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February 11, 2010

The Honorable Chief Justice Ronald M. George and
Associate Justices of the Supreme Court
Supreme Court of the State of California
350 McAllister Street
San Francisco, California 94102

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Re: *Davis v. Ford Motor Credit Company*
Case No. S179049

Amicus Curiae Letter in Support of Petition for Review

Dear Chief Justice Ronald M. George
and Associate Justices of the California Supreme Court:

This is an amicus curiae letter submitted pursuant to California Rule of Court 8.500(g) on behalf of United Policyholders, a non-profit organization that advocates on behalf of insurance policyholders. For the reasons set forth below, United Policyholders, through the undersigned counsel, supports the Petition for Review filed by the Plaintiff/Petitioner in *Davis v. Ford Motor Credit Company*, Case No. S179049. United Policyholders respectfully urges the Court to grant review in order to resolve the important question of what standard should apply when a consumer (as opposed to a business) brings a claim challenging an alleged “unfair” business practice in violation of the Unfair Competition Law, Business and Professions Code §17200, *et seq.* (“UCL”).

I. Interest of Amicus Curiae.

United Policyholders (“UP”) is a not-for-profit corporation founded in 1991 to educate the public, the judiciary and elected officials on insurance issues and the rights of policyholders. The organization is tax-exempt under Internal Revenue Code sec. 501(c)(3). United Policyholders is based in Northern California, but operates across the United States. The organization is funded by donations and grants from individuals, businesses, and foundations, and is governed by an eight member Board of Directors.

United Policyholders monitors legal and marketplace developments that impact insureds and participates in forums aimed at formulating public policy on insurance transactions. UP also publishes materials that give practical guidance on buying, coverage and claim issues to property and business owners and advocates, disaster relief personnel, attorneys and adjusters at www.unitedpolicyholders.org.

Businesses and individuals rely on insurance to protect their property and livelihoods against risk, while insurance companies are in business to earn profits by assuming risk. While the financial interests of the policyholder and insurance company sectors are distinct, both sectors need the overall insurance system to function. Insurers' interests are very well represented in judicial, legislative and media forums through trade associations, lobbyists, attorneys and spokespeople. Policyholders' interests are far less so, and United Policyholders is working to increase the representation of both large and small insureds in forums throughout the country.

United Policyholders previously has appeared as amicus curiae in over 280 cases throughout the United States, including numerous cases in the California courts.¹ United Policyholders also has appeared as amicus curiae in cases before the United States Supreme Court. *See Humana, Inc. v. Forsyth*, No. 97-303 (U.S. Sept. 18, 1998); *FL Aerospace v. Aetna Casualty and Surety Co.*, No. 90-289 (U.S. Sept. 13, 1990), and the United States Supreme Court cited United Policyholders' brief in *Humana, Inc. v. Forsyth*, 525 U.S. 299 (1999). United Policyholders was the only national consumer organization to submit an amicus brief in the landmark case of *State Farm v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513 (2003).

¹ *County of San Diego v. Ace Property & Cas. Ins. Co.* (2005) 37 Cal.4th 406; *Powerine Oil Co., Inc. v. Superior Court* (2005) 37 Cal.4th 377; *Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191; *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159; *Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747; *Garamendi v. Golden Eagle Ins. Co.* (2005) 127 Cal.App.4th 480; *American Ins. Ass'n v. Garamendi* (2005) 127 Cal.App.4th 228; *Watts Industries, Inc. v. Zurich American Ins. Co.* (2004) 121 Cal.App.4th 1029; *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780; *Marselis v. Allstate Ins. Co.* (2004) 121 Cal.App.4th 122; *Hameid v. National Fire Ins. of Hartford* (2003) 31 Cal.4th 16; *Rosen v. State Farm General Ins. Co.* (2003) 30 Cal.4th 1070; *County of San Diego v. Ace Property & Casualty Ins. Co.* (2002) 103 Cal.App.4th 1335; *Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059; *Bialo v. Western Mut. Ins. Co.* (2002) 95 Cal.App.4th 68; *Vu v. Prudential Property & Casualty Ins. Co.* (2001) 26 Cal.4th 1142; *20th Century Ins. Co. v. Superior Court* (2001) 90 Cal.App.4th 1247; and *AICCO, Inc. v. Insurance Co. of North America* (2001) 90 Cal.App.4th 579.

