U.S. Court of Appeals Docket No. 14-35027

THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TRANSAMERICA LIFE INSURANCE COMPANY.,
Plaintiffs/Appellants,

vs.

MAXINE PISTORESE, individually and as personal representative of the Estate of Ralph Pistorese.,
Defendants/Appellees.

On Appeal from a Decision
of the United States District Court
for the Western District of Washington,
At Seattle
Case No. C12-1083 TSZ
The Honorable Thomas S. Zilly, Judge

BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF APPELLEES

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CERTIFICATE OF CORPORATE DISCLOSURE

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amicus Curiae*, United Policyholders states that it is a non-profit 501(c)(3) charitable organization, that it does not have a parent corporation or shareholders.

Dated: August 7, 2014

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INTEREST OF THE *AMICUS CURIAE*

United Policyholders ("UP") submits this this brief of *amicus curiae* in support of Appellee Maxine Pistorese and asks this Court to affirm the trial court's decision. UP has received the consent of all parties to file this brief.

UP is a non-profit organization dedicated to helping preserve the integrity of the insurance system by serving as a voice and an information resource for insurance policyholders in all 50 states. United Policyholders' work is supported by donations, grants, and volunteer labor. This year marks the organization's twenty second year of service.

While much of UP's work is aimed at helping individuals and businesses purchase appropriate insurance and repair, rebuild, and recover after disasters, UP engages with regulators, public officials and various stakeholders in connection with legal and marketplace developments relevant to all policyholders and all lines of insurance. UP is an official representative of consumers in the National Association of Insurance Commissioners where facets of long term care insurance are routinely the subject of hearings and model rule proceedings.

A diverse range of individual and commercial policyholders throughout the United States regularly communicate their insurance concerns to UP. The organization advances policyholders' interests in courts nationwide by filing *amicus curiae* briefs in cases involving important insurance principles. UP

has been an *amicus curiae* on behalf of policyholders in more than 300 cases throughout the United States. UP's *amicus* brief was cited in the United States Supreme Court's opinion in Humana, Inc. v. Forsyth, 525 U.S. 299 (1999), and in numerous state and federal court opinions. Arguments from UP's *amicus curiae* brief were cited with approval by the California Supreme Court in Vandenburg v. Superior Court, 21 Cal. 4th 815 (1999), UP has been invited by several divisions of the California Court of Appeal to participate in oral argument as *amicus curiae*.

United Policyholders has been assisting policyholders, regulators and courts in regard to long term care insurance policies, premiums and claims since 2003 (see, e.g. *amicus curiae* brief in Harold J. Carrington v. Fortis Case No. 104694, Cal. Ct. App., 2003). In 2005 we established an online Long Term Care Insurance information clearinghouse under a grant from the California Healthcare Foundation that lives on our website www.uphelp.org. In recent years we've been brainstorming with regulators to contend with skyrocketing LTC premiums[1] while educating consumers on purchasing and using this useful but expensive product[2].

In this brief, UP seeks to fulfill the "classic role of *amicus curiae* by assisting in a case of general public interest, supplementing the efforts of counsel,

[1] *See, e.g.* February 2014 comments to the NAIC Health Actuarial Task Force byCA Healthcare Advocates and United Policyholders re: Proposed Changes to

[2] *See, e.g.* "Go Long?", United Policyholders, January, 2014. (http://www.uphelp.org/sites/default/files/january2013tipofthemonth.html).

and drawing the court's attention to law that escaped consideration." Miller-Wohl Co. v. Commissioner of Labor & Indus., 694 F.2d 203, 204 (9th Cir. 1982).

BRIEF OF AMICUS CURIAE

I. SUMMARY OF ARGUMENT

Insurance products have a unique role in our society: Americans who want to drive cars, operate businesses or borrow money to purchase a home are *legally required* to buy insurance. As home and business owners and those with aging or ill relatives in need of Long Term Care throughout Washington and the U.S. will confirm: insurance protection after a loss, illness, or incapacity requiring Long Term Care, makes the difference between recovery and ruin.

