IN THE
INDIANA SUPREME COURT
Cause No. ______________

WELLPOINT, INC. (f/k/a ANTHEM, INC.) and	)	Court of Appeals
ANTHEM INSURANCE COMPANIES, INC.,	)	Cause No. 49A05-1202-PL-92
	)	(Consol. w/ 49A05-1202-PL-439)
Appellants-Plaintiffs,	)	
	)	
v.	)	Appeal from the Marion Superior Ct.
	)	
NATIONAL UNION FIRE INSURANCE	)	
COMPANY, et al.,	)	Trial Ct. Cause No. 49D10-0507-
	)	PL-26425
Appellees-Defendants.	)	The Hon. David Dreyer

BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF WELLPOINT, INC. AND ANTHEM INSURANCE COMPANIES, INC.'S PETITION TO TRANSFER

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I. Statement of Interest of *Amicus Curiae*

United Policyholders, ("UP") is a non-profit 501(c) (3) organization founded in California in 1991 that is a voice and an information resource for insurance consumers throughout the United States. The organization advances the interests of individual and commercial policyholders with regard to every type of insurance product with a focus on fair claim practices. Grants, donations and volunteers support our work. UP does not accept funding from insurance companies.

UP's work is divided into three program areas: *Roadmap to Recovery*™ (disaster recovery and claim help), *Roadmap to Preparedness* (insurance and financial literacy and disaster preparedness), and *Advocacy and Action* (advancing pro-consumer laws and public policy). UP hosts a library of tips, sample forms and articles on commercial and personal lines insurance products, coverage and the claims process at www.uphelp.org.

State insurance regulators, academics and journalists throughout the U.S. routinely seek United Policyholders' input on insurance and legal matters. We have been appointed for six consecutive years as an official consumer representative to the National Association of Insurance Commissioners. UP works with insurance regulators, including the Indiana Department of Insurance, on matters that impact insureds.

UP seeks to assist courts as *amicus curiae* in appellate proceedings throughout the United States. Earlier this year UP appeared as *amicus curiae* in the Indiana Court of

Appeals, Case No. 49A04-1302-PL-00084, Commonwealth Land Title Insurance Company Appellant (Petitioner Below), Stephen W. Robertson, Insurance Commissioner of the State of Indiana, in his official capacity only and not in his individual capacity, on behalf of the Indiana Department of Insurance. A complete listing of all cases we've weighed in on can be found in our online Amicus Project library.

UP submits this brief in support of WellPoint, Inc.'s ("WellPoint") Petition for Transfer because the majority opinion of the appellate court has a damaging impact on errors and omissions ("E&O") policyholders throughout the state of Indiana and the United States. Although the memorandum decision was designated as not-for-publication under Indiana Appellate Rule 65(D), the decision is and will continue to be referenced by insurers and their advocates to restrict coverage under E&O policies.

II. Argument

The majority panel decision of the Court of Appeals ("Majority Decision") was wrongly decided and damages the interests of all E&O policyholders in Indiana for four reasons. First, the Majority Decision construed the insuring clause of the coverage section at issue in a manner that overly restricts coverage and is not supported by the language of the insuring clause itself. Second, the Majority Decision broadly forecloses coverage for claims involving professional services, because plaintiffs pled civil claims under the Racketeer Influence and Corrupt Organizations Act ("RICO"). Third, the

Majority Decision is shaped by a misstatement of Indiana law suggesting that E&O coverage is never available for acts that are alleged to be intentional, even if such intentional acts are not excluded from coverage. Fourth, the Majority Decision upholds summary judgment denying a claim for indemnity without considering the full record. Each of these issues represents a bruising blow to the rights of E&O policyholders as discussed below.

A. The Majority Decision Improperly Restricts the Scope of the Insuring Clause

The Insuring Agreement at issue states: "This Policy shall pay the Loss of the Insured resulting from any Claim...for any Wrongful Act of the Insured...but only if such Wrongful Act occurs solely in the rendering of or failure to render Professional Services." Under Indiana law, insuring agreements in a policy must be broadly interpreted. *Beatty v. Liberty Mut. Ins. Group*, 893 N.E.2d 1079, 1083 (Ind. Ct. App. 2008). Contrary to this principle, the Majority Decision interprets the insuring provision in the WellPoint policy exceedingly narrowly and in a manner which is inconsistent with the language of the provision.

