IN THE SUPREME COURT FOR THE STATE OF TENNESSEE

OPRY MILLS MALL LIMITED PARTNERSHIP, ET AL.,	)	Court of Appeals No. M2016-01763-COA-R3-CV
Petitioners/Appellants/Plaintiffs,	)	
v.	)	
ARCH INSURANCE COMPANY, ET AL.,	)	Supreme Court No. M2016-01763-SC-R11-CV
Respondents/Appellees/Defendants.	)	

PROPOSED BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF THE APPLICATION FOR PERMISSION TO APPEAL OF PLAINTIFF-APPELLANT SIMON PROPERTY GROUP, L.P. AND OPRY MILLS MALL LIMITED PARTNERSHIP

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

United Policyholders respectfully requests leave to file this brief *amicus curiae* in support of Petitioners, Simon Property Group, L.P. and Opry Mills Mall Limited Partnership (collectively, "Opry Mills"). United Policyholders is a non-profit organization founded in 1991 and dedicated to educating the public on insurance issues and advocating for consumer rights. United Policyholders serves as an information resource and a voice for a diverse range of insurance consumers across the United States, from low income homeowners to small and large businesses. United Policyholders' work is divided into three program areas: Roadmap to Recovery (helping disaster victims navigate the insurance claim process and recover fair settlements), Roadmap to Preparedness (promoting disaster preparedness and insurance literacy for homeowners and businesses), and Advocacy and Action (advancing the interests of insurance consumers in courts of law and before regulators). United Policyholders' work is funded by donations (generally of $5,000 or less), foundation grants and volunteer labor.

United Policyholders serves an important purpose by representing the interests of policyholders – a diverse collection of individuals and businesses whose resources, organization and influence is dwarfed by the highly organized and well-financed insurance industry and its trade organizations and lobbyists. Most consumers can scarcely afford legal counsel to pursue their rights under their insurance policies, whereas insurance companies have extensive resources to retain lawyers and other experts when they oppose policyholders' claims. United Policyholders seeks to level the playing field by offering similar resources and comparable counsel to represent policyholders in cases raising important insurance coverage and consumer issues.

Even in cases involving corporate policyholders already represented by fine counsel, United Policyholders often files *amicus* briefs in an effort to draw attention to the impact that the

precedent at hand will have on individual homeowners and consumers in the affected jurisdiction – as is the case with this important appeal. United Policyholders has filed *amicus curiae* briefs in numerous federal and state courts in over 450 cases since its founding in 1991.[1] More information about United Policyholders' Amicus Project can be viewed at www.uphelp.org/amicus.

[1] United Policyholders' positions have also been adopted by the Texas Supreme Court in *Excess Underwriters at Lloyd's, London v. Frank's Casing Crew & Rental Tools Inc.*, 246 S.W.3d 42 (Tex. 2008), as well as by the California Supreme Court in *Vandenberg v. Superior Court*, 88 Cal. Rptr. 2d 366 (1999) and *Association of California Insurance Companies v. Dave Jones, Insurance Commissioner* (S226529, January 23, 2017) and numerous other proceedings including *TRB Investments, Inc. v. Fireman's Fund Insurance Co.*, 145 P.3d 472 (Cal. 2006), and *In Re Salem Suede, Inc.*, 221 B.R. 586 (D. Mass. 1998). United Policyholders has also been granted leave to file briefs as an amicus curiae in numerous U.S. Supreme Court cases, including the following: *Heimeshoff v. Hartford Life & Accident Insurance Co.*, 134 S. Ct. 604 (2013); *US Airways, Inc. v. McCutchen*, 569 U.S. 88 (2013); *Hardt v. Reliance Standard Life Insurance Co.*, 560 U.S. 242 (2010); *Metropolitan Life Insurance Co. v. Glenn*, 554 U.S. 105 (2008); *Aetna Health, Inc. v. Davila*, 542 U.S. 200 (2004); and *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

An affirmance of the Court of Appeals' decision below would call into question well-settled law in Tennessee and Indiana regarding the construction of ambiguous provisions in insurance policies and open the proverbial floodgates to attempts by insurance companies in both states to thwart the reasonable expectations of their policyholders *after* those policyholders have been hit by serious losses. Under that settled law, where reasonable persons would find the terms of an insurance policy subject to more than one interpretation, those terms are considered ambiguous. *See, e.g., Bourland v. Heaton*, 393 S.W.3d 671, 676 (Tenn. Ct. App. 2012); *see also, Adult Grp. Props., Ltd. v. Imler*, 505 N.E.2d 459, 466 (Ind. Ct. App. 1987). Here, the honorable judges of the Chancery Court and the Court of Appeals – all "reasonable persons" to say the least – came to different conclusions regarding the interpretation of the insurance policy provisions at issue. Accordingly, the insurance policy here is ambiguous at best.

