

SUPREME COURT OF NEW JERSEY

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BUILDING MATERIALS CORPORATION  
OF AMERICA d/b/a GAF MATERIALS  
CORPORATION

DOCKET NO.: 070413

Plaintiff/

APPELLATE DIVISION

DOCKET NUMBER: A-4444-09T3

Appellant,

LAW DIVISION

DOCKET NO.: MID-L-10529-98

vs.

ALLSTATE INSURANCE COMPANY,  
et al.,

SAT BELOW IN THE

APPELLATE DIVISION:

HON. JACK SABATINO

HON. VICTOR ASHRAFI

HON. DOUGLAS FASCIALE

Defendants/  
Respondents.

SAT BELOW IN THE LAW DIVISION:

HON. VINCENT LEBLON, J.S.C.

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**BRIEF IN SUPPORT OF UNITED POLICYHOLDERS' MOTION TO APPEAR AS  
*AMICUS CURIAE***

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United Policyholders submits this brief in support of its motion for leave to appear as *amicus curiae* in support of Plaintiff/Appellant GAF Building Corp.'s ("GAF") Petition for Certification.

### QUESTIONS PRESENTED

UP refers the Court to GAF's Petition for Certification for the Questions Presented in the Petition.

### BACKGROUND OF THE CASE

UP refers the Court to GAF's Petition for Certification for a more detailed recitation of the specific facts, which are summarized here. Over the past fifteen years, GAF has faced a number of class action lawsuits claiming injury from allegedly defective roof shingles manufactured by GAF. GAF sought coverage for a settlement of one of those actions, *Coleman v. GAF*, from its insurer, National Union Insurance Company of Pittsburgh, Pa. ("National Union"). National Union's policy excluded the claimed damage to the shingles themselves, but indisputably covered the claimed damage to non-shingle property. The *Coleman* settlement dwarfed the \$25 million limits of the National Union policy.

At trial in the insurance coverage action, GAF offered objective evidence that its settlement was driven by its potential liability exposure for damage to the roof components other than shingles, including evidence that (1) the underlying claimants had sought payment for third-party property damage in

their complaints and in negotiations of the settlement (2) the underlying trial court approved the settlement specifically because it provided recovery for damage to property separate and apart from damage to the shingles themselves. GAF Br. at 6. GAF could reasonably do no more, as the very nature of a settlement is that, while monies are paid, liability is denied.

GAF maintained that, consistent with the law nationwide, this evidence was sufficient presumptively to bring the settlement within its insurance coverage, shifting the burden to National Union to prove that any part of the settlement was excluded. The trial court disagreed, requiring GAF to prove that it "actually paid" for damage to covered third-party property as a prerequisite to obtaining any insurance coverage for any part of the settlement. The Appellate Division affirmed, finding "no error" in the trial court's jury instructions and a jury interrogatory, and holding that policyholders like GAF must prove, to a "reasonable degree of certainty," the amount of their settlement paid for covered damage, as opposed to excluded damage. *Bldg. Mats. Corp. of Am. V. Allstate Ins. Co.*, 424 N.J. Super. 448, 467 (App. Div. 2012) ("App. Div.").

Under the Appellate Division's ruling, New Jersey policyholders seeking coverage for settlement of product liability claims against them must now admit actual liability, either by presenting proof they paid for third-party damage from

their product or proof that third-party damage was a reasonably likely consequence of damage to their product. Beyond this, New Jersey policyholders must establish the specific "portion" of any settlement they paid for covered property damage (thus, by necessity also establishing which portion of the settlement was for excluded property damage -- an issue that, until now, has properly been the burden of the insurer).

The Appellate Division recognized that its ruling would be a benchmark in future cases and "will affect how other class actions lawsuits are resolved." App. Div., 424 N.J. Super. at 466. This is undoubtedly true: the decision and the instructions it affirms will now be the model for similar coverage disputes, and will guide policyholders and insurers. Given the novelty of its holding, the critical context in which it arises and the way in which it unsettles existing New Jersey law, UP asserts that the Appellate Division's decision warrants the grant of UP's motion to appear as *amicus curiae*.

#### **SHORT STATEMENT OF THE MATTER**

UP hereby adopts the Short Statement of the Matter set forth in GAF's Petition for Certification.

