STATE OF NEW YORK
COURT OF APPEALS

Index No. 102187/11

In the matter of the Application of

MONARCH CONSULTING, INC., ELITE MANAGEMENT, INC., BRENTWOOD TELEVISION FUNNIES, INC., PROFESSIONAL EMPLOYER OPTIONS, INC., RECURRENT SOFTWARE SOLUTIONS, AHILL, INC., THE ACCOUNTING GROUP, LLC and PES PAYROLL, IA, INC.,

Respondents,

For an Order and Judgment Staying the Arbitration Commenced by

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, on behalf of itself and each of the related insurers that provided insurance coverage to Petitioners,

Appellants.

(Caption continued on next page)

MEMORANDUM OF LAW OF PROPOSED AMICUS CURIAE UNITED POLICYHOLDERS

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Index No. 651960/11

In the Matter of the Application of

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, on behalf of itself and each of the related insurers that provided insurance coverage to Respondents,

Appellant,

—against—

PRIORITY BUSINESS SERVICES, INC., f/k/a INLAND VALLEY STAFFING SERVICES, f/k/a MAINTENANCE MATCH, INC., d/b/a PRIORITY STAFFING,

Respondent.

Index No. 652366/10

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, on behalf of itself and each of the related insurers that provided insurance coverage to Respondent,

Appellant.

—against—

SOURCE ONE STAFFING, LLC,

Respondent.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 500.1(f) of the Rules of Practice for the Court of Appeals of the State of New York, proposed *amicus curiae* United Policyholders makes the following disclosure: United Policyholders is a non-profit 501(c)(3) organization. It has no parents, subsidiaries, or affiliates.

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PRELIMINARY STATEMENT

The issue in this consolidated appeal is the extent of the statutory authority of the California Workers Compensation Insurance Rating Bureau (hereinafter "WCIRB") and California Department of Insurance (hereinafter "CDI") to review and approve worker's compensation insurance policy forms before sale to the public. The outcome of this case will have a significant effect on states' ability to regulate the business of insurance as they are legally obligated to do. The decision of the Appellate Division was a proper interpretation of California insurance law and serves important state and national public policy interests.

Proposed *amicus curiae* United Policyholders ("UP") respectfully asks The Court of Appeals to affirm the decision of the Appellate Division and preserve the authority of the WCIRB and the DOI to regulate worker's compensation insurance in the state of California. A reversal will send a dangerous signal to insurance companies that they are now free to attach unapproved "collateral" or "side" agreements to their WCIRB and DOI-approved policies without repercussion; bypassing a crucial regulatory safeguard. The instant facts are distinct from a permissible situation where an insurer may amend a policy in force when the risk to be insured undergoes a material change. Appellants have attempted a mid-term contract modification which is illegal under the California insurance law and void as against public policy. Proposed *amicus curiae* UP respectfully submits this Memorandum of Law in support of its motion to be permitted to act as *amicus curiae* in this Appeal.

STATEMENT OF INTEREST

UP is a non-profit 501(c) (3) organization founded in 1991 that is an information resource and a voice for insurance consumers in New York and throughout the United States. The organization assists and informs disaster victims and individual and commercial policyholders

with regard to every type of insurance product. Grants, donations and volunteers support the organization's work. UP does not sell insurance or accept funding from insurance companies. (*See* Affidavit of Jean F. Gerbini, Esq. for more information about proposed *amicus curiae*).

STATEMENT OF FACTS

UP adopts the Statement of Facts of Respondents Monarch Consulting, Inc., Elite Management, Inc., Brentwood Television Funnies, Inc., Professional Employer Options, Inc., Recurrent Software Solutions, Ahill, Inc., The accounting group, LLC, and PES Payroll, IA, Inc.

