NO.: 06-0868
IN THE SUPREME COURT OF TEXAS

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.,
Appellant,

vs.

BEATRICE CROCKER,
Appellee.

On Certified Questions from the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS IN SUPPORT OF APPELLEE BEATRICE CROCKER

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I. STATEMENT OF INTEREST OF AMICUS CURIAE

United Policyholders was founded in 1991 as a non-profit organization dedicated to educating the public on insurance issues and consumer rights. The organization is tax-exempt under Internal Revenue Code § 501(c)(3). United Policyholders is funded by donations and grants from individuals, businesses, and foundations.

In addition to serving as a resource on insurance claims for disaster victims and commercial policyholders, United Policyholders actively monitors legal and marketplace developments affecting the interests of all policyholders. United Policyholders 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 policyholders throughout the United States communicate on a regular basis with United Policyholders, which allows us to provide important and topical information to courts throughout the country via the submission of *amicus curiae* briefs in cases involving insurance principles that are likely to impact large segments of the public.

II. QUESTIONS PRESENTED

The Fifth Circuit certified the following three questions:

1. Where an additional insured does not and cannot be presumed to know of coverage under an insurer's liability policy, does an insurer that has knowledge that a suit implicating policy coverage has been filed against its additional insured have a duty to inform the additional insured of the available coverage?

2. If the above question is answered in the affirmative, what is the extent or proper measure of the insurer's duty to inform the additional insured, and what is the extent or measure of any duty on the part of the additional insured to cooperate with the insurer up to the point he is informed of the policy provisions?

3. Does proof of an insurer's actual knowledge of service of process in a suit against its additional insured, when such knowledge is obtained in sufficient time to provide a defense for the insured, establish as a matter of law the absence of prejudice to the insurer from the additional insured's failure to comply with the notice-of-suit provisions of the policy?

III. SUMMARY OF ARGUMENT

This case is about an insurance company's breach of contract and breach of the covenant of good faith and fair dealing and its shameless attempt to avoid the results of its own wrongdoing.

Insurance companies like National Union owe their policyholders and additional insureds a duty of good faith and fair dealing that requires more than calculated silence when the policyholder or additional insured is faced with a potentially devastating lawsuit.

National Union accepted premiums from its policyholder in exchange for an insurance policy identifying Richard Morris as its additional insured, thereby transferring risks of covered litigation like Crocker's from its policyholder to itself. National Union knew that Richard Morris was its additional insured. National Union knew that Richard Morris had been sued. National Union knew that Morris was entitled to a defense for that lawsuit. National Union knew that Morris was ignorant of his right to coverage and even ignorant of the existence of the insurance policy in question. National Union knew that Morris had been fired by his employer and yet its only contacts with him were through attorneys identifying themselves as representatives of that employer. National Union knew that Morris was not being defended. National Union knew that a default judgment would be entered against Morris. Despite all of this knowledge, National Union made a calculated decision that it would be in its financial interest to do nothing and keep Morris in the dark. National Union assumed that if Morris remained in the dark about his rights, it could rely on

technical coverage defenses and save some money by avoiding its coverage obligations, thereby transferring the risk of loss back to Morris and the plaintiff, Crocker.

Now that this plan has backfired, National Union asks this Court to endorse its behavior by setting a new, unprecedented standard of insurance company self-interest for use in the future against other additional insureds. Such conduct is entirely inappropriate and against the public trust for an insurance company supposedly acting in the interests of its policyholders and beneficiaries. Insurance companies like National Union should be held to higher standards.

United Policyholders respectfully submits that this Court should confirm the well-established rule that insurance companies owe their policyholders and additional insureds a duty to disclose coverage. This rule is not only a long-established element of the duty of good faith and fair dealing recognized in many states, but is confirmed by the Texas Insurance Code.

Additionally, this Court should rule that an insurance company cannot rely on lack of formal notice when it (a) receives actual notice or (b) has not been prejudiced by a lack of notice.

IV. ARGUMENT

A. THE INSURANCE COMPANY HAD AN AFFIRMATIVE DUTY TO DISCLOSE COVERAGE.

Insurance companies have an affirmative duty to disclose information regarding coverage to their policyholders and additional insureds. The duty to disclose is widely recognized as a component of an insurance company's duty of good faith and fair dealing.

United Policyholders believes that the evidence in this case as stated by the opinion of the U.S. Court of Appeals for the Fifth Circuit certifying this case[1] shows that this duty has not been honored by National Union, and that National Union has sought to conceal, rather than disclose, coverage for insurance claims. Indeed, National Union's brief to this Court explicitly takes the position the insurance company has no duty to notify its policyholder or additional insured of potential coverage—even where the insurance company is admittedly aware of the coverage and aware of the pending lawsuit.[2] National Union has stated its beliefs that its duties are limited to the language in its standard comprehensive general liability

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1 United Policyholders relies on the Opinion from the Fifth Circuit ("Fifth Circuit Opinion") in discussing the factual background of this case. United Policyholders has not undertaken an independent review of the Appellate Record in this case.

2 See Appellant's Br. at 5.

policy—despite the fact that the duty of good faith and fair dealing is implied in every contract, and especially insurance policies.[3]

1. INSURANCE COMPANIES OWE A DUTY OF GOOD FAITH AND FAIR DEALING TO BOTH NAMED INSUREDS AND ADDITIONAL INSUREDS

"It is well established under Texas law that 'accompanying every contract is a common law duty to perform with care, skill, reasonable expedience and faithfulness the thing agreed to be done, and a negligent failure to observe any of these conditions is a tort as well as a breach of contract.'"[4] This duty of care and faithfulness arising under the common law of contracts "applies equally to insurance contracts."[5] In addition to the contractual duty of good faith and fair dealing, a tort duty of good faith and fair dealing has been established for the processing and payment of claims, which "arises out of the special trust relationship between the insured and

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3 See Restatement (Second) of Contracts § 205, Duty Of Good Faith And Fair Dealing ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."); see also id. at cmt. d ("Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further: bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty.").

4 Aranda v. Insurance Co. of North America, 748 S.W.2d 210, 212 (Tex. 1988) (quoting Montgomery Ward & Co. v. Scharrenbeck, 204 S.W.2d 508, 510 (Tex. 1947)).

