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Where IN THE
SUPREME COURT OF PENNSYLVANIA

No. 20 WAP 2018

ERIE INSURANCE EXCHANGE,
Appellant,
v.
TRACY L. MOORE and HAROLD E. McCUTCHEON, III,
Individually and as Administrators of the state of
HAROLD EUGENE McCUTCHEON, JR., and RICHARD A CARLY.

BRIEF FOR *AMICUS CURIAE* UNITED POLICYHOLDERS

Appeal from the Order of the Superior Court of Pennsylvania, entered November 22, 2017 at No. 869 WDA 2016, vacating the Judgment of the Court of Common Pleas of Washington County, entered June 15, 2016, at No. 2014-4931

AMY BACH, ESQ.
United Policyholders
222 Columbus Avenue, # 412
San Francisco, CA 94133
amy@unitedpolicyholders.org
Tel: (415) 393-9990
Fax: (415) 677-4170

JOHN N. ELLISON, ESQ. (I.D. No. 51098)
TIMOTHY P. LAW, ESQ. (I.D. No. 76793)
REED SMITH LLP
Three Logan Square
1717 Arch Street, 31st Floor
Philadelphia, PA 19103
Tel: (215) 851-8100
Fax: (215) 851-1420
jellison@reedsmith.com
tlaw@reedsmith.com

Counsel for *Amicus Curiae* United Policyholders

November 8, 2018

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STATEMENT OF INTEREST OF AMICUS CURIAE

United Policyholders is a not-for-profit educational organization with tax exempt status under Internal Revenue Code § 501(c)(3). The mission of United Policyholders is to educate the public on insurance issues and consumer rights related thereto, and to assist policyholders in securing prompt and fair insurance settlements. United Policyholders provides educational materials, organizes meetings in disaster areas, provides speakers at community and government forums, and acts as a clearing house for information on insurance issues.

After a disastrous firestorm in 1991 that destroyed over 3,000 structures in Oakland and Berkeley Hills, California, United Policyholders sponsored meetings, workshops, and seminars for the victims. United Policyholders worked with local officials, insurance companies, and relief agencies to facilitate claim settlements. United Policyholders has provided the same services in Florida for victims of Hurricane Andrew, in Texas for victims of Hurricane Harvey, in Southern California for the Northridge Earthquake, and in Northern California for victims of wildfires. United Policyholders participates in proceedings of the National Association of Insurance Commissioners and receives frequent invitations to testify at legislative and other public hearings, and to participate in regulatory proceedings on rate and policy issues.

Policyholders throughout the United States communicate on a regular basis with United Policyholders, which allows us to provide important and topical information to courts throughout the country via the submission of *amicus curiae* briefs in more than 400 cases involving insurance principles that are likely to impact large segments of the public. The organization's reputation as a reliable friend of the court was enhanced when its *amicus curiae* brief was cited in the United States Supreme Court's unanimous opinion in Humana, Inc. v. Forsyth, 525 U.S. 299 (1999). United Policyholders has appeared in many Pennsylvania Supreme Court cases, including Rancosky v. Washington National Ins. Co., 170 A.3d 364 (Pa. 2017); Babcock & Wilcox Co. v. American Nuclear Insurers, 131 A.3d 445 (Pa. 2015); Allstate Property & Casualty Co. v. Wolfe, 105 A.3d 1181 (Pa. 2014); American & Foreign Ins. Co. v. Jerry's Sport Center, Inc., 2 A.3d 526 (Pa. 2010); and ACE American Ins. Co. v Underwriters at Lloyds & Cos., 971 A.2d 1121 (Pa. 2009). A complete list of cases in which United Policyholders has appeared as amicus curiae can be found in our online Amicus Project library at www.uphelp.org/amicus.

United Policyholders' activities are limited only by the organization's reliance on donated labor and contribution of services and funds. This brief has been prepared *pro bono publico*.

SUMMARY OF ARGUMENT

An insurance company's duty to defend is broader than its duty to indemnify. When considering whether an insurance company must defend an underlying complaint against the insured, the factual allegations of the complaint are taken as true and are liberally construed in favor of a defense duty when a court considers whether an underlying action presents any potential for coverage under the terms of the insurance policy. Even where the allegations are groundless, false, or fraudulent, the insurance company must assume the defense of its insured, so long as the allegations, if true, could implicate coverage. The Superior Court correctly applied this standard, found a duty to defend, and should be affirmed.

