STATE OF CONNECTICUT
APPELLATE COURT

SHARON CAPEL PPA DONTE CAPEL,	)	
Appellants,	)	
v.	)	**Case No. AC 34524**
PLYMOUTH ROCK ASSURANCE CORP.,	)	
Appellees.	)	

BRIEF OF AMICUS CURIAE, UNITED POLICYHOLDERS

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STATEMENT OF INTEREST OF AMICUS CURIAE

Insurance policies provide a critical safety net under businesses and individuals. Because of the severe consequences that flow from the failure of that safety net when an insurance company breaches its contractual obligations to a policyholder, courts have long imposed special obligations and damage rules in insurance cases. The time has come for commercial and individual policyholders in the State of Connecticut to have insurance legal rights that are on par with residents of other states.

United Policyholders, ("UP") is a non-profit 501(c)(3) organization founded in 1991 that serves as an independent information resource and a voice for insurance consumers in all 50 states. Donations, foundation grants and volunteer labor support the organization's work. UP does not accept funding from insurance companies.

United Policyholders' advances the interests of insurance consumers in courts of law, before regulators, legislators, and in the media. United Policyholders participates in the proceedings of the National Association of Insurance Commissioners as an official consumer representative. UP receives frequent invitations to speak to trade and civic associations and testify at public hearings on insurance rate and policy issues.[1]

[1] United Policyholders has appeared as *amicus curiae* in three previous Connecticut cases and over three hundred cases throughout the United States in state, federal and the U.S. Supreme Court and been mentioned with approval in numerous published opinions including *Humana, Inc. v. Forsyth* at 525 U.S. 299 (1999). *See Security Ins. Co. of Hartford v. Lumbermens Mut. Cas. Co.*, 264 Conn. 688 (2003); *Buell Industries, Inc. vs. Greater N.Y. Mut. Ins. Co.*, 259 Conn. 527 (2002); *Fireman's Fund Insurance Co. v. TD Banknorth Ins. Agency Inc.*, Docket No. S.C. 18796, Conn. Supreme Ct. (awaiting oral argument).

STATEMENT OF THE CASE AND FACTS

United Policyholders adopts the Statement of Facts contained in the Appellant's Brief dated June 13, 2012.

ARGUMENT

The Court should answer the question presented pursuant to Connecticut Practice Book § 73-1, "[i]n a claim against Plymouth Rock for breach of contract for failure to defend and indemnify Charles Ingala, brought by the Capels as judgment creditors, are the damages limited to the limits of the putative liability policy, $300,000?", in the negative for the following reasons:

1. Although Connecticut law is silent on this precise issue, holding insurance companies liable for damages beyond the policy limits for breach of the duty to defend is consistent with the Connecticut Supreme Court's reasoning in *Missionaries of Co. of Mary, Inc. v. Aetna Casualty & Surety Co.*, 155 Conn. 104 (1967).

2. Eight of our sister states permit the recovery of a judgment in excess of policy limits as consequential damages where the insurance company wrongfully refused to defend.

3. Holding insurance companies responsible for breach of the duty to defend is in the public's best interest.

I. THE QUESTION PRESENTED HERE IS AN ISSUE OF FIRST IMPRESSION IN CONNECTICUT.

Missionaries held that an insurance company is liable for breach of the duty to defend "for the full amount of the obligation reasonably incurred by [the policyholder]." 155 Conn. at 114. Subsequent Connecticut Supreme Court cases have stated in dicta that under *Missionaries*, an insurance company's liability for breach of the duty to defend is capped by "the limit of liability fixed by [the] policy."

See Hartford Cas. Ins. Co. v. Litchfield Mut. Fire Ins. Co, 274 Conn. 457, 470 (2005); *Schurgast v. Schumann*, 156 Conn. 471, 490-91 (1968).

This gloss on *Missionaries* holding is not dispositive of the question presented here because it was articulated in cases which dealt with judgments or settlements that were within or "well below" the policy limits. *See Missionaries*, 155 Conn. at 114; *see also Hartford Cas. Ins. Co.*, 274 Conn. at 470 (finding insurance company liable for settlement and attorney's fees, which fell below the policy limits); *Schurgast*, 156 Conn. at 490-91(holding insurance company liable for amount of judgment court presumed to be below policy limit). No Connecticut appellate court has had occasion to address an insurance company's liability for breach of the duty to defend where, as here, the breach resulted in a default judgment against the policyholder in excess of the policy limit.[2]

Thus, contrary to the Appellee's assertion, this is an issue of first impression in our State.

