IN THE COURT OF APPEALS
IN THE STATE OF NEW MEXICO

ALLSTATE INSURANCE COMPANY,

Appellant,

No. 22,760

v.

JOSE PINCHEIRA, OLIVIA PINCHEIRA, and AMY MARQUEZ,

Appellees.

ALLSTATE'S RESPONSE IN OPPOSITION TO MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Appellant Allstate Insurance Company opposes United Policyholders' Motion for Leave to File Amicus Curiae Brief. The proposed Amicus Brief sheds more heat than light by addressing issues not before this Court. The proposed Amicus Brief also violates the New Mexico Rules of Appellate Procedure by impermissibly attaching three reports of market conduct examinations from South Carolina, Virginia, and California, all of which have nothing at all to do with issues before this Court, and unreported trial court decisions from Pennsylvania and Colorado, which again have nothing to do with issues before this Court.

It is clear that United Policyholders' sole motivation in attempting to file this Amicus Curiae Brief is to prejudice this Court against Allstate, by portraying Allstate as a bad actor. The proposed Amicus Curiae Brief appears to fit into the description of an amicus brief disregarded by the California Court of Appeal: "It raises new arguments on appeal, distorts the issues, relies on incompetent new evidence, and attributes disingenuous self-protective motives to the [Defendant], cast in an unnecessarily shrill and hostile tone. We ... therefore disregard the brief of amicus curiae." *Arnett v. Pearce*, 45 Cal. Rptr. 593, 595 n.4 (Ct. App. 1995). This Court similarly should not allow such manipulation of the judicial process, and should deny United Policyholders' Motion for Leave to File Amicus Curiae Brief.

ARGUMENT

I. THE PROPOSED AMICUS CURIAE BRIEF IS IRRELEVANT TO THE ISSUES BEFORE THIS COURT.

This Court granted Allstate's Petition for Writ of Error to address two discrete issues: (1) whether the District Court applied the incorrect legal standard when it ordered disclosure of Allstate's confidential business information and trade secrets without providing any limitation on Plaintiffs' use or dissemination of the documents outside this case; and (2) whether the Court erred in refusing to grant Allstate the evidentiary hearing it sought, after the Court allowed Plaintiffs to offer surprise evidence at the hearing on Plaintiffs' motion to compel without notice to Allstate and without giving Allstate a chance to rebut that evidence. The proposed Amicus Curiae Brief addresses *neither* of these issues.

The proposed brief pursues a different agenda. First, it spends eight pages arguing that insurance companies are regarded as "fiduciary" or are regulated by the states in the public interest. (Brief at 4-11.) These pages contain a collection of broad, out-of-context quotations from Dean Pound's college lectures, Warren Buffett's stockholder blurbs, insurance textbooks, articles, and inapposite cases over nearly ninety years suggesting public aspects, benefits, and ramifications of insurance, including rationales for canons of construction of insurance policies and for recognizing the tort of bad faith. This has nothing to do with the issues presented on appeal. None of these materials addresses protective orders limiting the use and disclosure of documents produced in discovery outside the pending case. None calls for refusing to recognize an insurers' right, like any person, to protect the confidentiality of internal operating materials against widespread public dissemination.

Moreover, with all due respect, neither plaintiffs' counsel nor United Policyholders are state regulators or attorneys general engaged in a market conduct examination or other regulatory proceeding, and they have no legal authority to determine what Allstate confidential materials should be widely disseminated as a matter of "public policy." (*See* Brief at 11, 19.) That is a legislative determination. At common law, there is no unfettered right of public access to

discovery materials. The United States Supreme Court has recognized that discovery materials and proceedings

> are not public components of a civil trial. Such proceedings were not open to the public at common law, and, in general, they are conducted in private as a matter of modern practice. Much of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action. Therefore, restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information.

Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33 (1984) (citations omitted); *see Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1311 (11th Cir. 2001) (no common-law right of access to discovery materials, which "are neither public documents nor judicial records").

