SUPREME COURT

STATE OF LOUISIANA

NUMBER 2010-C-2329

DANIEL ARCENEAUX, ET AL.
Plaintiffs,

versus

AMSTAR CORP., AMSTAR SUGAR CORP., TATE AND LYLE NORTH AMERICAN SUGARS, INC., AND DOMINO SUGAR COMPANY,
Defendants.

COURT OF APPEAL, FOURTH CIRCUIT
NO. 2006-CA-1592
34TH JUDICIAL DISTRICT FOR THE PARISH OF ST. BERNARD
DOCKET NO. 86-959, DIVISION "B"
HONORABLE MANUEL A. FERNANDEZ, PRESIDING

BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS

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INTRODUCTION

United Policyholders is a non-for-profit corporation founded in 1991 to educate the public, the judiciary, and elected officials on insurance issues and the rights of insureds. United Policyholders is based in northern California, and it operates across the United States of America. United Policyholders monitors legal developments that impact individuals and entities that purchase insurance. In the course of its activities, United Policyholders has filed over two hundred and thirty-five *amicus curiae* briefs since it was founded in 1991.

United Policyholders has a unique perspective on the issues presented in this case, and respectfully submits that its participation in this matter is desirable and will assist the Court. United Policyholders seeks to advance the interests of all policyholders that purchase liability insurance to protect themselves from litigation, including individuals, churches, hospitals, schools, as well as corporations. United Policyholders has previously appeared as *amicus curiae* in Louisiana in *Landry v. Louisiana Citizens Prop. Ins. Co.*, 07-1907 (La. 5/21/08), 983 So.2d 66; *Sher v. Lafayette Ins. Co.*, 2007-2441 (La. 4/8/08), 988 So.2d 186; *Norfolk Southern Corp. v. California Union Ins. Co.*, 2002-0371 (La.App. 1 Cir. 9/12/03), 859 So.2d 167; *Whitehead v. American Coachworks, Inc.*, 2002-0027 (La.App. 1 Cir. 12/20/02), 837 So.2d 678; and *Ducote v. Koch Pipeline Co., L.P.*, 98-0942 (La. 1/20/99), 730 So.2d 432. United Policyholders previously has appeared in other lawsuits that concern an insurer's wrongful denial of its duty to defend, and the impact that such a denial may have on a policyholder's right to settle underlying litigation. United Policyholders respectfully submits that it can bring a national perspective to the important insurance coverage issues presented by this case.

In its appeal, Continental Casualty Co. ("Continental") wrongly asserts that it may "second-guess" a reasonable settlement by its policyholder, Tate & Lyle North American Sugars, Inc. ("Tate & Lyle"), even though Continental failed to honor its contractual obligation to defend Tate & Lyle. Continental's position is contrary to established Louisiana law and has been rejected by courts across the country. Having breached its duty to defend, Continental cannot now force Tate & Lyle to prove Tate & Lyle's liability for settlements entered into between Tate & Lyle and the underlying claimants. Such a rule would have detrimental consequences to policyholders throughout Louisiana, forcing them into an untenable position of having to defend themselves in underlying litigation but being unable to settle that litigation for fear that their insurers would use any defenses to underlying liability against them.

The duty to defend is of paramount importance to a policyholder, and is one of the primary reasons policyholders purchase liability coverage. In fact, it is often referred to as "litigation insurance." Although major corporations may possess the financial resources to fund their own defenses, many other policyholders, such as individuals, locally owned and operated businesses, schools, churches and hospitals, do not. When an insurer abandons its policyholder, it should not be able to relitigate the actions taken by the policyholder during the insurance company's voluntarily assumed absence. The lower court's ruling that Tate & Lyle's settlements of the underlying claims were reasonable, and that therefore Continental is liable for such settlements, should stand.

STATEMENT OF THE CASE

United Policyholders hereby incorporates and adopts by reference the Statement of the Case of Tate & Lyle's original brief. For the Court's convenience, the following is a brief statement of the facts concerning Tate & Lyle's settlement of certain claims pending against it.

In February 1999, four employees of the Domino Sugar Refinery in Arabi, Louisiana sued Tate & Lyle, among others, alleging noise-induced hearing loss arising out of their employment at the factory. In April 2001, the petition against Tate & Lyle was amended to add the claims of 125 additional employees alleging noise-induced hearing loss. Continental provided Tate & Lyle with an unconditional defense to all of these claims and did not issue a reservation of rights letter.

