A135938/A136740

CALIFORNIA COURT OF APPEAL
FIRST APPELLATE DISTRICT, DIV. ONE

**STEPHENS & STEPHENS XII, LLC,**

*Plaintiff and Appellant*,

vs.

**FIREMAN'S FUND INSURANCE COMPANY, et al.,**

*Defendants and Respondents.*

*Appeal from the San Francisco Superior Court,*
*Case No. CGC-10-502891*
*The Hon. Curtis E.A. Karnow, Judge Presiding*

# BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS IN SUPPORT OF PLAINTIFF AND APPELLANT STEPHENS & STEPHENS XII, LLC

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## CERTIFICATE OF INTERESTED PARTIES

Pursuant to California Rule of Court 8.208, United Policyholders certifies that it is a non-profit organization that has no shareholders. As such, *amicus* and its counsel certify that *amicus* and its counsel know of no other person or entity that has a financial or other interest in the outcome of the proceeding that the *amicus* and its counsel reasonably believe the Justices of this Court should consider in determining whether to disqualify themselves under canon 3E of the Code of Judicial Ethics.

Dated: April 21, 2014

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SHARON J. ARKIN

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## INTRODUCTION

*Amicus curiae* United Policyholders ("UP"), a non-profit consumer organization, respectfully submits the following brief in support of Plaintiff and Appellant Stephens & Stephens XII, LLC ("Stephens") in its appeal of the trial court's erroneous post-trial orders rendered in favor of Fireman's Fund Insurance Company ("FFIC").

The jury in this case expressly found that FFIC unreasonably withheld actual cash value ("ACV") payments owed to Stephens and, in doing so, precluded Stephens from making repairs to its property; that unreasonable denial of benefits, in turn, precluded Stephens from making a replacement cost value ("RCV") claim under the policy.

Contrary to the jury's factual findings set forth in its extensive special verdict, the trial court granted JNOV and a new trial, concluding that the Stephens was not entitled to *any* benefits, either ACV or RCV because it did not make a timely claim for them. The trial court's orders disregard decades of insurance statutes, regulations and decisions that impose special – and affirmative – duties on insurers handling policyholder claims.

Those special duties include the duty to inform policyholders of benefits they are entitled to claim, what are the time limits for making the

claims for benefits, what the claims process entails, how the policyholder is to present its claim and what is needed to process the claim. (*Spray, Gould & Bowers v. Associated International Ins. Co.* (1999) 71 Cal.App.4th 1260, 1267-1268, 84 Cal.Rptr.2d 552; *City of Hollister v. Monterey Ins. Co* (2008) 165 Cal.App.4th 455, 488-491, 81 Cal.Rptr.3d 72; *Superior Dispatch, Inc. v. Insurance Corporation of New York* (2010) 181 Cal.App.4th 175, 190, 104 Cal.Rptr.3d 508; Cal. Code Regs., tit. 10, §§ 2695.4, subdivision (a), 2695.7, subdivisions (d) and (f).)

In addition to those affirmative duties, an insurer is obligated to investigate the claim fairly, reasonably and promptly and is precluded from unreasonably withholding coverage or benefits. (Insurance Code section 790.03, subdivisions (h)(1), (3), (5) and (13).)

If an insurer fails in *any of those duties*, the insurer is precluded from asserting a defense to the insured's claim for entitlement to the benefits or as a defense to its liability for bad faith that the policyholder did not meet its own contractual obligations. (*Spray, Gould, supra; City of Hollister, supra; Chase v. Blue Cross of Calif.,* (1996) 42 Cal.App.4th 1142, 1151, 50 Cal.Rptr.2d 178, 183; *Superior Dispatch, supra*.)

UP, as an organization that works to advance and protect policyholders' rights, is particularly concerned about the trial court's orders in this case, which are in direct conflict with the manifest weight of

evidence – and the jury's findings – that FFIC unreasonably delayed and denied coverage for Replacement Cost Value ("RCV") for Stephens' vandalized warehouse. If these orders are allowed to stand, it will effectively overturn important insurance law precedent that favors the insured in cases where the insurer unreasonably disputes, delays, or denies coverage and the insurer's own actions prevent the policyholder from complying with the policy requirements. The legal effect of these orders stands in stark contrast to direct California case law affirming the long-held contract principle *that a condition is excused whose fulfillment the other party prevented*.

