4th Civil No. G 018280
(OCSC No. 697526)

IN THE COURT OF APPEAL OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

ST. JOE MINERALS CORPORATION,

Plaintiff and Respondent,

v.

ZURICH INSURANCE COMPANY,

Defendant and Appellant.

Appeal from the Superior Court for Orange County
The Honorable William F. McDonald, Judge, Presiding

AMICUS CURIAE BRIEF OF UNITED POLICYHOLDERS IN SUPPORT OF RESPONDENT ST. JOE MINERALS CORPORATION

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INTEREST OF AMICUS CURIAE

United Policyholders is incorporated as a not-for-profit educational organization and was granted tax exempt status under §501(c)(3) of the Internal Revenue Code. United Policyholders' address is 110 Pacific Avenue, No. 262, San Francisco, California 94111.

United Policyholders' mission is to educate the public on insurance issues and consumer rights thereto, and to assist policyholders to secure prompt, fair, insurance settlements. United Policyholders provides educational materials, provides speakers at community and government forums, organizes meetings in disaster areas, and acts as a clearing house for information on insurance issues.

United Policyholders also provides assistance in large catastrophes. After a disastrous firestorm that destroyed over three thousand structures in Oakland and Berkeley Hills in 1991, United Policyholders sponsored meetings, workshops, and seminars for the victims, and worked with local officials, insurers and relief agencies to facilitate claim settlements. United Policyholders has repeated this process in Florida for victims of Hurricane Andrew, in Texas, for victims of the Northridge Earthquake, and in Northern California after a wildfire.

United Policyholders also files amicus curiae briefs in insurance coverage cases of public importance. Filing amicus curiae briefs is a small, albeit important, part of United Policyholders' activities. United Policyholders' amicus curiae briefs have been accepted by courts throughout the country. See e.g., Humana, Inc. v. Forsyth, 119 S. Ct. 710, No. 97-303, 1999 U.S. LEXIS 744, at *27

(January 20, 1999) (citing to pp. 19-23 of Brief for United Policyholders as Amicus Curiae); Western Alliance Ins. Co. v. Gill, 426 Mass. 115, 1997 Mass. LEXIS 392 (Nov. 10, 1997). United Policyholders' activities are limited only to the extent that United Policyholders exists exclusively on donated labor and contributions of services and funds.

United Policyholders is so highly regarded that the California Court of Appeals recently solicited United Policyholders to file an amicus curiae brief in an insurance coverage case with important public policy considerations. After United Policyholders filed its brief, the Court of Appeals then invited United Policyholders to participate in oral argument.

Amicus curiae has a vital interest in seeing that standard form comprehensive general ("CGL) liability insurance policies sold to countless policyholders, in California and elsewhere, are interpreted properly and consistently by insurance companies and the courts.

I.

INTRODUCTION AND SUMMARY OF ARGUMENT

The very issue pending before this Court, whether, under Missouri law, environmental administrative proceedings in which government-ordered cleanup costs are sought as "damages" are "suits" requiring a defense under a comprehensive general liability ("CGL") carrier, has been recently decided by a Missouri court. Trans World Airlines v. Associated Aviation Underwriters, et al., Case No. 942-01848A (Mo. Cir. Ct., St. Louis, Nov. 5, 1998) ("TWA"). The Missouri court found that "environmental claims seeking remedial action, initiated by notification of potential liability and subsequently settled after negotiation, are suits for damages for purposes of a comprehensive general liability policy (CGL) policy." TWA, Slip Op. at 12-13 (attached to the Request For Judicial Notice filed concurrently herewith as Exhibit "A").

In coming to that conclusion, the Missouri trial court conducted a routine application of long-settled principles of Missouri insurance law, as most recently articulated in the Missouri Supreme Court's decision in Farmland Indus., Inc. v. Republic Ins. Co., 941 S.W.2d 505 (Mo. 1997). The court concluded that Missouri legal principles dictate that an administrative proceeding constitutes a "suit" triggering the duty to defend.

The Missouri trial court's reasoning is particularly instructive here, where a California Court of Appeal is attempting to apply the same bedrock principles of Missouri insurance law to the *identical issue* before the TWA court.

Accordingly, *amicus* offers this brief to assist this Court in applying Missouri insurance principles, with a focus on the case law considered by the Missouri trial court in TWA and the reasoning behind the Missouri court's ruling.

II.

