

No. 12-55351

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

STREET SURFING, LLC, a Nevada limited liability company,

Plaintiff / Appellant

v.

GREAT AMERICAN E&S INSURANCE COMPANY, a Delaware corporation,

Defendant / Appellee

MOTION BY UNITED POLICYHOLDERS FOR LEAVE TO FILE
AMICUS BRIEF IN SUPPORT OF APPELLANT STREET SURFING'S
PETITION FOR PANEL AND EN BANC REHEARING

Amy Bach (CA Bar No. 142029)
Daniel Wade (CA Bar No. 296958)
UNITED POLICYHOLDERS
381 Bush Street, 8th Floor
San Francisco, CA 94104
Phone: 415-393-9990
Fax: 415-677-4170
Email: dan.wade@uphelp.org

Eric J. Schindler (CA Bar No. 141386)
Schindler Law Group
20321 SW Birch Street, Suite 200
Newport Beach, California 92260
Telephone: 949-483-8700
Facsimile: 949-464-9714
Email: eric@schindlerlaw.net

MOTION FOR LEAVE TO FILE AMICUS BRIEF

Pursuant to F.R.A.P. 29(a) and Circuit Rule 29-2, United Policyholders (hereinafter “UP”) hereby moves this Court for an order allowing UP to file an amicus curiae brief in support of appellant Street Surfing’s petition for panel and *en banc* rehearing, filed June 24, 2014. The motion and the attached proposed amicus brief are being filed well within the ten-day deadline set forth in Circuit Rule 29-2(e)(1).

On June 25, 2014, pursuant to Circuit Rule 29-3 UP sought the agreement of all parties for the filing of UP’s amicus brief, but on June 27, 2012, Appellee GAIC declined to consent to UP’s request, making this motion necessary.

This Court has broad discretion to allow amicus status to a party with a valid interest and timely, relevant information. *Gerritsen v. De La Madrid Hurtado*, 819 F.2d 1511, 1514 n. 3 (1987). Courts generally exercise liberality in granting amicus status when, as here, the matter is one of public concern. S. Thomas, *Corpus Juris Secundum*, “Amicus Curiae,” §3 (2012); see *Neonatology Associates, P.A. v. Commissioner of Internal Revenue*, 293 F. 3d 128, 133 (3rd Cir. 2002) (opinion by Circuit Judge Samuel Alito: “skeptical scrutiny of proposed amicus briefs may equal, if not exceed, the time that would have been needed to study the briefs at the merit stage if leave had been granted”).

MOVANT’S INTEREST

UP is a non-profit 501(c)(3) organization founded in California in 1991 that is a voice and an information resource for insurance consumers throughout the United States. UP’s growing reputation as a source of useful information for appellate courts was confirmed when its amicus brief was cited in the United States Supreme Court’s opinion in *Humana v. Forsyth*, 52 U.S. 299, 314 (1999). UP has

filed amicus briefs on behalf of insureds in more than 300 cases throughout the United States.

UP's work is divided into three program areas: Roadmap to Recovery (disaster recovery and claims help), Roadmap to Preparedness (insurance and financial literacy and disaster preparedness), and Advocacy and Action (advancing pro-consumer laws and public policy). UP hosts a library of tips, sample forms and articles about commercial and personal lines insurance products, coverage, and claims process at www.uphelp.org. State insurance regulators, academics, and journalists throughout the United States routinely seek UP's input on insurance and legal matters. UP has been appointed for six consecutive years as an official consumer representative to the National Association of Insurance Commissioners.

Among other things, UP monitors legal developments that impact insureds and publishes materials aimed at educating insureds and insurers alike. UP has previously appeared as amicus curiae in hundreds of cases in the California courts. UP has also appeared amicus curiae in cases before the United States Supreme Court and was the only national consumer organization to submit an amicus brief in the landmark case of *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003).

**WHY AN AMICUS BRIEF IS DESIRABLE AND WHY THE MATTERS
ASSERTED IN THE PROPOSED BRIEF ARE RELEVANT TO THE
DISPOSITION OF THIS CASE**

On June 10, 2014, this Court issued an opinion, for publication, deciding the appeal from the judgment below. On June 24, 2014, appellant Street Surfing filed a petition for panel and *en banc* rehearing on three significant issues of California insurance law stated in the Court's opinion: (1) that the "in your advertisement" element of the covered offense (f) is necessarily satisfied by a mere display in a

retailer's store of the insured, Street Surfing's, logo and mark on its product; (2) that application of the "first publication" exclusion to one possible view of "advertisement" sufficed to bar coverage "in all possible worlds"; and (3) that there was insufficient evidence to show use of the trademarked phrase "Street Surfing"/"Street Surfer" as a slogan in use by Noll.