In June 2003, Tate & Lyle settled certain claims and sought indemnification from Continental for the settlement. At that time, instead of recognizing its coverage obligation, Continental issued a reservation of rights letter and withdrew from Tate & Lyle's defense. Continental's reservation and denial of its coverage obligations was premised upon the assertion that the policies at issue contained an employee exclusion, an assertion that Continental later stipulated was incorrect.

In August 2003 and April 2004, an additional 160 claimants sued Tate & Lyle alleging noise-induced hearing loss arising out of their employment at the Domino Sugar plant. Continental did not assume the defense of any of these claims under any of the Continental policies issued to Tate & Lyle. On April 14, 2005, Tate & Lyle announced that it had resolved all of the pending claims against it. The settlement agreement provided that Tate & Lyle would pay $35,000 to each claimant who met certain criteria as set forth in the settlement agreement.

Rather than pay these covered claims, Continental sought to avoid its obligation to indemnify Tate & Lyle for the amount of the settlements, including the twelve settlements at issue in this appeal.

After a ruling by the trial court that the underlying settlements were covered because they were reasonable, on October 31, 2007, the Fourth Circuit issued a decision that addressed, among other things, Continental's argument that it was not liable for the settlements made by Tate & Lyle. The Fourth Circuit found that Continental was liable for the majority of the claims, but it remanded to the trial court certain claims where there was insufficient evidence as to whether the individual claimants satisfied the criteria of the settlement agreement. The Fourth Circuit clearly stated that "[t]he narrow issue on remand will be whether these plaintiffs meet the settlement criteria as interpreted by the trial court and affirmed by this court." *Arceneaux v. Amstar Corp.*, 2006-1592, p.35 n.25 (La.App. 4 Cir. 10/31/07), 969 So.2d 755, 778 n.25.

On remand, Continental moved for summary judgment, arguing that twelve of the settled claimants did not meet the criteria set forth in the settlement agreement. Tate & Lyle opposed summary judgment, and cross-moved for summary judgment as to Continental's obligation to indemnify Tate & Lyle for these settlements. In support of its motion and in opposition to Continental's motion, Tate & Lyle submitted evidence demonstrating its potential liability to each of the disputed claimants based upon the hearing loss and employment of that claimant.

The evidentiary submissions from Tate & Lyle convinced the trial court that Tate & Lyle's settlement with each of these claimants was reasonable. On appeal, the Fourth Circuit disagreed with Continental's position, and affirmed the trial court's finding that Tate & Lyle sufficiently demonstrated potential liability and entered into reasonable settlements with each of the contested claimants. Continental now petitions this Court to allow it to question Tate & Lyle's resolution of these claims after Continental had abandoned Tate & Lyle by refusing to honor its contractual obligation to provide a defense.

ARGUMENT

I. CONTINENTAL MUST PAY TATE & LYLE'S REASONABLE SETTLEMENTS

Continental wrongfully seeks to relitigate its policyholder's liability for certain underlying claims by challenging Tate & Lyle's settlements. Tate & Lyle entered into good faith settlements of these claims with no guarantee whatsoever that the Continental policies would cover the settlements and, in fact, in the face of Continental's staunch position that the policies did not apply. Having abandoned its policyholder to defend itself, Continental cannot now "second-guess" Tate & Lyle's defense and attempt to force Tate & Lyle to relitigate these claims.

A. Policyholders Rely On The Duty To Defend To Protect Them If They Become Defendants In A Lawsuit.

The duty to defend is of critical importance to a policyholder facing allegations of liability, and often is referred to as "litigation insurance." *See Miller v. Westport Ins. Corp.* 200 P.3d 419, 423 (Kan. 2009); *Continental Cas. Co. v. Rapid-American Corp.*, 609 N.E.2d 506, 509 (N.Y. 1993). The policyholder pays premiums for both the "promise to indemnify" and the "promise to defend the insured." *Trice, Geary & Myers, LLC v. CAMICO Mut. Ins. Co.*, Civ. No. WDQ-09-2754, 2010 WL 1375389, *4 (D. Md. Mar. 25, 2010) (quoting *Clendenin Bros., Inc. v. U.S. Fire Ins. Co.*, 889 A.2d 387, 392 (Md. 2006) (citations omitted)). "[T]he primary purpose of litigation insurance is to 'protect [ ] the insured from the expense of defending suits brought against him....'" *Id.* (quoting *Brohawn v. Transamerica Ins. Co.*, 347 A.2d 842, 851 (Md. 1975)). The insurance company's duty to defend is a broad obligation, requiring the insurer to defend the policyholder if there is a possibility of coverage for any of the allegations contained in the underlying complaint. *See Yount v. Maisano*, 627 So.2d 148, 153 (La. 1993); *Quick v. Ronald Adams Contractor, Inc.*, 2003-0751, p.3 (La.App. 5 Cir. 11/25/03), 861 So.2d 278, 280.

