
IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 01-SP-1451

NATIONWIDE MUTUAL INSURANCE COMPANY,

Plaintiff-Appellee,

v.

ANTOINETTE RICHARDSON,

Defendant-Appellant.

REHEARING *EN BANC* OF JUNE 12, 2003
DIVISION DECISION OF THE COURT

**MOTION OF UNITED POLICYHOLDERS, MCI, AND NATIONAL
ELECTRICAL MANUFACTURERS ASSOCIATION, FOR LEAVE TO APPEAR
AS AMICI CURIAE AND TO FILE BRIEF IN SUPPORT OF DEFENDANT-APPELLANT**

United Policyholders, MCI, and National Electrical Manufacturers Association (“NEMA”) respectfully move this Court, pursuant to Rule 29(a) of this Court, for leave to appear as *Amici Curiae* in support of defendant-appellant Antoinette Richardson and to file the accompanying brief. Plaintiff-Appellee Nationwide Mutual Insurance Company (“Nationwide”) objects to this request. *Amicus Curiae* Counsel for Ms. Richardson and *Amicus Curiae* Complex Insurance Claims Litigation Association (“CICLA”) take no position with regard to this motion. *Amici Curiae* the District of Columbia Department Insurance Commission consent to appearance by United Policyholders, MCI, and NEMA as *Amici Curiae* in this action.

STATEMENT OF INTERESTS OF AMICI CURIAE

Insurance contracts represent the purchase of nothing more than a promise for future performance and, as such, are “different” from other forms of contractual agreements.¹ As policyholders and businesses and organizations purchasing commercial general liability (“CGL”) and other types of insurance, United Policyholders, MCI, and NEMA have vital interests in this case. This case presents an issue of first impression in the District of Columbia which affects all purchasers of insurance – businesses as well as individuals – who buy standard-form insurance policies whose terms are not subject to negotiation or revision. The interpretation of the “absolute pollution exclusion” (“APE”) in standard-form liability insurance agreements is significant to policyholders of all kinds including individuals and a wide-range of businesses and trade associations, large and small, operating in the District of Columbia. The question of principles of insurance policy and contract interpretation raised in the Court’s Order of September 29, 2003, also are significant to policyholders, individuals, and businesses of all sizes, operating in the District of Columbia.

Amicus Curiae United Policyholders, a not-for-profit educational organization granted tax exempt status under § 501(c)(3) of the Internal Revenue Code, is dedicated to educating policyholders and the public about policyholders’ rights and duties under their insurance policies. Specifically, United Policyholders engages in educational activities by promoting greater public understanding of insurance issues and consumer 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 relies exclusively on donated labor and contributions of services and funds. United Policyholders has a vital interest in seeing that the standard-form liability

¹ See *E.I. duPont de Nemours & Co. v. Pressman*, 679 A.2d 436, 437 (Del. 1996).

insurance policies sold to countless policyholders, individuals and small and large businesses alike, are interpreted by insurance companies and the courts in a way that is consistent with reasonable expectations and the insurance industry's public representations. As a public-interest organization, United Policyholders seeks to assist and to educate the public and the courts on policyholders' insurance rights and their efforts to have them enforced throughout the country.

Amicus Curiae MCI² has purchased standard-form CGL and other types of insurance for its offices here in the District of Columbia, because of its extensive presence and operations in the District of Columbia since its founding more than two decades ago. MCI has a vital interest in seeing that its insurance policies (and those of its suppliers and vendors) provide the scope of protection that MCI thought it was purchasing at the time it entered into these agreements. MCI presently is engaged in a litigation over insurance coverage for construction defects. Some of the insurance company defendants have asserted that an APE or a "total pollution exclusion" precludes coverage because some of the damages involve a smell or odor from (among other things) defective carpeting and its installation, which has caused odors and other damage. Because D.C. law may apply to the insurance policies in question, MCI has an interest in supporting the majority's opinion in this case, which, in MCI's view, correctly sought to limit the application of the absolute pollution exclusion to "environmental pollution."

