COURT OF APPEALS OF THE STATE OF NEW YORK

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TOWN OF HARRISON AND VILLAGE OF HARRISON,

Plaintiffs-Appellants-Respondents,

-against-

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.,

Defendant-Respondent-Cross-Appellant,

and THE NORTH RIVER INSURANCE COMPANY,

Defendant-Respondent.

Docket Nos.: 94-01946
94-09730

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# BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS IN SUPPORT IN SUPPORT OF THE CROSS - APPEAL OF THE TOWN OF HARRISON AND VILLAGE OF HARRISON

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## PRELIMINARY STATEMENT

### INTEREST OF AMICUS CURIAE

Amicus Curiae, United Policyholders, is a non-profit corporation dedicated to educating policyholders on their rights and duties under their insurance policies. Specifically, United Policyholders engages in charitable and 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 exists exclusively on donated labor and contributions of services and funds.

United Policyholders has a vital interest in seeing that the standard-form liability insurance policies sold to policyholders throughout the United States are interpreted properly and consistently by insurance companies and the courts. As a public interest organization, United Policyholders seeks to assist and educate the public and the courts on policyholders' insurance rights, and to ensure that such rights are enforced throughout the country.

The exclusion at issue is a standard-form, non-negotiated provision that was drafted by the insurance industry in the early-1980's and added to standard-form insurance policies such as the liability policies at issue in this case.

Amicus Curiae maintain that the pollution exclusion contained in policies like that sold by North River Insurance Company and National Union Fire Insurance Company was never intended to apply in situations involving non-hazardous materials or to bar coverage for liability arising from a policyholder's negligent failure to prevent a third-party from polluting.

The lower court's decision, if upheld, would strip policyholders of protections for which they have paid substantial premiums.

## SUMMARY OF ARGUMENT

Insurance companies have an obligation of good faith and fair dealing requiring them, among other things, to inform their policyholders of any basis for coverage and to provide their policyholders with all relevant information which supports such a coverage determination.

National Union's and North River's contentions that their respective pollution exclusions are "absolute" ignores their prior inconsistent admissions. Additionally, the drafting and regulatory history of the so-called "absolute" pollution exclusion proves that the exclusion is anything but "absolute." National Union and North River's fiduciary duties requires them to provide the policyholder with all relevant information including regulatory filings and drafting history documents which will illuminate this Court's understanding of the true scope and effect of the standard-form exclusion at issue here.

## POINT I.

### A. Insurance Lore and the Sales Pitch:

The New York Insurance Commissioner was told one thing when the so-called absolute pollution exclusion was approved. The insurance company defendants are now telling this Court a different story.

North River contends that consideration of promises and representations to insurance regulators is unnecessary and would convert insurance policy controversies into an unnecessary search through regulatory records.[1]

NOT SO!

Insurance companies have an obligation to act honestly. Insurance company claims persons are not taught to lie to policyholders (at least one would hope not). The Code of Professional Ethics of the American Institute for Chartered Property Casualty Underwriters (1993) Rule 3.1 provides:

> .....a CPCU shall not engage in any act or omission of a dishonest, deceitful or fraudulent nature.

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1. Avoiding insurance coverage controversies is certainly a noble goal. According to the American Insurance Association:

> While the sums at issue in this case are relatively minor, direct (i.e., primary and excess) insurers spend (conservatively) a billion dollars a year in so-called "coverage litigation,".....

Brief of Amicus Curiae American Insurance Association at 3 (dated Feb. 25, 1993) Affiliated FM Insurance Co. v. Constitution Reinsurance Corp., No. SJC-06165 (Mass.), a copy of which is attached as Exhibit A to the Appendix to the Brief of Amicus Curiae of United Policyholders ("App.").

What an astonishing fact!

The Ethical Guidelines to Rule 3.1 provide that:

> A CPCU should neither misrepresent nor conceal a fact or information which is material to determining the....scope....of an insurance contract.....

Moreover, Rule 7.2 of the CPCU Ethical code provides that:

> A CPCU shall not misrepresent the... limitations...of...any product....of an insurer."[2]

Thus, pursuant to the CPCU Code North River and National Union have, and continue to have, a duty to disclose to the Town of Harrison any material fact supporting insurance coverage. The insurance companies are not permitted by the Code of Professional Ethics to misrepresent or conceal any information from its policyholder or from this Court.

Prospective Chartered Property and Casualty Underwriters (CPCUs) must study claims handling and are taught honesty and candor in dealing with policyholders. The mandatory and standard text for CPCU candidates states:

> (1) All insurance contracts contain a covenant of good faith and fair dealing.
> (2) If bad faith is a tort in a third-party claim, it should be a tort in a first party claim as well.
> (3) Insurance is a matter of public interest and deserves special consideration by the courts to protest the public.
> (4) Insurance contracts are not like other contracts because insurers have an advantage in bargaining power. Insurers should therefore be held to a higher standard of care.
> (5) Recovery for breach of an insurance contract should not be limited to payment of the original claim.

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2. Copies of Rule 3.1 and Rule 7.2 from The Code of Professional Ethics of the American Institute for Chartered Property Casualty Underwriters (3d. ed. 1993) (App. B).

(6) The public's expectations are elevated by the insurers' advertising, slogans, and promises, which give policyholders the impression that they will be taken care of no matter what happens.
(7) Policyholders buy peace of mind and are not seeking commercial advantage when they buy a policy. In addition, they are vulnerable at the time of the loss.
(8) Policy language is sometimes difficult to understand. The benefit of interpretation should be given to the policyholder.[3]

Policyholders do not need to search through New York State Insurance Department records because the insurance companies have a good faith obligation to tell the truth.

**B. Looking for Lore:**

To the extent that National Union and North River argue that the law of insurance gives less coverage than the lore (custom and practice) of insurance this Court should follow the lore. Lore is what is sold to customers.

Insurance company claims manuals should accurately reflect insurance regulatory representations and requirements. If they do not, the omission should not be visited upon policyholders.

Insurance companies have a duty to disclose all pertinent information concerning the insurance coverage which they sell to their policyholders. See, Widiss, Obligating Insurers to Inform Insureds About the Existence of Rights and Duties Regarding Coverage for Losses, 1 Conn. Ins. L.J. 67 (1995) (Available on Lexis).

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3. J. Markham, K. Quinley, L. Thompson, The Claims Environment 277, 278 (1st ed., Ins. Inst. of Am. 1993).

