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COURT OF APPEALS

STATE OF NEW YORK

UNIVERSAL AMERICAN CORP.,

Appellant,

-against-

No. 95

NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA,

Respondent.

20 Eagle Street
Albany, New York 12207
May 7, 2015

Before:

ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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Official Court Transcriber

1 JUDGE READ: Number 95, Universal American
2 Corporation v. National Union - - - Union Fire
3 Insurance Company of Pittsburgh, Pennsylvania.

4 Counsel?

5 MR. DOLAN: Good afternoon, my name is
6 Richard Dolan, representing the appellant. If I
7 could reserve two minutes for rebuttal?

8 JUDGE READ: Certainly.

9 MR. DOLAN: Thank you. A straightforward
10 application of this court's precedence about how
11 insurance co - - - policies are construed requires
12 the reversal of the order below. There's really no
13 question that this policy and the coverage provision
14 in it covers the loss that occurred here.

15 JUDGE PIGOTT: Well, it struck me that if -
16 - - if - - - if you have a claim and it's mailed in,
17 it doesn't - - - it doesn't get covered by this
18 thing, right?

19 MR. DOLAN: Not nec - - - if it's - - - if
20 that's all that happens, I think you're right.

21 JUDGE PIGOTT: Mail it in, it's all phony,
22 and the numbers - - -

23 MR. DOLAN: But it - - -

24 JUDGE PIGOTT: So if they - - - if they fax
25 it in, not covered?

1 MR. DOLAN: Yes, it - - - not covered,
2 provided it's not ultimately turned into electronic
3 form and entered.

4 JUDGE PIGOTT: Well, that's I mean.

5 MR. DOLAN: You never get paid then.

6 JUDGE PIGOTT: Somehow - - - somehow what
7 is the normal course of handling fraud simply because
8 you - - - you use a - - - a computer as opposed to a
9 fax machine or the United States Postal Service falls
10 within this policy?

11 MR. DOLAN: Yes, that's what it says,
12 Judge.

13 JUDGE READ: Does that make sense?

14 MR. DOLAN: That's what it says, whether it
15 makes sense or not. That's what the policy says.
16 Here are the words.

17 JUDGE PIGOTT: Well, they disagree. I
18 mean, obviously - - -

19 JUDGE READ: Yeah.

20 JUDGE PIGOTT: - - - if everybody agreed
21 with that - - - that - - -

22 MR. DOLAN: Judge, all I can tell you is
23 the - - - the rule is you read the words, you give
24 them the ordinary meaning as in common speech, and
25 see where you end up. And here's all it says: "loss

1 resulting directly from a fraudulent entry of
2 electronic" - - -

3 JUDGE ABDUS-SALAAM: Is - - - is your
4 adversary's reading of these words reasonable?

5 MR. DOLAN: I don't think it is, Judge,
6 because they're - - -

7 JUDGE ABDUS-SALAAM: It's only yours - - -

8 MR. DOLAN: - - - they're talking about a -
9 - -

10 JUDGE ABDUS-SALAAM: - - - your - - - your
11 reading is reasonable.

12 MR. DOLAN: It - - - I - - - I think our
13 reading is reasonable, because it gives the words
14 their ordinary meaning, and I'm happy to show how
15 that works. A fraudulent entry: fraud is about a
16 material misstatement of fact. That's - - -

17 JUDGE PIGOTT: That's right. Well, we'll
18 concede that. You got a fraudulent bill.

19 MR. DOLAN: Okay, but you only know that by
20 looking at the content of the bill.

21 JUDGE PIGOTT: Right.

22 MR. DOLAN: Okay, it's entered into the
23 electronic data. That's the only way you can ever
24 get money out of this system. It - - -

25 JUDGE PIGOTT: Well, that's your problem.

1 If - - - if it gets mailed, you - - - you're going to
2 pay it anyway.

3 MR. DOLAN: No, we're not, Judge.

4 JUDGE PIGOTT: Why not?

5 MR. DOLAN: Because it has to be entered
6 into the computer. That's the only way you get paid.

7 CHIEF JUDGE LIPPMAN: Well, you decide
8 that. I mean, it's not the carrier who decides that.

9 MR. DOLAN: The - - - the policy doesn't -
10 - -

11 JUDGE PIGOTT: So - - - so they get - - -
12 you get all of these - - - these fraudulent things in
13 - - - in the mail, and you say, holy cow, we're
14 getting - - - let's put these in the computer and run
15 them over to Alan's desk, and then we've got - - -
16 we've got an electronic fraud and we'll go after
17 National Union, right?