Under such circumstances, black letter law in Tennessee and Indiana requires such ambiguous provisions to be construed in favor of coverage. *See Everett Cash Mut. Ins. Co. v. Taylor*, 926 N.E.2d 1008, 1014 (Ind. 2010); *Tata v. Nichols*, 848 S.W.2d 649, 650 (Tenn. 1993). The Court of Appeals' failure to follow this established rule of construction exacerbates the "discord" in Tennessee law identified in Opry Mills' Brief and threatens the proper interpretations of all insurance policies under the standard approach for interpreting insurance policies in Tennessee, Indiana and elsewhere.[2] The recently-enacted statute the insurance companies ("Insurers") cite does not address any of the issues raised by this appeal and does nothing to clarify Tennessee law on those issues.

[2] The insurance companies' Answer argues that no defense of this rule is necessary precisely because it is "universal." But, insurance companies frequently use cases like the Court of Appeals' decision to argue against such rules. United Policyholders exists, in part, to ensure such rules protecting insurance consumers are not eroded in this manner.

The Court of Appeals' decision affects not only the owners of shopping malls, but also small business owners and individuals – rich and poor – that rely on the promises by their insurance companies to protect them when disasters strike. Insurance companies are in the business of taking on those risks, and are paid hundreds of millions of dollars every year by individuals and businesses across Tennessee to do so. Insurance companies are also in the business of ensuring that the insurance policies they issue unambiguously set forth the coverage being provided. The established rules of construction protect policyholders from attempts by insurance companies to take refuge from claims amidst confusing insurance policy wordings and thwart the risk-spreading principles on which the institution of insurance is based – leaving the individual policyholder holding the bag after a loss occurs. Such precedent must not be set, and United Policyholders respectfully submits this brief in support of the policyholder's position in this important case affecting the public interest in Tennessee.

ARGUMENT

The Court of Appeals improperly deviated from established rules of contract interpretation. The Courts of Tennessee and Indiana are uniform as to the applicable rules of insurance policy construction, and allowing the Court of Appeals decision to stand will create significant confusion in lower courts in both states.

When only one reasonable interpretation of contract language exists, the contract is unambiguous, and its plain meaning must be enforced. *See Eli Lilly & Co. v. Home Ins. Co.*, 482 N.E.2d 467, 470 (Ind. 1985) ("If the policy language is clear and unambiguous, it should be given its plain and ordinary meaning.") The parties, and the courts below, agree on this principle.

Where contract language is susceptible to more than one reasonable interpretation, it is considered to be ambiguous. *See Tata*, 848 S.W.2d at 650 ("Where language in an insurance

policy is susceptible of more than one reasonable interpretation" it is ambiguous); *see also, Eli Lilly & Co.*, 482 N.E.2d at 470 (citing *Benefit Trust Life Insurance Co. v. Waggoner* (1985), Ind. App., 473 N.E.2d 646); *Huntington Mutual Insurance Co. v. Walker* (1979), 181 Ind. App. 618, 392 N.E.2d 1182 ("Under Indiana law, an insurance policy is ambiguous if reasonable persons may honestly differ as to the meaning of the policy language.) Under Tennessee law, "[a] contract is ambiguous if a reasonable person would find it susceptible to different or inconsistent interpretations." *Bourland v. Heaton*, 393 S.W.3d 671, 676 (Tenn. Ct. App. 2012) (internal citation omitted). Indiana law is in accord: "[a] contract is ambiguous when reasonable persons would find its terms subject to more than one interpretation." *Adult Grp. Props., Ltd. v. Imler*, 505 N.E.2d 459, 466 (Ind. Ct. App. 1987): *see also* 2 Steven Plitt, et al., *Couch on Ins.* § 21:14 (3d ed. 2017 update) ("The test to be applied by the court in determining whether there is ambiguity is not what the insurer intended its words to mean[,] but what a reasonably prudent person applying for insurance would have understood them to mean."). The insurance policy at issue here is ambiguous, at best.