5 Id. at 212 (citing Burroughs v. Bunch, 210 S.W.2d 211, 214-15 (Tex. App.-El Paso 1948) (writ ref'd); American Standard Life Ins. Co. v. Redford, 337 S.W.2d 230, 231, 146 Tex. 153 (Tex. App.-Austin 1960) (writ ref'd n.r.e.)).

the insurer."[6] The duty of good faith and fair dealing even extends through coverage litigation.[7]

With its source in both contract and tort, the duty of good faith and fair dealing extends to additional insureds—despite the fact that they may not be in privity of contract with the insurance company.[8] In Hopkins, the Court of Appeals emphatically rejected the argument that no duty of good faith and fair dealing flows to an employee where an employer purchases an insurance policy under which the employee is an additional insured.[9] As that court observed, in Aranda, the Supreme Court of Texas extended the duty of good faith and fair dealing to an injured worker in the workers' compensation insurance context, "even though the employee was

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6 Id. (citing Arnold v. National County Mutual Fire Ins. Co., 725 S.W.2d 165, 167 (Tex. 1987); English v. Fischer, 660 S.W.2d 521, 524 (Tex. 1983) (Spears, J., concurring)).

7 See Sanchez v. New York Underwriters Ins. Co., 788 S.W.2d 916 (Tex. App.-Fort Worth 1990), rev'd on other grounds, 799 S.W.2d 677 (Tex. 1990). Sanchez brought a lawsuit against New York Underwriters Insurance Company ("NYUIC") to contest the amount of his workmen compensation claim award. As a result of the lawsuit, NYUIC suspended all workmen compensation payments, and Sanchez filed a second lawsuit, alleging that NYUIC had breached its continuing duty of good faith and fair dealing by suspending all payments. The appellate court reversed the lower court's grant of summary judgment for NYUIC, on the ground that the complaint failed to state a claim, and held that there is a duty of good faith and fair dealing toward a claimant which extends through the post-litigation proceedings. Id. at 916.

8 See Hopkins v. Highlands Ins. Co., 838 S.W.2d 819 (Tex. App.-El Paso 1992).

9 Id. at 826.

not the purchaser of the insurance or the named insured."[10] Likewise, in St. Paul Guardian Insurance Co. v. Luker, the Court of Appeals held that the child of a policyholder under homeowner's policy is owed a duty of good faith and fair dealing despite not being named in the insurance policy where the insurance policy is purchased for benefit of both.[11]

In this case, National Union owed a duty of good faith and fair dealing to its additional insured, Richard Morris. Disclosing coverage to a policyholder or additional insured who is not aware of coverage (or even a potentially responsive policy!) is part of performing "with care, skill, reasonable expedience and faithfulness the thing agreed to be done."[12]

2. INSURANCE COMPANIES HAVE A GOOD FAITH DUTY TO DISCLOSE COVERAGE.

In the instant case, as is noted in the Fifth Circuit's Opinion certifying questions to this Court, none of National Union's alleged attempts to contact Morris "included attempted notification to Morris that he was an additional insured or that National Union would provide Morris with a defense." Fifth Cir. Op. at 5. Instead, National Union's representatives identified themselves as counsel for Morris's former employer, which had

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10 Id. (citing Aranda, 748 S.W.2d 210).

11 801 S.W.2d 614, 616-19 (Tex. App.-Texarkana 1990) (no writ).

12 Aranda, 748 S.W.2d at 212.

fired him shortly after the incident that led to the lawsuit against him. Thus, National Union's contentions that Morris was "uncooperative" are meaningless; hanging up on a lawyer for the employer who just fired you is hardly a lack of cooperation between a policyholder and his insurance company. Perhaps Morris would have been more cooperative if he had been informed that he was potentially covered, or at the very least if he had been forwarded a copy of the policy containing the duty to cooperate. Conduct of that sort would begin to fulfill the insurance company's good faith responsibilities.

As is stated in Appleman on Insurance Law & Practice concerning the duty to cooperate:

> An insurer has the duty to exercise reasonable diligence to secure the assistance of its insured, including a request for assistance and reasonable efforts in attempting to locate him or her; ***when the insured is an additional insured and not a named insured, the insurer must show that the additional insured knew of the insurance coverage or that some reasonable effort was made to apprise him or her of the existence of the policy and its conditions.***[13]

National Union made no such reasonable efforts. Indeed, National Union made no efforts at all. Such sharp practice is not consistent with the duty

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13 Robert C. Clifford, Appleman on Insurance Law & Practice (2d ed.) § 138.9 (emphasis added).

of good faith and fair dealing owed by insurance companies to policyholders and additional insureds.[14]

Weaver v. Hartford Accident & Indemnity Co. should not be interpreted as holding that an insurance company does not owe a duty to disclose coverage to an additional insured.[15] In that decision, the Court was concerned with whether the insurance company should have "entered an appearance for Busch," the additional insured who had not complied with the policy's notice provisions.[16] The Weaver court held that Hartford "had no duty to voluntarily undertake a defense of Busch."[17] Although the issue was raised by the dissenters, the Court never addressed the question of whether an insurance company with knowledge of a suit against an additional insured should contact its additional insured to notify him or her of the existence of a potentially-responsive policy, or the potential existence of a duty to defend the suit.[18]

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14 Aranda, 748 S.W.2d at 212.

15 See 570 S.W.2d 367 (Tex. 1978).

16 Id. at 370.

17 Id.

18 National Union's argument to this Court that it "could not retain counsel to file an answer and represent Morris without his express consent"—completely misses the point. See National Union Br. at 13. The issue is not whether National Union should have entered an appearance and defended Morris without his consent; the issue is whether National Union should have asked Morris for his consent or

Thus, while an insurance company may not be required to enter an appearance and defend a policyholder or additional insured without being asked to do so, Texas law does not state that the insurance company's duty of good faith and fair dealing does not extend to providing the policyholder or additional insured with the basic information needed to make such a request. To the contrary, one of the few Texas cases that does address this issue provides that the duty of good faith and fair dealing does require such honest communication. In Allstate Insurance Company v. Darter, the Court of Appeals ruled that an additional insured "could not be expected nor required to give notice before he knew of the existence of the policy or of the fact that he was covered thereby."[19]

Moreover, as noted by the Fifth Circuit's Opinion certifying questions to this Court, subsequent to Weaver the State Board of Insurance began to mandate endorsements on all general liability insurance policies—including the policy at issue—requiring that before an insurance company can avoid liability based on lack of notice, it must prove

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at least provided him with the information needed to make an informed request for a defense when National Union (a) knew Morris had been sued; (b) knew Morris was its additional insured and entitled to a defense; and (c) knew Morris had recently been fired by the named insured and likely did not have access to the policy at issue.

19 361 S.W.2d 254 (Tex. Civ. App.-Fort Worth 1962) (no writ) (quoting Appleman, Insurance Law & Practice (1st ed.), Vol. 8, p. 54, § 4738).

prejudice.[20] Here, because National Union had ***actual notice*** of the lawsuit, there can be no prejudice to National Union from a lack of notice from Morris.[21]

Directly on point is the case of Allstate Insurance Company v. Pare, in which the named insured notified the insurance company of a lawsuit brought against its additional insured and the plaintiff's attorney forwarded the pleadings to the insurance company.[22] Although the additional insured himself did not notify the insurance company and a default judgment was entered, the Court of Appeals held that the insurance company's actual knowledge of the suit supported a jury's finding of no prejudice from the late notice.[23] The Court of Appeals reached the same result in Ohio Casualty Group v. Risinger, holding that evidence that an insurance company had actual notice of a suit supports a finding of no prejudice where the insurance company relies on its insured's failure to

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20 See Fifth Circuit Opinion at 13-14.