18 MR. DOLAN: Well, first of all, Judge, we
19 don't get most of them by mail, so fact - - -

20 JUDGE PIGOTT: I know, I know.

21 MR. DOLAN: Yeah.

22 JUDGE PIGOTT: I'm just trying to tell you
23 that I don't understand the distinction if they did
24 come in from mail, they're out. But if - - - if the
25 - - - if the receptionist gets them in the mail, and

1 then electronically sends them to the - - - to the
2 adjuster down the hall, that's an electronic data,
3 and therefore they got to pay it.

4 MR. DOLAN: Because - - - well, Judge,
5 first of all, the way it - - - again, what you're
6 talking about is a small percentage of the - - - of
7 the - - - of the - - -

8 JUDGE PIGOTT: I don't care. I'm just
9 trying to define the policy.

10 MR. DOLAN: Okay. I'm trying to do it too,
11 Judge. It says - - - it doesn't talk about who
12 enters the data.

13 JUDGE PIGOTT: Right.

14 MR. DOLAN: There's nothing in here which
15 says it has to be entered by the fraudsters. Anybody
16 can do the entry, okay. And so if it's mailed in to
17 us, and in the ordinary course, we get a phony
18 invoice, and in the ordinary course, the fraudsters
19 know someone's going to sit at a terminal, enter the
20 data, and it's going to generate a check through the
21 computer system, I'd say that's covered.

22 JUDGE PIGOTT: Okay.

23 MR. DOLAN: Because - - -

24 JUDGE RIVERA: Well, you know, considering
25 the concern with Medicaid fraud - - -

1 MR. DOLAN: Yes.

2 JUDGE RIVERA: - - - wouldn't this have
3 been written differently?

4 MR. DOLAN: Well, Judge, as the amicus
5 brief points out, this policy was written in 1983.
6 And in 1983, Bill Gates was still in his garage, you
7 know. And if you look at how - - - well,
8 particularly if we get to the exclusions, we're
9 talking about negotiable instruments and securities
10 and they pointed out it talks about debiting or
11 crediting - - - this was really written for a - - -

12 JUDGE ABDUS-SALAAM: So, in 1983, counsel,
13 were most of these claims submitted electronically,
14 or were they submitted the way Judge Pigott is
15 suggesting through the mail?

16 MR. DOLAN: It didn't exist in 1983. This
17 business didn't exist in 1983. All I'm telling you
18 is the - - - you're asking why the - - -

19 JUDGE FAHEY: You're say - - - you're
20 saying that when this policy was - - - was written,
21 there was no reason to protect against computer
22 fraud?

23 MR. DOLAN: No, there was, but it was for -
24 - - largely for the financial and banking industries.

25 JUDGE RIVERA: When did the parties sign

1 the policy?

2 MR. DOLAN: In 2008, in the summer of - - -

3 JUDGE RIVERA: Not 1983.

4 MR. DOLAN: No, you're asking when the
5 policy was written.

6 JUDGE RIVERA: No, no, no, I understand
7 that, but I had a different question about that and
8 you said, well, the policy written in 1983, but you
9 signed it; you must have reviewed it; you must have
10 considered the terms and whether or not they were
11 applicable.

