

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND**

PROCACCIANTI COMPANIES, INC.
and TPG HOTELS & RESORTS, INC.,

Plaintiffs,

v.

ZURICH AMERICAN INSURANCE CO.,

Defendant.

Case No. 1:20-cv-00512-WES-PAS

**REPLY IN SUPPORT OF MOTION OF UNITED POLICYHOLDERS
FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE**

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United Policyholders (“UP”) submits the following reply in support of its motion for leave to file a brief as *Amicus Curiae* in connection with Defendant’s Motion to Dismiss and Plaintiff’s Opposition thereto.¹ This Court should exercise its discretion to accept UP’s brief because UP is particularly well-suited to provide this Court with important information regarding coverage issues before it that are critical to restoring economic health to Rhode Island businesses and residents *and* are of national importance.

I. INTRODUCTION

Not surprisingly, Zurich does not want this Court to hear from a highly respected national non-profit organization that has spent the past 30 years acting as an advocate and information resource for individual and commercial insurance consumers throughout the United States. But the issues before this Court are critically important in this State and to some of the largest policyholders and greatest property risks in the world insured by Zurich’s Edge Policy. Zurich is attempting to upend long-standing principles of insurance contract interpretation to defeat coverage and deprive policyholders across Rhode Island and North America of compensation for losses sustained as a result of the SARS-CoV-2 virus (the “Coronavirus”), the disease it causes, Coronavirus Disease 2019 (“COVID-19”) and the physical loss of or damage to property that they cause, and the accompanying government closure orders (“COVID Losses”).

Zurich’s argument that there is a “presumption” in the First Circuit against a court accepting amicus briefs is simply wrong. No such “presumption” has been articulated by the First Circuit, and district courts within the Circuit regularly exercise their discretion and accept amicus briefs, particularly where, as here, this Court’s decision will address an issue of critical importance to policyholders across the country who purchased “all-risk” property insurance from Zurich

¹ Unless indicated otherwise, capitalized terms used herein such as “Policy” have the same meaning ascribed to them by Plaintiffs’ Opposition to Defendant’s Rule 12(b)(6) Motion to Dismiss (“Opp. to MTD”), ECF No. 17.

through its Zurich Edge Policy, and who believed that they had coverage for their COVID Losses and where the amicus provides the Court with new facts or arguments not raised by the parties.

Zurich's position – that the Contamination Amendatory Endorsement, or “Virus Deletion Endorsement” (i.e., that removes “virus,” “pathogen or pathogenic organism” and “disease causing or illness causing agent” from the Contamination Exclusion in the Edge Policy) is limited in geographic scope to Louisiana locations based solely upon the title of the endorsement that refers to “Louisiana” – is undercut by its own conduct. It is now apparent from publicly filed documents that Zurich attached the Virus Deletion Endorsement to its Zurich Edge Policies issued to policyholders with no Louisiana locations across the country.² That list, maintained by UP, is growing by the day. These Zurich Edge Policies also contain the clear and unambiguous provision that titles of endorsements “shall not in any way affect the provisions to which they relate” (“Titles Provision”). Long-standing principles of insurance contract interpretation require that unambiguous policy provisions such as the Titles Provision must be enforced as written; and to the extent that policy language is ambiguous, the ambiguity must be resolved in favor of the insured.

But even worse for Zurich, UP has now learned that in the Fall of 2020, Zurich sought and received approval for a revised Louisiana Amendatory Endorsement to the Zurich Edge Policy that states: “**THIS ENDORSEMENT ONLY APPLIES TO LOCATIONS IN LOUISIANA**” (the “Modified Louisiana Endorsement”). This language is absent in the Virus Deletion Endorsement contained in the Plaintiff's Zurich Edge Policy and other Edge Policies for which

² See, e.g., Ex. A (policy filed in *Detroit Entertainment, L.L.C. v. American Guarantee & Liability Ins. Co.*, No. 21-002630-CB (Mich. Cir. Ct., Wayne Cty.)), Ex. B (policy filed in *Empire Resorts, Inc., et al. v. American Guarantee & Liability Ins. Co.*, Index No. 704789/2021 (N.Y. Sup. Ct., Queens Cty.)), Ex. C (policies filed in *Firebirds International LLC v. Zurich Am. Ins.*, No. 2020-CH-05360 (Ill. Cir. Ct., Cook Cty.)) and Ex. D (policy filed in *HT-Seattle Owner, LLC v. American Guarantee & Liability Ins. Co.*, No. 2:21-cv-00048-BJR (W.D. Wash.)). The Court may take judicial notice of these court records. See *Curreri v. Saint*, 126 A. 3d 482, 485 (R.I. 2015).