21 Cf. Liberty Mutual Ins. Co. v. Cruz, 883 S.W.2d 164, 165 (Tex. 1993) (explaining that prejudice existed from late notice "absent actual knowledge of the suit"); Harwell v. State Farm Mut. Ins. Co.,896 S.W.2d 170, 174 at n.3; 38 Tex. Sup. Ct. J. 458 (Tex. 1995) (noting, in case where insurance company received notice of claim but no actual notice of a served suit against its additional insured, that "this is not a case in which the insurer received actual knowledge of a ***suit*** against the insured from a third party").

22 688 S.W.2d 680, 682-84 (Tex. App.-Beaumont 1985) (writ ref'd n.r.e).

23 Id. at 682.

comply with a notice of suit clause.[24] Similarly, in Struna v. Concord Insurance Services, Inc., based on "uncontroverted evidence of [the insurance company's] actual notice," the Court of Appeals overturned the trial court's grant of summary judgment to an insurance company based on a default judgment against the policyholder following failure to give notice.[25]

Because the duty to disclose coverage is based upon the duty of good faith and fair dealing, insurance companies that fail to disclose coverage to an additional insured should lose the right to assert any coverage defenses that earlier disclosure could have avoided, such as late notice, and subject them to liability for bad faith conduct. This Court should make clear to Texas insurance companies that they owe a duty of good faith and fair dealing to their policyholders and additional insureds, and that silence is not an appropriate response to actual notice of a suit against them. Prejudice from late notice can never result where the insurance company has actual notice. If the insurance company is unsure whether a defense is desired, it can gain that knowledge by simply asking or informing its insured of that possibility. There is no need for a requirement that the insurance company enter an appearance without being asked.

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24 960 S.W.2d 708, 711-12 (Tex. App.-Tyler 1997) (writ denied).

25 11 S.W.3d 355, 357-60 (Tex. App.-Houston 2000) (no pet.).

3. THE TEXAS DECEPTIVE TRADE PRACTICES ACT CONFIRMS INSURANCE COMPANIES' DUTY TO DISCLOSE COVERAGE.

The Texas Deceptive Trade Practices Act makes illegal what National Union attempts to justify in this case. Insurance companies violate their duty of good faith and fair dealing by misrepresentations of omission in failing to disclose coverage.

Section 541.060(a) of the Texas Insurance Code provides, in part, that "it is an unfair method of competition or an unfair or deceptive act or practice in the business of insurance" to "fail[] to attempt in good faith to effectuate a prompt, fair, and equitable settlement of . . . a claim with respect to which the insurer's liability has become reasonably clear."

Section 541.061(2) of the Insurance Code, concerning misrepresentations of insurance policies, provides in part that "It is an unfair method of competition or an unfair or deceptive act or practice in the business of insurance to misrepresent an insurance policy by . . . ***failing to state a material fact necessary to make other statements made not misleading***, considering the circumstances under which the statements were made.

Likewise, Section 542.003 of the Insurance Code makes it a prohibited unfair claim settlement practice for an insurance company to

"knowingly misrepresent[] to a claimant pertinent facts or policy provisions relating to coverage at issue."

Here, the insurance company violated the Texas Deceptive Trade Practices Act by failing to disclose even the possibility of coverage to a known additional insured who had been served with a known suit. As recognized by the Court of Appeals, an insurance company's failure "to disclose [coverage is] a 'false, misleading, or deceptive act or practice'" under the Texas Deceptive Trade Practices Act.[26]

Having made material omissions in its few contacts with its additional insured, National Union violated the Act and breached its duty of good faith and fair dealing to its additional insured. It violated its duty to disclose coverage. In these circumstances, National Union should not be allowed to avoid the consequences of its complete failure to give even minimal consideration to the interests of its additional insured.

B. THE DUTY TO DISCLOSE COVERAGE IS RECOGNIZED BY THE INSURANCE INDUSTRY, COMMENTATORS, AND THE COURTS OF SEVERAL STATES.

"When the insured is an additional insured and not a named insured, the insurer must show that the additional insured knew of the

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26 Aetna Cas. & Sur. Co. v. Martin, 689 S.W.2d 263, 269 (Tex. App.-Houston 1985) (writ ref'd n.r.e) (affirming recovery for Deceptive Trade Practices Act claim but also affirming judgment for insurance company for breach of contract claim).

insurance coverage or that some reasonable effort was made to apprise him or her of the existence of the policy and its conditions."[27]

The duty to disclose coverage is premised on an insurance company's good faith responsibility to look for coverage, not for ways to deny or avoid coverage:

> A trier of fact may find that an insurer acted unreasonably if the insurer ignores evidence available to it which supports the claim. The insurer may not just focus on those facts which justify denial of a claim.[28]

A leading insurance expert has written that the duty to disclose coverage is ***one of several*** elements of an insurance company's duty of good faith and fair dealing:

> Following notification of an occurrence, I believe an insurer is obligated to disclose all applicable benefits, or to clearly inform insureds about the existence of rights and duties regarding all coverages, or to explain why the insurance benefits will not be paid in order to (a) fulfill the insurer's contractual commitment, (b) comply with the obligation—implied as a matter of law in all contracts—to deal fairly and in good faith, (c) protect the insured's reasonable expectations, and (d) ***avoid omissions that could constitute fraudulent misrepresentation.***[29]

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27 Robert C. Clifford, Appleman on Insurance Law & Practice (2d ed.) § 138.9.

28 Mariscal v. Old Republic Life Ins. Co., 42 Cal. App. 4th 1617, 1623, 50 Cal. Rptr. 2d 224 (Cal. App. 2. Dist.) (1996).

29 Alan I. Widiss, Obligating Insurers to Inform Insureds About the Existence of Rights and Duties Regarding Coverage for Losses, 1 Conn. Ins. L.J. 67, 70 (1995) ("Widiss").

This last foundation—the doctrine of fraudulent misrepresentation—illustrates one way in which the courts have viewed the duty to disclose as an ***affirmative duty***. If an insurance company fails to disclose information which might have assisted the policyholder or additional insured in securing coverage, the insurance company's omission may constitute an actionable misrepresentation.[30]

A misrepresentation may be a falsehood or a "lie of omission."[31] "A representation need not be an affirmative misstatement; it can arise as easily from a failure to disclose facts."[32] If an insurance company fails to disclose information which might have assisted the policyholder or

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30 Id. at 85, citing Weber v. State Farm Mut. Auto. Ins., 873 F. Supp. 201, 209 (S.D. Iowa 1994) (court grants policyholders summary judgment motion "to the extent that in connection with the fraudulent nondisclosure claim the defendant was under a duty to exercise reasonable care to disclose the uninsured motorist coverage provisions of the policy").

