# COURT OF APPEALS

*of the*

# STATE OF NEW YORK

U.S. UNDERWRITERS INSURANCE COMPANY,

*Plaintiffs-Appellants,*

*-Against-*

CITY CLUB HOTEL, LLC, Shelby Realty, LLC, Forthright Development, LLC, Metropolitan Hotels, LLC, Stephen Brighenti, and Jonathan P. Zambetti

*Defendants-Appellants.*

Marek Szpakowski and Agnes Szpakowski,

*Defendants.*

CERTIFICATION OF QUESTIONS OF LAW
FROM THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

## BRIEF OF *AMICUS CURIAE*, UNITED POLICYHOLDERS, IN SUPPORT OF THE DEFENDANTS-APPELLANTS

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## STATEMENT OF INTEREST OF *AMICUS*

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

In addition to serving as a resource on insurance claims for disaster victims and commercial insureds, United Policyholders actively monitors legal and marketplace developments affecting the interests of all policyholders. United Policyholders receives frequent invitations to testify at legislative and other public hearings, and to participate in regulatory proceedings on rate and policy issues.

A diverse range of policyholders throughout the United States communicate on a regular basis with United Policyholders, which allows us to provide important and topical information to courts throughout the country via the submission of *amicus curiae* briefs in cases involving insurance principles that are likely to impact large segments of the public.

A United Policyholders' *amicus* brief was cited in the U.S. Supreme Court's opinion in *Humana v. Forsyth*, 525 U.S. 299 (1999), and our arguments were adopted by the California Supreme Court in *Vandenberg v. Sup.Ct.*, 21 Cal.4$^{th}$ 815 (1999). United Policyholders has filed *amicus* briefs on behalf of policyholders in over ninety cases throughout the United States, a testament to its position as a vanguard leader in interpreting the modern dilemmas faced by policyholders in today's insurance markets.

## QUESTIONS PRESENTED

The Court of Appeals for the Second Circuit has certified the following questions of state law to this Court:

> (1) Whether, in a case in which an insurance company has brought a declaratory judgment action to determine that it does not have policy obligations but defended in the underlying suit, a defendant prevailing in the declaratory judgment action should be awarded attorneys' fees expended in defending that action; or
>
> (2) To decide whether fees are to be awarded in the special circumstances of this case.

*U.S. Underwriters Ins. Co. v. City Club Hotel, LLC*, 369 F.3d 102, 113 (2d Cir. 2004) (order of certification). United Policyholders respectfully submits that both questions should be answered in the affirmative.

## STATEMENT OF JURISDICTION AND FACTS

United Policyholder adopts the statement of jurisdiction and facts as presented within the Brief of Defendants-Appellants.

## INTRODUCTION

### I. INSURANCE POLICIES ARE NOT ORDINARY COMMERCIAL CONTRACTS

Here is a tableau depicting the power of the typical American consumer to realize the benefit of the bargain in making an ordinary contract:

> A prospective husband enters a jewelry store eager to purchase a diamond ring which will commemorate his love for his wife. He knows the basics of gem shopping . He knows the four "Cs:" Clarity, Color, Carat, and Cut. He knows enough to protect himself from possibility of the snake-oil salesperson – the avaricious creature of commission – who trades in canards and empty promises, rather than authentic stones. A deal is struck. A bilateral contract, a promise for money in exchange for a good, based on the understanding that the item will be of impeccable quality commensurate with the expensive price demanded. Everything moves

> ahead smoothly until the ring is brought out from the merchandise storeroom. The buyer looks aghast at the alleged "diamond" before him. Instead, the vendor holds out a costume jewel, a tawdry replica of diamond, visibly green and faded around the wedding band with conspicuous flaws marring its face. The arms-length transaction has been tainted and the agreement clearly breached. With the deal turning sour, the buyer cordially excuses himself and exits the store, safe in the knowledge that another jewelry store is right down the road. He still has choices. Diamonds are ubiquitous and he may pursue other jewelers presenting a more favorable option. The benefit of the original bargain will be realized eventually.

The ordinary contract, where both parties perform simultaneously, provides the buyer tremendous latitude in accepting or rejecting the product tendered. Not so with insurance. *Insurance is different.* The standard insurance policy is an aleatory contract, meaning that one party, the policyholder, performs first by paying premiums to purchase protection from potential liability associated with a contingent risk which may or may not happen. The insurance company performs subsequently, but only if the insured event takes place.

