APPELLATE COURT

OF THE

STATE OF CONNECTICUT

A.C. NO. 34524

SHARON CAPEL PPA DONTE CAPEL,

PLAINTIFFS-APPELLANTS

V.

PLYMOUTH ROCK ASSURANCE CORPORATION,

DEFENDANT-APPELLEE

BRIEF OF *AMICI CURIAE*

INSURANCE ASSOCIATION OF CONNECTICUT
PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA
NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES

Page

Statutes

TABLE OF AUTHORITIES

STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The Insurance Association of Connecticut ("IAC") is a voluntary trade association, representing more than two dozen insurance and financial companies doing business in Connecticut. All of IAC's members have a substantial interest in the development of Connecticut insurance law. IAC regularly appears as *amicus curiae* in insurance-related matters in this Court and the Connecticut Supreme Court. *See, e.g.*, *Voris v. Molinaro*, 302 Conn. 791 (2011); *Reichhold Chems., Inc. v. Hartford Accident & Indem. Co.*, 252 Conn. 774 (2000); *Tovish v. Gerber Elecs.*, 32 Conn. App. 595, 606 (1993).

The Property Casualty Insurers Association of America ("PCI") is the nation's premier trade association for casualty insurers, representing over one thousand companies that write 40.5% of the premiums for the nation's property casualty market. In appropriate cases, PCI undertakes to address issues of importance to its members and the broader insurer community by seeking leave to appear as *amicus curiae* before state and federal appellate courts.

The National Association of Mutual Insurance Companies ("NAMIC") is the largest and most diverse national property and casualty insurers trade association in the United States. Its 1400 member companies write all lines of property and casualty insurance, range in size from small companies offering wind and fire insurance to some of the world's largest insurers providing comprehensive commercial and personal lines coverages, and together account for almost 50 percent of the homeowners insurance market and 31 percent of the business insurance market in the United States. On issues of importance to

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[1] Pursuant to Practice Book § 67-7, the Amici state that no party or their counsel wrote this brief in whole or in part, or contributed to the cost of preparation or submission of this brief. No person or entity other than the Amici and their members made such a monetary contribution.

the property and casualty insurance industry, NAMIC advocates sound public policies on behalf of its members in legislative and regulatory forums and files *amicus curiae* briefs in significant cases before federal and state courts. NAMIC has appeared as *amicus curiae* in the Connecticut Supreme Court on insurance-related matters. *See, e.g.*, *Voris v. Molinaro*, 302 Conn. 791 (2011).

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus briefs in state and federal courts in cases that raise issues of concern to the nation's business community. This is such a case.

INTRODUCTION

The reserved question before this Court asks whether, if an insurer is found to have breached its duty to defend, without proof of bad faith, an insurance company can be held liable to pay a default judgment exceeding the policy limits—here *ten times* the putative policy limits under an insurance contract that the insurer contends was never formed. To allow an award of damages exceeding the policy limits in this case, without a showing of bad faith, would: (a) contravene basic principles of Connecticut contract and tort law; (b) fundamentally alter the framework of Connecticut's insurance law; (c) increase without any limitation the potential exposure of insurance companies on all liability insurance policies issued in Connecticut; and (4) detrimentally affect Connecticut's insurance market. This Court therefore should adhere to the repeatedly-followed rule of *Missionaries of the Company of Mary, Inc. v. Aetna Cas. & Sur. Co.*, 155 Conn. 104 (1967), under which damages for a breach of the duty to defend are limited to the policy limit, absent a showing of bad faith.

FACTUAL BACKGROUND

Plaintiffs/Appellants Sharon Capel ppa Donte Capel filed this lawsuit against Defendant/Appellee Plymouth Rock Assurance Corporation ("Plymouth Rock"), attempting to recover against Plymouth Rock, pursuant to Conn. Gen. Stat. § 38a-321, on a default judgment of over $3 million they obtained against Ingala, arising out of an automobile accident.[2] The parties dispute, among other issues, whether an insurance contract was formed between Plymouth Rock and Ingala. Plymouth Rock's motion for summary judgment on that issue was denied by the Superior Court based upon genuine disputes of

[2] The Amici rely upon the parties' stipulation and briefs for the brief factual background set forth herein.

material fact. Thereafter, in accordance with Conn. Practice Book § 73-1, the parties entered into a stipulation of facts, and the Superior Court (Agati, J.) reserved the following question of law for the consideration and advice of the Connecticut Supreme Court: "In a claim against Plymouth Rock for breach of contract for failure to defend and indemnify Charles Ingala, brought by the Capels as judgment creditors, are the damages limited to the limits of the putative liability policy, $300,000?" The Supreme Court subsequently transferred the case to this Court.

ARGUMENT

I. ALLOWING RECOVERABLE CONTRACT DAMAGES TO EXCEED POLICY LIMITS WITHOUT PROOF OF BAD FAITH WOULD CONFLICT WITH ESSENTIAL PRECEPTS OF CONNECTICUT CONTRACT AND TORT LAW

Allowing damages above policy limits in this case would contravene fundamental principles of Connecticut contract law, in addition to contravening the repeatedly-followed rule of *Missionaries*. In Connecticut, insurance policies are governed by the same general rules that apply to all contracts. *Johnson v. Conn. Ins. Guar. Ass'n*, 302 Conn. 639, 643 (2011). "It is axiomatic that the sum of damages awarded as compensation in a breach of contract action should place the injured party in the same position as he would have been in had the contract been performed." *FCM Group, Inc. v. Miller*, 300 Conn. 774, 804 (2011). Here, assuming an insurance contract existed between Ingala and Plymouth Rock (which Plymouth Rock denies) and that coverage was triggered, at most Ingala would have received a defense by an attorney paid for by Plymouth Rock and, if the case went to trial and a verdict were entered against him, payment of any judgment against him *up to the policy limit*. To award damages greater than what full performance of the contract would have provided, as Plaintiffs urge, violates basic contract law, which requires a court to

"avoid placing the plaintiffs in a better position than they would have been in had the contract been fully performed." *Hees v. Burke Constr., Inc.*, 290 Conn. 1, 8-9 (2009).

