In The

Court of Appeals of Maryland

No. 18

September Term, 2016

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.

Petitioner,

v.

THE FUND FOR ANIMALS

Respondent.

On writ of certiorari from the Court of Special Appeals
Case No. 2598, Reported February 1, 2016 (Eyler, J)

BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS IN SUPPORT OF RESPONDENT

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INTRODUCTION

This appeal involves an issue of critical importance to United Policyholders ("UP") and to insurance consumers across Maryland: Whether Insurance Art. Section 19-110 requires an insurance company who receives allegedly late notice of an insurance claim to show that a delay in reporting caused actual prejudice to the insurance company. Put another way, must the insurance company establish by a preponderance of the evidence that the events leading to the outcome of the underlying case, here defense of a RICO suit brought against a non-profit organization, *actually* prejudiced the insurance company in a manner that would not have happened had the insurance company received timely notice of the claim. The answer to that question is a resounding "yes" and there are myriad reasons why.

The notice-prejudice rule, as it is known generally, is codified specifically in Maryland as Insurance Art. § 19-110. It is a rule of fairness that prevents undue forfeiture and draconian results. Otherwise, an insurance company who owes a duty to defend and indemnify underlying claims against its policyholder may escape liability on a mere technicality. If the insurance company can simply disclaim coverage without showing that, had it been in control of the litigation from the beginning, the outcome of the claim would have been different, then policyholders are unfairly and unjustly denied coverage they are owed and insurance companies obtain windfalls. The old adage "equity abhors forfeiture" is precisely why the notice-prejudice rule exists in Maryland and in the majority of jurisdictions.

INTEREST OF AMICUS CURIAE

UP is a non-profit organization founded in 1991 and dedicated to educating the public on insurance issues and consumer rights. UP serves as an information resource and a voice for a diverse range of insurance consumers across the United States, from low income homeowners to international businesses. Donations, foundation grants and volunteer labor support the organization's work, which is divided into three program areas: *Roadmap to Recovery* ™ (helping disaster victims navigate the insurance claim process and recover fair settlements), *Roadmap to Preparedness* (promoting disaster preparedness and insurance literacy for homeowners and businesses), and *Advocacy and Action* (advancing the interests of insurance consumers in courts of law through the submission of *amicus curiae* briefs and before insurance regulators).

UP has been active since its founding in helping a diverse range of policyholders throughout the United States. UP's Executive Director has been appointed for seven consecutive terms as an official consumer representative to the National Association of Insurance Commissioners, and works closely with State Insurance Commissioners and regulators, including the Maryland Insurance Administration and the Maryland People's Insurance Counsel Division of the Maryland Attorney General's Office on issues affecting insurance consumers. Media and academics also regularly seek UP's input on insurance consumer issues. UP is regularly called upon to testify before legislators on

insurance and consumer rights policy. Since its founding in 1991, UP has filed *amicus curiae* briefs in numerous federal and state appellate courts in over 400 cases.[1]

QUESTION PRESENTED ADDRESSED BY AMICUS CURIAE

Did the Maryland Court of Special Appeals (hereinafter "CSA") err in holding that the actual prejudice standard in Insurance Art. § 19-110 requires an insurance company to prove that, had it received timely notice, the outcome would have been different?[2]

STATEMENT OF FACTS

In this case, Respondent, The Fund for Animals (hereinafter "FFA") seeks liability insurance coverage from Petitioner National Union Fire Insurance Company of Pittsburgh, PA (hereinafter "National Union") from a non-profit organizational insurance policy, for a lawsuit alleging purported RICO violations against FFA in 2007. (Opinion of CSA at p. 9) Almost immediately after it was filed, the RICO case was stayed until 2010 and nothing happened in the case for approximately 3 years. (Op. at p.10.) The RICO case was stayed pending the outcome of a separate case ("the non-covered case") brought by FFA and others in 2000 against the party who, in 2007, filed the RICO suit.

