U.S. Court of Appeals Docket No. 14-55959

THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MATTHEW GRAYSON,
Plaintiffs/Appellants,

vs.

ALLSTATE INSURANCE COMPANY, ET AL.,
Defendants/Appellees.

On Appeal from a Decision
of the United States District Court
for the Central District of California
Case No. CV 13-05324 BRO (JCGx)
The Honorable Beverly Reid O'Connell, Judge

BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF APPELLANT

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CERTIFICATE OF CORPORATE DISCLOSURE

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) charitable organization, that it does not have a parent corporation or shareholders.

Dated: December 30, 2014 s/ Amy Bach

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INTEREST OF THE *AMICUS CURIAE*

United Policyholders ("UP") submits this this brief of *amicus curiae* in support of Appellant Matthew Grayson and asks this Court to reverse the District Court's Order granting summary judgment in favor of Allstate Insurance Company ("Allstate") on the issue of whether Allstate's actions in response to a settlement demand in an underlying action constituted a breach of its duties of good faith and fair dealing. UP seeks to assist this Court in evaluating the issues on appeal by focusing on the delicate nature of settlement negotiations and the importance of not allowing insurers to engage in conduct during those negotiations that is adverse to the economic interests of insureds.

UP is a non-profit organization dedicated to helping preserve the integrity of the insurance system by serving as a voice and an information resource for consumers in all 50 states. UP's work is supported by donations, grants, and volunteer labor. UP does not sell insurance or accept funding from insurance companies. While much of UP's work is aimed at helping individuals and businesses purchase appropriate insurance and repair, rebuild, and recover after disasters through its Roadmap to Preparedness and Roadmap to Recovery Programs, UP engages with regulators, public officials, academics, and various stakeholders in connection with legal and marketplace developments relevant to all policyholders and all lines of insurance. UP is an official consumer representative

to the National Association of Insurance Commissioners where claims handling rules and the duty of good faith and fair dealing are routinely discussed.[1]

A diverse range of individual and commercial policyholders throughout the United States regularly communicate their insurance concerns to UP which allows UP to submit *amicus curiae* briefs to assist state and federal courts in deciding cases involving important insurance principles. UP's *amicus curiae* briefs have been cited with approval by courts throughout the nation including the United States Supreme Court in *Humana, Inc. v. Forsyth*, 525 U.S. 299 (1999), the California Supreme Court in *Vandenburg v. Superior Court*, 21 Cal.4th 815 (1999), and most recently, the Pennsylvania Supreme Court in *Allstate Property and Casualty Ins. Co. v. Wolfe*, 39 MAP 2014 (2014).

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).[2]

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[1] *See, e.g.,* Unfair Claims Settlement Practices Act, National Association of

[2]UP was recently granted leave to file a brief of *amicus curiae* in the following 9th Circuit cases: *Street Surfing v. Great American E&S Ins. Co*., (Case No. 12-5531, 2014); *Pistorese v. Transamerica Life Ins. Co*. (Case No. 14-35027, 2014); and *Upadhyay v. Aetna Life Ins.* Co. (Case No. 14-15420, 2014).

BRIEF OF AMICUS CURIAE

I. SUMMARY OF ARGUMENT

This case arises from an underlying action in which a plaintiff – Grayson – asserted both property and personal injury claims against Peper, an Allstate insured. Grayson sent a settlement demand for Peper's policy limits that included a release of only the bodily injury damages, not his property damage claims. Allstate did not accept the strict terms of this demand. It instead sent essentially a counter-offer that included a release of both the bodily injury *and* property damage claims. As the District Court correctly found, Allstate's response was not a "mirror image" acceptance. It was a rejection and counter-offer. It may have been veiled as an acceptance in response to a policy-limits settlement demand, but it was, in fact, a rejection of that demand, and both Peper and Grayson recognized it as such.[3]

However, although the District Court correctly recognized that Allstate responded to the plaintiff's policy limits demand with a counter-offer and that Allstate's conduct sabotaged settlement negotiations and led to a trial and a substantial verdict against its insured, the Court incorrectly held that the conduct did not amount to a breach of the covenant of good faith and fair dealing. United

[3] SUF, Ex. 4-24:3-12 (trial testimony of Allstate Claims Adjuster Donna Czupryn).