Moreover, an insurer with a duty to defend has an obligation to act in good faith and use its professional expertise in defending litigations to protect the interests of the policyholder. *Reichert v. Continental Ins. Co.*, 290 So.2d 730, 734 (La. App. 1 Cir. 1974) ("as the insured's defender, the insurer has contractually assumed the role of the champion of the insured's rights. The duty thus undertaken is in the nature of a fiduciary relationship in which the rights of the insured are deemed paramount."); *see also Theriot v. Midland Risk Ins. Co.*, 95-2895, p.15 (La. 5/20/97), 694 So.2d 184, 193 ("While this court has never defined the precise basis of the duties owed by an insurer to its insured, we have held that they are fiduciary in nature and include the duty to discharge policy obligations to the insured in good faith, to defend the insured against covered claims and to consider the interests of the insured as paramount in every settlement."); *Pareti v. Sentry Indem. Co.*, 536 So.2d 417, 423 (La. 1988) ("the insurance company is held to a high fiduciary duty to discharge its policy obligations to its insured in good faith-including the duty to defend the insured").

This promise to pay defense costs is particularly important to policyholders that may not have the means to defend themselves against significant litigation. Costly and protracted litigation can inflict significant financial harm on an individual or entity, potentially leading to bankruptcy with no remedy available for the insurer's breach. Part of the reason liability insurance is purchased is to afford the policyholder with a defense funded by the insurance company's superior resources so as to avoid such financial harm to the policyholder if the policyholder ever is sued. Further, an insurance company will have far more experience in defending liability claims than will its policyholder. By breaching its duty to defend, an insurance company repudiates an important part of the insurance promise for which the policyholder paid consideration—"litigation insurance", i.e. the promise and support of the insurance company's superior experience and resources when the policyholder is faced with litigation.

The law does not permit an insurance company that has violated its duty to defend to force a policyholder into a second round of litigation over claims that a policyholder settled in the insurance company's absence. While Continental's position is premised on the assertion that Tate & Lyle made payments "it was not legally obligated to pay," the proper course for an insurance company seeking to contest its policyholder's liability to underlying claimants is for that insurance company to step in and assume the defense of its policyholder in the underlying litigation under a reservation of rights. Instead, Continental abandoned its policyholder.

B. The Law In Louisiana Prohibits An Insurer That Breached Its Duty To Defend From Relitigating A Settled Claim.

Louisiana law recognizes the important principle that when an insurance company beaches its duty to defend, it cannot require a policyholder to prove its underlying liability before it indemnifies the policyholder for a settlement. The Court of Appeal for the Fourth Circuit has affirmed that reasonableness is the standard by which a policyholder's settlement should be measured. "[T]he insured need not show that he would have lost the case, but only that a reasonably prudent person would have settled the case." *Arceneaux v. Amstar Corp.*, 2006-1592, pp. 21-22 (La.App. 4 Cir. 10/31/07), 969 So.2d 755, 771 (citing 14 *Couch on Insurance 3d* §§ 203.41 and 205.52).

Continental now seeks to "second-guess" Tate & Lyle's reasonable determination to settle 12 claims based upon the evidence presented and force Tate & Lyle to prove its liability for these settled claimants. Such an attempt cannot be countenanced, particularly in light of Continental's abandonment of its duty to defend its policyholder, which the trial court described as "grievous, mean spirited and designed to cause financial harm...." App. R. Vol. 10 at 2288 (Trial Court Reasons For Judgment On Continental Casualty Company's Motion For Partial Summary Judgment And Tate & Lyle's Cross Motion For Summary Judgment On Post Denial Plaintiffs, filed April 23, 2009).