ARGUMENT

A. Principles Of Missouri Insurance Law

1. Under Missouri Law, The Duty To Defend Is Broader Than The Duty To Indemnify.

In analyzing the "suit" issue, the TWA court relied upon well-settled principles of Missouri insurance law. First, a CGL insurer's duty to defend is determined "by measuring the language of the policy against the allegations of the petition brought by the person injured or damaged." Id. at 2 (citing Standard Artificial Limb, Inc. v. Allianz Ins. Co., 895 S.W.2d 205, 210 (Mo. Ct. App. 1995)). Second, the Missouri rule is that a CGL carrier is obligated to defend its insured whenever the underlying petition alleges facts that state a claim *potentially* within the policy's coverage. Id.

From these two basic principles of Missouri insurance law, the Missouri court extrapolated yet another basic principle: "the duty to defend is broader than the insurer's duty to indemnify." Id. at 2-3 (citing Capitol Indem. Corp. v. Callis, 963 S.W.2d 247, 250 (Mo. Ct. App. 1997)). As discussed below, this well-established principle compels that an administrative action in which indemnifiable damages are

sought is a "suit." This result is dictated by the inherently broad nature of the duty to defend.

2. Under Missouri Law, The Response Costs Set By The Environmental Administrative Actions At Issue Here Are "Damages."

In reaching its conclusion that administrative actions are "suits," the Missouri trial court looked to the Missouri Supreme Court's recent decision in Farmland Indus., Inc. v. Republic Ins. Co., 941 S.W.2d 505 (Mo. 1997), which concludes that environmental response costs sought in administrative actions are indemnifiable "damages." In Farmland, the Missouri Supreme Court examined the obligations of a CGL insurance company in light of the statutory scheme created by the Comprehensive Environmental Response Compensation Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601-9675, and analogous state statutes.[1]

The litigants presented the Missouri Supreme Court with arguments strikingly similar to those presented by this case. The policyholder contended that the Missouri Supreme Court should apply an ordinary meaning of "damages," which broadly includes equitable relief. Farmland, 941 S.W.2d at 508. The insurance companies argued that the term "damages" was a technical term meaning "legal damages," and that environmental response costs did not satisfy that definition. Id.

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[1] CERCLA provides two responses to environmental harm: "removal" and "remedial action." 42 U.S.C. § 9601(23)-(24). The costs of those responses are commonly referred to as "response costs."

The Missouri Supreme Court soundly rejected the technical definition urged by the insurance companies, and adopted the ordinary meaning of damages as set forth in lay dictionaries. Id. at 509 ("the equitable relief at issue is a cost that Farmland is legally obligated to pay as compensation or satisfaction of a wrong or injury"). As such, under Missouri law, environmental response costs -- such as those being sought against the policyholder in the environmental enforcement proceedings at issue here -- are indemnifiable "damages" within the meaning of CGL policies. Id. at 511.

B. As The Missouri Trial Court Recognized, Missouri's Long-Settled Principle That The Duty To Defend Is Broader Than The Duty To Indemnify Necessarily Leads To The Conclusion That Coercive Administrative Proceedings Are "Suits."

1. The Missouri Trial Court's Holding That Environmental Administrative Proceedings Are "Suits"

With the foregoing principles of Missouri insurance law in mind, the Missouri trial court examined the issue of whether coercive administrative enforcement proceedings to set indemnifiable response costs constitute "suits" obligating a CGL carrier to provide its insured with a defense. The court determined that because response costs were indemnifiable damages, and because the duty to defend is broader than the duty to indemnify, the coercive administrative proceedings setting those damages are "suits." TWA, Slip Op. at 11-13.

Notably, the Missouri trial court expressly rejected the very cases relied upon by the insurance company in this appeal. The CGL insurance companies in

TWA argued that Aetna Cas. & Sur. Co. v. General Dynamics Corp., 968 F.2d 707 (8th Cir. 1992) ("General Dynamics"), correctly predicted that a Missouri court would hold that administrative proceedings setting response costs were not "suits." TWA, Slip Op. at 11. The Missouri trial court refused to apply the Aetna case on the ground that Aetna relied on an erroneous Eighth Circuit decision which held that response costs were not damages under Missouri law. See TWA, Slip Op. at 12 (discussing Continental Ins. Cos. v. Northeastern Pharm. & Chem. Co., Inc., 842 F.2d 977 (8th Cir. 1988) ("NEPACCO")). As the Missouri trial court recognized, the NEPACCO decision was categorically rejected by the Missouri Supreme Court in Farmland. 941 S.W.2d at 510 ("The NEPACCO court misconstrues and circumvents Missouri law").