Zurich has denied coverage across the country and around the globe. Moreover, Zurich apparently failed to highlight this specific change for the regulator.

Zurich's conduct after the fact in adding an express geographical limitation in the new Modified Louisiana Endorsement absent from the Virus Deletion Endorsement is either conclusive evidence that the Virus Deletion Endorsement as it appears in the Zurich Edge Policy unambiguously applies to the whole Policy or concedes a prior ambiguity that must be resolved in favor of coverage for the insured. At a minimum, this revelation requires discovery into Zurich's internal communications regarding its regulatory effort to change the Virus Deletion Endorsement, subsequent to the emergence of the COVID Losses.

The proper application of the Virus Deletion Endorsement, affecting some of the largest policyholders and greatest property risks across the globe, currently is one of the most contested coverage issues concerning the COVID Losses, as the claims asserted under the Zurich Edge Policy are being litigated in state and federal courts across the country. UP, as a nationwide, non-profit industry organization, is uniquely well-positioned to address the Court on these issues in connection with a decision by this Court that will affect a significant number of UP's constituents. Zurich should not be permitted to silence UP. It was incumbent upon Zurich, as the drafter of the Edge Policy, to clarify its intention within the plain language of the Policy. It cannot wait until after a claim is filed to craft its arguments to deny coverage. Indeed, the law of insurance policy interpretation requires the precise opposite result, in favor of coverage for the insured.

II. ARGUMENT

A. There is No "Presumption" Against Amicus Briefs in the First Circuit.

In its attempt to keep UP's brief from the Court's consideration, Zurich incorrectly asserts there is a "presumption" against accepting amicus briefs in the First Circuit. (Opp. at 1). That is not the law in the First Circuit; nor does Zurich cite a single case so holding. Instead, Zurich

mainly relies on cases from outside the First Circuit to support this non-existent “presumption.” (Opp. at 1-2). To the contrary, district courts within the First Circuit regularly accept amicus briefs or otherwise appoint amici to assist them in a proceeding. *See, e.g., Students for Fair Admissions v. Harvard*, No. 14-cv-14176-ADB, 2018 WL 9963511, at *2 (D. Mass. Oct. 3, 2018); *Portland Pipe Line Corp. v. City of S. Portland*, No. 2:15-CV-00054-JAW, 2017 WL 79948, at *4 (D. Me. Jan. 9, 2017); *Animal Protection Institute v. Martin*, No. CV-06-128 BW, 2007 WL 647567, at *3 (D. Mass. Feb. 23, 2007); *Boston Gas Co. v. Century Indemn. Co.*, No. 02-12062-RWZ, 2006 WL 1738312, at *1 n.1 (D. Mass. June 21, 2006) (allowing amicus brief in large environmental insurance coverage action by the Complex Insurance Claims Litigation Association, an insurance industry organization that regularly supports *Zurich* with its amicus briefs); *Verizon New England v. Maine Public Utilities Commission*, 229 F.R.D. 335, 338 (D. Me. 2005).

Zurich’s strained reliance on *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970) does not support Zurich’s purported “presumption” against accepting amicus briefs in this Circuit. Indeed, the very case that Zurich cites for the uncontroversial standard that “[w]hether to grant amicus status remains ‘within the sound discretion of the court’” and “is a matter of ‘judicial grace,’” *Portland Pipe Line*, 2017 WL 79948, at *4 (*see Op.* at 2), accepted the amici briefs at issue. In so doing, the court embraced the modern standard announced by now-U.S. Supreme Court Justice Alito when he was a Circuit Judge in the Third Circuit. That standard instructs courts that “it is preferable to err on the side of granting leave” and to “grant the motion for leave to file an amicus brief and take the brief for what it is worth” so long as the movant shows: (1) an adequate interest; (2) desirability and (3) relevance as required by Federal Rule of Appellate Procedure 29. *See Portland Pipe Line*, 2017 WL 79948, at *5 (citing *Neonatology Assocs., P.A. v. Comm’r of Internal Revenue*, 293 F.3d 128, 132-33 (3d Cir. 2002) (Alito, J.)).

