
SUPREME COURT OF THE STATE OF CONNECTICUT

S.C. 18796

**FIREMAN'S FUND INSURANCE COMPANY,
Plaintiff-Appellee**

vs.

**TD BANKNORTH INSURANCE AGENCY INCORPORATED, f/k/a MORSE
PAYSON & NOYES INSURANCE,
Defendant-Appellant.**

**APPLICATION OF UNITED POLICYHOLDERS FOR PERMISSION TO APPEAR
AS, AND FILE A BRIEF OF, *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-
APPELLANT'S BRIEF ON THE MERITS**

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Pursuant to the Practice Book Section 67-7 of the Connecticut Rules of Appellate Procedure, United Policyholders respectfully requests permission to appear as *amicus curiae* and file an *amicus curiae* brief in this action in support of Defendant-Appellant TD Banknorth Insurance Agency Incorporated, f/k/a Morse Payson & Noyes Insurance (“TD Insurance”).

BRIEF HISTORY

United Policyholders refers the Court to TD Insurance’s Brief, filed on July 22, 2011, for a detailed recitation of the history of this case. On April 29, 2011, the United States Court of Appeals for the Second Circuit certified a single question to the Connecticut Supreme Court – “Are insurance policy deductibles subject to Connecticut’s make whole doctrine?” On June 8, 2011, this Court accepted that question. United Policyholders seeks to submit *amicus* briefing to assist the Court in deciding that question.

SPECIFIC FACTS

United Policyholders refers the Court to TD Insurance’s Brief, filed on July 22, 2011, for a detailed recitation of the specific facts of this case. A brief summary of the facts is set forth below:

- Fireman’s Fund Insurance Company (“FFIC”) sold an Errors & Omissions insurance policy to TD Insurance;

- Haynes Construction Company (“Haynes”) accused TD Insurance of negligence in procuring a Builder’s Risk insurance policy for Haynes from Peerless Insurance Company (“Peerless”);
- FFIC and TD Insurance settled Haynes’s claims against TD Insurance, with FFIC paying \$203,989.06 and TD Insurance paying a \$150,000 deductible;
- As part of the settlement, Haynes assigned to FFIC and TD Insurance its rights against Peerless, as well as rights to recover under an Inland Marine insurance policy sold by The Hartford Insurance Company (“Hartford”);
- Peerless and Hartford paid a total of \$208,433.29 to settle with FFIC and TD Insurance, and those amounts have been placed into escrow;
- FFIC claims it is entitled to all of the settlement proceeds, while TD Insurance asserts that under the make whole doctrine TD Insurance is entitled to the first \$150,000 of recovery; and
- The Second Circuit held that the FFIC policy did not abrogate the make whole doctrine and that the make whole doctrine was applicable to liability insurance, but then asked this Court to determine whether insurance policy deductibles are subject to Connecticut’s make whole doctrine.
- On June 8, 2011, this Court accepted that question for review.

LEGAL GROUNDS

Leave to file an *amicus curiae* brief is generally granted when the proposed *amicus* serves “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., Inc. v. Commissioner of Labor & Indus. State of Mont., 694 F.2d 203, 204 (9th Cir. 1982) (citations omitted) vacated on other grounds, 479 U.S. 1050 (1987); Wilderness Society v. U.S. Bureau of Land Mgmt., No. 09-CV-08010-PCT-PGR, 2010 WL 2594853 at *1 (D. Ariz. Jun. 21, 2010) (citations omitted).¹ United Policyholders’ brief will serve such a function.

United Policyholders was founded in 1991 as a non-profit organization dedicated to educating the public on insurance issues and consumer rights.² In addition to serving as a resource on insurance claims for disaster victims and commercial policyholders, United Policyholders actively monitors legal and marketplace developments affecting the interests of all policyholders. United Policyholders receives frequent invitations to testify at legislative and other public hearings, and to participate in regulatory proceedings on rate and policy issues. In fact, United Policyholders regularly contributes to the formulation of insurance-related public policy at both the national and state level. Because a diverse range of

¹ As commentators have often stressed an *amicus* is often in a superior position to “focus the court’s attention on the broad implications of various possible rulings”. 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).