## STATEMENT OF INTEREST

United Policyholders ("UP") was founded in 1991 as a non-profit organization dedicated to educating the public on insurance issues and consumer rights. UP is a voice and information resource for insurance consumers in all 50 states, based in San Francisco, California. UP is tax-exempt as §501 (c)(3) entity and is funded by donations and grants from individuals, businesses, and foundations. UP does not sell insurance or accept financial contributions from insurance companies. (www.uphelp.org).

Through a Roadmap to Recovery™ program United Policyholders

helps individuals navigate the insurance claim process and recover fair and timely settlements. Through an Advocacy and Action program, UP works with public officials, other non-profit and faith-based organizations and a diverse range of entities – including insurance producers, insurers and trade associations to solve problems related to claims and coverage. UP's Executive Director Chairs the California Department of Insurance Consumer Advisory Task Force, and has been appointed for six consecutive terms as an official consumer representative to the National Association of Insurance Commissioners.

A diverse range of policyholders throughout California communicate on a regular basis with UP, which allows us to provide important and 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 brief was cited in the U.S. Supreme Court's opinion in *Humana v. Forsyth*, 525 U.S. 299, 314 (1999), and its arguments have been adopted by the California Supreme Court in *TRB Investments, Inc. v. Fireman's Fund Ins. Co*., 40 Cal.4th 19 (2006) and *Vandenberg v. Super. Ct.*, 21 Cal.4th 815 (1999). UP has filed *amicus* briefs on behalf of policyholders in over 300 cases throughout the U.S.

## LEGAL ARGUMENT

### 1.

### THE TRIAL COURT'S RULINGS UNDERMINE EVERY PUBLIC POLICY DOCTRINE CONTROLLING INSURER CONDUCT IN THIS STATE

As the California Supreme Court confirmed decades ago, insurance companies have special obligations to their policyholders. (*Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 573, 108 Cal.Rptr. 480, 510 P.2d. 1032.) Those obligations are both specific and general. Generally, the insurer owes a duty to do nothing that will injure the policyholder's right to receive the policy benefits. (*Ibid*.; *Jonathan Neil & Associates, Inc. v. Jones* (2004) 33 Cal.4th 917, 937, 16 Cal.Rtpr.3d 849, 94 P.3d 1055.)

In addition to that general duty, California's statutes, regulations and case law impose specific obligations on insurers, the breach of which precludes insurers from withholding benefits or successfully defending against a policyholder's claim.

For instance, Cal. Code Regs., tit. 10, § 2695.4 imposes specific disclosure requirements on insurers: Insurers must inform their policyholders of "all benefits, coverage, time limits or other provisions of

any insurance policy issued by that insurer that may apply to the claim presented by the claimant." (*Id.*, subdivision (a).) Furthermore, that same regulation provides that "[w]hen additional benefits might reasonably be payable under an insured's policy upon receipt of additional proofs of claim, the insurer shall immediately communicate this fact to the insured and cooperate with and assist the insured in determining the extent of the insurer's additional liability." (*Ibid*.) Similarly, Cal. Code Regs., tit. 10, §2695.7, subdivision (f) states that "every insurer shall provide written notice of any statute of limitation *or other time period requirement upon which the insurer may rely to deny a claim*" and that the "notice shall be given to the claimant not less than sixty (60) days prior to the expiration date." (Emphasis added.)

Another regulation also comes into play here: Cal. Code Regs., tit. 10, § 2695.7, subdivision (d). That regulation requires the insurer to "conduct and diligently pursue a thorough, fair and objective investigation" of the insured's claim.