For precisely this reason, the Supreme Court of Washington held that damages for breach of the duty to defend are limited to the policy limits (plus defense costs if they do not erode limits). An award above policy limits "violates the fundamental principle of contract damages that . . . an insured should be put in only as good a position as he would have occupied had the contract not been breached." *Greer v. Northwestern Nat'l Ins. Co.*, 743 P.2d 1244, 1250 (Wash. 1987). Connecticut contract law requires the same result. Indeed, *Greer* was cited with approval (although the focus was on a different point) by the Connecticut Supreme Court in *Black v. Goodwin, Loomis & Britton, Inc.*, 239 Conn. 144, 160 (1996), one of the cases in which the Supreme Court recognized that an insurer that breaches its duty to defend is "under a duty to pay the judgment obtained against the [insured] by [the injured party] *up to the limit of liability fixed by its policy.*" *Id.* at 160 (quoting *Schurgast v. Schumann*, 156 Conn. 471, 491 (1968)). Adhering to *Greer* and *Black* also keeps Connecticut well within the mainstream of American law on the issue presented here.[3]

Awarding damages above policy limits in this case also would contravene the basic, fundamental distinction that the law of Connecticut and other jurisdictions makes between contract law and tort law. "The fundamental difference between tort and contract lies in the nature of the interests protected. . . . The duties of conduct which give rise to [a tort action]

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[3] *See, e.g., Mesmer v. Maryland Auto. Ins. Fund*, 725 A.2d 1053, 1059-61 (Md. 1999); *United Servs. Auto. Ass'n v. Pennington*, 810 S.W.2d 777, 784 (Tex. App. 1991); *Conway v. Country Cas. Ins. Co.*, 442 N.E.2d 245, 249 (Ill. 1982); *State Farm Mut. Auto. Ins. Co. v. Paynter*, 593 P.2d 948, 954 (Ariz. Ct. App. 1979); *Engeldinger v. State Auto. & Cas. Underwriters*, 236 N.W.2d 596, 602 (Minn. 1975); *Gordon v. Nationwide Mut. Ins. Co.*, 285 N.E.2d 849, 855 (N.Y. 1972).

are imposed by the law, and are based primarily upon social policy, and not necessarily upon the will or intention of the parties. . . . Contract obligations are imposed because of [the] conduct of the parties manifesting consent . . . ." *Bellemare v. Wachovia Mortgage Corp.*, 284 Conn. 193, 200 (2007) (quoting W. Prosser, TORTS (3d Ed. 1964) § 93, at 634). Here, assuming there was an insurance contract formed between Ingala and Plymouth Rock, nothing in the insurance contract would have required Plymouth Rock to pay more than the policy limits (plus defense costs) if it breached its duty to defend, or for any other reason. The only potential basis for an award above policy limits would be *extra*-contractual, arising from the *tort* of bad faith breach of contract. *See Buckman v. People Express, Inc.*, 205 Conn. 166, 170 (Conn. 1987) ("this court recognizes an independent cause of action in tort arising from an insurer's common law duty of good faith"). Plaintiffs implicitly recognize this distinction when they rely on a public policy argument. (Appellants' Br. at 19.) To the extent courts create public policy, they properly do so only by altering the common law of torts, not by altering the terms of contracts. *See Hammer v. Lumberman's Mut. Casualty Co.*, 214 Conn. 573, 591 (1990) ("A court cannot rewrite the policy of insurance or read into the insurance contract that which is not there. The liability of the insurer is not to be extended beyond the express terms of the contract.") (citation and internal quotations omitted).

In addressing the same issue presented by this case, the Maryland Court of Appeals persuasively reasoned that to allow an award above policy limits for a mere good faith breach of the duty to defend would contravene the fundamental distinction between contract law and tort law. The court explained that "when the dispute is over the existence of any valid contractual obligation covering a particular matter . . . the plaintiff is ordinarily

limited to a breach of contract remedy" rather than tort remedies. "Since the source of the duties to defend and indemnify are entirely contractual, a liability insurer breaches no tort duty when, upon learning of a claim, it erroneously denies coverage and refuses to undertake any defense against the claim." *Mesmer v. Maryland Auto. Ins. Fund*, 725 A.2d 1053, 1059, 1061 (Md. 1999). Connecticut law makes the same distinction between contract law and tort law, *see Bellemare*, 284 Conn. at 200, and warrants the same result.

While Plaintiffs suggest that insurance contracts should be treated differently from other contracts because of an "unequal playing field" between insurers and insureds (Appellants' Br. at 20), that is not the law of Connecticut. As the Connecticut Supreme Court has explained, "[a]n insurance policy is to be interpreted by the same general rules that govern the construction of any written contract," and, absent an ambiguity, an insured is "'bound by the terms of the policy [they] accepted and under which [they] paid premiums,' regardless of whether the policy is a contract of adhesion." *Voris v. Middlesex Mut. Assur. Co.*, 297 Conn. 589, 595-96 (2010). Plaintiffs' claim for extra-contractual damages above policy limits finds no support in the contract, and can only be based on the law of torts, which requires that bad faith be established. *Buckman*, 205 Conn. at 170.

Plaintiffs suggest that contract law principles support their position to the extent that consequential damages that "meet the requirements of causation, certainty, and foreseeability" potentially can be recovered at least under non-insurance contracts. *City of Milford v. Coppola Constr. Co.*, 93 Conn. App. 704, 714-715 (2006).[4] The question of whether consequential damages are available under Connecticut law for breach of the duty

[4] Even assuming these types of damages were available for a good faith breach of an insurance contract, the requirements of causation, certainty and foreseeability would need to be determined on a case-by-case basis.

to defend was recently certified to the Connecticut Supreme Court in *Ryan v. National Union Fire Ins. Co.*, __ F.3d __, 2012 WL 3641803 (2d Cir. Aug. 27, 2012). The distinct issue raised here is whether such damages are properly recoverable *in excess of policy limits* for a mere breach of the duty to defend, without a showing of bad faith.

