

Case No. S149988

IN THE SUPREME COURT OF CALIFORNIA

STATE OF CALIFORNIA,
Plaintiff,

vs.

UNDERWRITERS AT LLOYD'S LONDON, et al.,
ALLSTATE INSURANCE COMPANY, et al.,
Defendants.

STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

UNDERWRITERS AT LLOYD'S LONDON, et al.,
ALLSTATE INSURANCE COMPANY, et al.,
Defendants and Petitioners.

From an Opinion of the Court of Appeal,
Fourth Appellate District, Division Two, Case No. E037627

From a Decision of the Riverside County Superior Court Case No. 239784,
Consolidated With Case No. RIC-381555
The Honorable E. Michael Kaiser, Judge

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

**AMICUS CURIAE BRIEF OF
CONSUMER FEDERATION OF AMERICA AND UNITED POLICYHOLDERS
IN SUPPORT OF THE STATE OF CALIFORNIA**

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APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF
CONSUMER FEDERATION OF AMERICA AND UNITED POLICYHOLDERS

Pursuant to Rule 8.200(c) of the California Rules of Court, Consumer Federation of America (“CFA”) and United Policyholders (“UP”) (collectively “Amici”), jointly as *amicus curiae*, request leave to file an *amicus curiae* brief in support of plaintiff and respondent the State of California. Amici’s counsel is familiar with the issues in this case and with the scope of their representation.

CFA is a coalition of over 300 national, state, and local consumer, senior citizen, labor, farm, cooperative, and rural organizations representing more than 50 million people in matters pertaining to the well-being of the American consumer. CFA has a three-fold mission: to assist state and local organizations, to provide information to the public regarding consumer issues, and to conduct consumer research projects. Research supported by CFA also provides the basis for new consumer initiatives, public service advertising, and consumer information and education efforts. CFA also researches consumer issues, behavior, and attitudes through surveys, polling, focus groups, and literature reviews. The findings of such projects are published in reports that assist consumer advocates and policymakers as well as individual consumers.

UP was founded in 1991 as a non-profit, 501(c)(3) organization dedicated to educating the public on insurance issues and consumer rights. UP is funded by donations and grants from individuals, businesses, and foundations. The organization monitors legal and marketplace developments that impact policyholders and participates in formulating public policy on insurance transactions. UP offers practical guidance on coverage and claims issues to property and business owners and advocates, including disaster relief personnel, attorneys, and adjusters at www.uphelp.org.

CFA and UP are unaffiliated national organizations mutually concerned with the upholding of the Court of Appeals decision at issue in this Appeal that when a policyholder cannot distinguish between the covered and non-covered portions of a loss, the burden of proof rests with insurance providers, who must cover a loss fully if they cannot distinguish the non-covered part of the loss. If upheld, the decision will protect policyholders from the insurance industry's attempts to take advantage of their own deficiencies in the underwriting process by omitting concise exclusionary language into their policies. Any precedents established here may be expected to have a national impact upon consumers of insurance in other jurisdictions.

Amici believe they can bring additional perspective to certain issues that were not addressed in the parties' briefs. Because of their substantial interest in the issues before the Court in this case, Amici respectfully request permission to file the brief submitted herewith for the Court's consideration.

DATED: October 4, 2007

Respectfully submitted
Gauntlett & Associates

By: 
David Gauntlett

Attorneys for *Amicus Curiae*
Consumer Federation of America
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I. INTRODUCTION

The insuring provision in a Comprehensive General Liability insurance policy typically provides insurance to policyholders for “all sums” for which the policyholder is held liable. Rather than acknowledge the plain language of such policies, and the broad phrase “all sums”, the insurance companies here wrongfully seek to fabricate “anti-concurrent causation” exclusionary language to refuse payment for all loss when the portion of a covered loss cannot be distinguished from the non-covered portions of the loss. California law, however, requires the insurance companies to acknowledge the plain terms of their policies, particularly where, as here, the insurance companies failed to include exclusionary language used in other standard form policies.

II. ARGUMENT

A. Insurance Companies Are Forbidden From Rewriting Policies To Eliminate Coverage And Retroactively Remedy Their Own Failure To Exercise Their Earlier Opportunity To Include Available Limiting Policy Language When Selling Policies.

The plain language of general liability policies to provide coverage for “all sums” is impossible to reconcile with the insurance companies’ attempt to negate all coverage for covered losses due to indistinguishable concurrent causes of loss. The position taken by the insurance companies would require this Court to break with clear California precedent that “we do not rewrite any provision of any contract, including the standard policy underlying any individual policy, for any purpose.” *Powerine Oil Co., Inc. v. Superior Ct.* (2005) 37 Cal.4th 377, 392 (emphasis added).