In the 51 years since *Strasser*, Justice Alito’s standard articulated in *Neonatology Assocs*, liberally granting motions for leave to file amicus briefs, has gained general acceptance in the federal district courts of the First Circuit (and in courts around the country) when considering motions for leave to file amicus briefs. *See, e.g., Portland Pipe Line*, 2017 WL 79948, at *5; *Animal Protection*, 2007 WL 647567, at *3 (“[i]f denied, the court may be deprived of the advantage of a good brief, but if granted, the court can readily decide for itself whether the brief is beneficial. If beneficial, the court will be edified; if not, the brief will be disregarded”).

Accordingly, the question of whether this Court accepts UP’s Proposed Brief is within this Court’s sound discretion, considering UP’s interest as a nationwide, non-profit insurance industry organization; the desirability of an industry-wide entity speaking for its constituents; and the relevant information that UP brings to this Court through its experience and knowledge relating to this discrete issue of crucial importance facing policyholders saddled with tens of billions of dollars of COVID Losses for which Zurich has refused to provide coverage. For the reasons set out in its motion and in this reply, UP respectfully maintains that such considerations warrant the Court’s acceptance of UP’s amicus submissions.

B. UP’s Brief Properly Focuses this Court’s Attention on Broad Implications of its Ruling.

Zurich’s insistence that UP’s Proposed Brief does not address “any broad industry-wide issue” because it is “focused entirely on the specific wording of Plaintiffs’ Policy” (Opp. at 4; ECF 21 at 4) is misleading at best. As Zurich well knows, Zurich is litigating this precise policy – the Zurich Edge Policy – in state and federal courts across the country. Because Zurich issues the identical Edge Policy Form, each of these Policies contains identical Titles Provisions and Virus Deletion Endorsements. As such, this Court’s decision on the Virus Deletion Endorsement will have a significant impact on UP’s constituents across the United States. The pervasiveness of the

Zurich Edge Policy is now apparent from publicly filed documents. Lawsuits where the Zurich Edge Policy is at issue, across at least 14 states, include the following:

Arizona: *Ross Stores v. Zurich Am. Ins. Co., et al.*, No. RG20084158 (Ariz. Super. Ct., Alameda Cty.). California: *AECOM v. Zurich Am. Ins. Co.*, No. 21-cv-00237 (C.D. Cal.); *Crunch Holdings LLC v. Zurich Am. Ins. Co.*, No. CGC-20-587340 (Cal. Sup Ct., San Francisco Cty.); *In-N-Out Burgers v. Zurich Amer. Ins. Co.*, No. 8:20-cv-01000 (C.D. Cal.); *P.F. Chang's China Bistro, Inc., et al. v. Certain Underwriters at Lloyd's of London, et al.*, No. 20STCV17169 (Cal. Sup. Ct, Los Angeles Cty.). Colorado: *Qdoba Restaurant Corp. v. Zurich Am. Ins. Co.*, No. 20-cv-3575 (D. Colo.). Florida: *Spottswood Companies, Inc. v. Zurich Am. Ins. Co.*, No. 20-cv-10077 (S.D. Fla.). Illinois: *Designer Brands, Inc. v. Zurich Am. Ins. Co.*, No. 2021-CH-844 (Ill. Cir. Ct., Cook Cty.); *Firebirds International LLC v. Zurich Am. Ins.*, No. 2020-CH-05360 (Ill. Cir. Ct., Cook Cty.); *Tavistock Restaurant Group, LLC v. Zurich Am. Ins. Co.*, No. 20-CH-5086 (Ill. Cir. Ct., Cook Cty.); *Watson Woods Healthcare, Inc., et al. v. Zurich Am. Ins. Co.*, No. 1:21-cv-01150 (N.D. Ill.); *Wild Holdings LP, et al. v. Zurich Am. Ins. Co.*, No. 2021-CH-949 (Ill. Cir. Ct., Cook Cty.). Indiana: *Tom James Co. v. Zurich Am. Ins. Co.*, No. 49D01-2004-PL-013613 (Ind., Marion Cty.). Louisiana: *Foot Locker, Inc., et al. v. Zurich Am. Ins. Co.*, No. C-704784 (La.). Michigan: *Detroit Entertainment, L.L.C. v. American Guarantee & Liability Ins. Co.*, No. 21-002630-CB (Mich. Cir. Ct., Wayne Cty.). Missouri: *Lindenwood Female College v. Zurich Am. Ins. Co.*, No. 4:20-cv-01503 (E.D. Mo.). Nevada: *WP 6 Restaurant Management Group, LLC v. Zurich Am. Ins. Co.*, No. 20-cv-01506 (D. Nev.). New Jersey: *Capri Holdings Limited v. Zurich Am. Ins. Co., et al.*, No. BER-C-C21-21 (N.J. Sup. Ct., Bergen Cty.). New York: *Empire Resorts, Inc., et al. v. American Guarantee & Liability Ins. Co.*, Index No. 704789/2021 (N.Y. Sup. Ct., Queens Cty.). Rhode Island: *Procaccianti Companies, Inc., et al. v. Zurich Am. Ins. Co.*, No. 1:20-cv-00512-WES-PAS (D.R.I.). Washington: *Fitness International, LLC v. Zurich Am. Ins. Co., et al.*, No.