Under generally-applicable contract law in Connecticut, a clear and unambiguous provision limiting a party's contractual liability can exclude or limit liability for breach of contract, and this applies to consequential damages. *See, e.g., B & D Assocs., Inc. v. Russell*, 73 Conn. App. 66, 73 (2002); Conn. Gen. Stat. § 42a-2-719(3). Analogously here, the policy limit caps Plaintiffs' potential recovery, if they could establish a non-bad faith breach, to the policy limit.[5] Under long-standing and controlling law in Connecticut (and elsewhere), the measure of contract damages places the parties in the position they would have been in had performance been tendered. *FCM Group*, 300 Conn. at 804. Here, performance of the alleged insurance contract would have provided Plaintiffs only with the costs of a defense and funding of a settlement or judgment up to the policy limit. To allow contractual damages, direct, consequential or otherwise, to vastly exceed what performance of the contract would have provided violates the central principle governing the scope of damages for a non-bad-faith breach of contract. Not only does the recovery of

[5] It appears that the specific terms of the putative liability insurance policy at issue in this case are not in the record. However, the existence here of what the trial court found to be a reasonable dispute over the formation of an insurance contract is further reason not to allow damages above policy limits. As the Connecticut Supreme Court held in *Keithan v. Mass. Bonding & Ins. Co.*, 159 Conn. 128 (1970), an insurer "was under no contract duty to provide a defense for an uninsured stranger to the contract . . . simply because a third party had alleged facts which, if true, would have given Keithan the status of an insured." *Id.* at 142. Similarly here, the mere possibility that Ingala might be deemed to have formed an insurance contract with Plymouth Rock would not obligate it to provide a defense, let alone do so under penalty of potential liability for a judgment in excess of policy limits.

extra-contractual damages conflict directly with fundamental contract law, it also undermines the critical distinction that Connecticut's insurance law draws between contractual claims (i.e., claims for indemnity provided for in the contract) and extra-contractual claims. This distinction has been drawn through the long-term, careful balancing of interests by lawmakers, regulators and courts, as addressed in Part II below.[6]

II. UNDOING THE POLICY LIMIT CAP ON DAMAGES FOR A GOOD FAITH BREACH OF THE DUTY TO DEFEND WOULD VITIATE THE DISTINCTION BETWEEN CONTRACTUAL AND EXTRA-CONTRACTUAL CLAIMS THAT PERVADES CONNECTICUT INSURANCE LAW

Throughout Connecticut insurance law a fundamental, pervasive distinction exists between contractual claims and extra-contractual claims: in order for a plaintiff to obtain a recovery beyond what the contract explicitly provides, she is required to show either a dishonest or sinister purpose or a general business practice that violates Connecticut's unfair claim settlement statute. Establishing a bad faith claim requires "more than mere negligence; it involves a dishonest purpose." *De La Concha of Hartford, Inc. v. Aetna Life Ins. Co.*, 269 Conn. 424, 433 (2004); *see also Alexandru v. Strong*, 81 Conn. App. 68, 81 (2004) ("Absent allegations and evidence of a dishonest purpose or sinister motive, a claim for breach of the implied covenant of good faith and fair dealing is legally insufficient.") Similarly, the Connecticut Insurance Practices Act (CUIPA) proscribes various unfair claim settlement practices by insurers, but only when they are "[c]ommitt[ed] or perform[ed] with such frequency as to indicate a

[6] Plaintiffs cite *Bi-Economy Market, Inc. v. Harleysville Ins. Co. of New York*, 886 N.E.2d 127 (N.Y. 2008), but that case did not overrule a prior decision by the New York Court of Appeals holding that damages for breach of the duty to defend, without a showing of bad faith, are limited to the policy limits and costs of defense (that do not erode limits). *See Gordon v. Nationwide Mut. Ins. Co.*, 285 N.E.2d 849, 855 (N.Y. 1972). *Bi-Economy* was decided in the unique context of a business interruption insurance claim, and the court recognized that, consistent with *Gordon*, a showing of bad faith would be necessary for the insured to recover consequential damages. *See Bi-Economy*, 886 N.E.2d at 132.

general business practice." *See* Conn. Gen. Stat. § 38a-816(6). Under well-settled law, the Connecticut Unfair Trade Practices Act (CUTPA) allows an insured to pursue a claim for violation of CUIPA (under which there is no private right of action) only if the insured can establish a general business practice. This is because the enactment of CUIPA made a "legislative determination that isolated instances of unfair insurance settlement practices are not so violative of the public policy of this state as to warrant statutory intervention." *Mead v. Burns*, 199 Conn. 651, 666 (1986); *see also Naples v. Keystone Bldg. & Dev. Corp.*, 295 Conn. 214, 227 (2010) (mere breach of contract does not constitute a CUTPA violation). If Plaintiffs' position were adopted in this case, it would allow an extra-contractual recovery without any showing of a dishonest purpose or a general business practice of the type set forth in CUIPA, thereby rendering Connecticut's bad faith law and statutory law largely irrelevant in the context of a breach of the duty to defend.[7]

There are other doctrines in Connecticut insurance law that distinguish between contractual and extra-contractual claims and also turn on whether the insurer acted in bad faith. For example, "a trial court may award attorney's fees to a policyholder that has prevailed in a declaratory judgment action against its insurance company only if the policyholder can prove that the insurer has engaged in bad faith conduct prior to or in the course of the litigation." *ACMAT Corp. v. Greater N.Y. Mut. Ins. Co.*, 282 Conn. 576, 592 (2007). If the insurer was merely incorrect in denying a claim but did not act

[7] The same type of distinction between contractual and extra-contractual claims is prevalent in other jurisdictions that have not allowed a recovery in excess of policy limits, absent bad faith, for breach of a duty to defend. *See, e.g., Sukup v. State*, 227 N.E.2d 842, 844 (N.Y. 1967) ("It would require more than an arguable difference of opinion between carrier and insured over coverage to impose an extra-contractual liability . . . .").

in bad faith, the insured cannot recover its attorney's fees despite successfully proving that the claim was covered. *See id.* A predicate showing of bad faith meeting certain requirements also is a prerequisite to broader discovery into otherwise privileged materials. *See Hutchinson v. Farm Family Cas. Ins. Co.*, 273 Conn. 33, 42-43 (2005).

The clear distinction that Connecticut law makes between remedies and even discovery available in bad faith cases versus non-bad faith cases (such as the instant case) strongly supports adherence to the *Missionaries* rule. Vitiating that rule would disrupt the fabric of Connecticut's insurance law.