Louisiana law prohibits Continental's assertion that it is not liable for these 12 claimants because "T&L did not legally owe these claims." Continental's Brief at 23. Under well-established authority, the rule in Louisiana is that "one seeking indemnity for a settlement must show actual liability to recover; however, where the claim is based upon a written contract, such as an insurance policy, the indemnitee need show only potential, rather than actual, liability on his part." *Sullivan v. Franicevich*, 2004-0321, p.11 (La.App. 4 Cir. 3/9/05), 899 So.2d 602, 609 (citing *Vaughn v. Franklin*, 2000-0291, p.10, (La.App. 1 Cir. 3/28/01), 785 So.2d 79, 87).

Tate & Lyle has made a clear showing of potential liability to these 12 claimants by citing to audiogram evidence, evidence of employment and the reasoned opinion of its trial counsel as supporting these settlements. Tate & Lyle Original Brief at 21-23. As Tate & Lyle demonstrates, Continental's argument that this evidence should be ignored impermissibly questions the intent of the parties to the settlement agreement as to the sufficiency of Tate & Lyle's evidence. *See id.* at 22 (citing *Arceanaux*, p.20, 969 So.2d at 777; *Duet v. Lucky*, 621 So.2d 168, 172 (La.App. 4 Cir. 1993); *Sumrall v. Bickham*, 2003-1252, p.7 (La.App. 1 Cir. 9/8/04), 887 So.2d 73, 77).

Because it denied its duty to defend and abandoned Tate & Lyle, Continental cannot avoid its liability for Tate & Lyle's settlements by questioning the intent of the parties to the settlement agreement. Instead, Continental is bound by the reasonable settlement of its policyholder. When an insurance company unjustifiably refuses to defend, the policyholder must be free to protect its own interests and settle claims where there is potential liability if the policyholder deems it prudent to do so.

In fact, such action by the policyholder inures to the insurer's benefit as well. As this Court has held, "we regard as untenable the argument that the insurer should escape liability for penalties resulting from its own initial arbitrary denial of coverage, when subsequently to the mutual benefit of policyholder and insurer the policyholder by reasonable compromise and avoiding the expenses of litigation reduced the amount for which the insurer is ultimately held liable." *Thomas W. Hooley & Sons v. Zurich General Acc. & Liability Ins. Co.*, 235 La. 289, 302, 103 So.2d 449, 453 (1958).

Any other rule would dramatically chill settlement of litigation, as a policyholder would have little incentive to settle a claim only to have its insurers use the policyholder's defenses to liability as a reason to later deny coverage. This contravenes the strong public policy in Louisiana, and in all jurisdictions that favors and promotes settlements. *See, e.g., Randall v. Martin*, 2003-1311, p.4 (La.App. 5 Cir. 2/23/01), 868 So.2d 913, 926 ("Public policy favors compromise agreements and the finality of settlements"); *Dumas v. Angus Chemical Co., IMC*, 31-0969 (La.App. 2 Cir. 8/20/99), 742 So.2d 655 (same) (citing *Rivett v. State Farm Fire and Cas. Co.*, 508 So.2d 1356, 1361 (La. 1987)); *see also Brown v. Drillers, Inc*, 93-1019 (La. 1/14/94), 630 So.2d 741, 757 ("we are not unmindful of the strong policy favoring compromise agreements and finality of settlements").

Continental argues that further evidence of employment dates and hearing loss is needed for 12 claimants, but does not assert any grounds for the Court to find these settlements unreasonable. As set forth in Tate & Lyle's brief, the supporting evidence for these claimants meets the standards set forth in the settlement criteria. More importantly, Continental cannot challenge Tate & Lyle's reasonable assessment of that evidence, thereby forcing Tate & Lyle to prove its liability to these claimants. This is exactly the sort of whip-saw not allowed under Louisiana law. The rule proposed by Continental threatens litigation between insurer and insured of the matters resolved by settlement in the underlying case.[1] Tate & Lyle need only establish potential liability to these claimants in order to establish that the settlements were entered into reasonably.

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[1] In the context of determining whether the duty to defend exists, the Fourth Circuit has noted that this sort of insurer versus insured litigation of the facts at issue in the underlying litigation is contrary to Louisiana law. "The approach urged by [the insurance company], followed to its logical conclusion, would require a trial between the insured and insurer as to when an occurrence happened, which would render insurance defense coverage meaningless." *Colomb v. United States Fid. & Guaranty Co.*, 539 So.2d 940, 944 (La.App. 4 Cir. 1989). In that case, an insurance company sought to avoid its duty to defend by arguing that the event triggering coverage did not happen during the policy period. *Id.* at 943. The court held that the insurer's broad duty applied because the facts in the complaint did not unambiguously exclude coverage. *Id.* at 944.

