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*United States Court of Appeals
for the
Second Circuit*

ALLSTATE INSURANCE COMPANY,

Plaintiff-Appellee,

-against-

GREGORY V. SERIO, in his capacity as Acting Superintendent of Insurance
of the State of New York,

Defendant-Appellant.

GOVERNMENT EMPLOYEES INSURANCE COMPANY, GEICO GENERAL INSURANCE
COMPANY, GEICO INDEMNITY COMPANY, and GEICO CASUALTY COMPANY,

Plaintiffs-Appellees,

- against-

GREGORY V. SERIO, as Acting Superintendent of Insurance
of the State of New York,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT
OF DEFENDANT-APPELLANT**

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INTRODUCTION

United Policyholders, as amicus curiae, respectfully submits this brief in support of the appeal of defendant-appellant, New York Superintendent of Insurance.

Automobile insurance companies need substantially more regulation instead of less.

INTEREST OF AMICUS CURIAE

United Policyholders is a non-profit corporation dedicated to educating policyholders about their rights and duties under their insurance policies. United Policyholders engages in charitable and educational activities by promoting greater public understanding of insurance issues and policyholder rights. United Policyholders's activities include organizing meetings, distributing written materials, and responding to requests for information from individuals, elected officials, and governmental entities. These activities are limited only to the extent that United Policyholders exists exclusively on donated labor and contributions of services and funds.

Amicus curiae have a vital interest in seeing that policyholders have unlimited access to information so they can make informed decisions regarding, among other things, the safe repair of their automobiles. As a public interest organization, United Policyholders seek to assist and to educate the public and the courts on policyholders' insurance rights and their efforts to have them enforced consistently throughout the country.

No party to this case has contributed directly or indirectly to the cost of this brief.

POINT I. AUTOMOBILE LIABILITY INSURANCE IS MANDATORY

Automobile liability insurance in New York (and in other states) is mandatory.

The legislature, the Governor, the People of the State and the New York State Insurance Department mandate the product sold by Appellees, Allstate Insurance Company (Allstate) and

Government Employees Insurance Company (GEICO). In a very real sense the State is the "marketing department" of the automobile insurance industry. The insurance policy forms used by all automobile insurance companies in New York are supposed to be monitored by the New York State Insurance Department. Under the guise of free speech, the insurance companies are contending that the State cannot regulate the marketing of this mandated product.

The decision below strikes at the heart of the State's right to regulate the sale of this mandated product. Can the State require its citizens to buy a product and then be forced to stand by powerless in the face of the undesirable product claims in the advertising of the mandated product?

POINT II.

INSURANCE IS VESTED WITH THE PUBLIC INTEREST

A. THE PUBLIC SERVICE NATURE OF INSURANCE

1. Insurance Is Special

Plaintiffs-Appellees have held themselves out to the people of New York, the public, insurance regulators, legislators, courts and public officials as public service organizations. Based upon their claimed roles as public servants and protectors against death, disaster, destruction, disability and disease, the insurance companies get the benefits of very special treatment from the public, insurance regulators, legislators, courts and public officials. Favorable tax and other special benefits have financially benefited the officers, directors, controlling persons and stockholders of the insurance companies. The instances of insurance companies receiving special treatment not afforded to other corporations or citizens are legion.

The public service benefits promised by the insurance companies include:

- a. jobs for citizens of the State;
- b. support for businesses in the State via investments;
- c. safety studies;
- d. safety programs;
- e. safety legislation;
- f. promoting safety;
- g. education programs;
- h. protecting the public; and
- i. eliminating hazards.

The insurance industry has *repeatedly* acknowledged and even touted the special public nature of insurance. In 1981, the then-Chairman of the American Insurance Association stated:

Insurance leaders are fond of saying, without exaggeration, that the insurance industry is imbued with the public interest — that insurance is essential to commercial activity and necessary to daily living.

We focus the spotlight on ourselves. We convince others of the

leading role insurance plays in society. We encourage them to expect superior performance from us.¹

As far back as 1944, in an address on comprehensive general liability insurance (of which automobile insurance is a variant), an attorney for the National Bureau of Casualty Underwriters acknowledged that those “in the business” of insurance “are the trustees of the public interest.”