Policyholders respectfully submits that adherence to the covenant in the underlying fact scenario clearly required Allstate to accept the policy limits demand with a mirror image response and not with the attempted sleight of hand that caused negotiations to fail and led to a large judgment against its insured in resulting litigation. As this Court and Allstate are well aware, settlement negotiations are almost always highly sensitive and fateful. An insurer's obligation to act in good faith and fair dealing in protecting the interests of an insured tortfeasor during settlement negotiations must be diligently enforced. Reversal is warranted.

Insurance products have a unique role in our society: Americans who want to drive cars, operate businesses or borrow money to purchase a home are *legally required* to buy insurance. Automobile insurance policyholders know that when an accident occurs, insurance can make the difference between recovery and ruin. An injured party also relies on insurance – to make them whole after tragedy strikes. Both the tortfeasor and the victim rely on the tortfeasor's insurance company to be cooperative and to pay valid claims, without any nefarious purpose.

However, a perennial conflict exists: to an insurer, the paramount purpose of selling their product is to generate revenues to support a profitable, solvent business enterprise.[4] To an insured, the economic safety net function of insurance

[4] *See* Tom Baker, Constructing the Insurance Relationship. Sales Stories, Claims Stories, and Insurance Contract Damages, 72 Tex, L. Rev. 1395, 1401 (May 1994).

is paramount. For these reasons, a decades-old body of California case law governs the integrity of the products that insurers sell and imposes duties upon them that are higher than those imposed on their commercial peers. As a result, California recognizes that the duty of good faith and fair dealing implied in every contract applies more stringently to insurance. The public policy rationale is to balance insurers' legitimate profit with their customers' legitimate interests that payment on their claim will come without a fight at claim time.

As the California Supreme Court stated in the seminal insurance case:

> "[I]nsurers' 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…[A]s a supplier of a public service rather than a manufactured product, the obligations of insurers go beyond meeting reasonable expectations of coverage. The obligations of good faith and fair dealing encompass qualities of decency and humanity inherent in the responsibilities of a fiduciary." (citations omitted)

Egan v. Mut. of Omaha Ins. Co., 620 P.2d 141, 146 (Cal. 1979).

In addition to California, the U.S. Supreme Court has recognized the special nexus between the business of insurance and the public interest for almost 80 years. *See, e.g.*, *Cal. State Auto. Ass'n Inter-Ins. Bureau v. Maloney*, 341 U.S. 105, 109-10 (1951) (insurance has always had special relation to government); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 415-16 (1946) ("[insurance] business affected with a vast public interest"); *Robertson v. California*, 328 U.S..

440, 447 (1946); *United States. v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 540 at n.14 (1944) ("evils" in the sale of insurance "vitally affect the public interest"); *Osborn v. Ozlin*, 310 U.S. 53, 65 (1940) ("Government has always had a special relation to insurance."); *O'Gorman & Young, Inc. v. Hartford Fire Ins. Co*., 282 U.S. 251, 257 (1931) ("The business of insurance is so far affected with a public interest that the State may Regulate the Rates").

As such, insurance is a unique product imbued with state public policy concerns. California law recognizes that consumers purchase it for peace of mind. Whether the insurance is for property, liability, or health, the basic idea for its existence and purpose remains the same: recovery for loss and coverage for financially catastrophic events. Consumers do not purchase insurance with the expectation that they will find themselves in litigation with an injured party because their insurer breached its duty of good faith and fair dealing.

II. ARGUMENT

A. Knowingly Sending a Rejection and Counter-Offer Veiled as an Acceptance of a Policy-Limits Settlement Demand Constitutes Bad Faith and Subjects an Insurer to Liability for an Excess Verdict Awarded Against Its Insured

Under California law, an insurer must accept an injured party's settlement offer within policy limits in the mirror image or it is a rejection and counter offer.

See, e.g., Restatement (2d) of Contracts §59.[5] California law disfavors overly broad releases and it is bad public policy to encourage related litigation. An insurer, as here, may not play "fast and loose" with an injured party during settlement negotiations by attempting to broaden the scope of a release beyond the terms of the offer. Doing so, as Allstate attempted to do here, results in a rejection and counter-offer, which the injured party is free to accept or reject and institute litigation. The insurer then becomes liable for an excess judgment.[6]

Indemnity, the primary purpose of insurance, is frustrated when an insurer does not accept an injured party's settlement offer within policy limits. *Kransco v. Am. Empire Surplus Lines Ins. Co*., 23 Cal.App 4th 390, 400-401 (2000). As discussed above, consumers purchase insurance for peace of mind and to protect them from loss or liability. The insurer's duty to ensure that the insured is not subject to unnecessary litigation is intertwined with its responsibility to accept reasonable settlement offers. *Comunale v. Traders and General Ins. Co*. 50 Cal.2d 654 (1958) (the decisive factor in fixing the extent of liability is not the refusal to