III. OVERTURNING ESTABLISHED CONNECTICUT LAW ON THE SCOPE OF DAMAGES FOR BREACH OF THE DUTY TO DEFEND COULD HAVE SERIOUS ADVERSE CONSEQUENCES FOR THE CONNECTICUT INSURANCE MARKETPLACE

If this Court were to fail to follow the established Connecticut Supreme Court precedent in *Missionaries* and its progeny, that could have serious adverse consequences for the Connecticut insurance market. The effective operation of an insurance market depends on the ability of insurers to accurately rate policies to ensure that adequate funds will be available to pay claims. Insurers must comply with various legal requirements with respect to the adequacy of premium rates. Premiums must be adequate for the risk undertaken in light of loss experience, *see* Conn. Gen. Stat. §§ 38a-665, 38a-686, and to ensure compliance with this and other requirements, insurers must submit their rates for review by the Commissioner of Insurance. *See* Conn. Gen. Stat. §§ 38a-676, 38a-676a, 38a-688. Allowing damages for breach of the duty to defend that exceed the policy limit could lead to inadequacy in premium rates, and require an increase in premium rates. *See* Conn. Gen. Stat. §§ 38a-665, 38a-686; *Robbins v. Physicians for Women's Health, LLC*, 133 Conn. App. 577, 613 (2012) (Bear, J., dissenting) (noting that "[t]he majority's ruling

may result in an increase in insurance premiums for many businesses and professional entities" where not warranted).

CONCLUSION

For the foregoing reasons, the Amici respectfully request that the reserved question be answered in the affirmative, and that the Court hold that damages for breach of an insurer's duty to defend, absent a showing of bad faith, are limited to the policy limits.

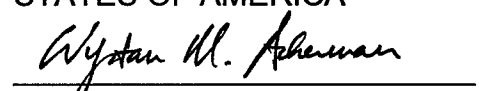
RESPECTFULLY SUBMITTED,

INSURANCE ASSOCIATION OF CONNECTICUT

PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA

NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

By 

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CERTIFICATION

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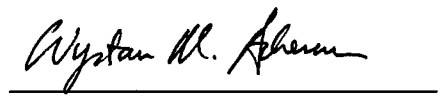
This is to further certify that this brief complies with all provisions of section 67-7 and section 67-2, including the use of the Arial 12 point font.



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692 F.3d 162
(Cite as: 692 F.3d 162)

H

United States Court of Appeals,
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Bruce Charles RYAN,
Plaintiff–Counter–Defendant–Appellee–Cross–Appellant,
Russell William Newton, Robert Fitzpatrick, Merit Capital Associates, Inc.,
Plaintiffs–Appellees–Cross–Appellants,
David W. Gwynn, Raquel Gwynn, Gwynn Financial Svc. Inc., Consolidated Plaintiffs–Counter Defendants,
v.
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA, Defendant–Counter–Claimant–Appellant–Cross–Appellee,
AIG Tech. Svc. Inc., Chartis Claims, Inc., Defendants.

Docket Nos. 10–4528–cv (L), 10–4700–cv (XAP).
Argued: May 10, 2012.
Decided: Aug. 27, 2012.

Background: Insureds, as executives of securities broker-dealer, filed suit against insurer, claiming breach of duty to defend and indemnify insureds in underlying securities arbitration, pursuant to securities broker/dealer professional liability insurance policy. Following jury trial, the United States District Court for the District of Connecticut, Christopher F. Droney, J., 2010 WL 3925208, entered judgment for insureds and awarded consequential damages, in addition to costs of defense and underlying settlement which insured had already paid. Insurer appealed.

Holdings: The Court of Appeals, Lohier, Circuit Judge, held that:
(1) insurer had duty to defend under policy, but
(2) questions were certified as to availability of consequential damages, including reputational damages and loss of income, for insurer's breach of duty to defend under Connecticut law.

Affirmed in part and questions certified.

West Headnotes

[1] Federal Courts 170B ⚿781

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)2 Questions of Local Law
170Bk781 k. Local law questions in general. Most Cited Cases
Court of Appeals reviews de novo the district court's interpretation of state law.

[2] Insurance 217 ⚿2914

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2914 k. Pleadings. Most Cited Cases

Insurance 217 ⚿2915

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2915 k. Matters beyond pleadings. Most Cited Cases
Under Connecticut law, a liability insurer has a duty to defend its insured if the pleadings allege a covered occurrence, even though facts outside the four corners of those pleadings indicate that the claim may be meritless or not covered.

[3] Insurance 217 ⚿2915

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2915 k. Matters beyond pleadings. Most Cited Cases
Under Connecticut law, an insurer is required to provide a defense when it has actual knowledge

of facts establishing a reasonable possibility of coverage, even if such facts lie outside the four corners of the complaint.

[4] Insurance 217 ⚿2913

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2913 k. In general; standard. Most Cited Cases

Insurance 217 ⚿2914

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2914 k. Pleadings. Most Cited Cases

Under Connecticut law, in determining whether a claim falls within the scope of an insurance policy, broad policy language is construed in favor of imposing a duty to defend on the insurer, and a defense is required if an allegation of the complaint falls even possibly within the coverage.

[5] Insurance 217 ⚿2264

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2263 Commencement and Duration of Coverage
217k2264 k. In general. Most Cited Cases

Insurance 217 ⚿2386

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(B) Coverage for Particular Liabilities
217k2383 Errors and Omissions Liabilit- ies
217k2386 k. Particular exclusions. Most Cited Cases

Insurance 217 ⚿2915

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2915 k. Matters beyond pleadings. Most Cited Cases

Under Connecticut law, investor's claims of losses from alleged wrongful acts of insured registered representative and executives of securities broker-dealer, and insurer's receipt of information that representative did not have discretionary control over investor's account, triggered insurer's duty to defend insureds in securities arbitration, pursuant to securities broker/dealer professional liability insurance policy that excluded coverage for losses arising out of wrongful acts or interrelated wrongful acts occurring prior to period of coverage and excluded coverage of discretionary accounts, since claims were possibly based on alleged wrongful acts occurring during period of coverage.

[6] Federal Courts 170B ⚿392

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(B) Decisions of State Courts as Authority
170Bk388 Federal Decision Prior to State Decision
170Bk392 k. Withholding decision; certifying questions. Most Cited Cases

Questions would be certified to Supreme Court of Connecticut as to availability of consequential damages, including reputational damages and loss of income, for liability insurer's breach of duty to defend, under Connecticut law, since questions were not authoritatively answered by any Connecticut court or statute, answers would be determinative of principal issues on insurer's appeal, and Connecticut had strong interest in deciding dispositive issues regarding award of consequential damages in insurance industry. C.G.S.A. § 51–199b(d); U.S.Ct. of App. 2nd Cir.Rules § 27.2, 28 U.S.C.A.

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Plaintiffs–Appellees–Cross–Appellants.

Dennis O. Brown, Gordon & Rees LLP (Joseph R. Geoghegan, on the brief), Hartford, CT, for De- fendant–Counter–Claimant–Appellant–Cross–Appellee.

