F043931

COURT OF APPEAL
STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

GUSTAVO PEREZ,

Plaintiff, Respondent and Cross-Appellant,
vs.

FIRE INSURANCE EXCHANGE,

Defendant, Appellant and Cross-Respondent.

APPLICATION BY UNITED POLICYHOLDERS FOR PERMISSION TO FILE BRIEF AS AMICUS CURIAE; AND AMICUS CURIAE BRIEF OF POLICY HOLDERS IN SUPPORT OF PLAINTIFF AND RESPONDENT GUSTAVO PEREZ

Appeal from Tulare County Superior Court, No. 01-195746
Honorable Melinda M. Reed, Presiding

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APPLICATION FOR PERMISSION TO FILE BRIEF AS AMICUS CURIAE

Pursuant to Rule 13(c) of the California Rules of Court, United Policyholders ("UP") seeks leave to file a brief in this action as amicus curiae. UP 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). UP 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 insureds, UP actively monitors legal and marketplace developments affecting the interests of all policyholders. UP 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 UP, which allows it 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.

UP's *amicus* brief was cited in the U.S. Supreme Court's opinion in *Humana, Inc. v. Forsythe* (1999) 525 U.S. 299, and its arguments were adopted by the California Supreme Court in *Vandenberg v. Sup. Ct.* (1999) 21 Cal.4th 815 and discussed by the Court in its recent decision in *Julian v. Hartford Underwriters Ins. Co.* (2005) __ Cal.4th __, 2005 WL 1039627. UP has filed *amicus*

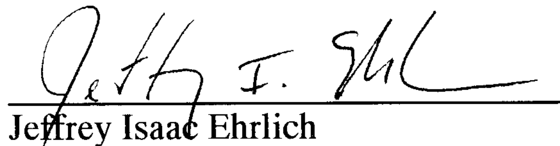
briefs on behalf of policyholders in over ninety cases throughout the United States.

UP believes that this case raises significant issues in the law of insurance bad-faith that go beyond the interests of the parties, and that the Court would benefit from having UP's perspective on behalf of insurance policyholders throughout the state.

UP therefore respectfully requests permission to file the attached brief in support of the plaintiff and respondent.

Dated: May 26, 2005. Respectfully submitted,

SHERNOFF BIDART & DARRAS, LLP

By 

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PRELIMINARY STATEMENT

If this appeal were a riddle, it would be this one:

Q: When can an insurer adopt an objectively reasonable construction of its policy and still be held liable for bad faith?

A: When the insurer's construction of the policy is not the *only* reasonable construction, and the carrier clings to its preferred construction to defeat coverage, even though the policy can also reasonably be read to provide coverage.

This is what happened here.

When an exclusion in an insurance policy is subject to two reasonable constructions it is ambiguous. If one of the reasonable constructions will support coverage, then the policy provides coverage. At that point, an insurer who clings to its preferred construction in order to defeat coverage is not behaving reasonably, and can be held liable for bad faith.

Here, the key question was whether the tractor involved in the underlying accident was "designed for" travel on public roads. Fire Insurance Exchange (FIE) argues that it was designed for such use, because it sports headlights, turn signals, and hazard lights. Perez responds that although the tractor was capable of being driven on a road, it was not "designed for" that purpose. Perez argues that the purpose for which the farm tractor was constructed and used was farming, as evidenced in part by its slow acceleration and high center of gravity. The parties' briefs debate which view of the policy term "designed for" is more apt.

This Court need not settle the question, because the outcome of this case does not turn on which construction of the term "designed

for" is more reasonable. All that matters is that there are at least two reasonable constructions, one of which results in coverage. FIE therefore cannot defend its coverage position by claiming that its construction of the policy was "objectively reasonable." Because its construction was not *the only* objectively reasonable construction, and Perez's construction (which was also objectively reasonable) resulted in coverage, FIE behaved *unreasonably* when it stubbornly clung to its preferred construction, and refused to defend Perez or indemnify him in the underlying action.

The trial court was therefore correct in directing a verdict against FIE on coverage, and the jury's verdict finding FIE liable for bad faith was supported by substantial evidence.

