No. 14-15420

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VANDANA UPADHYAY,
Plaintiff-Appellant,

v.

AETNA LIFE INSURANCE COMPANY, A CONNECTICUT CORPORATION, IN ITS CAPACITIES AS A FIDUCIARY AND AN ADMINISTRATOR OF THE SYMMETRICOM, INC. LONG TERM DISABILITY BENEFITS PLAN, AN ERISA-REGULATED EMPLOYEE WELFARE BENEFIT PLAN,
Defendants-Appellees.

On Appeal from the United States District Court
For the Northern District of California
Case No. 3:13-cv-01368-SI

BRIEF *AMICUS CURIAE* OF UNITED POLICYHOLDERS IN SUPPORT OF PLAINTIFF-APPELLANT'S PETITION FOR REHEARING *EN BANC*

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amicus Curiae*, United Policyholders, states that it is a non-profit 501(c)(3) consumer organization, that it does not have a parent corporation, and that no publicly-traded corporation owns 10% or more of the stock of United Policyholders.

Dated: May 18, 2016

By: s/Michelle L. Roberts
Michelle L. Roberts
Attorney of Record for *Amicus Curiae*
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INTEREST OF THE *AMICUS CURIAE*

This brief is filed pursuant to Rule 29-2(a) of the Federal Rules of Appellate Procedure. All parties have consented to its filing. United Policyholders ("UP") submits this amicus curiae brief in support of Plaintiff-Appellant Vandana Upadhyay's petition for rehearing *en banc* and asks this Court to grant Upadhyay's request to reconsider the panel's decision to affirm summary judgment in favor of Aetna on its defense that plaintiff's action is contractually barred by the limitations provision in the Symmetricom, Inc. Long Term Disability Benefits Plan. The undersigned counsel hereby certifies that no party's counsel authored the brief in whole or in part; no party nor a party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person — other than the *Amicus Curiae*, its members, or its counsel — contributed money that was intended to fund preparing or submitting the brief.

UP is a non-profit 501(c)(3) organization founded in 1991 that serves as a voice and an information resource for insurance consumers in all 50 states. As part of its mission, UP monitors the implementation and application of laws and rules under the Employee Retirement Income and Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, and helps consumers resolve concerns and disputes related to those laws and rules. Given that a substantial portion of in-force long-term disability insurance products are subject to ERISA, UP has a corresponding

interest in this case. In this brief, 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). As commentators have stressed, an *amicus* is often in a superior position to "focus the court's attention on the broad implications of various possible rulings."[1] Accordingly, we seek to assist the Court in this case because of the negative impact that the panel's memorandum decision will have on the millions of employees and policyholders enrolled in employee benefit plans governed by ERISA.

UP has filed *amicus curiae* briefs on behalf of policyholders in more than 400 cases throughout the United States, including numerous cases before the United States Supreme Court, The United States Court of Appeal for the Ninth Circuit (*see e.g.*, *Chubb Custom Insurance Company v. Space Systems/Loral*, et al., 710 F.3d 946 [9th Cir. 2013], cert. denied, 82 U.S.L.W. 3241 [U.S. Jan. 13, 2014] [No. 13-412]) and the California Supreme Court. UP's *amicus* brief was cited in the United States Supreme Court's opinion in *Humana, Inc. v. Forsyth*, 525 U.S. 299 (1999) and its arguments have been cited with approval by numerous state and federal courts (*see, e.g.*, *Vandenberg v. Superior Court*, 982 P.2d 299 (Cal. 1999). UP is often invited to participate as *amicus curiae* during oral argument.

[1] Robert L. Stern et al., Supreme Court Practice 570-71 (6th ed. 1986) (citing Bruce J. Ennis, Effective Amicus Briefs, 33 CATH. U. L. REV. 603, 608 (1984)).

