NO. 31392

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

STATE EX REL. ALLSTATE
INSURANCE COMPANY,

Petitioner,

v.

THE HONORABLE JOHN T. MADDEN,
Judge of the Circuit Court of Marshall County,
West Virginia, and Cindy Jo Falls,

Respondents.

From the Circuit Court of
Marshall County, West Virginia
Civil Action No. 00-C-200M

BRIEF OF UNITED POLICYHOLDERS AS *AMICUS CURIAE* IN OPPOSITION TO ALLSTATE INSURANCE COMPANY'S PETITION FOR WRIT OF PROHIBITION

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deny him the benefit of his bargain.") Even more so, no insured should need a lawyer just to find out what coverages he purchased. Not only do insureds pay premiums in return for indemnity coverage, they also pay for the "good hands" promise that induces them to trust their insurance company. This latter policy benefit is critical because the relationship between insureds and insurers is not supposed to be adversarial and insureds do not expect it to be so. If Allstate only stacked UIM benefits "when the claimant attorney demands the same," Poynter Memo dated April 27th, 1988 (attached as an exhibit to Respondent's Brief), unrepresented West Virginia Allstate insureds were victims of an large-scale intentional nondisclosure.

In this case, the insureds had purchased and paid premiums for stackable UIM benefits, but could not collect on their claims because Allstate hid those benefits. But for the civil discovery at issue, Allstate could have "gotten away with" concealing UIM benefits from its insureds. This case is an Enron-like example of how highly sophisticated profit-motivated commercial entities, and their zealous advisors need to be kept in check.

POINT I

FAILURE TO DISCLOSE UIM BENEFITS IS AN UNFAIR CLAIM PRACTICE AS A MATTER OF LAW

An insurer's failure to disclose UIM coverage has been held to establish, *as a matter of* law, an actionable unfair insurance practice. Anderson v. State Farm Mutual Ins. Co., 2 P.3d 1029, 1034, (Wash. Ct. App. 2000), review denied, 20 P.3d 945 (Wash. 2001). Failure to disclose pertinent policy provisions is unlawful in West Virginia, just as it is in virtually every state. See West Virginia Insurance Commissioner's Regulations § 114-14-4.1–4.2. "Failure to disclose pertinent policy provisions. No person shall knowingly fail to fully disclose to first

party claimants all pertinent benefits, coverages or other provisions of an insurance policy or insurance contract under which a claim is presented."

POINT II

ALLSTATE IS A QUASI-FIDUCIARY AND THEREFORE CANNOT CONCEAL BENEFITS FROM ITS INSUREDS

Allstate's role as a quasi-fiduciary is an important consideration for this Court in connection with a resolution of this case. See, Hartford Accident & Indemnity Co. v. Michigan Mutual Insurance Co., 462 N.Y.S.2d 175, 178 (N.Y. App. Div. 1983), aff'd, 463 N.E.2d 608 (N.Y. 1984). In Michigan Mutual, the Court held:

> It is well established that, as between an insurer and its assured, a fiduciary relationship does exist, requiring utmost good faith by the carrier in its dealings with its insured. In defending a claim, an insurer is obligated to act with undivided loyalty; it may not place its own interest above those of its assured. Similarly, it has been recognized in this and other States, as well as in the Federal courts, that the primary carrier owes to the excess insurer the same fiduciary obligation which the primary insurer owes to its insured, namely a duty to proceed in good faith and in the exercise of honest discretion, the violation of which exposes the primary carrier to liability beyond its policy limits. (extensive citations omitted) Id. at 340-341.

Even the corporate leaders of some insurance companies readily recognize their fiduciary status. The Chairman of the company that owns Geico, Allstate's primary competitor in many states, has stated "The insurance business is a fiduciary business. You get access to other people's money under conditions where in many cases the other people have very little knowledge or control of where the money's going. So you need a cop." See, Warren Buffet on Insurance: The Maestro in His Own Words, 7 Emerson, Reid's Ins. Observer, Nov. 1995, at 1, 11, a copy of which is attached as Appendix "A".

