
*Court of Appeals
of the
State of New York*

GAETANO DEMETRIO,

Plaintiff-Appellant,

- against -

STEWART TITLE INSURANCE CO.,

Defendants-Respondents.

**MOTION FOR LEAVE TO SUBMIT
A BRIEF OF AMICUS CURIAE**

AMY REBECCA BACH
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Date: March 18, 2015

Richmond County Clerk's Index No.: 2010/101760

STATE OF NEW YORK
COURT OF APPEALS

GAETANO DEMETRIO,

Plaintiff- Appellant,

-against-

STEWART TITLE INSURANCE CO.,

Defendant - Respondent.

Richmond County
Index No. 2010/101760

NOTICE OF MOTION

MOTION BY:

Amy Bach, Esq.
United Policyholders
381 Bush Street, 8th Floor
San Francisco, CA 94104

SUPPORTING PAPERS:

Affirmation in Support dated March 18, 2015
Proposed Brief of Amicus Curiae
Pro Hac Vice Letter Application
Exhibit A: Affidavit of Amy Bach, Esq.
Exhibit B: March 10, 2015 Letter from Court
Affirmation of Service dated March 18, 2015

PLACE:

Court of Appeals Hall
20 Eagle Street
Albany, NY

DATE AND TIME:

April 6, 2015 at 9:30 a.m.

RELIEF REQUESTED:

Leave to file the proposed brief of *amicus curiae*
and supporting papers with the Court of Appeals
pursuant to 22 NYCRR Section 500.23 and for all
other relief as this Court deems just and proper.

Dated: San Francisco, California
March 18, 2015

Respectfully,

By: _____

TO: Anderson Kill, P.C.
Attorney for Plaintiff-Appellant
1251 Avenue of the Americas
New York, NY 10020
Telephone: 212-278-1009
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Thomas G. Sherwood, LLC
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**AFFIRMATION OF AMY
BACH, ESQUIRE.**

I, Amy Bach, Esquire, serve as counsel and Executive Director for *amicus curiae* United Policyholders, a national non-profit organization, which advocates for the interests of insurance consumers. I am familiar with the facts and circumstances of the case at bar and set forth in this affidavit and supporting materials. As such, United Policyholders, as *amicus curiae*, has an interest in this case. The affidavit previously submitted to the Court on March 3, 2015 (Exhibit A) sets forth the legal and public policy reasons for accepting Plaintiff/Appellant's appeal, the substance of which is included in the proposed brief herein. This motion is made pursuant to the March 10, 2015 letter from the Court advising that Ms. Bach or United Policyholders to seek *amicus curiae* status (Exhibit B).

Dated: San Francisco, California

March 18, 2015

Respectfully,

By: _____

Amy Bach, Esq.
Counsel for amicus curiae

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**PROPOSED BRIEF OF
AMICUS CURIAE**

INTRODUCTION

United Policyholders ("UP") respectfully submits this proposed brief of *amicus curiae* in support of the motion of Plaintiff-Appellant Gaetano DeMetrio for leave to appeal to the Court of Appeals the Decisions and Orders made heretofore by the Appellate Division, Second Department. The procedural history of the case is set forth in the Motion for Leave to Appeal on Behalf of Plaintiff-Appellant, dated March 3, 2014 and filed with this Court March 5, 2015.

STATEMENT OF INTEREST

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 our work. UP does not accept funding from insurance companies.

UP's work is divided into three program areas: *Roadmap to Recovery*TM (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 since Superstorm Sandy caused extensive damage for residential and commercial property owners. We work with the New York Department of Financial Services, including Superintendent 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 helping insurance consumers.

State insurance regulators, academics, politicians, 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 state and federal courts of the United States, including the U.S.

Supreme Court. *See, e.g., Humana, Inc. et al. v. Mary Forsyth*, 525 US 299 (1999)

UP has appeared as *amicus curiae* in many cases in New York. *See, e.g., Bi-Economy Market, Inc. vs. Harleystown Insurance Company of New York* (Case No. 2004-11840, CA 06-00847, New York Court of Appeals, 2007); *Elizabeth Frances Kerrigan v. Met Life* (Case No. 111775/2003, New York Court of Appeals, 2014).

