be placed upon it." *Campanile v. State Farm General Ins. Co.*, 161 A.D.2d 1052, 1054 (3d Dep't 1990), *aff'd*, 78 N.Y.2d

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*Results in Application of the General Six-Year Period*, 59 ST. JOHN'S L. REV. 815 (2012).

912 (1991) (emphasis added); *see also Saks v. Nicosia Contracting Corp.*, 215 A.D.2d 832, 833 (3d Dep't 1995) (When there is an ambiguity, "an insurer must demonstrate not only that its interpretation is reasonable, but that it is the only fair interpretation."); *State Farm Mut. Auto. Ins. Co. v. Bentley*, 262 A.D.2d 739, 740 (3d Dep't 1999). Indeed, if a court deems policy language ambiguous, the court must interpret the language "in favor of the insured." *Int'l Bus. Machs. Corp.*, 18 N.Y.3d at 646, *see also Campanile*, 161 A.D.2d at 1054 ("The rule of construction applied to ambiguous terms in insurance contracts strongly favors the insured."); *Saks*, 215 A.D.2d at 833 ("It is also the general rule that when there is ambiguity as to existence of coverage, doubt must be resolved in favor of the insured and against the insurer.").

Here, Peerless cannot overcome its burden to demonstrate that its interpretation is reasonable. *See Saks*, 215 A.D.2d at 833. In situations where, as here, repair or replacement is a necessary pre-requisite to the filing of a replacement costs claim but, for reasons outside the policyholder's control, the completion of repairs or replacement is not possible despite the policyholder's best efforts, the application of a two-year limitation period would be *unreasonable*. Because the Peerless Policy requires the completion of repairs or replacement before a claim for replacement costs

can be made, if Peerless' interpretation were accepted, many policyholders' causes of action would be time barred before the causes of action had even accrued. Indeed, as discussed below, the application of the two-year limitation period pursuant to Peerless' interpretation would render illusory the replacement cost coverage under the Peerless Policy in violation of public policy.

Further, even if Peerless' interpretation were reasonable, Peerless cannot overcome its burden because Peerless' interpretation is not "the only fair interpretation" of the provisions of the Peerless Policy. *See Saks*, 215 A.D.2d at 833. As explained above in Section I, an average policyholder would reasonably expect replacement cost coverage after the policyholder had repaired or replaced the property "as soon as reasonably possible." This interpretation is bolstered by the fact that any other interpretation of the two provisions, including the interpretation proffered by Peerless, would be unreasonable and render replacement cost coverage illusory. Because Executive Plaza and the average policyholder's interpretation would be a "fair interpretation" of the Peerless Policy, Peerless cannot show that its interpretation of the Peerless Policy is "the only fair interpretation."

Finally, it is well settled that when an insurance policy contains language which renders its meaning doubtful or uncertain, all ambiguities must be resolved "in favor of the [policyholder] and against the [insurance company], the drafter of the policy language." *In re Mostow v. State Farm Ins. Cos.*, 88 N.Y.2d 321, 326 (1996); *see also Lavanant v. Gen. Accident Ins. Co. of Am.*, 79 N.Y.2d 623, 629 (1992) ("[W]here there is ambiguity as to the existence of coverage, doubt must be resolved in favor of insured and against insurer."); *Burriesci v. Paul Revere Life Ins. Co.*, 255 A.D.2d 993, 994 (4th Dep't 1998) ("[W]here the meaning of a policy of insurance is in doubt or is subject to more than one reasonable interpretation, all ambiguity must be resolved in favor of the policyholder and against the company which issued the policy."). This rule, known as *contra proferentem*, reflects the key public interest in addressing the inequities inherent in adhesion contracts such as insurance policies. This rule of interpretation reflects a recognition that the insurance promise is aleatory in nature. The policyholder performs in-full up-front by paying premium and is at the mercy of the insurance company to determine that its performance under the policy is due. Accordingly, if this Court were to find the Peerless Policy ambiguous, that ambiguity must be resolved in favor of Executive Plaza and in favor of coverage. Here, that would result in a determination that

policyholders like Executive Plaza are covered for replacement cost coverage even if their properties cannot reasonably be replaced within two years of the date of the loss.

## III. ALLOWING INSURANCE COMPANIES TO DENY COVERAGE WHEN POLICYHOLDERS ACTING REASONABLY CANNOT COMPLETE REPAIRS WITHIN TWO YEARS IS AGAINST THE PURPOSE OF INSURANCE.