31 See Restatement (Second) of Torts § 551, Liability for Nondisclosure:

> One who fails to disclose to another a fact that he knows may justifiably induce the other to . . . refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.

32 See Widiss at 83-85, citing Sinnard v. Roach, 414 N.W.2d 100, 105 (Iowa 1987); Cornell v. Wunschel, 408 N.W.2d 369, 374 (Iowa 1987); Weber v. State Farm Mut. Auto. Ins., 873 F. Supp. 201, 209 (S.D. Iowa 1994) ("This court concludes that under the circumstances of this case, the (insurer) was under a duty to exercise reasonable care to disclose the uninsured motorist coverage. While retention of an attorney by the plaintiff may arguably diminish the duty to disclose coverage, the duty was not extinguished.").

additional insured in securing coverage, the insurance company's omission may constitute a misrepresentation.[33] In Weber v. State Farm Mut. Automobile Insurance, the insurance company made indemnity payments to the claimant based on the claimant's automobile insurance policy but failed to disclose that there was also coverage available under the uninsured motorist coverage. The court granted the claimant's summary judgment motion "to the extent that in connection with the fraudulent nondisclosure claim the defendant was under a duty to exercise reasonable care to disclose the uninsured motorist coverage provisions of the policy."[34]

Even if not characterized as misrepresentation, an insurance company may breach its duty to disclose where it learns of a claim,

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33 Widiss at 85, citing Weber v. State Farm Mut. Auto. Ins., 873 F. Supp. 201, 209 (S.D. Iowa 1994). Notably, even agents of the insurance industry acknowledge the need to disclose information to the policyholder:

> Q. It is also correct that an insurance company should fully disclose all important facts related to an insurance policy [to] the policyholder?
>
> A. They should.
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> Q. An insurance company should always tell the truth to the policyholder?
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> A. They should.

So testified the insurance company's district manager in Foremost Ins. Co. v. Parham, 693 So.2d 409 (Ala. 1997).

34 Id.

determines that the policyholder or additional insured may be entitled to coverage, but nevertheless fails to inform the policyholder or additional insured of this potential for coverage. Such behavior may be characterized as a breach of contract because "[i]nvestigation, fair evaluation, and prompt rejection or settlement constitute 'performances' that are 'the essence of what the insured has bargained and paid for. . . .'"[35]

In the landmark decision of Dercoli v. Pennsylvania Nat. Mut. Ins. Co., the Supreme Court of Pennsylvania held that "the duty of an insurance company to deal with the insured fairly and in good faith includes the duty of full and complete disclosure as to all of the benefits and every coverage that is provided by the applicable policy or policies along with all requirements, including any time limitations for making a claim."[36]

In Gatlin v. Tennessee Farmers Mut. Ins. Co.,[37] Tennessee Farmers Mutual Insurance Company ("Farmers Mutual") sold insurance

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35 Widiss at 72, quoting Beck v. Farmers Ins. Exch., 701 P.2d 795, 801 (Utah 1985).

36 Dercoli v. Pennsylvania Nat'l Mut. Ins. Co., 520 Pa. 471, 477, 554 A.2d 906 (1989) (citing Gatlin v. Tennessee Farmers Mut. Ins. Co., 741 S.W.2d 324 (Tenn. 1987) ("Gatlin"); Sarchett v. Blue Shield of Cal., 43 Cal. 3d 1, 233 Cal. Rptr. 76, 729 P.2d 267 (1987). See also Darlow v. Farmers Ins. Exch., 822 P.2d 820, 827 (Wyo. 1991); Rawlings v. Apodaca, 726 P.2d 565, 571 151 Ariz. 149, 55 USLW 2086 (Ariz. 1986); MFA Mut. Ins. Co. v. Flint, 574 S.W.2d 718, 721 (Tenn. 1978)).

37 Gatlin v. Tennessee Farmers Mut. Ins. Co., 741 S.W.2d 324 (Tenn. 1987).

policies that provided coverage for both automobiles involved in a two-car collision. Ms. Gatlin, one of the drivers, was injured in the accident. She filed suit against the other driver, Mr. Williams. When she discovered that her settlement demand was in excess of the limits of the policy held by Williams, she turned to Farmers Mutual for coverage under her own uninsured motorist insurance. Farmers Mutual refused to pay for the reason, among others, that Gatlin's notice of claim was untimely. Reversing an appellate state court decision, the Tennessee Supreme Court held that the late-notice defense was without merit. The court noted that Farmers Mutual "was an active participant in all phases of this case," and that the insurance company "had liability insurance coverage on both automobiles."[38] ***The duty of good faith and fair dealing required Farmers Mutual to disclose information regarding what Gatlin had to do to secure coverage***:

> [A]n insurer has the duty to deal with its insured "fairly and in good faith." This includes informing an insured as to coverage and policy requirements when (1) it is apparent to the insurer that there is a strong likelihood that its insured only can be compensated fully under her own policy and (2) that the insured has no basis to believe that she must rely upon her policy for coverage."[39]

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38 Id. at 326.

39 Id.

In Bowler v. Fidelity & Cas. Co.[40], the New Jersey Supreme Court held that an insurance company was estopped from asserting a statute of limitations defense because the company had breached its duty to inform the policyholder of the steps it needed to take to secure coverage. The court characterized an insurance company's duty to disclose as a "contractual undertaking":

> In situations where a layman might give the controlling language of the policy a more restrictive interpretation than the insurer knows the courts have given it and as a result the uninformed insured might be inclined to be quiescent about the disregard or nonpayment of his claim and not to press it in timely fashion, the company cannot ignore its obligation. ***It cannot hide behind the insurer's ignorance of the law; it cannot conceal its liability. In these circumstances it has the duty to speak and disclose, and to act in accordance with its contractual undertaking. The slightest evidence of deception or overreaching will bar reliance upon time limitations for prosecution of the claim.***[41]

In Bowler, the policyholder endured fractures to his leg, and eventually developed osteomyelitis, a serious bone infection. As a result of this condition, the policyholder was disabled. The insurance company was obligated to pay the policyholder weekly indemnity payments for up to 199 weeks of disability. Assuming that the policyholder was deemed

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40 Bowler v. Fidelity & Cas. Co., 250 A.2d 580, 587, 53 N.J. 313, 43 A.L.R. 413(N.J. 1969).

