No. 18-3392

IN THE

United States Court of Appeals
For the Seventh Circuit

EMMIS COMMUNICATIONS CORPORATION,
Plaintiff-Appellee,

v.

ILLINOIS NATIONAL INSURANCE COMPANY,
Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of Indiana Indianapolis Division

BRIEF OF *AMICI CURIAE* UNITED POLICYHOLDERS, SHEPHERD INSURANCE LLC, AND MJ INSURANCE IN SUPPORT OF EMMIS'S PETITION FOR REHEARING OR REHEARING EN BANC

GEORGE M. PLEWS
GREGORY M. GOTWALD
Counsel for Amici Curiae
PLEWS SHADLEY RACHER & BRAUN, LLP
1346 N. Delaware St.
Indianapolis, IN 46202
(317) 637-0700
gplews@psrb.com
ggotwald@psrb.com

RULE 26.1 DISCLOSURE STATEMENTS

United Policyholders is a nonprofit corporation exempt from federal income tax under 26 U.S.C. §501(c)(3). MJ Insurance Company and Shepherd Insurance, LLC are privately held entities, and no publicly held corporation owns 10% or more of their stock. None of the *amici* have parent corporations.

George M. Plews is counsel of record for *amici* under Circuit Rule 3(d) and is a partner at Plews Shadley Racher & Braun, LLP. Gregory M. Gotwald, also a partner at Mr. Plews's firm, represents *amici* but is not counsel of record under Rule 3(d). No partners or associates from any other law firm have appeared for *amici* in this case, nor are attorneys from any other firm expected to appear for *amici* in this case.

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INTEREST OF *AMICI CURIAE*[1]

A. United Policyholders

United Policyholders ("UP") is a non-profit organization. It is a voice and information resource for consumers in Indiana and throughout the United States. UP assists and informs policyholders about every type of insurance. It often submits *amicus* briefs in coverage and claim-related appellate disputes. Its brief was cited with approval by the Supreme Court of the United States in *Humana Inc. v. Forsyth*, 525 U.S. 299, 314 (1999).

UP has an interest in this case because it will reshape the way policyholders report claims to their claims-made insurers. UP is concerned that the Court's decision will increase costs, create confusion, and ultimately cause policyholders to lose coverage for no good reason.

B. Shepherd Insurance & MJ Insurance

Shepherd Insurance, LLC ("Shepherd") is an independent insurance agency with twenty-six offices in five states, including Indiana and Illinois. Shepherd writes over $500 million in annual

[1] No party's counsel authored this brief, in whole or in part, and no party or other person besides *amici curiae*, its members, and its counsel, contributed money that was intended to fund preparing or submitting this brief. FED. R. APP. P. 29(a)(4)(E), 29(b)(4).

premiums and is ranked 51st in the country in size among independent insurance agencies. It is a member of the Inc. 5000, a list of the fastest-growing private companies in America.

MJ Insurance ("MJ") is one of the largest independent insurance agencies in the nation. MJ works with the world's top insurance carriers to place insurance for policyholders around the country. MJ has been named a 2018 Best Practices Agency by the Independent Insurance Agents & Brokers of America.

Shepherd and MJ are interested in this case because their agents' standard practice is to put D&O insurers on notice in the same way Emmis did. They are concerned that the panel's decision reshapes the claims-notice process in a way that is inefficient, places unwarranted burdens on brokers and policyholders, and unfairly increases liability exposure for agents and brokers. Shepherd's and MJ's mission is to make the insurance process efficient and easy to navigate. The panel's decision takes the law in the opposite direction.

INTRODUCTION

The panel's decision is likely to create needless chaos in the insurance industry. It upends a well-established practice of brokers giving broad notice and creates potential loss of coverage with no purpose. Insurance agents should not be forced to judge, at an early stage of litigation, whether a new claim is "related" to an earlier claim and select among potentially triggered policies the one policy they think applies, with the risk that they will limit or destroy coverage if they are wrong. The Court should vacate the panel's decision.

ARGUMENT

I. The panel's decision upends important reliance interests and fundamentally restructures how claims-made insurance works.

