Monroe County Clerk's Index No. 2010-10533

STATE OF NEW YORK

SUPREME COURT

Appellate Division – Fourth Department

JANNIE NESMITH, in her representative capacity only as Parent and Natural Guardian of JANNIE PATTERSON, an Infant, and LORENZO PATTERSON, JR.

Plaintiffs-Respondents,

-against-

ALLSTATE INSURANCE COMPANY,

Defendant-Appellant.

BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF PLAINTIFFS-RESPONDENTS JANNIE NESMITH, IN HER REPRESENTATIVE CAPACITY ONLY AS PARENT AND NATURAL GUARDIAN OF JANNIE PATTERSON, AN INFANT, AND LORENZO PATTERSON, JR.

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INTRODUCTION

Amicus curiae United Policyholders respectfully submits this Memorandum of Law in support of Plaintiffs-Respondents Jannie Nesmith, as guardian of Jannie Patterson and Lorenzo Patterson, Jr. ("Plaintiffs" or "the Nesmiths"). On appeal, Defendant-Appellant Allstate Insurance Company ("Defendant" or "Allstate") construes the word "occurrence" in its homeowner's policy to create an implied exclusion for any loss that is even vaguely related to a prior covered loss. This is not the law in New York. Allstate argues that this implied continuous loss "exclusion," phrased in the policy as a "limit of liability," bars coverage for the second of two injuries when the second injury happened after the cause of the first injury was identified and eliminated. Here, the second injury is also separate from the first injury for the following reasons: the injury was (1) to a different child; (2) from a different family; (3) in a different apartment; and (4) occurred during a different year and policy period. Allstate does not explain clearly that when such attenuated injuries occur, the first injury can operate to limit the coverage available to the policyholder for the second.

As discussed in more detail both below and in Plaintiffs' opposition, Allstate's argument defies both controlling case law and common sense. Allstate cannot meet its heavy burden to demonstrate that its policy language clearly excludes coverage under the facts at issue here. United Policyholders respectfully requests that this Court reject Allstate's argument and uphold the lower court's ruling in full.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

United Policyholders is a non-profit 501(c)(3) consumer organization founded in 1991 that has over twenty years of experience helping solve insurance problems and advocating for fairness in insurance transactions. 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' work is divided into three program areas: *Roadmap to Recovery* provides tools and resources that help individuals and businesses solve insurance problems that can arise after an accident, illness, disaster, or other adverse event. The *Roadmap to Preparedness* program promotes insurance and financial literacy as well as disaster preparedness. 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 as an official consumer representative. United Policyholders offers an extensive library of publications, legal briefs, sample policies, forms and articles on commercial and personal insurance products, coverage and the claims process at www.unitedpolicyholders.org.

A diverse range of personal and commercial 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 policyholders have in equitable insurance practices.

United Policyholders has filed *amicus curiae* briefs on behalf of policyholders in more than 280 cases throughout the United States. A significant number of those cases have been adjudicated in New York State courts. See, e.g., Belt Painting Corp. v. TIG Ins. Co., 100 N.Y.2d 377, 795 N.E.2d 15, 763 N.Y.S.2d 790 (2003); A-One Oil, Inc. v. Mass. Bay Ins. Co., 92 N.Y.2d 814, 705 N.E.2d 1215, 683 N.Y.S.2d 174 (1998); Travelers Cas. & Sur. Co. v. Certain Underwriters at Lloyd's of London, 277 A.D.2d 100, 716 N.Y.S.2d 297 (1st Dep't 2000); A-One

Oil, Inc. v. Mass. Bay Ins. Co., 250 A.D.2d 633, 672 N.Y.S.2d 423 (2d Dep't 1998); Stone v. Cont'l Ins. Co., 234 A.D.2d 282, 650 N.Y.S.2d 772 (2d Dep't 1996). United Policyholders has filed *amicus curiae* briefs in numerous cases before the United States Supreme Court. See, e.g., Philip Morris USA v. Williams, 549 U.S. 346 (2007); Aetna Health, Inc. v. Davila, 542 U.S. 200 (2004). 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 Mut. Auto. Ins. Co. 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 profits 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 the case at bar, United Policyholders appears as *amicus curiae* to address certain questions before the Court that are of significance well beyond the specific facts of this litigation. These important issues will affect policyholders nationwide. No party to this case has contributed directly or indirectly to the preparation of this brief.

