

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

COURT OF APPEALS

STATE OF NEW YORK

-----

SELECTIVE INSURANCE COMPANY OF AMERICA,

Respondent,

-against-

No. 4

COUNTY OF RENSSELAER,

Appellant.

-----

20 Eagle Street  
Albany, New York 12207  
January 04, 2016

Before:

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:

MELISSA J. SMALLACOMBE, ESQ.  
BURKE, SCOLAMIERO, MORTATI & HURD, LLP  
Attorneys for Appellant  
7 Washington Square  
Albany, NY 12212

RICHARD A. GALBO, ESQ.  
GALBO & ASSOCIATES  
Attorneys for Respondent  
1830 Liberty Building  
420 Main Street  
Buffalo, NY 14202

Sara Winkeljohn  
Official Court Transcriber

1                   JUDGE PIGOTT: Case number 4, Selective  
2 Insurance Company of America v. the County of  
3 Rensselaer.

4                   Ms. Smallacombe, good afternoon.

5                   MS. SMALLACOMBE: Thank you. Good  
6 afternoon, Your Honor, and thank you all for hearing  
7 this case. We - - - I'm start - - - I would like to  
8 start by asking for a five-minute rebuttal time on  
9 this case, if possible.

10                   The lower courts below, in finding that  
11 there was a separate occurrence for each member of  
12 the class that was drummed up after this litigation  
13 completed in the class action suit brought against  
14 Police of Troy - - - of - - - of the County of  
15 Rensselaer Sheriff's Department, must be reversed  
16 both because of the traditional rule that the plain  
17 language of the policy must be followed and the plain  
18 language of this policy with these facts clearly  
19 supports a determination of a single occurrence, the  
20 class action, based on a single act, a de facto  
21 policy of - - - of regularly, routinely, and without  
22 exception strip searching all entrants into the jail  
23 system - - -

24                   JUDGE STEIN: How - - - how do you explain  
25 the - - - the language in paragraph 9(B) that refers

1 to damages because of injuries sustained by one  
2 person or organization?

3 MS. SMALLACOMBE: I explain that by two  
4 things. First of all, I think as we set forth in our  
5 brief, the paragraph right after that doesn't have  
6 that specification and is - - -

7 JUDGE STEIN: Well, that's right, but  
8 you're talking about the plain language so you can't  
9 ignore that language by looking at the next  
10 paragraph, right?

11 MS. SMALLACOMBE: But nor can you ignore  
12 the next paragraph by focusing simply on that. And I  
13 - - - my point is that it also says "person or  
14 organization". And the Black's Law Dictionary  
15 definition of an organization could not more clearly  
16 incorporate a suit - - - a class action, a group of  
17 plaintiffs joined for purposes of a similar - - -

18 JUDGE STEIN: But when they were injured,  
19 they were not part of any organiz - - - even if - - -  
20 even assuming what you say is - - - is correct that -  
21 - - that the injury didn't occur to that organization  
22 at the time.

23 MS. SMALLACOMBE: But this court has  
24 already rejected the prop - - - proposition that a  
25 per - - - that - - - that the injury is the

1           determinative factor in determining how many  
2           occurrences there were, and it wasn't the injury.  
3           And in fact, there's no case law - - -

4                    JUDGE FAHEY:   But the harms weren't - - -

5                    MS. SMALLACOMBE:  - - - in the State of New  
6           York - - -

7                    JUDGE FAHEY:   The harms weren't suffered by  
8           an organization.  The class was formed purely for the  
9           purposes of litigation and the organization - - - the  
10          - - - the use of that phrase is - - - that seems like  
11          a stretch, I got to - - -

12                   MS. SMALLACOMBE:  Why would you put that  
13          language if - - -

14                   JUDGE FAHEY:   - - - I got to admit.  That's  
15          your alternative argument, you know, so - - - but - -  
16          -

17                   MS. SMALLACOMBE:  Yeah, but I - - -

18                   JUDGE FAHEY:   - - - it seems to be kind of  
19          a stretch.

20                   JUDGE PIGOTT:  Well, let me ask you a  
21          question as an old county attorney.  Where was the  
22          county in all of this?  I mean, couldn't you have  
23          said we're not - - - we're not settling if - - - if  
24          this is the way you're going to go?

25                   MS. SMALLACOMBE:  I'll tell you what

1           happened. That goes to the bad faith argument but it  
2           also goes to reasonable expectation.

3                         JUDGE PIGOTT: But still.

4                         MS. SMALLACOMBE: The County said from day  
5           one, we believe this is - - - first of all - - -

6                         JUDGE PIGOTT: Wait, wait, wait. Why don't  
7           you say we're not settling?

8                         MS. SMALLACOMBE: Because they were told -  
9           - -

10                        JUDGE PIGOTT: Go your - - - go your happy  
11           way. We - - - you know, we'll deal with you later,  
12           Selective, but for now we don't believe that this is  
13           - - - that - - - that this case ought to be a class  
14           action and we're going on our own. And - - - and if  
15           we're successful we're going to come after you, in  
16           bad faith or for our attorneys' fees or whatever any  
17           judgment amount it would be. Because it - - - it  
18           looked to me like a reasonable approach to this case  
19           is to get them all together and get it done.

20                        Now, the opposite of that, of course, is if  
21           you got 806 people, maybe 20 of them will make a  
22           complaint and the other 800, you know, won't, and  
23           you're - - - and you're better off. But if - - - if  
24           a lawyer on the plaintiff's side says, you know, by  
25           the way, Judge, I think we ought to go after all 800

1 of these, you're kind of stuck, aren't you?

2 MS. SMALLACOMBE: Well, the - - - there is  
3 two reasons why the County couldn't simply say we're  
4 going to do it our way. Number one, pursuant to the  
5 contract of insurance, Selective got to determine the  
6 method and manner of defending the lawsuit and they  
7 controlled the defense. Second of - - -

8 JUDGE PIGOTT: So you can't charge them  
9 with bad faith, right?

10 MS. SMALLACOMBE: Well, no, because there  
11 was bad faith in the manner and method in which they  
12 defended this lawsuit.