The purpose of insurance is to insure. Insurance transfers risk, and a policyholder pays a premium in order to transfer "the risk of a loss or the responsibility for certain costs and expenses" to an insurance company. Robert E. Keeton & Alan I. Widiss, *Insurance Law: A Guide to Fundamental Principles, Legal Documents, and Commercial Practices 11* (West Publishing Co. 1988). Rather than an isolated contract for money, New York state courts have recognized that "the primary purpose of insurance is to insure..." *Rubin v. Empire Mut. Ins. Co.*, 57 Misc. 2d 104, 106 (N.Y. Civ. Ct. New York County 1967), *rev'd,* 32 A.D.2d 1, 3 (1st Dep't 1969), *rev'd,* 25 N.Y.2d 426, 430 (1969).

Beyond the mere purpose to "insure," New York's Insurance Law and Regulation have further sought to *ensure* that policyholders are protected from the overreaching effects inherent in the unbalanced

relationship with insurance companies. Indeed, this approach is necessary to assist the policyholder, since "[i]nsurance contracts are usually contracts of adhesion in that their terms are generally dictated rather than negotiated." *Am. Home Prods. Corp. v. Liberty Mut. Ins. Co.*, 565 F. Supp. 1485, 1492 (S.D.N.Y. 1983), *aff'd*, 748 F.2d 760 (2d Cir. 1984); *see also Klos v. Polskie Linie Lotnicze*, 133 F.3d 164, 168 (2d Cir.1997) ("[t]ypical contracts of adhesion are standard-form contracts offered by large, economically powerful corporations to unrepresented, uneducated, and needy individuals on a take-it-or-leave-it basis, with no opportunity to change the contract's terms."); *First Fin. Ins. Co. v. Allstate Interior Demolition Corp.*, 193 F.3d 109, 118 (2d. Cir. 1999) ("As this Court has recognized, '[b]ecause insurance contracts are inevitably drafted by insurance companies, New York law construes insurance contracts in favor of the insured and resolves all ambiguities against the insurer…'"); *Eagle Star Ins. Co. v. Int'l Proteins Corp.*, 45 A.D.2d 637, 639 (1st Dep't 1974), *aff'd*, 38 N.Y.2d 861 (1976) (citing Williston on Contracts, 3d Ed., § 626, at pp. 855-57).

The policyholder's expectation for peace of mind that the policy bargained for will protect against the sudden occurrence of liability is reinforced by the well-established principle that the insurance company has an implied duty of good faith to carry out its obligations under the policy.

*Bi-Economy Mkt., Inc. v. Harleysville Ins. Co. of N.Y.*, 10 N.Y.3d 187, 194 (2008) ("implicit in contracts of insurance is a covenant of good faith and fair dealing, such that 'a reasonable insured would understand that the insurer promises to investigate in good faith and pay covered claims.'").

Indeed, insurance companies' obligation to act in "[g]ood conscience and fair dealing require that the [insurance company] pursue a course that is not advantageous to itself while disadvantageous to its policyholder." *Tank v. State Farm Fire & Cas. Co.*, 715 P.2d 1133, 1139 (Wash. 1986). Nevertheless, that is exactly what an insurance company is doing when it seeks to impose on the policyholder an arbitrary and unreasonable time restriction found nowhere in the policy within which the policyholder must rebuild its property in order to obtain the replacement costs of those repairs. The end result is illusory coverage that the insurance company improperly attempts to avoid providing to the policyholder, while requiring that the policyholder pay a premium because of that expectation of coverage.

Notwithstanding the fact that the only temporal requirement in the replacement cost provision simply requires repair or replacement "as soon as reasonably possible," Peerless contends that this language mandates

that the policyholder cannot receive replacement cost benefits (specifically the "holdback" or "recoverable depreciation" of the damaged property or actual replacement cost) unless he or she completes all repairs to his or her damaged home within two years of the date of the loss. Peerless' erroneous interpretation of the Legal Action Against Us provision and the replacement cost provision of the Peerless Policy turns many claims unfairly against the policyholder. Peerless would prefer that only the first half of the aleatory promise take place, and would prefer to collect premiums for coverage that would never go into effect. Practically, Peerless' erroneous interpretation forces the policyholder to: (1) hire architects or engineers to prepare the requisite plans, obtain the required permits, solicit bids from contractors to rebuild the structure, and then commence construction; and (2) pray that somehow no delays, even those outside the policyholder's control such as delays in the permit process, inclement weather, strikes, and unavailability of materials, push the completion date beyond two years after the date of loss. This scenario assumes, of course, that the policyholder can financially afford to rebuild the destroyed property using solely the actual cash value payment (or his or her own money), with only the *possibility* that the policyholder will be reimbursed later by Peerless upon completion. At the policyholder's weakest moment, Peerless requires the policyholder to be

financially capable of paying to rebuild its own property in order to receive full coverage under its policy.