The policyholder is stuck with *this* insurance provider dispensing an unexpected, limited version of coverage from *their* interpretation of the policy language. *Insurance is different.*[1] The purchaser of insurance is stuck with the insurance company who sold the policy. The policyholder has only two options. One, accept the now obviously hollow promise of protection being offered by the insurance company, or, two, take the unenviable plunge into coverage litigation. It becomes effectively impossible to locate an alternate supplier of insurance coverage after a potential risk comes to fruition in a verifiable claim of loss. The insurance companies are well-oiled litigation machines always ready for a scorched-earth campaign against

[1] "*Insurance is different.* Once an insured files a claim, the insurer has a strong incentive to conserve its financial resources . . ." *E.I. Du Pont de Nemours & Co. v. Pressman,* 679 A.2d 436, 447 (Del. 1996) (emphasis added).

the policyholder.[2] Using a flurry of technical exclusions and long-winded reservations of rights, language unfamiliar to the policyholder, insurance companies reduce the scope of coverage. The policyholder has not realized the benefit of the bargain from the promise with the insurance company. Basically, she has been duped. Instead of a diamond, she is now the aggrieved owner of a costume jewel -- disappointed, utterly out of options, and no hope of finding another jewelry store willing to accommodate her needs.[3] *Insurance is different.*

## II. THE QUAGMIRE WHEN THE INSURANCE COMPANY BREAKS ITS PROMISE

The above scenario is made worse when the policyholder faces a third-party liability claim and the insurance company fails to live up to its duty to defend or reimburse defense costs. Not only is the policyholder forced to go at it alone in the underlying litigation, but must now wage another legal battle on a second front against the insurance company.

The precepts of equity and fairness mandates that the policyholder can recover attorneys' fees when victorious in a coverage dispute resolved through declaratory relief no matter which party brought the action. There is a national shift towards validating the victorious

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[2] In 1997, world-wide insurance premiums totaled 2.13 trillion dollars, and that amount surely risen over the past seven years. Insurance Information Institute, The I.I.I. Fact Book 2000, v (1999). There is just no incentive for the insurance company to honor its coverage obligation right away. As explained in Pennington, *Punitive Damages for Breach of Contract: A Core Sample from the Decisions of the Last Ten Years,* 42 Ark. L. Rev. 31, 54 (1989):

> With regard to claims for small amounts of money, the insurance company has some incentive to refuse payment because little likelihood exists that claimant will pursue the claim. As for large claims, the insurance company may find it profitable to delay payment as long as possible to keep for itself the time value of the amount due.

[3] Herein lies the paradox of insurance policies that separates it from ordinary commercial contracts: After the sale the insurance company does not want its insurance policy to work. Rather, the quality of the promises in an insurance contract can be evaluated only by the insurance company's future performance. Richard E. Stewart, *The Loss of the Certainty Effect,* Risk Management and Insurance Review, Vol. 4, No, 2, 29-49 (2001).

policyholder's right to attorneys' fees. This Court's opinion in *Mighty Midgets v. Centennial Ins,* 47 N.Y.2d 12, 21 (1979), stated in non-exclusive language in examining two lower court decisions, "an insurer's responsibility to defend reaches the defense of Any actions arising out of the occurrence." The *Mighty Midgets* decision resoundingly affirmed the recovery of attorneys' fees when the policyholder is placed in a "defense posture" by the insurance company. *Mighty Midgets*, 47 N.Y.2d at 21. Most importantly, it set the stage for numerous courts across the country to rectify the inequalities between insurance company and policyholder, who is *always* in a defense posture when facing a denial of coverage, by allowing the recovery of attorneys' fees.

## ARGUMENT

In addressing the request of various environmental groups seeking attorneys' fees after successfully enjoining construction of the trans-Alaska pipeline, the United States Supreme Court determined in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975), that it could not "fashion a far-reaching exception" to the American Rule stating "the prevailing litigant is *ordinarily* not entitled to collect reasonable attorneys' fees from the loser" in litigation (emphasis added). The Court did recognize, however, that defense costs and attorneys' fees are routinely granted to the prevailing party in England pursuant to statutory authorization. *Alyeska Pipeline*, 421 U.S. at 247. Of more significance, in recognizing the broad equitable discretion of federal courts to deviate from this American Rule, Justice White proclaimed "[t]hese exceptions are unquestionably assertions of inherent power in the courts to allow attorneys' fees in particular situations" absent an explicit repudiation of such awards by Congress. *Alyeska Pipeline*, 421 U.S. at 259. It follows that without an express prohibition from the legislature, this Court is free to endorse any judicial schema which can enable a policyholder to recover