Amicus Curiae National Electrical Manufacturers Association (NEMA) is a trade association of manufacturers of electrical products. NEMA gathers and publishes statistics on economic activity relating to the performance of electrical products in the marketplace, provides input to various federal and state agencies on governmental policies, and promotes the standardization of electrical products. NEMA's members manufacture many different electrical products, including, among others, lighting systems products, batteries, traffic signals, fuses, circuit breakers, switches, surge

² As explained in the proposed *amicus* brief, "MCI" refers to WorldCom, Inc. and related companies doing business as MCI.

protectors, wiring devices, electrical insulation products, wire and cable products, motors and generators, electrical power equipment, and medical imaging equipment.

NEMA was based in the District of Columbia and purchased both CGL and professional errors and omissions (“E&O”) insurance here for many years. In the 1980s and 1990s, welders began to sue manufacturers of electric arc welding products for injuries incurred allegedly due to exposure to manganese and other chemicals in welding fumes. Starting in the 1990s, NEMA began to be sued in those actions because of its publication of voluntary guidelines intended to assist its members with the format and placement, but not the content, of warning labels on the members’ welding products. Both NEMA’s CGL and errors and omission insurers rejected coverage, and NEMA, which by then had moved from D.C. to Arlington, Virginia, sued its insurers to recover its defense costs.

The United States District Court for the Eastern District of Virginia accepted the argument by NEMA’s E&O insurance company, Gulf, that its absolute pollution exclusion precluded its duty to defend NEMA. The United States Court of Appeals for the Fourth Circuit held that, although this Court had never addressed the issue, the District of Columbia Court likely would apply the APE to preclude coverage because the complaints against NEMA included references to “fumes,” one of the words used in the exclusion. NEMA has been adversely affected by the Fourth Circuit’s conjecture about how this Court would interpret D.C. law and, as a commercial buyer of standard-form CGL and other insurance policies, supports application of generally accepted principles of insurance policy interpretation and a reasonable interpretation of the APE that prevents its overuse, and misuse, by insurance companies.

ARGUMENT

United Policyholders, MCI, and NEMA present the perspective of policyholders on the vital issue of insurance policy interpretation presented in this case— a perspective that should be

considered to counter-balance the positions in the *Amicus Curiae* brief presented by CICLA, and already accepted by this Court. Further, United Policyholders, MCI, and NEMA present evidence of the circumstances surrounding the standard-form policy provisions at issue, including sworn testimony and public records material made at the time the insurance industry sought approval for the boilerplate policy provisions at issue here. United Policyholders, MCI, and NEMA present a perspective not fully represented by other parties and *Amicus Curiae* – that of policyholders generally, including trade associations and businesses, small and large alike. United Policyholders, MCI, and NEMA also submit that, since that Court has allowed CICLA, a group of insurance companies, to appear as *Amicus Curiae*, it is appropriate to allow United Policyholders, MCI, and NEMA to appear on these important issues of insurance policy interpretation and construction.

United Policyholders, MCI, and NEMA did not learn about this case until the division opinions were published in June 2003 and did not learn of the Court's decision to rehear this case *en banc* until that Order was published.

The Court has focused its request for additional briefing on two questions, relating to interpretation of insurance contracts:

1. In this jurisdiction, to what extent do – or should – objective principles of contract interpretation govern the determination of coverage under an insurance policy contract?
2. In interpreting the pollution exclusion in this case, may either or both of the following be considered a reliable part of the circumstances surrounding the parties at the time the exclusion was adopted, *see 1010 Potomac Assocs. v. Grocery Mfrs. of Am, Inc.*, 485 A.2d 199, 205 (D.C. 1984):
 - a. the language of contemporary environmental legislation and regulations; and
 - b. the historical circumstances that preceded and allegedly led to the adoption of the exclusion.

Order of Sept. 29, 2003, at 2.

Principles of insurance policy interpretation affect not only insurance companies, as CICLA argued in its motion for leave to appear as *Amicus Curiae*, but also, of course, policyholders, the parties that buy insurance to protect their persons, their property, and other valuables. These principles also affect the public because, as courts have recognized, is imbued with the public interest. The process of interpreting any contract, including an insurance policy, is a search for "intent." CICLA has submitted, and the Court has accepted, its brief explaining the insurance industry's position about use of principles of insurance policy interpretation at least as they affect the interpretation of the "absolute pollution exclusion."