To find otherwise would be to hold that, after hearing all arguments, reviewing the parties' briefing and examining the applicable law, the Judge of the Chancery Court does not constitute a "reasonable person." Barring this absurd conclusion, there are, at minimum, two reasonable interpretations of the policy language at issue. Accordingly, under the unquestioned law of Tennessee and Indiana, the insurance policy is ambiguous.

The law is also clear, both in Indiana and Tennessee, that in the event there is an ambiguity in an insurance policy, it must be construed in favor of coverage. *See Everett Cash Mut. Ins. Co.*, 926 N.E.2d at 1014 ("A reasonable construction that supports the policyholder's position must be enforced as a matter of law."); *Tata*, 848 S.W.2d at 650 ("Where language in an

insurance policy is susceptible of more than one reasonable interpretation" it is ambiguous and "must be construed against the insurance company and in favor of the insured.")[3] Courts should not be permitted to avoid this last step by simply calling language that is susceptible to more than one reasonable interpretation "unambiguous" because the court believes it is the "correct" reading, as the Court of Appeals did in its decision below.

The conclusion that the language in this case is at least ambiguous is supported not only by the fact that two reasonable readers reached opposite conclusions about its meaning, but also by the parties' conduct and contemporaneous statements and writings in placing coverage and performing under the policies, including, *inter alia*: (1) the Evidence of Commercial Property Insurance Certificates issued by the Insurers from 2008-2010; (2) Aon's 2008 Property and Terrorism Renewal Proposal; and (3) Aon's policy summaries issued to Simon and its lenders. All of those documents, according to Opry Mills' Brief, stated that the $50 million "high hazard" limit in the insurance policies at issue applied only to the listed "High Hazard Flood Locations." At a minimum, the Court of Appeals should have considered such extrinsic evidence, which plainly supports the policyholder's position here.

Contrary to the suggestion of the Insurers, the recently enacted Tennessee statute, House Bill No. 1977, does not alter the analysis or obviate the need for this Court's intervention.[4] A review of the new bill reveals that it merely codifies aspects of existing law regarding interpretation of insurance policies, without addressing the central issue in dispute in this case:

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[3] This Court has repeatedly validated the important principal that "contracts of insurance are strictly construed in favor of the insured, and if the disputed provision is susceptible to more than one plausible meaning, the meaning favorable to the insured controls." *Martin v. Powers*, 505 S.W.3d 512, 517 (Tenn. 2016). *See also, Am. Justice Ins. Reciprocal v. Hutchison*, 15 S.W.3d 811, 815 (Tenn. 2000) (holding that ambiguous policy language "must be construed against the insurance company and in favor of the insured").

[4] As an initial matter, and as the Insurers concede, the statute has no application to this case as it is not retroactive. Nevertheless, the Insurers argue that the statute would resolve future disputes involving ambiguous insurance policies and thus leave to appeal to this court is not warranted. For the reasons described below, United Policyholders disagrees.

Whether Tennessee courts should determine ambiguity in insurance policy language by examining whether the competing interpretations are reasonable and, if so, construe the language in favor of coverage. The statute says nothing about how Tennessee courts should determine if insurance policy language is ambiguous, or how they should interpret ambiguous policy language.

For example, the statute states "[a] policy of insurance is a contract and the rules of construction used to interpret a policy of insurance are the same as any other contract." HB 1977 §1(b). This same principal was espoused by the court in *Am. Justice Ins. Reciprocal v. Hutchison* as follows: "[i]n general, courts should construe insurance contracts in the same manner as any other contract." *Am. Justice Ins. Reciprocal v. Hutchison, 15 S.W.3d 811, 814 (Tenn. 2000) citing McKimm v. Bell*, 790 S.W.2d 526, 527 (Tenn. 1990); *Draper v. Great Am. Ins.* Co., 224 Tenn. 552, 458 S.W.2d 428, 432 (Tenn. 1970). Likewise, "[g]enerally, in Indiana, contracts for insurance are subject to the same rules of interpretation as are other contracts. *Eli Lilly & Co. v. Home Ins. Co.*, 482 N.E.2d 467, 470 (Ind. 1985) *citing Asbury v. Indiana Union Mutual Insurance Co.* (1982), Ind. App., 441 N.E.2d 232; *American Economy Insurance Co. v. Liggett* (1981), Ind. App., 426 N.E.2d 136.