In contrast to the duty to defend, if it is ultimately *proven* that the insured intended to cause the injury that is the subject of the underlying lawsuit, then that injury is not accidental; rather, it is expected or intended from the standpoint of the insured and is excluded. However, insurance companies may not preemptively discern an intent to cause injury when the complaint alleges accidental injury. The very point of the breadth of the duty to defend is to ensure that the policyholder has a defense against allegations of potentially covered losses pending a determination of the actual facts. To rule in favor of the insurance company here would conflate the duty to defend and the duty to indemnify, which are distinct obligations, and effectively overturn decades of uniform Pennsylvania precedent. The terms of the

insurance policies themselves, longstanding Pennsylvania precedent, and, to the extent the Court needs to reach the issue, public policy fully support a ruling that insurance companies must defend cases alleging accidental injury pending determination of the actual facts in the underlying proceeding.

LEGAL ARGUMENT

I. THE DUTY TO DEFEND IS DETERMINED BY REFERENCE TO THE ALLEGATIONS OF THE COMPLAINT

A. The Standard for Determining the Duty to Defend is Critical to the Proper Determination of This Appeal.

The duty to defend is "a valuable service paid for by the insured and one of the principal benefits of the liability insurance policy." Woo v. Fireman's Fund Ins. Co., 164 P.3d 454, 459-60 (Wash. 2007). The importance and breadth of the duty to defend echoes throughout the precedent of this Commonwealth. Perhaps the most concise, yet comprehensive, statement of the legal precepts governing the duty to defend is set forth in American & Foreign Ins. Co. v. Jerry's Sport Center, 2 A.3d 526, 540-41 (Pa. 2010) (omitting citations and quotations):

> An insurer's duty to defend is broader than its duty to indemnify. It is a distinct obligation, separate and apart from the insurer's duty to provide coverage. An insurer is obligated to defend its insured if the factual allegations of the complaint on its face encompass an injury that is actually or potentially within the scope of the policy. As long as the complaint "might or might not" fall within the policy's coverage, the insurance company is obliged to defend. Accordingly,

> it is the potential, rather than the certainty, of a claim falling within the insurance policy that triggers the insurer's duty to defend.
>
> The question of whether a claim against an insured is potentially covered is answered by comparing the four corners of the insurance contract to the four corners of the complaint. An insurer may not justifiably refuse to defend a claim against its insured unless it is clear from an examination of the allegations in the complaint and the language of the policy that the claim does not potentially come within the coverage of the policy. In making this determination, the factual allegations of the underlying complaint against the insured are to be taken as true and liberally construed in favor of the insured. Indeed, the duty to defend is not limited to meritorious actions; it even extends to actions that are groundless, false, or fraudulent as long as there exists the possibility that the allegations implicate coverage.

The Superior Court meticulously followed these governing standards. It liberally construed the underlying complaint in analyzing whether there was any potential for coverage and ruled that "[b]ecause the complaint alleges that the shooting of Carly was accidental, the shooting must be considered an event occurring unintentionally that is within the coverage of the Policies." (Appellant's Br. at 13). The court made clear that it was ruling solely on the duty to defend, explaining in footnote 15 of its opinion that "whether Erie ultimately has an obligation to indemnify the defendants depends on the outcome of the tort action and the basis for any judgment against the defendants in that action."

Erie complains that the Superior Court liberally construed the allegations of the underlying complaint to allege a "chaotic brawl" involving "erratic gunfire"

during an "unplanned struggle." (Appellant's Br. at 14). Yet, that is a very fair characterization of the complaint's allegations. The underlying complaint alleges a "struggle" during which Mr. McCutcheon was "negligently tossing his arm around in which hand the gun was contained thereby recklessly shooting off various rounds in and about the room where Carly and decedent were struggling, one such round striking Carly." The underling complaint alleged various acts of negligence, carelessness, and recklessness.

