

STATE OF MINNESOTA
IN COURT OF APPEALS

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No. C3-95-1809
No. CX-95-1810

Fluoroware, Inc.

Respondent,

vs.

Chubb Group of Insurance
Companies, et al.,

Defendants (C3-95-1809),
Appellants (CX-95-1810),

United States Fire Insurance Company,

Appellant (C3-95-1809),

Crum & Forster Insurance
Organizations, et al.,

Defendants (CX-95-1810).

BRIEF OF AMICUS CURIAE
UNITED POLICYHOLDERS OF
AMERICA IN OPPOSITION TO
"MOTION" BY GREAT
NORTHERN INSURANCE
COMPANY TO STRIKE
APPENDIX

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Dated: January 4, 1996

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PRELIMINARY STATEMENT

Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.

Buckley v. Valeo, 424 U.S. 1, 67, 96 S.Ct. 612, 658 (1976), quoting, L. Brandeis, Other People's Money, 62 (National Home Library Foundation ed. 1933).

United Policyholders submits this opposition to the purported "Motion of Great Northern Insurance Company to Strike Appendix of Amicus Curiae United Policyholders of America". The materials that Great Northern Insurance Company seeks to keep from this Court's view will assist this Court by providing an historical context within which to view the standard form general liability insurance policy provisions at issue. As Justice Oliver Wendell Holmes stated, "[A] page of history is worth a volume of logic." New York Trust Co. v. Eisner, 256 U.S. 345, 349, 41 S. Ct. 506 (1921). United Policyholders requests that this Court take judicial notice of the documents in its appendix, or alternatively, accept the documents as a supplement to the record in this case.

* * * * *

FACTS

As of the date of this memorandum, no counsel for United Policyholders has been served by Great Northern Insurance Company with any portion of its purported Motion to Strike United Policyholders Appendix. Affidavit of William G. Passannante in

Opposition to Motion to Strike, sworn to January 3, 1996 ("Pass. Aff."), ¶ 2. Indeed, although Great Northern's purported motion is dated December 20, 1995, counsel for United Policyholders were only informed of the purported Motion to Strike its Appendix by counsel for respondent, Fluoroware, on January 2, 1996. Pass. Aff., ¶ 2.

A copy of the December 20, 1995 transmittal letter that enclosed the purported motion to strike was addressed to five law firms, none of which is counsel to United Policyholders in this action. Pass. Aff., ¶ 3, and Exhibit 1 thereto. This Court's December 6, 1995 Order states that United Policyholders' Minnesota counsel "will accept service of all papers." No such service has been made upon United Policyholders Minnesota counsel. Pass. Aff., ¶ 3.

Counsel for United Policyholders has submitted an affidavit regarding Exhibits 1 through 9 of the Appendix, Pass. Aff., ¶¶ 4-12, which provides this Court a supplemental foundation, and attests that the Appendices are what they purport to be.

Great Northern's motion is directed at shielding from this Court's view: a reported case regarding fundamental insurance principles (Appx. Ex. 9); a published article from the insurance industry trade press (Appx. Ex. 7); promotional sales materials published by major insurance companies (Appx. Exs. 1 and 4); an explanatory memorandum by the drafters of the insurance policy language at issue, the Insurance Services

Office, Inc. (see also Amicus Brief of United Policyholders, at 4-5) (Appx. Ex. 2); and legal memoranda filed with courts by insurance companies that contain representations regarding the meaning of the standard form policy language at issue (Appx. Exs. 3, 5, 6 and 8). None of the material attached to the appendix is confidential.

ARGUMENT

As noted in United Policyholders' Amicus Brief, this Court should not permit economically motivated contradiction. The material that United Policyholders has submitted provides this Court with a context in which to place the insurance companies' present-day interpretation of their policy language.

Further, pro-coverage inconsistent positions taken in briefs filed with courts by insurance companies are powerful indications that the ruling in favor of coverage by the Court below is supported by reasonable interpretations of policy language.

The purpose of an amicus brief is to inform the court as to facts or situations which may have escaped consideration or to remind the court of legal matters which have escaped its notice and regarding which it appears to be in danger of making a wrong interpretation. In Re Public Conservatorship of Holly Ann Foster, 535 N.W.2d 677, 684 (Minn. Ct. App. 1995) (citation omitted). United Policyholders' amicus brief and appendix provide just this type of information.

A. Great Northern Insurance Company's "Motion" is Fatally Defective.

Great Northern Insurance Company's purported "motion" is fatally defective on account of Great Northern's failure properly to serve counsel for United Policyholders. Under Minnesota law, a motion must be served on all parties. Minn. Rule App. P. 125.04, "Proof of Service." Great Northern's purported motion has not been served upon United Policyholders. Pass. Aff., ¶ 2. Obviously, a motion to strike United Policyholders' brief most significantly impacts United Policyholders, and the failure of Great Northern properly to effect service is fatal to its purported motion.