The proposed Amicus Curiae Brief spends its remaining ten pages on the proposition that "No insurance company should be allowed a litigation advantage by stonewalling discovery through numerous and often frivolous objections." (Brief at 12.) This appeal, however, is not about stonewalling discovery and "objecting to production of internal documents," or about whether the McKinsey documents are relevant to Plaintiffs' case.[1] (Brief at 13.) Relevance objections aside, Allstate produced the McKinsey documents, and has done so under an interim protective order issued by the District Court. This appeal concerns whether Plaintiffs and their counsel, *who have the McKinsey documents*, are entitled to use or disseminate them at will *outside this case* and for whatever purposes they choose. Indeed, by freely disseminating the documents, they would deprive future courts of the prerogative of determining that Allstate's relevance objections to discovery are meritorious and that the McKinsey documents should not be produced to other plaintiffs because they are not relevant to the cases at hand.

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[1] In fact, the McKinsey documents sought to be protected, like Allstate's Claim Core Process Redesign ("CCPR") itself, has *absolutely no relevance* to the issues before the District Court in this case. Plaintiffs in this case rejected uninsured motorist coverage, allegedly on the recommendation of their insurance agent. CCPR and the McKinsey documents analyze Allstate's *claims handling* processes, *not* the way in which insurance policies are sold. Allstate has always taken the position in this case that the documents Plaintiffs sought were completely irrelevant to their claims, and they are irrelevant.

At root, United Policyholders' brief amounts to a diatribe against "tactics utilized by large defendants, including insurance companies, in seeking to cloak information with the robe of secrecy." (Brief at 14.) It relies extensively on citations to *Full Disclosure*, a publication of the American Trial Lawyers Association, and similar publications by trial lawyers who share the professional interests of plaintiffs' counsel here. If Allstate had relied on similarly self-serving statements from industry promotional materials, no doubt United Policyholders would urge the Court to dismiss them on their face. But Allstate instead has cited extensive judicial precedent in which courts have granted protective orders limiting the use or disclosure of confidential insurer claim manuals and other claim process materials.[2] United Policyholders offers no responsive precedent. Rather, they cite a single case *eight or nine years ago* criticizing Allstate's response to discovery in that case, as well as the Utah Supreme Court's comment on evidence of conduct by *another insurer* in *Campbell v. State Farm Automobile Insurance Co.*, 2001 Utah LEXIS 170, without noting that the U.S. Supreme Court has granted a writ of certiorari to review the Utah court's decision. *State Farm Auto. Ins. Co. v. Campbell*, 122 S. Ct. 2326 (2002).

To the extent that United Policyholders discusses the McKinsey documents at all, it simply repeats in conclusory fashion the same arguments that Plaintiffs make about whether *other* CCPR materials are widely known, or whether McKinsey & Co., Allstate's consultant, also did work for other insurance companies. (Brief at 18.) The proposed amicus brief thus adds nothing beyond citations to self-serving materials written by United Policyholders' own counsel.[3]

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[2] *See, e.g., Newpark Envtl. Servs. v. Admiral Ins. Co.*, No. Civ. A. 99-331E, 2000 WL 136006, at *4 (E.D. La. Feb. 3, 2000) (providing that insurer's claims procedures manual be produced subject to a protective order); *Kimball v. Liberty Mut. Ins. Co.*, No. 9601, 1999 WL 1260846 at *3 (Mass. App. Ct. Dec. 22, 1999) (stating that it is likely the "better practice" to require that an insurer's claims procedures manual be produced under seal and used only for the purposes of the instant litigation); *Kaufman v. Nationwide Mut. Ins. Co.*, 1997 WL 703175, *2 n.3 (E.D. Pa. Nov. 12, 1997) (inviting insurer to request issuance of a protective order to protect insurer's claims manuals from general disclosure).

