

SUPREME COURT OF NEW JERSEY

AUGUSTINE W. BADIALI,	:	APPELLATE DIVISION DOCKET
	:	NO.: A-002795-11-T3
Plaintiff/Appellant,	:	
	:	LAW DIVISION DOCKET NO.:
v.	:	CAM-L-1751-11
	:	
NEW JERSEY MANUFACTURERS	:	SAT BELOW IN THE APPELLATE
INSURANCE COMPANY/NEW	:	DIVISION:
JERSEY INDEMNITY INSURANCE	:	HON. CARMEN H. ALVAREZ
COMPANY,	:	HON. CLARKSON S. FISHER, JR.
	:	HON. ALEXANDER P. WAUGH, JR.
Defendant/Respondent,	:	

AMICUS CURIAE BRIEF OF UNITED POLICYHOLDERS

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This Court should permit United Policyholders to appear as *amicus curiae* because the participation of U.P. will assist the Court in connection with the issue of public interest raised by this appeal; the application is timely; and no party will suffer any prejudice if U.P. appears.

QUESTIONS PRESENTED

Whether an insurance carrier is insulated from a claim of bad faith, irrespective of its ill will or bad motives, simply because there is conflicting, unpublished, and non-precedential authority concerning the propriety of its actions.

BACKGROUND OF THE CASE

U.P. refers the Court to Mr. Badiali's Petition for Certification for a detailed recitation of the specific facts, which U.P. summarizes here. Mr. Badiali, who was insured under policies issued by Harleysville Insurance Company and New Jersey Manufacturers Insurance Company, was injured in an automobile accident as a result of the negligence of an uninsured driver. Both the Harleysville and the NJM policies provided Uninsured Motorists coverage to Mr. Badiali. An arbitrator awarded \$29,148.62 to Mr. Badiali and Harleysville paid its half of the award. NJM attempted to reject the award and to demand a trial.

The Trial Court concluded that NJM must pay the award because a provision in the NJM policy provides that an arbitrator's award shall be final unless the award exceeds the

minimum limit of liability specified by the Financial Responsibility Law of New Jersey (in this case, \$15,000). The Trial Court concluded that, since NJM's liability was less than \$15,000, the award was final.

NJM appealed and the Appellate Division affirmed, in an unpublished opinion. That concluded what is now known as *Badiali I*.

Mr. Badiali then brought a separate action seeking damages for, among other things, NJM's bad faith in refusing to pay its one half share of the arbitration award. This action became *Badiali II*. The Trial Court in *Badiali II* granted summary judgment to NJM, finding that the carrier's rejection of the arbitration award in *Badiali I* was "fairly debatable." The Appellate Division, once again, affirmed. It held that, notwithstanding its decision in *Badiali I*, NJM did not act in bad faith because a separate panel of the Appellate Division had reached a different conclusion, in an unpublished 2004 opinion, than the panel in *Badiali I* had reached under very similar circumstances.

NJM was unaware of the 2004 decision at the time it rejected the *Badiali* arbitration award, raising that decision as a justification for its actions for the first time only on the appeal in *Badiali I*. In other words, the 2004 decision could not have formed a basis for NJM's rejection of the award.

Nevertheless, the Appellate Division held in *Badiali II* that the mere existence of the unpublished 2004 decision precluded a finding that NJM acted in bad faith.

This Court granted Mr. Badiali's Petition for Certification.

THE MATTERS U.P. WISHES TO ADDRESS

The decision in *Badiali II* negates the state of mind that a claim for bad faith ordinarily contemplates. Although the opinion upon which the decision in *Badiali II* relies was indisputably non-precedential, its existence insulated NJM from being the subject even of an inquiry into its motives and intentions at the time it improperly decided to litigate against its insured over the arbitration award. In this way, *Badiali II* expands the scope of protection from a bad-faith cause of action even for a carrier that acts with subjective malice, something that is contrary to the standard this Court established the last time it considered a case involving bad-faith insurance claim handling, in *Pickett v. Lloyds*, 147 N.J. 457 (1993).

IDENTITY AND INTEREST OF AMICUS CURIAE

United Policyholders is a non-profit 501(c) (3) organization whose mission is to be a trustworthy and useful information resource and an effective voice for consumers of all kinds of insurance in all 50 states. Donations, foundation grants, and volunteer labor support the organization's work. No

insurance companies underwrite or fund our programs. Our work is divided into three programs:

- *Roadmap to Recovery*[™] provides tools and resources for solving insurance problems after an accident, loss, illness, or other adverse event.