Statutory provisions similarly impose specific obligations on insurers: They must not misrepresent "pertinent facts or insurance policy provisions relating to any coverages at issue" (Ins. Code § 790.03, subdivision (h)(1)); they must establish standards for the "prompt investigation and processing of claims" (Insurance Code section 790.03,

subdivision (h)(3)); they must attempt "in good faith to effectuate prompt, fair and equitable settlements of claims" (Insurance Code section 790.03, subdivision (h)(5)); and, they must "provide promptly a reasonable explanation of the basis relied on in the insurance policy, in relation to the facts or applicable law, for the denial of a claim or for the offer of a compromise settlement" (Insurance Code section 790.03(h)(13); *Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1078, 56 Cal.Rptr.3d 312.)

These regulatory, statutory and case law requirements are intended to protect the policyholder and are necessary because of the nature of the insurer-policyholder relationship: "'The insurers' obligations are . . . rooted in their status as purveyors of a vital service labeled quasi-public in nature. Suppliers of services affected with a public interest must take the public's interest seriously, where necessary placing it before their interest in maximizing gains and limiting disbursements . . . and with the public's trust must go private responsibility consonant with that trust.'" (*Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 820, 169 Cal.Rptr. 691, 629 P.2d 141.) Moreover, as the Supreme Court pointed out in *Egan*, "the relationship of insurer and insured is inherently unbalanced: the adhesive nature of insurance contracts places the insurer in a superior bargaining position" and the imposition of additional protections for the policyholder "reflects an attempt to restore balance in the contractual relationship."

(*Ibid*.)

Most importantly, the failure of an insurer to comply with the duty of good faith, the failure to comply with provisions of section 790.03, subdivision (h), the failure to provide the notices, cooperation and assistance required under sections 2695.4(a) and 2695.7, subdivision (f) or the failure to conduct a thorough, *fair and objective* investigation under section 2695.7, subdivision (d) *precludes the insurer from asserting the insured's failure to comply with the policy's requirements as a defense to its obligation to pay policy benefits*. (*Spray, Gould & Bowers v. Associated International Ins. Co.* (1999) 71 Cal.App.4th 1260, 1267-1268, 84 Cal.Rptr.2d 552; *City of Hollister v. Monterey Ins. Co* (2008) 165 Cal.App.4th 455, 488-491, 81 Cal.Rptr.3d 72; *Superior Dispatch, Inc. v. Insurance Corporation of New York* (2010) 181 Cal.App.4th 175, 190, 104 Cal.Rptr.3d 508.)

These foundational public policy principles were ignored by the trial court in granting FFIC's post-trial motions. For example, FFIC argued, and the trial court found, that Stephens is precluded from obtaining *any* benefits under the policy (whether for ACV or RCV) because Stephens failed to make an explicit, separate claim for ACV benefits. But, despite Stephens' specific requests for information and assistance in properly submitting its claims (see Appellant's Opening Brief, p. 12, paragraph 2), there is no

evidence in this case that FFIC ever ***told*** *Stephens that such a specific, explicit ACV claim was required*. FFIC thereby violated the express provisions of sections 2695.4, subdivision(a) and 2695.7, subdivision (f). That, alone, is sufficient to preclude FFIC from withholding at least the ACV benefits.

Similarly, the evidence in this case confirms that FFIC never informed Stephens that a separate claim had to be made for RCV benefits, and certainly never provided Stephens with the information it needed in order to make that claim. Again, under California law, that precludes FFIC from withholding those benefits.

In fact, FFIC's claims handling – and the trial court's ruling – put Stephens in an impossible "Catch-22:" Stephens could not obtain the RCV benefits unless and until it made repairs, but FFIC withheld even the ACV benefits, thus making it impossible for Stephens to do the repairs. And the trial court's ruling exacerbated that conundrum by finding that Stephens *was not even entitled to the ACV benefits*.

Thus, the trial court's order teaches this: An insurer can violate its common law duties, can violate its statutory duties and can violate its regulatory duties and the only "punishment" it will receive is complete exoneration of its liability to pay covered claims. The trial court's rulings literally turn California law on its head and undermine every public policy

principle that regulates insurer conduct in this State.