C. Courts Around The Country Prohibit Relitigation Of Settled Claims.

Courts around the country are in accord with the lower courts' view, finding that, where an insured settles an underlying action, it need not prove its own liability; a showing of potential liability is sufficient. *Luria Bros. & Co. v. Alliance Ins. Co.*, 780 F.2d 1082 (2d Cir. 1985). There the Court stated that the policyholder:

> [N]eed not establish actual liability to the party with whom it has settled "so long as . . . **a potential liability** on the facts known to the [policyholder is] shown to exist, culminating in a settlement in an amount reasonable in view of the size of possible recovery and degree of probability of [the underlying] claimant's success against the [insured]."

Id. at 1091 (quoting *Damanti v. A/S Inger*, 314 F.2d 395, 397 (2d Cir. 1963), *cert. den'd*, 375 US 834 (1963) (emphasis added)). The *Luria* court held that, because the insurance policies at issue provided insurance coverage for the policyholder's potential liability, the insurers were obligated to indemnify the policyholder for its settlement. *Id.* at 1092.

The strong public policy basis for the *Luria* holding was explained in *Uniroyal, Inc. v. Home Insurance Co.,* 707 F. Supp. 1368 (E.D.N.Y. 1988), a case involving a policyholder's settlement of the Agent Orange products liability litigation. In *Uniroyal,* the insurers argued that the policyholder's coverage claim was invalid because the policyholder had failed to establish that its underlying settlements related to actual injuries that had taken place. The court held that the underlying claims were covered because requiring proof of actual liability for the alleged injury would place settling policyholders in the "hopelessly untenable position of having to refute liability in the underlying action until the moment of settlement, and then of turning about face to prove liability in the insurance action." 707 F. Supp. at 1378.

The court also noted that the *Luria* rule advanced the important public policy of encouraging settlements of litigation, because a regime in which the policyholder would have to prove its own underlying liability:

> would markedly reduce the advantages to the insured of settling [the underlying action]: faced with the choice of defending the tort action vigorously or settling it without hope of insurance reimbursement, the insured would tend to choose the former.

Id.; *see also Texaco A/S (Denmark) v. Commercial Ins. Co. of Newark, N.J.*, 160 F.3d 124, 128 (2d Cir. 1998); *Vitkus v. Beatrice Co.,* 127 F.3d 936, 944 (10th Cir. 1997) ("It would be wholly impracticable to charge the district court with trying the [underlying] litigation after a successful settlement in order to ascertain [the policyholder's] and the other settling parties' relative culpabilities."); *City of Idaho Falls v. Home Indemnity Co.*, 888 P.2d 383, 389 (Id. 1995) ("[a]n insurer is not entitled to re-litigate an underlying action following a settlement"); *Nordstrom, Inc. v. Chubb & Son, Inc.*, 820 F. Supp. 530, 534 (W.D. Wash. 1990), *aff'd*, 54 F.3d 1424 (9th Cir. 1995) (same); *United States Gypsum Co. v. Admiral Ins. Co.*, 643 N.E.2d 1226, 1243 (Ill. App. 1994) (recognizing that the policyholder would be subjected to the "hopelessly untenable position" of taking inconsistent positions if required to prove its own liability).

Other jurisdictions concur with the holding in *Luria* and will bind an insurance company to a reasonable settlement made by the policyholder when that insurance company breaches its duty to defend. The Fourth Circuit recently stated that "[u]nder North Carolina law, if an insurer improperly refuses to defend a claim, it is estopped from denying coverage and must pay any reasonable settlement-even if it made an honest mistake in its denial." *In re Abrams & Abrams, P.A.*, 605 F.3d 238, 241 (4th Cir. 2010). Similarly, in *Owners Ins. Co. v. Smith Mechanical Contractors, Inc.*, 285 Ga. 807, 810, 683 S.E.2d 599, 602 (Ga. 2009), the Georgia Supreme Court found that an insurer was bound to indemnify when the policyholder "essentially settled" with a claimant because the insurer refused to defend the policyholder.