In contrast to the Superior Court's diligent exposition and application of the relevant standard, Erie wishes to recast the underlying complaint as alleging an intentional shooting of Mr. Carly, but the underlying complaint simply does not allege that. The Insurance Industry Amici argue that "[w]hile it was alleged that he accidentally shot Mr. Carly in the face, it was Mr. McCutcheon's actions which instigated the fight that led to Mr. Carly being shot in the face, and it was substantially certain that harm would befall Mr. Carly during Mr. McCutcheon's armed assault upon him." (Amicus Br. at 9). The first part of that statement resolves the duty to defend question – "it was alleged that he accidentally shot Mr. Carly in the face." The remainder of the sentence construes the complaint contrary to Pennsylvania law's controlling standard to assume an "armed assault" intended to cause injury rather than construing the complaint liberally to allege an unintentional injury caused by erratic gunfire during an unplanned struggle.

Because the Superior Court properly construed the underlying complaint and the relevant standards, the Superior Court's decision should be affirmed.

B. If Erie Believes That the Allegations of the Underlying Complaint are Groundless, False, or Fraudulent, and the Injury was Actually Intentional, It Still Has a Duty to Defend.

1. The Duty to Defend Should Be Determined Based Solely Upon the Complaint and the Insurance Policy.

Erie concedes that a ruling on the duty to indemnify would have been premature. (Appellant's Br. at 14). The duty to indemnify is based on the facts as actually proven, rather than on the facts alleged. If the facts as proven in the underlying action are that Mr. McCutcheon intentionally shot Mr. Carly in the face (as Erie suspects), coverage would be excluded and Erie would have no obligation to pay any judgment under its insurance policy regardless of what the allegations are.[1]

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[1] Sometimes the facts are determined in a separate declaratory judgment action. This can be troublesome, as the insurance company should be defending its insured against allegations of wrongdoing, not proving the nature of the wrongdoing. An example from the precedent is Ohio Casualty Group of Insurance Companies v. Bakaric, 513 A.2d 462 (Pa. Super. Ct. 1986). Ohio Casualty filed a declaratory judgment action. A two-day jury trial was held and the jury was provided with sixteen special interrogatories, including whether Mr. Bakaric "should have expected harm to result to Helen Bakaric as a result of handling the gun." Id. at 464. The Superior Court noted that this unfortunate jury question did not properly resolve

While the actual facts are relevant for the duty to indemnify, only the factual allegations are relevant for the duty to defend. The allegations of the underlying complaint cannot be ignored simply because Erie believes the underlying complaint is framed artfully to access insurance coverage.[2] For purposes of the duty to defend, it matters not if the allegations of accidental injury are groundless, false, or even fraudulent. The insured does not control the wording that the plaintiff chooses to use in the complaint, and standard insurance policy language accordingly requires insurers to defend claims arising from such allegations. The

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whether Mr. Bakaric actually expected the injury, but the jury's verdict was merely advisory in any event. The trial court concluded based on the actual facts that Mr. Bakaric expected or intended the injury that he inflicted on his wife. Id. at 465. Although the Superior Court "might have come to a different conclusion than the trial judge," the court could not say that the judge's conclusion was "clearly wrong." Id. The better practice is for the insurer to defend the insured based on the allegations and evaluate coverage based on the actual facts established in any underlying judgment.

[2] This Court has recognized that "to allow the manner in which the complainant frames the request for redress to control in a case such as this one would encourage litigation through the use of artful pleadings to avoid exclusions in liability insurance policies." Mutual Ben. Ins. Co. v. Haver, 725 A.2d 743, 745 (Pa. 1999). However, this Court was clear that it was not inviting insurance companies to ignore the factual allegations as they are pled: "we must determine whether the factual allegations in the complaint fall within the knowing endangerment exclusion to coverage that is contained in the policy." Id. at 746. This Court drew a distinction between the factual allegations, which are binding in a duty to defend analysis, and the legal framing of those factual allegations, which are not.

insured still gets a defense because if the facts are proven as they are alleged, there would be coverage for the resulting judgment.