ARGUMENT

POINT I

THIS COURT SHOULD GRANT UNITED POLICYHOLDERS'S MOTION TO APPEAR AS AMICUS CURIAE IN NATIONAL UNION V. MONARCH ET AL

Under Rule 500.23(a)(4) of the Rules of the New York Court of Appeals (22 NYCRR), "a motion for *amicus curiae* relief shall demonstrate that: [i] the parties are not capable of a full and adequate presentation and that movants could remedy this deficiency; [ii] the amicus could identify law or arguments that might otherwise escape the Court's consideration; or [iii] the proposed *amicus curiae* brief otherwise would be of assistance to the Court."). Generally, leave to appear as amicus curiae is liberally granted, especially "[i]n cases involving questions of important public interest," though the ultimate determination is left in the sound discretion of the court. *Calmes v. Fisher*, 151 Misc. 222, 223 (N.Y. Sup., Erie County 1934)

Accordingly UP will "identify law or arguments that might otherwise escape the Court's consideration." 22 NYCCR at 500.23(a)(4), *supra*. Similarly, UP seeks to fulfill the "classic role of *amicus curiae* in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." *Miller Wohl Co. v. Commissioner o/Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982). Legal scholars and

commentators have noted that this is an appropriate role for *amicus curiae*. An *amicus curiae* is often in a superior position to "focus the court's attention on the broad implications of various possible rulings." Robert L. Stem, et al., *Supreme Court Practice* 570 71 (1986) (quoting Bruce J. Ennis, *Effective Amicus Briefs*, 33 Cath. U. L. Rev. 603, 608 (1984)).

Because of proposed *amicus curiae* UP's unique and focused mission, to act as a voice and information resource for insurance consumers, it posses the subject matter expertise required to provide a meaningful contribution to the briefing in this appeal (see Statement of Interest above). Specifically, UP aims to assist the Court in understanding the unique nature of California's regulatory scheme and the specific effect that it has on the California insurance marketplace and the consumers that purchase insurance as well as the broader public policy goal, which is shared by all states, to regulate insurance for the benefit of consumers.

As a non-profit consumer advocacy organization with no financial stake in the outcome of this litigation, UP's perspective on the issues in the case differs from those of the parties and shares a genuine and unique concern about the impact of an adverse decision on the California insurance market as well as the insurance market in any state that regulates insurance. Therefore, UP respectfully requests that this Court grant UP's motion to appear as *amicus curiae* in this appeal and accept this memorandum of law of proposed *amicus curiae*.

POINT II

THE INSURERS' PAYEMENT AGREEMENTS ARE NOT ONLY ILLEGAL UNDER CALIFORNIA INSURANCE LAW AND VOID AS A MATTER OF PUBLIC POLICY

A. The Regulations

Under California's unique regulatory scheme, worker's compensation insurance polices, such as the ones sold by the Appellants to Monarch *et al*, must be submitted to the WCIRB then approved by CDI before they are sold to the public. Cal. Ins. Code § 11658; Cal. Ins. Code §§

11750.3 and 11735; 10 C.C.R. §§ 2218 and 2268) (Decision of the Appellate Division, September 11, 2014, Tom, J.P., Sweeny, Moskowitz [hereinafter "Opn."] at 5-6, *passim*).

CCR, Title 10, § 2218, provides in relevant part:

> "(a) All workers' compensation insurance forms must be submitted in duplicate to the [WCIRB] for preliminary inspection. The [WCIRB] shall review such forms and submit them to the Commissioner for final action . . . [;] (b) Workers' compensation rates shall be filed as provided in § 2509.30, et seq, of this Chapter."

Similarly, Title 10, CCR, § 2268 provides:

> "No *collateral agreements modifying the obligation of either the insured or the insurer* shall be made unless attached to and made a part of the policy, provided, however, that if such agreements are attached and in any way restrict or limit the coverage of the policy, they shall conform in all respects with these rules." (emphasis added).

Title 10, CCR, § 2252, in turn, provides:

> "[l]imitation or restriction of coverage for liability under the [California] workers' compensation laws shall be governed by Sections 2253 to 2268, inclusive"

Finally, Cal. Ins. Code. § 11658(a) provides:

> A workers' compensation insurance policy or *endorsement* shall not be issued by an insurer to any person in this state unless the insurer files a copy of the form or endorsement with the rating organization pursuant to subdivision (e) of Section 11750.3 and 30 days have expired from the date the form or endorsement is received by the commissioner from the rating organization without notice from the commissioner, unless the commissioner gives written approval of the form or endorsement prior to that time. (emphasis added).

