STATE OF NEW YORK

SUPREME COURT

Appellate Division – Fourth Department

MICHAEL HENNER and ELIZABETH HENNER,

Plaintiffs-Appellants-Cross-Respondents,

-against-

GEMINI INSURANCE COMPANY,

Defendant-Respondent,

CONTINENTAL CASUALTY COMPANY, TRANSPORTATION INSURANCE CO. and AMERICAN CASUALTY CO. OF READING PA,

Defendants-Respondents-Cross-Appellants,

EVERDRY MARKETING AND MANAGEMENT, INC., J.M. ROMICH ENTERPRISES, INC. RICHARD SANTIAGO, JOHN DOE INSURANCE COMPANY, and JOHN DOE,

Defendants.

Docket Nos. CA 09-01832 and CA 09-01833

BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF APPELLANTS MICHAEL HENNER AND ELIZABETH HENNER

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INTRODUCTION

Accidents (like the fuel oil leak in this case) are inherent risks for most New York businesses, including those engaged in waterproof contracting. Fortunately, for the public's (and the policyholder's) sake, those businesses purchase general liability insurance to cover the costs and liabilities associated with the cleanup of environmental discharges. But what happens, as in this case, when a private homeowner is the victim of fuel oil leak caused by an independent waterproof contractor's negligence, and the independent contractor refuses to cooperate in identifying or notifying its insurance companies? Under New York law, that private homeowner has a statutory right to sue directly and recover costs from the independent contractor's liability insurance companies.

However, according to the lower court's decision in this case, the private homeowner will be forced to clean up the leak without insurance coverage despite legislative intent to bestow a statutory right to insurance coverage. In fact, even where the private homeowner acts with reasonable due diligence in identifying and notifying the insurance companies, and there is no demonstration of any prejudice arising from the timing of notice, the lower court's holding allows the liability insurance company to reap a windfall. Even though the insurance company accepted the risk and a loss occurred, to the environment, the spill victim and the citizens of the State are compelled to shoulder the insurance company's rightful

burden. As detailed below, the lower court's decision should be reversed because it runs afoul of both New York statutory law and public policy. It also penalizes a diligent victim while bestowing a windfall on the insurance company that had accepted the risk in exchange for money.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

United Policyholders is a non-profit 501(c) (3) consumer organization founded in 1991 that has eighteen years of experience helping solve insurance problems and advocating for fairness in insurance transactions. Donations, foundation grants and volunteer labor fuel the organization. United Policyholder's 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 lines insurance products, coverage and the claims process at www.unitedpolicyholders.org

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 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 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 the case at bar, 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.

QUESTION PRESENTED

Whether New York courts should apply the modern notice-prejudice rule in all coverage cases, especially where a diligent, innocent third party's statutory right to coverage for cleanup of an environmental discharge has been frustrated by the wrongdoer's unwillingness to identify and notify its insurance companies?

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

As to the operative facts, United Policyholders adopts the Statement of the Case and the Statement of the Facts of the Plaintiffs-Appellants Michael Henner and Elizabeth Henner.

SUMMARY OF THE ARGUMENT

The issue before this Court is whether the lower court erred in holding in favor of a forfeiture of the Plaintiffs-Appellants' (the "Henners") statutory right to insurance coverage. The forfeiture is based on alleged untimely notice of a claim without requiring the insurance companies to demonstrate that they were prejudiced by the timing of notice (putting aside that notice was timely) even where the Henners had a statutory right and acted diligently.

The New York Legislature enacted Section 190 of the Navigation Law to permit innocent third parties forced to clean up environmental spills or hazards

negligently caused by another to sue and recover directly from the tortfeasor's insurance company. *See* N.Y. NAV. LAW § 190 (McKinneys 2010) ("Any claims for costs of cleanup and removal, civil penalties or damages by the state and any claim for damages by any injured person, may be brought directly against the bond, the insurer, or any other person providing evidence of financial responsibility."). Like many direct-action statutes, Section 190 was intended to protect innocent victims and promote cleanup of spills and hazards by granting public access to the wrongdoer's insurance coverage.