SUMMARY OF ARGUMENT

Pursuant to FRAP 35(b), the panel decision in this case, *Upadhyay v. Aetna Life Ins. Co.*, No. 14-15420, 2016 WL 1128183 (9th Cir. Mar. 23, 2016), should be reviewed *en banc* because it conflicts with a decision of the United States Supreme Court in *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358, 364, 119 S. Ct. 1380, 1384, 143 L. Ed. 2d 462 (1999), and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decision. In addition, the proceeding involves questions of exceptional importance. Specifically, the panel's decision eviscerates the protection the California notice-prejudice rule was meant to provide to insureds. It also conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue of contractual limitations in the context of ERISA cases. This brief will explain why the panel's decision conflicts with Supreme Court precedent and the decision of other Circuit Courts of Appeals and the practical negative impact of permitting a contractual limitations period to circumvent the protection afforded by California's notice-prejudice rule.

REASONS TO GRANT THE PETITION

I. The Panel's Decision Nullifies California's Notice-Prejudice Rule.

California's Notice-Prejudice Rule prescribes:

> "[A] defense based on an insured's failure to give timely notice [of a claim] requires the insurer to prove that it suffered substantial prejudice. Prejudice is not presumed from delayed notice alone. The insurer must show actual prejudice, not the mere possibility of prejudice."

Shell Oil Co. v. Winterthur Swiss Ins. Co., 12 Cal.App.4th 715, 760–761, 15 Cal.Rptr.2d 815, 845 (1st Dist.1993) (citations omitted). If an insurer is required to accept a late claim absent a showing of actual prejudice, but an insured cannot pursue a legal action to vindicate her rights, there is absolutely no incentive for insurers to approve meritorious claims. Although the panel's decision is "unpublished," counsel for insurers have taken note on how to use the decision to their advantage to defeat claims. *ERISA (9th Circuit): Denial Letters – Sometimes Forgotten Arguments to Enforce Contractual Limitations Provisions*, http://www.boomerisablog.com/2016/04/04/erisa-9th-circuit-denial-letters-sometimes-forgotten-arguments-to-enforce-contractual-limitations-provisions/ (last visited May 13, 2016); Courts Tackle Issues Left Unresolved by *Heimeshoff v. Hartford*. ERISA and Life Insurance News (September 14, 2015) http://www.smithmoorelaw.com/courts-tackle-issues-left-unresolved-by-iheimeshoff-v-hartfordi (last visited May 13, 2016). Rehearing en banc is necessary because the consequences of this decision is not limited to the four corners of this case, but will have far-reaching and disastrous consequences for the millions of plan participants covered by ERISA-governed disability plans.

California's notice-prejudice rule works in conjunction with ERISA's civil enforcement scheme to protect the internal claims process, but it can only do so if it is enforceable. The panel's decision essentially forces claimants to submit their claims for disability benefits within one year of a date of disability, which is often impossible, or else lose the protection of notice-prejudice. Further, following U.S. Supreme Court precedent in *Heimeshoff v. Hartford Life & Acc. Ins. Co.*, 134 S. Ct. 604, 610, 187 L. Ed. 2d 529 (2013), California's notice-prejudice rule should be deemed a "controlling statute to the contrary" of the plan's contractual limitations period. Finally, the panel's decision creates a rift with Sister Circuit decisions which require that any contractual limitations period be disclosed in a denial letter in order for it to be enforced against a claimant.

a. California's Notice-Prejudice Rule Works in Conjunction with ERISA's Civil Enforcement Scheme to Protect the Internal Claims Process.

ERISA's internal claims procedure for disability benefit claims is often a time-consuming process, necessitated by numerous factors governing the assessment of disability and the mandatory good-faith exchange of information between participants and plan administrators. *See Booton v. Lockheed Medical Ben. Plan*, 110 F.3d 1461 (9th Cir. 1993). The time periods in ERISA's implementing regulations provide flexible deadlines, such that the internal claim and appeal process, which claimants must exhaust before they can file a lawsuit,

may not be completed within a set period of time and can vary widely on a case-by-case basis. *See* 29 C.F.R. § 2560.503-1, *et seq*.

California's notice-prejudice rule – under which an insurer cannot avoid liability based on an untimely proof of claim unless the insurer proves that it was prejudiced by the delay – requires that an insurer accept a late claim in most circumstances and engage in the appeals process. *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358, 364, 119 S. Ct. 1380, 1384, 143 L. Ed. 2d 462 (1999). Even though the District Court did not find that Defendants were prejudiced by Upadhyay filing her claim less than four years following the date of her disability, it found that Defendants did not have to show prejudice to prevail on a contractual limitations defense challenging the timeliness of an ERISA action. *Upadhyay*, 2014 WL 186709, at *6; 1ER20.