attorneys' fees when successful in a coverage action against an insurance company. The contention that such an exception to the American Rule would "potentially flood the court system with legal fee disputes in all contract cases" amounts to a shrill scare tactic.[4] In the insurance arena the *Mighty Midgets* doctrine is needed because the "disparity of bargaining power between an insurance company and its policyholder makes the insurance contract substantially different from other commercial contracts." *See Olympic Steamship Co. v. Centennial Ins. Co.*, 811 P.2d 673, 681 (Wash. 1991).[5] And the courts across the nation agree.

## III. THAT *INSURANCE IS DIFFERENT* IS SHOWN IN THE GROWING TREND TOWARDS AWARDING ATTORNEYS' FEES TO SUCCESSFUL POLICYHOLDERS

The law in many states support the award of attorneys' fees to policyholders achieving victory in an insurance coverage dispute. Many states grant attorneys' fees to policyholders regardless of which party initiates the declaratory action. Further, the procedural statutes of many states permit the courts to exercise their equitable discretion in granting attorneys' fees in any manner that results in a fair outcome for the policyholder.

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[4] *Brief of Amici Curiae Complex Insurance Claims Litigation Association* at 5. To also say that such a ruling would "give one party to an insurance contract an unfair litigation advantage" is simply preposterous considering it is well settled that the courts' discretion extends beyond merely rubber stamping the American Rule in all situations. As one court aptly noted in the property insurance context, "the fact that the general rule concerning fees works well *most* of the time does not necessarily imply that the rule works well *all* of the time. Indeed, at last count there were over fifty fee-shifting statutes in the *United States Code* alone." *Hayseeds, Inc. v. State Farm Fire & Cas.*, 352 S.E.2d 73, 78 (W. Va. 1986) (emphasis in the original).

[5] The Supreme Court of Washington added:

> Whether the insured must defend a suit filed by third parties, appear in a declaratory action, or as in this case, file a suit for damages to obtain the benefit of its insurance is irrelevant. In every case, the conduct of the insurer imposes upon the insured the cost of compelling the insurer to honor its commitment and, thus, is equally burdensome to the insured.

*Olympic Steamship*, 811 P.2d at 681. See also *Hayseeds*, 352 S.E.2d at 77

A. Case Law In Many States Supports The Award Of Attorneys' Fees To Successful Policyholders

The Supreme Court of Alaska, in interpreting Alaska Rule of Civil Procedure § 82(a)(1), found no abuse of discretion by the lower court in awarding attorneys' fees to a life policy beneficiary who succeeded in an action to recover proceeds under the policy. *Puritan Life Ins. Co. v. Guess*, 598 P.2d 900 (1979). The Court interpreted Section 82(a)(1) to "partially compensate a prevailing party for the costs and fees incurred where such compensation is justified." *Puritan Life*, 598 P.2d at 908. *See also Malvo v. J. C. Penney Co.*, 512 P.2d 575, 588 (Alaska 1973) ("[W]e recognize that where there is evidence that a losing party did not have a good faith claim or defense and all of the fees incurred by the prevailing party were justified, a judge might well choose to award the full amount of fees requested.").

In *Campbell v. Cal-Gard Surety Services, Inc.*, 62 Cal. App. 4th 563, 572 (Cal. Ct. App. 1998), a victim of auto theft prevailed against two insurance companies in bringing a bad faith action under a notification clause in the policy that was deemed unreasonable. The Appellate Court held that the trial term had erred when it denied attorneys' fees to the triumphant policyholder. *Campbell*, 62 Cal. App. 4th at 571. Quoting the California Supreme Court's early decision in *Brandt v. Superior Court*, 693 P.2d 796 (1985), the *Campbell* Court agreed that attorney fees, "reasonably incurred to compel payment of the policy benefits, 'are recoverable as an element of the damages in a bad faith action'." *Campbell*, 62 Cal. App. 4th at 571 (*quoting Brandt*, 693 P.2d at 815).