In the same vein, in *Liberty Mut. Ins. Co. v. Wheelwright Trucking Co., Inc.*, 851 So.2d 466, 478 (Ala. 2002), the Alabama Supreme Court noted that "the insurers are bound by Dorsey's consent judgment settling Wheelwright's claims to the extent that the consent judgment was reasonable and entered into in good faith." In that case, the insurer challenged a settlement based in part upon the admissibility of certain expert evidence on damages. The court stated that the relevant inquiry was not the sufficiency of the evidence, but merely whether the report supported the reasonableness of the settlement entered into by the policyholder. *Id.* at 479 n.9.[2]

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[2] The court also noted that liability in excess of policy limits may be awarded in situations where an insurance company denies its duty to defend in bad faith. *Liberty Mut. Ins. Co. v. Wheelwright Trucking Co., Inc.*, 851 So.2d 466, 478 (Ala. 2002) (discussing Alabama precedent regarding an "insurer's right to a jury determination of damages that exceed the limits of its policy as a result of a claim of bad-faith failure to defend or to provide coverage."). This remedy has also been recognized by courts in the State of Washington.

> The insured and the insurer contracted for insurance. One of the benefits to this insurance contract is that the insurer will provide a defense when a claim arises alleging facts that may be covered by the contract. In this case the insurer breached the contract by failing to provide a defense in bad faith. The insured did not receive the benefit of the bargain, and we assume the insured was harmed by the bad faith breach. We feel it is appropriate to estop the insurer from arguing a coverage defense when the insurer breached the contract in bad faith. In such a situation any claim that should have been defended, but was not, *will create liability for the insurer to pay at least policy limits.*
>
> Once the insurer breaches an important benefit of the insurance contract, harm is assumed, the insurer is estopped from denying coverage, and the insurer is

The Fifth Circuit has recognized that, under Texas law, "[a] consequence of breach [of the duty to defend], therefore, is that an insurer who wrongfully failed to defend its insured is liable for any damages assessed against the insured, up to the policy limits,[] subject only to the condition that any settlement be reasonable." *Ideal Mut. Ins. Co. v. Myers*, 789 F.2d 1196, 1200 (5th Cir. 1986);[3] *see also Gibbs M. Smith, Inc. v. U.S. Fidelity & Guar. Co.*, 949 P.2d 337, 344 (Utah 1997) (quoting *Waugh v. American Cas. Co.*, 378 P.2d 170, 177 (Kan. 1963)) ("Indeed, when an insurer disclaims liability on the basis of noncoverage, not only may the insured bring an action against the insurer, but in addition 'the insurer is bound by any reasonable compromise or settlement made by the insured.'").

Under circumstances such as those before this Court, an insurer cannot wrongfully deny its duty to defend, and then later question the settlement undertaken by its policyholder to protect itself. If the insurer seeks to contest the policyholder's ultimate liability, it has the opportunity to do so by associating in the policyholder's defense. Continental elected not to defend Tate & Lyle, and instead denied coverage despite the clear language of its policies. Having abandoned Tate & Lyle, Continental cannot now challenge its policyholder's settlement by seeking to litigate the facts underlying Tate & Lyle's resolution of the claims.

CONCLUSION

For all the foregoing reasons, United Policyholders respectfully requests that this Court affirm the rulings of the District Court and the Circuit Court and find that Continental is bound to Tate & Lyle's reasonable settlement of the underlying noise-induced hearing loss claims.

DATED: May 6, 2011

By:____________________________

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> liable for the judgment. The insurer who in bad faith refuses to acknowledge its broad duty to defend is no less liable than the insurer who accepts the duty to defend under a reservation of rights, but then performs the duty in bad faith.

Kirk v. Mt. Airy Ins. Co., 951 P.2d 1124, 1127-28 (Wash. 1998) (emphasis added).

[3] The Fifth Circuit also noted that "the insurer may be liable even for amounts in excess of the policy limits." *Ideal Mut. Ins. Co. v. Myers*, 789 F.2d 1196, 1200 (5th Cir. 1986) (citing *Blakely v. American Employers' Ins. Co.*, 424 F.2d 728, 734 (5th Cir.1970)).

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STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, the undersigned authority, personally came and appeared:

JOHN H. DENENEA, JR.

who, after being duly sworn, did depose and say that he is Counsel of record for amici, United Policyholders, in the above captioned matter, that the allegations contained in the foregoing brief are true and correct to the best of his knowledge and belief, and that copies of this brief have been served on the parties listed below, by United States Mail, facsimile and/or email this 6th day of May, 2011:

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SWORN TO AND SUBSCRIBED BEFORE ME

THIS 6TH DAY OF MAY, 2011

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NOTARY PUBLIC
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