The Wrongful Acts that were alleged in the multiple underlying lawsuits that were submitted for coverage fall within the broad coverage of the insuring agreement of

the policy.[1] The plaintiffs in the class action suits in Florida alleged that WellPoint's predecessor, Anthem, Inc. ("Anthem") conspired or aided and abetted a conspiracy to "systematically deny, delay and diminish" payments to healthcare providers. These plaintiffs also asserted that Anthem's automated claims programs were used to manipulate the standard codes on its claim forms to inappropriately "bundle" and "downcode" the services provided, while refusing to recognize "modifiers" which indicated the complexity of those services. In the two other class actions, plaintiffs alleged that Anthem's Connecticut affiliate bundled and down-coded claims to systematically deny, delay and reduce payments to doctors and engaged in other allegedly unfair practices in handling and adjusting claims for medical services. In these cases, however, plaintiffs did not allege any conspiracy between Anthem and other managed care providers.

The Majority Decision wrongly concludes that the "gravamen of the claims against Wellpoint was ... allegations Wellpoint participated in a common scheme to systematically deny, delay, and diminish the payments due to doctors.... and such unlawful agreements and conspiracies are not professional services in the form of claims handling activities." Op. at 11. Contrary to the Majority Decision, the gravamen of the claims against WellPoint was the allegations that WellPoint itself systematically

[1] The lawsuits submitted for coverage are: 1) *Shane v. Humana, Inc., et al.*, MDL No. 1334 (S.D. Fla.); 2) *Thomas v. Blue Cross and Blue Shield Ass'n, et al.*, No. 03-21296 (S.D. Fla.); 3) *Levinson v. Anthem Health Plans, Inc.*, No. 01-cv-426 (New Haven Sup. Ct.); 4) *Connecticut State Medical Society v. Anthem Health Plans, Inc.*, No. 01-cv-428 (New Haven Sup Ct.).

denied, delayed and diminished payments due to doctors. Moreover, two of the four underlying suits at issue did not even allege any agreement or conspiracy.

The allegations that WellPoint wrongfully denied, delayed and diminished payments to healthcare providers unquestionably go to the heart of the Professional Services WellPoint provides as a managed care organization. The policy's definition of Professional Services includes "claims handling and adjusting" services. The allegations of an unlawful conspiracy and scheme in two of the class actions were also focused on these same claims handling activities. To hold that no coverage is available under the policy for these types of claims simply because plaintiffs in two cases alleged that there was a conspiracy among managed care organizations, a claim that was ultimately dismissed by the court, is to eviscerate the coverage provided under the policy. And the reasoning of the majority in the Memorandum Decision leading to that result threatens the interests of all E&O policyholders.

Contrary to the Majority's Decision, courts around the country have held that E&O policies provide coverage where a conspiracy or collusive scheme is alleged that is tied to the professional services covered under the policy. *Executive Risk Indem., Inc. v. CIGNA Corp.*, 976 A.2d 1170, 1174 (Pa. Super. Ct. 2009); *PMI Mortgage Ins. Co. v. American Int'l Specialty Lines Ins. Co.*, 394 F.3d 761, 766-68 (9th Cir. 2005) (collusive kickback scheme within coverage for "professional services"); *Jefferson-Pilot Fire & Cas.*

Co. v. Boothe, Prichard & Dudley, 638 F.2d 670, 674 (4th Cir. 1980) (conspiracy claim covered under lawyer's professional liability policy).

