No. 09-1582

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DEMOLITION CONTRACTORS, INC. d/b/a PITSCH WRECKING CO.,

Plaintiff-Appellee,

-against-

WESTCHESTER SURPLUS LINES INSURANCE CO.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN

BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS IN SUPPORT OF PLAINTIFF-APPELLEE

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IN THE UNITED STATES COURT OF APPEALS
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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Federal Rule of Appellant Procedure 26.1 and 6th Circuit Court Rule 26.1, United Policyholders makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? No.

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DATED: November 3, 2009

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STATEMENT OF INTEREST OF AMICUS CURIAE

United Policyholders is a non-profit corporation founded in 1991 to educate the public, the judiciary, and elected officials on insurance issues and the rights of policyholders. The organization is tax-exempt under §501(c)(3) of the Internal Revenue Code. United Policyholders is funded by donations and grants from individuals, businesses, and foundations and governed by an eight member Board of Directors. United Policyholders operates in Michigan and nationwide.

While much of its work is aimed at individuals and businesses affected by disasters, United Policyholders actively monitors legal and marketplace developments affecting the interests of all policyholders. United Policyholders publishes free-of-charge materials that give practical guidance on buying coverage and claim issues to property and business owners and advocates, disaster relief personnel, attorneys and adjusters at www.unitedpolicyholders.org. The organization also receives frequent invitations to testify at legislative and other public hearings and to participate in regulatory proceedings on rate and policy issues.

A diverse range of personal and commercial line policyholders throughout the United States regularly communicate their insurance concerns to United Policyholders. In turn, the organization advances policyholders' interests in courts nationwide by filing *amicus curiae* briefs in cases involving important

insurance principles. United Policyholders advances the shared interest that commercial and personal lines policyholders have in equitable insurance practices. The organization's activities are supported by donated labor and contributions of services and funds.

United Policyholders has filed *amicus curiae* briefs on behalf of policyholders in more than 260 cases throughout the United States. A significant number of those cases have been adjudicated in Michigan and other jurisdictions in the Sixth Circuit.[1] United Policyholders also has filed *amicus curiae* briefs in numerous cases before the United States Supreme Court.[2] The U.S. Supreme Court cited United Policyholders' amicus curiae brief in *Humana, Inc. v. Forsyth*, 525 U.S. 299 (1999). Further, United Policyholders was the only national

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1 *See, e.g., Gencorp Inc. v. AIU Insurance Co.*, 138 F. App'x. 732 (6th Cir. 2005); *Advance Watch Co., v. Kemper Nat'l Ins. Co.*, 99 F.3d 795 (6th Cir. 1996); *Farmington Cas. Co. v. Cyberlogic Techs., Inc.*, 996 F.Supp. 695 (E.D. Mich. 1998); *Knotts v. Zurich Ins. Co.*, 197 S.W.3d 512 (Ky. 2006); *Kentucky Farm Bureau Mut. Ins. Co. v. Tina Rodgers*, 179 S.W.3d 815 (Ky. 2005); *Guaranty Nat'l Ins. Co. v. George*, 953 S.W.2d 946 (Ky. 1997); *Cello-Foil Products, Inc. v. Michigan Mut. Liab. Co.*, 560 N.W.2d 637 (Mich. 1997); *Pilkington N. Am. v. Travelers*, 106 Ohio. St. 3d 1451 (Ohio 2005); *Goodyear Tire and Rubber Co. v. Aetna Cas. & Surety Co.*, 95 Ohio St. 3d 512 (Ohio 2002); *The Glidden Co. v. Lumbermans Mut. Cas. Co.*, No. 81782, 2004 WL 2931019 (Ohio Ct. App. Dec. 17, 2004).

2 *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. Juan 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); *Humana Inc. v. Forsyth*, 525 US 299 (1999).

consumer organization to submit an amicus curiae brief in the landmark case of *State Farm v. Campbell*, 538 U.S. 408 (2003).