A New Jersey court said it best a long time ago in Bowler v. Fidelity & Casualty Co. of New York, 250 A.2d 580, 587-588 (N.J. 1969):

> Insurance policies are contracts of the utmost good faith and must be administered and performed as such by the insurer. Good faith "demands that the insurer deal with laymen as laymen and not as experts in the subtleties of law and underwriting. [citations omitted] In all insurance contracts, particularly where the language expressing the extent of the coverage may be deceptive to the ordinary layman, there is an implied covenant of good faith and fair dealing that the insurer will not do anything to injure the right of its policyholder to receive the benefits of his contract. This covenant goes deeper than the mere surface of the writing. When a loss occurs which because of its expertise the insurer knows or should know is within the coverage, and the dealings between the parties reasonably put the company on notice that the insured relies upon its integrity, fairness and honesty of purpose, and expects his right to payment to be considered, the obligation to deal with him takes on the highest burden of good faith.

The insurance companies' position that regulatory representations and drafting history concerning the scope and application of the so-called absolute pollution exclusion is undiscoverable ignores National Union's and North River's duties to their policyholders. Their refusal to produce such information places their policyholders in the unfair position of having to blindly search through State Insurance Department records.

## POINT II.

## THE INSURANCE INDUSTRY HAS PREVIOUSLY ADMITTED THAT THE SO-CALLED ABSOLUTE POLLUTION EXCLUSION IS ANYTHING BUT ABSOLUTE

### A. National Union's Prior Inconsistent Judicial Admissions:

> [A]ll segments of the insurance community -- policyholders, their brokers, insurance regulators, the trade press and insurers -- described the new ISO [Insurance Services Office] pollution exclusion as "total" or "absolute." They did so with full knowledge that there were exceptions to it.

So said National Union in its Post-Argument Submission and Reply to Amicus Curiae Brief of Texas Department of Insurance, Mid-America Legal Foundation, and Texas Independent Producers & Royalty Owners Association ("National Union's Post-Argument Submission"), filed in National Union Fire Insurance Co. of Pittsburgh, Pa. v. CBI Industries, Inc., No. D-4353, 1995 WL 92215 (Tex. Sup. Ct. dated Nov. 4, 1994) ("CBI"), at 16 (second emphasis supplied), (App. C).[4]

National Union further represented that in drafting the "absolute" pollution exclusion the Insurance Services Offices ("ISO"),[5] which is the principle drafter of standard form

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4. In CBI, the court found that the "absolute" pollution exclusion barred coverage for claims resulting when an accidental explosion produced a large hydrofluoric acid cloud over a city. See National Union Fire Ins. Co. of Pittsburgh, Pa. v. CBI Industries, Inc., 920 S.W.2d 517 (Tex. Sup. Ct. 1995).

5. ISO, the progenitor of the 1985 or "absolute" pollution exclusion, introduced the exclusion in the mid-1980s. There have been a number of variants used since, but conceptually all of these so-called "absolute" pollution exclusions evolved from the approval of the ISO form. The United States Supreme Court observed the following regarding standard-form insurance policies (continued...)

liability insurance policies, made clear that the exclusion was not absolute. In National Union's words:

> ISO [thus] clearly explained to insurance regulators at the outset that its "total" exclusion had an exception for certain limited off-premises pollution discharges. That there were exceptions to ISO's ... "total" exclusion was also a matter of common knowledge among policyholders, insurance brokers, and the trade press.

National Union's Post-Argument Submission at 19.

ISO's internal memorandum also contradict North River and National Union's assertions in this case regarding the scope of their "absolute" pollution exclusions.

Exhibit 16 to National Union's Post-Argument Submission contains an ISO memorandum which states that:

> [t]he exclusion does not apply to damages arising out of products or completed operations nor to certain off-premises discharges of pollutants.[6]

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5.(...continued)
and ISO:

> [ISO], an association of approximately 1,400 domestic property and casualty insurers... is the almost exclusive source of support services in this country for CGL insurance. ISO develops standard policy forms and files or lodges them with each State's insurance regulators; most CGL insurance written in the United States is written on these forms.

Hartford Fire Ins. Co. v. California, 113 S. Ct. 2891, 2896 (1993) remanded, In re Insurance Antitrust Litig., 5 F.3d 1556 (9th Cir. 1993) (citations omitted, emphasis added).

6. ISO, Explanatory Memorandum, Pollution Exclusion Endorsement (1984). (App. D).

Likewise Exhibit 28 to the Post-Argument Submission, a March 11, 1985 ISO letter to the Insurance Department of the Commonwealth of Pennsylvania, states, among other things, that:

> [a]lthough the revised pollution exclusion does not explicitly except products and completed operations, pollution liability coverage for products and completed operations is afforded when the exclusion is used.

(App. E).

These ISO documents squarely contradict the insurance companies' position before this Court that the "absolute" pollution exclusion has no exceptions.

**B. An Internal Memorandum Written By An Official Of National Union's Parent Corporation AIG Confirms That The Pollution Exclusion At Issue Contained Exceptions For Products Liability And Completed Operations**

A 1986 internal publication of National Union's parent corporation, AIG Insurance Companies ("AIG"),[7] confirms that the pollution exclusion never excluded coverage for products liability or completed operations. AIG's Product Management Bulletin, in discussing coverage for products liability and completed operations, states as follows:

> As you know, this exposure was never excluded by any pollution exclusion (pollution always being treated as a premises/operations potential) both under past or present contracts.[8]

This statement, made after inclusion of the so-called "absolute" pollution exclusion in standard-form liability

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7. National Union's parent corporation, AIG, was formerly known as American International Companies.

8. Products Management Bulletin, Nov. 13, 1986, at AH 000796 (emphasis supplied) (App. F).

insurance policies, squarely refutes National Union's position that its pollution exclusion is "absolute."

### C. The Representations Of North River's Parent Corporation Directly Refute North River's Claim That The So-Called "Absolute" Pollution Exclusion is Absolute

Similarly, Crum & Forster, the parent corporation of North River, has represented that the "absolute" pollution exclusion is "not absolute." Crum & Forster's representations are directly contrary to the position taken by North River in this action.

In 1985, seeking approval for the "absolute" pollution exclusion, Crum & Forster's Vice President for Government Affairs testified before the New Jersey Department of Insurance that the "absolute" pollution exclusion was subject to "significant" exceptions. Crum & Forster testified:

> I think it's important to emphasize a point that was made earlier and that is these are not total, absolute pollution exclusions. It does have significant coverage for completed operations and product liability in certain off-site discharges.[9]

Crum & Forster's representation that the "absolute" pollution exclusion is subject to exceptions and provides "significant pollution coverage"[10] directly refutes the position of its subsidiary North River in this action. Crum & Forster's representations before the New Jersey Department of Insurance

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9. Testimony of Robert J. Sullivan, Vice President for Government Affairs, Crum & Forster Insurance Companies, Transcript of Proceedings before the New Jersey Department of Insurance, Dec. 18, 1985, at 31 (emphasis supplied) (App. G).