LEGAL ARGUMENT

A. FIE' approach to policy construction ignores several relevant rules

1. The three-step approach: *AIU*, *Bank of the West*, and *Waller*

FIE's approach to the interpretation of its policy relies almost exclusively on the rules discussed in *AIU Ins. Co. v. Superior Court (FMC Corp.)* (1990) 51 Cal.3rd 807 and *Bank of the West v. Superior Court (Industrial Indem. Co.)*(1992) 2 Cal. 4th 1254. In these cases the Court described a three-part inquiry that a court should undertake in order to ascertain the meaning of policy language.

First, the mutual intent of the parties at the time the contract was made governs the interpretation of the contract. (Civil Code § 1636.) This intent is to be inferred, if possible, solely from the written provisions of the contract. (Civil Code § 1639.) The clear and explicit meaning of these provisions, interpreted in their ordinary and

popular sense will govern, unless the parties used them in a technical sense or gave them a special meaning. "Thus, if the meaning a layperson would ascribe to contract language is not ambiguous, we apply that meaning." (*AIU*, 51 Cal.3d at 831.) The first part of the test, then, is to decide whether the terms used in the policy are clear and unambiguous, when construed according to their plain meaning.

Second, if the terms are ambiguous when the plain-meaning test is applied, then the court should try to resolve the ambiguity by interpreting the ambiguous terms in the way that the insurer believed that the policyholder understood them when the contract was made. (Civil Code § 1649.) (*AIU*, 51 Cal.3d at 831.)

Third, if the first two tests fail to resolve the ambiguity, the ambiguous language will be construed against the party who caused the uncertainty to exist. (Civil Code § 1654.) In insurance cases, this is generally the insurer. (*AIU*, 51 Cal.3d at 831.)

After articulating these three rules, the *AIU* Court also noted that coverage clauses are generally interpreted broadly, to protect the insured's objectively reasonable expectations. (*Ibid.*)

FIE emphasizes the statement in *Bank of the West* that, "although insurance contracts have special features, they are still contracts to which the ordinary rules of contractual interpretation apply." (FIE AOB at 18, citing *Bank of the West*, 2 Cal.4th at 1264.) FIE analyzes its policy as if it were an ordinary commercial contract, not an insurance contract. It argues that because the tractor in question had lights and other features that allowed it to be used on roads, the tractor was clearly "designed for" travel on public roads; therefore the policy excluded all coverage for an accident involving it.

Building on this argument, it claims that its construction was objectively reasonable, and therefore even if its construction was wrong, it cannot possibly have been unreasonable for it to assert it. Hence, there can be no liability for bad faith.

What FIE does not acknowledge is that the cases that form the underpinning of its entire argument, all decided in the early to mid-1990s -- *AIU, Bank of the West*, and *Waller v. Truck Ins. Exchange* (1995) 11 Cal.4th 1, do not represent the Supreme Court's last word on the rules of insurance-contract construction.

2. The Supreme Court focuses on the special rules that apply to exclusions in insurance contracts: *Robert S.; MacKinnon;* and *E.M.M.I.*

While *AIU*, *Bank of the West*, and *Waller* focused on the interpretation of the coverage clauses in commercial general liability ("CGL") policies, beginning in 2001, the Supreme Court decided a second trilogy of cases that focused on the rules that apply to *exclusions* in insurance contracts. These cases are *Safeco Ins. Co. v. Robert S.* (2001) 26 Cal.4th 758; *MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635; and *E.M.M.I. v. Zurich Ins. Exchange* (2004) 32 Cal.4th 465. These cases are directly applicable here, but FIE ignores them in its brief.

Safeco v. Robert S. construed an exclusion for "illegal acts" contained in a homeowner's policy. The insured's son accidentally shot and killed a friend, and was convicted in juvenile court of involuntary manslaughter, a felony. The homeowner's carrier contended that, in light of the exclusion in the policy for illegal acts, it

had no duty to defend or indemnify its insureds in litigation brought by the decedent's parents.