A. Claims reporting in D&O insurance

D&O policies are generally written on a claims-made form. Claims-made insurance "protects the insured for claims that are made against it and reported to the insurer within the policy period." *CheckRite Ltd. v. Ill. Nat'l Ins. Co.*, 95 F. Supp. 2d 180, 191 (S.D.N.Y. 2000).

Nearly all claims-made policies include a mirror-image of this reporting requirement as an exclusion. These clauses state that a claim

made during the current period will not be covered if it is "related" or "interrelated" with a claim reported under an older policy. *See* 3 NEW APPLEMAN LAW OF LIABILITY INSURANCE §22.06[2][e]. Appleman quotes a typical version of the exclusion, barring claims:

> alleging, arising out of, based upon or attributable to the facts alleged, or to the same or related Wrongful Acts alleged or contained, in any claim which has been reported, or in any circumstances of which notice has been given, under any policy of which this policy is a renewal or replacement or which it may succeed in time.

Id. In turn, policies generally "deem" a newer claim as "made" under the older policy if it is "interrelated" with a claim "made" during the older policy period. *See Fin. Mgmt. Advisors v. Am. Int'l Spec. Lines Ins. Co.*, 506 F.3d 922, 924-26 (9th Cir. 2007).

These clauses work together "to place the entire coverage for such claims under the earliest policy which covers the claim," provided that "actual notice has been given under a prior policy." 3 NEW APPLEMAN LAW OF LIABILITY INSURANCE §22.06[2][e]. Like prior-litigation exclusions, "[t]he insurers' intent is to avoid exposure for the 'burning building'" of a claim that has already been asserted. 4 NEW APPLEMAN ON INSURANCE LAW, LIB. ED. §26.07[3][d].

The crucial component of these clauses is the "related" or "interrelated" term. *Id.* This term requires a comparison between a claim noticed under an old policy and a claim submitted under a newer one. *See, e.g.*, *Fin. Mgmt. Advisors*, 506 F.3d at 924-26; *Home Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 229 F.3d 56, 59, 64 (1st Cir. 2000). Coverage typically depends on whether "there is a sufficient nexus between the current claim and the prior claim." 4 NEW APPLEMAN ON INSURANCE LAW, LIB. ED. §26.07[3][d].

B. The panel's decision creates practical problems for brokers and policyholders reporting claims.

Deciding whether claims are "related" or "interrelated" is not always easy. To protect their clients, brokers typically notice new claims to all insurers who might be responsible. Michael Brittain & K. James Sullivan, *Building the Foundation of Your Coverage Claim*, 44 THE BRIEF 14, 17 (2015); Amy Elizabeth Stewart, *Insurance Law Update: It's Not Just for the Other Guy*, 70 THE ADVOCATE 248, §II.A (2015). Notice to all insurers is not only good practice, it is required by the notice requirement in claims-made policies. *CheckRite*, 95 F. Supp. 2d at 1192. Therefore, the near-universal practice is to submit the claim to all insurers and let them sort out whether the claims are "related" or not.

Brittain & Sullivan, 44 THE BRIEF, at 17; Stewart, 70 THE ADVOCATE 248 at §II.A.

The panel's decision obliterates this established superstructure. Until now, brokers and risk managers have generally assumed, correctly, that the only legal consequence of reporting was to preserve potential coverage. 3 NEW APPLEMAN LAW OF LIABILITY INSURANCE §22.06[2][e]. Now, rather than preserving coverage, broad reporting can do the opposite.

Under *Emmis*, the precise verb structure in a policy can make any reporting the legal equivalent of cutting the wrong wire while defusing a bomb. If a policyholder or agent notices the claim to both insurers, it risks losing coverage under the new policy, even if a court finds that the new claim does not "relate back" to the older policy. This is because an "*Emmis* clause" will mean that the mere fact of "reporting" to the old insurer, at any time, bars coverage under the newer policy.

Alternatively, if it notices the claim to only one insurer, it forfeits coverage under the others. If that guess is wrong, the policyholder loses all of its D&O coverage due to the late-notice rule. *CheckRite*, 95 F. Supp. 2d at 192. Ironically, the substance of the exclusion (to allow the

current insurer to avoid claims that are an older insurer's responsibility) is lost by the intervention of a procedural trap door, because the older insurer will never be told of the claim.