12 And so I get back to my question, certainly
13 in 2008, there's concerns about Medicaid fraud.
14 Would it not have been written differently? The fact
15 that it was written in 1983, fine - - -

16 MR. DOLAN: This - - -

17 JUDGE RIVERA: - - - I get your point with
18 that, but you're signing it - - -

19 MR. DOLAN: This language works for us.

20 JUDGE RIVERA: - - - over a decade later.

21 MR. DOLAN: This language works for us. It
22 doesn't particularly work - - -

23 JUDGE RIVERA: Well, it depends on what we
24 say.

25 MR. DOLAN: Yeah, if - - - absolutely,

1 Judge.

2 JUDGE FAHEY: Could I ask you a question -

3 - -

4 MR. DOLAN: Sure.

5 JUDGE FAHEY: - - - just to kind of follow
6 up on the - - - on the Medicaid - - - the Medicare
7 question in the - - -

8 MR. DOLAN: Yes.

9 JUDGE FAHEY: Are you saying that all - - -
10 all Medicare frauds then would be covered by this?

11 MR. DOLAN: Again - - -

12 JUDGE FAHEY: It would be entered
13 electronically - - -

14 MR. DOLAN: Yes.

15 JUDGE FAHEY: Is this the policy
16 implication? I'm just playing it out here.

17 MR. DOLAN: Yes, Judge, but bear in mind -
18 - -

19 JUDGE FAHEY: And that's about - - -
20 because you know that's - - - that's about 9.5
21 percent; it's about 11 billion dollars we're talking
22 about here.

23 MR. DOLAN: Bear in mind, there's a
24 deductible of 250,000 per loss.

25 JUDGE FAHEY: I thought it was 170, but

1 okay.

2 MR. DOLAN: 250 - - - the deductible, not
3 the premium.

4 JUDGE FAHEY: Oh, the cost of the premium
5 is 170, all right.

6 MR. DOLAN: That's right. The deductible
7 is 250,000, so you know, this isn't going to cover -
8 - -

9 JUDGE FAHEY: So just stay back with me;
10 let's not move - - -

11 MR. DOLAN: Sure.

12 JUDGE FAHEY: - - - off this point. You're
13 saying it would apply then in this situation?

14 MR. DOLAN: Absolutely, it applies here.

15 JUDGE FAHEY: I see.

16 JUDGE PIGOTT: So if TurboTax got this - -
17 - got this policy and so - - - so - - - and - - - and
18 there's all kinds of tax fraud going on as they later
19 found out, TurboTax would get it all back from
20 National Union?

21 MR. DOLAN: Up to their - - - up to their
22 coverage, depending again on how their deductibles
23 work, I think the answer's yes.

24 JUDGE ABDUS-SALAAM: Did you say that the
25 premium was 170,000?

1 MR. DOLAN: Yes, Judge, 170,500 - - -

2 JUDGE ABDUS-SALAAM: And - - - and the - -

3 -

4 MR. DOLAN: - - - for one year.

5 JUDGE ABDUS-SALAAM: - - - risk is over
6 eleven billion or so?

7 MR. DOLAN: No, the loss - - - the - - -
8 the policy limit is 10 million, subject to a 250,000
9 deductible per loss. And if you apply the deductible
10 as it's written, their calculation of the loss is
11 about 7 million; ours is about 7.7 million.

12 JUDGE STEIN: I want to get back to the
13 TurboTax question.

14 MR. DOLAN: Sure.

15 JUDGE STEIN: TurboTax doesn't pay out
16 things to - - - to the - - - to the people that file
17 their taxes using its software, do they?

18 JUDGE STEIN: I wouldn't think so. I don't
19 use them, but I don't think so.

20 JUDGE STEIN: So - - - so in that case,
21 they - - - they wouldn't be covered, because there
22 wouldn't be a loss, right?

23 MR. DOLAN: Well, that's a different
24 question, but the answer is yes, you're right,
25 because it has - - - the last thing of this "provided

1 that the entry causes property to be transferred,
2 paid or delivered."

3 JUDGE PIGOTT: Well, I'll tell you what,
4 I'll sue TurboTax if they screw up my taxes.

5 MR. DOLAN: And I'll represent you, Judge.

6 JUDGE PIGOTT: Well, you'll - - - and
7 you'll have coverage.

8 MR. DOLAN: But again, I - - - I just want
9 to get back to the - - - to the words and go through
10 them.

11 JUDGE RIVERA: Let me ask you - - - let me
12 just stay on the fraud.

13 MR. DOLAN: Okay.

14 JUDGE RIVERA: Is it customary in the
15 industry to cover this kind of fraud that we're
16 talking about?

17 MR. DOLAN: I - - -

18 JUDGE RIVERA: Would it have been easy to
19 have gotten this kind of coverage? Isn't this what
20 you do in the industry?

