

No. S052844
IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JERRY H. BUSS and CALIFORNIA
SPORTS, INCORPORATED,

Petitioners,

v.

SUPERIOR COURT FOR THE STATE OF
CALIFORNIA, COUNTY OF LOS ANGELES,

Respondent.

TRANSAMERICA INSURANCE COMPANY,

Real Party in Interest.

After a decision by the Court of Appeal
Second Appellate District, Division Three
2 Civ. No. B093806

BRIEF OF AMICUS CURIAE UNITED
POLICYHOLDERS IN SUPPORT OF
PETITIONERS JERRY H. BUSS and
CALIFORNIA SPORTS, INCORPORATED

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entities. These activities are limited only to the extent that United Policyholders exists exclusively on donated labor and contributions of services and funds.

Amicus curiae has a vital interest in seeing that the standard form commercial general liability insurance policies sold to countless policyholders are interpreted properly and consistently by insurance companies and the courts. As a public interest organization, United Policyholders seeks to assist and to educate the public and the courts on policyholders' rights and seeks to have these rights enforced consistently throughout the country. Thus, due to our interest and activities, United Policyholders has unique access to facts and materials which can aid this Court herein.

STATEMENT OF FACTS

The answer brief on the merits of Transamerica Insurance Company ("Transamerica"), dated August 1, 1996, makes several significant misstatements designed to convince this Court to restrict or eliminate the insurance company's duty to defend.

First, on page 4, Transamerica misstates the long established California rule on duty to defend and, instead, turns the insurance company's obligation on its head:

The court of appeal's decision thus implements fundamental duty-to-defend principles, the language of the policy, the reasonable expectation of the parties, and balances the competing equities. While an insured is entitled to rely on the insurer's superior resources in immediately mounting and funding a defense against the insured's adversary, the insured has no contractual entitlement or reasonable expectation that

the insurer will pay for the defense of claims for which there is no coverage under the policy. The reimbursement action, following resolution of the underlying action, is the proper way to balance these competing interests.

Transamerica's novel and unprecedented test for determining the existence of the duty to defend would defeat the reasonable expectations of the parties if it were law, and would impermissibly make a stranger to the contract the arbiter of coverage. Moreover, this rule, if adopted, would preclude an insurance company from accurately setting its premiums, or accurately setting loss expense reserves, as required by statute. An insurance company's potential defense fees would not be contingent on any traditional rating principle, but upon what claims a third party might plead against its policyholder.

Second, Transamerica is forced to rely on cases with what appear to be egregious factual situations in order to argue to this Court that the "litigation insurance" a policyholder purchases as part of its insurance contract should be ignored. For example, in footnote 9 on page 18, Transamerica cites cases involving sexual harassment, sexual molestation and wrongful termination:

See, e.g., Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co., 14 Cal. App. 4th 1595, 1603-04, 1613, n.3., 18 Cal. Rptr. 2d 692, 697-98, 705, n.3 (1993) [no duty to defend claim for sexual harassment]; B & E Convalescent Ctr. v. State Compensation Ins. Fund, 8 Cal. App. 4th 78, 93-100, 9 Cal. Rptr. 2d 894, 903-909 (1992) [no duty to defend claim for wrongful termination in violation of public policy]; and J.C. Penney Cas. Ins. Co. v. M.K., 52 Cal. 3d 1009, 1019,

1025, 804 P.2d 689, 693-94, 698, 278 Cal.
Rptr. 64 (1991) [no duty to defend claim for
sexual molestation].

Obviously, no such factual situations exist in the present appeal and Transamerica's efforts to rely on rulings based on inapposite facts should be rejected.

ARGUMENT

POINT I.

THE PHANTOM ALLOCATION EXCLUSION

Transamerica appears to rely on a phantom allocation exclusion to argue that only some, but not all, of the Petitioners' defense costs should be paid by the insurance company. However, there is no such allocation exclusion in standard form comprehensive general liability insurance policies. Instead, the duty to defend is described in the policies in the broadest and most expansive terms. As a result, the insurance company's duty to defend often is referred to as "litigation insurance" that should not be subject to apportionment among covered and non-covered claims or to subsequent reimbursement by the policyholder if certain claims ultimately are found not to be covered. Transamerica's reliance on a phantom allocation exclusion effectively turns the insurance company's duty to defend upside down by impermissibly seeking to place the burden