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[5] PURPORTED ACCEPTANCE WHICH ADDS QUALIFICATIONS: A reply to an offer which purports to accept it but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance but is a counter-offer. Comments: a. Qualified acceptance. A qualified or conditional acceptance proposes an exchange different from that proposed by the original offeror. Such a proposal is a counter-offer and ordinarily terminates the power of acceptance of the original offeree. b. Statement of conditions implied in offer. To accept, the offeree must assent unconditionally to the offer as made…

[6] For an in-depth discussion of the liability of an insurer for excess judgments in bad faith cases, *see* Richard S. Cohen, *Liability of an Insurance Carrier in Excess of Coverage*, 3 Wm. & Mary L. Rev. 357 (1962).

defend; it is the refusal to accept an offer of settlement within the policy limits). Here, instead, Allstate breached its duty to its insured by choosing to use the settlement process to put its own interests *ahead* of its insured~~'~~s and the result was a costly lawsuit instituted by Grayson against Peper.

The District Court seemed to focus on whether Allstate attempted to cure the non-conforming acceptance by sending a second conforming acceptance, but this was also in error. Black letter law requires that an acceptance must be in the mirror image and California law implies that failure to do so may subject the insurer to excess liability. *Comunale,* 50 Cal.2d 654. Here, it should not matter whether Allstate attempted to cure the acceptance. As the record shows, Allstate knew that it was acting improperly by altering the terms of the settlement offer to include a release of the property damage claims.[7] This constituted a rejection, exposing Peper to the risk of litigation and a huge excess verdict, and the inquiry should end there. From a legal perspective this is sufficient to find Allstate liable for bad faith failure to settle. From a public policy perspective, what Allstate did is contrary the core purpose of liability insurance.

Finally, as a procedural matter, because the District Court properly found that Allstate's purported ~~the~~ acceptance constituted a rejection and counter-offer, the question of whether this constituted a breach of the covenant of good faith and

[7] SUF, Ex. 6-45:2-15 (deposition of Allstate Claims Adjuster Donna Czupryn)

fair dealing (*i.e.*, bad faith failure to settle) is, as the District Court correctly pointed out, a question of fact for the jury. *Walbrook Ins. Co. v. Liberty Mutual Ins. Co.*, 5 Cal.App 4th 1445, 1454 (1992) (citing *Cain v. State Farm Mut. Auto Ins. Co.,* 47 Cal.App.3d 783, 792 (1975)). Thus, it was plainly error for the District Court to determine, in finding no question of fact, that there were no conflicting inferences and that reasonable minds could not differ. *Id.* The District Court's own findings regarding the policy-limits settlement offer and Allstate's counter thereto contradict this very determination. Thus, summary judgment was inappropriate and improperly granted in favor of Allstate.

B. California is a Strong Consumer-Oriented Public Policy State and has Long Held that Insurers are Akin to Fiduciaries and the Business of Insurance is Imbued with the Public Trust; accordingly Insurers Owe a Duty of Good Faith and Fair Dealing to their Policyholders

Implied in every contract of insurance is the covenant of good faith and fair dealing which in California includes the duty to accept reasonable settlement offers. *Egan,* 24 Cal.3d at 818; *Hamilton v. Maryland Cas. Co*., 27 Cal.4th 718, 724 (2002). A breach of the duty to settle results in the insurer being liable for the amount of a judgment rendered against insured, even when it is in excess of policy limits. *Comunale,* 50 Cal.2d 654 (the decisive factor in fixing the extent of liability is not the refusal to defend; it is the refusal to accept an offer of settlement within the policy limits; the implied covenant of good faith and fair dealing imposes a duty on the insurer to settle a clam against its insured within policy limits

whenever there is a substantial likelihood of a recovery in excess of those limits); *Miller v. Elite Ins. Co*. 100 Cal. App. 3d 739 (1980) ("the covenant of good faith and fair dealing is always a prominent issue in the settlement phase of insurance cases because of the possibility of a conflict of interest between the interests of the insurer and the insured.") (citing *Merritt v. Reserve Ins. Co*., 34 Cal. App. 3d 858 (1973); *Amato v. Mercury Casualty Co*. 53 Cal. App.4th 829 (1997) ("rejection of a settlement offer, subject[s] the insurer to liability for the judgment against the insured even when it is in excess of the policy limit") (citing *State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co*. 9 Cal. App. 3d 508, 528-531 (1970); *Walbrook,* 5 Cal. App. 4th at 1457 (citing *Johanson v. California State Auto. Assn. Inter-Ins. Bureau,* 15 Cal.3d 9, 16 (1975) ("duty of good faith compels acceptance of a settlement offer only if the offer is within the insurer's policy limits")).