21 MR. DOLAN: This is - - - this is the
22 standard policy, Judge.

23 JUDGE PIGOTT: Weren't - - - weren't you
24 thinking hackers?

25 JUDGE RIVERA: But no, that wasn't my

1 question. My question was is it customary in the
2 industry to provide insurance for this kind of fraud?

3 MR. DOLAN: I think it's customary to buy
4 this policy, and I think it covers it.

5 JUDGE PIGOTT: But weren't you thinking
6 hackers?

7 JUDGE RIVERA: Well, that's not the same
8 question. It's not the same - - -

9 MR. DOLAN: I think from our perspective,
10 Judge, that is the answer. This is the policy we
11 bought to cover ourselves for this problem.

12 JUDGE READ: What kind of a premium did you
13 pay?

14 MR. DOLAN: 170,500 for one year.

15 JUDGE PIGOTT: But weren't you thinking
16 hackers? Weren't you thinking our business runs this
17 way? You know, we get - - - we get this stuff in and
18 as long as everything's cool, it's cool. But if
19 somebody comes in and attacks our system, and we're
20 down, and we've got problems, we're going to call
21 National Union and they're going to pick up that
22 cost.

23 MR. DOLAN: Well, again, we may have
24 thought that, but we'd have to be able to fit it into
25 this language. But you can buy a hackers policy.

1 deal with any damage a hacker has done internally - -
2 - not - - - not about - - -

3 MR. DOLAN: No.

4 JUDGE RIVERA: - - - printing up a check
5 and mailing it out to someone - - -

6 MR. DOLAN: It's - - -

7 JUDGE RIVERA: - - - or direct depositing
8 or whatever it is.

9 MR. DOLAN: It's how it - - - provided the
10 entry causes property to be transferred, paid or
11 delivered, not that it causes us an expense. That's
12 not covered. We have to pay money out. And it's the
13 entry that has to cause us to make - - - pay the
14 money out.

15 JUDGE RIVERA: So if you have to get
16 someone external to your staff to - - - to fix what
17 the hacker has done, that's not covered?

18 MR. DOLAN: Not by this, maybe by something
19 else, because that's not - - - the entry is not
20 causing property to be paid out. That's causing
21 damage to us, but that's not what this covers.

22 JUDGE RIVERA: So you're not paying out
23 someone to - - - to cure the damage.

24 MR. DOLAN: The entry is not causing the
25 property to - - - to be paid out. We are paying it

1 out to fix the problem; that's different. This is
2 about fraudulent entries being made into a computer
3 system that causes money to go out the door. That's
4 exactly what happened to us. That's what - - -

5 JUDGE READ: And you say this is a standard
6 policy in the industry?

7 MR. DOLAN: It's been standard since 1983,
8 Judge.

9 JUDGE FAHEY: Well - - -

10 MR. DOLAN: And, you know, maybe they
11 should update this thing, and I - - - and if my time
12 is up, but - - -

13 JUDGE READ: Okay, you - - - you'll have
14 your rebuttal time.

15 MR. DOLAN: Thank you, Judge.

16 JUDGE READ: Counsel?

17 MS. LUKEMAN: May it please the court, my
18 name is Barbara Lukeman. I represent National Union.

19 JUDGE READ: Is this a standard policy?

20 MS. LUKEMAN: It is a standard hackers
21 policy. It is not a standard Medicare - - -

22 JUDGE READ: What about - - - what about
23 the point that you have to cause a loss to be paid
24 out?

25 MS. LUKEMAN: You do have to cause - - -

1 doctor who went in and manipulate - - - and was not
2 permitted to enter, because his - - - entry is
3 modified by fraudulent, was not permitted to enter,
4 entered, caused may - - - caused some manipulation of
5 the system to cause a - - - to cause money to be
6 paid.