#### **IDENTITY AND INTEREST OF AMICUS CUIRAE**

United Policyholders is a not-for-profit corporation founded in 1991 as an educational resource for the public on insurance issues and insurance consumer rights. United

Policyholders is tax-exempt under Internal Revenue Code § 501(c)(3). United Policyholders is based in California but operates nationwide and is funded by donations and grants from individuals, businesses, and foundations. United Policyholders is governed by an eight-member Board of Directors. United Policyholders contributes on an ongoing basis to the formulation of insurance-related public policy at both the national and state level.

United Policyholders exists because businesses and individuals rely on the insurance they buy to protect themselves, their property, and their livelihoods against the risk of loss, and insurance companies are in business to earn profits by assuming that risk. Insurance is a regulated industry because the financial security that insurance policies provide is an integral part of the fabric of our society and economy. United Policyholders monitors the insurance sector, works with public officials, has a nationwide network of volunteers and affiliate organizations, publishes written materials, files *amicus* briefs in cases involving coverage and claim disputes and is a general information clearinghouse on consumer issues related to commercial and personal lines insurance products. United Policyholders provides disaster aid to property owners across the United States via educational activities designed to illuminate and demystify the insurance claim process.

In this brief, United Policyholders seeks to fulfill the "classic role of *amicus curiae* by assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the Court's attention to law that escaped consideration."<sup>1</sup> This is an appropriate role for *amicus curiae*. As commentators have often stressed, an *amicus curiae* is often in a superior position to "focus the court's attention on the broad implications of various possible rulings."<sup>2</sup>

#### LEGAL ARGUMENT

##### **THE NEW JERSEY COURT RULES SUPPORT THE MOTION OF UNITED POLICYHOLDERS FOR LEAVE TO APPEAR AS *AMICUS CURIAE***

An *amicus curiae* is "one who gives information to the court on some matter of law in respect of which the court is doubtful, or who advises of certain facts or circumstances relating to a matter pending for determination." *Casey v. Male*, 63 N.J. Super. 255, 258 (N.J. Sup. Ct. 1960). An application to appear as *amicus curiae* shall be granted if the applicant's participation will assist in resolving an issue of public importance, the application is timely, and no party to the litigation will be unduly prejudiced. See N.J. Ct. R. 1:13-9 (2012). Moreover, in

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<sup>1</sup> *Miller-Wohl Co. v. Commissioner of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982).

<sup>2</sup> R. Stern, E. Greggian & S. Shapiro, *Supreme Court Practice*, 570-71 (1986) (quoting Ennis, *Effective Amicus Briefs*, 33 Cath. U.L. Rev. 603, 608 (1984)).



determining whether to grant an *amicus* application, courts consider whether the case has "broad implications" (*Taxpayers Association v. Weymouth Township*, 80 N.J. 6, 17 (1976)), or is of "general public interest." *Casey, supra*, 63 N.J. Super. at 259.

GAF's petition involves a matter of significant public importance. The Appellate Division decision has a substantial impact on the rights of policyholders and insurers in New Jersey because, as the Appellate Division itself recognized, it will set the standard for all New Jersey policyholders seeking to settle claims alleging both covered and excluded damages. United Policyholders seeks to assist this Court in deciding the central issue in this matter: the nature and scope of policyholders' and insurers' burdens of proof with respect to coverage for claims alleging both covered and excluded damage, and how those burdens will affect New Jersey policyholders. As such, the submission is appropriate under the *amicus curiae* rules. See *Bethlehem Township Bd. of Educ. v. Bethlehem Township Educ. Ass'n*, 91 N.J. 38, 48 (1982).

This motion is timely because the request to file an *amicus* brief will not delay the resolution of the appeal; briefing on the appeal is not yet complete and oral argument has not yet been heard. In addition, no party will be prejudiced by UP's participation. United Policyholders, therefore, respectfully

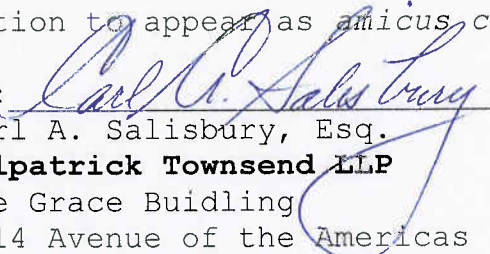
requests leave to file an *amicus curiae* brief in this Court to inform the Court with respect to the interests of New Jersey policyholders.

**CONCLUSION**

For the reasons set forth above, UP respectfully requests that the Court grant its application to appear as *amicus curiae*.

Dated: September 11, 2012

By:

  
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