To permit an insurance company to place a provision in the insurance policy entitling the policyholder to recover replacement costs, but then read into such a provision an implicit but invisible temporal requirement that makes it almost impossible for many policyholders to reap the benefits, would subject these future policyholders to hidden, crippling costs as merely "the business of insurance." Such an inappropriate result is not in line with the purpose of insurance, or the purpose of New York's insurance laws.

## IV. APPLICATION OF THE TWO-YEAR SUIT LIMITATION TO CLAIMS FOR REPLACEMENT COSTS WOULD RENDER REPLACEMENT COST COVERAGE ILLUSORY IN VIOLATION OF PUBLIC POLICY.

Peerless' position would improperly create illusory coverage by denying payment of replacement costs unless the policyholder can meet Peerless' implicit but invisible requirement of completely rebuilding within two years of the date of the loss. Insurance coverage is illusory "where part of [an insurance] premium is specifically allocated to a particular type or period of coverage and that coverage turns out to be functionally

nonexistent." *Jostens, Inc. v. Northfield Ins. Co.*, 527 N.W.2d 116, 119 (Minn. Ct. App. 1995); *see Thomas J. Lipton, Inc. v. Liberty Mut. Ins. Co.*, 34 N.Y.2d 356, 361 (1974) ("To say that the ... damage[s] claimed ... do not fall within such coverage would appear to exclude what, as a practical matter, would usually be some of the largest foreseeable elements of such damage[s] [and] ... would render the coverage nearly illusory.").

In *Nationwide Mutual Insurance Co. v. Davis*, 195 A.D.2d 561, 562 (2d Dep't 1993), the policyholder was involved in an automobile accident, received the $10,000 coverage limit from the tortfeasor's insurance company, and then sought underinsurance coverage from her own insurance company. Her insurance company argued that it was allowed to offset the $10,000 recovery from the tortfeasor against the $10,000 limit of plaintiff's underinsurance coverage. *Davis*, 195 A.D.2d at 562. The court disagreed, stating that allowing the reduction would render coverage illusory "by stripping the policyholder of underinsurance benefits which were paid for as part of the policy." *Davis*, 195 A.D.2d at 562.

Similarly here, Peerless' improper interpretation of its Policy, requiring the policyholder to completely rebuild his or her home within two years of the date of the loss, essentially strips the policyholder of the right to

replacement costs which were paid for as a benefit of the Peerless Policy. Given all the possible instances of delay and uncertainty in the rebuilding process, it is impossible for some policyholders, including Executive Plaza, to completely rebuild within two years of the date of the loss, especially when often the actual cash value payment is necessary to even begin repairs. When rebuilding their properties, policyholders are at the mercy of delays in the building permit process and delays inherent in the construction process, including inclement weather, strikes, and unavailability of materials. So, what happens when, despite the policyholder's best efforts, the policyholder is unable to complete the intended repairs to the property before the erroneous two-year deadline? Instead of providing the coverage for which it received a substantial premium, Peerless reaps windfall profits from the policyholder's misfortune by not having to pay replacement costs. That is fine for Peerless' bottom line, but that is not the purpose of insurance. Peerless' improper interpretation of the Peerless Policy should not be enforced under New York law.

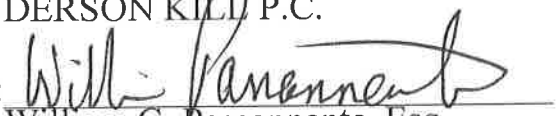
## CONCLUSION

For the foregoing reasons *amicus curiae* United Policyholders respectfully requests this Court to answer the certified question in the affirmative and hold that policyholders like Executive Plaza have replacement cost coverage even if their properties cannot reasonably be replaced within two years of the date of the loss.

Dated: November 7, 2013
New York, New York

Respectfully submitted,

ANDERSON KILL P.C.

By: 

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