United Policyholders has a vital interest in ensuring that insurance companies fulfill the promises they make to their policyholders. While insurance companies are in business to earn 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 certain questions before the Court that are of significance well beyond the application of law to the specific facts of this litigation. These important issues will affect policyholders nationwide. It should be noted that no party to this case has contributed directly or indirectly to the preparation of this brief.

SUMMARY OF ARGUMENT

I. Courts in Michigan and throughout the United States have held that, with regard to coverage, it makes no difference whether a policyholder voluntarily cleans up the contamination for which it is responsible before

government demand or waits until after government intervention. 1 Envtl. Ins. Litig.; L. and Prac. § 4:5 (2009); *Upjohn Company v. New Hampshire Insurance Company*, 178 Mich. App. 706, 720 (App. Ct. 1989) *rev'd on other grounds by* 438 Mich. 197, 476 N.W.2d 392 (1991) ("it makes no difference that [the policyholder] took the remedial action it did before being ordered to do so and, in fact, we believe that such swift remedial action should be encouraged rather than discouraged."). Further, in the absence of prejudice, a voluntary payment clause will not bar a policyholder's recover under their insurance policy. *Aetna Cas. & Sur. Co. v. Dow Chem. Co.*, 10 F. Supp. 2d. 800, 833-34 (E.D. Mich. 1998)

II. The No Action Clause has been misconstrued by the trial court; it functions to bar third party claims, not to prevent policyholders from suing their insurance companies. 15-112 Appleman on Insurance § 112.10 [A][3][a].

ARGUMENT

I. THE TRIAL COURT ERRED IN CONCLUDING THAT DEMOLITION CONTRACTORS FAILED TO COMPLY WITH THE POLICY'S VOLUNTARY PAYMENTS CLAUSE

Demolition Contractors did not violate the insurance policy's voluntary payment clause because they were facing liability and thus their actions cannot be construed as "voluntary." Public policy encourages property environmental clean-up and supports the notion that remediation efforts do not bar recovery under a voluntary payments clause.

A. Expenditures In Environmental Clean-Up And Remediation Do Not Constitute Voluntary Payments For A Company Facing Liability

Insurance policies usually contain a so-called "voluntary payments" clause which insurance companies argue prohibits the policyholder from voluntarily assuming any liability, settling any claims, incurring any expense, or interfering in any legal proceeding or negotiations for settlement without the insurance company's consent. Ostrager & Newman, Handbook on Insurance Coverage Disputes §5.06(a) (13th ed. 2006). Voluntary payments provisions are designed to "prevent collusion between the claimant and insured and to give insurer control over settlement negotiations." *Coil Anodizers, Inc. v. Wolverine Ins. Co.*, 120 Mich. App. 118, 124 (App. Ct. 1982).

Westchester Surplus Lines Insurance Co. ("Insurance Company") relies upon *Coil* and its progeny for the argument that voluntarily made payments, in response to government clean up demands, fall within the meaning of a "voluntary payments" clause in the policy. *See* Appellant Br. 39-40 *citing Tenneco Inc. v. Amerisure Mut. Ins. Co.*, 281 Mich. App. 429, 466-68 (App. Ct. 2008). This conclusion is neither binding nor correct.

In the context of environmental coverage, the great majority of courts have held that it makes no difference whether the policyholder voluntarily cleans up the contamination for which it is responsible before government demand or

waits until after government intervention. 1 Envtl. Ins. Litig.; L. and Prac. § 4:5 (2009); *Upjohn Company v. New Hampshire Insurance Company*, 178 Mich. App. 706, 720 (App. Ct. 1989) *rev'd on other grounds by* 438 Mich. 197, 476 N.W.2d 392 (1991) ("it makes no difference that [the policyholder] took the remedial action it did before being ordered to do so and, in fact, we believe that such swift remedial action should be encouraged rather than discouraged."); *See e.g., Aetna Cas. & Sur. Co. v. Dow Chemical Co.*, 10 F. Supp. 2d 771, 797 (E.D. Mich. 1998) (*Aetna* I); *Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.*, 123 Wash. 2d 891 (1994) (citing *Upjohn*); *Bausch & Lomb Inc. v. Utica Mut. Ins. Co.*, 330 Md. 758 (1993). "[I]t would be improper to force insureds who 'would have commenced or continued independent remedial actions to await formal enforcement by the State in order to avoid losing any potential for insurance coverage' because to do so would only create a 'disincentive to engage in independent cleanups' and 'slow the progress of hazardous waste cleanup." *Aetna* I, 10 F. Supp. 2d. at 797.

