APL-2014-00133

COURT OF APPEALS

STATE OF NEW YORK

UNIVERSAL AMERICAN FINANCIAL CORP.,

Plaintiff-Appellant,

-against-

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.,

Defendant-Respondent.

New York County Index No.: 650613/2010
First Department Docket No.: 2013-10648

BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF THE PLAINTIFF-APPELLANT UNIVERSAL AMERICAN FINANCIAL CORP.

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Dated: October 29, 2014

DISCLOSURE STATEMENT OF UNITED POLICYHOLDERS PURSUANT TO 22 N.Y.C.R.R. 500.1(f)

Pursuant to Rule § 500.1(f) of the Rules of Practice of the Court of Appeals, United Policyholders advises the Court that it is a non-profit 501(c)(3) consumer organization and that it does not have a parent corporation, subsidiary, or corporate affiliate.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

STATEMENT OF INTEREST OF *AMICUS CURIAE*

United Policyholders ("UP") is a non-profit 501(c)(3) organization founded in 1991 based in San Francisco, California that is an information resource and a voice for insurance consumers in New York and throughout the United States. The organization assists and informs disaster victims and individual and commercial policyholders with regard to every type of insurance product. Grants, donations and volunteers support its 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 (disaster preparedness through insurance education), and Advocacy and Action (advancing pro-consumer laws and public policy through legislative advocacy and Amicus Curiae briefs). UP hosts a library of informational publications and videos related to personal and commercial insurance products, coverage and the claims process at www.uphelp.org.

UP has been active in New York and most recently through efforts to provide assistance since Superstorm Sandy caused extensive damage for residential and commercial property owners. It works with the New York Department of Financial Services, including Superintendent Benjamin M. Lawsky, and other non-profits and individual home and business owners in the resolution of insurance-

related issues. UP is involved in projects related to property insurance availability, post-disaster mediation programs, flood insurance reform, and work in partnership with *pro bono* legal services providers such as the Disaster Relief Clinic at the Touro Law Center on Long Island.

State insurance regulators, academics and journalists throughout the U.S. routinely seek UP's input on insurance and legal matters. UP's Executive Director has been appointed for six consecutive years as an official consumer representative to the National Association of Insurance Commissioners. In addition, UP assists courts as *amicus curiae* in appellate proceedings throughout the United States, including the U.S. Supreme Court. *See, e.g., Humana Inc. v. Forsyth*, 525 U.S. 299 (1999). UP has appeared as *amicus curiae* in many cases in New York. *See, e.g., Bi-Economy Mkt, Inc. v. Harleysville Ins. Co. of N.Y., 10 N.Y.3d 187, 866 N.E.2d 127, 856 N.Y.S.2d 505 (2008).*

PRELIMINARY STATEMENT

UP respectfully submits this brief in support of the arguments made by Plaintiff-Appellant Universal American Financial Corp. ("Universal American") set forth in its brief to this Court, dated August 21, 2014. United Policyholders seeks to fulfill the role of *amicus curiae* by supplementing the efforts of Plaintiff-Appellant's counsel in a case of general public interest.

In the case at bar, Defendant–Respondent National Union Fire Insurance Company of Pittsburgh, Pa. ("National Union") denied coverage under a crime loss insurance policy with a Computer Systems Fraud rider for significant losses Universal American sustained by paying bogus Medicare claims fraudulently entered into Universal American's computer systems. National Union's purported ground for denial, supported by nothing more than National Union's say-so, yet, adopted by the courts below, is that the rider was intended to apply only to "hacking" incidents. As set forth below, UP respectfully submits that denial for this reason violates both the rules designed to protect policyholders and a policyholder's reasonable expectations, and is also undermined by the plain reading of the policy. UP asserts that the lower courts committed reversible error as there is nothing in the plain language of the insurance policy that restricts insurance coverage in the manner advanced by National Union and so ruled by the lower courts.