Indeed, in a vacuum, Defendants do not have to prove prejudice in order to prevail on a contractual limitations defense. However, where notice-prejudice governs and effectively extends the claim filing deadline, and an insurer cannot show prejudice from the claimant's delay, enforcing the Plan's limitations provision completely eviscerates California's notice-prejudice rule. It does so by causing, in many circumstances, a claimant's deadline for filing suit to run before she has had the opportunity to exhaust administrative remedies or providing a limitations period that is "unreasonably short." *See Heimeshoff*, 134 S. Ct. at 610.

The Supreme Court specifically held that insurers may not contract around the requirements of the notice-prejudice rule. *Ward*, 526 U.S. at 376. Yet, enforcing a Plan's contractual limitations period against a claimant whose claim the insurer had to accept effectively denies the participant access to ERISA's civil enforcement scheme. The Panel's decision allows Aetna to enforce its contractual limitations period in a manner that completely deprives Upadhyay of the protections afforded by the notice-prejudice rule. This is in direct contradiction to one of ERISA's stated goals because, in effect, it requires the claimant to file a protective lawsuit before there is a final claim denial. As such it is adverse to the interests of our overburdened judiciary and the universal goal of efficient dispute resolution.

b. The Panel's Interpretation of the Insurance Policy's Limitations Provision Requires All Claims to Be Filed within One Year, Completely Eviscerating the Notice-Prejudice Rule.

As a general rule, a court must give effect to an ERISA plan's limitations provision unless it determines either that the period is unreasonably short, or that a "controlling statute" prevents the limitations provision from taking effect. (*Heimeshoff*, 134 S. Ct. at 612) assuming that there are also no issues of notice, waiver or estoppel. In this case, Defendants' interpretation of the Plan's limitations provision made it such that Upadhyay had to file suit before she even filed a claim for benefits that could be denied. Upadhyay's delay did not prejudice

the insurer. But, in order for a claimant to have at least six months post-exhaustion to file a lawsuit,[2] assuming a typical 16-month exhaustion process, she would have to file her claim no later than 14 months following the date of disability.[3] And, that is only two months after most California claimants' short-term disability benefit payments end.[4]

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[2] We do not suggest that six months is a reasonable amount of time to file a lawsuit. Indeed, it is difficult for participants to find an attorney knowledgeable about ERISA claims. The ERISA bar representing individuals is extremely small. For example, in 2010, there were 852 attorney members of the Employee Benefit Committee of the Section of Labor and Employment Law of the American Bar Association; of those, only 101 classified themselves as representing Employee-Plaintiffs, or approximately less than twelve percent (12%) of the total membership. Brief of AARP and National Employment Lawyers Association, as *Amici Curiae*, in Support of Petitioner, *Hardt v. Reliance Standard Life Ins. Co.*, 2010 WL 768489 (U.S.)(Appellate Brief). A participant who has just been denied income replacement benefits because she is not gainfully employable due to a medical condition is often in a multi-factor crisis situation. Instead of relying on benefits that she believed would protect her and her family against the hardship of disability, she is now in the midst of making alternative arrangements to fund basic life necessities and medical treatment. While battling a medical condition that has deprived her of the ability to care for herself, she now has to fight a denial of a benefit claim against a large company. It may take her several weeks, months, or years to get her life in order before having the wherewithal to seek out the small community of ERISA attorneys who may be willing to take her case. *See e.g.*, *Steffy v. Liberty Life Assur. Co. of Boston*, No. 09–538, 2009 WL 3255219 (W.D. Penn. Oct. 7, 2009) (due, in part, to cognitive difficulties stemming from dementia, participant missed deadline to file a claim).

[3] The court in *Heimeshoff* noted that mainstream claims are resolved in about one year (134 S. Ct. at 607), but there are often circumstances which extend the claims and appeal process beyond one year. *See* Brief of Amicus Curiae United Policyholders in Support of Plaintiff-Appellant, 2014 WL 4271810 at pps. 9-18 (9th Cir. Aug., 22, 2014).