In *Upjohn*, a Michigan Court of Appeals decision on this issue, the policyholder was an industrial concern that had inadvertently leaked toxic by-products into the groundwater below its production facilities. *Upjohn*, 178 Mich. App. at 710-12. Upon notice of the contamination, the policyholder immediately undertook processes to decontaminate the water. *Upjohn*, 178 Mich. App. at 712. At no point during the decontamination process did the policyholder have any

contact with any governmental or regulatory authorities. The Court, however, held that governmental agencies could have ordered the policyholder to act, and had they done so, the policyholder would have been legally obligated to pay the costs of cleanup. *Upjohn*, 178 Mich. App. at 719-20. Thus, as noted, the fact that a company faced liability was a sufficient basis for finding coverage.

The Insurance Company relies, almost entirely, upon *Coil Anodizers, Inc. v. Wolverine*, a case that provides some guidance, but ultimately is factually distinguishable from this case. *See* Appellant Br. 21-27, 40.

Coil involved a settlement between a policyholder and its contractual partner, regarding the aesthetics of the product supplied. Namely, the aluminum sheet metals produced by Coil were defective and developed a marked yellowing as a result. *Coil*, 120 Mich. App. at 120. Because the ultimate destination of the metals was for incorporation into trailers and motor coaches, the ultimate recipient was "distressed at the jaundice which its lustrous silver trailer had developed and informed its supplier that the aluminum was unacceptable and would have to be replaced." *Coil*, 120 Mich. App. at 120. In turn, the supplier, who received the metals from Coil, informed Coil that Coil would be held responsible for the cost of replacing the defective aluminum. Coil agreed with this assessment and agreed to settle the matter through accounts payable offsets. *Coil*, 120 Mich. App. at 120.

Coil, therefore, never involved environmental hazards or other public health and safety concerns; a critical distinguishing fact, ignored in the Appellant's Brief, which limits its utility in this case. *See Governmental Interinsurance Exch. v. City of Angola, Indiana*, 8 F. Supp. 2d 1120, 1134-35 (N.D. Ind. 1998) (distinguishing *Coil* on similar grounds).

The present situation, akin to *Upjohn*, is one in which the policyholder faced liability under Michigan, as well as federal, law. Specifically, according to the Westshore Consulting Report:

> [seven] of the metals are present in concentrations that exceed the Drinking Water Protections Criteria, five of the constituents exceed the Groundwater Surface Water Interface Protections Criteria and chloride exceeds the Direct Contact Criteria...
>
> The Chemical make up of the aggregate that is present as the sub base presents some potential environmental risk. Although there is no evidence that any of the metals or chloride have leached into the underlying soils, the test data provides a likely indication that leaching could occur in the future. In addition, the test results indicate that leaching may occur at concentrations that could be harmful to the aquifer or nearby wetlands.

See Appellee Reply Br. on Appeal and Cross-Br. on Appeal 25-26. The policyholder, facing liability, was therefore compelled to act.

B. In The Absence Of The Insurance Company Showing Prejudice A Voluntary Payments Clause Will Not Bar Coverage

An insurance company cannot deny coverage under a voluntary payments clause in the absence of prejudice. The Insurance Company here cannot demonstrate any prejudice.