While this Court may be reluctant to impose upon Allstate the level of fiduciary obligations historically associated with trustees there are less stringent standards; insurance companies should be held to quasi-fiduciary standards and explicitly held to be public service organizations. See, Elmore v. State Farm Mut. Auto. Ins. Co., 202 W.Va. 430, 504 S.E. 2d 893 (1998) Syllabus Point 3 ("It will be the insurer's burden to prove by clear and convincing evidence that . . . accorded the interests and rights of the insured at least as great a respect as its own."). In short, insurance companies should be required to practice what they preach. See e.g., Shamblin v. Nationwide Mut. Ins. Co., 183 W.Va. 585, 396 S.E.2d 766 (1990).

POINT III

THE PUBLIC SERVICE NATURE OF INSURANCE

Dean Roscoe Pound, over 80 years ago in The Spirit of the Common Law (1921), noted:

> [W] e have taken the law of insurance practically out of the category of contract, and we have established that the duties of public service companies are not contractual, as the nineteenth century sought to make them, but are instead relational; they do not flow from agreements which the public servant may make as he chooses, they flow from the calling in which he has engaged and his consequent relation to the public.[1]

A standard textbook used to train insurance industry personnel has emphasized the need to monitor and enforce the special duties of the insurance industry:

> Notwithstanding the often-stated opinion that the insurance contract is a contract affected with a public interest, insurers often view their policies as simple contractual obligations between parties. While an insurance policy does represent a contractual commitment, the attitudes of the general public, the legislatures, and the courts make clear that the insurance agreement is viewed as having broader ramifications than a mere contract. The public has a definite interest in the reliability of the insurance product.

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[1] Dean Roscoe Pound, The Spirit of the Common Law 29 (Marshall Jones Co. 1921).

> Insurance involves an obligation that affects the public interest as well as the policyholder and therefore is necessarily subject to certain restrictions.[2]

Insurance protects not only policyholders, but also neighbors, the community, creditors and employees. To the extent insurance does not deliver the promised peace of mind to the policyholder there are, and should be legal consequences. Policyholders should not be the ones to suffer the consequences if insurers choose not to live up to the standards inherent in the insurance policies they issue. Another standard insurance textbook, published by the Insurance Institute of America, described the benefits of insurance this way:

> In addition to eliminating or reducing the financial uncertainty of risks to individuals and businesses, insurance benefits society by paying for losses, providing funds for investments, controlling losses, supporting credit, allocating resources, and satisfying legal and business requirements.[3]

Another text, used to train insurance industry claims personnel, notes statutes concerning the handling of claims "have been enacted by state legislatures in order to control the activities of the insurance companies and their relationships with policyholders."[4] Yet another text used to train insurance industry professionals states:

> Insurance contracts are different from other commercial contracts because insurance is more a necessity than a matter of choice. Therefore, insurance is a ***business affected with a public interest***, as reflected in legislative and judicial decisions.[5]

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2 James J. Lorimer et al., The Legal Environment of Insurance 38 (3d ed. American Institute For Property And Liability Underwriters 1987) (emphasis added).

3 James J. Markham et al., The Claims Environment 2 (1st ed. Insurance Institute of America 1993). The Insurance Institute of America is located in Malvern, Pennsylvania and, directly or indirectly, trains tens of thousands of students of insurance. Its textbooks are standard works in the field. Insurance benefits no one if valid claims are not administered properly.

4 Id. at 347.

5 James J. Lorimer, et al., The Legal Environment of Insurance 179 (4th ed. Insurance Institute of America 1993) (emphasis in original).

Medical Assurance v. Recht, ____ W.Va. ____, 483 S.E.2d at 101 (2003) (concurring opinion of Davis, J., approving of Werley analysis). Amicus Curiae respectfully suggest that this is the proper conclusion for the Court.

POINT V

THE CRIME-FRAUD EXCEPTION IS AN ESSENTIAL TOOL FOR PROTECTING AMERICANS AGAINST MISCONDUCT BY COMMERCIAL ENTITIES

Millions of Americans in recent years have seen their pensions and retirement savings obliterated by corporate malfeasance. The crime-fraud exception is essential to deterring corporate misconduct such as was committed by WorldCom, Enron, Global Crossing, Tyco, Arthur Andersen, and, of course, the tobacco industry.[6]