QUESTION PRESENTED

Whether Allstate has established that Plaintiffs' lead poisoning injuries are properly excluded from coverage as part of the same occurrence as a previous lead poisoning injury, when Plaintiffs' injuries occurred after remediation of the earlier lead paint conditions and were

suffered by an unrelated family, at a different time, in a different apartment, and during a different policy period.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

As to the operative facts, *amicus curiae* adopts the Statement of the Case and the Statement of Facts in Plaintiffs' opposition brief.

As discussed below, Allstate had the opportunity to use a particularized definition of "occurrence" in the homeowner's insurance policy at issue, but elected not to do so.

ARGUMENT

1. Allstate's Failure to Draft Key Policy Language with Sufficient Specificity Should Not Prejudice Unrelated Children Injured by Lead Paint In Unrelated Incidents

(a) Under New York Law, a Very Stringent Standard Is Applied to Whether "Occurrence" Is Unambiguous

Allstate rests its argument on the idea that the word "occurrence," and the policy's limitation on liability for injuries stemming from "the same general conditions," unambiguously provide a reasonable policyholder with notice of Allstate's position. Def. Brief at 4. Allstate, however, only asserted its present position on the eve of trial—after three years of litigation. Allstate ignores that under New York law the term "'occurrence' is not sufficiently unambiguous" because it is "susceptible to more than one reasonable interpretation." SR Int'l Business Insurance Co., LTD. v. World Trade Center Properties, LLC, 467 F.3d 107, 138 (2d Cir. 2006) ("WTC"); see also Belt Painting Corp. v. TIG Ins. Co., 100 N.Y.2d 377, 383 (2003) (holding certain exclusionary language ambiguous as applied). Allstate ignores the burden that New York law places on an insurance company attempting to exclude coverage by arguing that multiple losses all constitute one loss. The WTC holding expresses the general hostility of New

York courts toward construing "occurrence"-based policies to exclude coverage in the insurance company's favor.

(b) Allstate's Failure to Use Clear Language to Exclude Coverage Is Fatal to Allstate's Present Position

The actual policy language at issue in WTC—which itself was found "insufficiently unambiguous" by the Second Circuit—was significantly *more* specific than the language in the Allstate policy at issue here. In WTC, the relevant policy explained how related losses would be treated:

> When the word ["occurrence"] applies to loss or losses from the perils of tornado, cyclone, hurricane, windstorm, hail, flood, earthquake, volcanic eruption, riot, riot attending a strike, civil commotion and vandalism and malicious mischief one event shall be construed to be all losses arising during a continuous period of seventy-two (72) hours.

467 F.3d at 138.

By contrast, Allstate's explanation for how related losses are treated is significantly *less* detailed than the explanation deemed ambiguous in WTC:

> [O]ur total liability under the Family Liability Protection coverage for damages resulting from one accidental loss will not exceed the limit shown on the declarations page. All bodily injury and property damage resulting from one accidental loss or from continuous or repeated exposure to *the same general conditions* is considered the result of one accidental loss.

Policy, § II.4 (emphasis added) (although the limit of liability section above does not use the word "occurrence" explicitly, it is construing the declarations page, which uses "occurrence").

In WTC, the insurance company included a discrete list of the particularized events that would be subject to its limitation of liability for continuous losses. 467 F.3d at 138. Despite the insurance company's concerted effort to delineate all possible circumstances, the provision was nonetheless held ambiguous because the insurance company could not identify a general practice within the insurance industry for applying the policy's phrasing to specific conduct. Id. at 139.

Allstate's implied continuous loss exclusion was invoked on the eve of trial and applied to Plaintiffs' injuries, which Allstate suddenly asserted were derived from "the same general conditions" as the previous tenant's injuries. This could mean almost anything. Allstate's underwriters made no effort to delineate what constituted "the same general conditions" and what did not. Unlike in WTC, Allstate does not even attempt to interpret its vague policy using an industry norm for interpretation of the relevant language. Based on WTC alone, the Allstate policy language is ambiguous on its face, independent of how Allstate is now attempting to apply it subjectively to further Allstate's own economic interests.

(c) Implied Continuous Loss Exclusions Lead to Absurd Results and Must Be Limited, Just as New York Courts Have Carefully Limited the Scope of Other Exclusions

Exclusions involving pollution may be considered analogous to the implied continuous loss exclusion at issue here, in that insurance companies regularly attempt to broaden application of such exclusions beyond their original intent and the policyholders' reasonable expectations. Therefore, New York courts' careful efforts to limit the reach of the absolute pollution exclusion are instructive on how to interpret Allstate's implied continuous loss exclusion.