41 Id. at 588 (emphasis added).

permanently disabled by the 200th week, the insurance company was then obligated to make a final weekly payment and a lump sum payment equal to 600 weekly payments. Shortly before the 200th week, the policyholder was examined by his own doctor and a doctor assigned by the insurance company. The doctors' reports both found that the policyholder was disabled within the meaning of the policy. The insurance company sent the policyholder a number of forms to complete. The policyholder returned the forms, but never heard from the insurance company again. More than six years later, the policyholder filed suit against the insurance company seeking payment. In litigation, the insurance company took the position that coverage was barred on the basis of the statute of limitations. The New Jersey Supreme Court found the insurance company's behavior to be "shocking and unconscionable."[42] The court noted:

> ***Instead of fulfilling its contractual obligations, the company lapsed into silence***.... Bowler, a layman obviously not versed in insurance law took no legal action until in some manner, not explained in the present record, he got into the hands of an attorney, and this suit was brought--more than six years after the end of the 200 week total disability period. When this was done, the insurer pleaded the six-year statute of limitations, N.J.S. 2A:14-1 as a bar. We regard such treatment of its policyholder as shocking and unconscionable.[43]

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42 Id. at 587.

43 Id. at 587 (emphasis added).

The court added that when there is doubt regarding coverage, the insurance company is obligated to inform its policyholder of the precise steps it must take to secure coverage:

> [I]f the insurer has factual information in its possession substantially supporting the policyholder's rights to benefits, but it has a reasonable doubt as to whether the evidence is sufficient to require payment, ***the obligation to exercise good faith, upon which it knows or should know the insured is relying, cannot be satisfied by silence or inaction.*** It must notify the insured of its decision not to pay his claim. But mere naked rejection would not be sufficient. The giving of such notice should be accompanied by a full and fair statement of the reasons for its decision not to pay the benefits, and by a clear statement that if the insured wished to enforce his claim it will be necessary for him to obtain the services of an attorney and institute a court action within the appropriate time. The "appropriate time" means the time remaining under the policy or the applicable statute of limitations within which the suit must be brought. Failure on the insurer's part to follow such a course will bar reliance on the statute of limitations or a time restriction on court action expressed in the policy.[44]

The California courts share this view. In Ramirez v. USAA Casualty Insurance Co.,[45] the court observed that it is "basic that an insurer

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44 Id. at 588 (emphasis added). The referenced quotation from "page 26" is to James J. Markham et al., The Claims Environment (1993).

45 234 Cal. App. 3d 391, 399, 285 Cal. Rptr. 757 (1991) (citing the California Supreme Court decision, Davis v. Blue Cross of N. Cal., 25 Cal.3d 418, 600 P.2d 1060, 158 Cal. Rptr. 828 (1979), which upheld findings of a breach of the good

has a duty to disclose policy terms to its insureds," and held that the insurance company had to disclose the existence and amount of underinsured coverage to its policyholder. The insurance company owed an obligation "to give the insured's interest 'as much consideration as it does its own'" and "bring to the insured's attention relevant information so as to enable the insured to take action to secure rights afforded by the policy," ***particularly*** "in situations in which an insured's lack of knowledge may potentially result in a loss of benefits or a forfeiture of rights."[46] This is precisely the type of situation that faced National Union concerning its additional insured, Morris.

The Supreme Court of New Mexico, in Allsup's Convenience Stores, Inc. v. North River Insurance Co.,[47] refused to overturn a jury verdict finding that the insurance company breached the duty of good faith and fair dealing by failing to take the affirmative step of disclosing inadequate claims handling to its policyholder. The court observed that although there was no case law specifically imposing such a specific duty, the more general "concept of the implied covenant of good faith and fair

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faith duty and a waiver of arbitration rights where the insurance company failed to inform the insureds of arbitration provisions).

[46] Id. (quoting Davis, 25 Cal.3d at 428).

[47] 976 P.2d 1, 14-15, 127 N.M. 1 (N.M. 1998).

dealing requires that neither party do anything that will injure the rights of the other to receive the benefit of their agreement."[48] As the court explained it:

> We see no reason in law or logic why this duty should always be a negative one; if good faith and fair dealing require it, there can be an affirmative duty to act in order to prevent the denial of the other party's rights under the agreement. Such an aspect of the covenant of good faith and fair dealing is commonly found in insurance cases.[49]

In this case, just as Allsup's right to receive a benefit of the agreement—"a premium amount tied fairly to competent claims handling"—was injured by his insurance company's failure to disclose incompetent claims handling, Morris's right to receive a benefit of the insurance policy—a defense—was injured by National Union's failure to inform him of the policy's existence and his rights under it. National Union effectively denied Morris benefits that it knew to be due him through its failure to speak.

Obviously, silence and inaction intended to avoid a known liability to a known additional insured are hardly ways to "seek and find coverage." Even the head of environmental claims for Reliance (United

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48 Id. (quoting Bourgeous v. Horizon Healthcare Corp., 872 P.2d 852, 856, 117 N.M. 434 (N.M. 1994)).

49 Id. (citing Weber v. State Farm Mut. Auto. Ins. Co., 873 F. Supp. 201, 208 (S.D. Iowa 1994); Sears Mortgage Corp. v. Rose, 634 A.2d 74, 86, 134 N.J. 326 (N.J. 1993); Mark Patterson v. Bowie, 654 N.Y.S.2d 769, 771, 237 A.D. 2d 184 (App. Div. 1997); Miller v. Keystone Ins. Co., 586 A.2d 936, 941, 402 Pa. Super. 213 (Pa. Super. 1991), rev'd on other grounds, 636 A.2d 1109, 535 Pa. 531 (1994)).

Pacific) agreed that this was the chief duty of insurance claims representatives. On April 29, 1997, Paul Reetz testified as follows:

> Q Thank you.
>
> Could you turn to Statement 26, please, and read that into the record for us.
>
> A It says on Page 26, "The primary duty of the claim representative is to deliver the promise to pay. ***Therefore, the claim representative's chief task is to seek and find coverage, not to seek and find coverage controversies or to deny and dispute claims.***"
>
> Q Would you agree or disagree with that statement?
>
> A ***I agree with that wholeheartedly.***[50]

The leading text used to train insurance claims handlers also points toward a good faith duty to disclose coverage to policyholders and additional insureds. As noted by James J. Markham in The Claims Environment, "Claim representatives . . . are the people responsible for fulfilling the insurance company's promise . . .,"[51] and "[t]he essential function of a claim department is to fulfill the insurance company's promise,

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50 Deposition of Paul Reetz, Cascade Corp. v. American Home Assur. Co., No. 9205-03083 (Cir. Ct. Or., Apr. 29, 1997), at p. 61, lines 15-25 (reproduced as p. 36 of 46) (emphasis added) (pertinent portions attached as Exhibit A).

