

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-35275

AMERICAN GAMES, INC.,

Intervenor - Appellant-Intervenor,

v.

TRADE PRODUCTS, INC.,
a Washington Corporation,

Plaintiff-Appellee,

STUART ENTERTAINMENT, INC.,
a Delaware Corporation,

Defendant-Appellee.

Appeal from a Judgment of the United States
District Court for the Western District of Washington

**MOTION OF CITIZENS AGAINST UNFAIR INSURANCE PRACTICES AND
UNITED POLICYHOLDERS FOR LEAVE TO APPEAR AS AMICI CURIAE
IN SUPPORT OF INTERVENOR-APPELLANT AMERICAN GAMES, INC.**

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Citizens Against Unfair Insurance Practices ("Citizens") and United Policyholders ("United") hereby move pursuant to Rule 29 of the Federal Rules of Appellate Procedure for leave to appear as Amici Curiae in the above-entitled action and to file a brief in this appeal. Citizens and United have conditionally filed their proffered brief with the Court simultaneously with this Motion. In support of this Motion, Citizens and United state as follows:

1. Amici Curiae, Citizens and United, are non-profit organizations that champion the rights of insurance policyholders. Amicus Citizens is an organization with an office at 16 Mianus Drive, Bedford, New York 10506. Citizens' mission is to secure the guarantee that insurance companies will not practice unfair claims settlement practices against citizens of New York State. Citizens also seeks to protect insurance rights and to promote insurance reform legislation.

2. Amicus United is a corporation that engages in charitable and educational activities that promote greater public understanding of insurance issues and consumer rights. United's activities include organizing meetings, distributing written materials, and responding to requests for information from individuals, elected officials, and governmental entities. These activities are limited only to the extent that United exists exclusively on donated labor and contributions of services and funds.

3. One way Amici Citizens and United champion the cause of individual policyholders is by educating policyholders on their

rights and duties under their insurance policies. Insurance policies typically are standard-form contracts, written by insurance companies and sold with no (or minimal) modification, which come before the courts for interpretation time and time again. Amici thus have a vital interest in seeing not only that the standard-form insurance policies sold to policyholders throughout the United States are interpreted properly and consistently by the courts, but also that those decisions are not vacated solely by voluntary action of the interested parties and, thus, do not disappear from the case books. It is for this reason that Citizens and United seek leave of this Court to appear as Amici Curiae in this case.

4. Even though the United States Supreme Court has decreed that vacatur rarely should be granted when an underlying dispute voluntarily is mooted on appeal, U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18 (1994), parties nonetheless routinely seek to avoid the Supreme Court's edict when it suits their private interests. A prime example of this conduct is the order on appeal to this Court. See Order, Trade Prods., Inc. v. Stuart Entertainment, Inc., No. C94-1440D (W.D. Wash. Jan. 31, 1997) (vacating, upon joint motion of plaintiff Trade Products, Inc. ("Trade Products) and defendant Stuart Entertainment ("Stuart"), an earlier order and judgment in favor of Trade Products) (the "Trade Products Vacatur Order").

5. Other examples are replete in the area of insurance coverage litigation. See, e.g., Bankers Trust Co. v. Hartford

Accident & Indem. Co., 518 F. Supp. 371 (S.D.N.Y. July 22, 1981) ("Bankers Trust I"), vacated, 621 F. Supp. 685 (S.D.N.Y. Nov. 2, 1981) (discussed in detail in the brief Amici Curiae Citizens and United have conditionally filed with this Motion).

6. Used in this way, vacatur enables powerful litigants to privately engineer the common law. This ability has its obvious benefits. For example, in the insurance coverage litigation arena, where courts repeatedly confront the same issues over and over again, a decision in one court may have (and often does have) ramifications far beyond the case in which the decision is made. To avoid the precedential effect of such decisions, insurance companies routinely pay exorbitant post-judgment settlements to have precedent-setting insurance coverage decisions vacated.¹ Insurance companies then deny other policyholders the insurance coverage they bought and paid for, relying on this privately-engineered law.

7. Vacatur thus unfairly favors institutional parties like insurance companies that make and execute strategic settlement agreements with policyholders. After erasing unfavorable decisions, insurance companies then can make representations to courts about the very issues decided in those vacated decisions while ignoring the history of prior settlements and vacated

¹ Similarly, insurance companies also offer to pay policyholders to forego appeals to preserve pro-insurance industry decisions. This practice permits insurance companies to engineer the common law by shielding pro-insurance industry decisions from appellate review and by allowing insurance companies to claim the precedential value of such decisions in future cases.

rulings. This practice of "buying and lying" forces courts to relitigate the same issue time and time again. It also distorts the collective views of the judiciary and severely threatens the integrity of our common law system.

8. The Trade Products Vacatur Order on appeal before this Court represents yet another attempt by powerful litigants to privately engineer the common law through the use of vacatur. It relegates yet another decision to the burgeoning body of "disappearing decisions." If this Court grants this Motion for Leave to Appear as Amici Curiae, Citizens and United will ask this Court to reverse the Trade Products Vacatur Order. By reversing the Trade Products Vacatur Order, this Court can weigh in on the side of rejecting such a system of private justice.

WHEREFORE, Citizens and United respectfully request that this Court grant their Motion for Leave to Appear as Amici Curiae

in this action and to file a brief in this appeal.

Dated: June 6, 1997

Respectfully submitted,

AMICUS CURIAE, CITIZENS AGAINST
UNFAIR INSURANCE PRACTICES
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