California courts have long held that because insurance is imbued with the public trust and since insurers hold themselves out as fiduciaries, they owe a duty of good faith and fair dealing. *Egan,* 24 Cal.3d at 809. This duty extends to automobile insurance, which is compulsory in California. Veh. Code §§ 16020, 16021. The District Court discussed this duty at length in its Order but declined to recognize that the behavior of Allstate had risen to the level of "unwarranted[ly]

refusal" and thus was not liable for "bad faith."[8] *Comunale,* 59 Cal.2d at 659; *Crisci v. Sec. Ins. Co. of New Haven, Conn.,* 66 Cal.2d 425, 430 (1967).

However, the District Court was in error, given the fact that Allstate knew that its insured would in all likelihood be subject to an excess judgment due to the extent of the injuries suffered by Grayson.[9] *Walbrook,* 5 Cal.App.4th at 1453-1454. Given this, Allstate's failure to accept the policy-limits settlement offer was a breach of the duty of good faith and fair dealing and thus Allstate should be liable for the excess judgment. Furthermore, "the…obligation of good faith and faith dealing requires the insurer to settle in an *appropriate case*" such as one involving "a great risk of liability" and "a great risk of recovery beyond the policy limits." *Id.* at 1456 (citing *Comunale*, 50 Cal.2d 654 at 659-660) (emphasis added). Surely a $2.5 million verdict would constitute an *appropriate case*.[10] Further, while *Crisci* affirmed the "unwarranted refusal" standard in the context of bad faith, it nonetheless held that "liability is imposed not for bad faith breach of contract but for the failure to meet the duty to accept reasonable settlements, a duty included within the implied covenant of good faith and fair dealing." 50 Cal.2d at 430.

From a public policy standpoint, as the *Egan* court noted, "…the insured in a contract like the one before us does not seek to obtain a commercial advantage by

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[8] Civil Minutes – General, pp. 13-16.

[9] Czupryn Deposition, *supra* Note 5.

[10] Civil Minutes – General, p. 1.

purchasing the policy - rather, he seeks protection against calamity. As insurers are well aware… the purchase of such insurance provides peace of mind and security." 24 Cal.3d at 819. Imagine how the insured (Peper) felt here when his insurer decided to play games while he reeled from a tragic automobile accident? Peace of mind and security? Surely not. Further, "[i]nsurance contracts are unique in nature and purpose. An insured does not enter an insurance contract seeking profit, but instead seeks security and peace of mind through protection against calamity. That "bargained-for peace of mind comes from the assurance that the insured will receive prompt payment of money in times of need." *Love v. Fire Ins. Exchange* 221 Cal.App.3d 1136, 1148 (1990).

CONCLUSION

For the foregoing reasons, *amicus curiae* United Policyholders respectfully requests that this Court reverse the decision of the U.S. District Court for the Central District of California in favor of Plaintiff/Appellant Grayson.

Dated: December 30, 2014

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STATEMENT OF *AMICUS CURIAE*

Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, I hereby certify: (1) a party's counsel did not author the brief in whole or in part; (2) a party or a party's counsel did not contribute money that was intended to fund preparing or submitting the brief; and (3) no person – other than the *amicus curiae*, its member, or its counsel -- contributed money that was intended to fund preparing or submitting the brief.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations set forth in Rules 29(d) and 32(a)(7)(B) of Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font and contains 2,953 words.

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CERTIFICATE OF SERVICE

I, Daniel R. Wade, declare:

I am employed in San Francisco, California. I am over the age of 18 and not a party to this action; my business address is 381 Bush Street, 8th Floor, San Francisco, CA 94104, Telephone: 415-393-9990, email: dan.wade@uphelp.org

I certify that on December 30, 2014, I caused the attached BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANT GRAYSON to be electronically submitted to the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct, and I am employed in the office of a member of the bar of this Court at whose direction this service was made.

Executed on December 30, 2014, in the city of Oakland, California.

Daniel R. Wade

s/Daniel R. Wade