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**United States Court of Appeals**  
*for the*  
**First Circuit**

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Case No. 05-2877

DIANE DENMARK,

*Plaintiff-Appellant,*

v.

LIBERTY LIFE ASSURANCE COMPANY OF BOSTON, THE GENRAD,  
INC. LONG TERM DISABILITY PLAN, THROUGH TERADYNE, INC. AS  
SUCCESSOR FIDUCIARY,

*Defendants-Appellees.*

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*On Appeal from the United States District Court for the District of Massachusetts*

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**MOTION OF UNITED POLICYHOLDERS FOR LEAVE TO  
FILE BRIEF AS *AMICUS CURIAE* ON BEHALF OF DIANE  
DENMARK, PLAINTIFF-APPELLANT**

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*United Policyholders*

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure and the Court's discretionary authority, United Policyholders respectfully submits this motion for leave to file the accompanying brief *amicus curiae* in support of plaintiffs-appellants in the case of *Dian Denmark v. Liberty Life Assurance Company of Boston, et al.*, No. 05-2877.

*Amicus* has contacted the parties to this dispute to obtain permission to file this brief. Plaintiffs-Appellants have consented to its filing. Defendants-Appellees have refused to consent to *amicus*' request for consent to file.

## **I. INTEREST OF THE *AMICUS CURIAE***

1. United Policyholders is a non-profit organization founded in 1991 and dedicated to education on insurance issues and consumer rights. The organization is tax-exempt under §501(c)(3) of the Internal Revenue Code. United Policyholders is funded by donations and grants from individuals, businesses, and foundations.

2. While much of its work is aimed at individuals and businesses affected by disasters, United Policyholders actively monitors legal and marketplace developments affecting the interests of all policyholders. These policyholders specifically include participants in ERISA benefit plans, including plans for long term care and disability benefits like the one at issue in this case.

3. A diverse range of personal and commercial line policyholders throughout the United States communicate their insurance concerns on a regular basis to United Policyholders. United Policyholders advances policyholders' interests in courts throughout the country by filing *amicus curiae* briefs in cases involving important insurance principles.

4. This case presents issues relating to disability insurance coverage which have not been resolved uniformly among the Federal Circuit courts and which directly affect consumers of health and disability coverage. Many of the policyholders on whose behalf United Policyholders advocates will be affected directly by the outcome of this case. The affects of the decision in this case will extend outside of the First Circuit itself, as the issues in this case are continuing to evolve in other jurisdictions.

5. Many of United Policyholders' members are participants and beneficiaries in employer-sponsored pension plans covered by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.* One of United Policyholders' objectives is to ensure that employee benefit rights and protections under ERISA are not diminished.

6. United Policyholders' concern in this case is to preserve the Congressionally-enacted protections of accrued benefits that workers receive

through ERISA. ERISA's protections, and the ability to enforce these protections, are of vital concern to participants in such benefits plans.

7. United Policyholders' amicus brief was cited in the U.S. Supreme Court's opinion in Humana, Inc. v. Forsyth, 525 U.S. 299 (1999). United Policyholders has filed *amicus curiae* briefs on behalf of policyholders in over one hundred and twenty cases throughout the United States in the past six years.

8. United Policyholders also has filed *amicus curiae* briefs in numerous courts across the country, including in the Supreme Judicial Court of Massachusetts in Western Alliance Ins. Co. v. Gill, 426 Mass. 115, 1997 Mass. LEXIS 392 (Nov. 10, 1997).

9. United Policyholders regularly files *amicus curiae* briefs in federal and state courts across the country. It also receives frequent invitations to testify at legislative and other public hearings and to participate in regulatory proceedings on rate and policy issues. These activities are limited only to the extent that United Policyholders exists exclusively on donated labor and contributions of services and funds.

10. United Policyholders has a true stake in the outcome of this case, as the policyholders on whose behalf it advocates will be affected. Further, its experience in advocating those rights in other jurisdictions will assist the Court in making its determination here.

11. No party to this case has contributed directly or indirectly to the preparation of this brief.

## **II. UNITED POLICYHOLDERS HAS RELEVANT VIEWS**

12. The *amicus* brief attached to this motion as Exhibit A is desirable to this Court for the disposition of this case.

13. United Policyholders advocates not only that insurance companies be required to live up to the terms of the policies that they sell, but also that judicial policy consideration such as anti-consumer conduct and needless litigation are not encouraged by judicial decisions.

14. United Policyholders has concerns regarding the purpose of ERISA in protecting individual plan participants and whether that purpose is being frustrated by insurance company litigation.

15. The parties in an individual case often do not address these policy issues, as they are not of immediate concern to the parties. The policy issues underlying much of policyholder law, however, ought to be at least considered in reaching decisions that will have broad consequences for individuals nationwide who are seeking disability insurance coverage.

16. This *amicus* brief further addresses the legal issues of whether the arbitrary and capricious standard of review may be applied and how it should be

applied in cases involving illnesses that, like fibromyalgia, are notoriously difficult to document objectively.

17. More specifically, the brief addresses the evidentiary requirement of “objective evidence” of illness or disability in the context of an illness like fibromyalgia and whether requiring such evidence actually serves to eviscerate coverage for individuals with illnesses that are not amenable to objective documentation.

18. For these reasons, United Policyholders respectfully requests that the Court grant it leave to file the accompanying brief *amicus curiae* in support of Plaintiff-Appellant to facilitate a full consideration by the Court of the issues herein. If such leave is granted, *amicus* requests that the brief *amicus curiae* be considered filed as of the date of this motion, in accordance with Rule 25(a)(2)(B)(I) F.R.A.P.

Dated: June 20, 2006



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**AFFIDAVIT OF SERVICE**

DOCKET NO. 05-2877

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Diane Denmark,

vs.

Liberty Life Assurance Company of Boston, et al.  
-----X

STATE OF NEW YORK )

COUNTY OF NEW YORK )

I, **NELSON CABAN**, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:  
1154 ST. LAWRENCE AVE  
BRONX, NY 10472

on June 20, 2006

I served the within Motion of United Policyholders for leave to file Brief as Amicus Curiae on Behalf of Diane Denmark, Plaintiff-Appellant in the above captioned matter upon:

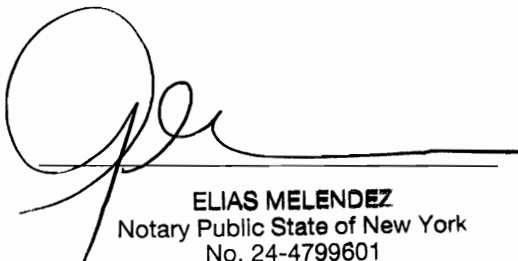
Jonathan M. Feigenbaum  
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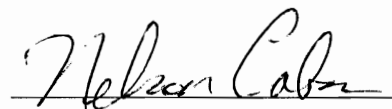
Andrew C. Pickett  
Richard W. Paterniti  
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via **Express Mail** by depositing **2** copies of same, enclosed in a post-paid, properly addressed wrapper, in an official depository maintained by United States Postal Service.

Unless otherwise noted, copies have been sent to the court on the same date as above for filing via Express Mail.

**Sworn to before me on June 20, 2006**

  
**ELIAS MELENDEZ**  
Notary Public State of New York  
No. 24-4799601  
Qualified in Kings County  
Commission Expires Aug 31, 2009

  
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