Court of Appeals

of the

State of New York

ELIZABETH FRANCES KERRIGAN, Individually and as Executrix of the Last Will and Testament of THOMAS W. CONNELLY, Deceased,

Plaintiff-Appellant,

- against -

METROPOLITAN LIFE INSURANCE COMPANY and METLIFE, INC.,

Defendants-Respondents.

MOTION FOR LEAVE TO FILE A BRIEF OF AMICUS CURIAE

AMY REBECCA BACH

Attorney for United Policyholders

381 Bush Street 8th Floor

San Francisco, California 94101

Phone: 415-393-9990

Facsimile: 415-677-4170

amy.bach@uphelp.org

Date: October 29, 2014

STATE OF NEW YORK
COURT OF APPEALS

ELIZABETH FRANCES KERRIGAN, Individually and as Executrix of the Last Will and Testament of THOMAS W. CONNELLY, Deceased, Plaintiff- Appellant, -against- METROPOLITAN LIFE INSURANCE COMPANY and METLIFE, INC., Defendant - Respondent.	N.Y. County Index No. 111775/2003 **NOTICE OF MOTION**

MOTION BY:	Amy Bach, Esq. United Policyholders 381 Bush Street, 8th Floor San Francisco, CA 94104
SUPPORTING PAPERS:	Affirmation in Support dated October __, 2014 Original Proposed Amicus Brief Pro Hac Vice Letter Application
PLACE:	Court of Appeals Hall 20 Eagle Street Albany, NY
DATE AND TIME:	October __, 2014 at 9:30 a.m.
RELIEF REQUESTED:	Leave to file a brief of *amicus curiae* with the Court of Appeals pursuant to 22 NYCRR Section 500.23 from a decision and order of the Appellate Division, First Department, entered on May 20,

2014 and its affirmance in a September 11, 2014 order of that same Court, and for all other relief as this Court deems just and proper.

Dated: New York, New York
October __, 2014

Respectfully,

By: _____

TO: Law Offices of Eric Dinnocenzo
Attorney for Plaintiff-Appellant
641 Lexington Avenue
14th Floor
New York, New York 10022
(212) 933-1675

d'Arcambal Ousley & Cuyler Burk LLP
Attorneys for Defendant-Appellee Metropolitan Life Insurance Company and MetLife, Inc.
40 Fulton Street – Suite 1005
New York, NY 10038
(212)971-3175

STATE OF NEW YORK
COURT OF APPEALS

ELIZABETH FRANCES KERRIGAN, Individually and as Executrix of the Last Will and Testament of THOMAS W. CONNELLY, Deceased, Plaintiff- Appellant, -against- METROPOLITAN LIFE INSURANCE COMPANY and METLIFE, INC., Defendant - Respondent.	N.Y. County Index No. 111775/2003 **AFFIRMATION OF AMY BACH, ESQUIRE.**

I, Amy Bach, Esquire, serve as counsel and Executive Director for *amicus curiae* United Policyholders, a national non-profit organization, which advocates for the interests of insurance consumers. I am familiar with the facts and circumstances of the case at bar and set forth in this affidavit and supporting materials. As such, United Policyholders, as *amicus curiae*, has an interest in this cause because of the potentially large implications of the practice of "post-claims underwriting" for insurance consumers in the state of New York. The proposed brief attached herein sets forth the legal and public policy reasons for limiting the aforementioned practice and the rationale for the Court of Appeals accepting Plaintiff/Appellant's appeal.

Dated: New York, New York

October __, 2014

Respectfully,

By: _____

Amy Bach, Esq.
Counsel for amicus curiae

TO: Law Offices of Eric Dinnocenzo
Attorney for Plaintiff-Appellant
641 Lexington Avenue
14th Floor
New York, New York 10022
(212) 933-1675

d'Arcambal Ousley & Cuyler Burk LLP
Attorneys for Defendant-Appellee Metropolitan Life Insurance Company and MetLife, Inc.
40 Fulton Street – Suite 1005
New York, NY 10038
(212)971-3175

STATE OF NEW YORK
COURT OF APPEALS

ELIZABETH FRANCES KERRIGAN, Individually and as Executrix of the Last Will and Testament of THOMAS W. CONNELLY, Deceased, Plaintiff- Appellant, -against- METROPOLITAN LIFE INSURANCE COMPANY and METLIFE, INC., Defendant - Respondent.	N.Y. County Index No. 111775/2003 **PROPOSED BRIEF OF AMICUS CURIAE**

Introduction

The underwriting process precedes the formation of an insurance contract. When an insurer underwrites a risk, it obtains information about the nature of that risk. It uses the applicant's answers and various data and records to classify, rate and price the risk and decide whether it is one it can or will insure. During the underwriting process, the insurer has opportunities to solicit additional information, ask follow-up questions, obtain and review additional records, and reject an applicant it deems too risky.

