Amicus Project Update: June 2009

Another victory for United Policyholders' Amicus Project

On March 9, 2009, the California Supreme Court ruled in favor of a large policyholder – the State of California – in connection with the State's insurance claim for the cost of cleaning up the Stringfellow acid pits in the case of State of California v. Allstate Insurance Company, 45 Cal. 4th 1008. Longtime Amicus Project supporters **Anderson Kill & Olick** won a hard-fought important victory for the State, (their client), and United Policyholders helped out with amicus briefs drafted by **David Gauntlett** in both the Court of Appeal and the California Supreme Court.

The Supreme Court's decision will be helpful in cases that get decided under California law where an insurance company is attempting to avoid paying a claim in which the cause of the loss may be a combination of covered and uncovered events. After Hurricane Katrina, insurance companies asserted flood exclusions to avoid paying for any damage, even though the damage was caused partly by wind (a covered loss).

In State of California v. Allstate, the Supreme Court ruled that if a loss is caused by covered and uncovered events and the policyholders can't prove exactly how much is covered, the insurance company has to pay for the whole loss up to the policy limits. Because insurance law is determined on the state level, precedents established in California, the nation's most populous state, are highly influential.

United Policyholders has filed numerous amicus briefs, as well as requests for rehearing, publication and depublication in 2009. Since 1991 United Policyholders has filed over 250 Amicus Curiae briefs in federal and state courts throughout the country. Justices often quote from and adopt arguments from UP briefs in their written opinions, and the points we make often lead to strengthened legal protections for policyholders. On occasion courts specifically invite UP to weigh in and allow UP attorneys to participate in oral argument.

The following are brief synopses of the cases where United Policyholders has appeared since publication of our last newsletter. Please visit http://uphelp.org/amicus.html to stay abreast of our work and of the new briefs we file over time.

CALIFORNIA

Kwikset Corp. v. S.C. (Benson), (2009) California Supreme Court

Issue: Petition for Review: Under Kwikset, the courts will not be open to challenge a falsely advertised product unless the plaintiff also alleges and proves a defect in the product, or that cheaper alternatives were available, or that the product was not "worth" what the consumer paid. This has nothing to do with standing as that concept is usually understood (meaning a sufficiently concrete and direct interest). Moreover, the Kwikset court's stringent requirements are difficult enough to prove with evidence, much less to allege at the pleading stage, before discovery, when standing is often determined. If Kwikset is the law, the negative impact on California's false advertising prohibitions will be substantial. This petition was prepared pro bono by attorney **Pamela Gilbert** with the Washington, D.C. firm of Cuneo Gilbert & LaDuca, LLP.

Meyer v. Sprint Spectrum L.P. (2009) –Cal.Rptr.3d—, 2009 WL 197560 (Jan. 29, 2008)
Supreme Court Case No. S153846

Issue: Petition for Rehearing urging the Court to revisit its decision that the Consumers Legal Remedies Act, Civil Code section 1770 e seg ("CLRA") does not authorize peremptory challenges to provisions in an agreement to foreclose the public civil justice system (e.g., through arbitration) and which are unconscionable under California law. This decision clearly ignores the plain language of the statute and the breadth of all its provisions and should be substantially modified. The opinion eviscerated the language and scope of the CLRA, despite the statute's plain language and its express command that its provisions be viewed liberally. Joining United Policyholders in urging the Court to grant a rehearing was the Center for Responsible Lending, Consumer Action, Consumer Watchdog, Consumers for Auto Reliability and Safety, The National Association of Consumer Advocates, the National Consumer Law Center, and Public Citizen. This letter was written pro bono by San Francisco attorney **James C. Sturdevant** of the Sturdevant Law Firm.

NORTH CAROLINA

Harleysville Mutual Insurance Company vs. Buzz Off Insect Shield (Jan. 2009), Supreme Court of North Carolina, Case No. 272A08, Appellate Court No. COA07-1002

Issue: The policyholder's ultimate liability has no bearing on the determination of whether an insurance company must defend the policyholder against a suit for "personal injury advertising injury." Whether an insurance company has a duty to defend depends solely on the allegations contained in the underlying complaint. Using the "comparison test" the court must read the pleading side-by-side with the insurance policy to determine whether any allegations in the complaint could possibly be covered.

In order for the failure to conform exclusion to apply, courts have held that the underlying complaint must contain specific allegations regarding non-conformity as to quality or performance advertised. Even if a policyholder is accused of mischaracterizing his own products in advertising, the failure to conform exclusion does not apply if the policyholder allegedly disparages, even implicitly, his competitor's products. Only where the underlying complaint alleges the policyholder misrepresented his own products, and his misrepresentations did not implicitly disparage a competitor's products, have courts applied the failure to conform exclusion. This amicus brief was written pro bono for United Policyholders by **John Ellison** of Reed Smith's Philadelphia office, and **C. Douglas Maynard, Jr.** of the North Carolina firm of Maynard & Harris.

PENNSYLVANIA

ACE American Insurance Company, v. Underwriters at Lloyds and Companies, et al., (2008) Supreme Court of Pennsylvania, No. 45 EAP 2008.

Issue: Errors and Omissions, or "E&O" insurance. If an insurance company attempts to avoid its coverage obligations under a claims-made policy due to "late notice," the insurance company must bear the burden to prove that notice was late, just like under an occurrence policy. Even when policies are drafted to require a policyholder to report a claim to the insurance company within the policy period or within a certain number of days thereafter, the insurance company still should be required to prove that notice was provided late and that the insurance company was materially prejudiced by the delay. Allowing an insurance company to collect full premiums yet refuse coverage based on a mistake or technicality, where the insurance company cannot demonstrate that it would have acted materially differently had it received notice earlier, or that its costs will now be higher, simply "is unduly severe and

inequitable.” UP’s brief was written pro bono by **Timothy Law** of Reed Smith’s Philadelphia offices.

Support UP’s Amicus Project

The number of briefs that insurance companies file to convince courts to see things their way far outnumber pro-policyholder briefs. Consumers’ voices are often drowned out by insurance companies. UP works to change this through our Amicus Project.

Help us level the playing field for consumers in court by supporting UP’s Amicus Project today. Tax-deductible donations can be made online at http://tinyurl.com/donateUP, or by check made payable to United Policyholders, 222 Columbus Avenue, Suite 412, San Francisco, CA 94133.