[3] United Policyholders' argument that CCPR has "been widely discovered by policyholder attorneys" relies entirely on citations to an article written by United Policyholders' *own counsel*, William Merlin and Mary Kestenbaum, and CLE seminar materials called *How to*

Moreover, it remains undisputed that the McKinsey documents have *never* been produced in any lawsuit without a protective order. Nor is there any evidence that the specific content of the more than 12,000 pages of McKinsey documents developed in the course of Allstate's CCPR has been published in any other form. United Policyholders' idle speculation is of no help to this Court. (Brief. at 18-19.)

Plaintiffs have the McKinsey documents, and any issues regarding the nature and confidentiality of those documents can be resolved on the merits through an evidentiary hearing before the District Court on remand. That is the very evidentiary hearing that Allstate sought below, that the District Court refused to hold, and that Allstate now seeks through this appeal.

II. THE PROPOSED AMICUS CURIAE BRIEF WOULD IMPROPERLY SUPPLEMENT THE RECORD WITH IRRELEVANT EXHIBITS.

The Amicus Brief also improperly attempts to supplement the record with three reports of market conduct examinations from South Carolina, Virginia, and California, and unreported trial court decisions from Pennsylvania and Colorado, none of which has anything to do with the issues before this Court. The general rule, repeatedly recognized in New Mexico, is that appellate courts "will not review matters not of record[.]" *Williams v. Bd. of Cty. Comm.*, 1998-NMCA-090, ¶ 10, 963 P.2d 522, 525, *cert. denied*, 125 N.M. 654, 964 P.2d 818 (1998). Furthermore, New Mexico Rule of Appellate Procedure 12-209(C) allows correction or modification of the record proper only when such material is omitted "by error or accident[.]" Neither of these grounds for supplementation apply here.

Other courts have recognized the impropriety of attempts by amici curiae to supplement the record by attaching exhibits, and have stricken such improperly submitted exhibits. "The brief of an amicus curiae (or attachments thereto) cannot be used as a vehicle to present additional evidence or new evidence to an appellate court." *State v. Quantex Microsystems, Inc.*, 809 So. 2d 246, 249 (La. App. 2001). Indeed, in *Fluoroware, Inc. v. Chubb Group of Insurance*

Hammer Allstate II of unidentified authorship, but presented by the Michigan Trial Lawyers Association.

Companies, 545 N.W.2d 678 (Minn. Ct. App. 1996), the Minnesota Court of Appeals struck exhibits attached to an amicus brief filed by *United Policyholders*, the would-be amicus here, noting that "[t]his court will grant a motion to strike material in an appendix when that material was not presented to the district court." *Id.* at 684. Furthermore, there, as here, the "documents offered by [United Policyholders] are not conclusive on any relevant issue . . . ." *Id.*

New Mexico courts have long recognized that "Amicus must take the case in this Court as it stands on appeal, and amicus cannot assume the functions of a party." *Nall v. Baca*, 95 N.M. 783, 785-86, 626 P.2d 1280, 1281-82 (1981). The proposed Amicus Curiae Brief submitted by United Policyholders violates these principles, and should be rejected.

CONCLUSION

For all of the foregoing reasons, Allstate Insurance Company respectfully requests this Court to deny United Policyholders' Motion for Leave to File Amicus Curiae Brief.

DATED this 13th day of September, 2002.

MODRALL, SPERLING, ROEHL, HARRIS
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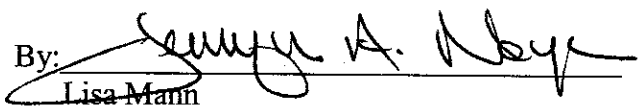
By: 
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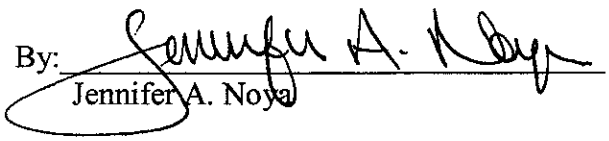
By: 
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