51 James J. Markham et al., The Claims Environment ("Markham") at vii (1993). The quoted textbook is a comprehensive text used to train insurance company personnel in claims handling practices and is part of the required materials for students preparing to obtain the professional designation of Chartered Property and Casualty Underwriter ("CPCU"), the highest professional status in the business of insurance.

as set forth in the insurance policy."[52] Further, the insurance company's obligation is triggered not by notice, but by the loss itself": "When a covered loss occurs, the insurance company's obligation under its promise to pay is triggered. The claim function should ensure the prompt, fair, and efficient delivery of this promise."[53] Moreover, "claim representatives must investigate the facts of each claim because policyholders do not know exactly what is covered, under exactly what circumstances it is covered, or exactly what amount should be paid,"[54] and they "generally do not understand all of the circumstances that are or are not covered in the policy."[55]

C. THE BUSINESS OF INSURANCE IS FOR INSURANCE COMPANIES AND NOT POLICYHOLDERS NOR ADDITIONAL INSUREDS.

The insurance company in this case is a specialist with superior expertise in their complex, multi-faceted fiduciary relationship. It should have an affirmative obligation to disclose coverage to an additional insured, regardless of his or her sophistication. At the very least, this rule should

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52 Markham at 5.

53 Markham at 6.

54 Markham at 13.

55 Markham at 59.

apply where the insurance company has actual knowledge of a suit against a person it knows to be or has reason to believe is its additional insured.

1. THE PURPOSE OF INSURANCE IS TO INSURE.

The first and fundamental rule is that the purpose of insurance is to insure. Insurance is a means of risk transference whereby a policyholder or additional insured transfers the risk of loss or the responsibility for certain costs and expenses to an insurance company in exchange for payment of a premium.[56] American industry today faces many business-threatening disasters. In dealing with such catastrophes—natural and man made—businesses turn to insurance companies to save the day and save their businesses. Liability insurance is purchased by virtually every business organization in the United States as protection. It covers a broad range of claims resulting from real or imagined bodily injury or property damage.

Insurance is an agreement whereby parties give valuable consideration for protection from and indemnification against loss, damage, injury, or liability. The rights and duties of the parties to the insurance contract are set forth in the insurance policy. Unlike a regular contract however, to a policyholder, an insurance policy is not a widget and it is not

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56 Alan I. Widiss, Insurance Law, at 11 (1988).

simply a contract to pay money. It is a product. It is peace of mind and an expectation that the policyholder or additional insured is protected. It is an obligation backed by a fiduciary duty and ***a duty of good faith by the insurance company*** which sold the policyholder the insurance coverage. It is the very nature of the insurance contract that payment is to be made automatically without the need for a lawsuit.

For the policyholder to derive the benefit of the insurance bargain, the insurance company must protect the policyholder's interests above its own. As servants of the public, insurance companies openly admit to the courts that they are held to the "universally high standard of 'good faith.'"[57] Insurance companies recognize that good conscience and fair dealing require that the insurance company not pursue a course which is advantageous to itself while disadvantageous to its insured.[58] If the insurer is motivated by selfish purpose or by the desire to

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57 See Plaintiff's Memorandum of Law For Trial, at 1 (filed Sept. 11, 1990), Continental Cas. Co. v. Great Am. Ins. Co., No. 86-C-3938, 1990 U.S. Dist. Lexis 12807 (N.D. Ill. Sept. 28, 1990) (pertinent portions attached as Ex. "B").

58 See Appellant's Reply Brief at 2, Century Indem. Co. v. Truck Ins. Exch. of the Farmers Ins. Group, 887 P.2d 455 (Wash. Ct. App. 1995) (No. 13141-6-III) (pertinent portions attached as Ex. "C") (asserting an obligation on the part of an insurance company "to act in good faith, and to give its insured's interests at least the same consideration it gave its own interest"); see also id. at 3 (castigating Truck Insurance Exchange for "putting its interests ahead of all others" and "gambling" with its insured's money); id. at 22-23 (asserting that the primary insurance company "has the duty to act reasonably for the protection of

protect its own interests at the expense of its insured's interest, bad faith exists, "even though the insurer's actions were not actually dishonest or fraudulent."[59]

The policyholder purchases an insurance policy, pays premiums up front and expects insurance coverage when a claim is made. The policyholder and additional insured do not expect their insurance company to be motivated by a selfish desire to protect its own interests. It is clear in this case that National Union did not seek to protect its policyholder's or additional insured's interests above its own. National Union chose, instead, to keep the additional insured at risk and in ignorance for its own purposes. Now, National Union seeks relief from its conscious decision to ignore its obligations to its additional insured and allow the judgment against him to be entered. That relief should not be granted.

2. THE INSURANCE COMPANY IS IN THE BEST POSITION TO ANALYZE AND ABSORB RISK, AND SHOULD PROMPTLY ACT WHEN IT KNOWS AN INSURED HAS BEEN SUED.

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its insured and not to put its own interests ahead of all others" pursuant to the duty of good faith and fair dealing—even when the insured is "oblivious").

59 See Ex. B, Plaintiff's Memorandum of Law For Trial, at 3, Continental Cas. Co. v. Great Am. Ins. Co., No. 86-C-3938, 1990 U.S. Dist. Lexis 12807 (N.D. Ill. Sept. 28, 1990) (quoting the Michigan Supreme Court in Commercial Union Ins. Co. v. Liberty Mut. Ins. Co., 393 N.W.2d 161, 164, 426 Mich. 127 (Mich. 1986)).

Most policyholders and additional insureds are rarely faced with insurance coverage issues. Many, as in this case, are entirely ignorant of issues as basic as an employee's potential coverage under the employer's insurance policy or the existence of a duty to defend. Even so-called "sophisticated" policyholders such as large corporations are only exposed to a major disaster about once every thirty years. An insurance company, on the other hand, is in the business of analyzing and absorbing risk. They are faced with claims for disasters every day. Insurance companies are able to successfully and profitably manage risks of loss from such disasters while maintaining a superior bargaining position with greater institutional knowledge than any policyholder.

Many courts have recognized that "the bargaining power of an insurance carrier vis-à-vis the bargaining power of the policyholder is disparate in the extreme."[60] An insurance company is a financial colossus with unmatched resources and expertise in insurance coverage litigation.[61]

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60 Hayseeds, Inc. v. State Farm Fire & Cas., 352 S.E.2d 73, 77, 177 W. Va. 323 (W. Va. 1986); Miller v. Fluharty, 500 S.E. 2d 310, 318, n.10, 201 W. Va. 685 (W. Va. 1997) (noting that the disparity of bargaining power between an insurance company and its policyholder "is apparent in the fact that insurance companies spend over $1 billion annually in litigation battles against policyholders") (citing Eugene R. Anderson & Joshua Gold, Recoverability of Corporate Counsel Fees in Insurance Coverage Disputes, 20 Am. J. Tr. Adv. 1, 3 n.5 (1996)).