QUESTIONS PRESENTED FOR REVIEW

UP adopts the Questions Presented for Review as set forth in Universal American's brief, filed August 21, 2014, at pp. 3-4.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

UP adopts the Statement of the Case and Statement of Facts of Universal American, as set forth in its brief submitted to this Court. *See Appellant's Brief*, filed August 21, 2014, at pp. 7-16.

ARGUMENT

I. IT IS CRITICALLY IMPORTANT THAT NEW YORK'S COURTS PROVIDE POLICYHOLDERS WITH RELIEF FOR IMPROPER DENIALS OF INSURANCE COVERAGE

In its briefing before this Court as well as the courts below, Universal American has persuasively set forth the law and circumstances demonstrating why its insurance claim is covered under the National Union crime insurance policy. Those arguments and facts will not be repeated here, other than where necessary to underscore certain points made below. Here, UP addresses how vitally important it is to correct National Union's and the lower courts' misinterpretation of the insurance policy.

As a general matter, individual and commercial policyholders alike rely heavily upon the pre-claim assurances of insurance protection from their insurance companies. Policyholders are counting on their insurance companies to

handle claims fairly and skip unduly restrictive readings of insurance clauses that have the effect of nullifying the insurance protection for which the policyholder paid. It is axiomatic that the purchase of an insurance policy is supposed to provide protection when calamity strikes—not simply an opportunity to spend enormous amounts of money in court for several years to wrangle with insurance companies over a hyper-technical reading of "the fine print" and unwritten insurance policy exclusions. The law, when correctly applied, provides policyholders relief from such tactics. UP respectfully submits that the lower courts failed to take into account the below considerations when presiding over the issues in this case.

First, because of both the unique and critical position insurance assumes in commerce and society generally, insurance policies are subject to special rules. These rules are largely designed to protect consumers of insurance—especially due to the fact that in all but the rarest of cases, the insurance company drafts almost exclusively the terms of the insurance policy and offers such coverage on a "take it or leave it" basis. "Insurance contracts are usually contracts of adhesion in that their terms are generally dictated rather than negotiated." *American Home Prods. Corp. v. Liberty Mut. Ins. Co.*, 565 F. Supp. 1485, 1492 (S.D.N.Y. 1983), *aff'd*, 748 F.2d 760 (2d Cir. 1984).

Second, over many years, New York law has adopted some, *but not all,* of these special rules for the protection of policyholders. For example, in 2008, New York enacted legislation to bar insurance companies from pursuing *per se* forfeitures of insurance coverage under specific lines of insurance coverage where notice of the claim was deemed "late".[1] Also in 2008, this Court held that insurance companies which deny coverage improperly are in fact liable for consequential damages. *Bi-Economy,* 10 N.Y.3d 187, 866 N.E.2d 127, 856 N.Y.S.2d 505 (2008).

Third, regarding Appellant's insurance claim here, this dispute need not have even reached this stage had National Union and the courts below properly applied the binding insurance coverage doctrines established under New York law. Contrary to the rulings from the courts below, established New York law (as set forth in the next section) necessitates a finding of insurance coverage in favor of Appellant.

The danger in not correcting the lower court's decision here is that it will be used against other policyholders who suffer further computer fraud losses to argue an unduly restrictive interpretation as grounds to deny insurance coverage. In fact, the undersigned knows first-hand that an insurance company that is not one

[1] This was accomplished through amendment of Section 3420 of the New York Insurance Law.

of the AIG companies (National Union is part of the AIG insurance group) is using the underlying decision in this case to deny coverage to a New York-based policyholder for a computer loss under a crime policy. Accordingly, the importance cannot be overstated of reversing the improperly narrow interpretations of insurance coverage made by the lower courts.