## 2.

## THE TRIAL COURT'S RULINGS IGNORE THE EQUITABLE DOCTRINES PROTECTING POLICYHOLDERS FROM INSURERS' VIOLATIONS OF ITS DUTIES

The trial court's post-trial orders not only disregarded the jury's factual findings, they also disregarded the equitable doctrines that apply under California law to protect a policyholder's reasonable expectations that it will be properly and promptly paid under its policy of insurance – insurance which is purchased in order to secure protection against calamity and ensure the policyholder's security and peace of mind. (*Egan*, *supra*, at 819.)

Stephens' brief thoroughly establishes that various equitable doctrines preclude relieving FFIC's of its duty to provide benefits under the policy. As extensively discussed in Stephens' briefs, the decision in *City of Hollister v. Monterey Ins. Co* (2008) 165 Cal.App.4th 455, 488-491, 81 Cal.Rptr.3d 72 summarizes the law applying these equitable doctrines in the insurance context and firmly establishes – in a factual context remarkably similar to the facts in this case – that these principles forbid

exonerating insurers who violate their duties to their policyholders. Not only that but the majority of out-of-state cases comport with the *City of Hollister* analysis and the cases relied on by FFIC are wholly inapposite.

### A. Other jurisdictions agree with *City of Hollister, et al.* on the issue of estoppel and excuse of a condition whose fulfillment the other party prevented.

Although California law is controlling and precedential, other jurisdictions support the principle that *a condition is excused whose fulfillment the other party prevented. See, e.g., Unruh v. Smith* (1954) 123 Cal.App.2d 431, 267 P.2d 52 (holding "where a party to a contract [in this case an insurance contract] prevents the fulfillment of a condition or its performance by the adverse party [the insured], he [the insurer] cannot rely on such condition to defeat his liability.")[1] In the present case, the record and the jury's finding compel the conclusion that FFIC's conduct prevented Stephens' compliance with the policy provisions with regard to RCV. As such, FFIC may not assert Stephens' noncompliance as a defense. An insurer may not assert its own misconduct (*i.e.* denial of benefits) as a defense to payment of otherwise-covered claims.

In its Opening Brief, Stephens relies, with good reason, on several

1 Stephens' Opening Brief includes a detailed discussion at pp. 45-55.

out-of-state cases that apply the same equitable doctrines that California courts do, and in virtually identical factual contexts. FFIC's attempts to distinguish these cases is unavailing.

For example, in *D & S Realty, Inc. v. Markel Ins. Co.* (Neb. 2012) 816 N.W.2d 1, the Nebraska Supreme Court confirmed that even a good faith, though wrongful, denial of coverage that prevents the insured from complying with the repair and replacement provisions of the policy precludes the insurer from imposing the repair requirement before damages for replacement costs can be awarded. (*D & S Realty*, at 19.) In *D & S Realty*, the insurer denied coverage, did not discuss RCV with the insured, and later refused to honor the RCV provision of the insurance policy, citing the insured's failure to comply with the 180-day RCV requirement. (*Id.* at 5-6.) Relying on the "doctrine of prevention" (*i.e.* the insured was *prevented* by the insurer from complying), the Nebraska Supreme Court remanded the case for a factual determination on whether the denial of coverage was, in fact, erroneous, holding that "not allowing claims of prevention based on the erroneous denial of coverage would trap the insured in a 'no-win situation.'" (*Id.* at 14.)

The present case is almost identical to factual situation in *D & S Realty*. FFIC denied coverage for Stephens' claim, did not discuss RCV, and then refused to pay RCV because Stephens failed to comply with the

180-day RCV requirement.

FFIC's brief basically acknowledges that the factual situation in *D & S Realty* is closely analogous to the factual situation in this case. (Respondent's Brief, pp. 44-46). Despite that, FFIC argues that the analysis in *D & S Realty* improperly allows the courts to "rewrite" the policy provision requiring the insured to complete repairs before obtaining RCV benefits.