7 JUDGE ABDUS-SALAAM: What about a - - -

8 JUDGE PIGOTT: Do you cover that?

9 MS. LUKEMAN: Yes, we would.

10 JUDGE PIGOTT: Okay.

11 JUDGE ABDUS-SALAAM: And what - - - what
12 about someone who was authorized? Your - - - your
13 adversary mentioned another case we had, the Golb
14 case, where someone goes in, is authorized because he
15 set up an account, but, you know, puts in some
16 fraudulent data.

17 MS. LUKEMAN: Right, here - - - here it
18 says "fraudulent entry of electronic data."
19 Fraudulent modifies entry; it doesn't modify
20 electronic da - - - data.

21 JUDGE STEIN: How do you explain the
22 difference between this policy and the policy which I
23 believe your - - - your client issued in Retail
24 Ventures?

25 MS. LUKEMAN: Right, that's a - - - that

1 was a computer crime policy, and although it - - - it
2 does extend to - - -

3 JUDGE STEIN: So computer crime is
4 different from computer fraud?

5 MS. LUKEMAN: It's just - - - it does - - -
6 there are some different aspects of it. It's a
7 different policy. It substantially covers the same
8 thing.

9 JUDGE STEIN: Well, I know it's a different
10 policy, but - - - but the wording there seems to go
11 to your point in this case. But the wording in this
12 policy is not the same as that wording. Why the
13 difference and - - -

14 MS. LUKEMAN: Right.

15 JUDGE STEIN: and how - - - what - - - how
16 do you explain - - -

17 MS. LUKEMAN: Well, the wording's
18 substantially similar. One is - - - the one that my
19 - - - my adversary points to says "input and
20 alteration." Here it's entry and change. You - - -
21 there are many ways to convey a similar idea. It's
22 just - - - they're just different policies. Looking
23 at this policy, it's a hacker policy. The practical
24 effect of what Universal American is arguing is
25 covering Medicare fraud.

1 JUDGE RIVERA: And as a practical matter,
2 in the industry, do you cover Medicare fraud?

3 MS. LUKEMAN: We don't. So if - - -

4 JUDGE RIVERA: If - - - if - - - if they
5 wanted that kind of a policy explicitly, you - - -
6 you're saying you would not have provided that policy
7 - - -

8 MS. LUKEMAN: The premium - - -

9 JUDGE RIVERA: - - - but in the industry,
10 you don't cover that.

11 MS. LUKEMAN: What I know is the premiums
12 would be a lot higher than 170,000 dollars a year.
13 And in fact - - -

14 JUDGE FAHEY: Sure, for 11 - - - for a
15 potential eleven billion dollars in - - - in payout
16 over the years, you'd probably eliminate most
17 insurance companies that do this stuff.

18 MS. LUKEMAN: Correct.

19 JUDGE STEIN: So the 200 - - - I'm sorry.

20 JUDGE READ: Are there such policies, by
21 the way? Can you - - - can you buy a policy that
22 would cover you for Medicaid fraud?

23 MS. LUKEMAN: I don't believe you can. I
24 do not believe you can. The - - - my - - - my
25 adversary mentioned the 250 deductible for a single

1 loss. But a single loss is defined as a series of
2 losses. So that - - - it's not one bill goes in - -
3 - it's a series of bills. That - - - so that
4 argument doesn't hold water. The fact is that - - -

5 JUDGE STEIN: So you're saying under this
6 policy, this entire scheme would be one - - - one
7 loss?

8 MS. LUKEMAN: No, the - - - no, there - - -

9 JUDGE STEIN: What would be a series here?

10 MS. LUKEMAN: Well, it's so interesting
11 because there were many, many doctors. They weren't
12 - - - they weren't working in concert. These were
13 bonafide doctors that - - -

14 JUDGE STEIN: So would each doctor - - -

15 MS. LUKEMAN: - - - were submitting bills.

16 JUDGE STEIN: - - - be a series, so if one
17 doctor submitted a hundred fraudulent bills - - -

18 MS. LUKEMAN: Correct.

19 JUDGE STEIN: - - - that would be a series?

20 MS. LUKEMAN: Correct. So - - - so here we
21 have fraudulent entry of electronic data or computer
22 program. It's under - - - it's under a title:
23 computer systems. And then underneath that is
24 computer systems fraud. This policy is directed at a
25 system, when there's a manipulation or some other

1 problem with the system. Here - - -

2 JUDGE STEIN: But why isn't this fraudulent
3 entry? If - - - if these doctors never actually
4 provided services to anyone, why isn't - - - why
5 isn't it fraudulent then to submit a claim?