13 JUDGE PIGOTT: You said they get to choose.

14 MS. SMALLACOMBE: They told the County that  
15 they were hiring a nationwide expert on class  
16 certification, that Dwight Davis was the man who  
17 would tell - - - who would do everything in his power  
18 to prevent class certification in this case.

19 JUDGE RIVERA: But that - - - but the  
20 expert decides that in this case, the likelihood of  
21 certification is very high. That's the opinion you  
22 got.

23 MS. SMALLACOMBE: But this opinion isn't  
24 based on anything other than what they wanted the  
25 opinion to be, because first of all, if you look at

1 the billing records for this expert, first thing they  
2 did was check to see what Judge McAvoy's usual  
3 response to class certification applications is.  
4 Guess what? He usually denies them. So that was  
5 knowledge they had coming in that was never shared  
6 with the County. Number two, they never shared with  
7 the County that - - - that the class certification  
8 had already been denied.

9 JUDGE RIVERA: But where's that bad faith  
10 that they're rely - - - where's that bad faith that  
11 they're relying on an expert, a legal expert who  
12 reviews the case law and comes to a conclusion? You  
13 might disagree with it, but how is it bad faith?

14 MS. SMALLACOMBE: It's - - - it's more than  
15 just disagreeing with it, Your Honor, Judge Rivera.  
16 In this case, they - - - Selective pumped up the  
17 value of this class certification expert, said we're  
18 spending all this extra money - - - and did spend a  
19 fortune that they now want Rensselaer County to  
20 reimburse them for - - - on this class action expert  
21 who did nothing, not once, and not in the entire  
22 docket through denial of class certification by  
23 Magistrate Homer, denial by District Court McAvoy,  
24 denial of leave to appeal by the Second Circuit. All  
25 of those were opportunities where even if his initial

1 opinion before he ever came in was, we - - - we're  
2 going to lose on class certification - - -

3 JUDGE STEIN: But wasn't - - - wasn't that  
4 denial - - -

5 MS. SMALLACOMBE: - - - why didn't he - - -

6 JUDGE STEIN: - - - because of some - - -  
7 because they failed to do certain things by a  
8 specific time, that they had been granted extensions  
9 and that all had to do with that they were trying to  
10 negotiate a settlement? I mean, how - - - how could  
11 - - - if - - - if that's the case, how could  
12 Selective then have oppos - - - you know, have - - -  
13 have challenged that?

14 MS. SMALLACOMBE: Well, first of all, the  
15 first mention that Selective encouraged the  
16 plaintiffs to ask for their last adjournment during -  
17 - - over a Labor Day weekend holiday instead of  
18 bringing their motion, as they were required to do  
19 pursuant to the fourth extension granted by  
20 Magistrate Homer, was in their brief in the Appellate  
21 level. So now we even have almost an admission on  
22 their part that they're all - - - they're doing  
23 everything in their power to delay a determination on  
24 class certification - - -

25 JUDGE PIGOTT: It seemed to - - -



1 MS. SMALLACOMBE: - - - until they can  
2 shove a settlement down my client's throat.

3 JUDGE PIGOTT: It seemed to me, though, I  
4 mean, if you look - - - I don't know what kind of an  
5 expert it takes, but I thought this was a perfect  
6 class. I - - - I didn't know how you'd get a  
7 different one. I mean, everybody that goes through  
8 your door gets strip searched, and I don't know, but  
9 why would you want 807 lawsuits?

10 MS. SMALLACOMBE: Well, there actually have  
11 been many jurisdictions that have specifically held  
12 that that's not a class - - - Judge McAvoy rejected a  
13 class for a strip search under a different plaintiff.

14 JUDGE ABDUS-SALAAM: Well, counsel, I have  
15 to go back to what Judge Pigott asked you a little  
16 earlier. Did this expert not keep you informed, the  
17 County informed, about what was going on? Or you - -  
18 - or - - - or is all this hindsight now, you're  
19 looking backwards to see that they didn't oppose  
20 class certification, they didn't do anything, they  
21 didn't make a motion to deny? What was happening?  
22 Where was the County when all of this was happening?

23 MS. SMALLACOMBE: Here's where the County  
24 was. First of all, with respect to Judge Pigott's  
25 comment about class actions, I - - - it - - - it is

1 an incredibly complex area of law that I have spent  
2 an enormous amount of time having to learn, and I  
3 assure you, County Attorney had - - - Smith had no  
4 idea about this and did rely - - - and I'm  
5 guaranteeing that Judge - - - that Tom O'Connor, the  
6 defense counsel, relied heavily on the representation  
7 that this Dwight Davis was an expert and knew the  
8 answers to all these questions.

9 And as far as - - - it's not a - - - it's  
10 not a hindsight thing. First of all, there was three  
11 or four adjournments requested, granted, and then - -  
12 - and then there was a final adjournment. They - - -  
13 they did not report, for example, to the County of  
14 Rensselaer, that on the one meeting that by the way,  
15 yesterday Judge McAvoy denied class - - - denied the  
16 motion for an extension and affirmed Magistrate  
17 Homer's denial of a further extension of time.

18 They - - - they - - - all of the - - - the  
19 dates of their letters - - - if you look at the  
20 record on appeal, the most compelling evidence of bad  
21 faith, at least in my opinion, is the letters drafted  
22 by my opponent here, Attorney Galbo, reiterating what  
23 occurred during meetings that he moderated and where  
24 he - - - where he manipulated - - - and when County  
25 Attorney Bob Smith said well, what about having

1 separate damage trials? We could do that. That  
2 would still save us a fortune, because some of these  
3 guys are going to get one dollar; they've already  
4 been arrested twenty-five times. They - - - they  
5 have no damages here, so why wouldn't we just go  
6 back?

7 Well, Dwight Davis says no, this would  
8 definitely not have been - - - they would not only  
9 grant class certification - - - which they didn't - -  
10 - but they also won't grant class certification on  
11 the issue - - - but they will also grant it as to  
12 damages, when there's no authority for that position  
13 whatsoever. Just like his saying that the - - - that  
14 the - - - that the piggyback action in Kahler was - -  
15 - would have given - - - even if the County continued  
16 to be successful, which it continued to be in  
17 refuting case certification in Bruce, they - - - they  
18 called that piggyback action and said oh, well,  
19 they're going to get start over and there's no  
20 tolling. The Second Circuit case that had been  
21 served - - - that was in binding on the date that  
22 Dwight Davis told that to Attorney Smith specifically  
23 said no piggyback, no tolling.

