**IN THE**
**SUPREME COURT OF LOUISIANA**

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**NO. 2019-C-01123**

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**BALTAZAR ORTIZ**

**VERSUS**

**MEADWESTVACO CORPORATION, *ET AL***

*Defendant-Third-Party Plaintiff/Applicant*

**VERSUS**

**JV INDUSTRIAL COMPANIES, LTD., *ET AL***

*Third-Party Defendants/Respondents*

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*Amicus Curiae* United Policyholders' Brief in Support of MeadWestvaco Corporation's Application for Writ of Certiorari and/or Review from the Third Circuit Court of Appeal's Decision of June 5, 2019 Affirming the District Court's Judgments Signed on November 19, 2014 and March 29, 2018

(Honorable Judges Ulysses Gene Thibodeaux, Chief Judge;
John D. Saunders, and Phyllis M. Keaty)

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Thirty-Sixth Judicial District Court for the Parish of Beauregard
Docket No. C-2009-0278 (Honorable Judge C. Kerry Anderson, District Judge)

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## INTRODUCTION

This appeal involves an issue of critical importance to United Policyholders (**"UP"**) and to insurance consumers across Louisiana; namely, whether an insurance company who receives allegedly late notice of an insurance claim is required to show that a delay in reporting caused actual prejudice to the insurance company in order to avoid paying what it owes under the policy. 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 personal injury suit brought by employees of an industrial contractor, *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 a rule of fairness that prevents undue forfeiture and draconian results. Otherwise, an insurance company which owes a duty to defend and indemnify an underlying claim 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 will be unfairly and unjustly denied coverage that they are owed and insurance companies obtain windfalls. The old adage "equity abhors forfeiture" is precisely why the notice-prejudice rule exists in Louisiana and in the vast majority of jurisdictions.

## QUESTION PRESENTED ADDRESSED BY *AMICUS CURIAE*

Did the Third Circuit Court of Appeal err in holding that under Louisiana's notice-prejudice rule, an insurer satisfies its burden of proving actual and substantial prejudice simply by pointing to the fact that its insured settled an underlying claim prior to notifying the insurer?

## STATEMENT OF THE CASE

This is an insurance coverage action between MeadWestvaco Corporation (**"MVW"**) and two liability insurance companies, Steadfast Insurance Company (**"Steadfast"**) and AIG Specialty Insurance Company (**"ASIC,"** together with Steadfast, the **"Insurers"**) regarding coverage for a personal injury claim asserted against MVW. MVW seeks review of the Third Circuit Court of Appeal of Louisiana's grant of summary judgment to the Insurers. *Amicus Curiae* United Policyholders adopts and incorporates by reference the Statement of the Case set forth in MVW's Application for Writ of Certiorari and/or Review.

## ARGUMENT

### A. Louisiana Law Requires Proof of Actual Prejudice to Avoid Policyholder Forfeiture and Insurance Company Windfall

The notice-prejudice rule, which has been adopted by the Louisiana courts, states that an insurer is not permitted to deny coverage based on an insured's alleged failure to provide timely notice absent a showing of the insurer's "actual" or "sufficient" prejudice created by delay in notice.[1]

The Louisiana Third Circuit has expressed the purpose of a notice provision in an insurance policy as follows:

> ***The function of the notice requirements is simply to prevent the insurer from being prejudiced, not to provide a technical escape-hatch*** by which to deny coverage in the absence of prejudice nor to evade the fundamental protective purpose of the insurance contract to assure the insured and the general public that liability claims will be paid up to the policy limits for which premiums were collected. Therefore, ***unless the insurer is actually prejudiced by the insured's failure to give notice immediately, the insurer cannot defeat its liability under the policy because of the non-prejudicial***

[1] *See Burge v. Northwestern Nat. Ins. Co. of Milwaukee*, 2008-CA-1396 (La.App. 4 Cir. 6/3/2009), 14 So. 3d 616, 623 ("As a general rule, an insurer may not raise the failure of its insured to give notice of the accident or suit as a valid defense to claims of an injured third party.") (citation omitted).

> ***failure of its insured to give immediate notice of an accident or claim as stipulated by a policy provision.***
>
> . . .
>
> We are unable to discern any logical or functional reason why a different rule should apply in Louisiana to the delayed notice of suit, than we now apply to the delayed notice of accident. As to the latter, ***coverage is not forfeited by the delayed notice unless the insurer is prejudiced thereby***. . . .
>
> The principle of interpretation followed in both instances is that policy clauses are interpreted in the light of their function and in view of ***the fundamental purpose of the insuring contract entered into between the parties: to effectuate the substantive coverage intended by the policy, rather than to defeat it by applying technically a clause designed merely to protect the insurer from prejudice, not to trap the insured***.[2]

Most Louisiana cases only find prejudice in severe circumstances, *e.g.*, a default judgment taken against the insured.[3] By contrast, there are cases where the court did not find prejudice even when notice had been extremely late.[4]

Indeed, Louisiana courts have made clear that even though an insurer may only receive notice after the underlying lawsuit has settled or gone to trial, that does not mean it was prejudiced as a matter of law absent specific proof of actual and sufficient prejudice.[5]

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[2] *Miller v. Marcantel*, 221 So. 2d 557, 559-60 (La. App. 3rd Cir.1969) (emphasis added). Thus, in Louisiana, because notice provisions are intended to protect insurance companies from prejudice, actual prejudice is ***always*** required to be proven to assert any late notice defense.