10. Id. (emphasis supplied).

also demonstrate that policyholders should be entitled to discovery with regard to the regulatory and drafting history of the "absolute" pollution exclusion.

### D. Insurance Industry Admissions Further Corroborate The National Union And North River Admissions That The "Absolute" Pollution Exclusion Is Subject To Broad And Widely Recognized Exclusions

Consistent with National Union and North River's admissions but inconsistent with their positions in this case, the insurance industry has represented in testimony before regulators and in its own publications that the so-called "absolute" pollution exclusion is not absolute. Indeed, the insurance industry has admitted that the "absolute" pollution exclusion is ambiguous, overbroad and subject to exceptions.

According to Liberty Mutual Insurance Company, the "absolute" pollution exclusion is not to be read literally:

> Mr. Thornberry [Texas insurance regulator]: Let me ask the next question. . . . [T]he definition of pollutants [in the pollution exclusion] is, "pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." Waste includes certain other things.
>
> My reading of that language is so broad that the example I have been given in the past[,] the grocery store where the alkali or acid spills on the floor, either through negligent failure to clean it up or negligence, the child walks in and falls in it, is disfigured. My reading of that exclusion is that's pollution excluded from the policy and there is no coverage. And that I guess is the correct reading.

> Mr. Harrel [Liberty Mutual representative]: That is a reading, yeah. It can be read that way, just as today's policy the pollution exclusion can be read in context with the rest of the policy to exclude any products liability claim. You can read today's CGL policy and say that if you insure a tank manufacturer whose tank is put in the ground and leaks, that that leak is a pollution loss. And the pollution exclusion if you read it literally would deny coverage for that. I don't know anybody that's reading the policy that way, and I think you can read the new policy just the way you read it. But our insured would be at the state board -- someone said yesterday -- quicker than a New York minute if, in fact, every time a bottle of clorox fell off a shelf at a grocery store and we denied the claim because it's a pollution loss.
>
> Mr. Thornberry: I have also heard the justification that if an insurance company denied the claim and you went to the courthouse, the courts wouldn't read the policy that way.
>
> Mr. Harrel: Nobody would read it that way.[11]

The insurance companies further acknowledge that the "absolute" pollution exclusion is overbroad:

> Mr. Thornberry: I guess my problem is why do we have language that appears -- If there's an ambiguity, why don't we have it cleared up rather than in the policy.
>
> Mr. Rinehimer [Travelers Insurance Company representative]: Would you like to volunteer to be on the next drafting committee?
>
> Mr. Thornberry: That's what I thought you would say. What I have heard is that everybody has thought about it but nobody knows how to --

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11. Transcript of Proceedings, Hearing to Consider, Discuss, and Act on Commercial General Liability Forms Filed by the Insurance Services Office, Inc. (Oct. 31, 1985) at 6-8 (emphasis supplied) (App. H).

> Mr. Harrel [Liberty Mutual representative]: That little crack that you want to talk about could turn into boulder dam. We have overdrafted the exclusion. We'll tell you, we'll tell anybody else, we overdrafted it. But anything else puts us back where we are today.[12]

These insurance industry representations directly contradict National Union's and North River's contentions before this Court that their pollution exclusions are "absolute." Clearly, the drafting history of these exclusions as well as the regulatory filings made by the insurance companies concerning the effect of such exclusions needs to be considered in order to ascertain exactly what was sold to policyholders by insurance companies such as National Union and North River.

## POINT III.

## NEW YORK COURTS UNAMBIGUOUSLY HOLD THAT INSURANCE COMPANIES OWE THEIR POLICYHOLDERS A DUTY OF GOOD FAITH AND FAIR DEALING WHICH CONTINUES THROUGH INSURANCE COVERAGE LITIGATION

The duty of good faith makes a search of insurance department records by the policyholder unnecessary; the insurance companies are obligated to provide all relevant information to its policyholders concerning the insurance coverage which they sold.

The special public nature of the business of insurance places insurance companies in a unique positions of trust with respect to their policyholders -- a position which rises to the

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12. Transcript of Proceedings, at 8-9 (emphasis supplied).

level of a fiduciary relationship. Insurance companies are duty bound to conduct themselves in accordance with the highest standards of good faith towards their policyholders. The courts and public policy seek to protect policyholders in disputes with insurance companies by reason of this fiduciary relationship.

There can be no dispute that insurance companies owe their policyholders a duty of good faith and fair dealing. See e.g., Gordon v. Nationwide Mut. Ins. Co., 285 N.E.2d 849 (N.Y. 1972), cert. denied, 410 U.S. 931 (1973); PepsiCo, Inc. v. Continental Casualty Co., 640 F. Supp. 656, 664 (S.D.N.Y. 1986). Indeed, New York recognizes a special relationship between an insurance company and its policyholders. In Hartford Accident & Indem. Co. v. Michigan Mutual Ins. Co., 462 N.Y.S.2d 175 (1st Dep't 1983), aff'd, 463 N.E.2d 608 (N.Y. 1984), the court discussed this relationship and found that insurance companies owe fiduciary duties to their policyholders:

> the primary carrier owes to the excess insurer the same fiduciary obligation which the primary insurer owes to its insured, namely, a duty to proceed in good faith and in the exercise of honest discretion.

462 N.Y.S.2d at 178. See also Ampower Semiconductor Corp. v. American Motorists Ins. Co., 552 N.Y.S.2d 269, 271 (1st Dep't 1990) ("By breaching its fiduciary duty to deal with its insured with the utmost good faith defendant cannot . . . take advantage of its own wrongdoing") (citation omitted). The standard was set forth in Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928) (Cardozo, J.) ("a [fiduciary] is held to something stricter than the morals of the market place. Not honesty alone, but the

punctilio of an honor the most sensitive, is then the standard of behavior.").

National Union understands that there are important reasons for requiring insurance companies to meet the highest standard of care in protecting policyholders' interests. Indeed, in a litigation with Liberty Mutual Insurance Company, Liberty Mutual contended and National Union did not dispute the weighty obligations they each owed to their policyholders. Specifically, Liberty Mutual wrote:

> [T]here are very substantial differences between the position of an insured and the position of an excess insurer which illuminate the differing duties owed to these entities by the primary carrier. The insured purchases liability coverage to shield itself from exposure to a variety of potential claims covered by the policy. For its part, the insurer contracts to protect the insured by way of investigating, defending, and evaluating any such claims brought against the insured and indemnifying the insured for any amount . . . for which the insured may be legally liable. Of course, the insured may be a private individual or a large corporation. In any case, the insured is likely not as familiar with litigation and claims evaluation and disposition as is the insurance company. In Cousins v. State Farm ... the Court cited approvingly language to the effect that the insurer is a professional defender of law suits and so is held to a higher standard of care than an unskilled practitioner (294 So. 2d at 275). Therefore, what might be ignorance in his (the insured) instance might be an unforgivable oversight of the insurer; what might be neglect in his instance could well constitute bad faith on the part of the insurer." 294 So. 2d at 275. This is why the insurer owes a duty of good faith to its insured. The insurer has control of the investigation, evaluation, settlement and trial of the claim. Because of its superior knowledge and experience regarding claims handling and litigation,

> vis-a-vis the insured[, t]he insurer owes its insured this duty of good faith.