24 JUDGE RIVERA: You're running out of time,  
25 so why - - - why don't we get to the issues about the

1 - - -

2 MS. SMALLACOMBE: Okay, the - - - the other  
3 arguments are - - -

4 JUDGE RIVERA: - - - the insurance policy  
5 otherwise.

6 MS. SMALLACOMBE: Let's - - - all right,  
7 let's talk about the unfortunate events test, which  
8 is my favorite argument here, with good reason. This  
9 court has defined and clarified what that test is so  
10 that - - - in such a manner that it cannot be  
11 disputed that number one, this is one occurrence  
12 under the unfortunate events test. That test  
13 requires that there be a continuity without an  
14 intervention that's spatially and temporally the  
15 same.

16 JUDGE RIVERA: I asked, does that test  
17 apply if the language is plain that this is not a  
18 single occurrence, that this is a multiple  
19 occurrence, wouldn't be a single occurrence?

20 MS. SMALLACOMBE: No, it doesn't, Your  
21 Honor, Judge Rivera. But I believe that even if you  
22 take that one sentence about personal organization  
23 and disregard the possibility that - - - and - - -  
24 and as far as the organization being - - - not being  
25 the - - - the entity that was injured, in this Ninth

1 Circuit case, the court - - - it's binding in exactly  
2 this case, a policy brutality class action suit did  
3 say it was the propagation of the policy that was the  
4 event and that determined whether it was one  
5 occurrence or multiple - - -

6 JUDGE RIVERA: I understand; you made this  
7 point that - - -

8 MS. SMALLACOMBE: So - - -

9 JUDGE RIVERA: - - - that because this is  
10 about civil rights actions - - -

11 MS. SMALLACOMBE: Right, it's not an  
12 initial injury.

13 JUDGE RIVERA: - - - in that context it  
14 might be about a policy and practice, and in that  
15 sense, the intent from your side is to cover the  
16 policy and practice.

17 MS. SMALLACOMBE: Exactly. And how can you  
18 say I'm going to provide coverage for police  
19 officers' liability for civil rights Section 1983  
20 actions or Section 1981 or any other civil rights  
21 violations and say - - - and not say, if you mean it,  
22 that - - - but each person in any class of these  
23 civil action lawsuits is going to require separate  
24 deductible? They didn't even mention it until six  
25 months after they assumed responsibility for the

1 defense because it did not even occur to Selective  
2 until six months after the case started that there  
3 was more than once occurrence here.

4 JUDGE RIVERA: Well, yeah, that's - - -  
5 that's because you think 9(B) doesn't mean one  
6 person.

7 MS. SMALLACOMBE: I don't believe it does.

8 JUDGE RIVERA: So if we disagreed with you  
9 - - -

10 MS. SMALLACOMBE: If you disagree with me -  
11 - -

12 JUDGE RIVERA: - - - you - - - you've run  
13 out of time, give me just one sentence on the pro  
14 rata.

15 MS. SMALLACOMBE: Okay.

16 JUDGE RIVERA: Of the fees.

17 MS. SMALLACOMBE: All right, the pro rata  
18 is clear. The two cases cited by opposing counsel on  
19 the pro rata is - - - are for cases where the court  
20 could not determine when the occurrences happened - -  
21 -

22 JUDGE RIVERA: All right.

23 MS. SMALLACOMBE: - - - and were regard - -  
24 - with regard to sharing costs amongst multiple  
25 insurance companies. Here, the - - - the complaint

1 in the underlying action that's the subject of this  
2 appeal specifies by - - - by year which - - - each  
3 cause of action is separated by year, because they  
4 could clearly define where each injury occurred in  
5 which - - - in each set - - - in each circumstance.

6 As far as the bad faith, at the very least  
7 there's a question of fact that requires some  
8 opportunity for us to obtain information to - - - to  
9 see if in fact this was bad faith based on just the -  
10 - - the obviousness of the timing that - - - that  
11 shows a strong indication that it might have been  
12 occurring here. Thank you, Your Honors.

13 JUDGE PIGOTT: Thank you. Mr. Galbo, good  
14 afternoon, sir.

15 MR. GALBO: Good afternoon, Judge Pigott.  
16 I'm here on behalf of the Selective Insurance  
17 Companies today as respondent.

18 To Judge Rivera's point, it's our  
19 contention that you don't get beyond 9(B), because it  
20 clearly states that it applies per person, and if you  
21 take the County's argument, you read out of 9(B) the  
22 per person and 9(B) only applies, according to the  
23 County, to say that the deductible applies to all the  
24 damages that - - - that - - - that are available  
25 under the policy and then you have to go to 9(C)

1           which says a deductible per occurrence, and that  
2           gives you the number of deductibles that apply in any  
3           instance.

4                    JUDGE PIGOTT:  How did this unfold?  You  
5           know, in so many class actions, the defense would say  
6           look, Judge, you know, we'll - - - we'll pay 100,000  
7           dollars, however they allocate it among their - - -  
8           their clients or whatever is up to them, or we'll a  
9           million dollars and we want hearings as to what the  
10          values are.  But to say we will pay 1,000 dollars to  
11          each and every one of these people means that there's  
12          no deductible.  It seems to me you got almost an  
13          instant conflict of interest because it's in your  
14          best interest to say it's 806 claims, and it's in  
15          their best interest to say it's one class, 806,000  
16          dollars, 10,000 deductible, you pay 796,000 dollars.

17                   MR. GALBO:  Well, it - - - it unfolds  
18          because at the time when the - - - the Second Circuit  
19          made clear that strip searches for violations and  
20          misdemeanors was absolutely unconstitutional,  
21          violation of the Fourth Amendment, there were many  
22          class action lawsuits that developed, and prior to  
23          the claim involving the County, there were four that  
24          were certified and settled and the amounts ranged  
25          from 1,000 to 2,000 up to an average in Vargas which



1 we cite in our - - -

2 JUDGE PIGOTT: No, but you see my point?

3 I'm say - - - what I'm saying, and I think this is  
4 part of Mrs. - - - Ms. Smallacombe's argument, is  
5 rather than going and looking at what the actual  
6 damages are per - - - per plaintiff, we're going to  
7 do a lump, and the lump's going to be 1,000 dollars  
8 times however many plaintiffs there are. We don't  
9 care whether the guy, you know, was strip searched  
10 and sent home; we don't care if he was strip searched  
11 - - - you know, was humiliated and committed suicide;  
12 we're just paying 1,000 each and that's it, Judge,  
13 we're done, everything - - - and plaintiff says fine.

