No. 15-1691

United States Court of Appeals for the Eighth Circuit

U.S. Bank National Association and U.S. Bancorp,

Appellees,

and

Indian Harbor Insurance Company and Ace American Insurance Company,

Appellants.

APPEAL FROM DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

MOTION OF UNITED POLICYHOLDERS TO PARTICIPATE AS AMICUS CURIAE

United Policyholders ("United") hereby moves, pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, for leave to file the amicus curiae brief submitted for approval simultaneously with this motion. In support of this motion, United would show the Court:

1. United sought the consent of counsel for Appellant for it to appear as amicus, but that consent was not forthcoming, despite its view of the importance of the issues presented on this appeal. (In its opening brief, Appellant describes this appeal as having "broad nationwide implications." Brief of Defendant–Appellant Indian Harbor Insurance Company at i. (filed July 14, 2015, Case No. 15-1691, Entry ID: 4294864).

Corporate Disclosure Statement

2. United is a California not-for-profit corporation with an educational charter. There is no corporation, publically traded or otherwise, that has any ownership interest in United, and it has no subsidiaries.

Identification of Amicus

3. United is a non-profit charitable organization founded to preserve the integrity of the insurance system by serving as an information resource and a voice for policyholders' interests. Donations, grants, and substantial volunteer labor support the organization's work.

4. United's Executive Director, Amy Bach, is serving her sixth consecutive term as an official consumer representative to the National Association of Insurance Commissioners and works closely with insurance regulators on a variety of issues affecting insurance consumers in Minnesota and throughout the 8th Circuit.

5. United has previously filed briefs as amicus curiae to this court. *See, e.g.*, *Labarre, Ann M. et al vs. Credit Acceptance Corp.*, No. 98-3097 (8th Cir. 1999); *Callas Enterprises vs. The Travelers Indem. Co. of America*, No. 98-3802, (8th Cir. 1998). United's amicus curiae brief was cited in the U.S. Supreme Court's opinion in *Humana v. Forsyth*, 525 U.S. 299, 314 (1999), and its arguments have been adopted by numerous state and federal appellate courts. All of United's amicus curiae briefs are available at http://uphelp.org/resources/amicus-briefs.

Reasons for Motion for Leave

6. United is uniquely able to offer the Court a broad prospective on the issues raised on this appeal, which are important.

7. United's brief, intended only to be helpful to the court, sets forth its views and shares its experience with a wide variety of insurance coverage issues that affect purchasers of insurance. United has no private interest in this litigation or the parties to it. Its only goal in submitting its amicus brief is to provide the court with a broader context and understanding of the reasons that insurance policies should be interpreted as written, and not subjected to unwritten (and unbargained for) modifications.

8. United's amicus brief does not repeat the arguments of the parties. It supports the affirmance of the decision rendered by the district court.

9. No party or party's counsel authored the United amicus brief in whole or in part; no party or party's counsel, nor any other person than United or its counsel identified on this brief, contributed money that was intended to fund preparing or submitting the brief.

Accordingly, United respectfully requests leave to file an amicus curiae brief, as submitted with this motion, to assist the Court in addressing the issues raised on this appeal.

Respectfully submitted,

Dated: August 19, 2015. **Maslon LLP**

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v.

Indian Harbor Insurance Company,

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ACE American Insurance Company,

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
Case No. 0:12-cv-03175-PAM-JSM
Senior Judge Paul A. Magnuson

BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS IN SUPPORT OF AFFIRMANCE

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Identification of Amicus Curiae

United Policyholders (hereinafter "United") seeks to participate in this appeal to provide the court with information broadly of interest to purchasers of insurance. UP supports the affirmance of the district court's judgment, so in that sense supports Appellees in the appeal.

United was founded in 1991 as a California non-profit corporation. It serves as a voice and information resource for insurance consumers in all 50 states. United is a tax-exempt §501(c)(3) entity. United is funded by donations from individuals and businesses and grants from foundations. Volunteers across the country donate thousands of hours each year to support the organization's work.

Corporate Disclosure Statement

United is a not-for-profit corporation. There is no corporation, publically traded or otherwise, that has any ownership interest in United. United has no subsidiaries.

United's Executive Director is serving her sixth consecutive term as an official consumer representative to the National Association of Insurance Commissioners and works closely with the Minnesota Department of Commerce – Insurance Division on a variety of issues affecting insurance consumers in Minnesota and also throughout the 8th Circuit.