The Appellate Division correctly held the payment agreements calling for New York arbitration should have been filed because they were endorsements, as they changed the material terms of the policy. The *Source One* Court (652399/10, one of the consolidated appeals), went so far as to find that the payment agreements were themselves insurance policies, unquestionably subject to the filing requirements of Cal. Ins. Code § 11658 (Opn. at 30). Appellants argued

unsuccessfully to the contrary, that the payment agreements were mere "financial documents" not subject to the filing requirements of Cal. Ins. Code. § 11658. (Opn. at 11).

The Appellate Division found these arguments unpersuasive and without merit for a number of reasons. It found that the payment agreements allowed, in the event of a default or non-payment, [Appellants to] "...change any or all unexpired Policies under Loss Reimbursement or Deductible plan to Non-Deductible plans for the remaining term of any such Policy, to become effective after ten days written notice to [the insured]. [National Union] will therewith increase the premiums for those Policies in accordance with our applicable rate plan." (Opn. at 7-8). The Appellate Division held that the payment agreements substantively changed the insurance policies. (citing *Montgomery Ward & Co., Inc. v Imperial Cas. & Indem.* Co., 81 Cal. App. 4th 356, 375, 97 Cal. Rptr. 2d 44, 56 [Cal. App. 2d Dist. 2000] (a contract alters large and important parts of the policies' scheme as it was originally issued, it qualifies as an endorsement even if the contract purports to be merely a loan agreement).

B. The Zurich Enforcement Action

The fact that CDI has been engaged in related enforcement actions, lends credence to the notion that the Insurers' payment agreements must be approved by the CDI prior to sale. On February 14, 2011, the CDI issued a directive to the WCIRB reiterating its position that under "[Ins. Code Sec. 11658], a workers' compensation insurance policy or endorsement shall not be issued by an insurer to any person in this state unless the insurer files a copy of the form or endorsement with the rating organization pursuant to subdivision (e) of Section 11750.3...[t]he Insurance Commissioner has prohibited the use of *Collateral Agreements*, which is synonymous with the term '*side-agreement*,' concerning workers' compensation insurance unless they are attached to the policy." The directive further notes: "The [DOI] is particularly concerned with

arbitration provisions contained in unattached collateral agreements and considers such terms unenforceable unless the insurer can demonstrate that the arbitration agreement was expressly agreed to by the insured at the time the policy was issued." (Opn. at 9-10) (emphasis added).

Thus, if CDI believes the payment agreements are "collateral agreements" or "side agreements" and they are inserted into the policy after the policy is submitted to the WCIRB and the CDI, they are void. CDI is actively pursuing enforcement of such violations. For example, *In the Matter of the Licenses and Licensing Rights of Zurich American Insurance Company and Zurich American Insurance Company of Illinois*, File No. DISP-2011-00811) involved Zurich American Insurance Company of Illinois's (hereinafter "Zurich") issuance of six consecutive years of workers' compensation policies and *payment agreements* to one of its insureds. DOI and Zurich entered into a settlement whereby Zurich agreed to comply with the DOI mandate and DOI agreed "that its rules and requirements regarding Deductible Agreements would be applied evenly to Zurich and its competitors on a level playing field basis."

Despite glaring factual similarities, the Insurers have presented no evidence that their conduct should be distinguished from *Zurich*, other than to repeat the argument that the payment agreements are not endorsements. But, as discussed above, the CDI and the lower courts maintain otherwise. Further, CDI's interpretation of the insurance code is persuasive in California and New York Courts. *State Farm Mut. Auto. Inc. Co. v Quackenbush*, 77 Cal App 4th 65, 71, 91 Cal Rptr 2d 381 [Cal Ct App 1999]; *Matter of New York Pub. Interest Research Group Inc. v New York State Dept. of Ins.*, 66 N.Y.2d 444, 448 [1985]); *Ass'n for Retarded Citizens v. Dep't of Developmental Serv.*, 696 P.2d 150, 38 Cal.3d 384, 391 (1985); Opn. at 25. In other words, if the CDI's interpretation of Ins. Code Sec. 11658 grants it the authority and

mandatory duty to review worker's compensation policy forms and all *collateral* or *side-agreements*, this Court should find that persuasive, of not dispositive.