Liberty Mutual Memorandum In Support Of Motion For Partial Summary Judgment dated July 5, 1988 at 7-8, filed in National Union Ins. Co. v. Liberty Mutual Ins. Co., No. 86-2000, Eastern District of Louisiana (App. I).

In another litigation National Union agreed and cited with approval legal precedent to the effect that:

> In the insurance context a special relationship arises out of the parties' unequal bargaining power and the nature of the insurance contracts which would allow unscrupulous insurers to take advantage of their insureds' misfortunes in bargaining for settlement or resolution of claims. In addition, without such a cause of action insurers can arbitrarily delay payment of a claim with no more penalty than interest on the amount owed. An insurance company has exclusive control over the evaluation, processing and denial of claims. For these reasons a duty is imposed that "[an] indemnity company is held to that degree of care and diligence which a man of ordinary care and prudence would exercise in the management of his own business."

National Union's Brief In Support Of Its Motion For Summary Judgment And In Response To Columbia Casualty's Motion For Summary Judgment, served May 7, 1992 at 13-14, and filed in National Union Fire Ins. Co. v. CNA Ins. Cos. et al., No. L-90-55-CA, Eastern District Texas (App. J).

The duty of good faith and fair dealing continues even after the policyholder has found it necessary to enforce its insurance coverage through litigation, and extends "to the assertion, settlement and litigation of contract claims and defenses.'" (underscoring supplied) Restatement (Second) of

Contracts § 295, comment e. See also Riveredge Assocs. v. Metropolitan Life Ins. Co., 774 F. Supp. 897, 899 (D.N.J. 1991).

Insurance companies agree that their fiduciary obligation requires them to inform their policyholders of any basis for coverage. For example, The Travelers Insurance Company ("Travelers") submitted a memorandum to this Court which stated:

> Travelers concluded that it was bound by ethical claims-handing practices to apprise its insured (a) that Koppers [policyholder] may be entitled under its policies to many of the claims-handling services that Koppers was offering to buy from Travelers, and (b) that indemnity coverage might exist.

Memorandum of the Travelers Insurance Company in Opposition to Defendants' Motions for Summary Judgment on Late Notice Grounds, at 14-15; Travelers Ins. Co. v. Buffalo Reinsurance Co., No. 86 Civ. 3369, slip op. at 14-15 (S.D.N.Y. Sept. 26, 1988) (App. K).

North River is no exception and, indeed, has argued to the Second Circuit that any efforts to improperly void a policyholder's insurance coverage is an act of bad faith. Specifically, North River cited New York law for the proposition that:

> [A] covenant of good faith and fair dealing "precludes each party from engaging in conduct that will deprive the other party of the benefits of their agreement." Any effort by [the defendant insurance company] to benefit by making a disingenuous determination that would create a windfall for him to the detriment of [the plaintiff] would not be an act of good faith or fairness, and thus would violate the contract.

Brief for Defendant-Appellee North River Insurance Company, Unigard Security Ins. Co. v. North River Ins. Co., No. 91-7534

(2nd Cir. 1991) filed July 31, 1991 at 45 (citations omitted). (App. L).[13]

Moreover, insurance companies have judicially admitted that their fiduciary obligations do not evaporate upon their refusal to provide insurance coverage to their policyholders. For example, Aetna Casualty & Surety Company, in its Brief in Opposition to Nestle's Motion For Partial Summary Judgment, filed in Nestle Foods Corp. v. Aetna Casualty & Sur. Co., No. 89-1701 (D.N.J. 1993) (App. M), stated:

> Aetna does not dispute the fact that its contracts with Nestle impose on both parties a duty of good faith and fair dealing. Aetna has honored that obligation.
>
> Nestle's bad faith, issue preclusion theory, is based upon Riveredge Assocs. v. Metropolitan Life Ins. Co., 774 F. Supp. 897 (D.N.J. 1991). The decision does not support Nestle's theory.
>
> The cornerstone of Riveredge Assocs. is Restatement (Second) of Contracts § 205 (1981) ("Restatement"), and more specifically, comment e. The comment states:
>
> > e. *Good faith in enforcement.* The obligation of good faith and fair dealing extends to the assertion, settlement and litigation of contract claims and defenses. See, e.g., §§ 73, 89. The obligation is violated by dishonest conduct such as conjuring up a pretended dispute, asserting an interpretation contrary to one's own understanding, or falsification of

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13. The insurance companies should not be permitted to maintain inconsistent positions at the expense of their policyholders. New York courts recognize that the "orderly administration of justice and regard for the dignity of judicial proceedings" would be undermined if parties were allowed to maintain inconsistent positions before the courts. Kimco of New York, Inc. v. Devon, 163 A.D.2d 573, 558 N.Y.S.2d 630, 632 (2d Dep't 1990) (citations omitted).

> facts. It also extends to dealing which is candid but unfair, such as taking advantage of the necessitous circumstances of the other party to extort a modification of a contract for the sale of goods without legitimate commercial reason. See Uniform Commercial Code § 2-209, Comment 2. Other types of violation have been recognized in judicial decision: harassing demands for assurances of performance, rejection of performance for unstated reasons, willful failure to mitigate damages, and abuse of a power to determine compliance or to terminate the contract. For a statutory duty of good faith in termination, see the federal Automobile Dealer's Day in Court Act, 15 U.S.C. §§ 1221-25 (1976).

Id. at 24 (additional citations omitted).

An overwhelming majority of courts throughout the country have confirmed that an insurance company's duty of good faith and fair dealing continues during the pendency of insurance coverage litigation. See Michael D. Silverman & Eugene R. Anderson, Pussy Cats vs. Jungle Cats: An Insurance Company's Duty Of Good Faith And Fair Dealing In Litigation," Mealey's Litig. Rep.--Bad Faith, Vol. 7, No. 17 (Jan. 13, 1994) at 18 ("Pussy Cats vs. Jungle Cats").[14]

Insurance company lawyers have written a reply to Pussy Cats vs. Jungle Cats. In Robert F. Cusumano, Spy vs. Spy: Coverage Litigation As Its Own Tort," Mealey's Litig. Rep.--Ins.,

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14. The authors are affiliated with Anderson Kill Olick & Oshinsky, P.C., attorneys on behalf of amici curiae in support of National Industry. A copy of Pussy Cats vs. Jungle Cats is attached as Exhibit N to the Appendix.