Once an insurer underwrites and accepts a risk, issues a policy and accepts premium payments , that risk is described in insurance terminology as "bound." The

applicant need no longer continue to shop for coverage from competing insurers. He or she now has the right to reasonably rely on the financial security net feature of the policy until further notice. Absent that notice, once a loss, injury or accident has occurred, the insured instantly becomes economically vulnerable and dependant on the insurer to act in good faith and deliver on its promises. Not only does the insured now need the paid-for economic security, but he/she ***cannot*** buy an insurance policy for a "loss in progress"…it is too late to secure an alternative source of indemnity.

That impossibility, combined with the insured loss victim's economic vulnerability, requires a rule of law that sets a high threshold for an insurer that wants to yank out a financial security net from under an insured. The rule of law cannot tolerate or allow what happened here – a practice known as "post-claims underwriting."

"Post-claims underwriting" describes the scenario where an insurer waits until after the insured makes a claim to investigate whether the insured is eligible for coverage based on the risk he or she presents to the insurer. *See*, *e.g.*, *Lewis v. Equity Nat'l Life Ins. Co*., 637 So. 2d 183 (Miss. 1994). Post-claims underwriting (also referred to as "post-loss underwriting" or "retroactive underwriting" in the property insurance context) occurs where an insurer seeks to deny coverage for claims based on information it could have ascertained at the time of application but chose not to or knew yet accepted the application for coverage. *See generally* Thomas C. Cady and

Georgia Lee Gates, *Post Claim Underwriting*, 102 W. Va. L. Rev. 809, 813 (2000).

In this case, Defendant/Appellee Metropolitan Life Insurance Company ("MetLife") seeks to rescind a contract for life insurance, issued to the deceased, Thomas W. Connelly, payable to Plaintiff Appellant for a misrepresentation about a history of heart attacks during the application process, which MetLife clearly had knowledge of based on a battery of medical tests it administered to him in conjunction with the application (Plaintiff/Appellant's Brief at 6-7). Mr. Connelly died in a construction accident unrelated to his previous health conditions and accordingly Plaintiff/Appellant sought payment under the aforementioned policy. MetLife disclaimed coverage on the grounds of material misrepresentation (*i.e.,* fraud). *See, e.g*., *Municipal Bond Ins. Assoc. Ins. Corp. v Countrywide Home Loans, Inc*., 34 Misc. 3d 895, 905-906 (Sup. Ct., N.Y. Cty. Jan. 3, 2012) *aff'd* 105 A.D.3d 412, 963 N.Y.S.2d 21 (1st Dept. 2013).

Plaintiff/Appellant sued in the unsuccessfully for breach of contract in the Supreme Court of New York County. (Plaintiff/Appellant's Brief at 8). The First Department upheld the Supreme Court's decision, giving rise to this timely appeal to the Court of Appeals. (*Id.* at 9). Accordingly, United Policyholders' brief of *amicus curiae* is submitted in support of Plaintiff/Appellant urging the Court of Appeals to accept the appeal for the reasons set forth above and below.

Statement of Interest

United Policyholders, ("UP") is a non-profit 501(c) (3) organization founded in 1991 that is an information resource and a voice for insurance consumers in New York and throughout the United States. The organization assists and informs disaster victims and individual and commercial policyholders with regard to every type of insurance product. Grants, donations and volunteers support our work. UP does not accept funding from insurance companies.

UP's work is divided into three program areas: Roadmap to Recovery™ (disaster recovery and claim help), Roadmap to Preparedness (disaster preparedness through insurance education), and Advocacy and Action (advancing pro-consumer laws and public policy through legislative advocacy and Amicus Curiae briefs). UP hosts a library of informational publications and videos related to personal and commercial insurance products, coverage and the claims process at www.uphelp.org.

UP works in coordination with New York officials, educational institutions and other non-profits to serve individual and business policyholders throughout the state. We are involved in projects related to property insurance availability and affordability on Long Island, post-Sandy claim dispute resolution, and a range of other issues.

UP's Executive Director has been appointed for six consecutive years as an official consumer representative to the National Association of Insurance Commissioners where she routinely confers with NYS Financial Services

Superintendent Lawsky and his team.