United has filed *amicus curiae* briefs in over 370 cases nationwide, including the following cases *See, e.g.*, *Labarre, Ann M. et al vs. Credit Acceptance Corp.*, 175 F.3d 640

(8th Cir. 1999); *Callas Enterprises vs. The Travelers Indem. Co. of America*, 193 F.3d 592 (8th Cir. 1998). All of United's amicus curiae briefs are available at http://uphelp.org/resources/amicus-briefs. United's amicus curiae brief was cited in the United States Supreme Court's opinion in *Humana v. Forsyth*, 525 U.S. 299, 314 (1999), and its arguments have been adopted by numerous state and federal appellate courts.

Interest of Amicus Curiae

United appears in this case to focus the Court's attention on the broad issues raised in this case, and on the pernicious effects on the insurance markets if Appellant's self-serving views of its obligations under the policy sold by it were to gain judicial endorsement. It seeks affirmance of the judgment rendered by Judge Magnuson. United has no pecuniary interest in the outcome of the case or any ongoing relationship with any of the parties.

Pursuant to Fed. R. App. P. 29(c)(5), the undersigned counsel certify that no party's counsel authored this brief in whole or in part; no party or party's counsel, or any other person, other than amicus United or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

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Rules

Argument

I. Delaware follows a common sense approach to contract interpretation and thus, unless an exclusion applies, a court or a party may not rewrite an insurance policy *ex post facto*.

This case presents a straightforward issue of insurance policy interpretation, though reading Indian Harbor's brief the Court might think this is a complicated insurance coverage dispute involving all manner of public policy concerns. To be fair, the underlying case involved allegations that U.S. Bank received an "ill-gotten gain" by reordering transactions in order to charge its customers overdraft fees. However, this litigation is about the insurance coverage sought by U.S. Bank to cover a legal settlement reached in the class action lawsuit, not about whether U.S. Bank's "overdraft scheme" was wrongful or whether the plaintiffs sought "disgorgement of profits."[1] It is about whether Indian Harbor's policy provides coverage for the settlement reached in the underlying case, which it does.

II. The plain and ordinary meaning of the policy controls.

In order to fully understand the legal landscape in which this case resides, the Court must revisit the basic principles of contract interpretation. Delaware follows an objective theory of contract interpretation. *Sassano v. CIBC World Mkts. Corp.*, 948 A.2d 453, 462 (Del. Ch. 2008) ("When the plain, common, and ordinary meaning of the words lends itself to only one reasonable interpretation, that interepretation

[1] *See* Brief of Defendant–Appellant Indian Harbor Insurance Company at 8-13 (filed July 14, 2015, Case No. 15-1691, Entry ID: 4294864).

controls the litigation.") (citing *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997)).[2]

As Judge Magnuson correctly explained, "Delaware courts interpret an insurance policy, like all contracts, 'in a common sense manner, giving effect to all provisions so that a *reasonable policyholder* can understand the scope and limitation of coverage.'" Memorandum and Order (Dec. 16, 2014) (hereinafter "Memorandum and Order") at 7 (quoting *Penn Mut. Life Ins. Co. v. Oglesby*, 695 A.2d 1146, 1149 (Del. 1997)).

Further, it is well settled under Delaware law that "when interpreting a contract, the role of a court is to effectuate the parties' intent." *See Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, 68 A.3d 1208, 1218 n. 40 (Del. 2012) (citing *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006); *see also Shiftan v. Morgan Joseph Holdings, Inc.*, 57 A.3d 928, 935 (Del. Ch. 2012) ("[T]he court therefore must attempt to discern the meaning of a contract and the intent of the parties *from the language that they used*, as read from the perspective of a reasonable third party." (emphasis added)). This is not a hollow rule of law, existing with no practical purpose; it allows the court to implement the bargained-for agreement of the parties and to allow parties to provide certainty and predictability to their affairs.

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[2] "Plain and ordinary meaning" is recognized in the majority of jurisdictions. *See* EUGENE R. ANDERSON, LORELIE S. MASTERS, JORDAN S. STANZLER, INSURANCE COVERAGE LITIGATION, § 2.03, 2-28 at n.76 (Supp. 2012).

Thus, this Court can only judge Indian Harbor's intent by what it wrote in its policy and what was in effect at the time of the disputed claim. The policies at issue provide, in relevant part, insurance coverage for:

> "Loss which [U.S. Bank] shall become legally obligated to pay as result of any Claim first made against [it] during the Policy Period arising out of any Wrongful Act committed by [it] during or prior to the Policy Period while performing Professional Services."

(Memorandum and Order at 3-4; Gilinsky Aff. Ex. 4, at 15.)