6 MS. LUKEMAN: Well, it's - - - because that
7 would be fraudulent content, which is what my
8 adversary's arguing. Here it's fraudulent entry.
9 They - - - they were allowed to enter. They had the
10 credentials to do so - - -

11 JUDGE STEIN: Well, anybody could enter.

12 MS. LUKEMAN: Right.

13 JUDGE STEIN: So - - - so - - - so then who
14 - - - who would not be authorized to enter here?

15 MS. LUKEMAN: Anybody who wasn't a doctor,
16 who - - -

17 JUDGE STEIN: Okay, but any - - - but if
18 they didn't get this - - - this - - - this
19 identification number from the government, right?

20 MS. LUKEMAN: Right.

21 JUDGE STEIN: But then - - - then they
22 wouldn't have been paid. So what is it that would
23 have been paid under this policy?

24 MS. LUKEMAN: If they could have - - - if
25 they put a fictional number in, many, many other

1 ways, but here we just have doctors, bonafide
2 doctors, putting in fraudulent bills. They were
3 padding their bills. They were putting in bills for
4 things that they didn't do - - -

5 JUDGE RIVERA: So it might be different if
6 it said from a loss resulting directly from a
7 fraudulent entry of fraudulent electronic data?

8 MS. LUKEMAN: Correct.

9 JUDGE RIVERA: Do you need one more
10 fraudulent in there?

11 MS. LUKEMAN: Correct. Or you could take -
12 - -

13 JUDGE RIVERA: More fraud?

14 MS. LUKEMAN: Yeah, a little bit more
15 fraud, or you could take the fraudulent away from
16 entry, which is what - - - how they reading it, and
17 put it on - - -

18 JUDGE RIVERA: Or alternatively - - -
19 because you want to get maybe the fraudulent entry of
20 the fraudulent data.

21 MS. LUKEMAN: Right. Or another way is to
22 say fraudulent entries, as in journal entries, but
23 that would - - - why would you have electronic data,
24 and it wouldn't make sense, because we follow it by
25 computer program.

1 So again, we give effect to contracts - - -

2 JUDGE RIVERA: Let me - - - let me go to
3 that second part, his argument about the - - - the
4 hackers is not going to result in the entry or - - -
5 that entry or change doesn't cause the property to be
6 transferred, paid or delivered. That's his argument
7 about it can't be the hacker. That it's not covering
8 a hacker.

9 MS. LUKEMAN: I'm sure a hacker could do
10 that. I - - - I mean - - -

11 JUDGE PIGOTT: I'm - - - I'm speculating
12 here, but I remember Target had a - - -

13 MS. LUKEMAN: I do.

14 JUDGE PIGOTT: - - - you know, they got
15 hacked. All right. Is that the kind of stuff you
16 cover?

17 MS. LUKEMAN: Correct.

18 JUDGE PIGOTT: All right.

19 MS. LUKEMAN: Correct. Well, Your Honors,
20 thank you very much.

21 JUDGE READ: Thank you, counsel.

22 JUDGE ABDUS-SALAAM: Well, before you sit
23 down counsel, if - - - if we agree with - - - and I'm
24 not saying we will, but if we agree with your
25 adversary, what then happens? Do we declare in their

1 favor? Or is your interpretation of this policy
2 equally reasonable to theirs, and if it's ambiguous,
3 what do we do?

4 MS. LUKEMAN: We - - - our - - - this is -
5 - - we have the only reasonable reading of this
6 policy and so we would ask to affirm the unanimous
7 First Department who declared that the coverage did
8 not cover what National - - - what Universal American
9 was saying.

10 JUDGE READ: But I think Judge Abdus-
11 Salaam's question is if we don't - - - if we think
12 it's ambiguous, we think there's more than one
13 reading, what do we do?

