

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION**

BIG ONION TAVERN GROUP, LLC;)
HEADQUARTERS BEERCADE LLC;)
MACHINE 1846 LLC; THE NEW 400 LLC;)
HARPER THEATER LLC; WELCOME)
BACK LLC; LEGACY HOSPITALITY)
LLC; MCBRIDES AURORA INC.;)
MCBRIDE’S PUB INC.; MCBRIDE’S ON)
52 INC.; HOMESLYCE IS WHERE THE)
HEART IS LLC; 3458 NORCLARK)
RESTAURANT LLC; HAPPY CAMPER)
PIZZERIA LLC; 1913 NORTHCO LLC;)
THE BURGER PHILOSOPHY LLC;; TAI’S)
LOUNGE INC.; ALEXANDERS CAFE 64)
INC.; ALEXANDERS RESTAURANT)
INC.; BK & MM VENTURES LLC;)
DOUBLE K & A SPORTS INC.; OR1 INC.;)
ROOKIES 5-ROSELLE INC.; TRIPLE K &)
A SPORTS BAR INC.; VILLAGE SQUIRE)
INC.; VILLAGE SQUIRE NORTH INC.;)
VILLAGE SQUIRE OF MCHENRY INC.;)
VILLAGE SQUIRE SOUTH INC.; 3471 N)
ELSTON INC.; CALM & CHAOS LLC; 108)
KINZIE LLC; SANCERRE HOSPITALITY)
I LLC; HARLEN-RASCALS, INC.; YMPV)
INC.; OVIE BAR & GRILL LLC;)
WOODFIRE BRICK OVEN PIZZA LLC;)
ANDERSONVILLE 5310 LLC; CLARK)
5260 LLC; MUNSTER TAVERNS, INC.;)
WELLS 1525 LLC; 1270 STOREFRONT)
LLC; 2450 N MILWAUKEE LLC; 806 W)
RANDOLPH LLC; A PIZZALLA BLUES)
LLC; QUEEN MARY LLC; RAMBUTTAN)
LLC; ROBERTA NOWAKOWSKI INC.;)
3478 N CLARK STREET INC; EXIT PLAN)
HOLDINGS LLC; GOUNTANIS)
ENTERPRISES, INC.; ALL DAY)
BROADWAY LLC; TS2 INC.; OLMAR)
CORP INC.; THE BARRELMAN TAVERN)
INC.; 540 WEST MADISON)
HOSPITALITY GROUP LLC; NICHE)
RESTAURANT GROUP LLC)
)

Hon. Judge Edmond Chang

Case No. 20-cv-02005

	Plaintiffs,)
)
v.)
)
	SOCIETY INSURANCE, INC.)
)
)
	Defendant.)
)

DEFENDANT SOCIETY INSURANCE’S OPPOSITION TO UNITED POLICYHOLDERS’ MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF’S RESPONSE TO DEFENDANT’S MOTION TO DISMISS UNDER RULE 12(B)(6) OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

NOW COMES, Defendant, SOCIETY INSURANCE (“Society”), by and through its attorneys Thomas B. Underwood, Michael D. Sanders, Michelle A. Miner and Amy E. Frantz of Purcell & Wardrope, Chtd., and for its Opposition to United Policyholders’ Motion for Leave to Appear as Amicus Curiae, states as follows:

Introduction

1. Plaintiffs, BIG ONION TAVERN GROUP, LLC, et al., filed their First Amended Complaint on May 8, 2020 asserting three causes of action: Count I – declaratory judgment, Count II – Breach of Contract, and Count III – Statutory Bad Faith pursuant to 215 ILCS 5/155. (Dkt. No. 29). Plaintiffs seek coverage under four of the additional coverage provisions found in the Businessowners Special Property Coverage Form of the Society Policies: Business Income, Extra Expense, Civil Authority, and Contamination. (*Id.*)