II. NEW YORK LAW, PROPERLY APPLIED, REQUIRES A FINDING OF INSURANCE COVERAGE FOR APPELLANT'S CRIME LOSS

Under New York law, coverage grants are to be construed broadly; exclusions narrowly. *See Miller v. Cont'l Ins. Co.*, 40 N.Y.2d 675, 678, 358 N.E.2d 258, 260, 389 N.Y.S.2d 565, 567 (1976) (noting that New York follows the "hornbook rule that policies of insurance . . . are to be liberally construed in favor of the insured").[2] Here, National Union and the courts below applied an erroneous and narrow construction to the Computer Systems Fraud coverage grant. The courts below confined coverage to "hacking" events when any plain reading of the policy terms evinces that the coverage provided is considerably broader than that.

Specifically, the Computer Systems Fraud coverage grant indicates that "In this Insuring Agreement, fraudulent entry or change shall include such

[2] Any such exclusions or exceptions from policy coverage must be specific and clear in order to be enforced. They "are not to be extended by interpretation or implication, but are to be accorded a strict and narrow construction." *Seaboard Sur. Co. v. Gillette Co.*, 64 N.Y.2d 304, 311, 476 N.E.2d 272, 275, 486 N.Y.S.2d 873, 876 (1984) (citations omitted). Further, it is the insurance company's burden to show that the exclusion applies to the particular case at hand. *Id.*

entry or change made by an Employee of the Insured acting in good faith on an instruction from a software contractor who has a written agreement with the Insured to design, implement or service programs for a Computer System covered by this Insuring Agreement." Rider #3, ¶ 1. "Schedule of Systems" (emphasis added). By its very terms, "fraudulent entry" cannot mean only an entry by a hacker if it includes "entry" by an "Employee acting in good faith". An "entry" by an "Employee acting in good faith" is the antithesis of what would commonly be understood as a computer hacker. No one would ever reasonably argue that an employee who uses a company computer system while acting in good faith is a "hacker."

Furthermore, this narrow reading of the coverage grant is at odds with the recognized intent of the insurance coverage in the insurance industry. Specifically, as set forth in the International Risk Management Institutes' (a/k/a IRMI) materials, "Computer Systems Fraud" insurance "Covers loss resulting from fraudulent input or alteration of electronic data or computer programs within the insured's computer system by a nonemployee." See IRMI Risk & Insurance, "Computer Sytems Fraud", http://www.irmi.com/online/cpi/ch012/1/12s000.aspx?cmd=print. IRMI, a well-

respected insurance educational organization and information resource[3] with no interest in this dispute interprets "fraudulent entry" to mean "fraudulent input".[4]

National Union's own insurance policy terms as well as the IRMI materials set forth above demonstrate the unduly restrictive construction that National Union and the courts below erroneously applied to Appellant's insuring clause. Under New York law, this is fatal to National Union's position on appeal before this Court. If an insurance policy is written in such language as to be doubtful or uncertain in its meaning, all ambiguity must be resolved in favor of the policyholder and against the insurance company as drafter of the policy language. *Mostow v. State Farm Ins. Cos.*, 88 N.Y.2d 321, 326, 668 N.E.2d 392, 394, 645 N.Y.S.2d 421, 423 (1996); *In re Ancillary Receivership of Reliance Ins. Co.*, 55 A.D.3d 43, 46, 863 N.Y.S.2d 415, 418 (1st Dep't 2008), *aff'd*, 12 N.Y.3d 725, 904 N.E.2d 495, 876 N.Y.S.2d 341 (2009); *In re New York Cent. Mut. Fire Ins. Co. v. Ward*, 38 A.D.3d 898, 833 N.Y.S.2d 182 (2d Dep't 2007).

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[3] IRMI's glossary has been cited as reliable authority in many judicial opinions. *See, e.g., Curran v. United of Omaha Life Ins. Co.*, CASE NO. 12CV1935 JLS (BLM), 2014 U.S. Dist. LEXIS 115882, *13-*14 (S.D. Cal. July 15, 2014); *Custom Cos. v. N. River Ins. Co.*, No. 11 C 8367, 2013 U.S. Dist. LEXIS 15238, *13, n. 3 (N.D. Ill. Feb. 5, 2013).