It is not clear how many policies use the "as reported" language present in the Emmis policy. But as the Appleman treatise observes, the term "has been reported" or slight variants are endemic to claims-made policies. Future courts can easily conclude that the different verb form (perfect-progressive) fails to add any "discernable temporal limitations" to the exclusion, resulting in widespread coverage losses.

Thus, policyholders will hire lawyers (and grammar experts) to review every D&O claim. Since claims-made policies often require reporting in as little as 60 days, every lawsuit will trigger a fire drill in the General Counsel's office. 4 NEW APPLEMAN ON INSURANCE LAW LIB. ED. §26.08[1]. If the lawyers uncover an "*Emmis* clause," or something similar, counsel will have to analyze the entire case and then guess at which insurer is most likely to produce coverage, all within the 60-day reporting window. *Id.*

The panel's decision also opens up a Pandora's Box of new legal problems for brokers. Is a broker liable for selecting the wrong insurer?

If she is, how much care does she need to exercise? Should she retain her own coverage counsel to evaluate the issue for her? Is it malpractice if she doesn't?

There is even more confusion brewing because under Indiana law, a broker is the insurer's agent once a policy is sold. *Benante v. United Pac. Life Ins. Co.*, 659 N.E.2d 545, 547 (Ind. 1995). By statute, insurance policies must include language stating that notice "to any authorized agent of the insurer . . . shall be deemed notice to the insurer." IND. CODE §27-8-5-3(a)(5). In addition, agents often "shop around" for D&O insurance from one year to the next. It is common for an entity to have three consecutive D&O policies issued by different insurers. If those policies are obtained by the same broker, notice to the agent is considered notice to all three insurers, which may destroy coverage. That cannot be the law.

Similarly, if a broker is an older insurer's agent, the policyholder cannot use that broker to apply for new insurance. If it does, it risks that the broker's knowledge will destroy its current D&O coverage. This makes it difficult, if not impossible, for brokers to retain customers. What policyholder is going to remain with an independent insurance

agent if that very fact will effectively negate coverage under every new policy the broker places?

All of these quandaries can be avoided by giving the term "as reported" its natural meaning, informed by the context supplied by decades of common practice: claims actually reported under an older policy while that older policy was in effect. *Baldwin Piano, Inc. v. Deutsche Wurlitzer GmbH*, 392 F.3d 881, 883-84 (7th Cir. 2004) ("Businesses are not *compelled* to make sensible bargains, but courts should not demolish the economic basis of bargains that would be sound if the contract were given a natural reading.").

This approach accords with Indiana law, which the U.S. Constitution requires this Court to respect. *N.Y. Life Ins. Co. v. Jackson*, 304 U.S. 261, 262 (1938); *Nat'l Am. Ins. Co. v. Artisan & Truckers Cas. Co.*, 796 F.3d 717, 723 (7th Cir. 2015). Anything less intrudes upon the Indiana Supreme Court's sovereign right to establish rules governing insurance law.

The essential principle of Indiana coverage law is that "[a]n insurance policy should be so construed as to effectuate indemnification . . . rather than to defeat it." *Masonic Acc. Ins. Co. v. Jackson*, 164 N.E.

628, 631 (Ind. 1929). An insurer cannot avoid coverage unless the limitation is "clearly expressed" in the text of the policy. *State Auto Mut. Ins. Co. v. Flexdar, Inc.*, 964 N.E.2d 845, 848 (Ind. 2012).

If more than one reading of an exclusion is reasonable, then it is ambiguous and must be construed in favor of coverage. *Id.*; *Am. States Ins. Co. v. Kiger*, 662 N.E.2d 945, 947-49 (Ind. 1996). The Indiana Supreme Court has rejected insurers' legalistic readings of exclusions advanced as the "only reasonable interpretation," pointing out that exclusions are subject to especially strict scrutiny. *E.g.*, *id.* at 947. Instead, interpretation is governed by the "perspective of an ordinary policyholder of average intelligence." *Travelers' Indem. Co. v. Summit Corp. of Am.*, 715 N.E.2d 926, 937 (Ind. Ct. App. 1999) (emphasis added). Such a policyholder would believe that its policy is consistent with common insurance practice.