2. On July 13, 2020, Society filed a motion to dismiss under Rule 12(b)(6) or in the alternative for summary judgment which argues that, as a matter of law, there is no coverage under the policies of insurance it issued to Plaintiffs. (Dkt. No. 112). Society’s motion sets forth, in relevant part, that Plaintiffs have not sustained a "direct physical loss of or damage to" their insured premises under Illinois law, as the physical condition of the properties has not changed and they

remain fit for use as evidenced by the fact that many of Plaintiffs' restaurants have been used to prepare and serve orders for takeout and delivery. (Dkt. No. 113). Society's motion further points out that the Law or Ordinance Exclusion contained in the policy is additional evidence there is no coverage for Plaintiffs' claims. (*Id.*) Society also filed supplemental authority in further support of its motion on August 21, 2020. (Dkt. No. 120).

3. Plaintiffs filed their response on September 11, 2020. (Dkt. No. 125). On the same day, within two hours of Plaintiffs' response being filed, United Policyholders filed its motion for leave to appear as amicus curiae along with its proposed amicus curiae brief in support of Plaintiffs' response to the pending motion. (Dkt. No. 127). United Policyholders asserts that it has a special interest in this litigation and that its amicus brief offers a unique perspective which will assist the Court as it considers the issues in Society's pending motion, despite the fact that its interest and perspective as a policyholders' advocacy group is nearly identical to that of the policyholder Plaintiffs.

4. This Court should deny United Policyholders' motion as it does not present any ideas, arguments, theories, insights, facts, or data that are not found—or that could be found—in Plaintiffs' briefs. When boiled down, United Policyholders and Plaintiffs make substantially the same arguments. They both incorrectly argue that Plaintiffs have sustained a "direct physical loss of" its insured property because they have allegedly incurred a "physical deprivation of use of their insured property," even going so far as to each citing the same nonbinding recent case from Missouri. (Dkt. No. 125, pp. 8-13; Dkt. No. 127, pp. 14-21). They also both argue that the Law or Ordinance Exclusion does not apply. (Dkt. No. 125, pp. 22-23; Dkt. No. 127, pp. 21-25). Put simply, allowing the amicus curiae brief will do nothing but require the Court to read, and Society

to respond to, substantially the same arguments twice. Plaintiffs are well-represented, and neither this Court nor the Parties need additional briefs that tread the same grounds.

Legal Standard

5. Supreme Court Rule 37 and Federal Rule of Appellate Procedure 29 provide for the filing of amicus curiae briefs before the United States Supreme Court or one of the circuit courts, but there is no federal procedure rule or local court rule governing the filing of briefs by amicus curiae in district court proceedings. District Courts are guided then by the general principles that have come forth from the discussion of amicus curiae in the appellate context.

6. The privilege of being heard amicus is recognized as resting within the discretion of the court which may grant or refuse leave as it deems the proffered information timely, useful, or otherwise. *National Organization for Women, Inc. v. Scheidler, et al.*, 223 F.3d 615, 616 (7th Cir. 2000) (citing 3A C.J.S. Amicus Curiae § 3).

7. Contrary to United Policyholders' assertion that there are no specific prerequisites for appearing as amicus, the Seventh Circuit has held that an amicus brief should only be permitted in cases "in which [1] a party is inadequately represented; or in which [2] the would-be amicus has a direct interest in another case that may be materially affected by a decision in this case; or [3] in which the amicus has a unique perspective or specific information that can assist the court beyond what the parties can provide." *Voices for Choices, et al. v. Illinois Bell Telephone Co.*, 339 F.3d 542, 545 (7th Cir. 2003). *See also National Organization for Women, Inc.*, 223 F.3d at 617; *Ryan v. Commodity Futures Trading Comm.*, 125 F.3d 1062, 1063 (7th Cir. 1997). In setting these criteria, the court acknowledged that amicus briefs have been abused by the allies of litigants who duplicate the arguments made in the litigants' briefs, and in effect merely extend the length of the litigant's brief. *Ryan*, 125 F.3d at 1063 (quoting *United States v. Michigan*, 940 F.2d 143, 164-65

(6th Cir.1991)). Additionally, the Seventh Circuit will reject amicus briefs that do not “assist the judges by presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties’ briefs.” *Voices for Choices*, 339 F.3d at 545.