Vol. 8, No. 22 (Apr. 12, 1994) at 19,[15] the author argues that the "concept of 'litigation bad faith' represents what appears to be the maximum conceivable expansion of liability to fulfill insurance contracts." Id.

Thus, it is clear that an insurance company's duty of good faith and fair dealing extends into litigation.

The policyholders need not plumb the depths of insurance department archives.

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15. The author is affiliated with Simpson Thacher & Bartlett, counsel for Travelers Insurance Company. A copy of Spy vs. Spy is attached as Exhibit O to the as Appendix.

## POINT IV.

## INSURANCE COMPANIES CONSISTENTLY AND STRENUOUSLY ARGUE THAT THE DUTY OF GOOD FAITH AND FAIR DEALING CONTINUES THROUGH LITIGATION

Hear this from a senior insurance company executive!!!

Q: Does the [insurance company's] duty of good faith and fair dealing continue after a claim is denied?

A: It always continues from the carrier's perspective.

Q: Does it ever end?

A: Never ends.

The above deposition testimony was given in an Oklahoma case by Donald DeCarlo, Esq., the general counsel of the Travelers Insurance Company, one of the largest insurance conglomerates in the country.[16]

The testimony of Travelers' general counsel in the Oklahoma City Urban Renewal Authority case, that an insurance company's duty of good faith and fair dealing is never ending, accurately states insurance industry lore, custom and practice and mirrors statements made by other insurance company executives. For instance, certain underwriters at Lloyd's of

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[16] The deposition testimony was given in an insurance coverage case brought by the Oklahoma City Urban Renewal Authority against Gulf Insurance Company arising out of Gulf's bad faith conduct and denial of a claim under a directors and officers liability insurance policy. Deposition of Donald T. DeCarlo at 128 (dated Nov. 27, 1995) Oklahoma City Urban Renewal Authority v. Gulf Insurance Company, Inc., Case No. CIV-94-1760-M (W.D. Okla.). Copies of the relevant pages from this transcript are attached as Exhibit P to the Appendix. A complete copy of the transcript will be provided if requested by the court or a party.

London and numerous other insurance companies told a California court that:

> [C]onduct in pursuing its claims in this litigation has violated [an] implied duty of good faith and fair dealing under its insurance contracts. C.F. White v. Western Title Ins. Co., 40 Cal. 3d 870 (1985).[17]

In another case, American Family Life Assurance argued that: "If, . . . the controversy is based on a frivolous contention as to non coverage, the [insurance company] in bringing the action is breaching its duties to its [policyholder] under the policy, and is inherently causing its [policyholder] unnecessary trouble and expense. This subjects the [insurance company] to liability."[18]

Similarly, Commercial Union Insurance Company, arguing for the admission of evidence relating to its post-litigation conduct, said that "[t]he allegations of fact invoked by Clemco,

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[17] Insurers' Opposition at 121 (filed by Plaisted and others on Sept. 3, 1993), Union Oil Co. of California v. Allianz Versicherungs, Nos. BC 028270, BC 028271, BC 031367, BC 033114, C 514463 (Cal. Super. Ct. Los Angeles Cty.). Copies of the relevant pages from this lengthy brief are attached hereto as Exhibit Q to the Appendix. A complete copy of the brief will be provided if requested by the court or a party.

Lloyd's and the other insurance companies argued that the policyholder had a continuing duty of good faith by citing White v. Western Title Ins. Co., 710 P.2d 309 (Cal. 1985). However, White holds that the duty of the insurance companies continues into the courthouse, not that policyholders have such a duty.

[18] Appellee's Brief at 35 (filed Feb. 3, 1989), American Family Life Assurance Co. v. United States Fire Ins. Co., 885 F.2d 826 (11th Cir. 1989) (No. 88-8755). Copies of the relevant pages from this lengthy brief are attached as Exhibit R to the Appendix. A complete copy of the brief will be provided if requested by the court or a party.

even if shown accurate, would provide only a limited telescopic review of the evidence relative to the bad faith allegation. Commercial Union maintains that all of the relevant evidence, including, inter alia, the details of [settlement] negotiations and offers of defense under reservation of rights, would prove germane to a bona fide bad faith inquiry...."[19]

Articles written from the "pro-insurance industry" viewpoint have even recognized that the duty of good faith may continue. One pro-insurance industry article noted that: "the manner in which an insurance company defends itself during a litigated contract dispute with its policyholder, including its attorneys' tactics and behavior, and any settlement offers made during litigation" may be subject to scrutiny in a policyholder's bad-faith action against its insurance company.[20]

Another insurance industry article, intended to counter the case law supporting the admissibility of insurance company litigation tactics, conceded "that the contractual duties of the parties to an insurance contract do not 'terminate with commencement of litigation'. . . is not particularly controversial."[21]

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[19] Defendant's Trial Brief at 69 (filed Jan. 26, 1986), Clemco Indus. v. Commercial Union Ins. Co., 665 F. Supp. 816, 829 (N.D. Cal. 1987), aff'd without op., 848 F.2d 1242 (9th Cir. 1988). Copies of the relevant pages from this lengthy brief are attached as Exhibit S to the Appendix. A complete copy of the brief will be provided if requested by the court or a party.

[20] See Randy Papetti, Note, The Insurer's Duty of Good Faith in the Context of Litigation, 60 Geo. Wash. L. Rev. 1931, 1933 (1992) (App. T).

[21] Robert F. Cusumano, Spy vs. Spy: Coverage Litigation as its Own Tort, Mealey's Lit. Rep. Insurance, Apr. 12, 1994 at 24.

In this case National Union and North River have a good faith obligation to abide by regulatory representations and fully disclose all such relevant information to their policyholder.

**POINT V.**

**CASE LAW FROM COURTS ACROSS THE COUNTRY OVERWHELMINGLY SUPPORTS A CONTINUING DUTY OF GOOD FAITH AND FAIR DEALING**

The vast majority of the cases from around the country, which have considered whether an insurance company's duty to its policyholders continues beyond the courthouse steps and through the litigation process, have held that the duty of good faith and fair dealing continues. In fact, twenty seven (27) of the thirty one (31) reported cases support a continued duty of good faith. This case count alone is compelling.

The following is a chronological listing and summary of the reported cases that have dealt with an insurance company's duty of good faith in the context of insurance coverage litigation. The first section includes those cases that support a continuing duty, while the second section includes those cases that oppose it. Some of the cases, notably Palmer v. Farmer's Insurance Exchange, 861 P.2d 895 (Mont. 1993), say one thing and hold otherwise.