Recall that "[t]he primary consideration in interpreting a contract is to "attempt to fulfill, to the extent possible, the *reasonable shared expectations* of the parties at the time they contracted." *See Cordis Corp. v. Boston Scientific Corp.*, 868 F. Supp. 2d 342, 351 (D. Del. 2012) (applying Delaware law and citing *Comrie v. Enterasys Networks, Inc.*, 837 A.2d 1, 13 (Del. Ch. 2003)). Any *reasonable policyholder* would expect coverage to be available for a lawsuit brought against it arising from the performance of Professional Services, which would include the underlying lawsuit related to overdraft fees.

But this is not disputed. (*See* Memorandum and Order at 7).[3] The coverage inquiry ought to end there. However, Indian Harbor has invented a coverage dispute based on the erroneous application of two exclusions; the above-referenced "uninsurable clause" and the "extension of credit" provision. But, as U.S. Bank

[3] "The parties do not dispute that the settlement relates to a claim made against U.S. Bank during the policy period for a wrongful act allegedly committed by it while performing professional services. Instead, they dispute that the settlement is a loss. Whether the settlement is a loss turns on the interpretation of the policies' definition of loss."

discusses at length in its brief, and as Judge Magnuson held, Indian Harbor's interpretation of its own policy is incorrect.

The plain language of the policy requires, *inter alia,* "final adjudication" in order for a loss to be uninsurable. Likewise, the "extension of credit" provision only applies to the assessment of overdraft fees, rather than the extension of overdraft protection when a customer attempts to make a purchase which overdraws their account. The former is insurable under Indian Harbor's policy, while the latter is not.[4] Thus, no exclusion applies.

III. Public policy favors U.S. Bank's coverage position.

Despite the absence of a final adjudication or an "extension of credit," Indian Harbor appears to be making a public policy argument to relieve itself of its coverage obligation. While it is true that the basis of the underlying class action alleged "ill-gotten gains" which are uninsurable here and elsewhere,[5] U.S. Bank entered into a

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[4] *See* Memorandum and Order at 17-18: "To be sure, the Extension-of-Credit Provision unambiguously removes from the loss definition "monies either paid, accrued, or due as the result of . . . an extension of credit." (Gilinsky Aff. Ex. 4, at 22.) And a few courts have held that a bank's practice of paying transactions that overdraw customers' accounts constitutes a loan to its customers for insurance purposes. *See Sayan v. Riggs Nat'l Bank of Wash., D.C.*, 544 A.2d 267, 269 (D.C. 1988) (stating that the "payment of an overdraft by the bank carries with it an implicit agreement by the customer to repay the loan"); *Affiliated Bank/Morton Grove v. Hartford Accident & Indem. Co.*, No. 91-cv-4446, 1992 WL 91761, at *6 (N.D. Ill. Apr. 22, 1992) (reasoning that "an overdraft by a bank depositor is treated as a loan from the bank to the depositor just as depositors with positive balances are considered creditors of the bank").

[5] *See* Memorandum and Order at p. 9: "'[L]oss' within the meaning of an insurance contract does not include the restoration of an ill-gotten gain." *J.P. Morgan Sec. Inc. v. Vigilant Ins. Co.*, 21 N.Y.3d 324, 335-36 (N.Y. 2013).

settlement with plaintiffs, *with the consent of Indian Harbor, but without an admission of liability*. Therefore, since there was not a final adjudication establishing liability, rather a settlement without an admission of liability, there is no evidence of an "ill-gotten gain" upon which Indian Harbor may base its coverage denial. *See* Memorandum and Order at 12 (citing *Atwell v. RHIS, Inc.*, 974 A.2d 148, 155 (Del. 2009) ("We cannot allow litigants to imply that one party's decision to settle means that the settling party has admitted liability.")).

Indian Harbor also advances a highly hypothetical argument as to whether a settlement, because it theoretically could be considered restitutionary in nature, is, in fact, restitution. This is unavailing. Judge Magnuson correctly noted that the cases cited by Indian Harbor holding that a restitutionary settlement is uninsurable contain little or no analysis of a final adjudication requirement. *See* Memorandum and Order at 15 (citing *Dobson v. Twin City Fire Ins. Co.*, No. 11-cv-0192 (DOC/MLG), 2012 WL 2708392, at *9-10 (C.D. Cal. July 5, 2012); *Aon Corp. v. Certain Underwriters at Lloyd's of London*, No. 06-16852 (Ill. Cir. Ct. Ch. Div. Dec. 3, 2010)). Nor do the factually similar cases involving overdraft fees apply because those policies contained specific fee exclusions. *See PNC Financial Services Group., Inc. v. Houston Cas. Co.*, No. 13-cv-331, 2014 WL 2862611, at *2-3 (W.D. Pa. June 24, 2014); *Fidelity Bank v. Chartis Specialty Ins. Co.*, No. 1:12-cv-4259 (RWS), 2013 WL 4039414, at *3-4 (N.D. Ga. Aug. 7, 2013).