B. This Court May Take Judicial Notice of the Documents in United Policyholders' Appendix.

This Court may take judicial notice of the documents in United Policyholders' appendix. This Court may take judicial notice of "adjudicative facts." Minn. Evid. R. 201. Judicial notice may be taken at any stage of the proceeding. Minn. Evid. R. 201(f). Judicial notice should be encouraged in "appropriate circumstances." Minn. Evid. R. 201, Committee Comment. Wholly apart from "supplementing the record," the additional foundation supplied in the accompanying affidavit erases any doubt regarding the ability of this Court properly to take judicial notice of the documents in United Policyholders' appendix.

Moreover, the facts which an amicus properly may bring to an appellate court's attention often will not be in the record of the case. R. Stern, Appellate Practice in the United States

339 (1981). The United States Supreme Court, for example, encourages the presentation of non-record facts by amicus brief. Id. Unpublished material referred to in such briefs may be filed with that Court's clerk. See Shapiro, Amicus Brief in the Supreme Court, 10 Litigation 21, 23 (Spr. 1984). A court has "inherent power to look beyond the record where the orderly administration of justice commends it." Crystal Beach Bay Assoc. v. Koochiching County, 309 Minn. 52, 243 N.W.2d 40, 43 (1976). The Supreme Court often relies on non-record material concerning, for example, historical, social or scientific facts. See, e.g., Regents of the University of California v. Bakke, 438 U.S. 265, 316-17, 321-24 (1978); San Antonio School District v. Rodriguez, 411 U.S. 1, 56-57 n.111 (1973). In many instances, the information that the Court obtains from amicus briefs is not common knowledge. Thus, the proper role of the amicus is not strictly limited to the doctrine of judicial notice. See R. Stern, Appellate Practice, at 339-40.

C. United Policyholders' Amicus Brief and Appendix are Proper Under Minnesota Law.

Assuming for the sake of argument that Great Northern's motion is required to be addressed, United Policyholders' Brief and Appendix are proper under Minnesota law. United Policyholders submitted its Brief and Appendix in support of respondent Fluoroware, Inc. In order to sustain the judgment of a District Court an Appeal Court may permit the record on appeal to be supplemented by documentary evidence of a conclusive

nature. Plowman v. Kopeland, Buhl & Co., 261 N.W.2d 581, 583 (Minn. 1977).

There is no debate that United Policyholders' Brief and Appendix were submitted in favor of affirmance.

Further, given the issues before this Court, the documentary evidence submitted is of a conclusive nature. Plowman, 261 N.W.2d at 583. The documents included in United Policyholders' appendix are incapable of serious dispute. The documents are either briefs filed with courts or widely available public materials. The issues before the Court include the "duty to defend" and liability insurance policy interpretation.

Under Minnesota law, an insurance company's duty to defend is broader than its duty to indemnify. An insurance company must defend its policyholder whenever the allegations against the policyholder in an underlying action arguably may lead to liability covered under the policy. Brown v. State Automobile & Casualty Underwriters, 293 N.W.2d 822, 825 (Minn. 1980). "An insurer seeking to avoid affording a defense carries a burden of demonstrating that all parts of the cause of action [against the policyholder] fall clearly outside the scope of coverage." Grain Dealers Mutual Ins. Co. v. Cady, 318 N.W.2d 247, 251 (Minn. 1982) (citation omitted).

In determining whether there is a duty to defend, a court must give the benefit of the doubt to the policyholder. Lanoue v. Fireman's Fund American Insurance Cos., 278 N.W.2d 49, 53 (Minn. 1979). Any ambiguity regarding whether coverage exists

must be resolved in favor of the policyholder. Seaway Port Authority of Duluth v. Midland Insurance Company, 430 N.W.2d 242, 247 (Minn. App. 1980). If the language of an insurance policy is reasonably subject to more than one interpretation, it is ambiguous. Columbia Heights Motors v. Allstate Insurance Co., 275 N.W.2d 32 (Minn. 1979).

Given the Minnesota rules regarding the duty to defend a policyholder and the effect of policy language that is capable of more than one reasonable construction, the documents in United Policyholders' appendix are of a conclusive nature. For example, representations by insurance companies contained in briefs filed with courts that contain interpretations of policy language that favor insurance coverage, conclusively show that such interpretations are at a minimum reasonable. (Appx. Exs. 3, 5, 6 & 8). The same is true for the explanatory memorandum prepared by the Insurance Services Office (Appx. Ex. 2) and marketing material used by Chubb and AIG (Appx. Exs. 1 & 4).