The trial court granted summary judgment for the insured, finding that the exclusion only applied to intentional illegal acts. The Court of Appeal reversed, finding that the plain meaning of the term "illegal" as demonstrated by its dictionary definition, meant "unlawful" or "not according to or authorized by law." The court concluded that, given this meaning, the exclusion applied to any act in violation of civil or criminal law, and hence did not cover an act resulting in a juvenile court adjudication of involuntary manslaughter. (26 Cal. 4th at 762.)

The Supreme Court reversed. The court first cited the three-step test, and concluded at step one that the term "illegal" was ambiguous. It could mean either any act prohibited by law or, more narrowly, a criminal act. (*Id.* at 763.) The court rejected the insurer's attempt to rely on the narrower construction, noting that if Safeco had wanted to include a criminal acts exclusion in its policy, it could have done so. Having opted for an illegal acts exclusion, Safeco could not have the court read into the policy what Safeco had omitted. (*Id.* at 764.) To do so, the Court noted, would violate the "fundamental principle" that in construing contracts, including insurance contracts, the court could not insert what had been omitted. (*Id.* at 764.)

Having concluded that the exclusion was ambiguous, the Court then applied the second test, and found that it did not resolve the term's meaning. If the term "illegal act" meant any unlawful act, it would extend to violations of the statutory duty to use due care imposed by Civil Code section 1714; in other words, it would

eliminate coverage for any act of simple negligence. This construction would render the policy's grant of coverage illusory, since it would allow the illegal acts exclusion to swallow the policy's grant of coverage for an "accident."

Looking at the insured's reasonable expectations, the Court framed the inquiry as, "Would reasonable insureds expect their homeowner's policy to protect them against liability for accidental injury or death occurring in their home. The answer is "yes." (26 Cal.4th at 766.) Because the Court concluded that the illegal-acts exclusion could not be given meaning under the established rules of construction of contracts, it was held invalid.

MacKinnon saw the Court returning to the construction of CGL policies. But this time the issue was the meaning of the policies' pollution exclusion, which excluded coverage for injuries caused by the "discharge, disposal, release or escape of pollutants." The insured in *MacKinnon* was a landlord who had been sued by a tenant's heirs following the tenant's death from exposure to pesticides sprayed by a pest-control firm hired by the landlord. The issue to be decided was whether the pest-control firm's conduct amounted to the discharge of pollutants within the terms of the pollution exclusion.

The Court began its analysis by tracing the drafting history of the pollution exclusion. After explaining that its purpose was to prevent CGL coverage from becoming a funding source for environmental cleanups ordered under the newly-enacted environmental statutes in the 1960s, the Court explained, "We would be remiss, therefore, if we were to simply look to the bare words of the exclusion, ignore its raison d'etre, and apply it to situations that do

not resemble traditional environmental contamination." (31 Cal.4th at 645.) *MacKinnon* hence shows that reliance on the plain meaning of the words in the contract has its limits.

The Court's discussion of the principles of California law that govern the construction of insurance policies also reveals further tension with the *AIU/Bank of the West/Waller* approach. But this discussion is followed immediately by another paragraph citing several principles of construction that apply only to insurance contracts. The Court says:

> [I]nsurance coverage is "interpreted broadly so as to afford the greatest possible protection to the insured, [whereas] ... exclusionary clauses are interpreted narrowly against the insurer." (*White v. Western Title Ins. Co.* (1985) 40 Cal.3d 870, 881, 221 Cal.Rptr. 509, 710 P.2d 309.) "[A]n insurer cannot escape its basic duty to insure by means of an exclusionary clause that is unclear. As we have declared time and again 'any exception to the performance of the basic underlying obligation must be so stated as clearly to apprise the insured of its effect.' [Citation.] Thus, 'the burden rests upon the insurer to phrase exceptions and exclusions in clear and unmistakable language.' [Citation.] The exclusionary clause 'must be *conspicuous, plain and clear.*' " (*State Farm Mut. Auto. Ins. Co. v. Jacober* (1973) 10 Cal.3d 193, 201-202, 110 Cal.Rptr. 1, 514 P.2d 953, italics in

original.) This rule applies with particular force when the coverage portion of the insurance policy would lead an insured to reasonably expect coverage for the claim purportedly excluded. (*Gray v. Zurich Insurance Co.* (1966) 65 Cal.2d 263, 272-273, 54 Cal.Rptr. 104, 419 P.2d 168.) [FN4] The burden is on the insured to establish that the claim is within the basic scope of coverage and on the insurer to establish that the claim is specifically excluded. (*Aydin Corp. v. First State Ins. Co.* (1998) 18 Cal.4th 1183, 1188, 77 Cal.Rptr.2d 537, 959 P.2d 1213.) (*MacKinnon*, 31 Cal.4th at 648.)