In Stoney Run Corp. v. Prudential-LMI Commercial Ins. Co., two apartment owners sought coverage and defense costs for civil actions alleging injury based on carbon monoxide released in the owners' apartments. 47 F.3d 34, 35-36 (2d Cir. 1995). The insurance company claimed that the release was barred by the pollution exclusion. Id. at 36. The court stated that "it is appropriate to construe the standard pollution exclusion in light of its general purpose, which is to exclude coverage for environmental pollution." Id. at 37. Looking to "common speech" and the policyholder's "reasonable expectations," the court easily determined that release of carbon monoxide within an apartment is not "environmental pollution." Id. at 39.

In Belt Painting Corp. v. TIG Ins. Co., a painting company was sued for injuries sustained by individuals who ingested paint fumes in a building the company painted. 100 N.Y.2d at 382. The insurance company denied its duty to defend based on the pollution exclusion. Id. "Reasonable minds can disagree as to whether the [pollution] exclusion applies here," the Court of Appeals said, and that *alone* was enough to deem the exclusion ambiguous and interpret it in the policyholder's favor. Id. at 387. Where the insurance company's reading "strains the plain meaning, and obvious intent" of the policy language, exclusionary language will not be applied. Id. at 388 (internal quotation omitted).

Just as the insurance companies in the above cases attempted unsuccessfully to stretch the exclusionary policy language to yield absurd results, Allstate is using vague language to exclude coverage by straining the plain meaning of the policy and ignoring the parties' obvious intent. Just as the pollution exclusion in Belt Painting Corp. could not reasonably be read to include paint fumes from use of a product for its intended purpose, common sense dictates that the Nesmiths' injuries are not the same as the injuries incurred by previous tenants living in the building at a different time and in a different apartment, based on unsafe lead paint conditions that were remediated before Plaintiffs' sustained their injuries. Moreover, as explained in Plaintiffs' opposition, Allstate's conduct demonstrates that even Allstate did not interpret its own policy language in the manner it now urges until the eve of trial. In other words, Allstate's interpretation arises from its efforts to protect its own interests, not from the plain meaning of the policy or the parties' original intent.

Allstate's implied continuous loss exclusion attempts to stretch a limit on liability clause beyond the reasonable expectations of any policyholder and beyond what any New York court to date has contemplated. Allstate disingenuously argues that injuries suffered by separate children,

from different families, living in different apartments, at different times, after full remediation of the prior lead paint conditions, are a "continuous" exposure to the "same general conditions." In order to exclude coverage in this manner, Allstate must spell out how its newfound exclusion works and put policyholders and state insurance regulators on notice, not simply adopt an interpretation on the eve of trial that suits Allstate's interests.

(d) Allstate Could Have Unambiguously Established that Losses Resulting from Unsafe Conditions in Separate Dwellings Are Subject to One Policy Limit, But Did Not

Allstate is one of the country's largest providers of homeowner's insurance. When assessing Allstate's arguments, it is important to remember that the language at issue is drawn from the "Family Protection" module of a homeowner's insurance policy. Allstate's underwriters are experienced with homeowner's insurance policies, and the underwriters in question knew or should have known that the homeowner's policy held by landlord Tony Wilson ("Wilson") would apply to multiple dwellings inhabited by separate families. Unsafe lead paint conditions, which can exist in different parts of one residential structure and may be caused by different circumstances discovered at different times, are the type of condition for which homeowner's insurance is intended to provide protection.

Allstate's experienced homeowner's policy underwriters could easily have explained whether substantively similar losses that occur in different apartments, at different times, and to different tenants after intervening remediation procedures, could limit Allstate's duty to provide coverage for both. If Allstate wished to include lead paint exposure in its implied continuous loss exclusion, it certainly knew how to do so. Instead, Allstate simply stated that multiple losses would be considered one occurrence if they stemmed from "repeated exposure to *the same general conditions*." "The same general conditions": it is difficult to imagine less helpful

phrasing for a policyholder trying to understand which types of situations are subject to a single policy limit and which are not.

Allstate failed to be specific where it had the information and experience necessary to do so. Allstate—not the Nesmith children—should bear the consequences of that failure.