[4] Compare http://www.irmi.com/online/cpi/ch012/1/12s000/al016820.aspx?cmd=print ("It covers loss resulting from a fraudulent entry....") with http://www.irmi.com/online/cpi/ch012/1/12s000.aspx?cmd=print and http://www.irmi.com/online/cpi/ch012/1/12u000/al016950/bl016980.aspx?cmd=print ("Covers loss resulting from fraudulent input....").

National Union's attempt to recast the computer fraud policy into merely a "hacker's policy" is unsupported by the terms of the policy it drafted. The language of the Policy is simply devoid of any language that restricts fraudulent "entries" to only those arising in the context of a computer hacker. Under New York law, it is well-settled that if an insurance company wants to bar coverage for certain types of claims, it is required to do so clearly. This Court, three decades ago, held:

> [W]henever an insurer wishes to exclude certain coverage from its policy obligations, it must do so in clear and unmistakable language. Any such exclusions or exceptions from policy coverage must be specific and clear in order to be enforced. They are not to be extended by interpretation or implication, but are to be accorded a strict and narrow construction. Indeed, before an insurance company is permitted to avoid policy coverage, it must satisfy the burden which it bears of establishing that the exclusions or exemptions apply in the particular case, and that they are subject to no other reasonable interpretation.

Seaboard Sur. Co. v. Gillette Co., 64 N.Y.2d at 311, 476 N.E.2d at 275, 486 N.Y.S.2d at 876 (internal quotations and citations omitted).

Furthermore, National Union knows how to draft computer fraud language to distinguish the risk of fraudulent access to a computer system by a hacker versus other fraudulent conduct through a computer system. In *Retail Ventures, Inc. v. Nat'l Union Fire Insurance Co.*, 691 F.3d 821 (6th Cir. 2012), for

example, National Union had sold a commercial crime insurance policy to a retailer that subsequently suffered a data breach at the hands of a computer hacker. National Union denied insurance coverage for the policyholder's losses and the trial court found that the insurance claim was covered. Ultimately, a unanimous United States Court of Appeals for the Sixth Circuit affirmed the trial court's ruling that National Union owed insurance coverage to its policyholder.

Specifically, the insurance coverage in that case involved a rider/endorsement to the crime insurance policy promising insurance coverage for Computer and Funds Transfer Fraud. Coverage was provided for "Loss which the Insured shall sustain resulting directly from: A. The theft of any Insured property by Computer Fraud; . . . ." The rider defined "Computer Fraud" to mean the "wrongful conversion of assets under the direct or indirect control of a Computer System by means of: (1) The fraudulent accessing of such Computer System; (2) The insertion of fraudulent data or instructions into such Computer System; or (3) The fraudulent alteration of data, programs, or routines in such Computer System." *Retail Ventures*, 691 F.3d at 826-827.

As evidenced by the insurance policy language National Union employed in the coverage sold in Retail Ventures, National Union knows how to, and does, distinguish fraudulent accessing (*i.e.*, hacking) of computer systems from

other computer fraud perils. It failed to do so in Appellant's insurance policy and a reasonable inference is that the policy was not limited to solely hacker intrusions.

Last, the lower courts committed reversible error because the interpretation they accepted from National Union makes no grammatical sense. National Union argues (and the courts below accepted) that "fraudulent entry of Electronic Data into the Insured's proprietary Computer System" means in reality "unauthorized access of Electronic Data into the Insured's proprietary Computer System". Such a construction does not make sense because you cannot have access of data "*into*" a computer system. For National Union's construction to make any sense, the word "into" would also have to be changed to the word "from". Appellant's reading of the insurance policy is far more reasonable as it does no violence to National Union's policy language or syntax. Furthermore, National Union's use of the word "into" demonstrates that the intent of the insurance policy is to also cover instances where a criminal enters fraudulent information "into" the computer system to steal money.