When the Court's analysis moved from the general principles that govern policy interpretation to the specific clause at issue, it noted that dictionary definition of the terms in the pollution exclusion might well support the broad view of the exclusion urged by the insurer, but that a court should not "make a fortress out of the dictionary." (31 Cal.4th at 649. [Citations omitted.])

The Court concluded that a broad construction of the exclusion, which would extend its reach to any injury caused by substances widely understood to be dangerous would undermine the purpose of CGL coverage and lead to unreasonable results. (31 Cal.4th at 654.) And even if the broad definition could be considered reasonable, it was not the *only* reasonable interpretation. Therefore, the exclusion did not plainly and clearly take away the coverage promised by the

insuring clause in the CGL policy, and the Court would construe the exclusion in favor of coverage. (31 Cal.4th at 654.)

E.M.M.I. is the most recent Supreme Court decision construing an insurance policy – in that case a jeweler's block insurance policy, which, as its name implies, covers damage or loss of jewelry. The policy contained an exclusion for loss caused by theft from any vehicle, unless the person whose duty it is to attend to the vehicle is "actually in or upon the vehicle." The case turned on the meaning of the term "in or upon." The insurer argued that it meant the employee must be either in the car, or, if the jewels were being transported by motorcycle, "upon" the motorcycle. Because the loss at issue occurred when the employee was outside of the car, crouching behind it while inspecting the exhaust system, the carrier argued that the exclusion applied.

As in *MacKinnon*, the Court followed its description of the three-part test with a list of additional, insurance-specific rules of construction, including the rules that exclusions are strictly construed, while exceptions to exclusions are broadly construed; that insurers cannot escape their basic duty to insure by means of an exclusion that is unclear; that any exception to the performance of the basic underlying obligation must be stated in terms that are conspicuous, plain and clear. (32 Cal.4th at 471.)

The insured in *E.M.M.I.* argued that the term "upon" was interchangeable with "on," and that the dictionary definition of "on" included "in close proximity." Hence, there was coverage because the employee was in close proximity to the car when the theft occurred. The insurer countered that "on" meant actually on, such as "on a ship"

or "on a train" and "upon" meant up and on, such as "upon" a motorcycle. The Court noted that a policy term need not be deemed ambiguous just because it carries multiple definitions. Rather, the context of the way the word was used in the policy was critical.

Because neither party's preferred construction of the term "in or upon" was consistent with the plain meaning of the term in the way a lay insured would use it, the Court concluded that the exclusion was ambiguous. Having reached this conclusion, the Court resolved the ambiguity in favor of coverage, "consistent with the insured's reasonable expectations." (32 Cal.4th at 474.) The Court went on to find that the exclusion failed the requirement that it be phrased in terms that were plain and clear to the insured.

3. The meaning of the exclusion in FIE's policy is not clear and unmistakable; rather, it is reasonably subject to at least two interpretations

As the parties' briefs demonstrate, the critical language in the exclusion in FIE's policy was ambiguous; that is, it was subject to more than one reasonable interpretation. In FIE's view, because the tractor was equipped with lights and running gear that allowed it to be used on roads, it was "designed for" use on roads. (*See* AOB at p. 20.) In advancing this position, FIE has chosen to define "designed for" as meaning "capable of."

Perez offers a different view, explaining that the tractor was designed for use as a tractor, not as a vehicle for travel on public roads. He points to testimony from the manufacturer that the tractor was designed "for" off-road and farm use, and was not suitable for

travel on public roads because of its high center of gravity and slow acceleration. (Perez's brief at 5, 6; 25 – 30.)