One insurance company recently noted:

The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters.²

In a September 22, 1970 speech entitled “There’s Got To Be A Better Way,” the then President of Crum and Forster Insurance Company noted:

If studied even casually, the history of our business proves that in the United States, as nowhere else in the world, insurance has functioned to set men’s minds free from economic worry so they could think about more constructive things; it has functioned to maintain productive enterprise so that more people could enjoy the fruits of our enterprise system; it has provided the means to rebuild burned and shattered cities and towns — to replace property — both private and public — that has been destroyed, damaged, or wrongfully taken away; to relieve physical pain as well as economic distress.³

The specialness of insurance company relationships with its policyholders and the public has also been long recognized by insurance industry outsiders. Dean Roscoe Pound, almost 70 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

¹ “The Burgeoning of Litigation,” Proceedings of American Insurance Association Annual Meeting, New York City, May 28-29, 1981, at 62.

² Appellant’s Brief at 19, *Century Indem. Co. v. Truck Ins. Exch. of the Farmers Ins. Group*, 887 P.2d 455 (Wash. Ct. App. 1995) (No. 13141-6-III).

³ Speech by B.P. Russell, the President of Crum and Forster Insurance Company, delivered Sept. 22, 1970.

relation to the public.⁴

Another commentator has noted:

The insurers' obligations are . . . rooted in their status as purveyors of a vital service labeled quasi-public in nature. Suppliers of services affected with a public interest must take the public's interest seriously, where necessary placing it before their interest in maximizing gains and limiting disbursements. . . . [A]s a supplier of a public service rather than a manufactured product, the obligations of insurers go beyond meeting reasonable expectation of coverage. The obligation of good faith and fair dealing encompass qualities of decency and humanity inherent in the responsibilities of a fiduciary. Insurers hold themselves out as fiduciaries, and with the public's trust must go private responsibility consonant with that trust.⁵

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

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. Insurance involves an obligation that affects the public interest as well as the policyholder and therefore is necessarily subject to certain restrictions.⁶

Insurance protects not only policyholders, but also injured parties, neighbors, the community, creditors and employees. Another insurance textbook, published by the Insurance Institute of America, described the benefits of insurance this way:

[I]n 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

⁴ Roscoe Pound, The Spirit of the Common Law at 29 (Marshall Jones Co. 1921).

⁵ Goodman & Seaton, Ripe for Decision, Internal Workings and Current Concerns of the California Supreme Court, 62 Cal. L. Rev. 309, 346-47 (1974).

⁶ 1 James J. Lorimer et al., The Legal Environment of Insurance 38 (3d ed. American Insitute For Property And Liability Underwriters 1987) (cmphasis added).

and business requirements.⁷

Loss Control. By their nature, insurance companies deal with risks. Thus, they are actively and heavily involved in loss control, or the reduction in frequency and severity of losses. Insurers can correct or eliminate hazards or dangerous conditions, thereby reducing preventable losses and minimizing the impact of unavoidable losses. Society benefits by the reduction and elimination of risks. It is much better for the insured, the insurer, and society in general that a loss never occur than that it be covered by insurance.⁸

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.

B. INSURANCE REGULATIONS

The "public service" nature of insurance is manifest in the myriad of state laws governing insurance. For example, automobile insurance coverage and workers' compensation insurance coverage are required by most states. Another text used to train insurance company claims personnel notes that statutes concerning the conduct of insurance companies "have been enacted by state legislatures in order to control the activities of the insurance companies and their relationships with policyholders."⁹ 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.¹⁰

⁷ James J. Markham et al., The Claims Environment 2 (1st ed. Insurance Institute of America 1993).

⁸ Id. at 3.

⁹ James J. Markham et al., The Claims Environment 347 (1993).

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

POINT III.

ALLSTATE AND GEICO INSURANCE COMPANIES ARE AT LEAST QUASI-FIDUCIARIES

A. INSURANCE COMPANIES ARE FIDUCIARIES

Insurance companies are fiduciaries. Who says?:

American International Group:

The ultimate objective of the Regional Claim Manager is to assist us in achieving major claim management objectives all over the world. Those objectives are: ...