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[1] UP's arguments were adopted by the Texas Supreme Court in *Excess Underwriters at Lloyd's, London v. Frank's Casing Crew & Rental Tools Inc*., 246 S.W.3d 42 (Tex. 2008), as well as by the California Supreme Court in *Vandenberg v. Superior Court*, 982 P.2d (Cal. 1999) and numerous other proceedings including *TRB Investments, Inc. v. Fireman's Fund Ins. Co*., 145 P.3d 472 (Cal. 2006) and *In Re Salem Suede, Inc*., 221 B.R. 586 (D. Mass. 1998).

UP has also been granted leave to file briefs as an *amicus curiae* in numerous U.S. Supreme Court cases, including the following: *Heimeshoff v. Hartford Life & Acc. Ins. Co*., 134 S. Ct. 604 (2013); *US Airways v. McCutchen*, 133 S. Ct. 1537 (2013); *Hardt v. Reliance Standard Life Ins. Co*., 560 U.S. 242 (2010); *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105 (2008); *Aetna Health, Inc. v. Davila*, 542 U.S. 200 (2004); and *Rush Prudential HMO v. Moran*, 536 U.S. 355 (2002).

[2] UP only addresses the first of two questions raised by the Petitioners.

(Op. at p. 10) When the non-covered case concluded, the stay of the RICO case was lifted and FFA reported a claim to National Union. (Op. at 11) National Union disclaimed coverage and reserved its rights because the claim had not been reported within the 2007 policy year. (*Id*.)

In 2012, FFA sued National Union for breach of contract on the grounds that in order for an insurance company to deny a claim based on late notice; it must show *actual* prejudice under Maryland Insurance Art. Sec. 19-110. (Op. at 13) (emphasis added) National Union moved for summary judgment on the ground that Virginia law applied and that Virginia does not require a showing of prejudice. (*Id.*) The court held that Maryland law applies, as FFA had argued, and in 2015, the case proceeded to a three-day jury trial. (Op. at 14)

After FFA presented its case, National Union moved for judgment on the grounds that it had met its burden to show that had it suffered prejudice as a matter of law due to FFA's failure to report the RICO suit in 2007. (Op. at pp. 14-16). The trial judge granted National Union's motion. (Op. at 17) On appeal the CSA reversed, holding that under Insurance Art. Sec. 19-110, late notice of a claim by a policyholder must result in *actual prejudice* to the insurance company, which National Union was unable to prove. (Op. 27).

ARGUMENT

I. STANDARD OF REVIEW

The standard of review for a finding as a matter of law is *de novo*. *DeMuth v. Strong*, 205 Md. App. 521, 547 (Ct. Spec. App. 2012); *See also, e.g., Pines Plaza Ltd. v. Berkley Trace, LLC,* 431 Md. 652 (2013) (We review the [CSA's] interpretation of the statute *de novo*.) FFA bore the burden to show that it was owed coverage under the 2007 policy. (Op. at 23) National Union, however, bore the burden to prove (1) that FFA breached the policy by not providing timely notice of the claim, and (2) that the late notice resulted in *actual* prejudice to National Union as required by Insurance Art. Sec. 19-110. (*Id.*)

II. THE NOTICE PREJUDICE RULE CODIFIED IN MARYLAND AS INSURANCE ART. SEC. 19-110, IS A RULE OF FAIRNESS AND REQUIRES INSURANCE COMPANIES TO SHOW ACTUAL PREJUDICE WHEN DISCLAIMING COVERAGE FOR LATE REPORTING

A. Insurance Art. Sec. 19-110

The relevant portion of Insurance Art. Sec. 19-110 reads as follows:

> An insurer may disclaim coverage on a liability insurance policy[3] on the ground that the insured or a person claiming the benefits of the policy through the insured has breached the policy by failing to cooperate with the insurer or by not giving the insurer required notice only if the insurer establishes by a preponderance of the evidence that the lack of cooperation or notice has resulted in *actual* prejudice to the insurer. (emphasis added)[4]

[3] Insurance Art. Section 19-110 applies to both claims-made and occurrence-based policies.