The definitions of "designed" and "designed for" that appear in the cases can be viewed as lending support to either position. *Fire Ins. Exch. v. Schepler* (1981) 115 Cal.App.3rd 200, 206, for example, recognizes that the term "designed" can mean *either* "fit, adapted, prepared, suitable [or] appropriate" or it could mean "intended, adapted, or designated." The court also noted that the term "designed for" is commonly used to designate "the purpose for which something was constructed." (*Ibid.*)

FIE seizes on the first set of definitions discussed in *Schepler*, arguing that the tractor was fit for or prepared for on-road use, because it was equipped with lights and turn signals that would allow it to be driven on a public road. Perez invokes the second meaning, noting that the manufacturer did not intend or designate the tractor as an on-road vehicle, and that the purpose for which it was constructed was not to be used on road, but rather as a tractor off roads.

Because the term "designed for" is reasonably subject to more than one meaning it is ambiguous. (*MacKinnon*, 31 Cal.4th at 654.) This ambiguity derives from the very language used by FIE, and cannot be remedied by simply asking how the insurer would understand how its policyholder would use the term. Hence, even under the *AIU/Bank of the West* three-part test, the exclusion is ambiguous. This conclusion is cemented by the application of the rules for exclusions described in *Safeco*, *MacKinnon*, and *E.M.M.I.*

FIE is attempting to do here what the Supreme Court refused to allow in *Safeco.* Because of the precision required for exclusionary

language, it is not sufficient for the insurer to use language that *can be* construed to have the meaning the insurer intends; rather, the language must allow no other construction. If courts cannot construe "illegal acts" to mean "criminal acts," then they certainly cannot construe "designed for" to mean "capable of."

FIE suggests that the ambiguity is cleared up by the context of the policy, which it claims draws a clear distinction between traffic-related risks and non-traffic risks. (AOB at 30.) This distinction is not actually stated in the policy; rather, FIE claims it can be divined by reading the exclusions and noting that they collectively exclude any possibility of traffic-related risks. Of course, this approach assumes that the "designed for" exclusion has the meaning ascribed by FIE.

Once again, if FIE had wanted to draw this distinction in its policy it was free to do so, but having failed to do so in clear terms, it should not be allowed to create exclusions by implication.

B. FIE cannot leverage the ambiguity in its policy into immunity for bad-faith conduct

1. The genuine-issue doctrine does not help FIE here, because its dispute was not genuine

Having sold a policy with an ambiguous exclusion, FIE was not free to simply adopt the view of its policy that defeated coverage. Rather, as *Safeco*, *MacKinnon*, and *E.M.M.I.* demonstrate, an ambiguous exclusion cannot be enforced against the policyholder to defeat coverage. FIE should have applied this well-established rule. Stated differently, it was not reasonable for FIE, in light of the rules of policy construction, to choose one meaning for an ambiguous exclusion, and to cling to that meaning to defeat coverage.

FIE is therefore off-target when it argues that because it advanced one reasonable construction of its policy, there must have been a "genuine dispute" about coverage and it cannot have acted unreasonably. The genuine-dispute doctrine, described in *Chateau Chamberay Homeowners Assoc. v. Associated Internat. Ins. Co.* (2001) 90 Cal.App.4th 335, 346, allows a court to grant summary judgment in favor of the insurer on a bad-faith claim when the insurer can show that its conduct was reasonable as a matter of law. As the language quoted from that decision in the AOB explains, when the underlying facts are not disputed, the trial court can determine on summary judgment whether "a reasonable and legitimate dispute actually existed." (AOB at 37, citing *Chateau Chamberay*, 90 Cal.App.4th at 348, n.7.)

Chateau Chamberay does not support the proposition that a dispute is reasonable when a carrier stubbornly clings to one interpretation of an ambiguous exclusion in order to defeat coverage, when there is a reasonable alternative construction that supports coverage. "A trier of fact may find that an insurer acted unreasonably if the insurer ignores evidence available to it which supports the claim." (*Mariscal v. Old Republic Life Ins. Co.* (1996) 42 Cal.App.4th 1617, 1623.)