8. This Court has previously supported limitations on amicus briefs filed at the trial court level, consistent with the Seventh Circuit’s guiding principles, in order to prevent circumvention of court rules, stating that district courts “should be reluctant to hear from amici where [] one party objects and the amici are so strongly aligned with the other side such that that side can, in effect, file multiple briefs in support of its position.” *Mechmet v. Four Seasons Hotel, Ltd.*, No. 84-C-7341, 1985 WL 766, at *1 (N.D. Ill. April 25, 1985) (Aspen, J.) (citing *Linker v. Custom-Bilt Machinery, Inc.*, 594 F.Supp. 894, 897-98 (E.D.Pa. 1984); *Leigh v. Engle*, 535 F.Supp. 418, 422 (N.D.Ill. 1982)). Indeed, other districts courts have come to the same conclusion. *Florida by & through McCollum v. United States Dep’t of Health & Human Services*, No. 3:10-CV-91-RV/EMT, 2010 WL 11570635, at *1 (N.D. Fla. June 14, 2010) (“Amici curiae typically appear at the appellate level, and are not usually necessary or helpful at the trial level”).

The Court Should Deny United Policyholders’ Request for Leave to Appear as Amicus Curiae and File the Proposed Brief

9. United Policyholders’ motion and brief do not meet any of the circumstances under which the Seventh Circuit or this Court has held warrant the filing of an amicus brief. Accordingly, the Court should deny United Policyholders’ request for leave to appear and file an amicus brief in this litigation.

10. First, United Policyholders makes no assertion that any of the parties to this litigation are inadequately represented. Plaintiffs are represented by King & Spalding, a firm that holds itself out as a world-class international law firm with over 1,200 attorneys across 22 offices

worldwide¹ which includes an insurance coverage and recovery practice group with 15 years of proven success for policy holders in various lines of coverage including property damage and business interruption.² Although United Policyholders states it aims to supplement the efforts of counsel, that is not the appropriate use of an amicus curiae filing and cannot be allowed by the Court. “The term ‘amicus curiae’ means friend of the court, not friend of the party.” *Ryan*, 125 F.3d at 1063. *See also Beesley v. Int’l Paper Co.*, No. 06-703-DRH, 2011 WL 5825760 (S.D. Ill Nov. 17, 2011) (Herndon, J.) (“complementing [a party’s] arguments is not sufficient reason to allow an amicus brief”); *Leigh*, 535 F.Supp. at 422 (denying leave to file as amicus curiae where the proposed memorandum presented more like an “amicus petitor, one proffered as a friend of the plaintiff(s)”).

11. Second, United Policyholders fails to identify any direct interest it has in another case that may be materially affected by a decision in this case, rather, it holds itself out as taking part in a case of general public interest. United Policyholders’ discussion of the potential impact this Court’s disposition of the pending motion may have nationwide is insufficient to meet the standard for amicus curiae filings in this Court.

12. Third, United Policyholders offers neither a unique perspective nor specific information that will feasibly assist the court beyond what the parties can provide and therefore should not be allowed to appear as amicus.

13. The parties have already provided the Court with over 50 pages of briefs discussing the issues raised in Society’s motion to dismiss.³ United Policyholders attaches a 15-page

¹ At <https://www.kslaw.com/?locale=en> (last visited September 16, 2020).

² At <https://www.kslaw.com/capabilities/insurance-coverage-and-recovery?locale=en> (last visited September 16, 2020).

³ Although Local Rule 7.1 specifies a fifteen-page limit for motion briefs, Society filed an enlarged brief (20 pages) in support of its motion to dismiss. Notably, Plaintiffs’ brief in response is also enlarged (25 pages) and makes

proposed brief and summarily announces that the Court will benefit by reviewing its amicus perspective because of its considerable experience in briefing courts on insurance coverage issues. (Dkt. No. 127, p. 6).