In a case decided by the Colorado Court of Appeals in *Wheeler v. Reese*, 835 P.2d 572 (Colo. Ct. App. 1992), a property owner entangled in a dispute with his real estate agent

filed a third-party complaint against his insurance company for failing to defend him in the underlying action. While remanding the matter to the trial court to determine attorneys' fees, the Court paused to discuss the resultant dilemma if the insurance company loses in a breach of contract action:

> [I]f the trial court finds that the incident resulting in liability was covered by the policy, then in addition to the expenses which the insured incurred in defending himself against the third party, the insurer also will be liable for attorney fees from the insured's action against insurer for breach of duty to defend.[6]

Florida Statute chapter 627.428(1) (1998) provides a statutory mechanism for the reimbursement of attorneys' fees to the prevailing policyholder in a coverage dispute:

> Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had.

The Florida Supreme Court in *Danis Indus. Corp. v. Ground Improvement Techniques*, 645 So. 2d 420, 421 (1994), simply stated "[u]nder the present statute, an insured or beneficiary who prevails is entitled to attorneys' fees." See also *Ivey v. Allstate Ins. Co.*, 774 So. 2d 679, 684 (Fla. 2000) ("Florida law is clear that in 'any dispute' which leads to judgment against the insurer and in favor of the insured, attorney's fees shall be awarded to the insured.").

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[6] *Wheeler*, 835 P.2d at 572. An earlier Colorado decision departed from the American Rule stating that if an insurance company fails in its contractual duty to defend the policyholder, attorneys' fees can be awarded as consequential damages. *See Hedgecock v. Stewart Title Guar. Co.*, 676 P.2d 1208 (Colo. Ct. App. 1983).

The New Jersey Court Rules, 1969 R. 4:42-9(a)(6), expressly permits the recovery of attorneys' fees and costs by the policyholder successfully enforcing its rights through an "action upon a liability or indemnity policy of insurance." Further, New Jersey allows said policyholder to recover attorneys' fees even if the insurance company's refusal to honor its obligations under its policy was made in good faith. See *Universal-Rundle Corp. v. Commercial Union Ins. Co.*, 725 A.2d 76 (N.J. Super. Ct. App. Div. 1999); *Corcoran v. Hartford Fire Ins. Co.*, 333 A.2d 293, 299 (N.J. Super. Ct. App. Div. 1975); *New Jersey Mfrs. Ins. Co. v. Consolidated Mut. Ins. Co.*, 308 A.2d 76 (N.J. Super. Ct. Law. Div. 1973).

The seminal decision in Connecticut from the Supreme Court's erstwhile form, the Supreme Court of Errors, *Connecticut Co. v. Mogillo*, 128 A.2d 528, 530 (Conn. 1957), supported the award of attorneys' fees to the successful policyholder stating "The nominal attorney's fee included in the trial court's assessment of damages against the insurance company was within the court's discretion and represented no abuse."

Applying Maryland law in a diversity suit, the U.S. District Court of Maryland in *Riviera Beach Volunteer Fire Co. v. Fidelity & Casualty Co.*, 388 F. Supp. 1114 (D.C. Md.1975), awarded attorneys' fees to a policyholder who had instituted a declaratory action against its insurance company alleging breach of the duty to defend. While the Court found that the liability insurance company had no duty to defend under the facts at issue, it posited that if such contractual breach was proven, attorneys' fees for the policyholder would have been in order:

> This duty to defend is entirely separate and distinct from, and not dependent upon, the insurer's liability to pay . . . Thus, an unjustified refusal by the insurer to properly carry out that duty constitutes a breach of contract subjecting it to liability for any damages suffered by the insured as a result thereof . . . *including any attorney's fees incurred by the insured*

> *in bringing a declaratory judgment action to establish the insurer's breach.*

*Riviera Beach*, 388 F. Supp. at 1120 (emphasis added).

The Maryland Court of Appeals has also weighed in on the issue of attorneys' fees finding that "[c]ontrary to the usual American rule that the prevailing party in litigation may not recover attorneys' fees from the losing party, an insured may recover attorneys' fees incurred due to the insurer's wrongful denial of a duty to defend." *Litz v. State Farm Fire and Cas. Co.*, 695 A.2d 566, 573 (Md. 1997).