Even if the majority were correct that the conspiracy allegations in the *Shane* and *Thomas* class actions are not covered, the majority incorrectly construes the Insuring Agreement to require that all Wrongful Acts alleged in a complaint must occur solely in rendering or failing to render a Professional Service. The Insuring Agreement does not say this. Instead, it says that the insurer will pay Loss "resulting from any Claim…for any Wrongful Act of the Insured…but only if such Wrongful Act occurs solely in the rendering of or failure to render Professional Services." This language broadly indicates that so long as there is a Claim that includes any Wrongful Act that occurs solely in rendering or failing to render Professional Services the Claim is covered. Interpreting the use of the word "solely" in a similar context, the U.S. Court of Appeals for the Eighth Circuit rejected "the conclusion that the presence of uncovered claims obviates an insurer's duty to indemnify its insured with respect to covered claims." *McAninch v. Wintermute*, 491 F.3d 759, 769-72 (8th Cir. 2007).

The Majority Decision is contrary to both the plain language of the Insuring Clause and the well-established principle that the courts will not rewrite insurance policies. *Vann v. United Farm Family Mut. Ins. Co.*, 790 N.E.2d 497, 502 (Ind. Ct. App. 2003). The Majority Decision effectively rewrites the Insuring Agreement to add the word "solely" where it doesn't appear – *i.e.*, to state that the Policy will "pay the Loss of

the Insured resulting from any Claim...*that is solely* for any Wrongful Act of the Insured...*that* occurs solely in the rendering of or failure to render Professional Services." This type of judicial redrafting to drastically restrict coverage undermines the reasonable expectations of all insureds under professional liability policies. It is not permitted under Indiana law. *Keckler v. Meridian Security Ins. Co.*, 967 N.E.2d 18, 28 (Ind. Ct. App. 2012).

B. The Majority Decision Wrongly Forecloses Coverage for Civil RICO Allegations.

The Majority Decision also is flawed because it effectively forecloses coverage for civil RICO and other claims merely alleging conspiracy under professional liability policies, notwithstanding the absence of a RICO or conspiracy exclusion. Coverage for RICO claims is extremely important to many businesses, professionals and other organizations. The courts have long recognized that "civil RICO plaintiffs persist in trying to fit a square peg into a round hole by squeezing garden-variety business disputes into civil RICO actions" because of the lure of treble damages and an award of attorneys' fees. *Carr v. Tillery*, 591 F.3d 909, 918 (7th Cir. 2010) (quotations omitted). Quoting, in part, former Chief Justice Rehnquist of the U.S. Supreme Court, the U.S. Court of Appeals for the Third Circuit has observed:

> RICO's treble damage provision has been seized upon to convert the statute into a hodgepodge of prohibitions that now function as a tripwire that offers the lure of treble recovery to all who can squeeze their claim into some combination of RICO's "predicate acts." The civil penalties in RICO have thus been transformed into a fulcrum that is used to pry treble

> damages out of causes of action originating in "divorce, trespass, legal and accounting malpractice, inheritance among family members, employment benefits and sexual harassment by a union."

DelRio–Mocci v. Connolly Properties Inc., 672 F.3d 241, 254 (3d Cir. 2012).

Given these propensities for plaintiffs to try to bring all kinds of claims as civil RICO claims, the risk of such claims and the importance of insurance coverage for them are apparent. If an insurer intends that civil RICO or similar claims alleging conspiracy be excluded from errors and omissions coverage, an explicit exclusion for those claims ought to be incorporated into the policy. The E&O policyholder has a right to be explicitly advised of this substantial restriction on its coverage.

The Majority Decision, however, ignores the absence of any explicit exclusion for RICO or conspiracy in the policy in question. Instead, the majority concludes that if plaintiffs merely allege that wrongful acts in providing professional services were carried out pursuant to a conspiracy, no coverage is available under E&O policies. This holding runs directly contrary to the law in Indiana (and elsewhere) requiring "exclusions, exceptions, and limitations must be plainly expressed in the policy and the exclusionary clause must bring within its scope the particular act or omission that will bring the exclusion into play." *Hoosier Ins. Co. v. Audiology Found. of Am.*, 745 N.E.2d 300, 309 (Ind. Ct. App. 2001). "Any doubts as to the coverage under the policy will be construed against the insurer in order to further the policy's basic purpose of indemnity." *Id.*