Yet, in the execution of an insurance contract (*contract of adhesion*)[3] and at drafting and claim time, insurers have the upper hand. Insurers draft the contracts, manage the claims and control the payouts. A perennial conflict exists: to an insurer, the paramount purpose of selling their product is to generate revenues to

[3] *See* Williston on Contracts 49:15 ("The fundamental reason which explains [contra proferentem] and other examples of judicial predisposition toward the insured is the deep-seated often unconscious but justified feeling or belief that the powerful underwriter, having drafted its several types of insurance contracts with the aid of skillful and highly paid legal talent, from which no deviation desired by an applicant will be permitted, is almost certain to overreach the other party to the contract. The established underwriter is magnificently qualified to understand and protect its own selfish interests. In contrast, the applicant is a shorn lamb driven to accept whatever contract may be offered on a 'take-it-or-leave-it' basis if he or she wishes insurance protection. In other words, insurance policies, while contractual in nature, are certainly not ordinary contracts, and should not be interpreted or construed as individually bargained for, fully negotiated agreements, but should be treated as contracts of adhesion [emphasis added] between unequal parties. This is because…insurance contracts are generally not the result of the typical bargaining and negotiating processes between roughly equal parties that is the hallmark of freedom of contract.").

support a profitable, solvent business enterprise.[4] To an insured, the economic safety net function of insurance is paramount. For these reasons, a decades-old body of case law governs the integrity of the products that insurers sell and imposes duties upon them that are higher than those imposed on their commercial peers. Judicial safeguards - *e.g. contra proferentem* - keep insurers' legitimate profit motive balanced with their customers' legitimate interests.

As the California Supreme Court has stated: [I]nsurers' obligations are…rooted in their status as purveyors of a vital service labeled quasi-public in nature. Suppliers of services affected with a public interest must take the public's interest seriously, where necessary placing it before their interest in maximizing gains and limiting disbursements…[A]s a supplier of a public service rather than a manufactured product, the obligations of insurers go beyond meeting reasonable expectations of coverage. The obligations of good faith and fair dealing encompass qualities of decency and humanity inherent in the responsibilities of a fiduciary." *Egan v. Mut. of Omaha Ins. Co.*, 620 P.2d 141, 146 (Cal. 1979) (ellipses in

[4] *See, e,g*. Tom Baker, Constructing the Insurance Relationship. Sales Stories, Claims Stories, and Insurance Contract Damages, 72 Tex, L. Rev. 1395, 1401 (May 1994).

original) (citations omitted). In addition to numerous state and federal courts, the special nexus between the business of insurance and the public interest has been recognized by the U.S. Supreme Court for almost 80 years.[5]

As such, insurance is a unique product imbued with state public policy concerns. Washington law recognizes that consumers purchase it for peace of mind. Whether the insurance is for property or for health, the basic idea for its existence and purpose remains the same: recovery for loss and coverage for financially catastrophic events. Consumers do not purchase insurance with the expectation that they will meet their insurance carrier in court to argue semantics or engage in any manner of unreasonable policy interpretation.

Washington law considers insurance policies to be contracts and favors liberal interpretation as to effectuate coverage. Ambiguous terms are strictly construed against the drafter-insurer, in favor of the policyholder. *Contra proferentem*, the idea that ambiguous terms are to be strictly construed against the drafter is an idea with a long history of support in the context of insurance.

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[5] *See, e.g.*, California State Auto. Ass'n Inter-Ins. Bureau v. Maloney, 341 U.S. 105, 109-10 (1951) (insurance has always had special relation to government); Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 415-16 (1946) ("[insurance] business affected with a vast public interest"); Robertson v. California, 328 U.S.. 440, 447 (1946); United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 540 n.14 (1944)("evils" in the sale of insurance "vitally affect the public interest"); Osborn v. Ozlin, 310 U.S. 53, 65 (1940) ("Government has always had a special relation to insurance."); O'Gorman & Young, Inc. v. Hartford Fire Ins. Co., 282 U.S. 251, 257 (1931) ("The business of insurance is so far affected with a public interest thatthe State may Regulate the Rates").

In this case, Transamerica's policy provided coverage for all levels of care as long as they are provided in a "Nursing Home." In this case, the District Court reasonably and correctly found the senior living facilities where the deceased, Ralph Pistorese, resided before his death qualified as "Nursing Home[s]." Washington law favors the type of analysis employed by the District Court and UP is aware of no such precedent that would indicate otherwise.

In addition, public policy, as enunciated by the Federal Government, favors the purchase and sale of LTC policies to alleviate the burden on the social safety net. Consumers will not be incentivized to purchase such policies if they fear litigating semantics with their insurance carrier over such provisions.