C. Recent Litigation

Monarch and *Source One* are not the only cases that have considered the issue of whether payment agreements are valid where inserted after policies have been approved by the CDI are valid. In *Ceradyne v Argonaut Ins. Co.* (2009 WL 1526071, 2009 Cal. App. Unpub LEXIS 4375 [Cal App 4th Dist., June 2, 2009, No. G039873]), the California Court of Appeal found that an insurer's failure to file an arbitration and forum selection provision rendered the provision "unenforceable" and found the document containing the provision to be part and parcel of the complete insurance plan offered. [The *Source One* Court] further noted that "*Ceradyne* is consistent with a directive issued by the [CDI]...regarding the kind of workers compensation collateral agreements that are at issue in this matter." The *Source One* court concluded: "the payment agreement is plainly a collateral agreement that modifies the obligations of the parties" and is subject to the filing requirements of Cal. Ins. Code. § 11658." (Opn. at 19-20).

A recent case, *Zurich American Ins. Co. v. Country Villa Service Corp.* (Case No. 2:14-cv-03779-RSWL-AS, N.D. Cal., July 9, 2015) is instructive on whether "side agreements" must be approved by CDI before the policy they are attached to may be sold to the public. In *Country Villa*, the Central District of California, applying California law held that "...unfiled and unapproved Incurred Deductible Agreements are illegal under [Cal. Ins. Code] 11658 and therefore void as a matter of law." (citing *Kremer v. Earl*, 27 P. 735, 736 (Cal. 1891) (stating that "[i]t is not necessary that the act itself... declare in express words" that a contract in violation of the act is "void"); *Monarch* 993 N.Y.S.2d at 290-92; *Ceradyne*, 2009 WL 1526071, at *11-*12.

Thus, in light of the findings of the courts in *Source One, Ceradyne, Country Villa*, and *Monarch* (the underlying case) this Court should have little difficulty finding the Insurer's conduct illegal under California law due to the factual and legal similarities. A ruling to the contrary will severely undermine California or any state's ability to regulate insurance.

D. Public Policy Favors Affirmance

The law views insurance policies as unique among commercial contracts. Individuals and businesses purchase insurance for piece of mind and economic security. Each state regulates the business of insurance as one imbued with public policy concerns.[1] All 50 states and the U.S. Supreme Court have recognized the nexus between the business and the public interest. *See, e.g., Cal. State Auto. Ass'n Inter-Ins. Bureau v. Maloney*, 341 U.S. 105, 109-10 (1951) (insurance has always had special relation to government); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 415-16 (1946) ("[insurance] business affected with a vast public interest"); *Osborn v. Ozlin*, 310 U.S. 53, 65 (1940) ("Government has always had a special relation to insurance."); *O'Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251, 257 (1931) ("The business of insurance is so far affected with a public interest that the State may Regulate the Rates").

When California enacted Cal. Ins. Code. § 11658 and the related regulations, it intended to protect the public interest by ensuring that insurance policies sold to the public would be first reviewed by the WCIRB and the CDI before hitting the market. This was not meant to be a hollow scheme. Rather, it was meant to be obeyed, not circumvented through semantics, as the Appellants are trying to here. Allowing the result the Appellants seek here will eviscerate the

[1] "Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." McCarran-Ferguson Act (15 U.S.C. §§ 1011-1015, Pub. L. 15).

piece of mind and security that California insurance consumers expect and have come to rely on by limiting an important regulatory authority and setting a dangerous precedent.

Big or small, commercial or personal, insurance consumers *in particular* expect that the product they purchase has been properly vetted by the appropriate regulatory agencies, here the CDI and WCIRB. This is true in California, where Cal. Ins. Code § 11658 and similar regulations applicable to personal lines insurance products mandate prior approval and it is true in many other states. State regulation of insurance, whether it be in California, New York, or elsewhere, contributes to a healthy, transparent marketplace for insurance consumers. The DOI has set a clear expectation that insurers operating in California will comply with statutory mandate and will refrain from attempting to circumvent the governmental review process.

CONCLUSION

United Policyholders respectfully requests that this Court grant it permission to appear as *amicus curiae* in this proceeding and, on the merits affirm the decision of the Appellate Division finding that the Insurers' payment agreements inserted after Cal. Ins. Code § 11658 review do not comply with the California insurance code and are thus void as against public policy.

Dated: September 15, 2015

By: _____

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