

CASE NO. 16-17287

In the
United States Court of Appeals
for the
Ninth Circuit

HOTCHALK, INC.

Plaintiff - Appellant,

vs.

SCOTTSDALE INSURANCE COMPANY

Defendant - Appellee.

Appeal From The United States District Court,
Northern District of California, Case No. 16-cv-03883-CW,
Hon. Claudia Wilken

**MOTION OF UNITED POLICYHOLDERS FOR LEAVE TO FILE BRIEF
AS *AMICUS CURIAE* SUPPORTING APPELLANT’S REQUEST FOR
REVERSAL**

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Pursuant to Fed.R.Civ.P. 29(b), United Policyholders (“UP”) moves for leave to file an *amicus curiae* brief in support of Plaintiff HotChalk, Inc. – Appellant (“Hotchalk”). UP sought consent for its filing from the parties. Counsel for Hotchalk consented. Counsel for Defendant – Appellee Scottsdale Insurance Co. (“Scottsdale”) declined to consent. Accordingly, this motion is necessary. In support of its motion for leave to file, UP states as follows:

UP is a national non-profit organization based in California that serves as a voice and information resource for insurance consumers in the 50 states. The organization is tax-exempt under Internal Revenue Code §501(c)(3). UP is funded by donations and grants and does not sell insurance or accept money from insurance companies. Most of its work is done by volunteers

UP’s work is divided into three program areas: *Roadmap to Recovery*TM (disaster recovery and claim help for victims of wildfires, floods, and other disasters); *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 on commercial and personal lines insurance products, coverage and claims at www.uphelp.org.

UP’s Executive Director, Amy Bach, is currently in her seventh consecutive term as an official consumer representative to the National Association of Insurance Commissioners where she works closely with California Insurance

Commissioner Dave Jones on consumer issues, and has performed government service as a consultant to the California State Senate and on the California Earthquake Authority Product Enhancement Committee.

A diverse range of policyholders throughout California communicate on a regular basis with UP, which allows UP to provide topical information to courts via the submission of *amicus curiae* briefs in cases involving insurance principles that are likely to impact large segments of the public and business community. UP's *amicus curiae* brief was recently cited by the California Supreme Court in *Association of California Insurance Companies v. Dave Jones, Insurance Commissioner*, Case No. S226529, Cuellar, J., January 23, 2017 (Ct.App. 2/1 B248622, Los Angeles County Super. Ct. No. BC463124) and its arguments were adopted by the Supreme Court in *TRB Investments, Inc. v. Fireman's Fund Ins. Co.*, 40 Cal.4th 19 (2006) and *Vandenberg v. Superior Court*, 21 Cal.4th 815 (1999). UP has filed *amicus curiae* briefs in nearly 400 cases throughout the United States.¹

¹ UP has appeared in many cases before the Ninth Circuit Court of Appeals, including, e.g., *Grayson v. Allstate Ins. Co.*, No. 14-55959 (2014); *Vandana Upadhyay v. Aetna Life Ins. Co.*, No. 14-15420 (2014); *Street Surfing, LLC v. Great American E&S Ins. Co.*, No. 12-5531 (2014). UP has also appeared in the U.S. Supreme Court, including, e.g., *Montanile v. Board of Trustees of the National Elevator Industry Health Plan*, 14-723, 2015, 577 U.S. ____ (2016).

UP 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.” *Miller-Wohl Co. v. Commissioner of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982). This is an appropriate role for *amicus curiae*. As commentators have stressed, an *amicus curiae* is often in a superior position to “focus the court’s attention on the broad implications of various possible rulings.” Robert L. Stern et al., *Supreme Court Practice* 570-71 (6th ed. 1986) (quoting Bruce J. Ennis, *Effective Amicus Briefs*, 33 CATH. U. L. REV. 603, 608 (1984)).

At issue is an appeal from a judgment entered in favor of Scottsdale, following Scottsdale’s motion for judgment on the pleadings. In that judgment, the District Court erroneously held that Scottsdale had no duty to defend HotChalk, a privately held service provider, under a directors and officers liability policy (“D&O Policy”) against a claim alleging that HotChalk made a wrongful management level decision about employee compensation.

Accordingly, UP seeks leave to file an *amicus curiae* brief in order to provide context on appeal as to (1) the purpose of the professional services exclusion within the private company D&O policy’s overarching coverage scheme, and (2) the national trend of insurance companies improperly using the professional services exclusion to deny D&O coverage to insureds in the business

of providing services, rendering their policies effectively illusory. It is UP's position that, if allowed to stand as precedent, the decision here threatens to contravene public policy and erode the coverage that private company D&O policyholders reasonably expect.

UP thus respectfully requests that the Court grant its motion to file its proposed *amicus curiae* brief. A copy of the proposed brief is attached.

Dated: March 30, 2017

Respectfully submitted,
FARELLA BRAUN + MARTEL LLP

By: /s/ Tyler C. Gerking
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Attorneys for *Amicus Curiae*

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 30, 2017.

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

/s/ Jeffrey L. Amante

Jeffrey L. Amante