New York County Clerk's Index No. 601602/2003

NEW YORK SUPREME COURT

Appellate Division – First Department

GULF INSURANCE COMPANY,

Plaintiff-Appellant,

Against

TRANSATLANTIC REINSURANCE, XL REINSURANCE AMERICA INC., ODYSSEY AMERICA REINSURANCE CORPORATION,

Defendants-Respondents,

-and-

EMPLOYERS REINSURANCE COMPANY,

Defendant.

BRIEF OF UNITED POLICYHOLDERS,
as AMICUS CURIAE in support of DEFENDANTS-RESPONDENTS

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PRELIMINARY STATEMENT

Gulf Insurance Company is a subsidiary of Travelers.

Gulf is contending in this case that "all" does not mean "all." Gulf claims that an agreement to produce "all" documents is an agreement to produce "all" documents except privileged documents.

UNITED POLICYHOLDERS

United Policyholders is a non-profit corporation dedicated to educating policyholders about their rights and duties under their insurance policies. United Policyholders engages in charitable and educational activities by promoting greater public understanding of insurance issues and policyholder rights. United Policyholders' activities include organizing meetings, distributing written materials, and responding to requests for information from individuals, elected officials, and governmental entities. These activities are limited only to the extent that United Policyholders exists exclusively on donated labor and contributions of services and funds.[1]

[1] No party to this case has contributed directly or indirectly to the preparation or cost of this brief.

POINT I.

BREACH OF CONTRACT – A.K.A. THE GREENBERG PRINCIPLE

A basic, fundamental principle of insurance economics and of contracts in general is that breach of contract is profitable. This bedrock economic principle is set forth in E. Allan Farnsworth, Legal Remedies for Breach of Contract, 70 Columbia L. Rev. 1145 (Nov. 1970) (discussing the legal system's lack of protection for the victims of broken contracts).

POINT II.

POSTER CHILD

This case is a poster child for "Insurance Nullification by Litigation." When an insurance company says "Sue Me" policyholders suffer. People who buy insurance are victims of the widespread (one might even say "universal") practice of destroying policyholder rights. Because of shenanigans such as played by Gulf/Travelers in this case, insurance is no longer "certain." Richard E. Stewart and Barbara D. Stewart *The Loss of the Certainty Effect*, RISK MANAGEMENT AND INSURANCE REVIEW, 2001, Vol. 4, No. 2, 29-49. Mr. Stewart is a former Superintendent of Insurance of the State of New York. A copy of the Stewart article is attached for the convenience of the Court.

Insurance policies are "sick" jokes. This case is unique in one respect: Gulf and Hartford have come right out and dramatized the word game that costs American policyholders untold billions of dollars.

In "Through the Looking Glass" Humpty Dumpty says:

> 'When I use a word,' Humpty Dumpty said in a rather scornful tone, 'it means just what I choose it to mean – neither more nor less.' 'The question is, said Alice, 'whether you can make words mean so many different things.' 'The question is,' said Humpty Dumpty, 'which is to be the master – that's all.'

It should pain this Court to see the Humpty-Dumpty Rule applied in a purportedly serious fashion.

The recent testimony of one insurance claims adjuster is symptomatic of the perversion of words. The testimony went something like this: the words mean what they say unless they mean something else.

The Courts should not countenance the use of legal process as a tactical weapon to coerce a desired result that is not the legitimate object of the process. General Refractories Company, et al. v. Fireman's Fund Insurance Company, et al., 337 F.3d 297, 306 (3rd Cir. 2003)

It would be hard to address this case in a serious fashion if it were not symptomatic of a billion dollar scam.

POINT III.

UNWRITTEN EXCLUSIONS

Gulf/Travelers have it right in one sense. The words **not** in an insurance policy are considerably more important than the words that are in the policy. There follows a list of unwritten exclusions:

Phantom and Unwritten Exclusions

1. Sophisticated policyholder exclusion (Smart policyholders get less coverage.)
2. Subjectivity exclusion (If it cannot be seen and felt it does not exist.)

    a. computer data/crash
    b. computer virus
    c. Y2K exclusion
    d. individual disability claims
    e. mental illness
    f. Improper drilling and soldering

3. Protecting "my" market exclusion (Risk managers are loath to pursue claims.)
4. "Know it all lawyer" exclusion ("Jack of all trades" lawyers are not masters of insurance coverage.)
5. Lack of broker support exclusion (Brokers get paid at point of sale, but not at point of delivery and have little incentive to help with claims.)
6. Anti-policyholder broker exclusion (Brokers have a symbiotic relationship with insurance companies; the recent disclosure of brokers' cash bonuses make claim denial a "profit center" for brokers.)
7. Conflicted broker exclusion (Brokers get kickbacks from insurance companies.)
8. Employers' Against Claims exclusion (Employers fail to support claimants and sometimes actively oppose employee claims in order to hold costs down.)
9. Insurance nullification by litigation exclusion
10. Multiple occurrences exclusion
11. Stacking deductibles exclusion
12. "Other insurance" exclusion (Not me; him.)
13. Hindsight is perfect exclusion (No damn fool would have done that. It must have been deliberate.)