A. Continuing Duty.

1. Central Armature Works Inc. v. American Motorists Insurance Co., 520 F. Supp. 283, 295 (D.D.C. 1980) (applying D.C. law). The court noted that the insurance company's "recalcitrance on the coverage issue continued even after this

suit was filed. In response to interrogatories filed at the outset of this case, American Motorists Insurance Company ("AMIC") responded under oath by categorically denying that it ever had a duty to defend [its policyholder] . . . As full discovery showed, and as the testimony at trial confirmed, AMIC's answers were untrue. These facts would establish that AMIC had dealt with its insured in bad faith...."

2. Smith v. American Family Mutual Insurance Co., 294 N.W.2d 751, 764 (N.D. 1980). American Family's claims counsel sent a letter to the outside law firm with which he was working suggesting that the law firm bring a counterclaim against the policyholder's attorney for abuse of process in the amount of $1,000,000. The court held that this letter was admissible in the policyholder's bad faith action because it was "indicative of American Family's relationship with Smith, its insured, and its obligation to deal fairly and in good faith with him." The letter was not inadmissible, the court held, simply because it permitted the policyholder "to use the company's conduct after the inception of his lawsuit against American Family to prove his claim."

3. Fassola v. Montgomery Ward Insurance Co., 433 N.E.2d 378, 383 (Ill. App. Ct. 1982). "The question of vexatious delay is a factual one, which must be based upon an assessment of the totality of the circumstances, taken in broad focus. . . . The evidence supports the inference that the Insurer was intentionally and deliberately attempting to prevent Mr. Fassola, its insured, from obtaining the rightful value of

his auto. The evidence supports the court's conclusion that the Insurer deliberately used the wrong standard of damages when making its initial offer. Then, it continued to stand by the improper and ludicrously low offer until it had forced Mr. Fassola to retain counsel and file suit. Only after suit was filed did the Insurer respond with a reasonable offer. Regardless of its later attempts to effect a reasonable settlement, the record in the instant case, considering the totality of the circumstances, supports a finding of vexatious delay."

4. Spadafore v. Blue Shield Ohio Med. Indem. Corp., 486 N.E.2d 1201, 1203-1204 (Ohio Ct. App. 1985). The policyholder appealed the trial court's grant of a directed verdict for the insurance company on the policyholder's bad faith claim. The policyholder argued that "[t]he court erred by refusing to allow the presentation to the jury of evidence of the breaches of the covenant of good faith and fair dealing by the defendant occurring between the time of filing of the complaint and the date of the trial...." The court agreed, holding that "evidence of the breach of the insured's[22] duty to exercise good faith occurring after the time of filing suit is relevant so long as the evidence related to the bad faith or handling or refusal to pay the claim."

5. Othman v. Globe Indemnity Co., 759 F.2d 1458, 1467 n.11 (9th Cir. 1985) (applying California law). The court held

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[22] The word "insured's," as used in the context of this decision, is a misprint and should be "insurer's."

that "[e]ven assuming arguendo that an insurance company's refusal to accept relevant information after it becomes apparent that a suit has been filed cannot be deemed a violation of its duty, its continued disinterest may constitute evidence regarding its good faith or lack thereof in its earlier dealings."

6. T.D.S. Inc. v. Shelby Mutual Insurance Co., 760 F.2d 1520, 1527 (11th Cir.), modified, 769 F.2d 1485 (11th Cir. 1985). Florida law does not recognize a suit for punitive damages for bad faith in failing to pay a first party claim. "To recover punitive damages, the plaintiff must show more than generalized 'bad faith'; the plaintiff must show that the conduct of the insurer rose to the level of 'deliberate, overt and dishonest dealings.'" Given that legal framework, the court held that "[c]ertainly the litigation conduct of Shelby was relevant to the claim that Shelby or those acting on its behalf dealt dishonestly with TDS."

7. Kyriss v. Aetna Life and Casualty Co., 624 F. Supp. 1130, 1133 (D. Mont. 1986) (applying Montana law). In response to the policyholder's claims against it for failure to negotiate in good faith and expeditiously settle the underlying lawsuit, Aetna moved to strike three paragraphs from the complaint which alleged that Aetna acted in bad faith and solely for the purpose of delay in appealing the state court verdict and judgment to the Supreme Court of Montana. The court held that an insurance company's motive behind a decision to appeal could be considered in a bad faith action and that such consideration did

not constitute a "chilling effect" on an insurance company's constitutional right of access to the courts.

8. Mohr v. Dix Mutual County Fire Insurance Co., 493 N.E.2d 638, 645 (Ill. App. Ct. 1986). The court held that "[a] trial court must consider the totality of the circumstances" before it determines that an insurer's conduct is vexatious and unreasonable. The court considered relevant the insurance company's behavior in ignoring repeated attempts by the policyholder, both before and after the commencement of litigation, to discuss their dispute over the settlement amount.

9. Safeco Insurance Co. v. Ellinghouse, 725 P.2d 217, 225 (Mont. 1986). Safeco contended that the jury should not have been permitted to hear evidence of its post-litigation activity because much of the evidence was irrelevant and prejudicial. The court found no merit in that contention, holding that the evidence was relevant to show malice. "'The essence of the cause," said the court, "is failure to deal fairly and in good faith with an insured and as such, the jury may be shown the entire course of conduct between the parties to arrive at a determination of whether that standard had been breached or not.'"

10. Sentry Ins. Co., A Mutual Co. v. Siurek, 748 S.W.2d 104, 107 (Tex. Ct. App.-Houston 1st Dist. 1987, no writ). Sentry contended that the trial court erred in not limiting the jury's consideration of bad faith to a period of time prior to Siurek's suit against it. Affirming the judgment of the trial court, the court stated that the jury's findings were sufficient

"even considering that the trial court did not limit the jury's consideration of bad faith to a period prior to litigation." The jury had found at trial that "Sentry refused, failed, or unreasonably delayed offer of settlement" after the policyholder had instituted suit.

11. Gourley v. State Farm Mutual Automobile Insurance Co., 265 Cal. Rptr. 634, 638 (Cal. Ct. App. 1990), rev'd on other grounds, 3 Cal. Rptr. 2d. 666, and remanded on other grounds, 1993 Cal. Lexis 3750.[23] In California, bad faith can be shown where the insurance company attempts to litigate a claim on the basis of an untested legal theory. That the argument may be theoretically tenable is irrelevant. As the court stated, "we do not believe good faith is established merely because a defense is 'tenable.' As noted, a major purpose of insurance is to provide peace of mind through prompt payment. (citation omitted). That purpose is frustrated where the insurer consciously decides to try out an untested legal argument against its own insured."