Policyholders must be protected against *contracts of adhesion*. As such, *amicus curiae* UP urges the court to affirm the District Court and follow long-held principles of Washington insurance law that effectuate coverage and construe ambiguities against the drafter-insurer and in favor of the policyholder's reasonable expectations. Washington law and public policy require it.

II. ARGUMENT

A. Washington Law Mandates Liberal Interpretation of Insurance Policies In Favor of Coverage

The legal issue in this case is simple: whether Transamerica's LTC policy benefit covers the assisted-living facilities where Mr. Pistorese resided. The answer is yes. Transamerica has attempted to argue for the narrow construction of its own policy and has delved into a semantic discussion that is at odds with the plain language of the policy, Washington state regulations, and Washington case law.

Washington law has taken a strong interest in regulating the business of insurance because it significantly impacts the public interest. Wash. Rev. Code § 48.01.030. As a result, the Washington state courts have developed strong guidelines for interpreting insurance policies. Insurance policies are construed as contracts. Austl. Unlimited, Inc. v. Hartford Cas. Ins. Co., 147 Wash. App. 758, 765, 198 P.3d 514 (2008). The purpose of insurance is to insure, so courts should use the construction that *provides coverage*, rather than one that eliminates coverage. Phil Schroeder, Inc. v. Royal Globe Ins. Co., 99 Wash.2d 65, 69, 659 P.2d 509 (1983), modified on other grounds, 101 Wash.2d 830, 683 P.2d 186 (1984). The policy should be interpreted as it would be understood by the average person purchasing insurance. McDonald v. State Farm Fire & Cas. Co., 119 Wash.2d 724, 733, 837 P.2d 1000 (1992). Courts are to presume the parties did not

intend a construction which contradicts the general purpose of the policy or results in "hardship or absurdity." Phil Schroeder, Inc., 99 Wash.2d at 68. If there is any ambiguity, it should be strictly construed against the insurance company and in favor of the insured. George v. Farmers Ins. Co. of Wash., 106 Wash. App. 430, 439, 23 P.3d 552 (2001).

Applying those standards to Transamerica's policy here, the District Court properly ruled there was coverage for Ralph Pistorese. Transamerica's policy pays for all levels of levels of care in a "nursing home" (now regulated as "assisted-living facilities" or "boarding homes" – *see* Wash. Rev. Code § 18.51.030; Laws of 1957, ch. 253, § 3; Laws of 2003, ch. 231, § 2; Laws of 2004, ch. 142 §§ 1, 5, 12). Transamerica's policy defines "nursing home" in relation to five factors: (1) The home must be licensed by a state health agency; (2) Provide room and board with *nursing care on a continuous in-patient basis* to three or more individuals; (3) Provide an on-duty or on-call nurse; (4) Has a planned program developed and reviewed by a licensed medical doctor; and (5) Maintain medical records. ER 59.[6]

Transamerica's denial of coverage stems exclusively from its erroneous interpretation of the meaning *"nursing care on a continuous in-patient basis."* According to Transamerica, this should be interpreted to mean the nursing care itself must be continuous or it must be offered on an uninterrupted 24-hour basis.

[6] All record citations are to the Excerpts of Record for Appellant Transamerica.

As the District Court characterized it, the parties disputed which part of the clause the word "continuing" modifies. ER 15. The District Court ruled that the word "continuing" modified the phrase immediately following it – "inpatient basis." Id. As such the District Court properly rejected Transamerica's argument that "continuing" modifies the entire clause. Ibid. As logic, common sense and basic rules of English grammar would dictate, the District Court's ruling was correct and Transamerica's interpretation is not a proper reading of the policy language.

But even if Transamerica was correct, that does not end the inquiry. Where there are two or more valid interpretations of an insurance policy, the language is declared ambiguous and is strictly construed against the insurance company. George, 106 Wash. App. at 439. In effect, Transamerica is asking this Court to change the rules of how Washington State interprets insurance contracts to completely eliminate the established rule of *contra proferentem*.