14. The claimant's allegations are right exclusion (Variation of Hindsight is perfect exclusion.)
15. "Expected or intended" exclusion (Policyholder must have known that it was wrong.)
16. Known risk exclusion
17. $10 million exclusion (No claims in excess of $10 million are paid without litigation.)
18. Musical claims handlers (At every point at which the insurance company touches a claim there is a new claims handler.)
19. Dead policyholder/claimant exclusion (Campbell) (Policyholders and claimants die; insurance companies do not.)
20. Invisible retro exclusion (Sell a policy; threaten rescission; double the premium.)
21. Loss of certainty exclusion (Insurance does not provide certainty.)
22. Post-loss underwriting (a/k/a post-claim underwriting.)
23. Judges love insurance companies (Judicial bias because insurance companies are essential to settle cases.)
24. Judges hate juries (The right to jury trial in civil cases is illusory because judges simply refuse to try civil jury cases.)
25. Don't fight city hall (Insurance companies are viewed as authority figures.)
26. Power blackouts
27. Discoloration
28. Loss of structural integrity
29. Trademark infringement
30. Exclusion by obfuscation
31. Second bite of the apple exclusion
32. Fifth amendment
33. Fortuity
34. Known loss
35. Loss in progress
36. Violation of Law equals an Intent to do Damage
37. 37 cent solution
38. 7% solution
39. Exclusion for all seasons. Every phrase, every word, even every punctuation mark must have meaning.
40. The law does not permit evidence to alter the unambiguous terms of a written insurance policy.
41. The law does not permit evidence to show that the express terms of an insurance policy were subject to a separate oral agreement.

42. Another important anti-policyholder exclusion puts the burden on the policyholders to explain and synthesize the insurance industry drafted language. Lloyds describes this exclusion as follows:

> It is fundamental that an insurance policy's terms and conditions must be analyzed and construed in the context of the entire policy, with all the contract language read together as a whole. (Foster-Gardner, Inc. v. National Union Fire Insurance Co. (1998) 18 Cal.4th 857, 868, citing Bank of the West v. Superior Court (1992) 2 Cal.4th 1254, 1265.) Policies must be interpreted so that each word and phrase is given independent effect and no terms are rendered meaningless or redundant. (Civil Code [Sec.] 1641 ["The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."]; see Powerine, supra 24 Cal.4th at 963-64 [declining to construe "damages" to be redundant to other policy wording]; see also Shell Oil Co. v. Winterthur Swiss Insurance Co. (1993) 12 Cal.App.4th 715, 753 ["The way we define words should not produce redundance, but instead should give each word significance."].)

POINT IV.

WORDS, WORDS, WORDS

One of the leading insurance nullification lawyers in the world, Eugene Wollan of the New York City law firm of Mound, Cotton, Wollan & Greenglass has published a recent article, a copy of which is attached for the convenience of the Court. Wollan, "Words, Words, Words," 17 John Liner Rev. 85 (2004).

Mr. Wollan spends his introduction explaining that in opera words do not count.[2]

A. Regarding insurance Mr. Wollan writes "[e]very phrase, every word, even every punctuation mark must have meaning." (p 86)[3]

B. Coverage decisions, Mr. Wollan notes, are made by adjusters, claim executives, judges and arbitrators (p 86). Pity the poor policyholders.

C. Misunderstandings are the policyholders' fault (blame the victim): Mr. Wollan lays the blame on policyholders as follows:

> "(And no matter how accurate and comprehensive the definition is thought to be, sooner or later some ingenious lawyer for an insured will propose a new, and probably distorted, meaning that no one ever considered before.)" (p 87)

That snide remark denigrating policyholder lawyers hardly fits this case.

D. Mr. Wollan closes his article using the "all" word at issue in this case:

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2 Unfortunately United States District Court Judge John E. Sprizzo is not on this Court, since he, too, is an opera aficionado.

3 This principle has been dubbed the "exclusion for all seasons" or the "we broke it now you fix it" exclusion. If the policyholder's reading of an insurance policy does not make perfect sense there is no coverage. Think about it! The only way insurance policies make perfect linguistic sense is if they provide **no coverage.**

"Words are, for the insurance lawyer at least, the be-all and the end-all" (p 88)

POINT V.

CONCLUSION

The decision below should be affirmed.

Dated: New York, New York
October 7, 2004

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CERTIFICATE OF COMPLIANCE

Pursuant to 22 NYCRR § 670.10.3(f)

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