This case concerns the interpretation of what constitutes "infringement upon another's slogan in your 'advertisement'" under Commercial General Liability ("CGL") Policies. Extended discussion of the *Interstate Bakeries Corp. v. OneBeacon Ins. Co.*, 686 F.3d 539, 546 (8th Cir. 2012) case relied upon by the panel in its decision is desirable as its conclusions are antithetical to established California insurance law (and indeed, Missouri law, as the dissent there noted). Its citation will thereby create conflicts with existing California law, which may ultimately require *en banc* review to be resolved so that the instant panel decision is best addressed now to avoid further conflicts.

The amicus brief also addresses what extrinsic evidence both insureds and insurers may rely on to show that a claim for coverage falls either within or outside an insurer's policy period when conduct evidencing potential coverage arises so as to assess the applicability of the "Material Published Prior" exclusion. Thus, this case involves issues of importance to insureds throughout the state. It presents an opportunity to clarify the circumstances under which an insurer has a duty to defend a lawsuit under offense (f) "infringement upon another's slogan in your 'advertisement,'" last addressed by this court in *Hudson Ins. Co. v. Colony Ins. Co.*, 624 F.3d 1264, 1268 (9th Cir. (Cal.) 2010) (cited on six occasions in Street Surfing's briefs but not the Panel's opinion). Such clarification is critical to explain the circumstances where reliance on extrinsic evidence as well as what form of that evidence will reveal that a claim falls within an exclusion, such as that for "Material Published Prior" found applicable here.

Finally, the Panel's failure to address the key published case supporting application of the doctrine of equitable estoppel to GAIC's decision, *City of Hollister v. Monterey Ins. Co.*, 165 Cal. App. 4th 455, 494 (2008), is problematic. This is especially troubling where GAIC declared, as Street Surfing explained at length, that the exclusion was not applicable. Indeed, GAIC thereafter declared that the "material made public" exclusion was **irrelevant** to its coverage determination. [Dkt. 13:50].

Under these circumstances, it is inequitable to allow GAIC to rely on statements in Street Surfing's policy application that GAIC never brought to Street Surfing's attention (while the underlying action was pending) to bolster GAIC's "Material Published Prior" exclusion argument.

This is even more clearly the case where GAIC argued in its Appellee's brief [Dkt. 13:26-29] that the elements of offense (f) were met by Street Surfing's conduct prior to policy inception. Its concession failed to clarify that the "in your advertisement" element of offense (f) ("use of another's advertising idea in your advertisement") could not be satisfied by a mere store display by Street Surfing retailers (not by Street Surfing itself) because neither the "in your" or "advertisement" elements of offense (f) were implicated under governing California law. *See Rombe Corp. v. Allied Ins. Co.*, 128 Cal. App. 4th 482, 495 (2005).

GAIC sought to "hide in the weeds" by failing to address with particularity why offense (f) was implicated prior to policy inception, where Street Surfing had a website before policy inception that described "The Wave," but that product was not available for sale on the internet, thus no "damages" due to offense (f) could have arisen from the website. The Panel's order is not to the contrary.

GAIC unfortunately persuaded the district court and the Panel to conclude that there was a basis for coverage under offense (f) before the policy inception.

The equitable estoppel doctrine exists to address just such attempts by a party to avoid facing difficult issues.

UP is familiar with the appellate briefing in this case. In its attached brief, UP does not address or agree with all the arguments of either party. Accordingly, UP respectfully seeks leave to file the attached brief so that, in resolving this matter, the Court will have the benefit of the perspectives presented in the brief, as well as of the arguments and authorities not heretofore presented.

For all the above reasons, UP's motion for leave to file an amicus brief should be granted.

Dated: July 2, 2014

Respectfully submitted,

s/Eric J. Schindler
SCHINDLER LAW GROUP
By Eric J. Schindler
Attorney for proposed Amicus United
Policyholders

CERTIFICATE OF SERVICE

I, Brent L. Vossler, declare:

I am employed in Orange County, California. I am over the age of 18 and not a party to this action; my business address is 20321 SW Birch St., Suite 200, Newport Beach, California 92660; Phone: 949-387-0495; Fax 949-464-9714; E-mail address: brent@schindlerlaw.net.


I certify that on July 2, 2014, I caused the attached MOTION BY UNITED POLICYHOLDERS FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF APPELLANT STREET SURFING'S PETITION FOR PANEL AND EN BANC REHEARING to be electronically submitted to the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I declare that all participants in the case are registered CM/ECF users and that service of this document will be accomplished by the appellate CM/ECF system.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct, and I am employed in the office of a member of the bar of this Court at whose direction this service was made.

Executed on July 2, 2014, in the City of Newport Beach, County of Orange, California.

NAME: Brent L. Vossler



(Signature)