12. Southerland v. Argonaut Insurance Co., 794 P.2d 1102, 1106 (Colo. Ct. App. 1990). The insurance company argued that the trial court erred in allowing into evidence several instances of bad faith conduct which occurred after the filing of the complaint. The court disagreed, holding that "[t]he admission of this evidence did not state a new cause of action, change the theory of the action, or cure a defective pleading. Indeed, the continued late payments and ongoing difficulties in

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[23] This opinion cannot be cited as authority in California because a review was granted by the California Supreme Court. Cal. Rules of Court 976 and 977.

securing rehabilitation were merely a continuation of the same difficulties that preceded the filing of the complaint and were relevant as evidence of defendant's habitual pattern in dealing with [its policyholder.]"

13. Norman v. American National Fire Insurance Co., 555 N.E.2d 1087, 1109-1110 (Ill. App. Ct. 1990). In this case an Illinois court reaffirmed its "totality of the circumstances" approach. Under that approach, evidence of conduct subsequent to the initiation of litigation is admissible to determine whether the insurance company behaved in a vexatious and unreasonable manner. The court then applied the approach to the facts of this case and held that "delays during litigation can be considered in the totality of the circumstances."

14. Home Insurance Co. v. Owens, 573 So. 2d 343, 344 (Fla. Ct. App. 1990), review denied, 592 So. 2d 680 (Fla. 1991). The insurance company argued that evidence concerning its pleadings denying coverage should have been inadmissible at trial. Affirming the trial court and concurring with the Eleventh Circuit Court of Appeals in T.D.S., Inc. v. Shelby Mutual Insurance Co., above, the court held that "the insurance company's litigation conduct was admissible, relevant evidence." Explaining its position, the court said that "[i]n pursuing a bad faith claim, it appears to us that evidence of the kind here objected to is relevant because it has 'a logical tendency to prove or disprove a fact which is of consequence to the outcome of the action.'"

15. Claussen v. Aetna Casualty and Surety Co., 754 F. Supp. 1576, 1583 (S.D. Ga. 1990) (applying Georgia law). Henry Claussen did not include a bad faith claim against Aetna in his original complaint because Aetna appeared to have several good faith defenses to his claim. During litigation, Georgia courts clarified these issues, stripping Aetna of its defenses, yet Aetna still refused to pay the claim. Based upon Aetna's post-litigation refusal to pay, Claussen moved to amend his complaint to include a bad faith claim. Said the court: "In the interest of justice, the Court will grant Claussen leave to amend. At the start of this litigation, Aetna claimed two good faith defenses to Claussen's claim. . . . Recently Georgia decisions have stripped Aetna of those defenses. The Court or the jury must decide at some point whether Aetna acted in bad faith."

16. Gregory v. Continental Insurance Co., 575 So. 2d 534, 541-542 (Miss. 1990), reh'g denied, 1991 Miss. Lexis 50 (Miss. 1991). Discussing the insurance company's conduct after suit was filed, the court said that "[t]he circuit judge never considered Continental's conduct following filing of the complaint, and here we find he erred. An insurance carrier's duty to promptly pay a legitimate claim does not end because a lawsuit has been filed against it for nonpayment. . . . We therefore remand this cause for determination of the reasonableness of or arguable reason for Continental's conduct after suit was filed."

merely by insisting on a trial at which it loses. However, we believe that the trial court correctly found not merely that defendant was unsuccessful but that its refusal to pay was unreasonable. . . . [A]s the judge noted, defendant's own conduct, particularly in the later stages of this litigation, belies its assertion that it had a bona fide defense to liability on the contract." (Citations omitted).

Turning to the policyholder's claim for fees for the defense of the insurance company's appeal of the trial court's judgment, the court said that "vexatious and unreasonable delay may include the delay incurred by an insurer's appeal of a judgment. Courts of review should enforce the Code's protection of insureds by restraining insurers from using the appeal process to punish the insured by lessening recovery through ill-founded appeals. We agree with plaintiff that defendant's appeal is vexatious and unreasonable." The court then awarded fees to the policyholder for defense of the insurance company's appeal.

19. Harris v. Fontenot, 606 So. 2d 72, 74 (La. Ct. App. 1992). The insurance company's sole assignment of error on appeal was that Louisiana's "good faith" statute did not apply to cases in litigation. The court disagreed, holding that "it is clear that the statute was enacted to impose a requirement of good faith and fair dealing on the insurer, requirements that are no less important after litigation has begun as before."[24]

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[24] Analogous is the case of Green v. International Ins. Co., 605 N.E.2d 1125, 1129 (Ill. App. Ct. 1992), where the court held that submitting a claim to the arbitration process does not extinguish the insurance company's contractual obligation to deal with its policyholder in good faith.

20. Kauffman v. Aetna Casualty and Surety Co., 794 F. Supp. 137 (E.D. Pa. 1992). Aetna Casualty and Surety Company apparently contended in this case that bad faith under the insurance policy could only occur during the course of insurance coverage litigation. The court held that the facts in the Kauffman case did not constitute bad faith litigation conduct.

21. Rottmund v. Continental Assurance Co., 813 F. Supp. 1104 (E.D. Pa. 1992). The court held that bad faith litigation conduct was actionable and, in that case, held that concealment of evidence by an insurance company was bad faith.

22. Minnesota Mutual Life Insurance Co. v. Elswood, No. A055590 (Cal. Ct. App. Mar. 9, 1993), Mealey's Litig. Rep. Ins. Apr. 1, 1993, at C-1, C-7. The insurance company breached the implied covenant of good faith and fair dealing by failing to respond to its policyholder's request while his bad faith suit on a previous claim was pending. The court stated that "the contractual relationship between insurer and insured does not terminate with the commencement of litigation; the insurer still owes contractual duties to the insured and must perform those duties fairly and in good faith while litigation is pending."

23. Nestle Foods Corporation v. Aetna Casualty and Surety Co., 842 F. Supp. 125, 128 (D.N.J. 1993) (applying New Jersey law). Nestle maintained, in its motion for summary judgment, that Aetna's assertion of the expected or intended defense in the alleged absence of supporting claims-evaluation evidence constituted bad faith, and therefore was barred as a

matter of law. Although it denied Nestle's motion, the court stated that

> New Jersey law . . . extend[s] the implied duty of good faith and fair dealing "to the 'assertion, settlement and litigation of contract claims and defenses'." Riveredge Assoc. v. Metropolitan Life Ins. Co., 774 F. Supp. 897, 899 (D.N.J. 1991) (quoting Restatement (Second) of Contracts § 205, comment e).[25]

24. Palmer v. Farmers Insurance Exchange, 861 P.2d 895, 913 (Mont. 1993). The Montana Supreme Court stated that

> Courts have held, and we agree, that an insurer's duty to deal fairly and not to withhold payment of valid claims does not end when an insured files a complaint against the insurer.