61 THE FACT BOOK 1998: Property/Casualty Insurance Facts 5 Insurance Information Institute (1998) (the insurance industry "[a]ltogether . . . has

In contrast, after a policyholder or additional insured suffers a loss it is in a vulnerable position. If it is ignorant of even the existence of potential coverage, it is even more vulnerable—and ironically, most in need of the promises to defend and indemnify in the insurance policy.

Even where all parties are aware of the applicable policy, coverage issues are generally not clear cut, or drawn clearly in black and white, and as such, coverage disputes require retention of coverage counsel and experts, and consume vast amounts of time and money. With superior resources, claims experience and litigation expertise, the balance of power is overwhelmingly tilted toward the insurance company. The Court should encourage insurance companies to make reasonable coverage decisions—such as identifying potentially applicable coverage—promptly and without prompting rather then foster a situation where the policyholder or additional insured must reassume from its own insurance company the very risk it thought it had transferred at a time when it is most vulnerable.

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responsibility for assets totaling $3.1 trillion at the end of 1996. The property/casualty segment of the business is responsible for assets totaling $802.3 billion at the close of 1996"). See also, "A World View Of Insurance Insolvency Regulation III", H. Subcomm., 103 Cong. (Comm. Print 1994) (describing insurance as "a $2.3 trillion financial industry....").

Unfortunately, exploiting policyholders' financial vulnerability can be a lucrative business. First, insurance companies earn investment income—a profit—during an insurance coverage dispute with a policyholder. This is done by continuing to invest the policyholder's premiums and the reserves for the duration of the dispute. Second, insurance companies are bulk purchasers of legal services; they incur proportionately lower litigation costs than their policyholders, and can reuse work product from case to case. In stark contrast to the typical policyholder's experience, litigation is the bread and butter of insurance companies. In large part, litigation is their business. Insurance companies now admit that they are waging a "war" against policyholders.[62] In this "war," insurance companies are "institutional litigants." Insurance companies boast that they have filed "tens of thousands of briefs across the country in a number of courts and in a vast variety of contexts" against their policyholders.[63] According to the former president of the Alliance of

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62 See Memorandum of Law of CNA in Support of Motion To Strike Amended Counterclaims, Cross-Claims and Third-Party Complaint of General Battery, at 1, Continental Cas. Co. v. General Battery Corp., No. 93C-11-008, 1994 WL 682320 (Del. Super. Nov. 16, 1994) (pertinent portions attached as Ex. "D"). The CNA Insurance Group is comprised of approximately forty-seven insurance companies. See Best's Insurance Reports: Property-Casualty United States (1997 ed.).

63 See Brief and Appendix of *Amicus Curiae* Insurance Environmental Litigation Association (IELA) in Support of Continental Insurance Company, Aetna

American Insurers, "[t]he liability system is fuel for the insurance engine."[64] Claims exceeding $10 million are seldom resolved without litigation.[65] In fact, the insurance industry admits that it spends over $1 billion a year battling their policyholders and additional insureds in court.[66]

These factors, combined with the insurance industry's tremendous collective resources and litigation experience, allow insurance companies to wage wars of attrition against individual policyholders and

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Casualty and Surety Company and Fireman's Fund Insurance Company of Newark, N.J., at 25, n.21, County of Columbia v. Continental Ins. Co., 595 N.Y.S.2d 988 (App. Div. 3d Dep't 1993) (No. 65588) (pertinent portions attached as Ex. "E").

64 Franklin Nutter, Search for Stability: Industry Must Solve Problems that Undermine a Stable Market, Bus. Inc., June 17, 1985, at 21).

65 See Richard A. Archer, Preparing For A 'Mega-Loss', Bus. Ins., Oct. 10, 1994, at 23. Mr. Archer is the retired deputy chairman of Jardine Insurance Brokers, Inc. See also L. Brenner, The Polluted Open Box, Corp. Fin., June/July 1995 at 34, 35 ("No matter what the policy language, if there's a significant seven-digit claim, it's not going to be covered [by the policyholder's insurance company]."); See also Eugene R. Anderson, et al., *Insurance Nullification By Litigation*, Risk Mgmt., Apr. 1994, at 46).

66 See Brief of *Amicus Curiae* American Ins. Assoc. at 3-4, Affiliated FM Ins. Co. v. Constitution Reinsurance Corp., 626 N.E.2d 878 (Mass. 1994) (No. SJC-06165) (pertinent portions attached as Ex. "F"); Leslie Schism, Tight-Fisted Insurers Fight Their Customers To Limit Bid Awards, Wall St. J., Oct. 15, 1996, at A1. Moreover, the $1 billion figure includes only what the insurance industry spends on property and casualty insurance litigation. When life and health insurance litigation expenditures are added, "the legal costs of coverage battles with policyholders may far exceed $1 billion[.]" Robert H. Gettlin, Fighting The Client, Best's Rev. P/C, Feb. 1997, at 49, 50).

additional insureds who may litigate an insurance dispute once in a lifetime.[67]

Texas courts recognize that the insurance company is in the business of analyzing and allocating risk.[68] The law in Texas should encourage insurance companies to actually perform their end of the bargain—bearing the risk of litigation with third-party claimants or the risk of funding default judgments with respect to claims against their policyholders and additional insureds that they know about but choose to ignore.

V. CONCLUSIONS

United Policyholders respectfully submits that the questions certified by the U.S. Court of Appeals for the Fifth Circuit should not be difficult for this Court to answer. Insurance companies owe a contractual duty and a tort duty of good faith and fair dealing in fulfilling their promises to policyholders and additional insureds. Remaining silent and keeping an

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67 See Eugene R. Anderson, et al., Insurance Nullification By Litigation, Risk Mgmt., Apr. 1994, at 46; Eugene R. Anderson, Is Something Wrong With Claims Handling? Plaintiff: Insurers Profit From Delay Litigation, Claims (Apr. 1995), at 33.

68 State Farm Fire & Cas. Co. v. Gandy, 925 S.W.2d 696, 714 (Tex. 1996); see also Shoshone First Bank v. Pacific Employers Ins. Co., 2 P.3d 510, 516 (Wyo. 2000) (stating "[t]he question as to whether there is a duty to defend an insured is a difficult one, but because that is the business of an insurance carrier, it is the insurance carrier's duty to make that decision."); Gonzalez v. Mission Am. Ins. Co., 795 S.W.2d 734, 737 (Tex. 1990) (observing that if a policy provision is vague or ambiguous, the fault lies with the insurance company as drafter of the policy).

additional insured in the dark concerning insurance that could provide the additional insured much-needed relief in litigation of which they have actual notice out of an overly-legalistic interpretation of a notice clause is not even close to good faith performance or fair dealing.