14 MR. GALBO: Because that's, I guess, the -  
15 - -

16 JUDGE PIGOTT: I'm almost done. I'm almost  
17 done.

18 MR. GALBO: Oh, I'm sorry.

19 JUDGE PIGOTT: So you make the  
20 determination that you're paying a lump. Why isn't  
21 that lump yours, less 10,000 dollars deductible?

22 MR. GALBO: Because each of those - - - the  
23 amount, the ultimate amount, was determined by how  
24 many people came forward and - - -

25 JUDGE PIGOTT: You did that. You - - - you

1           said that. You said - - - you said the - - - the  
2           number's 806, or -7, whatever it is, and we'll pay  
3           1,000 each. We don't care what happened to them,  
4           Judge. We don't care at all. We want out of this  
5           case. We're going to pay 1,000 dollars a person.  
6           Plaintiffs' drooling, you know, geez, most of these  
7           people aren't worth fifty bucks; I'll take 800,000  
8           dollars, and you said that's perfect for us, and by  
9           the way, County, it's all on you.

10                   MR. GALBO: No, because we were told, first  
11           of all, that there were a - - - a class of 2,650  
12           people that were potentially - - - that were strip  
13           searched during that period, and that we didn't know  
14           what number was going to come forward, and that we  
15           were told by the expert that the best way to minimize  
16           your exposure here is to settle these claims before  
17           class is certified and to try to get a - - - what  
18           they call a claims-made agreement, which is only  
19           those who come forward, you make payment to - - -

20                   JUDGE PIGOTT: Um-hum.

21                   MR. GALBO: - - - rather than put 2,700,000  
22           dollars in a pot, and if only 500 come forward, than  
23           that amount is spread among all of those. And we  
24           were able to get that amount - - -

25                   JUDGE PIGOTT: But do you see what I mean?

1                   MR. GALBO: - - - off the table. I do. I  
2 do. But it - - -

3                   JUDGE PIGOTT: Yeah, but why - - - why does  
4 - - -

5                   MR. GALBO: But - - -

6                   JUDGE PIGOTT: - - - it become the - - -  
7 that's a smart move. All right, so - - - so you - -  
8 - you say we're going to settle for X amount of  
9 dollars. But doesn't that make a built-in conflict  
10 of interest for the carrier when they're saying, we  
11 can do this and we can do it in such a way to  
12 absolutely avoid paying, because we can put a  
13 deductible on each and that way we win, even though  
14 the County loses?

15                   MR. GALBO: Well, it - - - it - - - it all  
16 sounds like a very good plan. But first of all - - -

17                   JUDGE PIGOTT: No, but isn't that a  
18 conflict of interest?

19                   MR. GALBO: No, it isn't. Because it - - -  
20 first of all, we have an obligation to deal with the  
21 liability. This was a full liability claim. There's  
22 no question that it was.

23                   JUDGE PIGOTT: Right.

24                   MR. GALBO: We had - - - we had the  
25 obligation to deal with that. Secondly, at the time

1 that - - - in - - - in 2003, there was no sure - - -  
2 sure interpretation of these deductible endorsements  
3 that - - - under the unfortunate event test, that we  
4 were going to prevail on that issue. So Selective  
5 was on equal footing with the County because we  
6 didn't know who was going to ultimately pay for this.

7 JUDGE STEIN: In fact, you still don't,  
8 right?

9 MR. GALBO: No, ten years later. And in -  
10 - - in - - - and in the - - - in that time, we didn't  
11 have Appalachian.

12 JUDGE PIGOTT: But isn't that the conflict?  
13 What I'm saying is you're on equal footing with it.  
14 You say, if - - - if it goes this way, we're paying  
15 the whole thing. If it goes this way, we're out of  
16 it.

17 MR. GALBO: Well, and that's why we kept  
18 the - - -

19 JUDGE PIGOTT: It's a conflict.

20 MR. GALBO: - - - County fully informed  
21 from - - - from day one. We - - -

22 JUDGE PIGOTT: Okay, and they're the ones  
23 that made the determination, even though they knew  
24 that they were going to be assessed - - - I'm almost  
25 done - - -

1 MR. GALBO: Yeah.

2 JUDGE PIGOTT: - - - a deductible on each  
3 one of these people?

4 MR. GALBO: We - - - we took great care to  
5 tell them the implications of our position that the  
6 deductible applied per person. They were told that  
7 the best way to negotiate this was before a class was  
8 certified. We had a painstaking meeting about  
9 tolling, about the subsequent Kahler action, about  
10 whether all those claims would still be preserved.  
11 And in the end - - - they had defense counsel, other  
12 than class action expert counsel, and in the end,  
13 they say okay.

14 JUDGE FAHEY: You know, it's - - - it's my  
15 understanding here that at the time the settlement  
16 took place - - - that was before Appalachian, I  
17 think, and it was also before the Roman Catholic  
18 Diocese - - -

19 MR. GALBO: Well before.

20 JUDGE FAHEY: - - - of Brooklyn, well  
21 before that also. So in that context, it seems to me  
22 like two defend - - - it's almost like two - - -  
23 that's why they have their own counsel, because  
24 there's two separate - - - there's two separate  
25 parties here who really have a - - - a different

1 interest in terms of the distribution of the cost of  
2 settlement, but not as to the amount of settlement.  
3 So it happens quite often that you'll settle for a  
4 certain amount and say we're going to have to keep  
5 fighting about who's going to pay this 806,000  
6 dollars. So that being the case, let's assume that  
7 that was the case, why shouldn't the logic of that  
8 deductibles then apply to the - - - or do you think  
9 it does apply to - - - to the legal fees?