II. IN THE ABSENCE OF BINDING AUTHORITY, CONNECTICUT SHOULD LOOK TO OTHER JURISDICTIONS FOR GUIDANCE.

A. Persuasive Sister State Authorities Allow A Policyholder To Recover Consequential Damages When the Insurance Company Breaches Its Duty To Defend.[3]

To resolve this question of first impression under Connecticut law, this Court should consider the results and reasoning in numerous decisions from sister state courts. Wisconsin, Montana, Illinois, Kentucky, California, Massachusetts, Texas

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[2] Several Connecticut trial courts have considered this issue, but those cases are not binding law on this Court. *See McDonald v. Rowe*, 43 Conn. App. 39, 43 (1996).

[3] This similar issue was recently certified to the Connecticut Supreme Court by the Second Circuit Court of Appeals in *Ryan v. Nat'l Union Fire Ins. Co. of Pittsburgh*

and Florida all hold that in a contract action for breach of the duty to defend, a judgment in excess of the policy limits is recoverable because it is a natural and reasonably foreseeable consequence of the breach.[4] Connecticut should follow suit with these eight jurisdictions and hold that excess judgments are recoverable as consequential damages because doing so is consistent with Connecticut's liberal construction of the duty to defend and is a logical extension of *Missionaries*. *See* 155 Conn. at 110-12, 114.

In *Missionaries*, the policyholder sued Aetna, claiming that it had breached its duties to defend and indemnify the policyholder in a negligence action. *Id.* at 106. In determining that the insurance company had breached its duty to defend, the Connecticut Supreme Court held that the insurance company "should reimburse the plaintiff for the full amount of the obligation reasonably incurred by it." *Id.* at 114 (*citing Arenson v. Nat'l Auto. & Cas. Ins. Co.*, 310 P.2d 961 (Cal. 1957). The court emphasized that the insurance company should not be "permitted, by its breach of the contract, to cast upon the plaintiff the difficult burden of proving a causal relation between the defendant's breach of the duty to defend and the results which are

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PA, Nos. CV-10-4528 and 10-4700, 2012 WL 3641803 (2d. Cir. Aug. 27, 2012) and is awaiting briefing.

[4] *Metropolitan Prop. & Cas. Ins. Co. v. Morrison*, 951 N.E.2d 662, 669 (Mass. 2011); *Nielsen v. TIG Ins. Co.*, 442 F.Supp.2d 972, 980-81 (D. Mont. 2006); *Amato v. Mercury Cas. Co.*, 61 Cal. Rptr.2d 909, 911-915 (Ct. App. 1997); *Newhouse by Skow v. Citizens Sec. Mut. Ins. Co.*, 501 N.W.2d 1, 6 (Wis. 1993); *Green v. J.C. Penny Auto. Ins. Co.*, 806 F.2d 759 (7th Cir. 1986); *Eskridge v. Educator & Exec. Ins., Inc.*, 677 S.W.2d 887, 888-90 (Ky. 1984); *Thomas v. Western World. Ins. Co.*, 343 So.2d 1298, 1302-04 (Fla. Dist. Ct. App. 1977); *Blakely v. American Emp. Ins. Co.*, 424 F.2d 728, 733-34 (5th Cir. 1970); *see also Bi-Economy Market, Inc. v. Harleysville Ins. Co. of N.Y.*, 886 N.E.2d 127 (N.Y. 2008)(affirming consequential damages for breach of first-party property insurance policy, and explaining that consequential damages are not to "punish the insurer, but to give the insured its bargained-for benefit.").

claimed to have flowed from it." *Id.* Thus, Aetna was required to reimburse the policyholder for the "obligations" it incurred in defending the suit, which in this case, were the settlement sum, attorneys' fees and costs, all of which were "well below" the policy limits. *Id.*

Because *Missionaries* involved an award "well below" the limit of the disputed liability insurance policy, it does not answer the question presented here. Thus, decisions from our sister states are instructive. One such decision is *Amato v. Mercury Casualty Co.* In *Amato*, the policyholder sued Mercury, his automobile liability insurance company, for bad faith after Mercury refused to defend the plaintiff against a negligence claim. 61 Cal. Rptr.2d at 911-912. The plaintiff could not afford counsel, and a default judgment in excess of the policy was entered against him. *Id.* at 912. The California Court of Appeal held that where an insurance company breaches its duty to defend and the policyholder suffers a default judgment in excess of the policy, the insurance company is liable for the default judgment because it is a "proximate result" of the insurance company's wrongful refusal to defend. *Id.* at 911, 914-915.