These concepts are not new to Erie. This Court explained to Erie in 1987 that the duty to defend is not limited to meritorious actions; it even extends to actions that are "groundless, false, or fraudulent" so long as there exists the *possibility* that the allegations implicate the insurance policy coverage. Erie Ins. Exch. v. Transamerica Ins. Co., 533 A.2d 1363, 1368 (Pa. 1987). Likewise, the Superior Court reminded Erie in 2004 that "[a]n insured has purchased not only the insurer's duty to indemnify successful claims which fall within the policy's coverage, but also protection against those groundless, false or fraudulent claims regardless of the insurer's ultimate liability to pay." Erie Ins. Exch. v. Muff, 851 A.2d 919, 925-26 (Pa. Super. Ct. 2004).

This is a precept that Erie still has not adopted and applied, as this case demonstrates. Erie's error in this regard is summarized in its pithy citation of Holmes, arguing that "[a] plaintiff cannot trigger coverage by alleging that he was tripped when the facts show that he was actually kicked." (Appellant's Br. at 39). On a review of a Complaint regarding the duty to defend, one does not ask what the "facts show" was "actually" done. That is the question for the duty to indemnify. If the plaintiff alleges that he was tripped, then the duty to defend must

be evaluated based on that allegation. If the actual facts show after trial that the plaintiff was not accidentally tripped, but instead was intentionally kicked, then there will be no coverage for the resulting judgment.

Erie repeatedly demeans the Superior Court, characterizing the Superior Court's decision as the "credulous acceptance of Carly's self-serving, legal characterization of the shooting." (Appellant's Br. at 36). But that is precisely what this Court's rulings on the duty to defend require the lower courts to do: accept the plaintiff's factual allegations as true and determine the duty to defend on that basis, even if the insurance carrier does not believe the allegations or wishes the plaintiff had been pleading something else.

2. If the Complaint Alleges That The Plaintiff's Injuries Were Intentionally Caused by the Defendant, Then the Defendant Will Have No Coverage.

This Court has recognized a difference between intending an act and intending a result. Eiseman v. Hornberger, 264 A.2d 673, 673-74 (Pa. 1970). It is the injury that must be caused by an occurrence, and it is only expected or intended injuries (not expected or intended acts) that are excluded:

> Pennsylvania law is clear on at least one of the issues involved. In our state, the exclusionary clause applies only when the insured intends to cause a harm. Insurance coverage is not excluded because the insured's actions are intentional unless he also intended the resultant

> damage. *See Mohn v. American Casualty Co. of Reading*, 458 Pa. 576, 326 A.2d 346 (1974). The exclusion is inapplicable even if the insured should reasonably have foreseen the injury which his actions caused.

United States Auto. Ass'n v. Elitsky, 517 A.2d 982, 987 (Pa. Super. Ct. 1986). The focus must remain upon whether the defendant intended to cause the injury for which the lawsuit was brought.

For cases where only intentional injury is alleged, there is neither a duty to defend nor indemnify in a "four corners" state like Pennsylvania. In Gene's Restaurant, Inc. v. Nationwide Mutual Insurance Co., 548 A.2d 246 (Pa. 1988), the complaint alleged that the defendant committed a malicious assault, intending to cause the very damages the plaintiff suffered:

> On or about January 6, 1976, at or about 1:30 a.m., the defendant willfully and maliciously assaulted and beat the wife plaintiff, PATRICIA A. ASCHENBACK, striking her with fists and with great force and violence repeatedly shook, cast and threw the said plaintiff to the ground causing plaintiffs to sustain the injuries and damages hereinafter set forth.

Id. at 247. This Court ruled that "[t]he willful and malicious assault alleged in the complaint is not an accident but rather is an intentional tort. As such, it is not covered by the policy and, therefore, the insurer owed no duty to defend." Id. Thus, when this Court characterized the complaint as alleging "willful and malicious assault" it was not improperly recasting the allegations of the complaint, but was instead faithfully addressing those allegations, just as the Superior Court

did here. Unlike the allegations in this case, which can be fairly construed as a chaotic brawl involving erratic gunfire during an unplanned struggle, the complaint in Gene's Restaurant alleged a malicious assault and beating in which the bodily injury was caused intentionally.