Accordingly, the first question should be answered in the affirmative: Where an additional insured does not and cannot be presumed to know of coverage under an insurer's liability policy, an insurer that has knowledge that a suit implicating policy coverage has been filed against its additional insured ***does*** have a duty to inform the additional insured of the available coverage.

As for the second question, the extent or proper measure of the insurer's duty to inform the additional insured of the available coverage should—at a minimum—include notification that a potentially responsive insurance policy exists and notification of a potential right to a defense and/or indemnification. Further, if there is potential coverage, a defense should be offered outright, together with a reservation of rights, if applicable. This duty to inform the additional insured of coverage should be considered primary to any duty on the part of the additional insured to cooperate with the insurance company. The reasoning for this is simple

and obvious: if the additional insured is unaware of any potential right to insurance, it cannot be aware of a concomitant duty to cooperate.

Finally, the third question should be answered in the affirmative. Proof of an insurance company's actual knowledge of service of process in a suit against its additional insured, when such knowledge is obtained in sufficient time to provide a defense for the insured, should establish as a matter of law the absence of prejudice to the insurer from the additional insured's failure to comply with the notice-of-suit provisions of the policy. Again, the reasons appear to be obvious: If an insurance company has actual knowledge of a suit, as well as "sufficient time to provide a defense for the insured," there appears to be little factual issue left concerning prejudice. A priori, if there is sufficient time to provide a defense, there can be no genuine issue of fact concerning inability to prepare a defense.

Insurance companies like National Union owe their policyholders and additional insureds a duty of good faith and fair dealing that requires more than calculated silence when the policyholder or additional insured is faced with a potentially devastating lawsuit. Having elevated its own interests above its fiduciary's, resulting in a default judgment, National Union should not be heard to complain that it must now

pay that judgment. National Union's conduct certainly should not be encouraged for use by it and other insurance companies in the future.

United Policyholders respectfully submits that when an insurance company receives actual notice or has not been prejudiced by a lack of notice, it should not be entitled to rely on a lack of formal notice or breach of a service-of-suit clause.

Respectfully submitted,

Dated: December 15, 2006

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RULE 11 CERTIFICATION

I hereby certify, in accordance with Texas Rule of Appellate Procedure 11(c), that this brief was prepared on behalf of Amicus Curiae United Policyholders on a *pro bono* basis.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the Brief of Amicus Curiae United Policyholders in support of Appellee Beatrice Crocker on Certified Questions from the United States Court of Appeals for the Fifth Circuit was served on counsel of record by United States certified mail, return receipt requested, on this 15th day of December, 2006, addressed as follows:

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INDEX OF EXHIBITS

Exhibit A: Deposition of Paul Reetz, *Cascade Corp. v. American Home Assur. Co.*, No. 9205-03083 (Cir. Ct. Or., Apr. 29, 1997), at p. 61

Exhibit B: Plaintiff's Memorandum of Law For Trial, at 1 (filed Sept. 11, 1990), *Continental Cas. Co. v. Great Am. Ins. Co.*, No. 86-C-3938, 1990 U.S. Dist. Lexis 12807 (N.D. Ill. Sept. 28, 1990)

Exhibit C: Appellant's Reply Brief at 2, *Century Indem. Co. v. Truck Ins. Exch. of the Farmers Ins. Group*, 887 P.2d 455 (Wash. Ct. App. 1995) (No. 13141-6-III)

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Exhibit F: Brief of *Amicus Curiae* American Ins. Assoc. at 3-4, *Affiliated FM Ins. Co. v. Constitution Reinsurance Corp.*, 626 N.E.2d 878 (Mass. 1994) (No. SJC-06165)

Deponent Name
REETZ, PAUL
CI: REETZ PAUL 970429

Depo Date
19970429

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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

CASCADE CORPORATION, an Oregon corporation,
Plaintiff,

v.

No. 9205-03083

AMERICAN HOME ASSURANCE COMPANY, a New York corporation, et al.,
Defendants.

TELEPHONIC DEPOSITION OF PAUL REETZ
Taken in behalf of the Plaintiff
April 29, 1997

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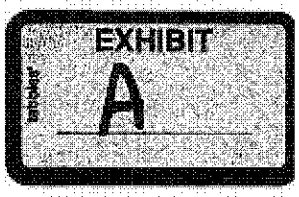
BE IT REMEMBERED THAT the telephonic deposition of PAUL REETZ was taken before Heather M. Ingram, Certified Shorthand Reporter, on April 29, 1997, commencing at the hour of 12:00 p.m., at the office of Newcomb, Sabin, Schwartz & Landsverk, in the City of Portland, County of Multnomah, State of Oregon.

-:-

APPEARANCES:

Newcomb, Sabin, Schwartz & Landsverk
By Richard S. Pope
Counsel for Plaintiff

Gordon & Polscer
By Thomas Gordon (appearing telephonically)
Marianne Ghim
Counsel for Defendant United Pacific



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~1 APPEARANCES, (Continued)
~2
~3 Zarosinski & Hill
~4 By Jeffrey V. Hill
~5 Counsel for Defendant Employers Reinsurance
~6 Corporation
~7
~8 Brownstein, Rask, Sweeney, Kerr, Grim & DeSylvia
~9 By Paul G. Dodds
~10 Counsel for Defendant Millers Mutual
~11
~12 Williams, Kastner & Gibbs
~13 By Paul Fogarty
~14 Counsel for AIG
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PAUL REETZ

was thereupon produced as a witness in behalf of the Plaintiff and, having been first duly sworn under oath by the CSR, was examined and testified as follows:

EXAMINATION BY-MR. POPE:

Q Mr. Reetz, we have not met. My name is Rick Pope. I'm an attorney for Cascade Corporation. Would you describe for us, sir, where you are at the moment and who's with you and whether you have any documents available to you.

A I'm in my office with Tom Gordon, and he has documents that are available to me.

Q What documents?

MR. GORDON: Do you want me to read them for you?

MR. POPE: Are they anything -- yes. Please do.

MR. GORDON: What's been marked previously as Exhb. 3020, Exhb. 3021, Exhb. 3023, a letter that I don't believe was marked previously dated July 9, 1993 with Bates stamp numbers on it 004744 and 4745; another letter that's dated December 18, 1989, Bates 004870, 71, 72 and 73; previously marked Exhb. 3027 and Exhb. 3026.

MR. POPE: The last exhibit I have marked for the United Pacific series is 3026. Does that square with what you have, Heather?

MS. GHIM: It was the policy. I just stuck it in.

MR. POPE: So 3029 would be the next exhibit number.

BY-MR. POPE: (Continuing)

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Q Okay. Mr. Reetz, since I'm not there and available to see you, I'm going to have to rely on your assurance to me that the testimony you give to me