In reaching this conclusion, the *Amato* court, like the court in *Missionaries*, quoted *Arenson,* an earlier California Supreme Court decision, for the proposition that an "[insurance] company is manifestly bound to reimburse its policyholder for the full amount of any obligation reasonably incurred by him." *Id.* at 918 (*quoting Arenson*, 310 P.2d 968); *see also Metropolitan Prop. & Cas. Ins. Co.*, 951 N.E.2d at 669 ("[w]hen an insurer's good faith refusal to defend an insured is ruled to have been unjustified, there is no reason not to apply normal contract damage

principles."); *Thomas,* 343 So.2d at 1304 ("[i]t seems only fair that an insurer whose contracts are by their very nature 'adhesive' should be held to at least the same standard of damages applicable to other contracting parties.").

The *Amato* court was also persuaded by *Arenson*'s public policy justification for its position:

> [The insurance company] will not be allowed to defeat or whittle down its obligation on the theory that plaintiff himself was of such limited financial ability that he could not afford to employ able counsel, or to present every reasonable defense, or to carry his cause to the highest court having jurisdiction .... Sustaining such a theory ... would tend ... to encourage insurance companies to similar disavowals of responsibility with everything to gain and nothing to lose.

61 Cal. Rptr.2d at 918 (*quoting Arenson*, 310 P.2d at 968); *see also* 14 Couch on Insurance § 205:64 (3d Ed. 2011)(insurer liable for damages traceable to its unjustifiable failure to defend, "largely to prevent injury to the insured, but also to prevent the insurer from profiting from its own wrong.").

Thus, *Amato* illustrates that a default judgment in excess of policy limits is recoverable where the insurance company has breached its duty to defend. *See* Stephen S. Ashley, Bad Faith Actions: Liability & Damages § 4:7 (2012)("[i]f the failure to defend causes the policyholder to incur a judgment he would not otherwise have suffered, the insurance company should bear responsibility for the judgment, even if it exceeds the policy limits ....").

The Supreme Court of Kentucky reached the same conclusion in *Eskridge v. Educator & Executive Insurance, Inc.* *Eskridge* also involved an automobile policy and judgment in excess of the policy's limits following the insurance company's refusal to defend. *Eskridge*, 677 S.W.2d at 888-89. In reversing the lower court's ruling, the court held that the insurance company was liable for the excess judgment

because "[i]f the contract to defend is breached, as it was in this case, the party aggrieved by the breach is entitled to recover all damages naturally flowing from the breach." *Id.* at 889. The Court relied heavily on the oft-quoted passage in *Comunale v. Traders & General Insurance Co.*, 328 P.2d 198 (Cal. 1958):

> An insurance company who denies coverage does so at its own risk, and, although its position may not have been entirely groundless, if the denial is found to be wrongful it is liable for the full amount which will compensate the policyholder for all the detriment caused by the insurance company's breach of the express and implied obligations of the contract.

Eskridge, 677 S.W.2d at 889; *see also Nielsen*, 442 F.Supp.2d at 980 (finding insurance company which breached duty to defend liable for full amount of damages, including those in excess of insurance policy limits); *Blakely*, 424 F.2d at 734 (same).

Based on the sound reasoning in *Amato*, *Eskridge*, and the other cited cases, Connecticut law should require that when an insurance company erroneously breaches its contractual duty to defend under a liability insurance policy and the policyholder then suffers a judgment in excess of the policy limits, the insurance company is liable for the full amount of that judgment, even amounts greater than policy limits, because such excess liability is a natural and reasonably foreseeable consequence of the breach. *See Amato*, 61 Cal. Rptr.2d at 918; *Eskridge*, 677 S.W.2d at 888-89. This holding is in accord with Connecticut's broad interpretation of the duty to defend and preference for tendering a defense even when coverage is ambiguous. This holding is also a logical extension of the decision in *Missionaries* because the reasoning employed by *Amato* and *Eskridge* is the same reasoning employed by the Connecticut Supreme Court in *Missionaries*. *Compare Amato*, 61

Cal. Rptr.2d at 918 (*quoting Arenson*, 310 P.2d at 968) *with Missionaries*, 155 Conn. at 114. Both the Connecticut Supreme Court in *Missionaries* and the California Court of Appeal in *Amato* relied on *Arenson*'s reasoning. Thus, this Court should follow suit with its eight sister states and hold here that breach of the duty to defend renders a liability insurance company liable for the full amount of the ensuing liability, without regard to policy limits.