21-2-00261-3 SEA (Wash. Sup. Ct., King Cty.); *HT-Seattle Owner, LLC v. American Guarantee & Liability Ins. Co.*, No. 2:21-cv-00048-BJR (W.D. Wash.).

Moreover, Zurich has briefed in motions in at least three other cases its argument that the Virus Deletion Endorsement is limited to Louisiana locations, *i.e.*, *Firebirds*, *HT-Seattle Owner* and *Lindenwood*. There can no dispute that the issues before this Court are not, as Zurich claims, from a narrowly-focused private contract dispute between two litigants, but rather are issues of monumental public importance that implicate tens of billions of dollars in coverage under the Zurich Edge Policy and, in many cases, the very survival of the businesses of the policyholders at issue.

Unlike the individual policyholders in each of these cases, UP is uniquely situated and appropriately qualified to speak to issues of universal application under the Zurich Edge Policy, such as the application of the Virus Deletion Endorsement to the entire Policy.

C. The Modified Louisiana Endorsement Adding a Geographical Limitation Confirms the Virus Deletion Endorsement has None and Confirms the Importance of UP's Participation in this Matter.

Zurich recently has been seeking regulatory approval for a new Edge II Policy form, which would re-insert “virus, pathogen or pathogenic organism and disease causing or illness causing agent” back into the Louisiana state-titled endorsement and therefore re-insert them into the Contamination Exclusion. At least one state regulator disapproved of the form in 2020.³

Notwithstanding, UP has now learned that in the Fall of 2020, well after Zurich began receiving claims for COVID Losses and being sued across the United States, Zurich sought and

³ See Ex. E (New York EDGE II Filing) at 2, 6 (submitted to New York on April 3, 2020; disapproved on September 22, 2020). This document was retrieved from the System for Electronic Rate and Form Filing (SERFF) created by the National Association of Insurance Commissioners (NAIC) for submitting and accessing filings. SERFF is the official system used by most states in the United States.

received approval for a revised Louisiana endorsement to the Zurich Edge Policy.⁴ In its regulatory filing, Zurich described the proposed amendment as follows:

Pursuant to La. Stat. § 22:885(B), Zurich North America and all affiliated companies are updating Louisiana Amendatory Endorsements. ***The change removes language concerning premium refunds*** attributable to mortgagees when there is a policy cancellation. ***The only changes are those in the above referenced code.***

Ex. D at 3, 13 (emphasis added). However, in addition to removing the language concerning premium refunds, Zurich also added: “**THIS ENDORSEMENT ONLY APPLIES TO LOCATIONS IN LOUISIANA.**” *Id.* at 14. This geographically limiting language, which Zurich did not call out for the regulator in its description of the changes to the endorsement⁴, is absent in the Virus Deletion Endorsement contained in the Plaintiffs’ Zurich Edge Policy and other Edge Policies for which Zurich has denied coverage across the country and around the globe. It is also the only amendment to the Zurich Edge Policy that Zurich has sought and received since the emergence of the Coronavirus, COVID-19 and the ensuing massive COVID Losses.

