COURT OF APPEAL

FOR THE FOURTH APPELLATE DISTRICT – DIVISION ONE

No. D038707

COUNTY OF SAN DIEGO, Cross-Complainant/Appellant, v. CIGNA PROPERTY AND CASUALTY COMPANY, et al., Cross-Defendants/Respondents.	Superior Court No. GIC732418

Appeal from Superior Court of the State of California, County of San Diego
The Honorable Ernest Williams, Judge, Presiding

BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS IN SUPPORT OF CROSS-COMPLAINANT AND APPELLANT COUNTY OF SAN DIEGO

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INTEREST OF AMICUS CURIAE

United Policyholders, a not-for-profit educational organization granted tax-exempt status under § 501(c)(3) of the Internal Revenue Code, is dedicated to educating policyholders about their rights and duties under their insurance policies. Specifically, United Policyholders engages in educational activities by promoting greater public understanding of insurance issues and consumer rights.

United Policyholders' activities include organizing meetings, distributing written materials, and responding to requests for information from individuals, elected officials, and governmental entities. These activities are limited only to the extent that United Policyholders exists exclusively on donated labor and contributions of services and funds. United Policyholders also files amicus curiae briefs in insurance coverage cases of public importance.

United Policyholders' amicus curiae briefs have been accepted by courts throughout the country. See, e.g., Humana, Inc. v. Forsyth, 525 U.S. 299, 313-14 (1999) (citing to pages 19-23 of Brief for United Policyholders as Amicus Curiae); Western Alliance Ins. Co. v. Gill, 686 N.E. 2d 997 (Mass. 1997). [1]

Amicus Curiae, United Policyholders, has a vital interest in seeing that the non-standard insurance policies sold to countless policyholders are interpreted properly

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[1] See also, Fleming v. United Services Auto. Assoc., 988 P.2d 378 (Or. 1999); Vandenberg v. Superior Court, 88 Cal. Rptr. 2d 366 (Cal. 1999); Peace v. Northwestern Nat'l Ins. Co., 596 N.W. 2d 429 (Wis. 1999); United States v. Brennan, 183 F.3d 139 (2d Cir. 1999); Board of Ed. of Township High School Dist. No. 211 v. International Ins. Co., 720 N.E.2d 622 (Ill. App. Ct. 1999), appeal denied, 729 N.E. 2d 494 (Ill. 2000); Carter-Wallace, Inc. v. Admiral Ins. Co., 712 A.2d 1116 (N.J. 1998); Guaranty Nat'l Ins. Co. v. George, 953 S.W.2d 946 (Ky. 1997).

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' insurance rights.

STATEMENT OF THE CASE AND FACTS

United Policyholders adopts the Statement of Facts, including the Case History, contained in the Appellant's Opening Brief, dated January 15, 2002.

ARGUMENT

I. AN INSURANCE COMPANY'S DUTY TO INDEMNIFY IS NOT DEPENDENT ON THE FORM IN WHICH LIABILITY IS IMPOSED.

Application of "form over substance" does not equate to fairness, equity and justice. Elevating the form in which liability for environmental damage is imposed over the substance of that liability strikes at the heart of state and federal environmental legislation. Under the insurance companies' view of the Powerine decision, a party who cleans up environmental property damage pursuant to statutory liability – without first forcing regulatory agencies to commence in-court lawsuits – may forego any prospect of liability insurance coverage. The insurance companies' view of Powerine creates the following paradox:

Case No. 1:

Policyholder A generates waste material that is taken to a landfill. Policyholder A subsequently becomes liable for the clean-up. Rather than assist in the remediation, Policyholder A sits on its hands, does nothing, and waits until it is sued by the enforcement agency.

Its share of the clean-up costs: $10 million.

Result:

Sitting on its hands and awaiting a lawsuit creates the possibility that liability insurance will be available for the $10 million clean-up. This also may exacerbate the potential harm to public health or the environment, and it causes unnecessary litigation between the policyholder and the enforcement agency.

Case No. 2:

Policyholder B generates waste material that is taken to a landfill. Policyholder B subsequently becomes liable for the clean-up. Rather than waiting to be instructed to commence expensive clean-up, Policyholder B immediately moves, in a responsible fashion and under statutory authority, to clean-up the landfill without the delay and increased costs of litigation with the government.

Total clean-up costs: $7.5 million.

Result:

Under the insurance companies' view of Powerine, Policyholder B has forfeited its rights to liability insurance coverage.