The court held that the particular insurance company activities in that case did not constitute bad faith.[26]

25. UTI Corporation v. Fireman's Fund Insurance Co., 896 F. Supp. 362, 368 (D.N.J. 1995)(applying Pennsylvania law). A federal district court found that "an insurer has a continuing obligation to act in good faith toward its insured, which obligation extends through litigation." Based upon that principle, the court denied the insurance company's motion for summary judgment dismissing the bad faith count on the ground of statute of limitations.

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25 In Nestle, Aetna contended that the policyholder had a duty of good faith and fair dealing which continued during the litigation process. See Brief in Opposition to Nestle's Motion for Partial Summary Judgment at 28 (filed Dec. 20, 1993) (App. M).

26 The Palmer case raises the interesting question of attorneys as claims handlers.

26. West American Insurance Co. v. Freeman, 42 Cal. App. 4th 320 (Cal. Ct. App. 1995), review granted.[27] The California Court of Appeals affirmed a jury verdict finding bad faith on the part of an insurance company in handling a policyholder's underlying construction liability action, holding that an insurance company's "declaratory relief action can constitute an act of bad faith when the [insurance company] has 'otherwise abandoned, compromised or rejected the [policyholder]'s claim.'" Id. at 330.

27. Tucson Airport Authority v. Certain Underwriters at Lloyd's of London, 207 Ariz. Adv. Rep. 22, 1996 Ariz. App. LEXIS 3 (Ariz. Ct. App. Jan. 4, 1996). The insurance companies argued that they were entitled to an "immunity" for conduct, regardless of how egregious, if: (1) the conduct occurred after coverage litigation had begun; or (2) the insurance company's attorney was involved in the conduct. The Arizona Court of Appeals rejected the insurance company's claim of "litigation immunity" and reversed the lower court's dismissal of the policyholder's bad faith complaint. Thus, the Arizona Court unanimously ruled that insurance companies must adhere to their duty of good faith and fair dealing even during courtroom disputes with their policyholders.

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[27] This opinion cannot be cited as authority in California because a review was granted by the California Supreme Court. Cal. Rules of Court 976 and 977.

statutorily imposed duty of an insurance company to bargain in good faith did not apply once litigation had commenced. The Louisiana Court of Appeals, in Harris v. Fontenot, above, strongly criticized this decision and held that the same Louisiana statute does impose a duty of good faith on insurance companies after the commencement of litigation.

3. California Physicians' Service v. Superior Court of San Diego County, 12 Cal. Rptr. 2d 95, 98 (Cal. Ct. App. 1992). This court followed the court in Nies in interpreting White restrictively, holding that defensive pleadings are communications protected by an absolute litigation privilege under the California Civil code.[28] Such pleadings, even though alleged to be false, cannot be used as the basis for allegations of ongoing bad faith. Distinguishing this case from White further, the court said that "[t]he effort here is not to use trial tactics as evidence of prior bad faith, but to mount a new cause of action for severable damages on the theory of an action for bad faith defense."

4. Timberlake Construction Co. v. United States Fidelity & Guaranty Co., 71 F.3d 335 (10th Cir. 1995). Purporting to predict Oklahoma law, the Tenth Circuit concluded that evidence of an insurance company's litigation conduct will not generally be admissible because an insurance company's duty

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[28] Arguably anti-continuing duty is the case of Clemco Indus. v. Commercial Union Ins. Co., 665 F. Supp. 816, 829 (N.D. Cal. 1967), aff'd without op., 848 F.2d 1242 (9th Cir. 1988). Relying on Federal Rule of Evidence 408, the court held that evidence concerning settlement negotiations between the parties was inadmissible on the issue of bad faith.

to its policyholder is limited to the circumstances surrounding the insurance coverage determination.

In sum, insurance coverage is not a game of cat and mouse. Insurance companies should not be allowed to withhold from their policyholders information detailing the scope of insurance coverage which was sold and for which the policyholders paid significant premiums.

## POINT VI.

## TORTIOUS FAILURE TO DISCLOSE

National Union and North River would not hide regulatory filings and misrepresentations because this would subject them to the possibility of tort liability. Restatement (Second) of Torts Section 551(1) states:

> One who fails to disclose to another a fact that he knows may justifiably induce the other to ... refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.

This Court should presume that insurance companies' claims people will not commit tortious acts.

## POINT VII.

## LAWYERS AS UNDERWRITERS

### A. Crying Wolf:

The purpose of insurance is to insure.[29]

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[29] 13 J. Appleman, "Insurance Law & Practice," § 7403, at 302.

Crying wolf is a favorite pastime of insurance industry lawyers. The insurance company defendants have given this Court a heavy measure of the ills that will befall the insurance industry and municipalities if the Town of Harrison's claim is covered. [**See, Memo. of Law in Support of Motion for Permission to Appeal to the Court of Appeals filed by National Union, dated October 20, 1995 at 4.**] It is not hard to imagine that the insurance company that sold a "Teamsters Insurance" policy to the owner of the first horseless carriage balked at paying claims. Nevertheless, the insurance industry survived and prospered.

B. **Claims and Rates:**

Will a finding of insurance coverage in this case impact claims and rates? There is no evidence in the record to support National Union's speculation about claims and rates. If concrete, hard facts were available to anyone, they were available to National Union at the trial court level. The insurance companies' failure to put on proof in this regard reflects a judgment call on the part of National Union. National Union is inviting this Court to assume the role of "underwriter by hindsight" and find that claims and rates will increase if insurance coverage is found. The Court should decline the invitation to substitute its speculation about the impact of a decision in this case on claims and rates for the absence of factual record.

## POINT VIII.

## CASE COUNTING

The insurance companies' reliance on its count of reported cases for and against its contentions regarding the so-called "absolute" pollution exclusion is badly flawed.

Determining the weight of authority with respect to insurance coverage matters is impossible.

### A. Wiping Cases Off The Books:

Fifty percent of the pro-policyholder judicial decisions are wiped off the law books by the insurance industry. See, Carrizosa, Making the Law Disappear: Appellate Lawyers Are Learning to Exploit the Supreme Court's Willingness to Depublish Opinions, Cal. Law., (Sept. 1989) at 65.[30] See, Parloff, Rigging the Common Law, Am. Law. (March 1992) at 74[31]; Gordon, Vanishing Precedents, Bus. Ins., (June 15, 1992) at 1[32]; and Fisch, Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur, 76 Cornell L. Rev. 589 (1991).[33]

Noting the value of judicial precedent to the legal community as a whole and the need for orderly procedure, the United States Supreme Court held in U.S. Bancorp Mortgage Co. v.

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30 (App. U).

31 (App. V).

32 (App. W).

33 (App. X).