United Policyholders has a particular interest in the manner in which the UCL is interpreted in that that statute has been used effectively in many cases to challenge unlawful, unfair and fraudulent practices by insurance companies. *See e.g., Donabedian v. Mercury Ins. Co.*, 116 Cal.App.4th 968 (2004); *Massachusetts Mutual Life Insurance Co. v. Superior Court*, 97 Cal.App.4th 1282 (2002); *Smith v. State Farm Mutual Automobile Insurance Co.*, 93 Cal.App.4th 700 (2001); *Stevens v. API Insurance Services, Inc.*, 75 Cal.App.4th 594 (1999); *AICCO v. Insurance Company of North America*, 90 Cal.App.4th 579 (2001); *State Farm Fire & Casualty Company v. Superior Court*, 45 Cal.App.4th 1093 (1996).

II. The Court Should Grant Review to Resolve the Standard for “Unfair” Conduct in a Consumer Action.

United Policyholders supports the Petition for Review filed in this matter because there is substantial conflict and uncertainty in the existing case law as to the standard that applies under the UCL when a consumer alleges that he or she has been the victim of an “unfair” practice. The Petition for Review sets forth succinctly the manner in which the case law has developed – and diverged – among the Courts of Appeal on this issue since this Court’s decision in *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal.4th 163 (1999).

In *Cel-Tech*, this Court rejected earlier Court of Appeal attempts to define what constituted an “unfair” business practice as “too amorphous” in the context of alleged injuries to competition. *See Cel-Tech, supra*, 20 Cal.4th at 185, addressing the holdings in *People v. Casa Blanca Convalescent Homes, Inc.*, 159 Cal.App.3d 509 (1984) and *State Farm Fire & Casualty Co. v. Superior Court*, 45 Cal.App.4th 1093 (1996). Instead, after analyzing the issue at the some length, the Court adopted the following test:

When a plaintiff who claims to have suffered injury from a direct competitor’s ‘unfair’ act or practice invokes section 17200, the word ‘unfair in that section means conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.

Cel-Tech, at 187.

The Court expressly stated in *Cel-Tech*, however, that its decision applied *only* in actions between commercial entities, in which the plaintiff alleged anticompetitive conduct, and did *not* apply to actions filed under the UCL on

behalf of consumers. *Cel-Tech*, at 187, n. 12 (“Nothing we say relates to actions by consumers or by competitors alleging other kinds of violations of the unfair competition law such as ‘fraudulent’ or ‘unlawful’ business practices or ‘unfair, deceptive, untrue or misleading advertising.’”)

As described in the Davis Petition for Review, some Courts of Appeal have followed this Court’s instruction in *Cel-Tech* not to apply its “unfairness” test to consumer claims, *see e.g.*, *Smith v. State Farm Mutual Automobile Insurance Co.*, 93 Cal.App.4th 700 (2001), while other Courts of Appeal have disregarded the instruction and have treated the “*Cel-Tech*” standard as applying in consumer cases. *See e.g.*, *Gregory v. Albertson’s, Inc.*, 104 Cal.App.4th 845 (2002). Still other courts have attempted to craft a new test for unfairness in consumer cases, based on the standard used by the Federal Trade Commission. *See e.g.*, *Camacho v. Automobile Club of Southern California*, 142 Cal.App.4th 1394 (2006).

United Policyholders submits that this divergence in the Court of Appeal case law on the “unfair” prong of the UCL has created substantial uncertainty, both for trial Judges as they attempt to apply the correct standard, and for consumer plaintiffs and their counsel, as they attempt to evaluate and to prosecute meritorious claims.

As this Court has so frequently instructed, the prohibition against “unfair” practices is essential to the core of purpose of the UCL, which is to prohibit wrongful business conduct, in whatever context it may occur, and regardless of whether the specific conduct has previously been addressed by legislative prohibition. In other words, the prohibition against “unfair” practices is *intentionally* broad, and is supposed to be different from, *and broader than*, the prohibition against “unlawful” practices. As stated by this Court in *Cel-Tech*, “[T]he Legislature . . . intended by this sweeping language to permit tribunals to enjoin on-going wrongful business conduct in whatever context it might occur. Indeed, . . . the section was intentionally framed in its broad, sweeping language, precisely to enable judicial tribunals to deal with the innumerable “new schemes which the fertility of man’s invention would contrive.”” *Cel-Tech*, at 181, citing *American Philatelic Soc. v. Claribourne*, 3 Cal.2d 689, 698 (1935).