14 MS. LUKEMAN: If it's ambiguous, you know,
15 that may change the - - - the way you look at it.
16 General - - - generally, this court says ambigu - - -
17 ambiguities are in favor of the insureds.

18 JUDGE READ: Thank you, counsel.

19 MS. LUKEMAN: Thank you.

20 JUDGE READ: Rebuttal?

21 MR. DOLAN: Yes, very briefly, Judge. All
22 the words that you just heard my adversary describe
23 this policy, manipulated, hacker, the one problem is,
24 none of them show up in the policy.

25 JUDGE PIGOTT: But the thing I was - - - I

1 was thinking about when I brought up the Target
2 thing, in your interpretation, you can't make a
3 mistake that's not covered by them. Ever - - - every
4 single bill that comes in, if there's an error in it,
5 because it comes through the computer, you can just
6 mail over to them.

7 MR. DOLAN: If - - - it has to be
8 fraudulent, Judge. That's not a mistake.

9 JUDGE PIGOTT: Right.

10 MR. DOLAN: Okay, fraud has to be submitted
11 with the intent to deceive.

12 JUDGE PIGOTT: I understand.

13 MR. DOLAN: Mistakes aren't that way.
14 That's just negligence. That's not covered, okay.
15 So and then you get to the deductible of 250,000 is
16 defined, if you're interested in how it's defined on
17 page 251 of the record.

18 JUDGE PIGOTT: Is - - - is it as your
19 opponent suggested, it can be a group of bills?

20 MR. DOLAN: It says - - -

21 JUDGE PIGOTT: In other words, if Dr. Dokes
22 sends in fifty bills, all of them fraudulent - - -

23 MR. DOLAN: It - - - it says - - -

24 JUDGE PIGOTT: - - - there's only one
25 deductible on that.

1 MR. DOLAN: Here's - - - here's - - - a
2 series of losses. "All losses or a series of losses
3 involving the fraudulent acts of one individual or
4 involving fraudulent acts in which one individual is
5 implicated," that'll be - - - you know, you're
6 looking at the fraudsters here.

7 JUDGE READ: So it would be one doctor
8 submits a bunch bills, that's - - -

9 MR. DOLAN: Well, a lot of these were
10 clinics, Judge. They weren't even a doctor.

11 JUDGE READ: All right. Well, one entity -
12 - -

13 MR. DOLAN: Yes.

14 JUDGE READ: - - - one doctor.

15 MR. DOLAN: Yes, that's right. But this
16 was - - -

17 JUDGE READ: So it - - - it wouldn't be
18 hard to get to 250,000 dollars then, would it?

19 MR. DOLAN: Well, at - - - we had - - - we
20 had eighteen million dollars in loss - - -

21 JUDGE READ: Yeah.

22 MR. DOLAN: - - - and the - - - and the
23 amount that's covered is 7.7, so okay. You know,
24 there's a lot here that's getting eliminated by the -
25 - - by the deductible.

1 In - - - again, the Judge asked if whether
2 - - - if ambiguity - - - this - - - this court's
3 cases are so clear. The most recent one that comes
4 to mind is Pioneer Towers. That involved the
5 excavation where the policy - - - you said it was
6 covered literally, but it wasn't good enough. This
7 case isn't even close.

8 JUDGE ABDUS-SALAAM: Well, counsel, let me
9 - - - your light is on, so I want to ask. Your
10 adversary said that you needed essentially - - - and
11 I think Judge Rivera said it too - - - you need
12 another fraud in this language to cover the content
13 that you said is - - - is covered by this. That you
14 have a fraudulent entry - - -

15 MR. DOLAN: Yes.

16 JUDGE ABDUS-SALAAM: - - - of fraudulent
17 electronic data.

18 MR. DOLAN: No, you don't. Let me give you
19 - - - common speech. A senior partner says to an
20 associate, when you make your entries in the time
21 sheets, don't put X in them. Daughter says to daddy
22 when she's visiting Albany, I made an entry in my
23 diary today; I met the Chief Judge. Okay? Entry
24 refers to what's written either in the time sheets or
25 the diary. Entry here refers to what's submitted,

1 the content of the message. And it has to be,
2 because in order for it to be fraud, you have to be
3 able to say is it true or false - - - that's fraud -
4 - - and is it meant to deceive.