This Court has held unequivocally that "[o]ur conclusion in *Gene's Restaurant* that injuries caused by intentional conduct are not 'accidental' does not absolve an insurer of the duty to defend its insured when the complaint filed against the insured alleges that the intentional conduct of a third party was enabled by the negligence of the insured." Donegal Mut. Ins. Co. v. Baumhammers, 938 A.2d 286, 291 (Pa. 2007). Likewise, insurance companies may not bootstrap their way into evading the duty to defend by conflating injuries caused accidentally by the insured with injuries caused intentionally. In Baumhammers, the shooting spree was intentional, but that did not make any less accidental the allegations of negligence against the shooter's parents. Likewise, Mr. McCutcheon's killing of his ex-wife Terry McCutcheon was not accidental, but that says nothing about whether Mr. Carly's injuries were caused intentionally or accidentally.[3] The focus

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[3] The Superior Court was correct not to be misled into considering whether the injuries to Terry McCutcheon were caused by an occurrence. The underlying complaint did not seek any recovery for bodily injury to Terry McCutcheon. Likewise, the Superior Court was correct not to focus on the fact that Mr. McCutcheon grabbed Mr. Carly by his shirt and pulled him into the home. Mr. Carly's injuries were not caused by shirt pulling. Rather, the

under the policy language must be on whether the alleged bodily injury to Mr. Carly was caused by an occurrence, *i.e.*, whether Mr. McCutcheon intentionally injured Mr. Carly or accidentally injured Mr. Carly. Here, the injuries were alleged to be accidental, and Erie owed its insured a duty to defend.

II. Pennsylvania Public Policy Fully Supports the Broad Duty to Defend in Liability Insurance Policies.

A. The Broad Duty to Defend Ensures Adequate Representation of Defendants.

Due process is the hallmark of our justice system. Adequate representation in civil cases helps ensure that defendants receive due process. Although defendants in civil cases are not constitutionally entitled to representation, the judicial process functions far better when civil defendants are represented by attorneys. Insurance funds the defense in many civil cases, and that is a public good.

B. Tort Claimants Have a Legitimate Interest in the Recovery of Insurance Proceeds.

Just as a defendant has an interest in being defended, so does a plaintiff have an interest in the ultimate existence of coverage for the plaintiff's claim. This Court has recognized that "the plaintiff has an interest in seeing that an insurance

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Superior Court properly evaluated whether the injuries to Mr. Carly's face were alleged to have been caused intentionally or accidentally.

company pays the judgment against its insured," and for that reason, must be joined in any declaratory judgment action. Vale Chemical Co. v. Hartford Acc. and Indem. Co., 516 A.2d 684, 686-687 (Pa. 1986). While the plaintiff controls the *allegations* that trigger a duty to defend, the plaintiff does not control the *actual facts* which govern the duty to indemnify. This minimizes any concern about "artful pleading," as the plaintiff's interest is ensuring that the ultimate judgment is covered, which is based on the actual facts not on the plaintiff's allegations. As previously discussed, an insurance company has the duty to defend a complaint even if the facts as pleaded are false or fraudulent, but it has no duty to pay a judgment if the actual facts as proven fall outside the parameters of the insurance policy's coverage.

It is a public good to ensure that claimants are properly compensated. That is the goal of the workers' compensation system and our civil justice system. The most important constituency in a civil action may be the injured party, people like Mr. Carly. They often have horrific injuries that have changed their lives and that may require ongoing medical care. There is no public policy against compensating victims who are unintentionally injured, even in connection with intentional acts – such as the boy who is unintentionally struck when a friend intentionally swings a baseball bat, the pedestrian injured by a speeding driver, the homeowner who loses her home when a smoker intentionally discards a cigarette butt, or the Good

Samaritan who intervenes in a violent situation and is unintentionally shot (like Mr. Carly). While the insurance industry can make a strong case that public policy should not stretch the provisions of insurance policies to *ensure* compensability where the insuring agreement says there is none, the insurance industry cannot legitimately contend that their duties under insurance policies should be abrogated or circumscribed where their terms of coverage apply. Public policy supports enforcement of insurance policies as drafted; public policy is not a tool for insurance companies to rewrite contracts of insurance that happen not to exclude the losses that the insurance company now regrets having chosen to cover.