This paradox creates a strong disincentive for policyholders to conduct any independent clean-up of California environmental sites until they are "sued" in-court by the government. Those policyholders, such as the County of San Diego, which act responsibly in addressing environmental damage before a lawsuit is commenced, thereby avoiding unnecessary litigation and delay, are unjustifiably penalized.

The clean-up costs associated with environmental property damage are staggering. Under the insurance companies' view of Powerine, responsible policyholders with non-standard insurance policies cannot recover on their liability insurance policies unless the government files a lawsuit. Thus, the prudent choice for a policyholder with non-standard insurance policy language, in light of such arguments based on Powerine, is

to await a lawsuit by the government to avoid being stripped of any possibility of insurance coverage. Because state-mandated clean-up generally is more expensive than independent clean-up, one bizarre effect of the Powerine decision may well be to increase the insurance companies' ultimate liability as well as the government's litigation expenses due to the potential increase in environmental lawsuits.

It benefits everyone when cooperation between the policyholder and government is achieved without resort to litigation. Such cooperation should be encouraged, even if only for public policy reasons:

> It would be folly to argue . . . that the insured would be required to delay taking preventative measures [to abate pollution], thereby permitting the accumulation of mountainous claims at the expense of the insurance carrier. Stated another way, the policy does not require the parties to calmly await further catastrophe.

Chesapeake Utilities Corp. v. American Home Assur. Co., 704 F. Supp 551(D. Del. 1989) (quoting Broadwell Realty Servs., Inc. v. Fidelity & Cas. Co. of New York, 218 N.J. Super. 516 (App. Div. 1987)); see also Weyerhaeuser Co. v. Aetna Cas. & Sur. Co., 984 P.2d 142 (Wash. 1994) (en banc 9-0).

II. THE HOLDING IN POWERINE GOES AGAINST THE HISTORICAL MEANING OF THE TERM "SUIT" AS WELL AS THE INSURANCE INDUSTRY'S INTENT.

By holding that proceedings brought by federal and state environmental authorities are not within the bounds of the word "suit" as that term is used in general liability insurance policies, unless those proceedings are brought in a court of law, the Powerine decision contravenes the historic origins of the word "suit."

Like virtually all other jurisdictions in the past 60 years, California has abandoned the formalistic distinction between equitable "suits" and legal "actions,"

providing one form of civil action for all civil redress. See California Civ. Proc. Code § 30 (West 1982). Ironically, when there existed a distinction between proceedings for legal relief and proceedings for equitable relief, legal proceedings for damages -- like those brought by government environmental authorities seeking clean-up costs -- were called "actions" and not "suits." Indeed, prior to abolition of the split between law and equity, "suits" were brought before a chancellor to seek equitable relief and "actions" were filed before a court or judge to seek legal relief. See Black's Law Dictionary 28, 1434 (6th ed. 1990). Accordingly, a reading of the word "suit," based on its historical origins, would even more strongly suggest that insurance companies must cover suits seeking equitable relief, precisely the type of relief for which CGL insurance companies typically refuse to pay.

In addition, the term "suit" is not limited to proceedings in a court of law. See McKinney v. Mires, 26 P.2d 169 (Mont. 1933) ("Actions technically applies only to actions at law, since action is narrower than suit which denotes any legal proceeding of a civil kind brought by one person against another, and includes action at law and suits in equity"); In re Oliver's Guardianship, 83 N.E. 795 (Ohio 1908) ("[suit] is a more general term denoting any legal proceeding of civil kind"); Shepard v. Standard Motor Co., 92 S.W.2d 337 (Ky. 1936) ("[suit is defined as] a process in law instituted by one party to compel another to do him justice").

A duty to indemnify may exist even where there is no duty to defend. See Weyerhaeuser Co. v. Aetna Cas. & Sur., 874 P.2d 142 (Wash. 1994) (9-0 decision) (the duty to defend and the duty to indemnify should be examined separately); Harleysville Mut. Ins. Co. v. Sussex Cty., 831 F.Supp. 1111, (D. Del. 1993) aff'd, 46 F.3d 1116 (3d

Cir. 1994) (even if no duty to defend exists, insurance company may be called upon to indemnify); and Metro Wastewater Reclamation Dist. v. Continental Cas. Co., 834 F.Supp. 1254 (D. Col. 1993) (the duty to defend and the duty to indemnify are separate and distinct).

This causes an apparent conflict between the indemnity and defense obligations of a standard-form CGL insurance policy. On one hand, the insurance companies contend that they pay only "damages" awarded at law, not in equity. On the other hand, they contend that they defend only "suits" which are equitable, not legal. Insurance companies apparently would have their policies pay for nothing at all, ever.