[4] Insurance Art. Section 19-110 was enacted in "apparent response" to the Maryland Court of Appeals decision in *Watson v. United States Fidelity and Guaranty Co.* 231 Md. 266 (1963) in which this court held there was no coverage when a court finds the notice

The CSA correctly pointed out that "proof of harm to the [insurance company] resulting from the late notice is essential." (Op. at 20) Maryland courts have been clear on this point: "[P]ossible, theoretical, conjectural, or hypothetical prejudice is not enough to satisfy [Insurance Art.] **[**S]ection 19-110; prejudice cannot be surmised or presumed from the mere fact of delay." (Op. at 20) (citing *Oliff-Michael v. Mutual Benefit Ins. Co.*, 262 F. Supp.2d 602, 604 (D. Md. 2003) (citing *Commercial Union Ins. v. Porter Hayden Co*., 116 Md. App. 605, 698 (Ct. Spec. App. 1997)). Put another way, "[a]n [insurance company] may not disclaim coverage on the basis of prejudice that is only possible, theoretical, conjectural, or hypothetical." *Id.* (citing *Gen. Acc. Ins. Co. v. Scott*, 107 Md. App. 603, 615 (Ct. Spec. App. 1996)).

The insurance company bears the burden to prove it suffered actual prejudice, not theoretical or hypothetical prejudice. The CSA correctly explained "the [insurance company] must prove by a preponderance of the evidence that it in fact was prejudiced by the 'late delivered notice in investigating, settling, or defending'" the claim. (Op. at 20) (citing *Sherwood Brands, Inc., v. Great Am. Ins. Co.*, 418 Md. 300, 331 (2011). Further, as the CSA elegantly stated, relying on precedent set by this court: "if a [policyholder] violates [the] notice provision [in a liability insurance policy] without harming the interests of the insurance company, *i.e.,* without prejudice – then there is no reason to deny coverage." (Op. at 19) (citing *Prince George's County v. Local Gov't Ins. Trust*, 388 Md. 162 (2005)).

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was late. *See* Eugene R. Anderson, Jordan S. Stanzler, Lorelie S. Masters, *Insurance Coverage Litigation* (2014 Supplement) at §5.04 (5-46)

Simply put, National Union did not meet its burden to show by a preponderance of the evidence that it suffered actual prejudice due to FFA's allegedly late notice. It is not sufficient to play Monday-morning quarterback. As the CSA pointed out, National Union's only evidence of what it might have done differently had the claim been reported in 2007, was to appoint panel counsel, monitor the underlying litigation, and participate in the decision to stay the RICO case. (Op. at 25) National Union would have done this because it allegedly would have "tried to settle" the RICO case. (Op. at 25) But, as the CSA noted: "There was no evidence, let alone compelling and conclusive evidence, that had [insurance company]-appointed panel counsel [been involved in the RICO case or tried to settle it]…would [it] have had any impact on the outcome of the case." (Op. at 26).

National Union's argument on appeal is absurd for numerous reasons. The RICO case was completely and entirely stayed from just after it was filed until the non-covered case was concluded. That is not disputed. That means that National Union could not have taken any steps to make any difference at all in the case for which coverage is sought, which is the time National Union purportedly was prejudiced. It could not have taken action in a stayed case and lifting the stay would not have been in its own interests or the FFA's.

Moreover, the FFA was a plaintiff in the non-covered case that was active during the time National Union claims it was prejudiced. No one National Union had any right or duty to participate FFA. National Union would not have involved itself in that case. Insurance companies do not involve themselves freely in cases where there is no

possibility that they could owe coverage. Insurance companies do not typically defend cases in which the policyholder is a plaintiff and take the position that the duty to defend in most liability policies does not include the duty to prosecute such cases. *See, e.g., James 3 Corp. v. Truck Ins. Exch.*, 111 Cal. Rptr. 2d 181 (Ct. App. 2001); *Int'l Ins. Co. v. Rollprint Pkg'g Prods.*, 728 N.E.2d 680, 694 (Ill. App. Ct. 2000). National Union does not argue otherwise here.