C. Insurance Can Be An Important Aspect of Gun Ownership.

In recent years, insurance has gained prominence as one way of addressing the consequences of gun violence. Legislators have proposed mandatory insurance for gun owners, and insurance scholars have commended the effort. See, generally, Peter Kochenburger, Liability Insurance and Gun Violence, 46 Conn. L. Rev. 1265 (2013-2014). One could imagine a law that imposes strict liability on gun owners for injuries caused by their firearms, regardless of intent, and a statutory requirement of mandatory liability insurance to cover that liability. Id. at 1287-94. Indeed, such a law might look to the innocence of the victim rather than the perpetrator. While such a law might be the subject of fierce debate, this Court

should not state or imply that such insurance would be against public policy or would be unenforceable under the laws of Pennsylvania. It is far preferable to focus on the policy language and well-established precedent on the duty to defend to resolve this case, while leaving to the legislature the decision of whether, and under what circumstances, insurance for injuries arising from the use of firearms is good public policy.

D. Insurance Companies Insure Against Risks That the Insured Controls.

The Insurance Industry Amici argue that "insurance companies generally do not insure against risks that the insured controls" (Amicus Br. at 12) and that there is no coverage because "it was Mr. McCutcheon who controlled the risk of loss here" (Amicus Br. at 9). The Insurance Industry Amici argue that "regardless of whether or not Mr. McCutcheon intended to injure Mr. Carly," there is no coverage.

These statements are divorced from any policy language and are clearly wrong as a matter of insurance practice. Insurance companies often market their services as assisting insureds to control their risks of loss. As just one pertinent example, Erie has an entire section of its website dedicated to risk control services. See https://www.erieinsurance.com/business-insurance/risk-control. Insurance

companies obviously cannot urge insureds to control their risks and then argue that risks that are under their control are uninsurable.

Insureds control whether they engage in business that is particularly risky or entirely benign; whether they drive within the speed limit or outside of it; whether they fix an uneven sidewalk or leave the repairs to a later day. Insurance does not protect only the pure and the perfect. Every complaint will allege that the defendant did something wrong. Nearly every complaint will allege that the defendant could have avoided causing the loss by doing something differently, by being more cautious, or simply by not doing whatever instigated the loss or injury. That does not deprive the policyholder of coverage. Erie's insurance policy only deprives the policyholder of coverage if the policyholder intentionally caused the injury that is the subject of the underlying lawsuit. If there is any room for doubt on that point, Erie must honor its duty to defend

E. Insurance Companies Explicitly Cover the Defense of Intentional Torts and Crimes.

The Insurance Industry Amici speculate about what crimes Mr. McCutcheon might have committed, and whether those crimes require that an intent to harm be inferred or proven. But Mr. McCutcheon was not indicted or convicted of any

crime.[4] Moreover, this Court has rejected an inference of willful conduct outside of the sexual assault context. See Minnesota Fire & Cas. Co. v. Greenfield, 855 A.2d 854, 861 (Pa. 2004) ("We reject the Superior Court's extension of the doctrine of inferred intent to general liability insurance matters as inappropriate and unnecessary to resolution of this case."). Moreover, there has been no civil adjudication of whether Mr. McCutcheon caused the injuries to Mr. Carly intentionally or accidentally. Particularly prior to a final adjudication, it is common for insurance companies to defend those committed of crimes and intentional torts – indeed, the insurance company's duty to retain competent counsel to defend against accusations of misconduct is a key reason why people buy liability insurance.

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[4] The question of whether the defendant's criminal conviction of a crime that contains an element of intent to harm resolves questions of intent for insurance coverage purposes is a difficult one. See, e.g., Economy Premier Assur. Co. v. Welsh, No. 14-1581, 2016 WL 5468121 (W.D. Pa. Sept. 29, 2016); Stidham v. Millvale Sportsmen's Club, 618 A.2d 945 (Pa. Super. Ct. 1992). In Stidham, the Superior Court noted that it was unfair to invoke collateral estoppel against a party due to a guilty plea because the plea may have been agreed for reasons having little to do with the nature of the crime itself. In any event, the duty to defend should be resolved through a pure comparison of the allegations of the complaint and the provisions of the insurance policy. On the question of indemnity, the current state of the law is that evidence of the guilty plea would be admissible as an admission against interest if it can considerably elucidate the issues. Id. at 952. In the present case, there was no criminal conviction or guilty plea to consider, and the only question was the duty to defend.