III. REQUIRING A LIABILITY INSURANCE COMPANY TO INDEMNIFY A JUDGMENT IN EXCESS OF POLICY LIMITS RESULTING FROM BREACH OF ITS DUTY TO DEFEND IS A FAIR COMPROMISE BETWEEN THE COMPETING INTERESTS OF THE POLICYHOLDER AND THE INSURANCE COMPANY.

Responsible policyholders seek insurance to protect against the devastating loss that can occur without insurance coverage. *See Bi-Economy Market, Inc.*, 886 N.E.2d at 131 (*quoting Noble v. Nat'l Am. Life Ins. Co.*, 624 P.2d 866, 867 (Ariz. 1981)("[a]n insurance policy is not obtained for commercial advantage; it is obtained as protection against calamity."). When policyholders purchase liability insurance, they expect to receive the benefit of their bargain that the insurance company will defend any claims against them that fall under the policy. If the insurance company wrongfully refuses to defend a claim, the policyholder is left to stand alone, after the loss has arisen, when it is too late to obtain substitute coverage from another insurance company. This can have catastrophic consequences not only for the policyholder, but also for claimants who may go uncompensated for their injuries. This is why the obligation of the insurance company to defend is of vital importance to the policyholder and the primary reason for the purchase of insurance. *See* Karon O. Bowdre, Litigation Insurance: Consequences of An Insurance Company's Wrongful Refusal To Defend, 44 DRAKE L. REV. 743, 747-48 (1996).

Holding insurance companies liable for damages in excess of the policy limits is a fair compromise between the competing interests of the policyholder and insurance company for two reasons: (1) it creates an economic incentive for the insurance company to fulfill its duty to defend; and (2) does not yield unworkable results, because the insurance company has remedies available to it to protect its financial interests.

1. Economic Incentive to Defend.

Capping an insurance company's liability for wrongful refusal to defend at its policy limits would erode incentives for an insurance company to defend, particularly in circumstances where coverage is ambiguous and the potential of liability to the policyholder is great. Rather, such a cap would likely lead insurance companies to deny their defense obligations because, if later found to have breached its duty, the insurance company would be no worse off than had it defended the policyholder in the first place. In fact, the insurance company would be *better off* because, in that circumstance, it would only be liable for the policy limits and not the costs of providing a defense, which frequently are outside the indemnity limits of general liability insurance policies, so the cost of defense may well exceed policy limits. An insurance company should not be placed in a better position for breaching its duty to defend than had it fulfilled its obligations. In short, the insurance company should not be rewarded for gambling with its policyholder's money. *See R.C. Wegman Constr. Co. v. Admiral Ins. Co.*, 629 F.3d 724, 729 (7th Cir. 2011)("[g]ambling with an insured's money is a breach of fiduciary duty.")(*Posner, J*). Exposure to liability beyond the policy limits will curb an insurance company's temptation to gamble with policyholders' money.

The policyholder has paid a premium for the insurance company's promise to defend and should not be denied that bargained-for benefit merely because it is in the insurance company's economic interest. *See Taco Bell Corp. v. Cont'l Cas. Co.*, 388 F.3d 1069, 1076 (7th Cir. 2004)(holding that insurance company which assumes the risk of refusing to defend must accept the economic consequences of its decision)(*Posner, J*). Thus, allowing a policyholder to recover damages in excess of the policy limits when excess liability results from a wrongful denial of a defense will encourage insurance companies to take their duty to defend seriously and not gamble with their policyholders' money and expectations.

2. The Insurance Company Is Not Without Remedies To Protect Its Financial Interest.

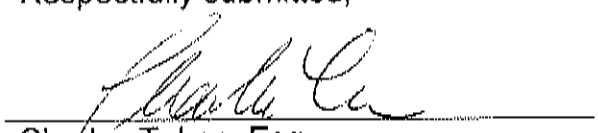
Holding an insurance company liable for a judgment in excess of policy limits is not unfair to the insurance company. Insurance companies can protect themselves in circumstances where coverage is uncertain or ambiguous by either defending under a reservation of rights or bringing a declaratory judgment action against the policyholder. In this way, the insurance company gives up none of its rights should it ultimately be determined that coverage does not exist under the policy. In fact, according to *Missionaries*, this is the preferred avenue where coverage is in dispute. *See Missionaries*, 155 Conn. at 113-14.

CONCLUSION

For the foregoing reasons, Amicus Curiae United Policyholders, respectfully requests this Court answer the question presented in the negative and hold that an insurance company is liable for a judgment in excess of the policy limits where it breached its duty to defend the policyholder.

Dated: October 9, 2012

Respectfully submitted,



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