Similarly, even when their policyholder is a defendant alleging a counterclaim, insurance companies routinely go so far as to parse out the difference between a compulsory counterclaim or a defensive counterclaim on the one hand, and a counterclaim that arguably is not necessary to the defense of the case on the other. *See, e.g., Rollprint Pkg'g*, 728 N.E.2d at 694 (insurance company arguing that an affirmative counterclaim or cross-claim must seek to reduce the policyholder's liability and that a claim will not be considered "defensive" simply because it is part of the insured's overall litigation strategy.) National Union does not contend that it owes coverage – either a duty to reimburse defense costs or indemnity for liability –, with regard to the non-covered case. Its arguments that it would have acted in that case, made in hindsight, are not credible and run counter to positions about which insurance companies litigate to avoid having to take action.

Insurance companies further argue, with some success, that they are not compelled to pay for the defense of affirmative claims even when they are compulsory and the courts have suggested that insurance companies may nonetheless want to notify the policyholder of available compulsory counterclaims so the policyholder may prosecute

them at its own expense. *See, e.g., Red Head Brass, Inc. v. Buckeye Union Ins. Co.*, 735 N.E.2d 48 (Ohio Ct. App. 1999); *Prevratil v. Mohr*, 678 A.2d 243, 250 (N.J. 1996). Liability insurance companies simply do not get involved in the prosecution of claims, let alone assume, control or direct the "defense" of affirmative claims. National Union's argument that it would have stepped in and forced a settlement of that case, particularly when its insured was one of several plaintiffs and was not seeking coverage for the case, is extraordinarily unlikely.

Against this backdrop, National Union asks this Court to hold that it was prejudiced because FFA prevented it from participating in the "defense" of the non-covered case against Feld, in which the FFA was a plaintiff prosecuting claims. The argument is one that an insurance company would only make in hindsight. It further runs directly contrary to the arguments insurance companies put forth – and aggressively litigate – across the country to avoid taking exactly the kind of actions National Union conveniently claims it would have taken here. National Union cannot credibly claim that in this one case it would have undertaken voluntarily to expend resources to participate in the FFA's prosecution of a case for which FFA was not seeking coverage.

Perhaps even more absurdly, National Union argues that the prejudice it suffered is that the arguments it would have put forth in the RICO case were precluded by findings from the non-covered case in which FFA and others argued that the defendant, Feld, had mistreated animals. As the FFA explained in detail in its brief before the CSA, this *theory* of prejudice is not sustainable because the FFA was not forced to settle the RICO case because of the threat of collateral estoppel and the RICO court did not actually apply

collateral estoppel.[5] At most, National Union's theory of prejudice is not more than that, a theory that it may possibly have been prejudiced. National Union thus falls far short of the required showing that it suffered actual prejudice.

The cases National Union cites (*e.g., Local Gov't Ins. Trust, supra*) actually support FFA's position. The FFA would not have had coverage and did not claim liability coverage for the non-covered case in which FFA was a plaintiff. National Union, by asserting that it *could have had* some impact on the non-covered case *for which FFA did not have coverage*, fails utterly to establish anything beyond a "possible, theoretical, conjectural, or hypothetical prejudice," which of course is, in itself, insufficient to disclaim coverage under Insurance Art. Sec. 19-110. As the CSA correctly held: "evidence of a causal link [between the late notice and the outcome of the RICO case or the underlying case] was necessary." (Op. at 27) Put another way, National Union "failed to identify any specific, palpable instances to show how its ability to protect [FFA] were frustrated" [by FFA's late notice]. (*Id.*) (citing *Gen. Acc. Ins. Co*, 107 Md. App at 616). Thus, the CSA correctly held that under Insurance Art. Sec. 19-110, National Union could not disclaim coverage and this decision should be affirmed.

B. THE NOTICE PREJUDICE RULE

The notice-prejudice rule, while codified in Maryland as Insurance Art. Sec. 19-110, is not a creature of statute unique to Maryland.[6] The notice-prejudice or "prejudice-

[5] E.352; E486-87.