Under California law, the question of whether insurance policies afford coverage “turns on the literal language of the insuring agreement.” *Powerine Oil Co., Inc. v. Superior Ct.* (2005) 37 Cal.4th 377, 400 (emphasis in original). The insurance company defendant in that

case, Central National, attempted to avoid coverage for the policyholder's administrative costs despite the policies' explicit inclusion of coverage for "expenses." In rejecting Central National's strained argument invoking settlements or compromises as a prerequisite to coverage, this Court, among other things, found significant the absence of a "no action" clause in the policies which might have supported Central National's argument:

Central National, however, chose not to include a "no action" clause in its policies. We will not rewrite the policies to insert a provision that was omitted.

Id. at 401.

Likewise, in *Safeco Ins. Co. of Am. v. Robert S.* (2001) 26 Cal.4th 758, an insurance company attempted to have this Court adopt an interpretation of an "illegal act" exclusion in a homeowner's policy as a "criminal act" exclusion as existed in other policies. This Court rejected the insurance company's attempt to rewrite the policy to make up for the insurance company's own failure to include broader excluding language it easily could have added at the time it sold the policies:

Had Safeco wanted to exclude criminal acts from coverage, it could have easily done so. Insurers commonly insert an exclusion for criminal acts in their liability policies. (Croskey & Kaufman, Cal. Practice Guide: Insurance Litigation (The Rutter Group 2000) ¶¶ 7:331.5, 7:2256, pp. 7A-86, 7I-23 (rev.# 1, 2000).) Because Safeco chose not to have a criminal act exclusion, instead opting for an illegal act exclusion, we cannot read into the policy what Safeco has omitted. To do so would violate the fundamental principle that in interpreting contracts, including insurance contracts, courts are not to insert what has been omitted. (Code Civ. Proc., § 1858; *Jensen v. Traders & General Ins. Co.* (1959) 52 Cal.2d 786, 790, 345 P.2d 1; *Jacobson v. Simmons Real Estate* (1994) 23 Cal.App.4th 1285, 1294, 28 Cal.Rptr.2d 699.)

Id. at 763-64 (emphasis added).

As the Court of Appeals has recognized, California courts are not unique in viewing the absence of available language limiting coverage in an insurance policy as evidence that the insurance company intended broader coverage without such limitation:

With respect to the words used to express the mutual intent of the parties, several courts have observed an insurance company's failure to use available language to exclude certain types of liability gives rise to the inference that the parties intended not to so limit coverage. (See Pardee, supra, 77 Cal.App.4th at pp. 1359-1360; Syufy, supra, 69 Cal.App.4th at p. 330; Marathon Ashland Pipe Line v. Maryland Cas. Co., supra, 243 F.3d at p. 1240, fn. 5.) For example, in Merchants Ins. Co. of New Hampshire, Inc. v. USF&G (1st Cir. 1998) 143 F.3d 5, 10, the court stated: "After all, if USF&G had really intended to limit coverage under the additional insured Endorsement to those situations in which an added insured such as D'Agostino was to be held vicariously liable only for the negligence of a principal insured such as Great Eastern, USF&G was free to draft a policy with qualifying language that expressly implemented that intention. [Citation.]"

Fireman's Fund Ins. Cos. v. Atlantic Richfield Co. (2001) 94 Cal.App.4th 842, 852 (emphasis added).

For example, recently the Supreme Court of Massachusetts rejected the attempts of two insurance companies to avoid coverage by re-interpreting advertising injury coverage explicitly provided for in their existing general liability policies. *Terra Nova Ins. Co. v. Fray-Witzer*, 869 N.E.2d 565, 574 (Mass. 2007). In *Terra Nova*, the policyholder, an auctioneer services company was sued in a class action complaint for violating state statutes against unsolicited facsimile transmissions. The policyholder sought coverage for advertising injury arising out of "[o]ral or written publication of material that violates a person's right to privacy." The insurance company denied coverage on the basis that, among other things, in order to secure coverage, the content of the facsimile, rather than its mere existence, must violate the right of privacy. In rejecting the insurance companies' defense, that Court noted that in order for the insurance companies to succeed, the policies' definitions of injury would instead have to read,

“[o]ral or written publication of material, *the content of which* violates a person’s right to privacy.” The onus is upon the insurance companies to clearly limit coverage at the time of underwriting:

[H]ad Terra Nova and Royal wished their policies to pertain only to violations of privacy created by the content of material, it was incumbent on them to draft explicit policies to that effect.

Terra Nova Ins. Co. v. Fray-Witzer, 869 N.E.2d 565, 574 (Mass. 2007).

Here, the insurance policies sold to the State of California at issue in this case explicitly provide broad coverage for “all sums” to which the State is held liable, promising:

To pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of liability imposed by law ... for damages, including consequential damages, because of direct damage to or destruction of tangible property (other than property owned by the Insured), including the loss of use thereof, which results in an Occurrence during the policy period.

See, e.g., AA 308 (emphasis added).

The insurance companies re-interpret the insuring language of “all sums” to mean that when a policyholder cannot distinguish between the covered and non-covered portions of a loss, the insurance company need only pay those sums which the policyholder can conclusively distinguish as attributable solely to a covered loss. The insurance companies, however, selectively failed to place such language in their policies.