5 JUDGE PIGOTT: But doesn't - - - I - - - I
6 - - - I asked you earlier, and I'm not sure what you
7 said. If - - - if - - - if your bills come in in the
8 mail - - -

9 MR. DOLAN: Yes.

10 JUDGE PIGOTT: - - - to the receptionist
11 and then she e-mails them. She electronically
12 transmits them to the adjuster - - -

13 MR. DOLAN: Yes?

14 JUDGE PIGOTT: - - - are they covered?

15 MR. DOLAN: Again, probably not, because
16 they have to be entered into the billing computer.

17 JUDGE PIGOTT: Well, somebody's going to do
18 that.

19 MR. DOLAN: Somebody will do that, yes.
20 Mostly it's done at the fraudster end - - - about
21 eighty percent at the fraudster end - - - because
22 that's how these things are all done. You submit
23 them - - - somebody's at a computer at the fraudster
24 end, either them or a vendor they've hired to put it
25 in what's called a HIPAA form, you know, the Health

1 Insurance - - - you know, you have the - - -

2 JUDGE PIGOTT: Nobody knows - - - nobody

3 knows - - -

4 MR. DOLAN: Health Insurance Protection And

5 - - -

6 JUDGE ABDUS-SALAAM: Portability.

7 MR. DOLAN: Portability Act, there you go.

8 But it's - - - it's all about, you know, protecting

9 the confidentiality of the patients' information.

10 None of that's involved here. It has to be in the

11 right form. Somebody does that and then inputs it

12 into our computer. It's computer to computer. There

13 are a certain subset of these that come in in

14 hardcopy, about twenty percent or so, and they're - -

15 -

16 JUDGE RIVERA: If - - - if we disagree with

17 you, what might be the impact on - - - on - - - on

18 the industry?

19 MR. DOLAN: This policy - - -

20 JUDGE RIVERA: Wouldn't you just rewrite it

21 - - -

22 MR. DOLAN: Well - - -

23 JUDGE RIVERA: - - - to make it clearer?

24 MR. DOLAN: - - - insurers don't write

25 these policies. These are all given - - -

1 JUDGE RIVERA: No, I understand that, but
2 what - - -

3 MR. DOLAN: This is - - -

4 JUDGE RIVERA: If you were really looking
5 for a - - - a policy to cover this kind of fraud - -
6 - well, she says no one will cover it - - - you say,
7 yes, it'll be covered - - -

8 MR. DOLAN: This - - -

9 JUDGE RIVERA: - - - it's either - - -
10 well, she's saying they wouldn't cover it. You're
11 going to have to find another - - - another company.

12 MR. DOLAN: If you look at how this policy
13 begins, it's a crime-loss policy. It covers crime.
14 It covers embezzlement, dishonest employees, robbery,
15 common law larceny, all that other stuff. That's
16 what it's all about.

17 JUDGE RIVERA: Yes, but - - -

18 MR. DOLAN: And that's what - - -

19 JUDGE RIVERA: - - - the kind of fraud - -
20 - the kind of fraud you're talking about here is
21 quite costly, very expensive.

22 MR. DOLAN: That's why they're paying - - -

23 JUDGE RIVERA: It's not comparable to some
24 of that other stuff you just described.

25 MR. DOLAN: This does - - - we've been in

1 business for many years. This doesn't happen to us
2 very often.

3 JUDGE RIVERA: It's a good thing.

4 MR. DOLAN: Thank you, Lord. But it
5 doesn't happen to us very often.

6 JUDGE PIGOTT: That you know.

7 MR. DOLAN: Well, if we know, they'd know
8 too, and you'd be hearing about it. It doesn't
9 happen often. This is the first - - -

10 JUDGE READ: All right, thank you, counsel.

11 MR. DOLAN: Okay, thank you, Judge.

12 (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Universal American Corp. v. National Union Fire Insurance Company of Pittsburgh, PA, No. 95, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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