14. United Policyholders' proposed brief fails to present any specific information or unique perspective stemming from its experience or position. United Policyholders' purported special interest owed to its position as a "voice for policyholders" is no different than the interests of the approximately fifty-four policyholder Plaintiffs.

15. The motion for leave and attached proposed brief are simply an attempt to improperly weigh in as a partisan advocate for Plaintiffs and circumvent briefing limits. The Seventh Circuit cautioned that "[a]micus curiae briefs...may be intended to circumvent the page limitations on the parties' briefs, to the prejudice of any party who does not have an amicus ally." *Nat'l Org. for Women, Inc.*, 223 F.3d at 617; *see also Ryan*, 125 F.3d at 1064 ("the Board's brief, if allowed to be submitted, would in effect bring that length up to 62 pages" from the 45 submitted by the petitioner). Even where there may be no ill intent or collusion, "it is very rare for an amicus curiae brief to do more than repeat in somewhat different language the arguments in the brief of the party whom the amicus is supporting," and such repetition does not meet the Seventh Circuit's standard for admission of an amicus brief. *Voices for Choices*, 339 F.3d at 545.

16. United Policyholders does not provide a different perspective as its proposed brief adds no materially significant argument that was not or could not have been raised by Plaintiffs themselves. *See Int'l Union of Operating Engineers Local 139 v. Schimel*, 210 F. Supp. 3d 1088, 1101 (E.D. Wis. 2016), *aff'd*, 863 F.3d 674 (7th Cir. 2017) (leave to file an amici curiae brief denied even where Court noted the unique perspective of the Amici, but found that the "proposed

excessive use of footnotes in its brief which on any reasonable page layout would add another six pages to their brief.

amicus brief adds no materially significant argument that was not or could not have been raised by the State”).

17. United Policyholders maintains that the proposed amicus brief it seeks to file in this case “will analyze relevant precedent not already addressed in Defendant’s motion or Plaintiff’s response, including analysis of whether the involved covered causes of loss cause ‘direct physical loss and damage’ under a property insurance policy.” (Dkt. No. 127, p. 6). However, “[t]he inclusion of additional cases means nothing when the ideas and assertions are the same, and, in fact, an amicus brief that contains a significant number of new case citations and yet fails to present new ideas or arguments is one that would effectually serve only to increase the page limit allotted [.]” *Monarch Beverage Co., Inc. v. Johnson*, No.1:13-CV-01674-WTL-MJD, 2014 WL 7063019, at *2 (S.D.Ind., Dec. 11, 2014) (Dinsmore, J.). The Seventh Circuit has declined to entertain amicus briefs that merely repeat what has been said before. *See, e.g. Nat’l Org. for Women*, 223 F.3d at 617 (“[N]one of the rejected briefs presents considerations of fact, law, or policy overlooked by the appellants.”).

18. Finally, allowing United Policyholders to file an amicus brief will inevitably “open the floodgates” and encourage other purported amici to request the privilege of joining this case. This will do nothing but clog this Court’s already busy docket with additional briefs that will not assist the Court in deciding the merits of this case beyond what is already contained in the parties’ briefs.

WHEREFORE, Defendant SOCIETY INSURANCE requests this Court enter an order denying UNITED POLICYHOLDERS’ Motion for Leave to Appear as Amicus Curiae in Support of Plaintiff’s Response to Defendant’s Motion to Dismiss Under Rule 12(b)(6) or in the Alternative for Summary Judgment and rejecting the accompanying proposed amicus curiae brief.

Date: September 16, 2020

Respectfully submitted,

Society Insurance

Thomas B. Underwood (#3122933)
Michael D. Sanders (##6230187)
Michelle A. Miner (#6299524)
Amy E. Frantz (#6312526)
PURCELL & WARDROPE, CHTD.
10 South LaSalle Street, Suite 1200
Chicago, IL 60603
(312) 427-3900
(312) 427-3944 (facsimile)
tbu@pw-law.com
msanders@pw-law.com
mminer@pw-law.com
afrantz@pw-law.com

By: /s/ Thomas B. Underwood
Counsel for Defendant