[4] Most California residents who become unable to work as a result of disability qualify for California's State Disability Insurance ("SDI") benefit program. SDI

By its terms, Aetna's policy provision impermissibly attenuates the period of time that a plan participant has to submit a claim. This is so because, even though an insurer may still be required to accept a late claim, if it denies the claim the participant will not have meaningful access to the courts to enforce her rights because any lawsuit would be contractually time-barred.

But when a contractual limitations period is pitted against the notice prejudice rule, the latter should prevail. "By allowing a longer period to file than the minimum filing terms mandated by federal law, the notice-prejudice rule complements rather than contradicts ERISA and the regulations." *Ward*, 526 U.S. at 377. This Court, too, has recognized the importance of the notice-prejudice rule above an insurer's hard deadline for submission of proof of claim,

> We are fully cognizant of the complications and extra burdens that the notice-prejudice rule imposes on insurers. UNUM forcefully brings these to our attention. In this limited respect, a plan's written terms are altered. Moreover, the notice-prejudice rule is more difficult to administer and provides less predictability than does the calendar. All of this, of course, may generate additional litigation. UNUM's concerns are real-but that does not alter the scope of the saving clause written into the law by Congress or the validity of the notice-prejudice rule adopted in California. Moreover, we presume that insurers structure their premiums and conduct their financial affairs around the principle that they may have to honor and pay for the coverage provided.

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provides income replacement for 52 weeks and starts after a 7-day waiting period. *See* Employment Development Department online at http://www.edd.ca.gov/Disability/FAQ_DI_Eligibility.htm (last accessed August 17, 2014).

Cisneros v. UNUM Life Ins. Co. of Am., 134 F.3d 939, 947 (9th Cir. 1998). The only way to preserve the notice-prejudice rule is to render nugatory any Plan term which serves to limit or restrict its application as Defendants' interpretation does in this case.

c. California's Notice-Prejudice Rule is a "Controlling Statute to the Contrary."

In *Heimeshoff*, the Supreme Court held that contractual limitations periods cannot be enforced in the presence of controlling statutes to the contrary. *Heimeshoff*, 134 S. Ct. at 610. At least forty-four states have a notice-prejudice rule, and in ten of those states, the rule is statutory (including Arizona which is in the Ninth Circuit).[5] ERISA's goal of national uniformity is not served by allowing

[5] **Alaska** (*Weaver Bros., Inc. v. Chappel*, 684 P.2d 123 (Alaska 1984)); **Arizona** (Ariz. Rev. Stat. § 20-1115); **California** (*Shell Oil Co. v. Winterthur Swiss Ins. Co.*, 12 Cal App. 4th 715, 760-761 (1993)); **Colorado** (*Clementi v. Nationwide Mut. Fire Ins. Co.*, P.3d 223, 232 (Colo. 2001)); **Connecticut** (*Arrowood Indem. Co. v. King*, 304 Conn. 179, 198 (2012)); **Delaware** (*Falcon Steel Co., Inc. v. Maryland Cas. Co.*, 366 A.2d 512, 514 (Del. Super. Ct. 1976)); **Florida** (*Lane v. Provident Life and Accident Insurance Co.*, 178 F. Supp. 2d 1281 (S.D. Fla. 2001)); **Georgia** (Ga. Code Ann. § 33-7-15); **Hawaii** (*Standard Oil Co. of Cal. v. Hawaiian Ins. & Guar. Co.*, 654 P.2d 1345 (Haw. 1982)); **Indiana** (*Miller v. Dilts*, 463 N.E.2d 257, 261 (Ind. 1984)); **Iowa** (*Grinnell Mut. Reins. Co. v. Jungling*, 654 N.W.2d 530, 541-542 (Iowa 2002)); **Kansas** (*Atchison, Topeka & Santa Fe Ry. Co. v. Stonewall Ins. Co.*, 275 Kan. 698 (2003)); **Kentucky** (*Best v. West American Ins. Co.*, 270 S.W.3d 398, 405 (Ky. Ct. App. 2008)); **Louisiana** (*State ex rel. Div. of Admin., Office of Risk Mgmt. v. Nat'l Union Fire Ins. Co. of Louisiana*, 56 So.3d 1236 (La. App. 1st Cir. 2011)); **Maine** (*Maine Mutual Fire Insurance Co. v. Watson*, 532 A.2d 686 (Me. 1987)); **Maryland** (Md. Code Ann., Ins., §19-110); **Massachusetts** (Mass Gen. Laws Ann., c. 175, §112); **Michigan** (Mich. Comp. Laws Ann. § 500.3008); **Minnesota** (*Reliance Ins. Co. v. St. Paul Ins. Companies*,