ARGUMENT¹

UP and Ms. Bach have read the Motion for Leave to Appeal being submitted by the Plaintiff - Appellant, the Decisions and Orders that are the subject of that Motion, and the Defendant – Respondent’s Opposition to the Motion. UP supports the Motion because the Decisions and Orders, if not reversed by the Court of Appeals and if followed by other courts in New York or nationally, drastically alter the allocation of functions between the courts analyzing the law and triers of facts, particularly juries, when insurance companies refuse coverage.

Insurance coverage disputes frequently arise because there is ambiguity in the policy wording as to coverage. The law of New York, like the law nationally, provides that it is the task of the Court to determine whether the text of an insurance policy is textually unambiguous. New York has recognized that if a court finds textual ambiguity in an insurance agreement, (a contract of adhesion), the

¹ Adopted from Bach Affidavit – Exhibit A.

ambiguity is to be construed against the insurance company that drafted the agreement. This is the familiar doctrine of *contra proferentem*, a bedrock principle of insurance law applied routinely by New York courts and a majority of states in insurance disputes. *See, e.g. Dean v. Tower Ins. Co of New York*, 19 N.Y.3d 704 (2012). A court faced with textual ambiguity may review extrinsic evidence to assist the trier of fact in ascertaining what the parties intended in entering into the contract. *See, e.g. State v. Home Indemnity Co.*, 66 N.Y. 669 (1985).

However, what the instant case does is to permit the insurance company to argue to the court, and not to the jury, that an ambiguous coverage provision in an insurance policy drafted by the insurance company ought, in retrospect, to deprive the policyholder of coverage as a matter of law. That places the policyholder at a double disadvantage: Such a rule would require policyholders to undertake independent investigations into whether the coverage promises made to them at the point of sale were actually delivered in the policy contract, **and** it would give insurance companies a free pass on inadequate and improper drafting.

The Plaintiff-Appellant refers in his Motion to a variety of extrinsic evidence that he argues provides a strong basis for the trier of fact to conclude that he sought and obtained title insurance to seven lots of real property. The Defendant-Respondent in its Opposition argues that other extrinsic evidence, also in the record, negates that claim. For the court to overrule the granting of summary

judgment to Plaintiff-Appellant on the coverage issue and to substitute summary judgment for the Defendant Respondent is to usurp the necessary role of the trier of fact in determining the intended meaning of a coverage ambiguity drafted by and the responsibility of the insurance company. Were this significant change in the role of court and jury to be permitted to stand would be to validate post-loss underwriting that is contrary to the integrity and intent of title insurance, the goal of which is to transfer the possibility of loss due to title defects from a purchaser of real property to the title specialists that sell and profit from title insurance.

The point is particularly important in dealing with title insurance. During a real estate sale closing, a title company generally prepares the legal documents. Where, as in the instant case, there is a prior deed with a description that arguably is at odds with the proposed closing description, surely it is the title company that is in the best position to determine precisely what is being bought, and to insure that precise parcel.

CONCLUSION

For the reasons set forth above, UP supports the motion of the Plaintiff-Appellant for leave to appeal to the Court of Appeals the Decision and Orders made heretofore by the Appellate Division, Second Department.

Date: San Francisco, California

March 18, 2015

Respectfully,

By: _____

Amy Bach, Esq.
Counsel for amicus curiae

TO: Anderson Kill, P.C.
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LETTER APPLICATION
FOR PRO HAC VICE
ADMISSION OF AMY
BACH, ESQUIRE

I, Amy Bach, a duly licensed attorney in the state of California, active and in good standing with no record of discipline, (Bar No. 142029, admitted December 11, 1989) submit this motion and letter application for *pro hac vice* admission for the limited and express purpose of appearing as counsel for *amicus curiae* United Policyholders and submitting the proposed brief of *amicus curiae* herein.

Date: San Francisco, California

March 17, 2015

Respectfully,

By: _____

Amy Bach, Esq.
Counsel for amicus curiae

TO: Anderson Kill, P.C.
Attorney for Plaintiff-Appellant
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New York, NY 10020
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