Before: WESLEY and LOHIER, Circuit Judges, and MURTHA, District Judge.[FN*]

FN* The Honorable J. Garvan Murtha of the United States District Court for the District of Vermont, sitting by designation.

LOHIER, Circuit Judge:

This appeal requires us to consider whether consequential damages, which are traditionally available for breach of contract claims, are also available for a claim of breach of a duty to defend an insured under Connecticut law, and if so, whether they may include damages for harm to reputation. The defendant National Union Fire Insurance Company of Pittsburgh PA ("National Union") appeals from a judgment of the United States District Court for the District of Connecticut (Droney, *J.*) awarding the plaintiffs consequential damages, following a jury trial, for National ***164** Union's breach of its duty to defend the plaintiffs in a securities arbitration. The District Court found that National Union had breached its duty to defend and concluded that, in addition to being liable for the defense costs and underlying settlement, which it had already paid, National Union could also be liable for consequential damages for the breach of the duty to defend, including damages for injury to professional reputation and loss of future earning potential. On appeal, National Union challenges the District Court's determination that it breached its duty to defend, and also argues that consequential damages are not available in the context of an insurer's breach of a duty to defend.

The Connecticut courts have said very little either way about whether consequential damages are available solely for such a breach. Nor have they determined whether reputational damages, specifically, are compensable in an action predicated on an insurer's breach of its duty to defend. Although no case in Connecticut has awarded consequential damages solely for a breach of a duty to defend, we hesitate to prohibit recovery of such damages, which are generally permitted under contract law, when Connecticut has not clearly addressed the issue. Similarly, absent a precedential decision from the Connecticut courts, we are reluctant to foreclose claims for reputational damages in actions similar to this one. Accordingly, we certify the following two questions to the Supreme Court of Connecticut and stay resolution of this appeal and cross-appeal in the interim: [FN1]

FN1. National Union and the plaintiffs raise other issues in their appeal and cross-appeal, respectively, that are not relevant to the question certified in this opinion, but that this panel will consider once the Supreme Court of Connecticut has either provided us with guidance or declined certification.

(1) Does Connecticut law permit a policyholder to recover consequential damages in a breach of contract action against an insurer predicated on the insurer's breach of its duty to defend?

(2) If consequential damages are available, may such damages include damages for harm to reputation and loss of income?

BACKGROUND

Plaintiffs Bruce Ryan, Russell Newton, and Robert Fitzpatrick were executives of Merit Capital Associates, Inc. ("Merit"), a securities broker-dealer. All three were insured by National Union under a Securities Broker/Dealer Professional Liability Insurance Policy (the "Policy"), which covered losses up to $1 million for each loss and $2 million in the aggregate for the period from August 23, 1999 to September 23, 2001. In August 2001 Michael Sowell, Merit's former client, filed a securit-

ies arbitration claim before the National Association of Securities Dealers ("NASD") against the plaintiffs and David Gwynn, a registered representative working for Merit. In his Amended Statement of Claim (the "Sowell Claim"), Sowell claimed approximately $1 million in damages arising from Gwynn's mismanagement of his Merit account, which was opened in May 1998. Sowell alleged that Gwynn had "churned" his account by trading excessively for the sole purpose of generating commissions, fraudulently and negligently managed the account, and unlawfully solicited investments for some sham charter school businesses owned by Gwynn. He also alleged that the other Merit executives had negligently supervised Gwynn.

Plaintiffs submitted the Sowell Claim to National Union, seeking a defense and coverage under the Policy, which included three exclusions relevant to this appeal. First, exclusion (f) exempted coverage for ***165** losses arising out of wrongful acts or interrelated wrongful acts occurring prior to August 23, 1999. Second, exclusion (s) precluded coverage of discretionary accounts. Third, exclusion (t) barred coverage of claims involving entities outside of Merit.

Several months after initiating an investigation to confirm Sowell's allegation that he had given Gwynn discretionary control over his account, and after also arranging for separate counsel to represent Gwynn, National Union withdrew its defense. Although it subsequently received documents showing that Sowell's account was in fact not discretionary, National Union continued to deny the plaintiffs a defense. Meanwhile, the plaintiffs obtained replacement counsel, and Gwynn proceeded *pro se* in the NASD arbitration, although he borrowed funds to retain counsel to pursue coverage under the Policy. A few days before the arbitration, Gwynn, through counsel, again sought coverage from National Union, warning the insurer that he might allow the arbitration panel to enter a default judgment against him and assign his claims against National Union to Sowell.

By the time National Union provided Gwynn with defense counsel, it was too late. Although he had not agreed to a default judgment, Gwynn had already appeared *pro se* at the arbitration and compromised the plaintiffs' defense. The arbitration panel found Gwynn and the plaintiffs jointly and severally liable and awarded Sowell $1.125 million in damages. Gwynn and the plaintiffs requested that National Union settle with Sowell before the arbitration award was confirmed. When National Union failed to respond, the plaintiffs commenced this action alleging that National Union had breached its duties to defend and indemnify, acted in bad faith, and violated various provisions of Connecticut law not relevant to the question certified in this opinion. The plaintiffs sought to recover their "costs connected with the Sowell arbitration, damages related to regulatory proceedings initiated as a result of the Sowell arbitration award, and damage to the plaintiffs' reputations, earning potential, ability to conduct business and obtain certain licenses." S.P.A. 5. Soon after the plaintiffs filed this lawsuit, National Union negotiated a $1 million settlement with Sowell, as part of which Sowell agreed to vacate the arbitration award and enter into a covenant not to sue National Union, the plaintiffs, or Gwynn. National Union then filed counterclaims against the plaintiffs seeking to recover these costs and alleging unjust enrichment, among other claims.

Arguing that it had no duty to defend because Sowell's allegations clearly fell within exclusions (s), (f), and (t) of the Policy, National Union moved for summary judgment to dismiss the plaintiffs' claims. The District Court denied the motion because it concluded that those exclusions did not preclude coverage under the Policy for all of the claims in the underlying Sowell Claim. [FN2]

> FN2. Although it may have been able to do so, National Union did not argue before the District Court that the claims in the underlying Sowell Claim were segregable for the purposes of its duty to defend.

The plaintiffs' claims then proceeded to a jury

trial. During the trial, the court determined that National Union had breached its duty to defend the Sowell Claim and granted the plaintiffs' motion for judgment as a matter of law on National Union's counterclaim of unjust enrichment. The court further concluded that by breaching its duty to defend, National ***166** Union was liable to indemnify the plaintiffs.