Further, the underlying intent of the prohibition against “unfair” practices in the UCL, as applied to consumers, is that courts should be empowered to enjoin and to remedy any practice that victimizes consumers, whether the practice does so by taking advantage of consumers’ relative lack of sophistication or financial resources, by exploiting the superior bargaining power of the business, or by other creative and exploitative means, and regardless of whether the challenged practice falls neatly within the parameters of what is otherwise expressly proscribed as unlawful or fraudulent. *See Cel-Tech*, at 181, quoting *People ex rel. Mosk v.*

National Research Co. of Cal., 201 Cal.App.2d 765, 772 (1962) (“[I]t would be impossible to draft in advance detailed plans and specifications of all acts and conduct to be prohibited . . . since unfair or fraudulent business practices may run the gamut of human ingenuity and chicanery.”) If lower courts apply this Court’s definition of “unfair” in the *Cel-Tech* decision to UCL claims on behalf of consumers, however, or if courts otherwise attempt to fashion a definition that is unduly narrow, the effectiveness of the UCL as one of this State’s most important consumer protection statutes will be significantly undermined.

Finally, United Policyholders submits that now is a particularly appropriate time for the Court to address the underlying *substantive* standard for “unfairness” under the UCL, given the plethora of litigation in recent years concerning the *standing* requirements for UCL actions imposed by Proposition 64. As this Court is all too aware, there has been extensive litigation in the trial courts and Courts of Appeal in recent years concerning the meaning, intent, and effect of the Proposition 64 amendments to the UCL. Much of that litigation culminated in this Court’s decision last year in *In re Tobacco II Cases*, 46 Cal.4th 298 (2009). Although this Court emphasized, once again, in *Tobacco II* that the changes wrought by Proposition 64 “left entirely unchanged the substantive rules governing business and competitive conduct,” *Tobacco II*, at 314 (citation omitted), it is apparent that some lower courts have allowed the requirements for standing to seep into the underlying *substantive* standards for establishing liability, and/or have wrongly interpreted the heightened standing requirements as implying that there should also be a narrower focus for the substantive reach of the statute. While litigation as to the application of the standing requirements continues, *see e.g., Kwikset Corporation v. Superior Case*, Case No. S171845 (fully briefed), *Cohen v. DIRECTV, Inc.*, S177734 (petition for review pending), now is the time for the Court to address, *directly*, the substantive elements of a claim of unfairness under the UCL, and to reaffirm the purpose, efficacy, and importance of the UCL as a consumer protection statute.

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Accordingly, for the foregoing reasons, United Policyholders urges the Court to grant the Petition for Review in this matter, and to resolve this important, unsettled, question of law.

Sincerely,

A handwritten signature in black ink, appearing to read "Kim E. Card". The signature is fluid and cursive, with the first name "Kim" and last name "Card" clearly distinguishable.

Kim E. Card (State Bar No. 147779)
LAW OFFICES OF KIM E. CARD
1690 Sacramento Street
Berkeley, California 94702

Amy Bach (State Bar No. 142029)
Executive Director
United Policyholders

On Behalf of
Amicus Curiae United Policyholders

CERTIFICATE OF SERVICE

(C.C.P. §1013a(2))

STATE OF CALIFORNIA)
) ss.
COUNTY OF ALAMEDA)

I, Kim E. Card, am an active member of the California Bar (Bar number 147779), and am not a party to this action. My business address is: Law Offices of Kim E. Card, 1690 Sacramento Street, Berkeley, California, 94702.

On February 11, 2010, I served the foregoing:

**AMICUS CURIAE LETTER OF UNITED POLICYHOLDERS IN
SUPPORT OF PETITION FOR REVIEW**

on the interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed to each as follows:

Arthur D. Levy Three Embarcadero Center, Suite 1650 San Francisco, California 94111 <i>Attorney for Petitioner Robert Davis</i>	Kimberly A. Kralowec Schubert Jonckheer Kolbe & Kralowec Llp Three Embarcadero Center, Suite 1650 San Francisco, California 94111 <i>Attorney for Petitioner Robert Davis</i>
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Jan T. Chilton Regina J. McClendon Erik W. Kemp Severson & Werson One Embarcadero Center, Suite 2600 San Francisco, CA 94111 <i>Attorneys for Ford Motor Credit Company</i>	Clerk of the Superior Court Los Angeles County Superior Court Central Civil West Courthouse 600 S. Commonwealth Ave. Los Angeles, CA 90005
Clerk of the Court of Appeal Court of Appeal, 2nd Appellate District, Division 3 300 So. Spring St. 2nd Floor	District Attorney's Office County of Los Angeles 210 West Temple Street, Suite 18000 Los Angeles, CA 90012-3210

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[X] BY FIRST CLASS MAIL: The foregoing documents were placed in sealed envelopes, with postage fully paid, and deposited in the mail of the United States Postal Service on this date in Berkeley, California.

Executed on February 11, 2010, at Berkeley, California.

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


KIME. CARD