The failure to apply these fundamental principles in the Majority Decision creates a substantial risk for E&O policyholders in Indiana. As noted in the Majority Decision, the allegations supporting plaintiffs' RICO conspiracies in the underlying litigation included "Wellpoint's involvement in trade associations that develop industry standards and industry groups that disseminate unified information." Op. at 11. Many businesses, not-for-profit organizations, charities and religious organizations participate in the same and similar types of associations and groups. That such participation might provide alluring grounds for plaintiffs to attempt to turn disputes about their receipt of professional services into claims for alleged RICO violations or similar causes of action is a risk that is unavoidable. But, the E&O coverage of such participants should not be imperiled based on the creative lawyering of plaintiffs' counsel. Yet that is the implication and inevitable result of the Majority Decision.

Moreover, the Majority Decision is in conflict with decisions throughout the country which have upheld coverage under E&O policies for RICO and other claims based on alleged conspiracies. *See, e.g., CIGNA Corp.*, 976 A.2d at 1173-75 (RICO claims in *Shane* covered under managed care policy); *Truck Ins. Exch. v. PacifiCare Health Sys., Inc.*, 2005 WL 715976 at *2, 4-6 (Cal. Ct. App. Mar. 30, 2005) (RICO claims in *Shane* covered under hospital professional liability policy). At a minimum, the Majority Decision puts Indiana E&O policyholders at a significant disadvantage as compared to policyholders in these other jurisdictions.

C. A Broad Proscription against Coverage for Alleged Intentional Acts Unfairly Prejudices Policyholders.

The Majority Decision adopts a broad prohibition of coverage for alleged intentional acts even when there is no express exclusion for intentional conduct in the policy. Op. at 3, f.n. 3. Under the Majority Decision, the prohibition is applied even when such conduct is only alleged, never proven. Such a sweeping judicial restriction on E&O coverage is contrary to Indiana law, is not justified by public policy concerns, and is injurious to Indiana policyholders.

The Majority Decision is in conflict with a consistent line of Indiana appellate decisions that have rejected insurer efforts to broadly prohibit coverage for intentional acts solely on public policy grounds. *See, e.g., Liberty Mut. Ins. Co. v. OSI Indus., Inc.*, 831 N.E.2d 192, 204 (Ind. Ct. App. 2005); *Collins v. Covenant Mut. Ins. Co.*, 604 N.E.2d 1190, 1197 (Ind. Ct. App. 1992), *vacated on jurisdictional grounds*, 644 N.E.2d 116 (Ind. 1994); *Dillon v. Callaway*, 609 N.E.2d 424, 428 (Ind. Ct. App. 1993).

In addition, the assertion in the Majority Decision that a prohibition on coverage for intentional acts can be imposed on an insured even when it is not found in a policy is contrary to fundamental principles of Indiana law. There is a very strong presumption in favor of contracts being enforceable as written. *Fresh Cut, Inc. v. Fazli*, 650 N.E.2d 1126, 1129-30 (Ind. 1995). Coverage can be avoided on public policy grounds only when that coverage is prohibited based on a public policy articulated in the Indiana constitution, in its statutes, by its administrative officers or by decisions

from the Indiana Supreme Court. *Prudential Ins. Co. of Am. v. Rice*, 52 N.E.2d 624, 626-27 (Ind. 1944); *Keckler*, 967 N.E.2d at 26. In *Rice*, the Indiana Supreme rejected the insurer's argument that disability coverage for an insured blinded in a suicide attempt should be prohibited based on public policy. This Court reasoned that the absence of an exclusion for this conduct demonstrated that the insurer did not intend to place any limitation or restrictions on the coverage for blindness and that the court's imposition of a restriction of coverage by "judicial construction" would place the policyholder "in the position of paying for protection which would never be available." 52 N.E.2d at 627.

Similarly, in the recent Indiana Appellate decision in *Keckler*, the court rejected an insurer's argument that coverage should be excluded under an automobile policy for injury arising out of the commission of crime based on public policy. 967 N.E.2d at 28-29. The court observed that the insurer could not direct the court to a single Indiana case in which a court "read a 'public policy' exclusion into an insurance policy" and that to do so would be a "radical departure from Indiana law." *Id.* at 26, 28.