Notwithstanding Indian Harbor's strained attempt to escape coverage by advancing the foregoing theories, it is not the role of *amicus curiae* to fully brief the

legal issues before the Court. The foregoing discussion serves only as a summary of the legal standards the Court is bound to follow and to point out, ever so briefly, the flaws in Indian Harbor's arguments.

The crux of this case, and the reason for *amicus curiae* participation, is simple: if the Court is to enforce the contract on an objective basis, it cannot allow Indian Harbor to simply rewrite its insurance policy *ex post facto*. Indian Harbor may well have made a mistake in drafting and is paying the price, so to speak. If the Court affirms, there is certainly a risk here that Indian Harbor may fall victim to its own to poor draftsmanship and *amicus curiae* takes no position on whether the type of conduct at issue *should* be insurable, but under the plain language Indian Harbor's policy, it *is* insured. The unfortunate reality for Indian Harbor, that it must begrudgingly indemnify U.S. Bank, however, pales in comparison to the widespread implications of allowing them to escape their coverage obligation by asking the Court to correct its mistake *ex post facto*.

If an insurer wishes to limit its exposure, it is absolutely free to do so, but it must do so *only at the time of contracting* and it should never be allowed to do so at claim time. Such a result would defeat the very purpose of insurance – to provide piece of mind and economic security in the event of loss. To an extent, the same is true for a policyholder – who cannot insist on coverage for a peril that was not contemplated by the policy – or one that falls clearly within an exclusion. This is black letter contract law.

Amicus United is particularly concerned with the outcome of this case because the rules that courts make in high-profile coverage disputes have implications for every type of policyholder. Individuals and small businesses rarely have the resources or representation to make law. Large corporations do. Thus, while Indian Harbor may attempt to persuade the Court that U.S. Bank's actions were wrongful, or that it meant to exclude a particular type of conduct from coverage, that is not the issue before the Court.

The issue before the Court is simple: whether Indian Harbor's insurance policy provides coverage for the settlement entered into by U.S. Bank in a class action lawsuit brought but its customers related to overdraft fees under the policy's own definition of loss? The answer is **yes**. The Court can arrive at this conclusion by simply applying basic rules of contract interpretation, rules that serve the interests of justice, fairness, and ensure principled and consistent outcomes in coverage disputes. A departure from these rules will send a message to policyholders everywhere that the peace of mind and security they bargained for and expect from their insurance is illusory.

If there is a "public policy" that bears on this case, other than the obvious public policy favoring the enforcement of policies as written rather than allowing an insurer to avoid its obligations by after-the-loss underwriting, it is the well-recognized policy favoring settlement of disputes. *See, e.g., Fins v. Perlman*, 424 A.2d 305, 309 (Del. 1980) ("Settlements are encouraged because they voluntarily resolve disputed

matters."); *Voicestream Minneapolis, Inc. v. RPC Props. Inc.*, 743 N.W.2d 267, 271 (Minn. 2008) ("Settlement of claims is encouraged as a matter of public policy."). If this Court were to accept Indian Harbor's attempt to nullify the "final adjudication" language of the policy, policyholders would be discouraged from entering into settlements by a range of that have such coverage enhancements in their liability insurance policies. The addition of "final adjudication" language to personal acts exclusions promotes the settlement of complex litigation by giving defendants the comfort of knowing that their insurance coverage remains in place for a settlement entered into prior to final adjudication. By discouraging otherwise likely settlements, Indian Harbor's distorted interpretation of its policy contradicts widely recognized public policy favoring settlement.

Conclusion

In light of the arguments presented herein, *amicus curiae* respectfully requests that this Court reject Indian Harbor's improper construction of the policy and affirm the decision of the District Court in all respects.

Dated: August 19, 2015

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Certificate of Compliance with Rule 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7) because the brief contains 3,283 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(iii) and complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 (for Windows) in 14-point Garamond type.

The PDF version of the brief filed electronically with the court using the CM/ECF system has been inspected for viruses and was found to be virus-free.

Dated: August 19, 2015

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CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that on August 19, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Jesse D. Mondry