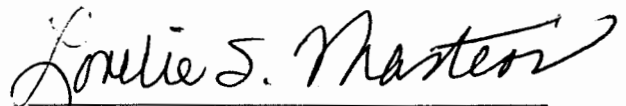
For these reasons, United Policyholders, MCI and NEMA submit that consideration of their views as buyers of insurance will assist the Court in its analysis of the rules of insurance policy interpretation and interpretation of standard-form insurance policy provisions like the APE.

CONCLUSION

For the foregoing reasons, United Policyholders, MCI and NEMA respectfully request that this Court grant their motion for leave to appear as *amici curiae* in support of the Defendant-Appellant.

Dated: October 29, 2003

Respectfully submitted,



Lorelie S. Masters (D.C. Bar No. 358686)
Nicole G. Berner (D.C. Bar No. 472280)
Kali N. Bracey (D.C. Bar No. 458965)
James A. Trilling (D.C. Bar No. 467273)
JENNER & BLOCK, LLC
601 13th Street, NW, Suite 1200
Washington, DC 20005
(202) 639-6000

Attorneys for *Amici Curiae*, MCI and National
Electrical Manufacturers Association

-and-

Richard P. Lewis / RPL

Richard P. Lewis (D.C. Bar No. 445034)

Anderson Kill & Olick, P.C.

1251 Avenue of the Americas

New York, NY 10020

(212) 278-1000

John N. Ellison (D.C. Bar No. 421757)

Anderson Kill & Olick, P.C.

1600 Market Street

Philadelphia, PA 19103

(215) 568-4202

-and-

Amy Bach, Esquire

United Policyholders

42 Miller Avenue

Mill Valley, CA 94941

(415) 381-7627

Attorneys for *Amicus Curiae*,

United Policyholders

CERTIFICATE OF SERVICE

I hereby certify that, on this 29th day of October, 2003, this Motion of United Policyholders, MCI and National Electrical Manufacturers Association for Leave to Appear as *Amici Curiae* and to File Brief in Support of Defendant-Appellant and accompanying Brief in Support of Defendant-Appellant and Appendix were filed with the District of Columbia Court of Appeals, and a copy was mailed by first-class mail, postage prepaid to each of the following:

David P. Sutton, Esq.
120 E. Baltimore Street, Suite 1701
Baltimore, MD 21202

-and-

Robert J. Pleshaw, Esq.
1111 14th Street, NW, Suite 1000
Washington, DC 20005

Counsel for Defendant-Appellant, Antoinette Richardson

David P. Durbin, Esq.
JORDAN COYNE & SAVITS, LLP
1100 Connecticut Avenue, NW, Suite 600
Washington, DC 20036

-and-

Catherine M. Colinvaux, Esq.
ZELLE, HOFMANN, VOELBEL,
MASON & GETTE LLP
950 Winter Street, Suite 1300
Waltham, MA 02451

Counsel for Plaintiff-Appellee, Nationwide Mutual Insurance Company

Hon. Lawrence H. Mirel
Commissioner
DISTRICT OF COLUMBIA DEPARTMENT OF
INSURANCE AND SECURITIES REGULATION
810 First Street, NE, Suite 701
Washington, DC 20002

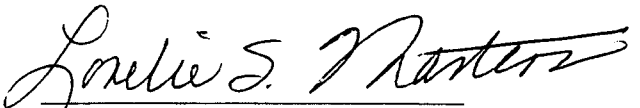
-and-

Charles L. Reischel, Esq.
Chief, Appellate Section
OFFICE OF CORPORATION COUNSEL
441 4th Street, NW
Washington, DC 20001

Counsel for Amicus Curiae, District of Columbia Department of Insurance & Securities Regulation

Laura A. Foggan, Esq.
WILEY REIN & FIELDING LLP
1776 K Street, NW, Suite 1000
Washington, DC 20006

Counsel for Amicus Curiae, the Complex Insurance Claim Litigation Association


Lorelie S. Masters