The crux of the issue in this case is the construction of contracts and Washington State's strong history of interpreting ambiguous insurance policies in favor of the policyholder and against the drafter-insurer. By making the arguments it does, Transamerica now asks this Court – as it asked the District Court below – to help it revise its own contract. But that argument also goes against clearly stated Washington law that a court is *not* free to revise an insurance contract under the theory of construing it. Contintental Ins. Co v. Paccar, Inc., 26 Wash. App. 85, 614

P.2d 675 (1980). An insurer, as a drafter of the contract, is primarily responsible for defining the scope of coverage. Mission Ins. Co. v. Guarantee Ins. Co., 37 Wash. App. 695, 683 P.2d 675 (1980). An insured "has little choice but to accept the policy language the insurance company used." *See* Greer v. Northwestern Nat'l Ins. Co., 109 Wash.2d 191, 206, 743 P.2d 1244 (1987) (Dore, J. concurring in result only). It was this imbalance of power that led to the rule that ambiguity is construed against the insurer. *See also* Williston, *supra* at FN 3.

Transamerica is arguing is that it only intended for Mr. Pistorese's LTC policy to cover "nursing homes" with 24-hour nursing care seven days a week. Yet this was not how Transamerica drafted its policy. It could have been as specific as it wanted in defining "nursing home." Transamerica could have referenced RCW 18.51.030 in the policy itself or expressly excluded "boarding homes" and clarified that a "nursing home" must provide 24-hour nursing care. It did neither, and thus may not now claim it meant something different than what its policy said.

Transamerica also makes two additional far-fetched arguments. First, it claims that changes in Washington *state regulations* should rewrite the policy. The District Court properly pointed out that the Court is charged with interpreting the policy language, not Department of Health and Human Services. ER 18-19. And Transamerica's second argument is that Judge Zilly refused to follow the precedent set forth in another trial court decision, McDermott v. Life Investors Ins. Co. of

America, 2007 U.S. Dist. LEXIS 84369 (W.D. Wash. Nov. 1, 2007). Judge Zilly properly found McDermott to be easily distinguishable. Id.

In sum, ambiguous clauses in insurance policies will be given the meaning and construction most favorable to the insured. Here, Transamerica asks this Court to write in a much more broad exclusion that it wrote into its insurance policy. Mr. Pistorese and any other reasonable consumer would expect that the plain, ordinary meaning of "nursing home" to include "boarding homes" such as Aegis and Claire Bridge. A reasonable consumer purchasing insurance – here, Mr. Pistorese – would reasonably expect coverage under the circumstances and would not and should not expect to litigate semantics with their insurance carrier at claim time.

B. The Public Policy Behind Long Term Care Insurance Policies Also Supports The District Court's Interpretation

Public policy favors the purchase and sale of LTC policies to alleviate the burden on the social safety net. Both the Federal Government and the State of Washington have partnerships with LTC insurance providers to encourage the purchase and sale of LTC policies. According to statistics, at least 70% of persons over the age of 65 will need some form of LTC care.[7]

[7] *See, e.g.* Understanding Long Term Care Insurance: The Basics of What You Need to Know, American Association of Retired Persons (AARP) (June 2012)

Consumers will not be incentivized to purchase such policies if they fear litigating semantics with their insurance carrier over such provisions. In the case of Mr. Pistorese, he purchased an LTC policy from Transamerica with the *reasonable expectation* that he would have coverage for the Aegis and Claire Bridge facilities, thereby alleviating financial stress from his family and the government when he required LTC. A favorable ruling for Transamerica in this case would have a chilling effect on the purchase and sale of LTC insurance.

(http://www.aarp.org/health/health-insurance/info-06-2012/understanding-long-term-care-insurance.html).

CONCLUSION

For the foregoing reasons, *amicus curiae* United Policyholders respectfully requests that this Court affirm the decision of the U.S. District Court for the Western District of Washington in favor of Plaintiff/Respondent.

Dated: August 7, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on this 7st day of August 2014, I electronically filed the foregoing *Amicus Curiae Brief of United Policyholders in Support of Appellees,* with the Clerk of the Court of the United States Court of Appeals by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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STATEMENT OF *AMICUS CURIAE*

Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, I hereby certify: (1) a party's counsel did not author the brief in whole or in part; (2) a party or a party's counsel did not contribute money that was intended to fund preparing or submitting the brief; and (3) no person – other than the Amicus Curiae, its member, or its counsel -- contributed money that was intended to fund preparing or submitting the brief.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations set forth in Rules 29(d) and 32(a)(7)(B) of Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font and contains *2,434* words.

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