(e) Allstate Fails to Consider All Relevant Circumstances, As Is Required When the Policy May Be Ambiguous

Tacitly acknowledging that its policy is ambiguous, Allstate in its appeal brief purports to conduct an exhaustive factual analysis of whether the Nesmiths' injuries are excluded from coverage by the implied continuous loss exclusion. However, when analyzing an insurance policy in light of underlying facts, an insurance company cannot "ignore potentially decisive aspects by artificially focusing exclusively upon one aspect" of the factual scenario. North River Ins. Co. v. Dutchess County, 872 F. Supp. 1262, 1263 (S.D.N.Y. 1994). Allstate does exactly that, ignoring at least four key facts: (1) that the two exposures happened at different times; (2) that the injurious lead paint was located in two different apartments; (3) that the injured parties were from two separate families with no connection to one another; and (4) that the first lead paint discovered was completely removed before separate lead paint caused Plaintiffs' injuries. In the presence of potentially ambiguous policy language, however, "*all* relevant circumstances" must be considered. Id. (emphasis added); see also 9 COUCH ON INS. § 126.31. Therefore, Allstate's analysis is incomplete. The trial court properly relied on the four circumstances above to distinguish each of Allstate's key precedents and find in Plaintiffs' favor.

2. Allstate's Position in this Litigation Stems from Convenience Rather than Objective Policy Interpretation

Independent of Allstate's legal argument—which is without merit—Allstate's conduct throughout this litigation must not be countenanced. Allstate litigated for more than three years before isolating its limit of liability clause as a means to exclude coverage for any loss even

vaguely related to a previous covered loss. This is part of a pattern of bad faith conduct. Throughout the litigation, Allstate refused to produce the insurance policy under which Plaintiffs made their claim. In other words, Allstate required Plaintiffs to *subpoena* the single most relevant document in the entire litigation. Plaintiffs' opposition explains in more depth the disturbing extent of Allstate's improper conduct throughout this litigation. Moreover, Allstate's tactics highlight the extent to which Allstate will go to protect its own interests. Insurance companies must not be rewarded for discovery abuses and 11th hour arguments that pit claimants against one another in a last-ditch effort to avoid paying what they owe.

3. All Public Policies Governing the Law of Insurance Point to Coverage for Plaintiffs' Injuries

(a) Insurance is a product—policyholders purchase it for peace of mind and should not be subjected to insurance companies' pernicious attempts to reinterpret policy language whenever it suits them

In the minds of individuals and businesses who purchase insurance, an insurance policy is considered to be more a product than a contract. Insurance companies across the board advertise the insurance they provide as a beneficial, life-improving product, not simply an opportunity to become party to a contract with the insurance company. Indeed, people buy insurance for the peace of mind it provides, not to become business partners with an insurance company. There is no better example of insurance as a product than homeowner's insurance. In nearly all circumstances, the would-be policyholder's understanding of insurance policies pales in comparison to the sophisticated knowledge of the insurance company, whose entire existence revolves around the preparation and sale of insurance policies. Therefore, although the relationship between policyholder and insurance company is officially contractual in nature, many courts treats insurance policies as *de facto* contracts of adhesion. See, e.g., Pan Am World Airways Inc. v. Aetna Cas. & Sur. Co., 505 F.2d 989, 1002-03 (2d Cir. 1974); American Home

Products Corp. v. Liberty Mut. Ins. Co., 565 F. Supp. 1485, 1492 (S.D.N.Y. 1983); Eagle Star Ins. Co. v. International Proteins Group, 45 A.D.2d 637, 650-51 (1st Dep't 1974); see also Satz v. Massachusetts Bonding & Ins. Co., 243 N.Y. 385, 393 (1926) (New York Court of Appeals noting "[t]he tendency on the part of the courts to treat insurance contracts as standing in a class by themselves").

(b) Well-settled canons of insurance contract interpretation support Plaintiffs' argument

i. Courts interpret insurance policies based on "common speech" in order to divine the policyholder's "reasonable expectations"

In keeping with the idea that an insurance policy is a product purchased by the policyholder, insurance policies are always interpreted according to a policyholder's "reasonable expectations." WTC, 467 F.3d at 138. To most effectively identify the policyholder's reasonable expectations and avoid confusion over arcane insurance terminology, courts in New York and throughout the nation define terms within a policy according to "common speech." Parks Real Estate Purchasing Group v. St. Paul Fire and Marine Ins. Co., 472 F.3d 33, 42 (2d Cir. 2006).