FFIC's argument is not based on contract law, but on fear-mongering, falsely claiming that insureds might receive RCV "as a matter of right" regardless of whether the insurer acted in good faith or bad faith. FFIC's argument is not only theoretical, it is unrealistic. The issue in this case is not whether the courts are entitled to "rewrite" policy provisions, but rather whether FFIC's *own misconduct* in unreasonably withholding ACV payments prevented Stephens' compliance with the 180-day RCV requirement. The answer to that question is a resounding "Yes."

Similarly, in *Bailey v. Farmer's Union Co-op Ins. Co. of Neb.* (Neb 1992) 498 N.W.2d 591, 597, a Nebraska Court of Appeal found that an adjuster's mistaken and erroneous belief that a loss was not covered prevented the insured from complying with a 180-day RCV requirement. *Bailey* is also significant because that court found in that case – as the jury found in this case – that because of the insurer's denial, the insured was not

able to secure a loan to begin rebuilding. (*Ibid.*) In other words, the insured relied on the assurances of the insurer that RCV would be covered in making a determination as to whether to rebuild. In the present case, and as established as a factual finding made by the jury, Stephens' delay in repairs is attributable to FFIC's persistent refusal to provide *any* benefits, including even the ACV benefits.

Indeed, FFIC's brief actually acknowledges that *Bailey* – and several of the other out-of-state cases relied on by Stephens (i.e., *Rockford*, *Zaitchick*, *Ward,* and *Pollack*, discussed below) – involve situations in which "the insurer's failure to pay actual cash value actually prevented the insured from making repairs." (Respondents' Brief, p. 46.) That is, in fact, precisely the factual determination made by the jury in *this* case and exemplifies FFIC's complete distortion of both the facts and the law applicable here. FFIC attempts to distinguish those cases on the basis that the insurer's conduct in those cases involved "egregious and in some cases 'near criminal' actions," all the while ignoring the fact that the jury here expressly found that FFIC's actions in this case were in bad faith.

FFIC also asserts that *Bailey* and the other out-of-state cases are distinguishable because the "insurers actively prevented individual insureds from exercising their rights under their policies." (Respondents' Brief, at 47.) But in attempting to distinguish those cases, FFIC ignores that the jury

made *a factual finding* – supported by substantial evidence – that FFIC's conduct did, in fact, prevent Stephens from exercising *its* rights under the policy. These cases therefore provide compelling support for the conclusion that the trial court erred in granting JNOV and a new trial.

FFIC also fails to effectively distinguish *Conrad Brothers v. John Deere Ins. Co.* (Iowa 2001) 640 N.W. 2d 231, in which the Iowa Supreme Court held that an insurer's denial of coverage relieved the insured from the obligation to comply with policy provisions. The court relied on the long-held contract principle of excuse and prevention, providing that where one party to the contract repudiates the contract [*e.g.* denies coverage] before the other's performance is due, that excuses the other party entirely from performing the conditions [*e.g.* complying with the 180-day RCV requirement], and permits him to bring suit immediately. (*Id.* at 241.) Without going as far as holding the insurer liable for bad faith, that court awarded damages to the insured in form of RCV. But here, the jury *did* find that FFIC acted in bad faith and FFIC presents no compelling argument as to why *Conrad Brothers* is inapplicable.

Similarly, in *Rockford Mutual Ins. Co. v. Pirtle* (Ind.App. 2009) 911 N.E.2d 60, an Indiana Court of Appeal confronted the issue of an offer to pay ACV when the policy promised RCV if repairs were made. In *Rockford*, the insurer offered a low-ball and wholly insufficient ACV,

which the policyholder refused. When the insurer refused to pay RCV, the court affirmed judgment for the insured, holding that "…equitable principles win the day…otherwise, the repair or replacement endorsement paid for by [the insured] would be rendered illusory." (*Id.* at 66.) FFIC argues in its Brief that *Rockford* should not apply because Stephens presented no evidence that FFIC's failure to offer ACV had any bearing on whether Stephens chose to make repairs. (Respondent's Brief, p. 47). Again, FFIC's argument is contrary to both the evidence presented at trial as outlined in Stephens' briefs, and the jury's findings.