10 MR. GALBO: Why - - -

11 JUDGE FAHEY: Or is there an ambiguity in -  
12 - - in the way the contract is written in - - - in  
13 terms of the distribution of legal fees that would  
14 require you to pay them?

15 MR. GALBO: No, I - - - I think that the  
16 policy is clear that the legal fees are included  
17 within the deductible under paragraph 9(C).

18 JUDGE FAHEY: So - - -

19 MR. GALBO: And - - -

20 JUDGE FAHEY: Reverse it then. If there's  
21 - - - if - - - if there's only one deductible for  
22 legal fees, then why should there only be one - - -  
23 wouldn't - - - wouldn't be one deductible with you on  
24 the general liability claim?

25 MR. GALBO: If there is only one deductible

1 - - -

2 JUDGE FAHEY: You got - - - you got two  
3 claims, one for 400,000, one for 800,000. Your - - -  
4 and for the 400,000 claim, the legal fees claim,  
5 you're saying one deductible. The 800 - - - it goes  
6 to Bruce or whoever the primary claims was, that's  
7 the legal fees. Follow me.

8 MR. GALBO: Okay.

9 JUDGE FAHEY: The 800,000 deductible goes  
10 for each person. Shouldn't it be the same for both  
11 either on a deductible for every claimant on both the  
12 legal fees and the general liability claim, or not?

13 MR. GALBO: Absolutely, and that's been our  
14 position all along. It was the court - - -

15 JUDGE FAHEY: It should be the same for  
16 both?

17 MR. GALBO: It was the court that - - - and  
18 - - - and at the urging of the County, that took the  
19 defense costs, which were 314,000, and the 440,000  
20 dollars in plaintiffs' attorney fees, and allocated  
21 that as one deductible to Bruce.

22 JUDGE FAHEY: So what if we find that the  
23 court was right as to legal fees? Then wouldn't that  
24 mean that you would then lose on the individual  
25 deductible being applied for the claimants' fees?

1 MR. GALBO: Well, because the court - - -  
2 the - - - the court had a different reason.

3 JUDGE FAHEY: The ambiguity in the  
4 contract.

5 MR. GALBO: The ambiguity in the contract,  
6 that there was no provision in that - - - in - - - in  
7 the contract to deal with multiple claims and  
8 apportioning the legal fees - - -

9 JUDGE PIGOTT: Well, the - - - the problem  
10 with that, though, is I - - - I agree with Judge  
11 Fahey, if you settled them individually for 1,000  
12 dollars, they'd go away and one-third of the 1,000  
13 goes to their lawyer. You don't pay an attorneys'  
14 fee on top of it if you settled them - - - settled  
15 them individually.

16 MR. GALBO: That's correct. But that's not  
17 the - - - we had a class action that - - - we  
18 couldn't make it go away.

19 JUDGE PIGOTT: But if you had a class  
20 action, it would seem to me you got a deductible on  
21 the class action and a deductible on the attorneys'  
22 fee and everybody goes home.

23 MR. GALBO: That's not what the policy  
24 says, though. The policy says that we have a  
25 deductible per person, and each of these persons did



1 show up; 807 showed up here. Not - - - not, you  
2 know, one or groups - - -

3 JUDGE PIGOTT: Well, shouldn't the argument  
4 have been here he comes, he's going to come in and  
5 prove his case, he says I was strip searched, here's  
6 1,000 dollars, pay your lawyers 333 dollars, and  
7 leave?

8 MR. GALBO: In terms of - - -

9 JUDGE PIGOTT: The attorneys' fee for the  
10 plaintiff. I - - - I - - -

11 MR. GALBO: Then - - - then you're  
12 suggesting that the - - - that the - - - the  
13 certification would not have been accomplished.

14 JUDGE PIGOTT: But if it is, then it - - -  
15 then it is for the attorneys' fees, period, is my  
16 point.

17 MR. GALBO: The - - - the class would have  
18 been certified. I think we've set - - - set forth in  
19 our brief.

20 JUDGE PIGOTT: I guess we're - - - I guess  
21 we're there, yeah.

22 MR. GALBO: Right. So if the class is  
23 certified, then the question becomes how do you - - -  
24 how do you decide how to settle it. We were told to  
25 do that before class certification, with the idea the

1 class was going to be certified. Now, keep in mind,  
2 there's two sides to settlement negotiations, and the  
3 plaintiffs' attorneys did not want to and would not  
4 agree to a settlement with, you know, going and  
5 having separate damage trials and only - - - they  
6 were looking for class certification on damages as  
7 well.

8 And as a matter of fact, there have been,  
9 and we cite in our brief, certification of the class  
10 with either a formula for damages based on how the  
11 strip searched occurred, or just giving one case 500  
12 dollars per person for humiliation, and then you  
13 would have a separate trial on emotional damages.  
14 That's another approach, but the insistence here was  
15 that we want 1,000 dollars per head. The negotiation  
16 was in exchange for that, then we want a claims-made  
17 class. So we're not going to take that 1,000  
18 multiply it by 2,650 individuals who were the class,  
19 which has been the case in many other class actions.  
20 Instead we're going to wait to see who comes forward,  
21 and 807 came forward.

22 JUDGE PIGOTT: And then close the door.

23 MR. GALBO: And then close the door. So -

24 - -

25 JUDGE ABDUS-SALAAM: But, counsel - - -

1 JUDGE RIVERA: So on the legal fees - - -  
2 can I ask you on - - - on - - -

3 MR. GALBO: Yes.

4 JUDGE RIVERA: - - - the legal fees?

5 MR. GALBO: Yes.

6 JUDGE RIVERA: Got a little confused in  
7 terms of your response to Judge - - -

8 MR. GALBO: Yes.

9 JUDGE RIVERA: - - - Fahey. So on - - - on  
10 the legal fees, you're saying the - - - the insurance  
11 policy is not ambiguous because each occurrence  
12 includes these legal fees, and these are separate  
13 occurrences; is that - - -

14 MR. GALBO: The - - - the - - -

15 JUDGE RIVERA: Am I understanding you  
16 correctly?

17 MR. GALBO: It's each deductible includes  
18 the legal fees.

19 JUDGE RIVERA: The deductible, but it's per  
20 occurrence.

21 MR. GALBO: The deductible is per person  
22 and per - - -

23 JUDGE RIVERA: Per person in this case and  
24 per occurrence.

25 MR. GALBO: Right.

1 JUDGE RIVERA: Okay, so we're staying with  
2 the person.

3 MR. GALBO: Yes.

4 JUDGE RIVERA: Okay. All right.

5 JUDGE ABDUS-SALAAM: Counsel - - -

6 JUDGE RIVERA: I'm - - - I'm sorry. Let me  
7 just finish the thought.

8 JUDGE ABDUS-SALAAM: All right.

9 JUDGE RIVERA: So then you've got it per  
10 person, and under this policy are you then required  
11 to establish the amount per person of those fees?  
12 Would you have to have shown Rensselaer, the County,  
13 here's - - - here's the hours my attorneys spent on  
14 this member of the class and that member of the  
15 class?