[6] In fact, many states that previously followed the traditional rule have enacted statutes similar to Insurance Art. Sec. 19-110. *See, e.g.,* N.Y. Ins. Law § 3420.

required" rule is a majority rule.[7] Courts across the country hold that insurance companies claiming late notice as grounds for denying coverage must establish that the delay in receiving notice actually caused prejudice. Interestingly enough, *Local Gov't Ins. Trust, supra* concludes that the notice-prejudice rule is followed by at least 38 states.[8] Most jurisdictions provide reasonable protections for policyholder, based on sound policy considerations, that actual prejudice to the insurance company is required before late notice rescinds coverage.[9]

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[7] *See* Jeffrey W. Stempel and Erik S. Knutsen, *Stempel and Knutsen on Insurance Coverage*, Fourth Edition, Volume 1, §9.01[H] at 9-37 (2016). *See, e.g., Kolkman v. Greens Creek Mining Co.,* 936 P.2d 150 (Alaska 1997); *Holt v. Utica Mut. Ins. Co.*, 759 P.2d 623 (Ariz. 1988); *Arrowood Indem. Co. v. King,* 39 A.3d 712 (Conn. 2012); *Nationwide Mut. Ins. Co. v. Starr*, 575 A.2d 1083 (Del. 1990); *Bankers Ins. Co. v. Macias*, 475 So. 2d 1216 (Fla. 1985); *Cessna Aircraft Co. v. Hartford Acc. & Indem. Co.*, 900 F. Supp. 1489 (D. Kan. 1995); *Jones v. Bituminous Cas. Corp.*, 821 S.W.2d 798 (Ky. 1991); *Lanzo v. State Farm Mut. Auto. Ins. Co.*, 524 A.2d 47 (Me. 1987); *Bolivar County Bd. of Supervisors v. Forum Ins. Co.*, 779 F.2d 1081 (5th Cir. 1986)(Mississippi); *State Farm Mut. Auto. Ins. Co. v. Murnion*, 439 F.2d 945 (9th Cir. 1971) (Montana); *Las Vegas Metro. Police Dep't v. Coregis Ins. Co.*, 256 P.3d 958 (Nev. 2011); *Schroth v. New Mexico Self-Insurer's Fund*, 832 P.2d 399 (N.M. 1992); *Great Am. Ins. Co. v. C.G. Tate Constr. Co.*, 340 S.E.2d 743 (N.C. 1986); *Finstad v. Steiger Tractor, Inc.*, 301 N.W.2d 392 (N.D. 1981); *Halsey v. Fireman's Fund Ins. Co.*, 681 P.2d 168, (Or. Ct. App. 1984); *Brakeman v. Potomac Ins. Co.*, 371 A.2d 193 (Pa. 1977); *Avco Corp. v. Aetna Cas. & Sur. Co.*, 679 A.2d 323 (R.I. 1996); *Vermont Mut. Ins. Co. v. Singleton*, 446 S.E.2d 417 (S.C. 1994); *Cooperative Fire Ins. Ass'n v. White Caps, Inc.*, 694 A.2d 34 (Vt. 1997); *Dairyland Ins. Co. v. Voshel*, 428 S.E.2d 542 (W. Va. 1993).

[8] *See also* Masters and Stanzler at (5-35 *et seq*) for a 50 state survey of the notice-prejudice rule finding at least 41 states adopt some version of the modern rule (prejudice required).

[9] *Id* at 9-35.

