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Submitted via email to: abowne@illinoiscourts.gov

RE: Illinois Supreme Court Rules Committee - Public Hearing - June 24, 2020
Public Comments

PUBLIC COMMENT - ITEM 19-11 (P.R. 0276)
AMENDS SUPREME COURT RULE 23

I am an attorney practicing primarily in the area of insurance claim disputes on behalf of insureds. This letter contains my comments on the proposal to repeal Supreme Court Rule 23 in its entirety. I support this proposal.

The use of Rule 23 to issue non-precedential orders is harmful to my clients in almost every case when I find an order directly on point to a particular policy provision. As background, many insurance policies are written using terms that are not defined, that are susceptible to more than one reasonable interpretation, and the policies themselves are not updated according to applicable legal rulings. The consequence is that despite prior appellate findings, insurance company claims adjusters continue to interpret the same undefined terms and ambiguous provisions in ways that limit or exclude coverage.

In the case of non-precedential orders under Rule 23, the insured is prevented from using these prior findings of ambiguity and interpretations of the same or similar policy language, despite the interpretation of insurance policies being matters of law. *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill.2d 384, 391 (Ill. 1993). Where an appellate order finds a policy provision to be ambiguous, that interpretation is therefore a matter of law. No public policy justifies allowing insurers

to continue interpreting that ambiguous provision in its own favor when the law requires ambiguities to be resolved in favor of insureds. *Hobbs v. Hartford Ins. Co. of the Midwest*, 214 Ill.2d 11, 17 (Ill. 2005). Demonstrating the perverse injustice of the situation is *Gaudina v. State Farm Mut. Auto. Ins. Co.*, 2014 IL App (1st) 131264, ¶¶ 23-25, 31 (Considering cases from foreign jurisdictions on ambiguity of policy term, yet refusing to consider prior Rule 23 order cited by Gaudina as precedent in which the term at issue, "spouse", had apparently been found to be ambiguous).

The following are examples of Rule 23 orders in which insurance policy terms were deemed ambiguous:

- *State Farm Fire and Casualty Co. v. Hutchins*, 2012 IL App (3d) 100339-U, ¶¶ 36, 45
  (Finding the phrase "resides primarily" to be ambiguous for absence of defined time frame), ¶¶ 61-68 (Justice McDade, specially concurring, finding ambiguity also for absence of definitions for critical words).

- *American Access Cas. Co. v. Rodriguez*, 2014 IL App (1st) 131661-U, ¶¶ 13-14 (Finding the exclusion: for "any automobile while used in the delivery, or any activity associated with delivery, of food, mail, newspapers, magazines, or packages for an employer or business or in any trade or business" to be ambiguous as to whether the fourth "or" means the delivery-use exception applies to, or is separate from, use of the auto for any trade or business.)

- *Boatright v. Ill. Farmers Ins. Co.*, 2013 IL App (5th) 120297-U, ¶¶ 26-29, 32 (Reversing trial count finding that the antistacking language is unambiguous, because the language precluded stacking with "[A]ny member company of the Farmers Insurance Group of Companies" which was undefined and susceptible to more than one interpretation.)

- *Hastings Mut. Ins. Co. v. Carpenter*, 2013 IL App (4th) 120281-U, ¶¶ 19-21 (Finding that the phrase "`comprehensive liability' policies" to be ambiguous where two such policies existed.

- *Pekin Ins. Co. v JB Architecture Grp., Inc.*, 2017 IL App (2d) 170109-U, ¶ 12 (Finding a duty to defend where the allegations in underlying complaint are ambiguous and should be resolved in favor of coverage.

- *Pekin Ins. Co. v. Murphy*, 2014 IL App (2d) 140020-U, ¶¶ 22-24
  (Finding mutual waiver of subrogation provision to be ambiguous.)

- *United Equitable Ins. Co. v. Hare*, 2016 IL App (1st) 143878-U, ¶¶ 32-35 (Finding the term "owner" in an automobile policy to be ambiguous.)

- *W. Bend Mut. Ins. v. Fair,* 2016 IL App (5th) 140499-U, ¶¶ 9,11,15, 16-22 (Finding the excluding phrase "participating in" as applied to "any sports or athletic contest or exhibition" to be ambiguous.)

A similar deprivation by the public arises where a policy provision is given a specific interpretation by Rule 23 order. There is no public policy reason why that interpretation cannot be cited, as it leaves insurers free to continue interpreting it to the contrary. The following are examples of Rule 23 orders in which insurance policy provisions were given definite interpretation against that of the insurer:

- *Williams v. Country Mut. Ins. Co.,* 2014 IL App (1st) 142534-U, ¶¶ 60-65 (Interpreting the Loss Payment provision to require payment of Replacement Cost Value rather than Actual Cash Value, despite the insured not rebuilding within one year as a condition precedent to receiving Replacement Cost, because the insurer's failure to pay actual cash value was a breach preventing insured from use of the funds to rebuild and obtain the recoverable depreciation.)

- *Meza v. Country Mut. Ins. Co.,* 2020 IL App (1st) 181456-U, ¶¶ 66-67, 106-109 (Finding Illinois' Standard Fire Policy requirement for a reasonable time to rebuild prevails over the policy requirement that rebuilding must occur within one year to obtain recoverable depreciation pursuant to the Loss Payment provision.)

I cannot think of any valid reason why a Rule 23 order that goes into meaningful detail explaining its reasoning on an issue of law cannot be cited. I represent insureds against Country Mutual and its sister company Country Casualty (using the same policy language) in which it continues to assert policy defenses to payment of recoverable depreciation as affirmative defenses and in motions *in limine*, where rebuilding did not occur within one year despite the insured asserting its actions prevented use of the Actual Cash Value funds toward rebuilding. While I can and do cite these cases under the doctrine of collateral estoppel, this does not help other

insureds in cases against other insurers with similar policy requirements. Significant public resources are expended in these cases at both the trial and appellate levels in the form of buildings which are owned and maintained, courtrooms and chambers which are furnished and outfitted with technology, and judges, clerks and deputies who are paid wages. Yet those proceedings might just as well have been closed to the public if future litigants cannot rely on the ultimate explanations of law they produce.

It has been said the reasoning for Rule 23 orders is to avoid unnecessary or duplicative legal opinions. In my experience I rarely find a published opinion on the same proposition as a non-precedential order. If such duplication were real, the Rule 23 order would simply cite to a prior published opinion interpreting that same policy language rather than analyzing it again, yet that is not my experience.

In conclusion, it is my opinion that non-precedential orders unfairly allow serial litigants like insurers to avoid modifying their policy language, and force each insured to repeat the same arguments as were already decided. Resolution then depends on the inclination of each future trial judge rather than consistent application of legal principles to policy language. It is a misuse of significant public resources without a meaningful purpose, and deprives the public a substantial benefit from the courts which it funds.

Respectfully submitted,

s/Steven B. Pollack

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