Since United Policyholders offered the material in support of an affirmance, and the documents are conclusive on the issues for which they are offered, this Court may accept them as part of the record. Plowman, 261 N.W.2d at 583.

D. Disappearing Decisions.

Seeking to keep inconsistent representations made to other courts from this Court is one thing. Another mechanism insurance companies use in attempting to keep information from courts and policyholders is the vacatur or depublishation of pro-

policyholder judicial decisions. See Carrizosa, Making the Law Disappear: Appellate Lawyers Are Learning to Exploit the Supreme Court's Willingness to Depublish Opinions, Cal. Law., Sept. 1989, at 65. This astonishing manipulation of our judicial system, one of our most precious heritages, only recently has come to light. See Parloff, Rigging the Common Law, Am. Law., Mar. 1992, at 74; Gordon, Vanishing Precedents, Bus. Ins., June 15, 1992, at 1; and Fisch, Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur, 76 Cornell L. Rev. 589 (1991).

The United States Supreme Court recently has held that "mootness by reason of settlement does not justify vacatur of a judgment under review" even though "[s]ome litigants, at least, may think it worthwhile to roll the dice rather than settle in the district court, or in the court of appeals, if, not only if, an unfavorable outcome can be washed away by a settlement-related vacatur." U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership, 115 S.Ct. 386, 393 (1994).

The Supreme Court's recent decision was based upon an appreciation that "[j]udicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur . . . To allow a party . . . to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment would - quite apart from any considerations of fairness

to the parties - disturb the orderly operation of the federal judicial system." 115 S. Ct. at 392.

Improper use of motions to strike carries the same potential.

E. Motions to Strike are Disfavored.

Generally, motions to strike are viewed with disfavor and are denied unless the challenged pleading has no possible relationship to the controversy and will unfairly prejudice the other party. See Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distrib. Pty. Ltd., 647 F.2d 200, 201 (D.C Cir. 1981); Lipsky v. Commonwealth United Corp., 551 F.2d 887, 893 (2d Cir. 1976); Augustus v. Board of Public Instruction, 306 F.2d 862, 868 (5th Cir. 1962); Dah Chong Hong, Ltd. v. Silk Greenhouse, Inc., 719 F. Supp. 1072, 1073 (M.D. Fla. 1989); Pessin v. Keeneland Ass'n, 45 F.R.D. 10, 13 (E.D. Ky. 1968) (motions to strike are considered "time wasters"). In other words,

[m]atter will not be stricken from a pleading unless it is clear that it can have no possible bearing upon the subject matter of the litigation; if there is any doubt as to whether under any contingency the matter may raise an issue, the motion should be denied. And even if the allegations are redundant or immaterial, they should be stricken only if they are prejudicial to the moving party.

2A Moore's Federal Practice Paragraph 12.21[2] (2d ed. 1993) (emphasis added).¹ While Great Northern does not rely upon

1. Federal Rule of Civil Procedure 12(f) and Minnesota Dist. Ct. Gen. Rule 12.06 are identical in material aspects. Thus, as there is little authoritative guidance interpreting the Minnesota rule, this Court may look to authorities under the federal rule.

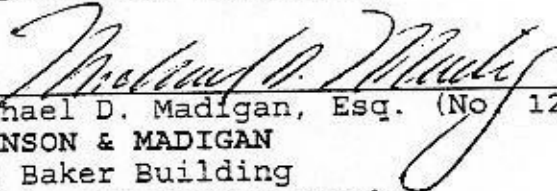
Dist. Ct. Gen. Rule 12.06, the reasons for disfavoring motions to strike at the appellate level are similar. This Court should deny Great Northern's purported motion.

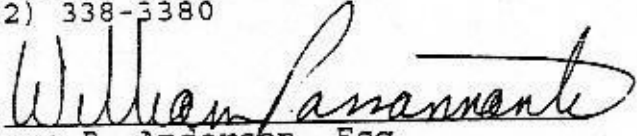
CONCLUSION

United Policyholders simply requests that this Court have the opportunity for a full and fair review of information regarding the standard form policy language at issue. For all the foregoing reasons, United Policyholders of America respectfully requests that this Court deny Northern Insurance Company's purported motion to strike United Policyholders' Appendix.

Dated: January 4, 1996

Respectfully Submitted,

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AFFIDAVIT OF SERVICE

On the 4th day of January, 1996 true and correct copies of the above Brief of Amicus Curiae United Policyholders of America in Opposition to "Motion" By Great Northern Insurance Company to Strike Appendix, and Accompanying Affidavit of William G. Passannante in Opposition to Motion To Strike, sworn to January 3, 1996, were mailed by United States Mail, postage prepaid, to:

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Tracy Schmitz

Subscribed and sworn to before me
this 4th of January, 1996.


Notary Public