Recently, New York courts and the Legislature have adopted the notice-prejudice rule, which prevents an insurance company from disclaiming coverage based on untimely notice of claim absent a showing of prejudice caused by the timing of notice. Courts across this country have applied the notice-prejudice rule to enforce the public's special interest in enforcing **all** types of insurance policies as an element of "social policy."

This is such a case where the Court should apply the notice-prejudice rule to prevent the insurance companies from frustrating the rights of innocent victims consistent with express legislative intent and practial public policy. The lower court summarily denied the Henner's statutory right to insurance coverage under Section 190, based on untimely notice without even considering whether the insurance companies were prejudiced by the timing of notice. This holding

frustrates the Legislature's intent to protect the public from the negligence of others. For the reasons discussed below, the trial court's decision must be reversed.

ARGUMENT

POINT ONE

THE LOWER COURT'S SUMMARY HOLDING THAT THE HENNERS AUTOMATICALLY FORFEITED COVERAGE BASED ON UNTIMELY NOTICE SHOULD BE REVERSED BECAUSE THE COURT FAILED TO CONSIDER ALL OF THE FACTS, INCLUDING THE TIMING AND CIRCUMSTANCES OF NOTICE, THE HENNER'S DILIGENCE, AND LEGISLATIVE INTENT

A. The Overwhelming Majority of States Apply the Notice-Prejudice Rule Where Timing of Notice and the Public's Interest in Insurance Coverage Is at Issue

The overwhelming majority of states apply the notice rule that an insurance company may not shirk its responsibilities under an insurance policy without first demonstrating that the timing of notice of a claim caused the insurance company prejudice. *See, e.g., Terminal Transfer, Inc. v. Truck Ins. Exch.*, 65 F.3d 176, 1995 WL 40176 (9th Cir. 1994); *Steelcase, Inc. v. Am. Motorists Ins. Co.*, 907 F.2d 151, 1990 WL 92636 (6th Cir. 1990); *Clementi v. Nationwide Mut. Fire Ins. Co.*, 16 P.3d 223 (Colo. 2001); *T. Copeland & Sons, Inc. et al. v. Kansa Gen. Ins. Co.*, 762 A.2d 471 (Vt. 2000); *Alcazar v. Hayes*, 982 S.W.2d 845 (Tenn. 1998); *Coop. Fire Ins. Ass'n of Vt. v. White Caps, Inc.*, 694 A.2d 34 (Vt. 1997) *Trevino v. Allstate Ins. Co.*, 651 S.W.2d 8 (Tex. Ct. App. 1983); *Katz Drug Co. v. Commercial*

Standard Ins. Co., 647 S.W.2d 831, 836 (Mo. Ct. App. 1983); *Johnson Controls, Inc. v. Bowes*, 409 N.E.2d 185, 188 (Mass. 1980); *Shelton v. Ray*, 570 S.W. 2d 419, 420 (Tex. Civ. App. 1978) *Flacon Steel Co. v. Md. Cas. Co.*, 366 A.2d 512, 518 (Del. Super. Ct. 1976); *see also* Eugene R. Anderson et al., Insurance Coverage Litigation § 5.02 (2d ed. Supp. 2010) (noting that the majority of states following the notice-prejudice rule). Moreover, many states also require the insurance company to demonstrate that the claimant did not act reasonably. *See, e.g.*, *Lusch v. Aetna Cas. & Sur. Co.*, 272 Or. 593, 599-600 (1975), and subsequent cases.

The old no-prejudice approach, which allowed an insurance company to void coverage and obtain a windfall even where it suffered no harm and the Henners acted diligently, is particularly draconian in light of both the expensive premiums paid by policyholders, and Legislative intent to provide the public with a statutory right to insurance coverage.