Under analogous facts in *Churchill v. Factory Mut. Ins. Co.*, 234 F. Supp. 2d 1182 (W.D. Wash. 2002), the court held that an insurer’s subsequent addition of exclusionary language in a policy supported the policyholder’s position that the exclusion ***did not*** apply to the earlier policy issued to the policyholder. *Churchill*, 234 F. Supp. 2d at 1190.

That is precisely the situation here – Zurich’s addition of the geographical limitation to the Virus Deletion Endorsement in the Modified Louisiana Endorsement supports Plaintiff’s position that ***no such geographical limitation applied in the first place.*** Specifically, the Churchill Court explained:

The Estate points to FM’s removal of the mold exclusion in the transition from the Form 2000 policy to the Form 3000 policy, and FM’s subsequent reinsertion of the mold exclusion in the Global Advantage policies, as support for its position that the Form 3000 does not contain a mold exclusion. FM claims that the reinsertion of

⁴ See Ex. F (Louisiana EDGE Endorsement Filing, the “Modified Louisiana Endorsement”) at 2, 6 (submitted to Louisiana on August 31, 2020; approved on September 8, 2020). This document was also retrieved from SERFF. See also Ex. G (Modified Louisiana Endorsement as filed as an exhibit to the complaint in *Watson Woods Healthcare, Inc., et al. v. Zurich Am. Ins. Co.*, No. 1:21-cv-01150 (N.D. Ill.)).

the mold exclusion into the Global Advantage policies was merely for emphasis and that FM was being redundant. [...] **The Estate's interpretation should control because the Court must interpret a contract so as to give effect to each provision.** *McDonald v. State Farm Fire & Cas. Co.*, 119 Wash.2d 724, 734, 837 P.2d 1000 (1992). **Thus, FM's explanation that the reinsertion of the mold exclusion was redundant and merely for emphasis runs contrary to principles of contract interpretation.**

Churchill, 234 F. Supp. 2d at 1190 (emphasis added). Thus, any argument Zurich might make that it merely inserted the new geographic restriction to be redundant or to emphasize a geographic restriction that already existed in the endorsement is meritless. Such an interpretation would render the newly inserted language meaningless surplusage, rather than giving every provision effect, in violation of Rhode Island law and general principles of insurance contract construction. *See, e.g., Med. Malpractice Joint Underwriting Ass'n of Rhode Island v. Lyons*, No. PC 00-5583, 2004 WL 3190049, at *4 (R.I. Super. Dec. 17, 2004) ("In ascertaining the usual and ordinary meaning of contractual language, every word of the contract should be given meaning and effect; an interpretation that reduces certain words to the status of surplusage should be rejected.").

UP's amicus submission thus now places before the Court a newly-discovered and pivotal Zurich document that neither Zurich (which knew about the Modified Louisiana Endorsement it wrote yet failed to inform this Court of its existence when claiming that the Virus Deletion Endorsement is limited to locations in Louisiana) nor the policyholder Plaintiffs have provided the Court. This amicus submission by UP is the *only* vehicle by which this Zurich document has been presented to this Court prior to its decision on Zurich's motion to dismiss – a motion that relies centrally on Zurich's argument that the Virus Deletion Endorsement contained in the Policy sold to plaintiffs is limited to locations in Louisiana. This newly-discovered Zurich document contradicts Zurich's argument and presents the Court with new arguments not made by the Plaintiffs. Thus, even under the more strenuous Seventh Circuit standard for accepting amicus briefs, upon which Zurich has relied, it is respectfully submitted this Court should accept UP's

amicus submissions. *See Voices for Choices v. Illinois Bell Telephone Co.*, 339 F.3d 542, 545 (7th Cir. 2003) (cited by Zurich, Opp. at 2) (directing courts to consider “whether the [amicus] brief will assist the judges by presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties’ briefs”).

III. CONCLUSION

On behalf of policyholders in Rhode Island and nationwide, we trust this Court will find the above points of context helpful in resolving the issues raised in Defendant’s Motion to Dismiss and the Plaintiffs’ Response.

Respectfully submitted by:

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CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2021, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

/s/ Matthew T. Oliverio