Indeed, for CGL insurance policies to make any sense, insurance companies could not have intended to use an archaic distinction between "suit in equity" and "action at law."

CGL insurance policies do not hinge upon the form of action taken by the federal or state government or the nature of the relief sought. Indeed, when there is a simple accident, insurance companies often have their adjusters out before any claim has been asserted because a settlement before matters become adversarial likely will be less expensive than one later. The existence of damage and liability is the touchstone, and not formalization of the claim to a point where notice of intent to sue is given. That is the result that a plain reading of insurance policy's duty to indemnify language should achieve.

III. REASONABLE EXPECTATIONS OF A POLICYHOLDER MUST BE CONSIDERED.

It is a well-settled principle of insurance law that insurance policies should be enforced so as to comport with the reasonable expectations of the parties. Armstrong

World Indus. v. Aetna Cas. & Sur. Co., 45 Cal.App.4th 1, 52 Cal.Rptr.2d 690, 697 (1st Dist. Ct. App.1996). In cases where the insurance policy language is ambiguous, the insurance policy is to be interpreted in accordance with the policyholder's objectively reasonable expectations. Id.

A policyholder's "reasonable expectations" of coverage is the "focal point" of insurance policy interpretation. Hanson v. Prudential Ins. Co., 772 F.2d 580 (9th Cir. 1985), *modified and reh'g denied en banc*, 783 F.2d 762 (9th Cir. 1985 & 19685) ("The insurance contract must be considered in light of the reasonable expectations of the insured at the time he purchased coverage."); Continental Casualty Co. v. City of Richmond, 763 F.2d 1076 (9th Cir. 1985) (" When interpreting an insurance policy, the intent of the parties and the reasonable expectations of the insured are considered."); McLaughin v. Connecticut Gen. Life Ins. Co., of N. Am., 453 F. Supp. 732 (N.D. Cal. 1978); AIU Ins. Co. v. Superior Court, 51 Cal.3d 807 (FMC 1990) (" We generally interpret the coverage clause of insurance policies broadly, protecting the objectively reasonable expectations of the insured."); Smith v. Westland Life Ins. Co., 15 Cal.3d 111 (1975); Gyler v. Mission Ins. Co., 10 Cal.3d 216 (1973) ("Ambiguities in an insurance contract are generally resolved in favor of coverage. The courts generally interpret the coverage clauses of insurance policies broadly, protecting the objectively reasonable expectations of the insured"). See also, Tonkovic v. State Farm Mut. Auto. Ins. Co., 513 Pa. 445, 456, 521 A.2d 920, 926 (1987); Collister v. Nationwide Life Ins. Co., 479 Pa. 579, 594, 388 A.2d 1346, 1353, cert. denied, 439 U.S. 1089 (1979); J.H. France Refractories Co. v. Allstate Ins. Co., 396 Pa. Super. 185, 194-95, 578 A.2d 468, 472-73 (1990), aff'd in part, rev'd in part on other grounds, 534 Pa. 29, 626 A.2d 502 (1993);

1. Under The "Reasonable Expectations" Doctrine A Court Must Examine The Dynamics Of The Insurance Transaction, Regardless Of Any Ambiguity In The Insurance Policy.

It is important to examine the "reasonable expectations" doctrine and its significance in insurance policy interpretation. The Pennsylvania Supreme Court has explained the "reasonable expectations" doctrine and its application to insurance policies in the following way:

> The reasonable expectation of the insured is the focal point of the insurance transaction involved here. E.g. Beckham v. Travelers Insurance Co., 424 Pa. 107, 117-18, 225 A.2d 532, 537 (1967). Courts should be concerned with assuring that the insurance purchasing public's reasonable expectations are fulfilled. Thus, regardless of the ambiguity, or lack thereof, inherent in a given set of insurance documents (whether they be applications, conditional receipts, riders, policies, or whatever), the public has a right to expect that they will receive something of comparable value in return for the premium paid. Courts should also keep alert to the fact that the expectations of the insured are in large measure created by the insurance industry itself. Through the use of lengthy, complex, and cumbersomely written applications, conditional receipts, riders, and policies, to name just a few, the insurance industry forces the insurance consumer to rely upon the oral representations of the insurance agent. Such representations may or may not accurately reflect the contents of the written document and therefore the insurer is often in a position to reap the benefit of the insured's lack of understanding of the transaction.
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> Courts must examine the dynamics of the insurance transaction to ascertain what are the reasonable expectations of the consumer. See, e.g., Rempel v. Nationwide Ins. Co., 471 Pa. 404, 370 A.2d 366 (1977). Courts must also keep in mind the obvious advantages gained by the insurer when the premium is paid at the time of application. An insurer should not be permitted to enjoy such benefits without giving comparable benefit in return to the insured.