The old no-prejudice approach (*i.e.*, automatic forfeiture) today is disfavored because it operates irrespective of the rule's resulting harshness or inequity. New York courts have recognized this view. Courts across the country have applied the modern rule based on several justifications, including that insurance policies "are not purely private agreements but affect the public generally." *See N. River Ins. Co. v. Johnson*, 757 S.W.2d 334, 355 (Tenn. Ct. App. 1988).

Courts consistently have applied the notice-prejudice rule to prevent insurance companies from reaping a windfall and frustrating the rights of third parties to insurance coverage on the basis of the policyholder's failure to cooperate or provide notice. *See, e.g.*, *Fox v. Nat'l Sav. Ins. Co.*, 424 P.2d 19, 25 (Okla. 1967) (finding coverage under a public liability insurance policy despite untimely notice because of the policy's "third-party beneficiary aspects."); *Ind. Ins. Co. v. Williams*, 463 N.E.2d 257, 265 (Ind. 1984) (The notice-prejudice rule "is not in conflict with the public policy theory that the court should seek to protect the innocent third parties from attempts by insurance companies to deny liability for . . . failure to notify.").

Courts abhor forfeiture of insurance coverage in these situations because it would "disservice the public interest," as "insurance is an instrument of a social policy that victims of negligence be compensated." *Cooper v. Gov't Employees Ins. Co.*, 237 A.2d 870, 874 (N.J. 1968). As one court aptly stated:

> [A]n analysis that does not consider whether the insurance company has suffered prejudice from untimely notice too lightly disregards significant public policy considerations. Insurance contracts are not purely private matters between insurance companies and their insureds.

Brakeman v. Potomac Ins. Co., 371 A.2d 193, 198 n.8 (Pa. 1977).

This case presents the precise situation where the trial court should have engaged in some more-detailed factual analysis as to whether the insurance

companies suffered prejudice from the timing of notice, the claimant acted diligently and/or the Legislature's intent was relevant. While United Policyholders maintains, and putting aside the fact that, the Henners were reasonably diligent in identifying and providing notice to the insurance companies, the lower court's failure to properly examine the factual circumstances and even consider the issue of prejudice is error. So are the facts that what results is a windfall to the insurance company without imposing any obligation to provide justification for forfeiture of coverage which coverage was expressly made available to the public at large by the Legislature in order to address accidental environmental hazards.

B. Applying the Notice-Prejudice Rule in This Case Is Consistent with New York Law and Public Policy

Over the years, New York courts have taken strides to eliminate the old no-prejudice approach and resulting disadvantages for policyholders and those entitled to insurance coverage, including a 2008 statute that eliminates the old no-prejudice rule for liability insurance policies delivered on or after January 19, 2009.

In 2002, New York's highest court took the first step in rejecting the old no-prejudice approach. In *Brandon v. Nationwide Mutual Insurance Co.*, 97 N.Y.2d 491, 769 N.E.2d 810, 743 N.Y.S.2d 53 (2002), the New York Court of Appeals held that the no-prejudice standard did not apply to alleged untimely notice of suit in the uninsured motorist context. In so holding, the court recognized that the old

approach was draconian and indicated that its decision would be the first step to adopting the modern approach:

> [S]tates often begin the shift to a prejudice requirement in the uninsured motorist context, where various policy considerations – the adhesive nature of insurance contracts, the public policy objective of compensating tort victims, and the inequity of the insurer receiving a windfall due to a technicality – are clearly implicated. The issue of whether New York should continue to maintain the no-prejudice exception when [insurance companies] assert late notice of claim as a defense is not before us.

Brandon, 97 N.Y.2d at 496 n.3 (citations omitted).