- *Roadmap to Preparedness* promotes disaster preparedness and insurance literacy through outreach and education in partnership with civic, faith based, business, and other non-profit associations.

- *Advocacy and Action* advances pro-consumer laws and public policy related to insurance matters.

U.P. speaks for a diverse range of policyholders from low income drivers to international energy companies to domestic manufacturers. We have filed more than 300 "friend of the court" briefs in state and federal cases and in U.S. Supreme Court matters. We host a dynamic library of publications, sample documents, links and reports.

Elected officials, academics and journalists throughout the U.S. routinely seek U.P.'s input. U.P. has been appointed for six consecutive years as an official consumer representative to the National Association of Insurance Commissioners.

U.P. is currently serving New Jersey home and business owners who were affected by Superstorm Sandy. U.P. staff are

participating in educational workshops and events in the state and offering a menu of publications and tools through our Roadmap to Recovery program.

See <http://www.uphelp.org/blog/roadmap-recovery/hurricane-sandy-claim-help>).

In this case, United Policyholders 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."¹ This is an appropriate role for *amicus curiae*. As commentators have often stressed, an *amicus curiae* is often in a superior position to "focus the court's attention on the broad implications of various possible rulings."²

LEGAL ARGUMENT

PURSUANT TO NEW JERSEY COURT RULES, THIS MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE SHOULD BE GRANTED

An *amicus curiae* is "one who gives information to the court on some matter of law in respect of which the court is doubtful, or who advises of certain facts or circumstances relating to a matter pending for determination." *Casey v. Male*, 63 N.J. Super.

¹ *Miller-Wohl Co. v. Commissioner of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982).

² R. Stern, E. Greggian & S. Shapiro, *Supreme Court Practice*, 570-71 (1986) (quoting Ennis, *Effective Amicus Briefs*, 33 Cath. U.L. Rev. 603, 608 (1984)).

255, 258 (N.J. Sup. Ct. 1960). An application to appear as *amicus curiae* shall be granted if the applicant's participation will assist in resolving an issue of public importance, the application is timely, and no party to the litigation will be unduly prejudiced. See N.J. Ct. R. 1:13-9 (2012). Moreover, in determining whether to grant an *amicus* application, courts consider whether the case has "broad implications," *Taxpayers Association v. Weymouth Township*, 80 N.J. 6, 17 (1976), or is of "general public interest." *Casey, supra*, 63 N.J. Super. at 259.

In accordance with these criteria, this request to appear as *amicus curiae* should be granted. Mr. Biali's Petition involves a matter of public importance. The Appellate Division's decision in *Badiali II* effectively eliminates a policyholder's protection from an insurer's bad faith because, among other things, it negates any consideration of an insurer's state of mind or motive in the treatment of its policyholder during the claim process.

The decision affects the rights of New Jersey policyholders, generally, and arguably contradicts this Court's decision in *Pickett v. Lloyds*, which held that the New Jersey Unfair Claims Settlement Practices Act declares New Jersey public policy in respect of the standard for bad faith treatment of policyholders. NJM's decision to litigate against its insured on an issue that was plainly resolved by its own policy

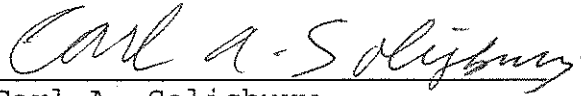
language placed its own economic interests ahead of those of its insured.

U.P.'s motion for leave to participate as *amicus curiae* is timely because this request is made less than seventy-five days after this Court granted Mr. Badiali's Petition for Certification.³ Finally, no party will be prejudiced by U.P.'s participation. United Policyholders, therefore, respectfully requests leave to file an *amicus curiae* brief in this Court to inform the Court with respect to the interests of New Jersey policyholders.

CONCLUSION

For the reasons set forth above, U.P. respectfully requests that the Court grant U.P.'s motion for leave to file an *amicus curiae* brief.

Dated: June 17, 2013

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³ Due to a recent death in the family of the undersigned, U.P. requested a brief extension of the time to submit this motion. We understand that the Court will consider this motion as having been timely filed.