[3] *Haynes v. New Orleans Archdioceses Cemeteries*, 2001-CA-0261, 2001-CA-0262 (La.App. 4 Cir. 12/19/2001) 805 So. 2d 320 (finding prejudice when insured was sued and never notified homeowners' insurer until after default had been confirmed and insured was then faced with judgment debtor rule).

[4] *See Chennault v. Dupree*, 398 So. 2d 169 (La. App. 3rd Cir. 1981)(holding that despite the fact that insurer was not named in an amended petition for five years, no prejudice was established).

[5] *See, e.g., Fakouri v. Insurance Co. of N. Am.*, 378 So. 2d 1083 (La. App. 3d Cir. 1979)(holding notice to excess insurer first received after trial and after judgment had become executory not untimely where the insurer was unable to prove actual prejudice); *Burge v. Northwestern Nat. Ins. Co. of Milwaukee*, 2008-CA-1396 (La.App. 4 Cir. 6/3/2009), 14 So. 3d 616 (finding fact issue on whether excess insurer suffered prejudice when petitioned after a settlement already reached); *see also Transcontinental Pipe Line Corp. v. National Union Fire Ins. Co. of Pittsburgh,*

### B. The Modern View of Insurance Requires Proof of Prejudice before Insurers May Avoid Coverage on the Ground of Late Notice

Based on the modern view of insurance, courts have adjusted the standards for avoiding coverage on late notice grounds to ensure that the purpose of notice provisions in insurance policies is being fulfilled, rather than blindly allowing insurers to avoid coverage through a mechanical application of the language in such provisions. Courts balance the interests of policyholders and insurers in light of this purpose to arrive at the rule which requires actual prejudice to insurers before they can avoid coverage. As the Vermont Supreme Court has explained:

> "[A] reasonable notice clause is designed to protect the insurance company from being placed in a substantially less favorable position than it would have been in had timely notice been provided . . . . In short, the function of a notice requirement is to protect the insurance company's interests from being *prejudiced*." *Brakeman*, 371 A.2d at 197 (emphasis added)."
>
> It follows that in cases where a late notice does not harm the insurer's interests, the reason for the notice clause has not been undermined. A strict forfeiture of coverage in these circumstances would thus "outreach[] the purposes of the provision" and constitute an "invidious . . . forfeiture . . . damaging to both an unwary insured and an innocent injured." [Citation omitted.] Properly understood and applied, the notice clause should not function as "a technical escape-hatch by which to deny coverage in the absence of prejudice." *Miller v. Marcantel*, 221 So.2d 557, 559 (La. Ct. App. 1969), but rather as an early warning mechanism to benefit both insurer and insured.
>
> We conclude, therefore, that the modern rule represents the better reasoned approach. The contract of insurance "not being a truly consensual arrangement," *Cooper*, 237 A.2d at 874, and the penalty being a matter of forfeiture, we think it appropriate to abandon the strict contract analysis of *Houran*. We hold, instead, that an insurer may not forfeit its insured's protection unless it demonstrates that the notice provision was breached, and that it "suffered substantial prejudice from the delay in notice." *Jones*, 821 S.W.2d at 803.[6]

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*PA*, 378 F. Supp. 2d 729 (M.D. La. 2005)(holding sufficient prejudice not established even when insurer was not notified of the existence of the suit until after a trial on the merits).

[6] *Cooperative Fire Ass'n of Vermont v. White Caps, Inc.*, 694 A.2d 34, 38 (Vt. 1997).

Applying reasoning similar to that expressed by the Vermont Supreme Court in *Cooperative Fire*, a large majority of jurisdictions - not just Louisiana - follow the modern rule and requires proof that an insurer was prejudiced before it can avoid coverage on the grounds that notice was late.[7] Thus, the view that an insurer can avoid coverage without proving actual prejudice is based on an ever-shrinking body of law that advocates an outdated and discredited interpretation of insurance policies generally, and notice provisions specifically.

### C. Legal and Insurance Coverage Authorities Across Jurisdictions Agree that this Modern View Requires that Insurance Companies Prove Actual Prejudice, Not Theoretical Prejudice

The concept that the notice-prejudice rule requires proof of *actual* prejudice, as is required under Louisiana law, is well-known and accepted nationwide. For example, one of the leading treatises on insurance coverage law provides 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.***[8]

[7] *See generally* Barry R. Ostrager and Thomas R. Newman, Handbook on Insurance Coverage Disputes § 4:04 (19th ed. 2018).