6. Performance of our Fiduciary responsibility....¹¹

Fireman's Fund:

An insurer stands in a fiduciary relationship to its insured; when an insurer chooses his interest over the interests of his insured his actions are indeed 'intentional and deliberate' . . . and when a case can be settled with no personal liability to said insured, [failure to do so] has the 'character of outrage frequently associated with crime'.¹²

Home Insurance Company:

Under Oregon law an insurer is in a fiduciary relationship to its insured. A fiduciary is one who is in a position of trust and confidence with another, usually called a principal, while acting for and on behalf of the other. A fiduciary is legally bound in equity and good conscience to act in good faith and for the best interest of the principal.... Any conduct which is intended to place a fiduciary's own interest or the interests of any other party ahead of the best interests of the principal is a breach of the fiduciary's duty.¹³

Continental Casualty

It has been held that an insurer who issues a [comprehensive general liability policy] is under a fiduciary duty to look after the

¹¹ American International Companies, Manual No. CLMD-1, Date 20 Feb. 1985, Page 1.

¹² Civil Action--Cross Petition for Certification and Brief in Opposition to Defendant-Appellant Petition for Certification (filed Mar. 4, 1975), at 13, 16, Fireman's Fund Ins. Co. v. Security Ins. Co. of Hartford, 367 A.2d 864 (N.J. 1976).

¹³ Defendant's [Home Insurance Company's] Proposed Jury Instruction No. 2, submitted on September 8, 1988. Georgetown Realty, Inc. v. The Home Insurance Company, Mult. County Circuit, No. A8708-05098.

interests of the insured as well as its own interests.¹⁴

Continental Insurance Company

Representing the insured is clearly a 'fiduciary' situation, especially in view of the fact that improper conduct by the insurer could expose the insured to liability beyond the amount of his insurance protection.¹⁵

National Union

Underlying all forms of insurance is a fiduciary duty to some extent simply because of the insurer's expertise in the area of its business. In the public liability area the fiduciary duties are heavier because the insurance company is an expert in the litigation arena in all parts of the country since it has thousands of cases nationwide and trained personnel to handle them.¹⁶

Liberty Mutual

[T]he cases have readily acknowledged that the insurer-insured relationship gives rise to a fiduciary duty.¹⁷

St. Paul Fire and Casualty

St. Paul owes a fiduciary duty to [the plaintiff]. We don't contest that . . . We owe a fiduciary duty to every one of our policyholders . . .¹⁸

These are but a few of examples. Insurance companies clearly understand the fiduciary duties

¹⁴ Continental Casualty Company's Memorandum of Law For Trial at 27, filed Sept. 11, 1990 (No. 86-C-3839), Continental Cas. Co. v. Great Am. Ins. Co., (N.D. Ill).

¹⁵ Memorandum in Opposition to Plaintiff's Cross-motion to Dismiss Defendants' First and Second Defenses and Plaintiff's Request For Leave to Further Amend its Amended Complaint at 9-10, submitted Apr. 5, 1993, New York University v. Continental Ins. Co., (N.Y. Sup. Ct.) (No. 11627/92).

¹⁶ Memorandum in Opposition To Columbia Casualty Company's Motion For Summary Judgment at 18-19, dated Dec. 16, 1989, Columbia Cas. Co. v. National Union Fire Ins. Co. of Pittsburgh, (E.D. Pa.) (No. 89-3506).

¹⁷ Memorandum of Law in Support of Plaintiff's Response, Liberty Mut. Ins. Co. v. Paper Mfrs. Co. at 6, dated July 13, 1993, (E.D. Pa.) (No. 90-3787).

¹⁸ Motion For Summary Judgment Hearing, Transcript, Richland Valley Prods. v. St. Paul Fire & Cas. Co. at 24, dated Jan. 18, 1994, (Wis. Cir. Ct.) (No. 92CV149).

owed to their policyholders. Some commentators disagree and so do some courts.¹⁹

B. THE GOOD HANDS BECOME CLENCHED FISTS

For policyholders making a claim for insurance coverage, the cooperation to be expected from a fiduciary is often simply not there. Instead, the policyholder may be confronted by a financial colossus with unmatched expertise in insurance coverage litigation.