Accordingly, the implication in the Majority Decision that an E&O policy does not provide coverage for intentional acts, even when there is no intentional acts exclusion in the policy, represents a radical departure from Indiana law. Reading such an exclusion into the Policy undermines the confidence of policyholders, who as the Supreme Court noted in *Rice* "are concerned above all else, that the protection which they purchase shall be certain." 52 N.E.2d at 627.

D. The Majority Decision Was Based Solely on the Underlying Complaints and Failed to Consider Key Evidence Presented by the Policyholder.

In establishing it right to indemnity under an insurance policy, a policyholder must be able to present evidence from the underlying litigation, as well as evidence to resolve any uncertainty as to the intent of the Policy that is not resolved in favor of coverage. Indiana courts have recognized the right of policyholders to submit evidence outside the complaint to establish a duty to defend. *See Auto–Owners Ins. Co. v. Harvey*, 842 N.E.2d 1279, 1291 (Ind. 2006); *Indiana Farmers Mut. Ins. Co. v. North Vernon Drop Forge, Inc.*, 917 N.E.2d 1258, 1269 (Ind. Ct. App. 2009). It is all the more evident that evidence developed in the underlying litigation and other evidence extrinsic to the complaint must be considered in determining a policyholder's right to indemnity "which cannot be assessed until the litigation has concluded." *North Vernon*, 917 N.E.2d at 1276.

The Majority Decision, however, is based solely on its flawed construction of the Insuring Agreement in the Policy and the allegations in the underlying complaints, which the majority appears to have assumed to be true. This approach is erroneous. In assessing indemnity under an insurance policy, a court cannot assume that the allegations of the underlying complaint are true, but rather must consider evidence from the concluded litigation. *Caterpillar, Inc. v. Great Am. Ins. Co.*, 62 F.3d 955, 964 (7th Cir. 1995). It is critical to policyholders to have the court consider evidence from the resolved underlying litigation in addressing coverage questions. Otherwise, the

policyholder's coverage "hinge[s] on the draftsmanship skill or whims of the plaintiffs in the underlying action." *American Econ. Ins. Co. v. Holabird & Root*, 886 N.E.2d 1166, 1171 (Ill. App. Ct. 2008) (allowing evidence extrinsic to complaint to be considered in determining duty to defend).

The evidence that a policyholder must be allowed to submit in the context of a claim for indemnity include determinations that were reached by the underlying court and the state of the factual record at the time of a settlement and statements or admissions from plaintiffs obtained through discovery. In addition, information regarding inconsistent positions taken by an insurer on similar claims, the interpretation of policy provisions by a primary insurer, and the coverage positions taken by underlying insurers may all be relevant in reaching a determination regarding an insurer's duty to indemnify. The implication of the Majority Decision that a determination of an insurer's duty to indemnify can be made without considering all of these factors is erroneous. The failure to require a court to consider the full record in reaching a determination on an insurer's duty to indemnify will undermine the confidence of policyholders generally that their reasonable expectations in purchasing E&O coverage or other professional liability insurance will be satisfied when claims are made implicating their professional services.

III. Conclusion

For the foregoing reasons, *Amicus Curiae* United Policyholders respectfully requests this Court grant the petition to transfer and reverse the majority opinion of the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF WELLPOINT, INC. AND ANTHEM INSURANCE COMPANIES, INC.'S PETITION TO TRANSFER has been served upon the following counsel of record:

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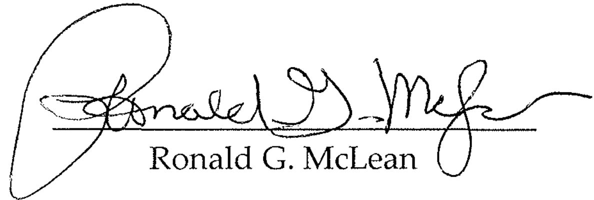

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