Insurance companies must establish actual prejudice to avoid indemnification coverage in the context of a voluntary payments clause. *Aetna Cas. & Sur. Co. v. Dow Chem. Co.*, 10 F. Supp. 2d. 800, 833-34 (E.D. Mich. 1998) (*Aetna* II). This requirement is reasonable in light of similar requirements with regard to the insurance industry's use of an untimely notice or cooperation clause. *Aetna* II, 10 F. Supp. 2d at 833-34 ("[t]he distinction between the voluntary payment and cooperation provisions is 'one without a difference.'"). Moreover, absent a showing of prejudice, coverage may be unfairly forfeited and insurance companies may receive a windfall. *Aetna* II, 10 F. Supp. 2d at 832.

In addition, practical considerations support a prejudice requirement:

> [t]hat is, if cooperation with state or federal agencies is enough to invoke a "voluntary payments" provision and bar coverage, an insured would be left with no choice but to defy the governmental entity at least long enough to attempt to ensure that any loss will be a covered loss. In many instances, this may 'have the detrimental effect of inducing policy holders to avoid cooperation with state environmental agencies ... in the administrative process 'in order to invite the filing of a formal complaint' to prompt the insurer's duty to defend ... This would defeat public interests in judicial economy and in encouraging

> early settlement and administrative resolution of environmental clean-up problems.'

Governmental Interinsurance Exch., 8 F. Supp. 2d at 1135.

Encouraging prudence does not nullify or make a "voluntary payments" clause obsolete. As stated in *Coil*, the purpose of voluntary payments clauses is to prevent collusion between the claimant and the insured and give the Insurer control over settlement negotiations. *Coil*, 120 Mich. App. at 123. This is a legitimate reason for inclusion of such clauses in liability policies, but that reason is not defeated by holding that a "voluntary payments" provision is inapplicable to the facts of a case. *Governmental Insurance Exch.*, 8 F. Supp. 2d at 1135. Thus, in the absence of collusion, an insurer has not suffered the sort of prejudice the provision is designed to prevent. *Governmental Insurance Exch.*, 8 F. Supp. 2d at 1135. A "voluntary payments" provision, therefore, does not operate to bar coverage. *Governmental Insurance Exch.*, 8 F. Supp. 2d at 1135.

Demolition Contractors provided notice of intent to remediate to the Insurance Company and then proceeded to do so for approximately $90,000 less than the Insurance Company's preferred choice of company to remediate. Demolition acted while facing the liability that delaying environmental cleanup would have imposed. Further, even if such action was deemed to be "voluntary," the insurance company's inability to demonstrate prejudice should prevent the "voluntary payments clause from barring coverage.

Accordingly, the trial court erred when it concluded that Demolition Contractors failed to comply with the insurance company's "voluntary payment" clause.

II. THE TRIAL COURT ERRED IN CONCLUDING THAT DEMOLITION FAILED TO COMPLY WITH THE POLICY'S NO-ACTION CLAUSE

A. No Action Clauses Bar Third Party Suits, They Do Not Prevent A Policyholder From Suing Their Insurance Company

"No Action" clauses stand in the place of the following truism: in the absence of a contractual or statutory provision allowing direct action, a third party claimant has no right to a direct action against the liability insurer. 15-112 Appleman on Insurance § 112.10 [A][3][a]. Thus, the "no-action" provision does not act in the manner suggested by the Appellant, rather it presents a bar to third parties commencing an action against the insurance company and not to the policyholder.

The trial court's interpretations of the no action clause is contrary to decades of insurance law and practice, and does not prevent a policyholder from commencing an action for breach of the insurance policy or other duty against the Insurance Company. Hundreds, if not thousands of such coverage actions are commenced involving policies containing "no action" clauses. Such clauses do not prohibit a policyholder from enforcing the policy in court.

Accordingly, the trial court erred when it concluded that Demolition Contractors failed to comply with the insurance company's "no action" clause.

CONCLUSION

For the reasons set forth in this brief, *amicus curiae* United Policyholders respectfully requests that this Court apply proper meaning to the voluntary payment and no action provisions.

Dated: November 3, 2009

Respectfully submitted,

By: _____

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(d) because:

   This brief contains 2598 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because:

   This brief has been prepared in the proportionally spaced typeface using Microsoft Office Word 2002/XP in 14 point Times New Roman.