The statute further provides that "[a] policy of insurance must be interpreted fairly and reasonably, giving the language of the policy of insurance its ordinary meaning [and a] policy of insurance must be construed reasonably and logically as a whole." HB 1977 §1 (c) and (d) Again, Tennessee case law makes clear that "[t]he language of the policy must be taken and understood in its plain, ordinary and popular sense" *Hutchison*, 15 S.W.3d at 814-15, *citing Bob Pearsall Motors, Inc. v. Regal Chrysler-Plymouth, Inc.*, 521 S.W.2d 578, 580), and "the policy should be construed as a whole in a reasonable and logical manner." *S. Tr. Ins. Co. v. Phillips*,

474 S.W.3d 660, 665 (Tenn. Ct. App. 2015) (internal citations omitted). Indiana is in accord. *See Milbank Ins. Co. v. Ind. Ins. Co.*, 56 N.E.3d 1222, 1229 (Ind. Ct. App. 2016) citing *Dunn v. Meridian Mut. Ins. Co.*, 836 N.E.2d 249, 251-52 (Ind. 2005) ("[w]e construe the policy as a whole rather than considering individual words, phrases, and paragraphs, and we give clear and unambiguous policy language its plain and ordinary meaning.)

What House Bill 1977 does not speak to is interpretation of ambiguous contracts, and it is, therefore, of no utility in resolving the type of issues presented by this case. The Insurers' statement that this statute somehow either settled Tennessee law or confirmed that Tennessee law is settled on the important questions of insurance policy interpretation presented by this case is unexplained and incorrect. The statute did nothing to address those questions.

If the Insurers are suggesting that the statute abrogated the case law from this Court holding that insurance policy language that is susceptible to more than one reasonable interpretation is ambiguous and should be construed in favor of coverage, that would be a remarkable and incorrect assertion under Tennessee law. In *Hutchison*, this Court stated the rules for interpreting insurance policies as follows:

> In general, courts should construe insurance contracts in the same manner as any other contract. The language of the policy must be taken and understood in its plain, ordinary and popular sense. Where language in an insurance policy is susceptible of more than one reasonable interpretation, however, it is ambiguous. If the ambiguous language limits the coverage of an insurance policy, that language must be construed against the insurance company and in favor of the insured.

15 S.W.3d at 815 (internal citations omitted). If the statute cited by the Insurers was intended by the legislature to eliminate this Court's rules for determining ambiguity and construing ambiguities in favor of coverage, it was required to do so explicitly. *See State v. Howard*, 504 S.W.3d 260, 270 (Tenn. 2016) ("[W]hile the General Assembly unquestionably has the

constitutional and legislative authority to change the common law of this state, it must make clear its intention to do so. This Court has held that without some clear indication to the contrary, we simply will not presume that the legislature intended to change the common law by implication. Additionally, new statutes change pre-existing law only to the extent expressly declared. If the statute does not include and cover such a case, it leaves the law as it was before its enactment.") (alterations and internal citations omitted); *Ezell v. Cockrell*, 902 S.W.2d 394, 399 (Tenn. 1995) ("statutes in derogation of the common law are to be strictly construed and confined to their express terms.") Such a drastic change to the common law certainly may not be inferred from the very general rules set forth in House Bill 1977, which simply mirror portions of those already established in the case law. *Id.* Indeed, the sponsor of the legislation, in introducing the bill, specifically stated that House Bill 1977:

> codifies existing Tennessee case law [...] it doesn't change anything, it doesn't add anything.

See http://wapp.capitol.tn.gov/apps/BillInfo/default.aspx?BillNumber=HB1977&GA=110

Because of the importance of this issue to every policyholder, United Policyholders urges this Court to take this opportunity to clarify the issue going forward by confirming that: (1) a policy of insurance is deemed ambiguous if it susceptible to two reasonable interpretations; (2) an ambiguous insurance policy is to be read in favor of coverage; and (3) House Bill 1977 does not disturb this well-settled rule in Tennessee.

CONCLUSION

Amicus United Policyholders respectfully requests that the Court grant review pursuant to Tennessee Rule of Appellate Procedure 11 to address the important questions of insurance coverage and policy interpretation discussed herein, and to secure uniformity of decision and

proper application of Tennessee law as to those issues; or, if the Court decides Tennessee law differs from Indiana law, the proper application of Indiana law.

Respectfully submitted,

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