UP assists courts as *amicus curiae* in appellate proceedings throughout the courts of the United States, including the U.S. Supreme Court. See, e.g., *Humana, Inc. et al. v. Mary Forsyth,* 525 US 299 (1999) and this Court's landmark ruling in in *Bi-Economy Market, Inc. vs. Harleysville Insurance Company of New York* (Case No. 2004-11840, CA 06-00847, Court of Appeals, 2007).

UP has briefed the issue of "post-claims underwriting" in other jurisdictions, including California, Georgia, and others. *See, e.g., Hailey vs. California Physicians' Service,* California Court of Appeal, 2007; *Southern Realty Management Inc. v. Aspen Specialty Ins. Co*., Case No. 10-11513-G, U.S. Court of Appeals, 11th Circuit, 2010) and has appeared as *amicus curiae* in many cases.

Argument

Post-claims underwriting unfairly penalizes insurance consumers and rewards insurance companies; the legality of which should be decided by this Court.

As a general matter, when an insurer writes a contract for insurance, coverage is owed unless the insured's application includes a ***material*** misrepresentation as to the risk insured. New York Ins. Law sec. 3105(b) (no misrepresentation shall avoid any contract of insurance or defeat recovery thereunder unless such misrepresentation was *material*) (emphasis added). In a "post-claims underwriting" scenario, if the insured is to deny coverage at claim, it must only be allowed to do so when the misrepresentation or omission is, in fact, *material*. Thus, the insurer should be asked

to prove that *but for* the insured's misrepresentation or omission the insurer would not have issued the policy in the first place.

In this case, MetLife issued a policy to Mr. Connelly, accepted thousands of dollars in premiums, and now seeks to disclaim coverage. Yet it is clear from the facts that MetLife knew or should have known about Mr. Connelly's previous health problems when it issued the policy based on blood, urine, and EKG tests it administered to him. The First Department wrongly imposed an "actual notice" standard on MetLife instead of the universally accepted "constructive notice" standard, as is discussed at length in Plaintiff/Appellant's brief.

It is important to note that the practice of "post claims underwriting" in the material misrepresentation context has become a heavily litigated issue primarily because insurers often claim not to have learned of the misrepresentation until claim time. *Lewis,* 637 So. 2d. at 188-189. This is often not the case, however, as insurers frequently overlook warning signs or evidence of misrepresentations—as occurred here in light of the medical test results—in order to issue policies and collect premiums, then suddenly imbue those signs and evidence with significance after a claim is made in order to support a denial, What the practice highlights is that insurers, despite a duty to properly investigate its applicants, often fail to do so until the insured needs coverage due to illness, injury, or in this case, death—and then does so with the sole aim of denying the claim. *See, e.g., First Colony Life Ins. Co. v.*

Sanford, 480 F. Supp. 2d 870, 875 (S.D. Miss. 2007) (discussing the assertion by plaintiff's attorneys that insurers engage in "post-claims underwriting" by issuing coverage based on the application responses and only investigate the accuracy of such responses with the intent of voiding the policy and claim time).[1]

Further, and perhaps most interestingly, the First Department has effectively agreed with the position advanced by Metlife that it could not have known that Mr. Connelly's application contained a material misrepresentation, despite its superior resources and that it never denied that the EKG revealed prior heart attacks. Insurance companies are well equipped with teams of lawyers, doctors, financial analysts, and other claims and underwriting professionals who can properly investigate potential insureds and risks posed to the insurer, whether they are disclosed or not. Unfortunately, at least one New York federal court has held that insurers may blindly rely on the application, and have no duty to conduct any further inquiry.[2] *See John Hancock Life Ins. Co. v. Perchikov*, 553 F. Supp. 2d 229

---

[1] Cady and Gates, *supra* at 827, citing Richard A. Poser, Economic Analysis of Law 5 4.1. (5th ed. 1998) ("An insurer engaged in post claim underwriting tries to take advantage of the postponement in fulfilling its promise, made possible by sequential performance, by waiting until after a claim has been filed to determine [policyholder's] eligibility. It takes advantage of [the policyholder] because it continues to accept premiums from the [policyholder], knowing that it will challenge the policyholder's eligibility for coverage to avoid contract performance. As a consequence, the law of contracts should protect the [policyholder] from an insurer's efforts to implement post claim underwriting as a means of taking advantage of the vulnerabilities created by sequential performance.).

[2] In this case, MetLife could not have relied solely on Mr. Connelly's application, because otherwise it would not have administered medical tests and had them analyzed by its medical director. Insurance companies often claim to have relied on the application, yet this is belied by its own independent investigations such as administering medical tests.