² The organization is tax exempt under Internal Revenue Code § 501(c)(3) and funded by donations and grants from individuals, businesses and foundations.

policyholders throughout the United States regularly communicate with United Policyholders, the organization can provide important and topical information to courts nationwide via the submission of *amicus curiae* briefs in cases involving insurance principles that will likely impact large segments of the public. The specific question certified to this Court is an example of such a case.

United Policyholders has participated as *amicus curiae* in more than 300 cases across the country involving significant insurance issues. The organization's reputation as a reliable friend of the court was enhanced when its *amicus curiae* brief was cited in the United States Supreme Court's opinion in Humana v. Forsyth, 525 U.S. 299, 314 (1999), and its arguments were adopted by the California Supreme Court in both Vandenberg v. Superior Court, 88 Cal. Rptr.2d 366 (Cal. 1999), and TRB Investments, Inc. v. Fireman's Fund Insurance Co., 145 P.3d 472 (Cal. 2006). Points raised in United Policyholders' *amicus curiae* briefs have made their way into published opinions in numerous courts.

United Policyholders has a particular interest in promoting the rights of policyholders and seeing that policyholders obtain the full measure of the insurance they purchase. United Policyholders offers comprehensive knowledge of evolving concepts of insurance law and how insurance law impacts consumers. The question presented in this case is of importance to insurance consumers across the nation. Indeed, this Court's decision undoubtedly will be considered by sister jurisdictions.

The resolution of this case will include considerations of equity and public policy. Exempting deductibles from the make whole doctrine would have harmful effects on individual policyholders, as well as on small businesses, in Connecticut

and nationwide. United Policyholders can help explain what deductibles are and how they interact with an insurance company's right of subrogation. Indeed, deductibles are among the most misunderstood aspects of insurance, so such briefing will be critical to this Court's complete understanding of the issues and the impact of its ruling on consumers.

Among other things, United Policyholders can address the public policy and equitable issues raised by the Second Circuit in its opinion. For example, the Second Circuit raised concerns that applying the make whole doctrine to deductibles would create an "unhealthy incentive" for an insurance company to delay payment. Fireman's Fund Ins. Co. v. TD Banknorth Ins. Agency Inc., 644 F.3d 166 (2d Cir. 2011). United Policyholders can point out why, in practice, the Second Circuit's concern is not well founded. Quite to the contrary, proper application of the make whole doctrine ensures that policyholders receive the full benefit of their insurance, while incentivizing insurance companies to pursue fully their rights of subrogation without shortchanging their policyholders.

Finally, United Policyholders can provide a counterweight to insurance industry *amici* who may seek to participate in this appeal.

CONCLUSION

United Policyholders, therefore, respectfully requests permission to appear as *amicus curiae* and file an *amicus curiae* brief in this Court.

Dated: New York, New York
August 9, 2011

AMICUS CURIAE UNITED POLICYHOLDERS

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CERTIFICATION OF COMPLIANCE

I hereby certify that this document is in compliance with all the provisions of Practice Book Sections 66-3 and 67-7 of the Connecticut Rules of Appellate Procedure.

Dated: New York, New York
August 9, 2011

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CERTIFICATION OF SERVICE

I hereby certify that, in accordance with Practice Book Section 62-7 of the Connecticut Rules of Appellate Procedure, I have arranged for this document to be served, via UPS Overnight and electronic mail, on the following counsel of record:

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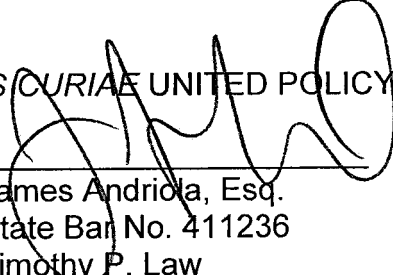
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