III. POLICYHOLDERS ARE PARTICULARLY VULNERABLE WHEN INSURANCE COMPANIES ARE NOT COMPELLED TO HONOR THEIR COVERAGE OBLIGATIONS

It is essential that New York's courts provide, without hesitation, the protections afforded policyholders under the law. As the Supreme Court of Delaware explained:

> Insurance is different. Once an insured files a claim, the insurer has a strong incentive to conserve its financial resources balanced against the effect on its reputation of a "hard-ball" approach. Insurance contracts are also unique in another respect. . . . In a typical contract, the non-breaching party can replace the performance of the breaching party by paying the then-prevailing market price for the counter-performance. With insurance this is simply not possible. This feature of insurance contracts distinguishes them from other contracts and justifies the availability of punitive damages for breach in limited circumstances.

E.I. DuPont de Nemours & Co. v. Pressman, 679 A.2d 436, 447 (Del. 1996).

The protection of policyholders, through the careful and proper application of New York law, is essential to fostering fair claims-handling conduct. Whether rightly or wrongly, New York has been perceived for years as a favorable jurisdiction for insurance companies disputing insurance claims. For example, several years before this Court decided *Bi-Economy*, lawyers who regularly represented insurance companies observed that "few courts demonstrate the remarkable reluctance of the New York Court of Appeals to impose extracontractual liability for insurer claims handling practices." *See* McGuire and McMahon, Issues For Excess Insurer Counsel In Bad Faith And Excess Liability Cases, 62 Defense Couns. J. 337, 338 (1995).

As this Court has since recognized in *Bi-Economy Market, Inc. v. Harleysville Insurance Co. of N.Y.*, 10 N.Y.3d 187, 866 N.E.2d 127, 816 N.Y.S.2d

505 (2008), "'(A)n insured bargains for more than mere eventual monetary proceeds of a policy; insureds bargain for such intangibles as risk aversion, peace of mind, and certain and prompt payment of the policy proceeds upon submission of a valid claim.'" *Id.* at 194 (citations omitted). It is hard to think of another industry that regularly embroils its customers in litigation as much as insurance companies do over the benefits that are promised under the product they market and sell.[5]

For this reason, the law in almost every state, including New York, has established insurance coverage principles that are designed to protect policyholders against unduly narrow interpretations of insurance coverage. Those protections need to be followed without exception or deviation—otherwise, the harm already caused by the underlying loss leading to the insurance claim is further compounded.[6]

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[5] *See generally*, Jay M. Feinman, "Delay Deny Defend" (2010).

[6] This Court, in the context of business interruption coverage sold to policyholders, explained that: "Thus, this insurance contract included an additional performance-based component: the insurer agreed to evaluate a claim, and to do so honestly, adequately, and--most importantly--promptly. The insurer certainly knew that failure to perform would (a) undercut the very purpose of the agreement and (b) cause additional damages that the policy was purchased to protect against in the first place." *Bi-Economy*, 10 N.Y.3d at 195. This Court's conclusions in *Bi-Economy* are certainly relevant to numerous insurance products sold by insurance companies and relied upon for protection by policyholders, including crime insurance. A crime insurance loss can be devastating. Policyholders who suffer a loss which is then met with an improper claim denial suffer a double whammy.

IV. THE LOWER COURTS' FINDINGS REGARDING INSURANCE COVERAGE INTENT WERE ERRONEOUS

Insurance policies must be interpreted according to common speech and consistent with the reasonable expectation of the average policyholder. *See Dean v. Tower Ins. Co. of New York*, 19 N.Y.3d 704, 708, 979 N.E.2d 1143, 1145, 955 N.Y.S.2d 817, 818 (2012); *Cragg v. Allstate Indem. Corp.*, 17 N.Y.3d 118, 122, 950 N.E.2d 500, 502, 926 N.Y.S.2d 867, 869 (2011). It should be beyond debate that Appellant, like any reasonable commercial insurance buyer, would expect its crime insurance coverage to protect it when the crime involves the theft of money through a computer system—this is especially true where the crime insurance policy has a section of the policy entitled "Computer Systems Fraud". The policyholder's payment of insurance premiums for such coverage is *prima facie* evidence of both an intent to purchase and a reasonable expectation of such protection. Based upon the vague language used in the insurance policy, it is far more likely than not that the policyholder meant to have insurance coverage for crime losses that result from the taking of money through fraudulent billing accomplished through the subject computer system. As a corollary, it is far less likely that the intent behind the vague language used by National Union was ever meant to restrict insurance coverage to only computer hacking losses.