Hence, NEPACCO, and the line of cases relying on it for a prediction of Missouri insurance law, such as the General Dynamics decision, could not be relied upon by the Missouri trial court. Instead, because the Farmland court found that response costs are indemnifiable damages, and because the duty to defend is broader than the duty to indemnify, the only logical conclusion was that "environmental claims seeking remedial action, initiated by notification of potential liability and subsequently settled after negotiation, *are suits for damages*, for purposes of a comprehensive general liability (CGL) policy." TWA, Slip Op. at 12-13 (emphasis added).

2. **A Holding That Environmental Administrative Proceedings Are "Suits" Comports With Missouri Principles Of Insurance Contract Interpretation.**

In addition to preserving the fundamental Missouri principle that the duty to defend is broader than the duty to indemnify, the Missouri trial court's ruling correctly applied Missouri's long-settled rules of insurance contract interpretation. First, under Missouri law, the words of an insurance contract "must be given their plain meaning, consistent with the reasonable expectations, objectives, and intent of the parties." Standard Artificial Limb, Inc., 895 S.W.2d at 209 (citing Chase Resorts, Inc. v. Safety Mut. Cas. Corp., 869 S.W.2d 145, 150 (Mo. Ct. App. 1993)). Second, "limitations contained in insurance policies should be construed strictly against the insurer." Id.

In light of these bedrock rules of policy interpretation, the Missouri trial court correctly found that environmental proceedings setting indemnifiable response costs were "suits." As the Missouri trial court noted, the duty to defend is broader than the duty to indemnify since a CGL carrier must defend its policyholder against claims that create even a potential for indemnity. See TWA, Slip. Op. at 2-3 (citing Capitol Indem. Corp., 963 S.W.2d at 250). Thus, an insured would reasonably expect a defense for any action that potentially seeks damages (i.e., response costs) within the coverage of the policy.

A result where response costs are "damages," while the government enforcement proceedings seeking those damages are not "suits that the insurance company has an obligation to defend," would be contrary to the insured's reasonable

expectations. The upshot of a determination herein that administrative proceedings are not "suits," is that although under Farmland the policyholder is entitled to have the insurance company indemnify for the damages imposed by the administrative proceeding, the policyholder would have to finance and conduct the defense of the administrative proceeding. This would turn Missouri law on its head, making the duty to indemnify broader than the duty to defend. As the Missouri trial court implicitly recognized, it is objectively reasonable for the parties to expect that if there is a duty to indemnify for damages fixed in government enforcement proceedings there is also a duty to defend the same proceedings provided by that same policy. Any other result would contradict Missouri's most basic principles of contract interpretation, as well as common sense.

III.

CONCLUSION

For the foregoing reasons, the California Superior Court's interpretation of Missouri law is consistent with fundamental interpretive principles applied in the Missouri courts. The trial court's ruling therefore should be affirmed.

Dated: April 12, 1999

Respectfully submitted,

ANDERSON KILL & OLICK, P.C.
John A. MacDonald

By 
John A. MacDonald
Attorneys for *Amicus Curiae*
UNITED POLICYHOLDERS

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PROOF OF SERVICE BY FEDERAL EXPRESS

I am employed in the County of Philadelphia, State of Pennsylvania. I am over the age of 18 and not a party to the within case. My business address is Anderson Kill & Olick, 1600 Market Street, Philadelphia, PA.

I served the below listed document(s) described as:

1. APPLICATION OF UNITED POLICYHOLDERS FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF RESPONDENT ST. JOE MINERALS CORPORATION;

2. *AMICUS CURIAE* BRIEF IN SUPPORT OF RESPONDENT ST. JOE MINERALS CORPORATION; and

3. NOTICE OF AND REQUEST FOR JUDICIAL NOTICE RE UNITED POLICYHOLDERS' *AMICUS CURIAE* BRIEF IN SUPPORT OF RESPONDENT ST. JOE MINERALS CORPORATION.

on April 12, 1999 on the following parties to this case by placing a copy of the above document(s) with Federal Express, marked "priority, overnight" as follows:

California Supreme Court (5 copies)
303 Second Street, South Tower
San Francisco, CA 94107

Clerk of California Court of Appeals (original and 4 copies)
Fourth Appellate District, Division Three
925 N. Spurgeon St.
Santa Ana, California 92701

Clerk of Orange County Superior Court
[TO BE DELIVERED TO: Judge William F. McDonald]
700 Civic Center Drive West
Santa Ana, CA 92701

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I caused to be placed a sealed envelope containing the document(s) with Federal Express, a common carrier, fees prepaid by charge to Anderson Kill's account, in Philadelphia, Pennsylvania addressed to the above parties and designated for overnight delivery.

I declare under penalty of perjury that the above is true and correct.

Executed on April 12, 1999, at Philadelphia, Pennsylvania.

Sheryl Charzewski

Sheryl Charzewski