In *Empire Fire and Marine Ins. Co. v. North Pacific Ins. Co.*, 905 P.2d 1025, 1028 (Idaho 1995), the Supreme Court of Idaho interpreted Idaho Code § 41-1839 (1998) to allow the recovery of attorneys' fees to the aggrieved policyholder, regardless of which party brought the declaratory suit. The Court stated, "[i]f it became necessary to bring an action against [the insurance company] to secure such payment, [the policyholder] would have been entitled to recover attorney fees." *Empire Fire*, 905 P.2d at 1028. In an earlier decision by Court in *Occidental Fire & Cas. Co. v. Cook*, 435 P.2d 364, 368 (Idaho 1967), the significance of the type of action initiated by the insurance company or policyholder was deemed irrelevant:

> The fact that this is a declaratory judgment action should have no effect on the award of 'reasonable expenses' to the insured. [Insurance company's] rights are being determined in this cause and he is required to defend. Appellant [Insurance] Company cannot avoid its responsibility . . . on the ground that the action is for declaratory judgment relief, when the effect upon the insured is as burdensome in its consequences as any other type of legal action.

The New York rule currently provides recovery for defendants-appellants here, but should be clarified to clearly permit recover of attorneys' fees by the policyholder regardless of who commences the action.

B. Public Interest Concerns Support Additional Judicial Protection Of Policyholder's Rights

Some of the most compelling language in favor of awarding attorneys' fees to the successful policyholder who initiated or defended against a declaratory action comes from the Supreme Judicial Court of Massachusetts in *Rubenstein v. Royal Ins. Co. of America,* 429 Mass. 355 (1999). Here, the trustees of the policyholder commenced a declaratory action against various insurance companies trying to invoke their duty to defend and indemnify the loss created from underlying environmental contamination claims. *Rubenstein*, 429 Mass. at 355. In holding that the policyholders were entitled to attorneys' fees incurred in litigating the declaratory action, the Court relied on its previous holding in *Preferred Mut. Ins. Co. v. Gamache*, 426 Mass. 93, 96-97 (1998), where it stated that precluding such a recovery would:

> [P]ermit . . . the insurer to do by indirection that which it could not do directly. That is, the insured has a contract right to have actions against him defended by the insurer, at its expense. If the insurer can force him into a declaratory judgment proceeding and, even though it loses in such action, compel him to bear the expense of such litigation, the insured is actually no better off financially than if he had never had the contract right mentioned above.[7]

The Court found "no logical reason" to delineate between policyholders achieving success in the declaratory coverage dispute "by hinging recovery on whether the [policyholder] or the [insurance company] initiated the coverage action." *Rubenstein*, 429 Mass. at 357. Resoundingly, the Court endorsed the rights of the policyholder stating that "[a]n insured is entitled to attorney's fees, regardless of which party instituted the declaratory judgment action, whenever the insured establishes that the insurer violated its duty to defend." *Rubenstein*, 429

[7] In chronicling its earlier holding, the Court interpreted *Gamache* as concluding that "such an exception to the so-called 'American Rule' was warranted in cases involving disputes between insurers and insureds." *Rubenstein*, 429 Mass. at 357.

Mass. at 358. The Court went on to account for the expectations of the policyholder buying insurance protection stating "[t]he intent of an insured in acquiring liability insurance is to transfer to the insurer the responsibility for defending the insured against any claim which may fall within the coverage of the policy." *Rubenstein*, 429 Mass. at 358. Noting the unfairness of allowing the insurance company to wrongfully deprive the policyholder of the benefit of her bargain which induced the payment of premiums by denying coverage, the Court observed that "[e]ven if the insured were eventually compensated for its defense of the third party action" through a favorable policy interpretation by the courts, "it would remain permanently uncompensated for the costs associated with the declaratory judgment action it was forced to initiate because of the insurer's violation of its duty to defend." *Rubenstein*, 429 Mass. at 358-359 (citations omitted). Hence, the policyholder was entitled to attorneys' fees in litigating the declaratory action she commenced and won.

The imbalance of bargaining power between policyholder and insurance company warrants a mechanism which protects the weaker party's interests in realizing the protection of her insurance coverage and the fruits of her paid premiums. The recovery of attorneys' fees in all circumstances to the policyholder achieving victory in a declaratory action levels the playing field. As reported in *Olympic Steamship*, 811 P.2d at 681, "an award of fees is required in any legal action where the insurer compels the insured to assume the burden of legal action, *to obtain the full benefit of his insurance contract,* regardless of whether the insurer's duty to defend is at issue" (emphasis added).