1. Legal and Insurance Coverage Authorities Agree that Insurance Companies Must Be Required to Prove Actual Prejudice, Not Theoretical Prejudice

The concept that is the foundation of the notice-prejudice rule is well-known and accepted. For example, the Restatement (Second) of Contracts §229, Excuse of a Condition to Avoid Forfeiture reads:

> To the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange.[10]

One of the leading treatises on insurance coverage law sets out that while an insurance company need not predict exactly what would have happened if it had received timely notice, it does have to establish exactly how it suffered actual prejudice:

> In proving prejudice as a result of a delay in providing notice, it has been stated that an insurer is not required to show precisely what outcome would have been had timely notice been given to make [a] showing of substantial prejudice. However, an insurer must show the precise manner in which its interests have suffered, meaning that an insurer must show not merely the possibility of prejudice, but, rather, that there was a substantial likelihood of avoiding or minimizing the covered loss, such as that the insurer could have caused the insured to prevail in the underlying action, or that the insurer could have settled the underlying case for a small sum or smaller sum than that for which the insured ultimately settled the claim.[11]

Evidence of actual prejudice is not the same as the underlying case resulting in an outcome requiring coverage to be paid. Actual prejudice requires that the outcome could have been avoided. National Union must demonstrate with evidence that it suffered prejudice because it could have taken action that would have been substantially likely to

[10] The notice-prejudice rule has also been endorsed by the Reporters in the most recent drafts of the Restatement of the Law of Liability Insurance.

[11] 13 Russ & Segalla, COUCH ON INSURANCE § 193:29.

avoid the defense of and the settlement of the RICO case that the FFA reached. National Union cannot demonstrate this point because the evidence shows the case was stayed up until the time National Union had notice. National Union further has not and cannot point to evidence that it would have altered the course of the non-covered case, in which the court never reached the merits of the FFA claims. The legal experts who study insurance law and the behavior of insurance companies, such as Stempel and Knutsen, point out that courts and scholars alike prefer the rule for numerous and compelling public policy reasons; requiring the insurance company to demonstrate prejudice in order to escape coverage that would otherwise be owed avoids unnecessary forfeiture of contractual rights.[12] It also serves the purpose of liability insurance, which is to provide financial protection liabilities.[13] They further explain that the public policy reasons for the rule include the fact that insurance policies are "contracts of adhesion, the reasonable expectations of the policyholders, the general preference of contract law to avoid unnecessary forfeitures, protection of third party interests, and societal interests regarding the availability of insurance."[14] The burden then, for showing that late notice resulted in actual prejudice to the insurance company, is on the insurance company, since the insurance company is in the best position to show the existence of any prejudice. And under Maryland law, the plain language of the statute requires that an insurance company demonstrate that the prejudice it suffered be *actual*. Insurance Art. Sec. 19-110.

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[12] *Id.* at 9-37.

[13] *Miller v. Marcantel*, 221 So.2d 557, 559 (La. Ct. App. 1969)(stating that notice violations should not be used to evade the fundamental purpose of insurance to pay liability claims up to policy limits).

[14] *Ibid.*

2. Maryland Law Statutorily Requires Proof of Actual Prejudice, In Accord with the Majority Rule, to Avoid Policyholder Forfeiture and Insurance Company Windfall

Maryland case law consistently has applied the statutory language of section 19-110 to require insurance companies to establish that they suffered actual prejudice that causes them to owe more in insurance proceeds than they should fairly be required to pay. *See, e.g., Sherwood Brands, Inc. v. Hartford Acc. & Indem. Co.,* 347 Md. 32, 42 (1997)). *See also, e.g., Harleysville Ins. Co. v. Rosenbaum,* 30 Md. App. 74, 84 (Ct. Spec. App. 1976).

Many states when faced with a case of late notice have recognized that a technical violation of the policy is not sufficient to allow a forfeiture of coverage. *See, e.g., O'Connor v. Proprietors Ins. Co.* 696 P.2d 282, 285 (Colo. 1985) ("Public policy does not favor the forfeiture of insurance coverage based on the insured's technical violation of the insurance policy); *See also, e.g., Cooper v. Government Employees Ins. Co,* 237 A.2d 870, 874 (N.J. 1968) ("The insurance contract not being a truly consensual arrangement and being available only on a take-it-or-leave-it basis and the subject being in essence a matter of forfeiture…the carrier may not forfeit the bargained-for protection unless there are both a breach of the notice provision and a likelihood of *appreciable prejudice*. The burden of persuasion [to show the prejudice] is the carrier's.) (emphasis added) (citations omitted). Here, again, National Union failed to show that it was *actually* prejudiced by FFA's late notice of the claim and thus may not disclaim coverage.