Insurance companies explicitly cover numerous intentional torts, such as defamation, disparagement, trademark infringement, misappropriation of a style of doing business, unfair competition, infringement of copyright, title or slogan, false imprisonment, employment discrimination, wrongful termination, wrongful eviction, malicious prosecution, and invasion of privacy. Christopher French, Debunking the Myth that Insurance Coverage is Not Available or Allowed for Intentional Torts or Damages, 8 Hastings Bus. L.J. 65, 67-69 (2012) (Winter 2012) (collecting cases). As another scholar noted after surveying the insurance landscape, "insurers, either by public policy or by choice and market demands, often insure illegal and intentional acts, despite the moral hazards inherent in doing so." Peter Kochenburger, Liability Insurance and Gun Violence, 46 Conn. L. Rev. 1265, 1291 (2013-2014). Nevertheless, "it is unlikely that insurance coverage for intentional shootings would encourage additional gun violence even by reducing the financial costs of such actions." Id. at 1291. There are already numerous disincentives.

Directors and officers liability insurance insures claims for wrongful acts, which includes criminal claims. Attorneys' fees associated with the defense of criminal proceedings against directors and officers and various professionals are covered as they are incurred until there is a "final adjudication" finding that the losses result from fraudulent or criminal conduct. See, e.g., In re Enron Corp. Sec.,

Derivative & "ERISA" Litig., 391 F. Supp. 2d 541, (S.D. Tex. 2005). The definition of "claim" in directors and officers liability insurance often expressly includes criminal proceedings. See Thomas R. Newman, Claims-Made Coverage: What Is a Claim?, FDCC Quarterly 63:1, 4 (Fall 2012) (quoting AIG form that includes criminal proceedings commenced by indictment or information in the definition of "claim").

Municipalities buy coverage for allegations of intentional assault and battery committed by police, and police accused of assault and battery are typically indemnified for these alleged assaults either by the municipality or by the insurance company. John Rappaport, How Private Insurers Regulate Public Police, 130 Harv. L. Rev. 1539, 1571-72 (April 2017). Those law enforcement liability or public officials liability policies typically cover the defense of allegations of intentional malfeasance. See Continental Cas. Co. v. County of Chester, 244 F. Supp.2d 403, 408 (E.D. Pa. 2003).

In addition, the National Rifle Association sponsors insurance that provides reimbursement for criminal defense costs for shootings where the charges are dismissed or the insured is acquitted due to an act of self-defense. Peter Kochenburger, Liability Insurance and Gun Violence, 46 Conn. L. Rev. 1265, 1283-84 (2013-2014). Likewise, the "occurrence" definition and intentional injury

exclusions in general liability and homeowner policies often include a modification to allow coverage for harm inflicted intentionally, but in self-defense. Id. at 1282. Thus, defense coverage for allegations of intentional assault is commonplace.

Indeed, insurance companies themselves purchase extra-contractual obligations coverage ("ECO" Clauses) to cover their own intentional conduct and bad faith. See generally Larry P. Schiffer and William Bodkin, Caveat Reinsurer: Reinsuring Punitive Damages Under ECO Clauses, 37 Tort & Ins. L.J. 147 (Fall 2001); Hartford Fire Ins. Co. v. Lloyd's Syndicate 0056 ASH, No. Civ397CV00009AVC, 1997 WL 33491787 (D. Conn. July 2, 1997). It is ironic that the insurance industry sells insurance covering intentional acts, and insures the intentional acts of insurance companies, and then claims that such acts are uninsurable as a matter of public policy. This is not a new tactic for the insurance industry. The insurance industry urged that policyholders should not be permitted to use the RICO statute against insurance companies, while at the same time insurance companies were using the RICO statute themselves. See Humana v. Forsyth, 525 U.S. 299, 314 (1999) (citing brief of United Policyholders and noting "insurers, too, have relied on the statute when they were the fraud victims").

Accordingly, public policy does not prevent the defense of a lawsuit, like the underlying action, that can reasonably be construed as alleging accidental injury.