Finally, there is no merit in the assumption that a ruling by the Court in favor of the Defendant-Appellants today will open the floodgates for "plaintiffs in non-insurance contract disputes from arguing that attorneys' fees should be awarded for all breaches of all contracts."

*Brief of Amici Curiae CICLA* at 16-17. An opinion specifically tailored to insurance policies sold to policyholders by insurance companies creates no such danger.

## IV. NEW YORK LAW PROVIDES GUIDANCE TO CLARIFY THE RECOVERY OF ATTORNEYS' FEES BY POLICYHOLDERS REGARDLESS OF A BREACH OF THE DUTY TO DEFEND

The conclusory statement by *amici curiae* CICLA that "[t]he better reasoned New York cases . . . limit the exception to cases where the insurer has breached its defense obligation" avoids the root inequity between policyholder and insurance company at issue, while ignoring several key Appellate Division decisions where attorneys' fees were awarded under the court's discretion. *Brief of Amici Curiae CICLA* at 11. Assertions that "subsequent case law has clarified" the impregnability of the *Mighty Midgets* rule to a broader interpretation is spurious. *Brief of Amici Curiae CICLA* at 10.

### A. Breach Of The Duty To Defend Should Not Be Required To Recover Attorneys' Fees In Insurance Coverage Actions.

In *Public Service Mut. Co. v. Jefferson Towers, Inc.*, 586 N.Y.S.2d 799 (App. Div. 1992) (1st Dep't), the insurance company brought a declaratory action against the policyholder and moved for summary judgment on the issue of indemnity. Without mentioning whether the duty of the insurance company to defend was satisfied, the Court relied on *Mighty Midgets* stating that the policyholder was "entitled to recover attorneys' fees and costs, having been compelled by its [insurance company] 'to defend against its attempts to obtain a declaration of its right to disclaim'." *Jefferson Towers*, 586 N.Y.S.2d at 800 (*quoting Mighty Midgets, Inc. v. Centennial Ins. Co.*, 47 N.Y.2d 12, 21 (1979)).

In *Allegany Co-op Ins. Co. v. Williams*, 628 N.Y.S.2d 900 (App. Div. 1995) (4th Dep't), the insurance company brought a declaratory action arguing that "it had no obligation to

indemnify or to defend [policyholder] *further* with respect to a personal injury lawsuit filed against her by defendant." *Williams*, 628 N.Y.S. at 900.[8] The Court found the award of costs and attorneys' fees to the policyholder proper in relation to the "defensive posture" she was put into by the insurance company. *Williams*, 628 N.Y.S.2d at 900.

Further, in *U.S. Liability Ins. Co. v. Staten Island Hospital*, 556 N.Y.S.2d 153 (App. Div. 1990) (2nd Dep't), the hospital's liability insurance company accepted its duty to defend under a "nonwaiver agreement" against a claim filed by a plaintiff injured on her way into the facility. *Staten Island Hospital*, 556 N.Y.S.2d at 154. Thirteen months later, after learning that the injured party could be considered a "patient" under the policy's exclusionary language, the insurance company commenced an action against the policyholder-hospital seeking a ruling that it had no continuing obligation to defend or indemnify. *Staten Island Hospital*, 556 N.Y.S.2d at 154. The Court held, as a matter of law, that the insurance company's delay in disclaiming coverage was unreasonable and precluded a denial of its duty to defend. *Staten Island Hospital*, 556 N.Y.S.2d at 155. Turning to the matter of attorneys' fees in the declaratory action, the Appellate Division awarded attorneys' fees to the successful policyholder under the *Mighty Midgets* rule, recognizing that the insurance company had commenced the action "seeking to free itself from its policy obligations." *Staten Island Hospital*, 556 N.Y.S.2d at 155.

Finally, in *U.S. Underwriters Ins. Co. v. Mesiftah Eitz Chaim of Bobov*, 620 N.Y.S.2d 5 (App. Div. 1994) (2nd Dep't), an insurance company which at first attempted to avoid its duty to defend, subsequently withdrew from the declaratory action and settled the underlying claim on behalf of the policyholder, acquiescing to full coverage under the policy. *Mesiftah*, 620

[8] Though the facts are not recited in the decision, apparently the insurance company had initially taken the reigns on the policyholder's defense, but subsequently attempted to disclaim coverage nine months later, a delay which the court found "unreasonable as a matter of law." *Williams*, 628 N.Y.S.2d at 900.