(E.D.N.Y. 2008). Significantly, the First Department decision has gone further to hold that insurers may rely on the application, and have no duty to conduct a further inquiry, even when they have warning signs or evidence of the undisclosed condition. Accordingly, "postclaim underwriting" in New York is now a powerful tool for insurers to deny claims. The Court of Appeal should clarify the law in New YorkFrom a public policy standpoint, "post-claims underwriting" unfairly penalizes insurance consumers, who may not recognize the significance of omissions and misrepresentations, and rewards insurance companies for a lack of due diligence in investigating its potential customers.[3] In this case, the Plaintiff/Appellant has been severely penalized even though she did not personally make any misrepresentations. Worse even, the decision to engage in "post-claims underwriting" "…culminates in either an irresponsible decision not to pay, or an unwarranted delay in payment." Cady and Gates*, supra* at 830. The Court of Appeal has an opportunity here to make a definitive statement on the issue.

This case also presents an opportunity for the Court of Appeal to expressly disavow the practice of "post-claims underwriting" as many courts have done (*See, e.g., Anderson v. Continental Ins. Co.,* 271 N.W.2d 368 (Wis. 1972).[4] In fact, while

---

[3] For instance, a California court has observed that, "Most people are capable of forgetting facts at the time they apply for insurance, especially if those facts relate to a condition or event in the past which is no longer (and perhaps never was) deemed a problem by the applicant…" *Hailey*, 158 Cal. App. 4th at 466.

[4] The U.S. Supreme Court has also enunciated the long-held principle that t*he law abhors a*

postclaim underwriting has received heavy criticism in recent years, and was expressly made unlawful by the Affordable Care Act (a/k/a "Obamacare"), the First Department's decision in contrast has gone in the other direction to strengthen and empower the practice. The First Department's decision is decidedly **not** pro-consumer and is out of step with the national trend. The issue of "post-claims underwriting has not reached the Court of Appeal for a definitive ruling. Should the Court of Appeal choose to accept Plaintiff/Appellant's appeal, it will present an opportunity for New York to come out strongly as the pro-consumer state it hold itself out to be on an issue that is of great significance to insurance consumers. New York should follow the lead of California, Wisconsin, and other states with respect to the law on the practice of "post-claims underwriting."

Conclusion

Accordingly, *amicus curiae* United Policyholders respectfully requests that the Court of Appeal grant leave for Plaintiff/Appellant's appeal to this Court.

---

forfeiture in the insurance context. *See UNUM Life Ins. Co. v. Ward*, 526 U.S. 358, (1988).

Date: New York, NY

October ___, 2014

Respectfully,

By: _____

Amy Bach, Esq.
Counsel for amicus curiae

TO: Law Offices of Eric Dinnocenzo
Attorney for Plaintiff-Appellant
641 Lexington Avenue
14th Floor
New York, New York 10022
(212) 933-1675

d'Arcambal Ousley & Cuyler Burk LLP
Attorneys for Defendant-Appellee Metropolitan Life Insurance Company and MetLife, Inc.
40 Fulton Street – Suite 1005
New York, NY 10038
(212)971-3175

STATE OF NEW YORK
COURT OF APPEALS

ELIZABETH FRANCES KERRIGAN, Individually and as Executrix of the Last Will and Testament of THOMAS W. CONNELLY, Deceased, Plaintiff- Appellant, -against- METROPOLITAN LIFE INSURANCE COMPANY and METLIFE, INC., Defendant - Respondent.	N.Y. County Index No. 111775/2003 **LETTER APPLICATION FOR PRO HAC VICE ADMISSION OF AMY BACH, ESQUIRE**

I, Amy Bach, Esquire, a duly licensed attorney in the state of California, active and in good standing with no record of discipline, (Bar No. 142029, admitted on December 11, 1989) submit this letter brief for the limited and express purpose of appearing as counsel for *amicus curiae* United Policyholders in the case at bar.

Date: New York, NY

October ___, 2014

Respectfully,

By: _____

Amy Bach, Esq.
Counsel for amicus curiae

TO: Law Offices of Eric Dinnocenzo
Attorney for Plaintiff-Appellant
641 Lexington Avenue
14th Floor
New York, New York 10022
(212) 933-1675

d'Arcambal Ousley & Cuyler Burk LLP
Attorneys for Defendant-Appellee Metropolitan Life Insurance Company and MetLife, Inc.
40 Fulton Street – Suite 1005
New York, NY 10038
(212)971-3175