In this case, Jannie Nesmith moved into the apartment in question having no awareness that a previous family living in the building, who Nesmith never met and who had lived in a separate apartment, had been injured by unsafe lead paint conditions. Wilson maintained homeowner's insurance with Allstate, which he renewed every year, and which he assumed would apply fully to injuries suffered by different tenants in different apartments during different policy years. Allstate argues that it is reasonable for Plaintiffs' right to compensation for lead-based injuries to have been almost completely exhausted *before they even moved in*. It is ludicrous to argue that Wilson's reasonable expectations were that an injury suffered in one apartment would exhaust coverage for an injury suffered in an entirely separate apartment,

especially when the unsafe conditions causing the first incident were completely remediated before the second incident took place, and the second incident took place during a separate year and policy period. Yet this is precisely what Allstate argues. If Wilson had understood Allstate's position as to the contours of the implied continuous loss exclusion prior to the eve of trial in this lawsuit, he surely would not have purchased and repeatedly renewed his Allstate policy. Allstate cannot argue with a straight face that its interpretation of the "same general conditions" language comports with Wilson's reasonable expectations as a policyholder.

ii. The doctrine of *Contra Preferentum*: Tie Goes to the Policyholder

As discussed above, New York's highest court has found the word "occurrence" in insurance policies ambiguous and impossible to apply uniformly. In the event of ambiguities in a policy, which the analysis above demonstrates is present in the Allstate policy at issue, such ambiguities are construed in favor of the policyholder. Brabender v. Northern Assurance Co. of America, 65 F.3d 269, 273 (2d Cir. 1995). This rule, known as *contra preferentum* ("against the offeror"), is not a creature of arbitrary judges who feel the need to place the burden on one party or the other. To the contrary, the rule addresses key public policies including the inequity inherent to adhesive contracts, such as insurance policies. Since in almost all circumstances the sophisticated insurance company drafts the policy language and the unsophisticated policyholder takes a leap of faith that the policy actually provides the coverage it appears to provide, it should be and is the insurance company's burden to resolve any ambiguity. Since the policyholder's reasonable expectation is to be covered for the type of loss contemplated by the policy, it should be the insurance company's burden to prove otherwise. In this case, *contra preferentum* dictates that all ambiguities in the underlying Allstate policy be resolved in Plaintiffs' favor.

iii. Courts' preference against applying an exclusion or other coverage limitation

It is also the insurance company's burden to prove the applicability of a limitation on coverage. Brabender, 65 F.3d at 273. A court may apply a coverage limitation when it "conclude[s] as a matter of law that '[the insurer's] interpretation is *the only fair construction* of the policy language at issue.'" Id. (quoting Kula v. State Farm Fire & Casualty Co., 212 A.D.2d 16, 19 (4th Dep't 1995) (emphasis added)). That burden is of key relevance in this case, where Allstate attempts to argue that Plaintiffs' injuries, which are of a type that is clearly covered under the policy, are nonetheless excluded based on a very broad reading of the "same general conditions" language in the policy. If the policy is deemed ambiguous, it is clear that Allstate's argument is *not* the "only fair construction" of the language at issue.

4. Allstate's Creative Attempt to Avoid Coverage Is Yet Another Example of the Ironic Anti-Consumer Attitude that Pervades the Modern Insurance Industry

In the 19th century insurance was a profession on par with medicine, religion and the law. In the early 1900s there were annual insurance lectures at Yale University. See, e.g., Yale Insurance Lectures, Volume I, The Tuttle, Morehouse & Taylor Press (1903-1904). The basic form of insurance in the United States was property insurance. Professional standards for insurance professionals were high.

The oath of the Chartered Property and Casualty Underwriters was (and strangely still is)

> "I shall strive to ascertain and understand the needs of others … and place their interests above my own."
>
> The CPCU Professional Commitment, http://www.aicpcu.org/doc/CPCUProfessionalCommitment.pdf at 3 (last visited July 10, 2012).

That is a **powerful promise.**

The treatment of the word "occurrence" seems to illustrate less about ethical behavior than it does underscore the sad principle of life that when dollars come in the door, ethics go out the window. Upton Sinclair wrote, "It is difficult to get a man to understand something when his salary depends upon his not understanding it." I, Candidate for Governor: And How I Got Licked (1935). Here, between its counterintuitive, unreasonable, 11th hour policy interpretation and its willful obstruction of discovery, Allstate is proving the verity of Sinclair's sad statement.

CONCLUSION

For all of the foregoing reasons, *amicus curiae* United Policyholders respectfully requests that this Court affirm the decision of the Supreme Court.

Dated: July 16, 2012
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