Indeed, as Liberty Mutual Insurance Company recognized:

[the policyholder] is likely not as familiar with litigation and claims evaluation and disposition as is the insurance company . . . [T]he insurer is a professional defender of lawsuits . . . Unlike the insured, an [insurance company] is not a novice as to matters involving litigation.²⁰

The insurance industry does not limit anti-policyholder activities to little people; it applies the practice of opportunistic breach to policyholders of all sizes. As a sadly disillusioned policyholder, the chairman of Dow Corning Corporation lamented that "it has become standard operating procedure for some insurance companies to procrastinate and dispute rather than honor policies with companies that become embroiled in litigation."²¹ Claims in excess of \$10 million rarely get paid without litigation.²² In fact, the property and casualty insurance industry has

¹⁹ See, Randy Papetti, Note, The Insurer's Duty of Good Faith in the Context of Litigation, 60 Geo. Wash. L. Rev 1931, 1933 at n.10 (1992) (listing cases) (Note that Mr. Papetti supports the positions of the insurance industry.) and United States v. Brennan, 183 F.3d 139 (2nd Cir. 1999).

²⁰ Liberty Mutual Insurance Company's Memorandum in Support of Motion for Partial Summary Judgment at 7, (filed July 5, 1988), National Union Ins. Co. v Liberty Mut. Ins. Co., 696 F Supp 1099 (E.D. La. 1988) (No. 86-2000). Liberty Mutual has been sanctioned for being a "major league team" in the game of "hardball litigation." See Adolph Coors Co. v. American Ins. Co., et al., 164 F.R.D. 507, 509 (D. Colo. 1993).

²¹ See Richard Hazleton, The Tort Monster That Ate Dow Corning, Wall St. J., May 17, 1995, at A21.

²² See Richard A. Archer, Preparing For A 'Mega-Loss,' Business Ins., Oct. 10, 1994, at 23. Mr. Archer is retired deputy chairman of Jardine Insurance Brokers, Inc. in Los Angeles.

admitted that it now spends over \$1 billion a year litigating against its policyholders.²³ The property and casualty insurance industry files "tens of thousands" of briefs against policyholders every year.²⁴

POINT IV.

INSURANCE COMPANIES OWE A DUTY OF GOOD FAITH AND FAIR DEALING TO THEIR POLICYHOLDERS

A. UNDER NEW YORK COMMON LAW, A DUTY OF GOOD FAITH AND FAIR DEALING IS IMPLIED IN ALL CONTRACTS, INCLUDING INSURANCE POLICIES

In New York, there is a common law duty of good faith and fair dealing implied in every contract. See, e.g., Greenspan v. Allstate Insurance Co., 937 F. Supp. 288, 292 (S.D.N.Y. 1996) (interpreting New York law). This duty of good faith and fair dealing generally obligates the parties to a contract to do and perform those things that they should in order to carry out the purpose for which the contract was made, and to refrain from doing anything that would destroy or injure the other parties' right to receive the fruits of the contract. See Greenspan, 937 F. Supp. at 291-292. Insurance policies are contracts, and the duty of good faith and fair dealing implied under New York law applies to the insurance companies that sell those policies. See, e.g., New York University v. Continental Insurance Co., 87 N.Y.2d 308, 318, 662 N.E.2d 763, 769, 639 N.Y.S.2d 283, 289 (1995). Moreover, New York has enacted a statement that imposes a duty on

²³ See Brief of Amicus Curiae American Ins. Assoc. at 3, (filed 2/25/93) Affiliated FM Ins. Co. v. Constitution Reinsurance Corp., 626 N.E.2d 878 (Mass. 1994) (No. SJC-06165). See also Leslie Scism, Tight-Fisted Insurers Fight Their Customers To Limit Big Awards, Wall St. J., Oct. 15, 1996, at 1; Robert H. Gettlin, Fighting The Client, BEST'S REVIEW P/C, Feb. 1997, at 49, 50 (noting that 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[.]")