Indeed, public policy does not prevent the *defense* of a lawsuit that *alleges* assaults, intentional harm, malfeasance, or criminal activity. The insurance industry *amici* must know that they insure such matters. Public policy should be used with extreme caution as a basis for voiding coverage provided to insurance consumers.

F. Finding a Duty to Defend in This Case Does Not Encourage Evil, Increase Moral Hazard, or Lead to Suicide.

The Insurance Industry Amici repeatedly characterize Mr. McCutcheon's actions as "evil" and "illegal." Erie had an "expected or intended injury" exclusion in the relevant insurance policies. If the injury to Mr. Carly is proven to be expected or intended, it is excluded. If the injury cannot be proven to be expected or intended, it is covered. If there is some question about that, based on the allegations of the pleadings, then there is a duty to defend. The question of "evil" or "illegal" simply diverts attention from the issue.

As this Court noted in Jerry's Sport Center, 2 A.3d at 541, "whether a complaint raises a claim against an insured that is potentially covered is a question to be answered by the insurer in the first instance, upon receiving notice of the complaint by the insured." This Court recognized that such decisions "may be difficult" but insurance companies "are in the business of making this decision."

Id. at 542. They should do so based on the facts alleged in the complaint and the terms of the insurance policy, not based on amorphous notions of public policy.

Erie argues that requiring it to meet its defense obligation in the present case would create a "perverse incentive for the perpetrator of a violent crime spree to commit suicide to avoid both criminal prosecution and uninsured liability, thereby protecting the assets of the wrongdoer's estate." (Appellant's Br. at 59). This is farfetched. It should be safe to say that, however this appeal is resolved, nobody will commit suicide due to the holding. Erie's decision on the duty to defend should have been based on the allegations of the complaint and the provisions of the insurance policy, not upon whether the insured has been criminally prosecuted or has committed suicide.

CONCLUSION

The Superior Court's well-reasoned and thoughtful opinion should be affirmed.

Dated: November 8, 2018

Respectfully Submitted,

/s/ Timothy P. Law

AMY BACH, ESQ.
United Policyholders
222 Columbus Avenue, # 412
San Francisco, CA 94133
amy@unitedpolicyholders.org
Tel: (415) 393-9990
Fax: (415) 677-4170

JOHN N. ELLISON, ESQ. (I.D. No. 51098)
TIMOTHY P. LAW, ESQ. (I.D. No. 76793)
REED SMITH LLP
Three Logan Square
1717 Arch Street, 31st Floor
Philadelphia, PA 19103
Tel: (215) 851-8100
Fax: (215) 851-1420
jellison@reedsmith.com
tlaw@reedsmith.com

Counsel for *Amicus Curiae* United Policyholders

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that the foregoing brief complies with the word limit of Pennsylvania Rule of Appellate Procedure 531(b)(3). Specifically, it contains 5,465 words based on the word count of Microsoft Word 2010, the word processing system used to prepare the brief.

I further certify that a true and correct copy of the Brief of Amicus Curiae United Policyholders in Erie Insurance Exchange v. Tracy L. Moore, et al. was served via eFiling and by U.S. Mail on this date to the following counsel:

Allan C. Molotsky
Matthew D. Vodzak
Fowler Hirtzel McNulty & Spaulding, LLP
2000 Market Street, Ste. 550
Philadelphia, PA 19103

Frances A. Lettieri
1013 Lowber Drive
Cherry Hill, NJ 08034

Herman J. Bigi
Bigi & Walsh
337 Fallowfield Ave.
Charleroi, PA 15022

Meghan K. Finnerty
Offit Kurman, PA
1801 Market Street, Suite 2300
Philadelphia, PA 19103

Jerome A. Moschetta
225 Deerfield Drive
Canonsburg, PA 15317

Louis C. Long
Thomas, Thomas & Hafer LLP
525 William Penn Pl. 37th Floor, Ste. 3750
Pittsburgh, PA 15219

Dated: November 8, 2018

By: /s/ *Timothy P. Law*
Timothy P. Law, Esq.

REED SMITH LLP
Three Logan Square
1717 Arch Street, 31st Floor
Philadelphia, PA 19103
Tel: (215) 851-8100
Fax: (215) 851-1420
tlaw@reedsmith.com

Counsel for *Amicus Curiae* United Policyholders