Since *Brandon*, the New York Legislature has passed an insurance bill that prevents an insurance company from avoiding coverage based on timing of notice unless the timing of notice has prejudiced the insurance company. N.Y. INS. LAW § 3240. Further, under the bill, the burden is on the insurance company to prove it suffered prejudice as long as the notice was provided within two years of the policy period. *See id.*

Moreover, application of the prejudice-notice rule in this context is consistent with established principles of New York law. In general, New York, like virtually all jurisdictions, abhors a forfeiture. *See Ellis v. Colombian Nat'l Life Ins. Co.*, 270 A.D. 143, 59 N.Y.S.2d 335 (1st Dep't 1945), *aff'd*, 296 N.Y. 594, 68 N.E.2d 879 (1946); *Press Publ'n Co. v. Gen. Accident Fire & Life Assurance Corp.*, 160 A.D. 537, 145 N.Y.S. 711 (1st Dep't 1914), *aff'd*, 217 N.Y.

648, 112 N.E. 1072 (1916); *McCormack v. Sec. Mut. Life Ins. Co.*, 161 A.D. 33, 146 N.Y.S. 613 (3d Dep't 1914), *rev'd on other grounds*, 220 N.Y. 447, 116 N.E. 74 (1917). As one New York court described the equitable approach: "Courts of equity frown upon the principle of forfeiture. As the keeper of the conscience of the king, equity will ameliorate the harshness of the full application of legal forfeitures, when, in a given case, **justice demands such action**." *Rockaway Park Series Corp. v. Hollis Auto. Corp.*, 206 Misc. 955, 135 N.Y.S.2d 588 (Sup. Ct. 1954), *aff'd*, 285 A.D. 1140, 142 N.Y.S.2d 364 (1st Dep't 1955) (emphasis added). Here, the lower court should have at least inquired into whether the insurance company was prejudiced before summarily forfeiting the Henner's coverage rights.

POINT TWO

THE HENNERS WERE REASONABLY DILIGENT IN PROVIDING NOTICE

Putting aside the fact that the insurance companies were not prejudiced by the timing of notice, the Henners fulfilled their obligations in identifying the insurance companies and furnishing notice as required by New York law. In New York, under Section 190 of the Navigation Law, an aggrieved party need only demonstrate that it was reasonably diligent in identifying and notifying the discharger's insurance company. *See State of New York v. Taugco, Inc.*, 213 A.D.2d 831, 623 N.Y.S.2d 383 (3d Dep't 1995).

Here, the Henners complied with the statute and acted reasonably. They repeatedly notified the waterproofing contractor and warned it to contact its insurance companies, but were denied information by the waterproofing contractor necessary to access to the insurance. As a result, the insurance company reaps an improper windfall by retaining unearned premiums and avoiding liability. The wrongdoing policyholder manipulates its loss history and enjoys lower premiums than it is entitled to.

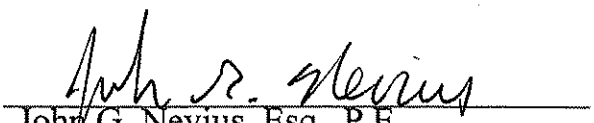
Because the Henners had a statutory right to insurance coverage and acted with reasonable diligence in identifying and notifying the insurance companies – keeping in mind that the insurance companies were not prejudiced and the Legislature has expressed an intent to provide access to coverage and to inquire into the circumstances of notice – this Court should reverse the lower court's summary adjudication, avoid bestowing a windfall on the insurance companies at the expense of an innocent victim and the public at large, and send the case back for a more-thorough analysis. Holding otherwise would set a dangerous precedent compelling the State and spill victims to cover the cost to clean up environmental discharges, which this State has recognized as the insurance company's responsibility and encouraging wrongdoers to frustrate efforts to make coverage assets available.

CONCLUSION

For the reasons stated herein, *amicus curiae* United Policyholders respectfully requests that this Court reverse the decision of the lower court.

Dated:
New York, New York
March 19, 2010

Respectfully submitted,

By: 

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