Crime insurance (which includes "Financial Institution Bonds") is intended to provide insurance coverage for losses resulting from fraudulent or

criminal acts of employees or third-parties. This insurance is sold to policyholders on the premise that it protects against such perils as embezzlement, robbery, burglary, theft, computer fraud, and disappearance of money or securities.

Placed in historical context, technological advances provided fraudsters with new ways to steal; thus, in 1983, the Surety and Fidelity Association of America introduced the Computer Systems Rider for the standard form Financial Institution Bond – the very Rider at issue here. *See* Annotated Financial Institution Bond, Third Edition [Michael Keeley] (2013), at page 562[7]. In 1993, the SFAA introduced a stand-alone Computer Crime Policy which offers several coverages – Computer Systems Fraud (the coverage offered by the Rider) and Destruction of Data or Programs by Hacker/Virus among them, and offered different riders with their insuring agreements to be used with Financial Institution Bond forms. *Id.* at p. 567. The fact that the SFAA issued insuring agreements on the technological side of coverage aimed at the separate perils of Computer Systems Fraud and hacking indicates that "Computer Systems Fraud" embraces more than unauthorized access to a company's computer systems.

One of the most obvious errors in the reasoning of the courts below is that their determination of insurance coverage intent is so counter to the

[7] The editor, Michael Keeley, regularly represents insurance companies in coverage disputes and is past Chair of the Fidelity and Surety Law Committee.

fundamental purposes of purchasing insurance in the first place. The purpose of insurance is to insure. Insurance is intended to transfer risk—not just a tiny sliver of risk subject to multiple insurance company arguments and insurance policy escape hatches. A policyholder pays a premium in order to transfer "the risk of a loss or the responsibility for certain costs and expenses" to an insurance company. ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCUMENTS, AND COMMERCIAL PRACTICES 11 (West Publishing Co. 1988). Rather than an isolated contract for money, New York state courts have recognized that "the primary purpose of insurance is to insure...." *Rubin v. Empire Mut. Ins. Co.*, 57 Misc. 2d 104, 106, 290 N.Y.S.2d 241, 243 (N.Y. Civ. Ct. New York County 1967), *rev'd on other grounds*, 32 A.D.2d 1, 299 N.Y.S.2d 1 (1st Dep't 1969), *rev'd*, 25 N.Y.2d 426, 255 N.E.2d 154, 306 N.Y.S.2d 914 (1969). The purpose, and the intent, is most certainly not to pay insurance premiums in exchange for a legal fight with your insurance company in order to secure the benefits of coverage needed and intended.

CONCLUSION

In New York, it is critical that trial and intermediate appellate courts apply, without hesitation or error, those canons of insurance that protect policyholders against aggressive insurance claims handling tactics and arguments. This is especially so in a jurisdiction such as New York where insurance

companies routinely assert that claims for unfair claims settlement practices cannot be pursued under New York law.

As such, United Policyholders respectfully requests that this Court reverse the decisions of the courts below and find that Appellant is entitled to insurance coverage in full for the losses suffered as set forth in its insurance claim submitted to Respondent-National Union.

Dated: October 29, 2014
New York, New York

Respectfully submitted,

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AFFIDAVIT OF SERVICE

Donald Flynn, being duly sworn, deposes and says that he is not a party to this action and is over 18 years of age and employed by Anderson Kill, P.C.

On the 29th day of October, 2014, deponent caused to be served three copies of the annexed Brief of *Amicus Curiae* United Policyholders in Support of Plaintiff-Appellant Universal American Financial Corp. upon the following named attorneys at the addresses indicated below by hand-delivery:

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Sworn to me before this
29th day of October, 2014

Notary Public

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