²⁴ Brief and Appendix of Amicus Curiae Insurance Environmental Litigation Association in Support of Continental Insurance Company, Aetna Casualty and Surety Company and Fireman's Insurance Company of Newark, N.J. (Aug. 24, 1992) at 25, 21, filed in County of Columbia, New York v. Continental Ins. Co., No. 65599 (N.Y. App. Div.).

insurance companies to deal with policyholders fairly and in good faith. See N.Y. Ins. Law § 2601 (McKinney 1985).

B. ALLSTATE AND GEICO HAVE FAILED TO DEMONSTRATE GOOD FAITH AND FAIR DEALING, AND CANNOT BE TRUSTED TO FAIRLY REPRESENT THEIR POLICYHOLDERS

Consistent with the affidavit of Eugene R. Anderson, Esq. (the "Anderson Aff."), submitted to the Court below in support of United Policyholders' amicus brief to that Court, United Policyholders urged the District Court to recognize the need for greater regulation of the insurance industry. Anderson Aff. at ¶¶ 9-11. With regards to the automobile insurance industry in New York, the regulation is particularly necessary. The need for regulation is exemplified in two particular situations that Mr. Anderson recounts in his affidavit: (1) the study of comprehensive automobile insurance premiums in New York City; and (2) Allstate's practice of "steering" both policyholders and non-policyholders away from seeking legal representation.

1. The Mayor's Task Force On Insurance Rates

The New York City Mayor's Task Force on Automobile Insurance, of which Mr. Anderson served as a member, found that insurance companies have failed to reduce automobile insurance premiums in accordance with the reduced costs of such insurance in New York City. Anderson Aff. at ¶ 11. The Mayor's Task Force definitively concluded that automobile thefts decreased in New York City by 60 percent from 1990 to 1996. Id. However, insurance companies failed to grant New York City policyholders comprehensive premium reductions commensurate with the theft reductions. Thus, insurance companies realized excessive profits on comprehensive automobile insurance through this period. Id.

2. Allstate's "Steering" of Policyholders away from Procuring Legal Representation

Allstate stands accused of contacting victims of automobile accidents caused by Allstate policyholders who have yet to hire legal counsel to wrongfully dissuade them from hiring

a lawyer. See, Annette Wencel & Roselyn Bonanti, Beware: Insurers' Acts of "Kindness" are Rarely Random, Trial, October 1998, at 59-63 (attached to the Anderson Aff. as Exhibit G); Anderson Aff. at ¶¶ 12-16.²⁵ Allstate made such contacts to "steer" the victims away from seeking legal advice, and to convince the victims that Allstate could more effectively protect their interests if they did not have legal counsel. In fact, Allstate sought to gain the confidence of victims in order to negotiate settlements favorable to Allstate and, thus, enlarge Allstate's profits.

Allstate has named this anti-lawyer program the Allstate Customer Service Campaign. In fact, the only party receiving beneficial service is Allstate.

Pending and past litigation against Allstate details how injured persons without lawyers receive lesser settlements than those who have legal advice.

Wrongful activities have spurred disciplinary proceedings against Allstate by numerous states, including New York. The disciplinary actions are for providing legal advice without a license to practice law. Such actions clearly demonstrates that Allstate can and will put its economic interests before the health of the automobile accident victims. Allstate settled its unauthorized practice of law case in New York.

²⁵ See also, Deborah Lohse, Accident Victims Sue Allstate Alleging the Insurer Misled Them, Wall St. J., July 28, 1998, at B5; Deborah Lohse, Pennsylvania Sues Allstate, Alleging It Deterred Legal Help, Wall St. J., December 9, 1998.

POINT V.

CONCLUSION

For all the reasons set forth above, United Policyholders respectfully requests that this Court uphold the constitutionality of Section 2610 of the New York Insurance Law and reverse the judgment below.

Dated: October 11, 2000
New York, New York

Respectfully submitted,
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CERTIFICATE OF SERVICE

I certify that on the 11th day of October, 2000 I served a copy of the Brief of Amicus Curiae United Policyholders in Support of Defendant-Appellant upon the following counsel of record, at the last known addresses listed below, by depositing true copies thereof enclosed in properly addressed postpaid wrappers in an official depository of the United States Postal Service within the State of New York. The preceding statements are true and correct under penalty of perjury.



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