[8] 13 *Russ* & Segall, COUCH ON INSURANCE § 193:29 (emphasis added).

Evidence of actual prejudice is not the same as the underlying case resulting in an outcome requiring coverage to be paid. Prejudice cannot be presumed simply because an insurer was deprived of an opportunity to investigate a case or participate in settlement discussions:

> If the abstract loss of the rights to investigate, defend, participate in, and control settlement negotiations were sufficient to show the necessary prejudice, then delaying notice to the primary insurer until after settlement would always result in forfeiture of coverage, because the settlement would necessarily foreclose the insurer's participation.[9]

Actual prejudice requires that the outcome could have been avoided.[10] Accordingly, the Insurers must demonstrate with evidence that they suffered prejudice because they could have taken action in defense that would have been substantially likely to avoid the settlement of the underlying case that MVW reached. The Insurers have not and cannot point to evidence that they would have altered the course of the case, in which the court never even reached the merits of the 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 notice prejudice 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.[11] It also serves the purpose of liability insurance,

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[9] *Coastal Refining & Marketing, Inc. v. Coastal Offshore Ins. Ltd.*, 218 S.W.3d 279, 291 n. 14 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

[10] *See, e.g.*, Cal. Prac. Guide Ins. Lit. Ch. 7A-L, 7.410 (prejudice is only established if the insurer shows a "substantial likelihood that, with timely notice, and notwithstanding its denial of coverage or reservation of rights, it would have settled the claim for less or taken steps that would have reduced or eliminated the insured's liability")

[11] Jeffrey W. Stempel and Erik S. Knutsen, *Stempel and Knutsen on Insurance Coverage*, Fourth Edition, Volume I, §9:01[H] at 9-37 (2016). *Id.* at 9-37.

which is to provide financial protection liabilities.[12] 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."[13] 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. Further, and appropriately, under Louisiana law, an insurance company must demonstrate that the prejudice it suffered be *actual*.[14] The Insurers failed to and cannot meet that standard.

**D. Louisiana Law Strongly Disfavors Forfeiture of Insurance Coverage**

It is a longstanding principle that Louisiana strongly disfavors the forfeiture of insurance coverage.[15]

Black letter law fully supports Louisiana's anti-forfeiture precedent:

> 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.[16]

Indeed, while insurance companies often focus on notice as a "condition" of coverage, conditions should be excused in the event of disproportionate forfeiture. Accordingly, Louisiana courts'

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[12] *See Miller*, 221 So.2d at 559 (stating that notice violations should not be used to evade the fundamental purpose of insurance to pay liability claims up to policy limits).

[13] Jeffrey W. Stempel and Erik S. Knutsen, *Stempel and Knutsen on Insurance Coverage*, Fourth Edition, Volume I, §9:01[H] at 9-37 (2016). *Id.* at 9-37.

[14] *See Burge*, 14 So.3d at 623.

[15] *See, e.g., Salomon v. Equitable Life Assurance Soc.*, 205 La. 941, 948 (1944) (stating that insurer should not have "attempt[ed] to declare a forfeiture of the policy, an undertaking disfavored in the law of insurance."); *Jasper v. Mutual Life Ins. Co.*, 10 La. App. 259, 266 (1929) ("Forfeitures are disfavored in law.").

[16] Restatement (Second) of Contracts § 229 (1979).

disfavor of the forfeiture of insurance coverage is yet another reason why it is imperative that this Court follow long-standing jurisprudence requiring that the Insurers provide evidence of *actual* prejudice as a result of MVW's late notice.

## CONCLUSION

*Amicus curiae*, United Policyholders, respectfully prays that this Court reverse Third Circuit Court of Appeal's Decision and Judgment of June 5, 2019 affirming judgment in favor of the Insurers on the basis that they were prejudiced as a matter of law by MVW's alleged delay in notice and consent to settle.

Respectfully submitted,

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## AFFIDAVIT OF VERIFICATION AND SERVICE

**STATE OF LOUISIANA**

**PARISH OF LAFAYETTE**

Before me, the undersigned authority, personally came and appeared counsel for United Policyholders, who after first being duly sworn did depose and state:

I certify that the above information and all the information contained in this Brief of *Amicus Curiae* United Policyholders in Support of MeadWestvaco Corporation's Application for Writ of Certiorari and/or Review are true and correct to the best of my knowledge.

I further certify that all counsel has been notified either by telephone, email or facsimile that this Brief has been filed and a copy of this Brief has been served forthwith on the following by hand delivery, email, or overnight delivery:

| | |
|---|---|
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SWORN TO AND SUBSCRIBED BEFORE ME this 23rd day of July 2018.

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My Commission is For Life