16 MR. GALBO: Well - - - well, there's the  
17 rub, because it - - - it couldn't be done.

18 JUDGE RIVERA: Why not?

19 MR. GALBO: It couldn't be done because the  
20 fees were generated, by and large - - - other than  
21 the taking of eleven depositions, dealing with the  
22 issues - - -

23 JUDGE RIVERA: With the class.

24 MR. GALBO: - - - in the - - - in the class  
25 setting.

1 JUDGE RIVERA: In the class. So then isn't  
2 then the policy ambiguous about how to deal with a  
3 litigation that is done in a class context?

4 MR. GALBO: Well - - - well, I would argue  
5 that the analogy is in the Continental case and in  
6 Diocese of Brooklyn - - -

7 JUDGE RIVERA: Okay.

8 MR. GALBO: - - - where the damages were  
9 not separable among policy periods. The court didn't  
10 say the silence there in the policy about how to deal  
11 with that was ambiguous. Instead, they went and  
12 fashioned a practical remedy, which was to spread  
13 that two-million-dollar settlement that the Diocese  
14 entered into - - -

15 JUDGE RIVERA: Yeah, but the - - -

16 MR. GALBO: - - - over the seven policy  
17 periods.

18 JUDGE RIVERA: But - - - but the reason for  
19 this is because of the nature of the formation of  
20 this - - - the litigation as a class and the way you  
21 organize your work towards the - - - that particular  
22 litigation.

23 MR. GALBO: Well, it was - - - it was - - -

24 JUDGE RIVERA: It's not about the events.

25 MR. GALBO: It - - - it was the - - - the

1 defense counsel in that.

2 JUDGE RIVERA: Yeah. No, I understand.

3 MR. GALBO: Okay. Yeah.

4 JUDGE RIVERA: I understand.

5 MR. GALBO: And - - - and the plaintiffs'  
6 attorneys too. They were in the same - - -

7 JUDGE RIVERA: Yes. Yes.

8 MR. GALBO: - - - situation - - -

9 JUDGE RIVERA: Yes.

10 MR. GALBO: - - - the - - - the way it was  
11 organized because it was a - - - it was a class. But  
12 why - - -

13 JUDGE RIVERA: And that's the point of the  
14 class, right? There's a certain - - -

15 MR. GALBO: Yes.

16 JUDGE RIVERA: - - - efficiency behind the  
17 class - - -

18 MR. GALBO: But the - - -

19 JUDGE RIVERA: - - - that anticipates,  
20 although obviously some class actions do result in  
21 very hefty legal fees - - -

22 MR. GALBO: Right.

23 JUDGE RIVERA: - - - but they anticipate  
24 there's a certain efficiency in that particular  
25 litigation model.

1 MR. GALBO: Right.

2 JUDGE RIVERA: And that this insurance  
3 policy does not have any language explaining what you  
4 do when you have that kind of litigation.

5 MR. GALBO: Right. And what we're saying  
6 is that silence alone doesn't create the ambiguity,  
7 the court should fashion a reasonable remedy. And to  
8 say that the reasonable remedy that the court below  
9 fashioned was that you assign 700-and-some-thousand  
10 dollars' worth of legal fees between the defense and  
11 the plaintiffs to the Bruce claim - - -

12 JUDGE RIVERA: Um-hum.

13 MR. GALBO: - - - to recover 5,000 dollars  
14 is not any basis for reality. And that's what - - -  
15 what - - - what happened below, so there - - - there  
16 doesn't seem to be much difference - - -

17 JUDGE RIVERA: Would - - - would the amount  
18 have been that much different if you had - - - if it  
19 was just Mr. Bruce?

20 MR. GALBO: Well, I - - - I believe so. I  
21 don't think anyone would have - - -

22 JUDGE RIVERA: You wouldn't have gotten  
23 into these long settlement - - -

24 MR. GALBO: No.

25 JUDGE RIVERA: - - - negotiations?

1 MR. GALBO: No.

2 JUDGE RIVERA: You wouldn't have hired the  
3 expert on the class - - -

4 MR. GALBO: No, the - - -

5 JUDGE RIVERA: - - - action?

6 MR. GALBO: The case would probably settle  
7 within the - - - the deductible.

8 JUDGE RIVERA: But just for his amount?

9 MR. GALBO: Yes, absolutely.

10 JUDGE RIVERA: Okay.

11 JUDGE ABDUS-SALAAM: Your time is up, but I  
12 do have a question - - -

13 MR. GALBO: Yes.

14 JUDGE ABDUS-SALAAM: - - - about the class  
15 certification - - -

16 MR. GALBO: Yes.

17 JUDGE ABDUS-SALAAM: - - - because you said  
18 it was inevitable it became a class.

19 MR. GALBO: Yes.

20 JUDGE ABDUS-SALAAM: But counsel was - - -  
21 for the County is arguing that it shouldn't have been  
22 inevitable, that Selective brought in an expert on  
23 class certification who - - - essentially, she,  
24 according to the County, did nothing to prevent this  
25 class from being certified.



1                   MR. GALBO: The - - - the advice that was  
2 given is that the - - - from that expert was that the  
3 class was going to be certified, that the previous  
4 strip search cases in New York dealing with this  
5 Second Circuit prohibition had been certified, there  
6 was no reason this one wouldn't be, and that in light  
7 of that, the best way to move forward is to try to  
8 settle pre-certification to get the best deal.