Tonkovic, 513 Pa. at 456-57, 521 A.2d at 926 (quoting Collister, 479 Pa. at 594-95, 388 A.2d at 1353-54) (emphasis added).

As described by an en banc panel of the Superior Court of Pennsylvania, the "reasonable expectations" doctrine springs from the law's recognition that a contract, such as an insurance policy, inevitably fails to evince a true "meeting of the minds" as to all possible factual contexts which could arise:

> [T]here is an implicit recognition in law that even the most carefully drafted document and extensively bargained contract will not provide a true proverbial "meeting of the minds" as to all possible, or even likely, scenarios of application. In such cases, contract law requires that the reasonable expectation of the parties be, in essence, imputed as the intent of the parties and, perhaps as important, acquiesced to by the parties to the contract.

J.H. France, 396 Pa. Super. at 194, 578 A.2d at 472. As further explained by this court, an examination of the policyholder's "reasonable expectations" of coverage "should clearly incorporate an understanding of the general relationship between the parties, the purpose behind their entering a contractual relationship and the relative position of each." J.H. France, 396 Pa. Super. at 195, 578 A.2d at 473.[2] California courts have adopted similar applicationS of the "reasonable expectation" doctrine.

It is important to recognize that the required examination of a policyholder's "reasonable expectations" of coverage is not predicated upon an initial finding of ambiguity in the policy language. For example, the Supreme Court of

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[2] As such, the "reasonable expectation" doctrine is really an application of a long-established rule governing the interpretation of contracts in general: "[I]n construing a contract we seek to ascertain what the parties intended and, in so doing, we consider the circumstances, the situation of the parties, the objects they have in mind and the nature of the subject matter of the contract." United Refining Co. v. Jenkins, 410 Pa. 126, 138, 189 A.2d 574, 580 (1963); see also, In re Estate of Herr, 400 Pa. 90, 93, 161 A.2d 32, 34 (1960) ("The Court in interpreting a will or contract can always consider the surrounding circumstances in order to ascertain the intention and the meaning of the parties."). Indeed, an examination of the "dynamics of the insurance transaction" under the "reasonable expectations" analysis is synonymous with an examination of the "surrounding circumstances" under general rules of contract interpretation.

Pennsylvania has directed that an examination of the policyholder's "reasonable expectations" of coverage must be undertaken, "regardless of ambiguity, or lack thereof, inherent in a given set of insurance documents." Tonkovic, 513 Pa. at 456, 521 A.2d at 926 (quoting Collister, 479 Pa. at 595, 388 A.2d at 1353-54). In so doing, courts, however, must examine "the totality of the insurance transaction involved to ascertain the reasonable expectations of the insured." As a result, even the most clearly written exclusion will not bind the policyholder in circumstances in which the policyholder has a reasonable expectation of coverage. See, Bensalem Twp. v. International Surplus Lines Ins. Co., 38 F.3d 1303, 1311 (3d Cir. 1994); see also Tonkovic, 513 Pa. at 455, 521 A.2d at 926 (citing Collister, 479 Pa. at 594-95, 388 A.2d at 1353-54); Regardless of the ambiguity or lack thereof, inherent in a conspicuous exclusion provision, courts should assure that the policyholder's "reasonable expectations are fulfilled." As one federal court has summarized the reasonable expectations principle adopted by the Pennsylvania Supreme Court, "where unambiguous terms do not support the reasonable expectations of the insured, that expectation prevails over the language of the policy." Island Assocs., Inc. v. Erie Group, Inc., 894 F. Supp. 200, 203 (W.D. Pa. 1995) (citing Bensalem Twp., 38 F.3d at 1311).

If there is ambiguity in an insurance policy, it is resolved by interpreting the ambiguous provisions in the sense the insurer believed the policyholder understood them at the time of the formation of the insurance policy. If application of this rule does not eliminate the ambiguity, ambiguous language is construed against the party who caused the uncertainty to exist, the insurance company. Montrose Chemical Corp. v. Admiral Ins. Co., 10 Cal.4th 645 (1995). This rule, as applied to a promise of coverage