The District Court found that National Union had already paid the plaintiffs' attorneys' fees incurred in defending the Sowell arbitration and also paid to settle the arbitration. Accordingly, the only remaining issues for the jury to determine were: (1) whether the plaintiffs had proven that they had suffered "reasonably foreseeable" consequential damages from National Union's breach of its duty to defend, and (2) whether National Union had acted in bad faith and, therefore, whether the plaintiffs were entitled to compensatory and punitive damages. The plaintiffs contended that they had suffered consequential damages "in the form of injury to their professional reputations and future earning potential, as well as continued costs in addressing regulatory proceedings." J.A. 584. They relied on evidence from an expert who testified that broker/dealers who have paid significant sanctions have trouble finding work, and on testimony from plaintiff Newton, who described his professional difficulties following the Sowell award.

In response, National Union argued that consequential damages were not available under Connecticut law. The District Court rejected National Union's argument and charged the jury that it could award consequential damages to the plaintiffs above the limits set forth in the Policy. The jury found that National Union had not acted in bad faith and thus awarded only consequential damages in the amounts of $350,000 for Ryan, $325,000 for Newton, $200,000 for Fitzpatrick, and $0 for Merit. In a post-trial motion, National Union insisted that consequential damages should be denied as a matter of law, as the plaintiffs had failed to prove that the damages were foreseeable and had failed to provide a sufficient evidentiary basis for the jury's damages calculation. The District Court denied the motion and entered judgment in favor of the plaintiffs.

This appeal followed.

DISCUSSION

[1] On appeal, National Union argues principally that it had no duty to defend the Sowell Claim, and that, even if it had breached its duty, consequential damages are not available under Connecticut law for such a breach. With respect to both issues, "[w]e review de novo the district court's interpretation of [state] law." *Amerex Grp., Inc. v. Lexington Ins. Co.,* 678 F.3d 193, 199 (2d Cir.2012). We conclude that National Union had a duty to defend the Sowell Claim and that it breached that duty when it declined to defend the action as a whole.[FN3] *See Sec. Ins. Co. of Hartford v. Lumbermens Mut. Cas. Co.,* 264 Conn. 688, 826 A.2d 107, 120 (2003) ("An insurer must bear the entire cost of defense when there is no reasonable means of prorating the costs of defense between the covered and the not-covered items...." (alteration and quotation mark omitted)); *Lancia v. State Nat'l Ins. Co.,* 134 Conn.App. 682, 41 A.3d 308, 314 (2012). As we explain below, however, we certify the question of whether consequential damages are available under Connecticut law for an insurer's breach of its duty to defend and, if so, whether the insured may recover reputational damages.

FN3. On appeal, the plaintiffs do not contest the District Court's finding that exclusion (t) of the Policy applied to Sowell's claims relating to Gwynn's charter school businesses. For its part, National Union has abandoned the argument that exclusion (s) (which relates to discretionary control) absolves it of the duty to defend Sowell's thirteen claims of churning, fraud, negligence, and violation of various NASD rules.

167 1.** ***Duty To Defend

National Union relies on exclusion (f) of the

Policy to contend that it had no duty to defend the Sowell Claim.[FN4] This exclusion states:

> FN4. National Union could not have appealed the denial of its motion for summary judgment, because such a denial is not a final judgment and is not ordinarily appealable. *See* 28 U.S.C. § 1291. Thus, insofar as National Union appeals the District Court's denial of National Union's summary judgment motion, that appeal is improper. *See Pahuta v. Massey–Ferguson, Inc.*, 170 F.3d 125, 132 (2d Cir.1999). The District Court entered its final judgment on the applicability of exclusion (f) when it disposed of the plaintiffs' Rule 50 motion, concluding that "because a reasonable jury would not have a legally sufficient evidentiary basis to find for National Union on the issue of breach of duty to defend, judgment as a matter of law is entered for the plaintiffs on that count against National Union." J.A. 533. Accordingly, we construe National Union's appeal as an appeal from the District Court's ruling on the plaintiffs' Rule 50 motion, rather than as an appeal from its denial of summary judgment. Because we conclude below that the District Court ruling on that legal question was correct, we affirm the court's entry of judgment for the plaintiffs on that issue.

> The Insurer shall not be liable for Loss in connection with any Claim made against an Insured:
>
> f) alleging, arising out of, based upon or attributable to any Wrongful Act occurring prior to [August 23, 1999] or arising out of any subsequent Interrelated Wrongful Act.
>
> J.A. 725–26.

[2][3][4] Under Connecticut law, " '[i]t is well established ... that a liability insurer has a duty to defend its insured ... if the pleadings allege a covered occurrence, even though facts outside the four corners of those pleadings indicate that the claim may be meritless or not covered.' " *Hartford Cas. Ins. Co. v. Litchfield Mut. Fire Ins. Co.*, 274 Conn. 457, 876 A.2d 1139, 1144 (2005) (first two alterations in original) (quoting *QSP, Inc. v. Aetna Cas. & Sur. Co.*, 256 Conn. 343, 773 A.2d 906, 914 (2001)). Connecticut also requires that the insurer " 'provide a defense when it has actual knowledge of facts establishing a reasonable possibility of coverage,' " even if such facts lie outside the "four corners of the complaint." *Id.* at 1146 (quoting *Fitzpatrick v. Am. Honda Motor Co.*, 78 N.Y.2d 61, 571 N.Y.S.2d 672, 575 N.E.2d 90, 93 (1991)). In determining whether a claim falls within the scope of an insurance policy, the Supreme Court of Connecticut "construes broad policy language in favor of imposing a duty to defend on the insurer," *id.* at 1145, and requires a defense "[i]f an allegation of the complaint falls even *possibly* within the coverage," *id.* at 1144 (emphasis in original) (quotation mark omitted).

[5] With these principles in mind, we affirm the District Court's determination that National Union had a duty to defend the Sowell Claim. Although the Sowell Claim alleges that Gwynn's investment relationship with Sowell began in February 1998, several allegations of wrongful acts are either undated or occurred after August 23, 1999. For example, Sowell's claim of churning did not identify when Gwynn conducted his "excessive, in-and-out trading in technology stocks" or his "trad[ing] extensively on margin," J.A. 992, and whenever Sowell alleged that certain misconduct occurred "during this timeframe," he referenced dates after August 1999. More particularly, Sowell claimed that when his account experienced significant gains in December 1999 and early 2000, it was "[d]uring this timeframe" that Gwynn had refused his requests "to sell at least half of his stock and put the profits in cash" and instead "continued [the] hyperactive***168** trading." J.A. 993. Sowell also alleged that when his account began losing value from April 2000 to 2001, he attempted "during this

timeframe" to contact Gwynn, who advised him "that the account was fine" and "not to watch the account." J.A. 993–94. Similarly, Sowell did not identify a time frame for the negligence, fraud, and failure to supervise causes of action—although these presumably occurred after Sowell opened his account in 1998, but before he filed his complaint in 2001. Given the ambiguity in the timing of the alleged wrongful acts within the four corners of the complaint, it is *possible* that these claims were based on conduct that occurred after August 1999.