9                   Now in - - - in addition to that, when the  
10 class with Bruce as the lead plaintiff was dismissed,  
11 it was dismissed only on a technicality, not on the  
12 merits. And the plaintiffs' attorneys, in order to  
13 protect themselves, took another plaintiff with the  
14 same class, the same number of people, and started  
15 another action, and there was no indication that that  
16 tolling is applied, which we, you know, set forth in  
17 our brief, would not have done anything to continue  
18 and perpetuate this.

19                   JUDGE ABDUS-SALAAM: It's your - - - your  
20 position that the County has not even raised an issue  
21 of fact regarding bad faith?

22                   MR. GALBO: Absolutely, because it's clear  
23 that the - - - the tolling would still apply and we  
24 would be right back here with the Kahler action; that  
25 it was clear that class certification was inevitable,

1 and that the County was well informed before any  
2 decisions were made about Selective's position  
3 concerning the deductible per person and had - - - we  
4 had painstaking discussions about the merits of all  
5 of these things.

6 JUDGE PIGOTT: I know your light's on.  
7 Just - - - just so I'm clear, you're saying that the  
8 County of Rensselaer was told, we're going to settle  
9 these on a per-person basis, because that's what the  
10 contract provides and you're going to be responsible  
11 for all the damages and they said good, that's fine?

12 MR. GALBO: We - - - we told them our  
13 position on the deductible, that it was a per person.

14 JUDGE PIGOTT: Say yes to that? I mean - -  
15 -

16 MR. GALBO: They disagreed vehemently with  
17 that.

18 JUDGE PIGOTT: Okay.

19 MR. GALBO: They didn't disagree with  
20 settling these things.

21 JUDGE PIGOTT: Is there anything wrong with  
22 that? In other words let's assume they said we  
23 disagree with you on that but, you know, we'll - - -  
24 we'll take the 800 grand, you know, that's - - - we  
25 don't want to get more exposure, so we'll settle it

1 for 800,000 but we want to debate with you the idea  
2 of these being per person as opposed to per  
3 occurrence?

4 MR. GALBO: And that's - - -

5 JUDGE PIGOTT: And that's why we're here.

6 MR. GALBO: That's why we're here, and as a  
7 matter of fact, the record is clear from my letter  
8 that we were willing to share this equally and - - -  
9 and not even be here - - -

10 JUDGE PIGOTT: Right.

11 MR. GALBO: - - - but that didn't work out.

12 JUDGE PIGOTT: Well, we're glad you're here  
13 right now.

14 MR. GALBO: Thank you.

15 JUDGE PIGOTT: Ms. Smallacombe.

16 MS. SMALLACOMBE: Thank you. I'd like to  
17 address - - - first of all, back to the per-person  
18 part of this insurance contract. There are - - - the  
19 - - - the assumption that because that one sentence  
20 says per person or - - - or - - - I'm sorry, I'm - -  
21 - I'm losing my words right now.

22 JUDGE FAHEY: Organization.

23 JUDGE ABDUS-SALAAM: Organization.

24 MS. SMALLACOMBE: Organization, right, that  
25 that means in every instance, every case, in every

1 single claim brought under this policy will be one  
2 person gets one deductible, is simply not shown in  
3 this policy. The deductible provision itself in the  
4 policy says there's one deductible per person, and  
5 there's one deductible per occurrence, so you do get  
6 to the whole issue of the unfortunate events test by  
7 virtue of the ambiguity in the very policy itself  
8 that does provide, in several places in the policy, a  
9 distinct per-person obligation and a distinct  
10 occurrence obligation.

11 And the unfortunate invest - - - events  
12 test, this happened in the same location continuously  
13 without interruption. The exact same acts of  
14 wrongdoing were occurred - - - alleged wrongdoing,  
15 now found to be Constitutionally appropriate.

16 JUDGE STEIN: I guess my question is, why  
17 can't those two provisions, if we look at them on  
18 their face - - -

19 MS. SMALLACOMBE: Um-hum.

20 JUDGE STEIN: - - - provide that there are  
21 multiple deductibles if one person is injured in  
22 multiple occurrences, or if numerous individuals  
23 sustain some injury as a result of one occurrence?  
24 Why can't it be either/or?

25 MS. SMALLACOMBE: I can't see a situation

1 under a police officer's liability policy whereby one  
2 person would be a victim of multiple occurrences.

3 JUDGE PIGOTT: Well, let's - - - let's  
4 assume you've got a police officer who's driving  
5 about thirty of these people to the jail and he  
6 drives it off a cliff. Now you got thirty dead  
7 prisoners who all want to sue you.

8 MS. SMALLACOMBE: Yeah. Right.

9 JUDGE PIGOTT: Is that - - - is that per  
10 person?

11 MS. SMALLACOMBE: No, that's a single  
12 occurrence. And - - - and you know what, Selective  
13 would be arguing it's a single occurrence because  
14 they would only want to have one one-million-dollar  
15 policy exposed. If you accepted their arguments from  
16 day one that there was a per person deductible, then  
17 arguably, 800 million dollars was available to these  
18 plaintiffs for a - - - because he's saying oh, each -  
19 - - the policy just keeps repeating itself, every  
20 person gets 10,000 deductible and a million in  
21 coverage, 10,000 - - - they never said that and they  
22 never intended it.

23 And the - - - the - - - you cannot ignore -  
24 - - the law is so clear that you cannot ignore clear  
25 language in the policy, and there really is no reason

1 for - - - for there to be two sentences, one  
2 deductible per person, one deductible per occurrence,  
3 if you don't even consider the possibility that in a  
4 class action for a police officer's liability policy  
5 that expressly includes coverage for civil rights  
6 violations, which will almost always constitute  
7 multiple plaintiffs, that if you want to say each  
8 member of that class is going to take a separate  
9 deductible, why that shouldn't have been in the  
10 policy saying that.

11 JUDGE RIVERA: You and the - - - the County  
12 understands this. Why didn't you negotiate that  
13 language and make it clear?