In *Ward v. Merrimack Mut. Fire Ins. Co.* (N.J. App. Div. 2000) 753 A.2d 1214, a New Jersey Court of Appeal held that under "equitable rules," an insurer is "estopped from arguing than an insured cannot demand replacement costs under a policy provision requiring actual replacement of the damaged property as a precondition to recovery where the insurer's conduct frustrates the insured's ability to satisfy the precondition." (*Id.* at 1218.) Again, FFIC's argument against the application of *Ward* is inapposite, citing an apparent disagreement between FFIC and Stephens on the timeline of events, rather than discussing the applicable legal principles and the effect of the jury's factual findings. (Respondent's Brief, 48-49).

In *Pollack v. Fire Ins. Exchange* (Mich. 1988) 423 N.W.2d 234, a Michigan Court of Appeal refused to hold the insured to a rebuilding

timeline in order to collect RCV when the insurer itself had delayed and ultimately denied coverage – just as FFIC did here. The court's decision was grounded in "equitable considerations" just like those that apply here. (*Id.* at 235.) Again, FFIC's argument against the application of *Pollack* is incoherent (the fact that the insurer apparently insisted on the insured obtaining counsel) and meaningless. (Respondent's Brief, p. 48).

FFIC incorrectly asserts that *Pollack* was overruled by the Michigan Supreme Court in *Smith v. Michigan Basic Property Ins. Assn*. (Mich. 1992) 490 N.W.2d 864, 867, fn. 6. (Respondents' Brief, p. 48, fn. 20.) Not so. The Michigan Supreme Court merely *distinguished Pollock* by noting that, in the case before it, the insurer's refusal to pay claims based on an arson defense was *in good faith* and that, as such, its refusal to pay benefits did not estop it from asserting the failure to comply with the replacement cost requirements as a defense to payment of replacement costs benefits. Thus, where the insurer's refusal to pay the ACV benefits is in *bad* faith, *Pollock* is still good law in Michigan. And, to the extent lack of good faith in refusing benefits does estop an insurer under *Pollock*, the finding of FFIC's lack of good faith by the jury in this case confirms that the *Pollock* court's analysis applies here.

In *Zaitchick v. American Motorists Ins. Co.* (S.D. N.Y. 1982) 554 F.Supp. 209, the Federal District Court for the Southern District of New

York confronted the issue of replacement cost. The court rejected the "repair requirement" and recognized that because the policyholder was "refused any monies under the insurance contract" the insurer "made it impossible for [the insured] to fulfill the condition precedent [which] excuses plaintiffs from performance of the replacement condition." (*Id.* at 217. ) That is precisely the situation here and *Zaitchick* is squarely on point.

All of these cases apply the same analysis followed under California law in *City of Hollister* and FFIC cannot rationally distinguish them from the factual context of this case.

### B. FFIC incorrectly argues that *City of Hollister* is inapposite and cites out-of-state cases which are inapplicable to the facts here.

FFIC incorrectly argues in its brief that *City of Hollister* is inapposite and in support of that contention cites only a few out-of-state cases, which ostensibly disagree with *City of Hollister*, but which are themselves inapplicable. (Respondent's Brief at pp. 40-49).

FFIC argues that *City of Hollister* does not expressly excuse the "repair requirement" (*i.e.* whether Stephens did or planned to conduct repairs) and somehow, therefore, estoppel should not apply. FFIC has

attempted to convince this Court that *City of Hollister* applies only to procedural policy requirements – *e.g.* the 180-day contract-for-repairs requirement – not *substantive* policy requirements – *e.g.* whether Stephens was obligated to repair or contract for repair in order to receive RCV. (*Id.)* But FFIC's *substance-vs-procedure* argument is a distinction without a difference. The issue in the present case is whether FFIC's wrongful denial of coverage prevented Stephens from complying with the policy requirements for claiming RCV. The answer is yes. The record reflects it and the jury agreed.