insurers to escape the notice prejudice rule only in states where notice prejudice is a creature of statute. For this reason, the court should hold that California's notice-prejudice rule is a controlling statute to the contrary that prevents enforcement of the Plan's contractual limitations period.

II. Aetna Cannot Enforce Its Contractual Limitations Period Against Upadhyay Because Aetna Violated ERISA's Notice Requirements.

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307 Minn. 338 (1976)); **Mississippi** (*Jackson v. State Farm Mut. Auto Ins. Co.*, 880 So. 2d 336 (Miss. 2004)); **Missouri** (*Thomas v. A.G. Elec., Inc.*, 304 S.W.3d 179 (Mo. Ct. App. 2009)); **Montana** (*XL Specialty Ins. Co. v. Progressive Cas. Ins. Co.*, 411 F. App'x 78, 80 (9th Cir. 2011)); **Nebraska** (*Herman Bros., Inc. v. Great W. Cas. Co.*, 255 Neb. 88 (1998)); **Nevada** (*Las Vegas Metro. Police Dept. v. Coregis Ins. Co.*, 256 P.3d 958, 965 (Nev. 2011)); **New Hampshire** (N.H. Rev. Stat., §491:22-a); **New Jersey** (*Gazis v. Miller*, 378 N.J. Super. 59, 66-67 (App. Div. 2005)); **New Mexico** (*UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358 (1999)); **New York** (N.Y. Ins. Law § 3420 (2009)); **North Carolina** (*Great American Insurance Company v. C. G. Tate Construction Company*, 315 N.C. 714 (1986)); **North Dakota** (*Finstad v. Steiger Tractor, Inc.*, 301 N.W.2d 392 (N.D. 1981)); **Ohio** (*Ferrando v. Auto-Owners Mut. Ins. Co.*, 98 Ohio St.3d 186 (2002)); **Oregon** (*Lusch v. Aetna Cas. & Sur. Co.*, 538 P.2d 902, 904 (Or. 1975); **Pennsylvania** (*Ace American Ins. Co. v. Underwriters at Lloyds and Co.*, 939 A.2d 935 (Pa. Super. 2007)); **Rhode Island** (*A&W Artesian Well Co. v. Aetna Cas. & Sur. Co.*, 463 A.2d 1381, 1382 (R.I. 1983)); **South Carolina** (*Merit Ins. Co. v. Koza*, 274 S.C. 362, 264 S.E.2d 146 (1980)); **South Dakota** (*Union Pacific R.R. v. Certain Underwriters*, 771 N.W.2d 611 (August 05, 2009)); **Tennessee** (*Alcazar v. Hayes*, 982 S.W.2d 845 (Tenn. 1998)); **Texas** (*Fin. Indus. Corp. v. XL Specialty Ins. Co.*, 285 S.W.3d 877, 879 (Tex. 2009)); **Utah** (Utah Code Ann. § 31A–21–312(2) (2001)); **Vermont** (*Hardwick Recycling & Salvage, Inc. v. Acadia Ins. Co.*, 2004 VT 124 (2004)); **Washington** (*Safeco Title Ins. Co. v. Gannon*, 54 Wash. App. 330, 336, 774 P.2d 30, 33-34 (1989)); **West Virginia** (*State Auto. Mut. Ins. Co. v. Youler*, 396 S.E.2d 737 (W. Va. 1990)); **Wisconsin** (Wisc. Stat. Ann. §631.81(1)); **Wyoming** (Wyo. Stat. §26-18-111).