14 MS. SMALLACOMBE: Well - - -

15 JUDGE RIVERA: You're a sophisticated  
16 party.

17 MS. SMALLACOMBE: But not really  
18 sophisticated. Unlike the Roman Catholic - - -

19 JUDGE RIVERA: I - - - I appreciate the  
20 candor.

21 MS. SMALLACOMBE: It's true. Well, first  
22 of all, the Roman Catholic Archdiocese, they - - -  
23 they were sophisticated. They said okay, we'll take  
24 a 250-thousand-dollar self-insured retention to save  
25 premiums. Taking a 10,000-dollar or a 15,000-dollar

1 deductible didn't save any premiums for the County.

2 The County assumed, based on their  
3 reasonable expectations, that in a class action  
4 situation based on a civil rights violation, there  
5 would be one deductible. The Selective Insurance  
6 expert senior representative who sent the two letters  
7 to the County after these suits were brought refers  
8 to a single claim, a single deductible, a single  
9 occurrence.

10 The - - - the - - - it was six months after  
11 they first got involved in this litigation that they  
12 decided to claim that they were entitled to a  
13 separate deductible per person. The ambiguities in  
14 the contract clearly require that you do the  
15 unfortunate events test.

16 JUDGE ABDUS-SALAAM: Counsel, who - - - who  
17 put - - - or who insisted on the language that says,  
18 under the definition of occurrence, "All claims  
19 arising out of A) a riot or insurrection, B) a civil  
20 disturbance resulting in an official proclamation of  
21 a state of emergency, C) a temporary curfew, or D)  
22 martial law are agreed to constitute one occurrence"?

23 MS. SMALLACOMBE: That was part of the  
24 policy by Selective. The County of Rensselaer had no  
25 input on the language of this policy, and I'm a soph

1           - - - I am a sophisticated user of insurance because  
2           I've defended people for thirty-one years. I do not  
3           negotiate the terms of my insurance contract. I've  
4           never been offered the opportunity to do so, nor have  
5           I ever implied I was entitled to do so.

6                     The sophisticated user really doesn't - - -  
7           is an unfair argument that was raised by the court  
8           below. There is no reason to believe that the County  
9           of Rensselaer thought that they could have this - - -  
10          or even assume there was a problem that a civil  
11          rights coverage would not include one deductible for  
12          one - - - one action. The - - - the plaintiff  
13          themselves - - - I mean, the - - - the - - - Selective  
14          themselves understood there to be more than one, so  
15          to say it's not ambiguous, and - - - and as such they  
16          must be construed against the insurer, is just - - -

17                    JUDGE RIVERA: Well - - - well, I get - - -  
18          well, who chose the language that it's a civil rights  
19          action?

20                    MS. SMALLACOMBE: That's just part of the  
21          policy.

22                    JUDGE RIVERA: That's theirs also?

23                    MS. SMALLACOMBE: And - - - and the  
24          definition of personal injury includes civil rights,  
25          any claim - - -



1 JUDGE RIVERA: I understand, but you're  
2 saying that was also their language, not yours?

3 MS. SMALLACOMBE: That's all part of the  
4 policy that they bought, which was a standard police  
5 professional liability policy. It wasn't a specific  
6 policy designed for Rensselaer County. It's for  
7 every police force who buy this policy, and they  
8 spent a lot of money on this policy.

9 JUDGE STEIN: So it's not just a civil  
10 rights policy, it's any - - - any kind of liability.

11 MS. SMALLACOMBE: Yeah, but that was one  
12 section. It was bodily injury - - -

13 JUDGE STEIN: Um-hum.

14 MS. SMALLACOMBE: - - - property damage,  
15 and personal injury. Under personal injury, civil  
16 rights was. And - - - and the - - - the last thing,  
17 the - - - the contention that - - -

18 JUDGE RIVERA: But civil rights actions, of  
19 course, can involve one individual.

20 MS. SMALLACOMBE: It can, absolutely. But  
21 most likely when it's a civil rights violation,  
22 there's a large percent - - - and this has even been  
23 stated by courts in other jurisdictions, it's going  
24 to be a class action. And why not specifically say  
25 in the complaint, by the way, class actions are - - -

1 are always going to constitute one deductible per  
2 class member or will never constitute it. It - - -

3 JUDGE RIVERA: It depends on the nature of  
4 the class action, right?

5 MS. SMALLACOMBE: But it shouldn't.

6 JUDGE RIVERA: I mean, your - - - your  
7 point here is that there's a - - - that there's a  
8 policy, right, that that's the occurrence?

9 MS. SMALLACOMBE: That - - - the  
10 implementation of the policy - - -

11 JUDGE RIVERA: The decision to impose a  
12 strip search is - - -

13 MS. SMALLACOMBE: - - - without volition.

14 JUDGE RIVERA: - - - the occurrence.

15 MS. SMALLACOMBE: Right.

16 JUDGE RIVERA: But that need not be the  
17 basis for other civil rights actions.

18 MS. SMALLACOMBE: True, 1983 instance, it  
19 would always be a policy, because - - -

20 JUDGE RIVERA: Because you've got - - - the  
21 municipal policy - - -

22 MS. SMALLACOMBE: - - - you got to have the  
23 - - -

24 JUDGE RIVERA: - - - is the only way  
25 they're going to get to you, correct.

1 MS. SMALLACOMBE: Right, that - - - so that  
2 would be always the case.

3 JUDGE RIVERA: Correct.

4 MS. SMALLACOMBE: But yes, to - - - to say  
5 that we have separate deductibles for occurrences in  
6 this policy and separate deductibles for persons, but  
7 to say always it's going to be per person per injury  
8 as per deductible is completely inconsistent, and I  
9 would request that this court - - - urge the court to  
10 not find in that - - - in that - - -

11 JUDGE PIGOTT: Thank you. Thank you both.

12 MS. SMALLACOMBE: Thank you.

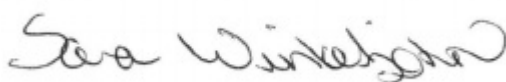
13 (Court is adjourned)

14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

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

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Selective Insurance Company of America v. County of Rensselaer, No. 4 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: \_\_\_\_\_

Agency Name: eScribers

Address of Agency: 700 West 192nd Street  
Suite # 607  
New York, NY 10040

Date: January 6, 2016