National Union argues that exclusion (f) nonetheless precludes coverage because all of the alleged losses "arose out of" two alleged primary wrongful acts that occurred prior to August 23, 1999:(1) Gwynn directing Sowell to sign a power of attorney and give Gwynn discretionary control over the account, and (2) Gwynn's improper solicitation of investments for charter school businesses. We disagree. For the reasons discussed above, given our duty to construe a policy governed by Connecticut law broadly in favor of imposing a duty to defend, it is not clear from the face of the Sowell Claim that all of the alleged losses "arose out of" these two wrongful acts within the meaning of the Policy. *Cf. U.S. Auto. Ass'n v. Kaschel,* 84 Conn.App. 139, 851 A.2d 1257, 1261 (2004) (finding that injuries arose out of an automobile accident because the "accident was the operative event giving rise to the injuries"). Therefore, the Sowell Claim's allegations possibly fell within the scope of the Policy's coverage. Furthermore, National Union did not contest that it received information that Gwynn did not in fact have discretionary control over Sowell's account.

Accordingly, the District Court properly determined that National Union had a duty to defend the Sowell Claim, and that it breached that duty. Because we conclude that National Union breached its duty to defend, we now address whether Connecticut law permits the plaintiffs to recover consequential damages for National Union's breach of that duty.

2. *Consequential Damages*

The parties rely on competing interpretations of *Missionaries of the Company of Mary, Inc. v. Aetna Casualty & Surety Co.,* 155 Conn. 104, 230 A.2d 21 (1967), in arguing their respective positions on the availability of consequential damages for breach of a duty to defend. The plaintiff insured in *Missionaries* sued the insurer for breaching its duties to defend and indemnify the plaintiff in a negligence action brought by a person who had been injured on the plaintiff's property. *Missionaries,* 230 A.2d at 22. After determining that the insurer had breached its duty to defend the plaintiff, the Supreme Court of Connecticut reasoned that the plaintiff was entitled to recover the amount of the settlement between the plaintiff and the injured party, without having to prove a causal relationship between the breach and the negative result of the negligence action that "flowed from" the breach. *Id.* at 26. Thus the court established that "[w]here an insurer is guilty of a breach of its contract to defend, it is liable to pay to the insured not only his reasonable expenses in conducting his own defense but, in the absence of fraud or collusion, the amount of a judgment obtained against the insured up to the limit of liability fixed by its policy." *Keithan v. Mass. Bonding & Ins. Co.,* 159 Conn. 128, 267 A.2d 660, 666 (1970) (citing *Missionaries,* 230 A.2d at 26).

***169** The court in *Missionaries* reached this conclusion despite the possibility that the injury that occurred on the plaintiff's property fell within an exclusion from the insurer's duty to indemnify. *Missionaries,* 230 A.2d at 25. It appears to have concluded that the insurer, having breached its duty to defend, was estopped from invoking the indemnity coverage exclusion: "[t]he defendant, after breaking the contract by its unqualified refusal to defend, should not thereafter be permitted to seek the protection of that contract in avoidance of its indemnity provisions." *Id.* at 26.

Pointing to the absence of any subsequent case law permitting a policyholder to recover con-

sequential damages for its insurer's breach of a duty to defend under Connecticut law, National Union urges us to conclude that the measure of damages applied in *Missionaries* is the *only* permissible measure for damages in cases involving a breach of a duty to defend. The plaintiffs respond that a breach of a duty to defend is really no more than a breach of a contractual duty, and that neither *Missionaries* nor any of the cases cited by National Union expressly precludes the availability of traditional contract remedies, including consequential damages.

Connecticut courts have offered virtually no guidance on this issue. In *L.F. Pace & Sons, Inc. v. Travelers Indemnity Co.,* 9 Conn.App. 30, 514 A.2d 766 (1986), a Connecticut intermediate appellate court declined to distinguish insurance claims from other contract claims as they relate to the recovery of consequential damages. *See id.* at 772–74 (affirming jury award of consequential damages for breach of implied contract to act as surety). And in *City of West Haven v. Liberty Mutual Insurance Co.,* CIV. No. N–87–68 (PCD), 1989 WL 190242 (D.Conn. June 1, 1989), a federal district court in Connecticut suggested in dictum that consequential damages may be available based on the facts of that case. The court cited a treatise for the proposition that "[d]amages for wrongful refusal to defend a claim include the negotiated or adjudicated amount of the claim, the insured's expenses in resisting the claim and *any additional loss legally traceable to the breach* in order that the insured may be made whole." *Id.* at *2 (emphasis added) (quoting 7C Appleman, *Insurance Law and Practice,* § 4689).[FN5] At issue in *City of West Haven,* however, was the recovery of attorneys' fees for the duty to defend action, which the court regarded as a form of punitive or exemplary damages. *Id.*

> FN5. The treatise upon which *City of West Haven* relied for this proposition, *Insurance Law and Practice,* itself cites a federal district court case that merely recites the rule in *Missionaries. See United Servs. Auto. Ass'n v. Glens Falls Ins. Co.,* 350 F.Supp. 869 (D.Conn.1972).

National Union asserts that *City of West Haven* supports its narrow interpretation of *Missionaries* by limiting the award of attorneys' fees to situations in which "the breach of contract is motivated by bad faith, malice or reckless indifference." *Id.* We find this argument unpersuasive, if for no other reason than that the court in *City of West Haven* determined that *Missionaries* was irrelevant because the plaintiff in that case had withdrawn its request for similar attorneys' fees. *Id.* In short, no Connecticut decision appears to answer the specific dispositive question presented by this appeal.