ERISA's minimum regulations spell out the insurer's duty to inform beneficiaries about their right of judicial review, including time limits. The regulations requiring notice of the right to file an action were promulgated under Congress's mandate that ERISA employee benefit plans "provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied," 29 U.S.C. § 1133(1), and "afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review," *id.* § 1133(2). This clear and specific mandate was part of Congress's response to the "lack of employee information and adequate safeguards concerning" the operation of these plans, which threatened the "continued well-being and security of millions of employees and their dependents." *Id.* § 1001(a).

Through ERISA, Congress intended to "protect ... the interests of participants in employee benefit plans and their beneficiaries, by ... establishing standards of conduct, responsibility, and obligation for fiduciaries ... and by providing for appropriate remedies, sanctions, and **ready access to the Federal courts**." *Id*. §1001(b) (emphasis added).

It is undisputed that Aetna never notified Upadhyay of the time limit for judicial review in any adverse determination letter. This is required by **29 C.F.R. § 2560.503-1(g)(1)(iv) and (j)(4)**:

> **(g) Manner and content of notification of benefit determination.** (1) Except as provided in paragraph (g)(2) of this section, the plan administrator shall provide a claimant with written or electronic notification of any adverse benefit determination.… **The notification shall set forth, in a manner calculated to be understood by the claimant** –
>
> …(iv) A description of the plan's **review procedures** and **the time limits applicable to such procedures, including a statement of the claimant's right to bring a civil action** under section 502(a) of the Act following an adverse benefit determination on review[.]
> * * *
> **(j) Manner and content of notification of benefit determination on review.** The plan administrator shall provide a claimant with written or electronic notification of a plan's benefit determination on review.… In the case of an adverse benefit determination, the notification shall set forth, in a manner calculated to be understood by the claimant –
> … (4) A statement describing any voluntary appeal procedures offered by the plan and the claimant's right to obtain the information about such procedures described in paragraph (c)(3)(iv) of this section, **and a statement of the claimant's right to bring an action** under section 502(a) of the Act[.]

(Emphasis added.)

Although the U.S. Supreme Court has recognized the particular importance of enforcing plan terms as written, *Heimeshoff*, 134 S. Ct. at 612, it has also recognized that trust documents cannot excuse trustees from their duties under ERISA, *Fifth Third Bancorp. v. Dudenhoeffer*, 134 S. Ct. 2459, 2468-69 (2014). Among those duties is the duty to clearly disclose in denial letters any contractual limitation periods that appear within ERISA plans, or else the periods are not enforceable. *Moyer v. Metro Life Ins. Co.*, 762 F.3d 503, 506-507 (6th Cir. 2014) (holding that an ERISA insurer's failure to identify its insurance policy's

contractual limitations period in its benefit denial letter precluded the insurer from raising contractual limitations as a defense in litigation); *Mirza v. Ins. Adm'r of Am., Inc.*, 800 F.3d 129, 136-38 (3rd Cir. 2015)(holding that ERISA regulation required plan administrator to inform the claimant of the plan-imposed deadline for bringing a civil action and its failure to do so resulted in the application of New Jersey's six-year limitations period for breach of contract actions); *Santana-Díaz v. Metro. Life Ins. Co.*, 816 F.3d 172, 182-83 (1st Cir. 2016)(holding that denial letter that did not provide the time limit for filing action was per se prejudicial and rendered contractual three-year limitations period altogether inapplicable); *Novick v. Metro. Life Ins. Co.*, 764 F. Supp. 2d 653, 664 (S.D.N.Y. 2011) (holding that insurer's letter denying claimant's appeal violated ERISA regulations and the appropriate remedy is to disregard the plan's contractual limitations period). Because Aetna failed to do so, the Plan's contractual limitations provision cannot be enforced against Upadhyay.

CONCLUSION

For each of the foregoing reasons, United Policyholders, as *amicus curiae*, respectfully requests that this Court grant Plaintiff-Appellant's request for rehearing or rehearing *en banc*.

DATED: May 18, 2016 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 29-2(c)(2), the attached brief is proportionately spaced, has a typeface of 14 points or more, and contains 3,773 words.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief Amicus Curiae of United Policyholders in Support of Plaintiff-Appellant's Petition for Rehearing En Banc 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 May 18, 2016.

All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

I swear under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed this 18 day of May 2016.

By: s/Michelle L. Roberts
Michelle L. Roberts