If the insurance companies wanted “anti-concurrent causation” exclusionary language in their policies, they should have put it in during the underwriting process when they sold the policies. Indeed, “anti-concurrent causation” exclusionary language is standard in other types of policies which explicitly except covered losses caused concurrently by non-covered losses:

We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

David L. Leitner; Reagan W. Simpson; and John M. Bjorkman, Law and Practice of Insurance Coverage Litigation § 45:33 (July 2007) (citing standard form earth movement exclusions in construction insurance policies).

No such “anti-concurrent causation” exclusionary language exists in the State’s policies. Accordingly, the insurance companies essentially argue that this Court, contrary to California law, should retroactively rewrite the language of the policies to negate coverage. At the time of underwriting, however, the insurance companies – not the policyholder – have the resources and expertise to craft the policies to reflect their intent. They should not be permitted to retrospectively rewrite their insurance policies to favor exclusion when the time comes to pay claims.

B. Although Unnecessary Here, Consideration Of Extraneous Factors Outside Of The Policy Terms Favors California Insurance Consumers.

As set forth above, any appeal by the insurance companies to considerations outside the policy language must be rejected by this Court. Even if this Court considers factors outside of the policy terms, such considerations should be made in favor of the policyholder and against the original drafters of the policies:

[A]ny ambiguity or uncertainty in an insurance policy is to be resolved against the insurer and ... if semantically permissible, the contract will be given such construction as will fairly achieve its object of providing indemnity for the loss to which the insurance relates....

This is particularly true with respect to policy provisions which limit insurance coverage. Because of the superior bargaining power of the insurer, exceptions and exclusions in the insurance policy are strictly construed against the insurer and liberally interpreted in favor of the insured.

Delgado v. Heritage Life Ins. Co. (1984) 157 Cal.App.3d 262, 271 (citations omitted).

California courts have long held that insurance companies may not deny coverage based upon unduly restrictive policy interpretations. *See, e.g., Delgado v. Heritage Life Ins. Co.* (1984) 157 Cal.App.3d at 277-78. Indeed, California's Unfair Practices Act specifically prohibits "misrepresenting the terms of the policy." Cal. Ins. Code § 790.03(a).

Furthermore, even if an "anti-concurrent causation" clause were written into the State's policies – they are not – such clauses are themselves contrary to public policy and should be disfavored. "Anti-concurrent causation" clauses give insurance companies a clear financial incentive to avoid paying legitimate claims by contending that policyholder claims are uncovered losses. This conflicts-of-issue problem exists not only in the environmental context, but also arise in other catastrophic situations, such as earthquake losses. Indeed, the issue has come to the forefront in recent years as the result of claims handling practices in connection with policyholders devastated by hurricane losses.

For example, following hurricane Katrina, insurance companies' were confronted with a conflict-of-interest in their allocation between flood damage, which is an uncovered loss, and wind damage, which is a covered loss. No regulatory protections or oversight existed to protect consumers from an insurance company's financial incentive to allocate a policyholder's loss to uncovered causes or to make sure insurance companies treated policyholders fairly and consistently in evaluating the wind element in a storm surge and in the breaching of the levees in New Orleans thereby aggravating the storm surge throughout the Gulf Coast. This conflicts-of-issue problem for consumers is compounded where, as here, insurance companies seek to completely escape liability by attributing any portion of a loss to an uncovered cause.

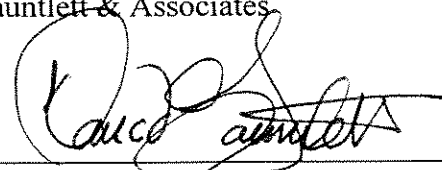
Thus, any extraneous evidence or public policy considerations should favor a decision against the insurance companies. Consumer confidence in the language of policies to cover claims have broad implications beyond environmental property damage and include auto accidents, life insurance, homeowners insurance, and more. While there is no need to appeal to public policy here, any interpretation of the policy terms beyond an insurance company's explicit promises, should not be allowed to adversely impact California consumers of insurance to the benefit of the insurance companies.

III. CONCLUSION

For the reasons set forth above Amici respectfully request that this Court deny the insurance companies' appeal.

Dated: October 4, 2007

By: Gauntlett & Associates



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Proof of Service

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I, Karen Knokey, am employed in the aforesaid County, State of

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On October 4, 2007 I served the foregoing **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF** and **AMICUS CURIAE BRIEF OF CONSUMER FEDERATION OF AMERICA AND UNITED POLICYHOLDERS IN SUPPORT OF THE STATE OF CALIFORNIA** on the interested parties in this action by mail, placing a true copy thereof, enclosed in a sealed envelope, addressed as follows:

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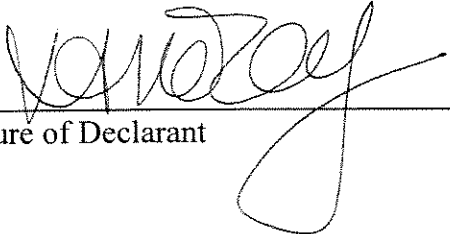
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Signature of Declarant