At the very least, Emmis's reading is reasonable. The lack of any "discernable temporal limitations" cuts against Illinois National, not Emmis. The terms "has been reported" and "as reported" are past-tense verbs. If Illinois National wanted to destroy coverage for claims reported at any point in time, it was required to say that in the policy,

not infer it during litigation. *Flexdar*, 964 N.E.2d at 848 (all coverage limitations "must be clearly expressed to be enforceable"). Thus, the exclusion does not satisfy the clear-statement rule that has been a fixture of Indiana law for nearly a century. *Masonic*, 164 N.E. at 637 (coverage "will not be destroyed by language of exception, unless such exception shall be clear and free from all reasonable doubt") (emphasis added). The exclusion does not apply, and the Court should say so.

II. The panel's reading of the clause deprives policyholders of valuable coverage rights and dispute-resolution tools.

Assume the fire drill at the General Counsel's office produces a policy with an "*Emmis* clause." The claim at issue might fairly be "related" to a claim noticed under an older policy, but also potentially covered under the new policy. In this situation, Indiana law imposes a duty to defend on both insurers. *Fed. Ins. Co. v. Stroh Brewing Co.*, 127 F.3d 563, 566 (7th Cir. 1997) (Indiana law). But since *Emmis* construed this clause as barring coverage if the policyholder notices both insurers, a policyholder cannot invoke both duties to defend. Instead, it must notice the claim to one insurer and hope that it picked the right one.[2]

[2] Even if the policyholder is allowed to change notice to the correct insurer after an initial misstep, being forced to select only one at the

Emmis also deprives policyholders of valuable dispute resolution tools. It is often difficult to determine whether one claim is "related" to another. Policyholders resolve these questions by exchanging coverage position letters with insurers, by engaging mediators, and by filing declaratory judgment actions. It is cheaper to settle close cases than to litigate them, and it is common for multiple claims-made insurers to collectively fund settlements to avoid the risk and expense of litigation.

But none of these options are available unless the new claim is reported to all potential insurers. If the act of reporting itself destroys coverage for everyone except the oldest insurer, then these tools evaporate. *See* Robert H. Jerry, II, *Vade Mecum: Mediators and Disputes Involving Insurance*, 2019 J. DISP. RESOL. 25, 67-69 (2019) ("In sum, if all the potentially responsible insurers are not on notice about the claim . . . the case is not ready for mediation."). This is not sound law.

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beginning of the case may lead to a loss of pre-tender defense costs. *See Travelers Ins. Cos. v. Maplehurst Farms, Inc.*, 953 N.E.2d 1153, 1154 (Ind. Ct. App. 2011).

CONCLUSION

Ultimately, *Emmis* sows chaos and confusion around a product that is supposed to provide peace of mind. The panel's interpretation of the language is not the only reasonable interpretation. Context matters. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015). The context here shows that Emmis's interpretation is consistent with industry practice and is not contradicted by the text of the policy. Such a reading is reasonable—and it governs as a matter of Indiana law. *Eli Lilly & Co. v. Home Ins. Co.*, 482 N.E.2d 467, 470-71 (Ind. 1985). This Court lacks the authority to interfere with that standard, which is "the voice adopted by the State as its own." *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) (quotations omitted). Either the panel or the *en banc* Court should vacate the opinion and rehear the case.

Respectfully Submitted,

/s/ *George M. Plews* /
GEORGE M. PLEWS
GREGORY M. GOTWALD
Counsel for Amici Curiae
PLEWS SHADLEY RACHER & BRAUN, LLP
1346 N. Delaware St.
Indianapolis, IN 46202
(317) 637-0700
gplews@psrb.com
ggotwald@psrb.com

CERTIFICATE OF SERVICE

I certify that on August 6, 2019, a copy of this brief was filed electronically. Notice of this filing will be sent to all counsel of record by operation of the Court's electronic filing system.

/s/ *George M. Plews* /

CERTIFICATE OF COMPLAINCE WITH RULE 32(g)

This document complies with the type-volume limit of FED. R. APP. P. 29(g)(4). Excluding the parts of the document exempted by FED. R. APP. P. 32(f), and including the *Interest of Amici Curiae* section, the document contains 2,534 words. The document complies with the typeface and typestyle requirements of FED. R. APP. P. 32(a)(5)-(6) because it was prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook 14-point font.

/s/ *George M. Plews* /