This case did not present a situation where the evidence that supported coverage and the evidence that defeated coverage was in equipoise. Rather, the well-established rules of construction dictated the outcome of the coverage inquiry, and FIE simply ignored them. The coverage dispute that FIE manufactured was therefore

counterfeit, not genuine, and the genuine-dispute doctrine is of no help to FIE here.

2. An insurer does not have carte blanche to construe ambiguous portions of its policy in a way that defeats coverage

FIE places strong reliance on *Morris v. Paul Revere Life Ins. Co.* (2003) 109 Cal.App.4th 966, which it claims stands for the proposition that an insurer cannot be held liable for denying coverage based on an objectively reasonable construction of its policy. In fairness, there is language in *Morris* that supports FIE' position. But the case itself is distinguishable because it involved a dispute over statutory construction, not policy construction – a distinction that is important. To the extent that *Morris* suggests that an insurer is free to adopt any construction of its policy that favors its position, as long as that position is reasonable, it is simply wrong and should not be followed.

The issue in *Morris* was whether the statutorily-mandated two-year incontestability clause in disability insurance policies precluded an insurer from enforcing an exclusion in the policy for illness that "manifested" before the effective date of the policy. The trial court had enforced the exclusion, granting summary judgment for the insurer. While the policyholder's appeal was pending, the California Supreme Court considered and decided the identical issue, in *Galanty v. Paul Revere Life Ins. Co.* (2000) 23 Cal.4th 368.

In light of *Galanty,* the parties stipulated to reversal of the summary judgment and to remand to the trial court for resolution of the sole issue of whether the insurer had acted in bad faith by denying

coverage in light of the incontestability clause. (*Morris*, 109 Cal.App.4th at 972.) The insurer then moved for summary judgment on the issue, arguing that in light of the split of out-of-state authority on the issue presented in *Galanty*, and the dearth of California precedent, the issue was not sufficiently settled to render its coverage denial unreasonable. (*Morris,* 109 Cal.App.4th at 973.) The trial court granted the motion and the policyholder appealed.

Division 3 of the Court of Appeal for the Fourth Appellate District affirmed the summary judgment on bad faith. In essence, the court found that the issue was not settled in California; the appellate courts were split and the fact that the Supreme Court accepted *Galanty* for review showed that the issue was not definitively resolved. (*Morris*, 109 Cal.App.4th at 975.)

The part of the decision that is problematic, on which FIE relies, is Part I of the opinion, which purports to decide the issue to be decided. The court begins by stating the summary-judgment standard, and then defines what is, and is not, insurance bad faith. It notes that the ultimate test of bad-faith liability is whether the insurer's refusal to pay benefits was unreasonable, and that before an insurer can be held liable for bad faith its refusal to pay must have been "without proper cause." (*Morris*, 109 Cal.App.4th at 973, citations omitted.)

The court then rejected the policyholder's argument that unresolved factual issues pertaining to the insurer's subjective understanding of the law and its intent to shape the law to suit its purposes should preclude summary judgment. The court noted that an insurer is not a fiduciary, and as long as its conduct was objectively reasonable, its subjective intent was irrelevant. (*Id.*) The court then

noted that an insurer was permitted to give its own interests equal consideration to that it gives to the interests of its insureds, and is not required to pay non-covered claims, even if that would be in the best interests of its insureds. (*Id.*, citations omitted.)

From these propositions, the court drew the following conclusion, "In short, Revere was entitled to argue for whatever interpretation of the law and policy language that most benefited its own interests. The sole issue then, is whether the position it took was objectively reasonable in light of the law that existed prior to *Galanty*." (*Morris*, 109 Cal.App.4th at 974.)

Morris was not a case, like this one, where coverage would be determined by an ambiguity in policy language. Rather, it involved a legal conclusion about the meaning of statutorily-mandated policy language. Unlike this case, there was no rule of construction that dictated the outcome of the coverage analysis. *Morris* may, therefore, have been properly decided. There is no rule that requires that an insurer adopt the construction of a statute that most benefits its policyholders. After all, the insurer does not draft the statutory language. As long as it adopts a reasonable construction of a statute, it will be for the courts to decide whether its construction is right or wrong.