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[6] The crime-fraud exception has proved to be particularly indispensable in uncovering the massive crimes, frauds, and chicanery perpetrated by the tobacco industry for more than 40 years, misconduct that the tobacco companies and their attorneys concealed from the public by invoking the attorney-client privilege. *See, e.g., American Tobacco Co. v. Florida*, 697 So. 2d 1249, 1256-57 (Fla. App. 1997)("The special master found that there was evidence that the defendants hid from and misrepresented to the public the health risks of smoking and that their conduct constituted fraud on the public. There was also evidence that the defendants utilized their attorneys in carrying out their misrepresentations and concealment to keep secret research and other conduct related to the true health dangers of smoking. Thus, the master found evidence sufficient to support the state's theory of fraud and that the attorneys were used to perpetuate the fraud."); *Haines v. Liggett Group, Inc.*, 140 F.R.D. 681, 697 (D.N.J.), *order vacated on other grounds*, 975 F.2d 81 (3d Cir. 1992)("Aside from the obvious and intentional manipulation by defendants of the [industry created, funded, and controlled] CTR [or "Council for Tobacco Research"] as a public relations tool rather than an independent, scientific research body, defendants' own 'admissions' that the CTR is an industry 'shield' and a 'front' for 'special projects' challenges defendants' current representations that the two were indeed separate. Given plaintiff's theories of fraud, which, if believed by a jury based on the evidence presented, would give rise to liability, after an *in camera* review of these selected documents, the court is convinced that the only possible conclusion is that the crime/fraud exception applies to these documents. The court finds that there is *prima facie* evidence that defendants were engaged in an ongoing fraud, and that defendants obtained attorney assistance in furtherance of that fraud through the use of the special projects division."); *Burton v. R.J. Reynolds Tobacco Co.*, 167 F.R.D. 134, 142-43 (D. Kan. 1996)("the plaintiff has carried his burden to make out a *prima facie* case of fraud [sufficient to defeat attorney-client privilege claims] based on the Frank Statement and the excerpts from the FDA's Special Supplement. The Frank Statement clearly indicates that the [Tobacco Industry Research Committee/Council for Tobacco Research] was created to research and disclose to the public the effects of tobacco use on people's health."); *Washington v. American Tobacco Co.*, No. 96-2-15056-8 SEA, 1997 WL 728262, *6 (Wash. Super. Nov. 21, 1997) ("The 32 documents considered as a whole provide evidence that supports the State's assertions that defendants used CTR to mislead the public and/or that RJR [R.J. Reynolds Tobacco Co.] concealed health risks associated with its products. The court finds that the State has made a *prima facie* showing

Patrick Casey & Richard Dennison, The Revision to ABA Rule 1.6 and the Conflicting Duties of the Lawyer to Both the Client and Society, 16 GEO. J. LEGAL ETHICS 569, 579 & n.81 (2003); see also Task Force on Corporate Responsibility: Should the American Bar Association Adopt New Ethics Rules?, 16 GEO. J. LEGAL ETHICS 727, 746+ (2003). The modern trend is to respect the attorney-client privilege, but staunchly oppose its abuse.

This Court should feel confident in taking a strong stand against the abuse of the public trust by insurance companies and other corporations. Without a strong crime-fraud exception to the attorney-client privilege, an insurer has virtual *carte blanche* to cheat its customers out of benefits owed so long as it runs a tight ship in its "corporate litigation department." This case shows how the information about an insurer's premium calculations and claims handling practices most relevant to an important inquiry may be contained in files marked "privileged and confidential." This Court should vindicate the purposes of West Virginia's Unfair Trade Practices Act, the implied covenant of good faith and fair dealing and the basic principles of respect for our courts and the rule of law by recognizing the crime-fraud exception in cases involving insurer misconduct.

POINT VI

AS A FREQUENT USER OF THE WEST VIRGINIA LEGAL SYSTEM ALLSTATE IS ON NOTICE OF THE LIMITS OF THE ATTORNEY-CLIENT PRIVILEGE

Allstate Insurance Company is among the largest sellers and suppliers of legal services in West Virginia. It sells defense legal services as part of its liability policies. It has absolute control over the activities of the defense lawyers it hires to defend its policyholders. As such Allstate is on notice that the attorney-client privilege is subject to the crime-fraud exception in appropriate circumstances. The insurance industry is the largest user of the civil justice

CERTIFICATE OF SERVICE

I, G. David Brumfield, declare that this the 8th day of January, 2004, I deposited in the United States Mail a copy of the attached APPENDIX and BRIEF OF UNITED POLICYHOLDERS AS AMICUS CURIAE IN OPPOSITION TO ALLSTATE INSURANCE COMPANY'S PETITION FOR WRIT OF PROHIBITION in a sealed envelope, with postage fully prepaid, addressed to:

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