FFIC cites *Buckley Towers Condo Inc. v. QBE Ins. Corp.* (11th Cir. 2010) 395 F.App'x 659, 664, *accord Fl. Ins. Guar. Assn. v. Somerset Homeowner's Ass'n, Inc.* (Fla.Dist.Ct.App. 2011) 83 So. 3d 850, 852 for the proposition that the doctrine of prevention "may not wielded as sword" to require the insurer to pay replacement cost without repair. (Respondent's Brief, p. 43). FFIC also relies on *Whittmer v. Graphic Arts Mut. Ins. Co.* (Va. 1991) 410 S.E.2d 642, 646, for the proposition that courts are not in the business of "rewriting policies" without any apparent justification for raising these issues. Stephens' position is not that FFIC should be required to pay RCV without repair, rather that FFIC was required to effectively communicate to Stephens the ACV-vs-RCV requirements under the policy and should not be able to escape the responsibility of payment when non-

compliance is traceable to FFIC's unreasonable and unjustified refusal to even pay the ACV benefits.

Neither Stephens nor UP is arguing that the policy should be rewritten. But the principles involved here do not require rewriting of the policy; rather they impose standard equitable doctrines to preclude FFIC from obtaining an advantage over its policyholder that resulted solely from its own unreasonable misconduct in failing to fairly, thoroughly and promptly investigate the claim with an eye toward paying it rather than seeking grounds for denying it. (*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 720-721, 68 Cal.Rptr.3d 746, 171 P.3d 1082.) FFIC had substantial duties under California law requiring it to communicate with Stephens, to notify Stephens of controlling policy provisions, time limits and requirements, and to provide assistance needed to actually *prevent* Stephens' purported default under the applicable policy provisions. The evidence in this case amply demonstrates that FFIC failed miserably in complying with those duties.

The consequence of FFIC's failures should inure to FFIC's detriment, not Stephens'. As the jury found, based on substantial evidence, FFIC's failure to fulfill its duties prevented Stephens from complying with the policy requirement of making repairs before RCV benefits could be paid.

If FFIC's argument is accepted, the simple reality is that FFIC – and other insurers – will be incentivized to withhold ACV benefits whenever the insured cannot afford to effect repairs themselves because the insurer will then ***never*** have to pay RCV benefits – and may not even have to pay ACV benefits, as found by the trial court in this case.

FFIC should be prevented from asserting the policy provisions that would otherwise protect it; to do otherwise results in the anomalous situation in which the more egregious the insurer's conduct, the greater the likelihood it can escape all liability under its policy – a result condoned nowhere under the law of California or any other jurisdiction.

## CONCLUSION

The trial court ignored the evidence, the jury's findings and the law in granting the JNOV and new trial motions. Its determinations are insupportable as a legal, factual or practical matter and those rulings should be reversed.

Dated: April 21, 2014 THE ARKIN LAW FIRM

By: _____
SHARON J. ARKIN
Attorney for *amicus curie*
UNITED POLICYHOLDERS

## CERTIFICATE OF LENGTH OF BRIEF

I, Sharon J. Arkin, declare under penalty of perjury under the laws of the State of California that the word count for this Brief, excluding Tables of Contents, Tables of Authority, Proof of Service and this Certification is 4831 words as calculated utilizing the word count feature of the Word:Mac 2008 software used to create this document.

Dated: April 21, 2014

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SHARON J. ARKIN

## PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address 225 S. Olive Street, Suite 102, Los Angeles, CA 90012.

On **April 21, 2014**, I served the within document described as:

**AMICUS BRIEF OF UNITED POLICYHOLDERS IN SUPPORT OF PLAINTIFF AND APPELLANT STEPHENS & STEPHENS XII, LLC**

on the interested parties in this action by placing true copies thereof, enclosed in sealed envelopes to be delivered, addressed as set forth in the attached service list with postage paid thereon and depositing them with the United States Postal Service at Brookings, Oregon.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

**Executed on April 21, 2014 at Brookings, Oregon**.

_____
SHARON J. ARKIN

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