N.Y.S.2d at 5. The Court upheld the award of attorneys' fees to the policyholder in defending against the truncated declaratory action stating:

> The [insurance company] does not dispute that it was required to defend and indemnify the respondent in the underlying action. Because the [policyholder] *was cast in a defensive position as the result of the [insurance company's] attempt to free itself from the obligations of its policy*, the Supreme Court properly concluded that the [policyholder] is entitled to an award of reasonable costs and attorney's fees incurred in defending this declaratory judgment action.

*Mesiftah*, 620 N.Y.S.2d at 218 (*citing Mighty Midgets*, 47 N.Y.2d 12 (1979).

Intermediate appellate authority supports a broad grant of attorneys fees to policyholders successful in coverage actions.

B. Insurance Companies And Their Surrogates Are Motivated By Profit And Self-Interest In Attempting To Manipulate New York Law

The Defendants-Appellant's brief recites the many state decisions outside New York which correctly state that the policyholder may receive attorneys' fees from the insurance company in a declaratory action even in instances where the duty to defend has been satisfied. *Brief for Defendant-Appellants* at 12-17. The *Brief of Amici Curiae CICLA* makes a tremendous misstatement on page 12, overlooking the policyholder's expectation when buying an insurance policy:

> However, where . . . the insurer provides a defense to its insured, the insured does not have to hire counsel or make settlement decisions regarding the underlying suit. Rather, the *only expense* of the insured are in defending or prosecuting the declaratory judgment action . . . Consequently, the rationale for New York's prior exception to the American Rule is not present, and, in this situation, there is nothing to distinguish the insured from other litigants in contract disputes. (emphasis added).

The policyholder buys the promise of protection. Instead of protection from lawsuits the policyholder has signed on to an additional shadow litigation below the surface of the claim.

The recovery of attorneys' fees should not be conditioned upon whether the insurance company has cast the policyholder into a defensive posture using blunt antagonism with an immediate denial of coverage or through the "kill them with kindness" approach.

C. CICLA Hides Its True Colors

The interest of *amicus curiae* CICLA in this appeal is not fully disclosed. CICLA, formerly known as the Insurance Environmental Litigation Association ("IELA"), is an association of insurance companies. The one and only purpose of CICLA is to provide litigation support to insurance companies engaged in disputes regarding insurance coverage for claims against their policyholders. While CICLA has filed *amicus curiae* briefs in over 500 cases throughout the country, it has not identified one single case in which CICLA sought to appear on behalf of a party other than an insurance company. Clearly, CICLA is not a true "friend of the court," but rather a friend of the insurance companies.[9]

Furthermore, CICLA claims to be a "trade association." Yet, it has not specified any informational or normal trade association roles, i.e. "interchange of ideas and statistics" and "maintenance of industry standards" within a particular industry, that qualify it to perform this function. *See* Black's Law Dictionary 119 (7th Ed. 1999). Thus, the "special expertise" of CICLA is that solely of a litigant on behalf of its insurance company membership that seeks to avoid paying under insurance policies.

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[9] The United States District Court for the Western District of Washington ruled in *Time Oil Co. v. Cigna Property & Cas. Ins. Co.*, No. C88-1235R, 1990 WL 515585, at *1 (W.D. Wash. April 2, 1990):

> Having reviewed the IELA's [CICLA's predecessor's] memorandum, the court concludes that the IELA is not appearing as a friend of the court, rather, as their title suggests, the association is a 'friend of defendants.' Therefore, the court will not permit the IELA to appear as an *amicus* curiae in this action.

CICLA's Brief is a misleading attempt by the insurance industry to eradicate any and paths available to the policyholder to vindicate her rights . CICLA, which comes before this Court touting its "extensive experience with the application of liability insurance contracts," fails to inform this Court that its sole purpose as an organization is to lay the foundation for a judicial and legislative climate which will maximize insurance company profits. For this reason, this Court should not give any weight to the arguments presented in CICLA's Brief.

## CONCLUSION

For the foregoing reasons, *amicus curiae* United Policyholders respectfully submits that the Court, in its answers to the questions of state law certified by the United States Court of Appeals for the Second Circuit, should accept the arguments of Defendants-Appellants.

November 10, 2004

Respectfully submitted,

By: _____

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