This logic does not extend to policy construction; at least not when the case involves an ambiguous exclusion. In that situation, the rules of construction constrain the insurer's freedom. Courts do not select the "most" reasonable construction of an ambiguous policy. Rather, the issue is simply whether there is more than one reasonable

construction; if so, then there is coverage if one of those constructions supports coverage.

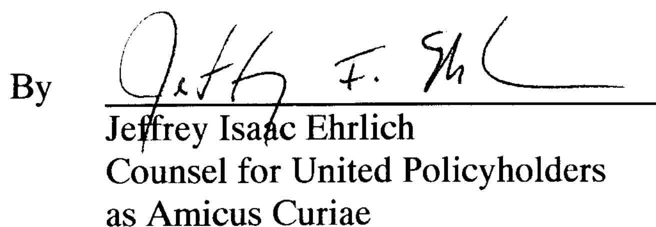
Insurers are not allowed to ignore the construction that supports coverage and cling to the one that defeats coverage. Rather, ambiguous terms are resolved in the insureds' favor and exclusions are strictly construed. (*Safeco Ins. Co. v. Robert S.*, 26 Cal.4th at 763.) The loose language in *Morris* on which FIE relies cannot be reconciled with these rules. To the extent that *Morris* suggests that an insurer's only obligation is to assert a reasonable position, it is simply wrong.

CONCLUSION

This case provides an excellent opportunity for this Court to clarify that an insurer who has included an ambiguous exclusion in its policy is not free to select the meaning of that exclusion that allows it to deny coverage when there is an alternative reasonable construction that will support coverage. An insurer who does so, like FIE here, does not act reasonably. The bad faith judgment is accordingly supported by substantial evidence and should be affirmed.

Dated: May 26, 2005. Respectfully submitted,

SHERNOFF BIDART & DARRAS, LLP

By 

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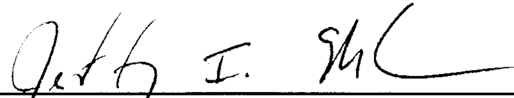
CERTIFICATE OF WORD COUNT

I certify under Court of Appeal, Rules of Court, Rule 14 (c)(1), that this brief complies with the word count not to exceed 14,000 words, in that this brief contains 4,475 words.

Date: May 26, 2005.



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as Amicus Curiae

Perez v. Fire Insurance Exchange
Appellate No. F043931
Superior Court Case No. 01-195746

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 600 South Indian Hill Boulevard, Claremont, California 91711.

On **May 26, 2005**, I served the foregoing documents described as: **APPLICATION BY UNITED POLICYHOLDERS FOR PERMISSION TO FILE BRIEF AS AMICUS CURIAE; AND BRIEF AMICUS CURIAE OF POLICY HOLDERS IN SUPPORT OF PLAINTIFF, RESPONDENT AND CROSS-APPELLANT GUSTAVO PEREZ** on the interested parties in this action:

PLEASE SEE ATTACHED LIST.

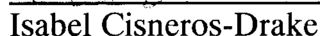
[XX] BY MAIL I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Claremont, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit.

[ ] BY PERSONAL SERVICE I delivered such envelope by hand to the offices listed above.

[XX] BY FEDERAL EXPRESS OVERNIGHT MAIL/COURIER to expedite the delivery of the above-named document, said document was sent via overnight courier for next day delivery to the above-listed party.

[X] (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on **May 26, 2005,** at Claremont, California.



Isabel Cisneros-Drake

Perez v. Fire Insurance Exchange
Appellate No. F043931
Superior Court Case No. 01-195746

SERVICE LIST

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California Supreme Court Clerk of the Court 350 McAllister Street, Room 1295 San Francisco, CA 94102	Via Overnight Delivery (5 copies of Amicus Curiae Brief)
Honorable Melinda M. Reed Clerk of the Court Tulare County Superior Court County Civic Center, No. 303 Visalia, CA 93291	1 copy
Clerk of the Court of Appeal Fifth Appellate District 2525 Capitol Street Fresno, CA 93721-2227	Filed via Overnight Delivery (original plus 4 copies of Amicus Curiae Brief)

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