

IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

D.C. Case No. 95-1852

INTERNATIONAL RECOVERY CORPORATION, a
Florida corporation, INTERNATIONAL ENVIRONMENTAL
SERVICES, INC., a Florida corporation, and
INTERNATIONAL PETROLEUM CORPORATION, a
Florida corporation,

Plaintiffs - Appellants,

v.

NATIONAL UNION FIRE INSURANCE COMPANY
OF PITTSBURGH, PENNSYLVANIA, a Foreign
corporation,

Defendant - Appellee.

Appeal from the Circuit Court
of the Eleventh Judicial Circuit
in and for Dade County, Florida
C.C. Case No. 93-16803 CA 27
Circuit Court Judge: Juan Ramirez, Jr.

MEMORANDUM OF LAW OF AMICUS CURIAE
UNITED POLICYHOLDERS IN SUPPORT OF
APPELLANTS' APPEAL OF THE TRIAL COURT'S
ORDER GRANTING DEFENDANT/APPELLEE'S MOTION
FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS/
APPELLANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTEREST OF THE AMICUS CURIAE

United Policyholders is a non-profit corporation dedicated to educating policyholders on their rights and duties under their insurance policies. Specifically, United Policyholders engages in charitable and educational activities by promoting greater public understanding of insurance issues and consumer rights. United Policyholder's 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 contribution of services and funds.

Amicus curiae have a vital interest in seeing that the standard-form commercial general liability policies sold to countless policyholders are interpreted properly and consistently by insurance companies and the courts. As a public interest organization, United Policyholders seek to assist and educate the public and the courts on policyholders' insurance rights and their efforts to have them enforced throughout the country.

STATEMENT OF THE FACTS

Amicus curiae adopts the Statement of the Case and Statement of the Facts as set forth in the brief of appellants, International Recovery Corporation, International Environmental Services, Inc., and International Petroleum Corporation

(collectively, referred to as "IRC"), and respectfully refers the Court thereto.

Amicus curiae respectfully requests that this Court take judicial notice of all documents in the Appendix.¹

SUMMARY OF ARGUMENT

In order to get approval for use of the 1985 "polluter's exclusion" in its insurance policies, the insurance industry represented to the Insurance Commissioner of the State of Florida, as well as to state regulators in many other states, that the restriction excluded coverage only for certain types of environmental harm as a result of pollution. This portrayal of the polluter's exclusion is contrary to the position that National Union has taken in the instant case. It also is contradictory to both Florida and other states' case law. Finally, IRC's excess insurance company, Crum & Forster, rejected National Union's disingenuous interpretation of this restriction, which appears in identical form in Crum & Forster's excess liability policy, and aided IRC in settlement of the underlying claim. Crum & Forster's actions demonstrate the reasonableness of IRC's interpretation of the 1985 "polluter's exclusion."

1. See Brown v. Board of Education, 347 U.S. 483 (1954) (Court referred to articles and other publications in rendering its landmark decision); American Guar. & Liab. Ins. Co. v. Vista Medical Supply, 699 F. Supp. 787, 789 n.2 (N.D. Cal. 1988) (insurance company permitted to submit non-party's complaint filed in related case).

ARGUMENT

[All] segments of the insurance community -- policyholders, their brokers, insurance regulators, the trade press and insurers -- described the new ISO [Insurance Services Office] pollution exclusion as "total" or "absolute." They did so with full knowledge that there were exceptions to it.²

This judicial representation by Defendant Appellee, National Union Fire Insurance Company of Pittsburgh, Pennsylvania ("National Union") is diametrically opposed to the position this insurance company has taken in this litigation. In the CBI case, National Union represented and admitted that the 1985 "polluter's exclusion" is in fact not "absolute."³ Rather, as National Union admitted, it is subject to broad exceptions. These

2. Post-Argument Submission of National Union Fire Insurance Company of Pittsburgh, Pa. and Reply to Amicus Curiae Brief of Texas Department of Insurance, Mid-America Legal Foundation, and Texas Independent Producers & Royalty Owners Association ("National Union's Post-Arg Subm."), in National Union Fire Insurance Co. of Pittsburgh, Pa. v. CBI Industries, Inc., No. D-4353, 1995 WL 92215 (Tex. Sup. Ct. dated Nov. 4, 1994) ("CBI"), at 16 (second emphasis supplied). See Appendix, at Tab 1.

In CBI, the court found that the "absolute" pollution exclusion barred coverage for claims resulting when an accidental explosion produced a large hydrofluoric acid cloud over a city. See National Union Fire Ins. Co. of Pittsburgh, Pa. v. CBI Industries, Inc., No. D-4353, 1995 WL 92215 (Tex. Sup. Ct. Oct. 5, 1995) at Appendix, at Tab 2. Amicus respectfully contends that the CBI case was wrongly decided. See Section V, infra.

3. National Union currently labels this restriction either "exclusion (f)" or an "absolute exclusion". In the past, National Union and other insurance companies have called the exclusion an "absolute" pollution exclusion. This brief will refer to this exclusion as the 1985 "polluter's exclusion."