The same body of case law also explains that denial of coverage on grounds of late notice leads to a windfall for the insurance company, who collected premiums and

avoided paying coverage for a covered claim. *See. ,e.g., Alcazar v. Hayes,* 982 S.W.2d 845, 850 (Tenn. 1998)("it is inequitable for an insurer that has not been prejudiced by a delay in notice to reap the benefits flowing from the forfeiture" of coverage); *Prince George's County v. Local Gov't Ins. Trust,* 388 Md. 162, 186 (2005)(notice should not be used to achieve "severe results of a forfeiture for the insured and a windfall to the insurer, even when the violation of the notice requirement caused no harm.)

The majority rule was strengthened just this month by the ruling of the Wyoming Supreme Court in *Century Surety Co. v. Jim Hipner, LLC, et al*.[15] In adopting the Notice-Prejudice Rule, the court held that an insurance company "will only be able to disclaim coverage if it demonstrates it was *actually* prejudiced by late notice."[16] It explicitly based its decision on sound public policy rational and legal precedent from a "majority of courts."[17]

Maryland, having long ago adopted the requirement that an insurance company must prove actual prejudice, should affirm the CSA decision and require National Union to prove actual prejudice. Such proof must establish more than a theoretical prejudice and must demonstrate that National Union was substantially likely to have taken steps that could have avoided coverage in the RICO case, during the time the case was stayed. National Union failed to and cannot meet that standard.

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[15] Case No. 2016 WY 81, Opinion dated August 17, 2016. The opinion can be found at the following web page: http://courts.state.wy.us/Documents/Opinions/2016WY81.pdf.

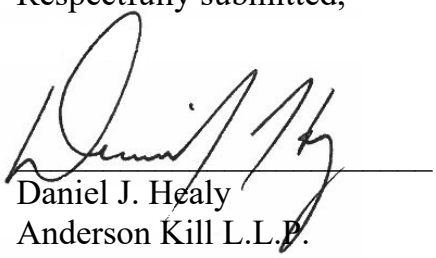
[16] *Id.* at 1 (emphasis added).

[17] *Id.* at 9-11.

CONCLUSION

For the reasons set forth above, *amicus curiae* UP urges affirmance.

Respectfully submitted,



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Dated: August 22, 2016

CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

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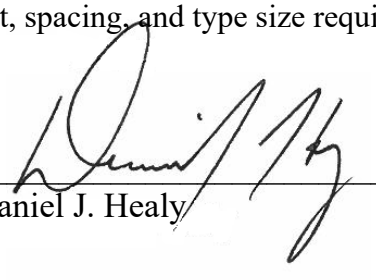

Daniel J. Healy

STATEMENT PURSUANT TO RULE 8-504(A)(9)

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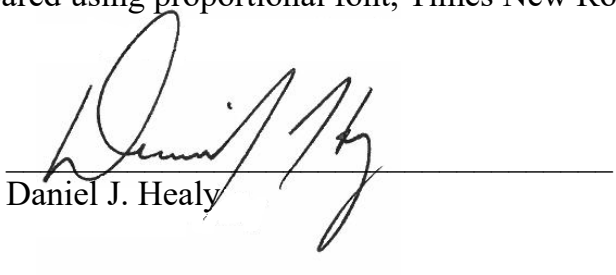

Daniel J. Healy

CERTIFICATE OF SERVICE

Court of Appeals
No. 18, September Term, 2016
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NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA.
Petitioner,

v.

THE FUND FOR ANIMALS
Respondent.

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I, John C. Kruesi, Jr., being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

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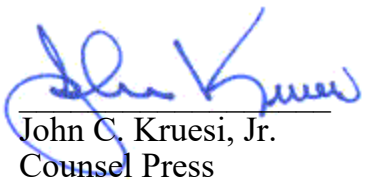
August 22, 2016



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