Dated: November 3, 2009

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CERTIFICATE OF FILING AND SERVICE

In compliance with Federal Rules of Appellate Procedure 25(a)(2)(D) and 25(c)(2), and 6th Circuit Local Rules 25(e)(1) and 25(f)(1), I hereby certify that on this 3rd day of November, 2009, I filed and served the foregoing Brief of *Amicus Curiae* United Policyholders in Support of the Plaintiff-Appellee using the Court's electronic filing system (ECF). I further certify that I accomplished service on all counsel of record in this case on the same date using this Court's electronic filing system (ECF).

Dated: November 3, 2009

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DEMOLITION CONTRACTORS, INC. d/b/a PITSCH WRECKING CO., Plaintiff-Appellee, -against- WESTCHESTER SURPLUS LINES INSURANCE CO., Defendant-Appellant.	Case No. 09-1582

MOTION OF UNITED POLICYHOLDERS FOR LEAVE TO FILE *AMICUS* BRIEF IN SUPPORT OF PLAINTIFF-APPELLEE

Pursuant to Fed. R. App. P. 29, United Policyholders moves this Court for leave to file the attached *amicus* brief in support of the Plaintiff-Appellee in the above-referenced matter. This appeal presents important issues regarding the construction of policy provisions and the equitable interests of policyholders.

In support of this Motion, United Policyholders states as follows: United Policyholders is a non-profit corporation founded to educate the public, the judiciary, and elected officials on insurance issues and the rights of policyholders. Accordingly, United Policyholders has filed amicus curiae briefs on behalf of policyholders in more than 260 cases throughout the United States. A significant number of those cases have been adjudicated in Michigan and other jurisdictions in

the Sixth Circuit.[3] United Policyholders has filed amicus curiae briefs in numerous cases before the United States Supreme Court.[4] The U.S. Supreme Court cited United Policyholders' amicus curiae brief in *Humana, Inc. v. Forsyth*, 525 U.S. 299 (1999). United Policyholders was the only national consumer organization to submit an amicus curiae brief in the landmark case of *State Farm v. Campbell*, 538 U.S. 408 (2003).

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[3] *See, e.g., Gencorp Inc. v. AIU Insurance Co.*, 138 F. App'x. 732 (6th Cir. 2005); *Advance Watch Co., v. Kemper Nat'l Ins. Co.*, 99 F.3d 795 (6th Cir. 1996); *Farmington Cas. Co. v. Cyberlogic Techs., Inc.*, 996 F.Supp. 695 (E.D. Mich. 1998); *Knotts v. Zurich Ins. Co.*, 197 S.W.3d 512 (Ky. 2006); *Kentucky Farm Bureau Mut. Ins. Co. v. Tina Rodgers*, 179 S.W.3d 815 (Ky. 2005); *Guaranty Nat'l Ins. Co. v. George*, 953 S.W.2d 946 (Ky. 1997); *Cello-Foil Products, Inc. v. Michigan Mut. Liab. Co.*, 560 N.W.2d 637 (Mich. 1997); *Pilkington N. Am. v. Travelers*, 106 Ohio. St. 3d 1451 (Ohio 2005); *Goodyear Tire and Rubber Co. v. Aetna Cas. & Surety Co.*, 95 Ohio St. 3d 512 (Ohio 2002); *The Glidden Co. v. Lumbermans Mut. Cas. Co.*, No. 81782, 2004 WL 2931019 (Ohio Ct. App. Dec. 17, 2004).

[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. Juan 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); *Humana Inc. v. Forsyth*, 525 US 299 (1999).

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 the case at bar, United Policyholders seeks to appear as *amicus curiae* to address certain questions regarding the interpretation of insurance contracts before the Court that are of significance to policyholders nationwide.

For this reason, United Policyholders respectfully requests that this Court grant it leave to file an *amicus* brief in support of the Plaintiff-Appellee.

Dated: November 3, 2009

Respectfully submitted,

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