Nor do the policy considerations underlying *Missionaries* compel a decision one way or the other on the availability of consequential damages. We recognize that what appears to be the estoppel rule adopted in *Missionaries* reflects a preference under Connecticut law for an insurer to provide a defense for claims that are even potentially covered by the relevant ***170** policy, under a reservation of rights. *See Missionaries,* 230 A.2d at 26. The estoppel rule prompts insurers to err on the side of providing a defense. *See Keithan,* 267 A.2d at 666–67. But contract remedies, which would ordinarily include consequential damages, *see Sullivan v. Thorndike,* 104 Conn.App. 297, 934 A.2d 827, 833 (2007), would also encourage insurers to defend the insured. And the breach of a duty to defend seems fundamentally to be a breach of a contractual duty. Indeed, courts in other states have relied on traditional breach of contract principles to express a similar preference to motivate insurers to provide a defense. *See, e.g., Bainbridge, Inc. v. Travelers Cas. Co. of Conn.,* 159 P.3d 748, 751 (Colo.App.2006) ("Generally, the appropriate course of action for an insurer who believes it has no duty to defend is to provide a defense ... under a reservation of its rights to seek reimbursement, or to file a declaratory judgment action after the underlying case has been adjudicated."); *Newhouse v. Citizens Sec. Mut. Ins. Co.,* 176 Wis.2d 824, 501 N.W.2d 1, 6 (1993) ("The best

approach is for the insurance company to defend under a reservation of rights.").

In sum, Connecticut cases are silent on the availability of these damages in duty to defend cases, a lone federal district court in Connecticut addressed the issue only in dicta, and policy considerations underlying *Missionaries* fail to provide a decisive answer. Under these circumstances, we are unable to conclude with confidence that *Missionaries* precludes consequential damages arising out of a breach of the duty to defend.

3. *Reputational Damages*

Even if consequential damages are available, it is not clear that Connecticut law permits plaintiffs to recover reputational damages for breach of a contractual duty to defend. Connecticut appellate courts have not addressed whether such reputational damages are available in a breach of contract action. [FN6] It is true that some courts in other jurisdictions have held that reputational damages arising from a breach of contract are typically not compensable, as they are "too speculative and could not reasonably be presumed to have been contemplated by the parties when they formed the contract." *Rice v. Community Health Ass'n,* 203 F.3d 283, 288 (4th Cir.2000); *see Flynn v. AK Peters, Ltd.,* 377 F.3d 13, 22 (1st Cir.2004); *Smith v. Positive Prods.,* 419 F.Supp.2d 437, 453 (S.D.N.Y.2005); *O'Leary v. Sterling Extruder Corp.,* 533 F.Supp. 1205, 1209–10 (D.Wis.1982). But here, the District Court specifically instructed the jury that it should award consequential damages only if the plaintiff proved those damages would have been contemplated by the parties at the time they agreed to the Policy. Without more guidance from the Connecticut courts on this important issue, we are reluctant to decide one way or the other whether a plaintiff can recover reputational damages in such actions under Connecticut law, even when a jury finds that the damages are not speculative and were contemplated at the time the contract was formed.

> FN6. At least one Connecticut trial court has suggested that recovery for loss of reputation arising out of a breach of contract is ordinarily not allowed. *See Sutera v. Estate of Washton,* No. 556177, 2003 WL 1478788, at *8 (Conn.Super.Ct. Mar. 14, 2003).

4. *Certification*

[6] Under the rules of this Court and Connecticut law, we may certify a question to the Supreme Court of Connecticut "if the answer may be determinative of an issue" in a pending case before us "and if there is no controlling appellate decision, ***171** constitutional provision or statute." *See* Conn. Gen.Stat. § 51–199b(d); 2d Cir. Local R. 27.2. We conclude that certification is warranted in this case for at least three reasons. First, "no Connecticut court has ever provided an authoritative answer" to the dispositive questions in this appeal, *Caruso v. Siemens Bus. Commc'ns Sys., Inc.,* 392 F.3d 66, 71 (2d Cir.2004), and there is no statute that addresses the issues. We have "long recognized that state courts should be accorded the first opportunity to decide significant issues of state law through the certification process." *Parrot v. Guardian Life Ins. Co. of Am.,* 338 F.3d 140, 144 (2d Cir.2003). Second, an answer to the questions we certify will be determinative of the principal issues on appeal. Third, "[i]nsurance is an important industry in Connecticut," *Fireman's Fund Ins. Co. v. TD Banknorth Ins. Agency Inc.,* 644 F.3d 166, 172 (2d Cir.2011), and the availability of consequential damages in this context implicates significant public policy considerations such that "Connecticut has a strong interest in deciding the issue[s] certified rather than having the only precedent on point be that of the federal court," *Parrot,* 338 F.3d at 145 (alteration in original) (quotation mark omitted); *see Arrowood Indem. Co. v. King,* 605 F.3d 62, 79–80 (2d Cir.2010) ("The case for certification to the Connecticut Supreme Court is especially compelling when the uncertainty pertains to an insurance dispute, given the 'established preeminence' of that court in the field of insurance law."). Under these circumstances, it would be prudent and "in the interest of simplicity, directness and economy of judi-

cial action" to certify the questions presented by this case. Conn. R.App. P. § 82–3.

CONCLUSION

For the reasons set forth above, we respectfully certify the following questions to the Supreme Court of Connecticut:

(1) Does Connecticut law permit a policyholder to recover consequential damages in a breach of contract action against an insurer predicated on the insurer's breach of its duty to defend?

(2) If consequential damages are available, may such damages include damages for harm to reputation and loss of income?

The Supreme Court of Connecticut may reformulate this question and address any additional questions that it deems pertinent to this appeal. *See* Conn. Gen.Stat. § 51–199b(k); Conn. R.App. P. § 82–3.

It is hereby Ordered that the Clerk of Court transmit to the Clerk of the Supreme Court of Connecticut a Certificate, together with this decision and a complete set of the briefs, appendices, and record filed in this Court by the parties. The parties are directed to bear equally such fees and costs that may be required by the Supreme Court of Connecticut. This panel will retain jurisdiction to consider all issues that remain on this appeal and cross-appeal (including issues not discussed in this opinion) once the Supreme Court of Connecticut has either provided us with its guidance or declined certification.

CERTIFICATE

The foregoing is hereby certified to the Supreme Court of Connecticut pursuant to Connecticut General Statute § 51–199b and Second Circuit Local Rule 27.2, as ordered by the United States Court of Appeals for the Second Circuit.

C.A.2 (Conn.),2012.
Ryan v. National Union Fire Ins. Co. of Pittsburgh PA

692 F.3d 162

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