

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

**GALLAGHER BASSETT SERVICES, INC.,**

**Defendant-Appellant**

**vs.**

**CHARLES H. "BO" JEFFCOAT, JR.**

**Plaintiff-Appellee**

Supreme Court No. 98-TS-00192

Hinds County Circuit Court Nos.  
251-94-1073 CIV and 251-05056  
CIV

**BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS  
IN SUPPORT OF PLAINTIFF-APPELLEE**

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**FILED**

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## INTRODUCTION

United Policyholders, as amicus curiae, respectfully submits this brief in support of Plaintiff-Appellee, Charles H. "Bo" Jeffcoat, Jr.

Third Party Administrators ("TPAs") like Defendant-Appellant increasingly are used to further insulate insurance companies from the consequences of claim denial through obfuscation and delay.

This is not a dispute between a TPA and the insurance company that hired it as Defendant-Appellant suggests. This case is about how real policyholders, like Mr. Jeffcoat, get squeezed when caught between the interests of large corporations and the smaller corporations they pay to save money by limiting services and breaching promises. For every Bo Jeffcoat there are many more policyholders who simply give up in the face of generally accepted TPA tactics. A jury found Gallagher Bassett Services, Inc. engaged in bad faith claims mishandling. There is no excuse.

## INTEREST OF AMICUS CURIAE

United Policyholders was founded in 1991 as a non-profit organization dedicated to educating the public on insurance issues and consumer rights. United Policyholders is funded by donations and grants from individuals, businesses, and foundations.

United Policyholders serves as a resource for insurance claimants and 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 public policy issues involving insurance.

A diverse range of policyholders throughout the United States communicate on a regular basis with United Policyholders, which allows us to provide important and topical information to courts throughout the country via the submission of amicus curiae briefs in cases involving insurance principles that are likely to impact large segments of the public and business community.

United Policyholders' amicus brief was cited in the United States Supreme Court's opinion in Humana, Inc. v. Forsyth, 525 U.S. 299 (1999), and our arguments were adopted by the California Supreme Court in Vandenberg v. Superior Court, 982 P.2d 229 (Cal. 1999). United Policyholders has filed amicus briefs on behalf of policyholders in over one hundred cases throughout the United States. As a public interest organization, United Policyholders seeks to assist and to educate the public and the courts on policyholders' insurance rights and United Policyholders' efforts to have them enforced consistently throughout the country.

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

## ARGUMENT

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### A. PUBLIC SERVICE NATURE OF INSURANCE

#### I. Insurance Is Special

Insurance companies and their TPA brethren hold themselves out to the people of Mississippi, the public, insurance regulators, legislators, courts and public officials as public service organizations. Based upon their claimed roles as public servants and protectors against death, disaster, destruction, disability and disease, the insurance industry gets the benefit of very special treatment from the public, insurance regulators, legislators, courts and public officials. The instances of the insurance industry receiving special treatment not afforded to other corporations or citizens are legion.

The public service benefits promised by the insurance industry include:

- a. jobs for citizens of the State;
- b. support for businesses in the State via investments;
- c. safety studies;
- d. safety programs;
- e. safety legislation;
- f. promoting safety;
- g. education programs;
- h. protecting the public; and
- i. eliminating hazards.

The insurance industry has repeatedly acknowledged and even touted the special public nature of insurance. In 1981, the then-Chairman of the American Insurance Association stated:

Insurance leaders are fond of saying, without exaggeration, that the insurance industry is imbued with the public interest — that insurance is essential to commercial activity and necessary to daily living. We focus the spotlight on ourselves. We convince others of the leading role insurance plays in society. We encourage them to expect superior performance from us.<sup>1</sup>

As far back as 1944, in an address on comprehensive general liability insurance (of which uninsured motorist insurance is a variant), an attorney for the National Bureau of Casualty Underwriters acknowledged that those “in the business” of insurance “are the trustees of the public interest.” One insurance company recently noted:

The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters.<sup>2</sup>

In a September 22, 1970 speech entitled “There’s Got To Be A Better Way,” the then-President of Crum and Forster Insurance Company noted:

If studied even casually, the history of our business proves that in the United States, as nowhere else in the world, insurance has functioned to set men’s minds free

<sup>1</sup> “The Burgeoning of Litigation” Proceedings of American Insurance Association Annual Meeting New York City at 62. (May 28-29, 1981). Please refer to the Addendum to the Brief of *Amicus Curiae*, “Add.,” at Tab 1. Hereinafter excerpts of sources attached to the Addendum will be referred to by “Add.” followed by the corresponding Tab number.

<sup>2</sup> Brief of Appellant Century Indemnity Co. at 19 *Century Indemnity Co. v. Truck Ins. Exch. of the Farmers Ins. Group*, 887 P.2d 455 (Wash. Ct. App. 1995) (No. 13141-6-III) (emphasis added). (Add. 2)



from economic worry so they could think about more constructive things; it has functioned to maintain productive enterprise so that more people could enjoy the fruits of our enterprise system; it has provided the means to rebuild burned and shattered cities and towns — to replace property — both private and public — that has been destroyed, damaged, or wrongfully taken away; to relieve physical pain as well as economic distress.<sup>3</sup>

The specialness of an insurance company's and its TPA's relationships with policyholders and the public also has been long-recognized by insurance industry outsiders. Dean Roscoe Pound, almost 35 years ago in The Spirit of the Common Law (1921), noted:

[W]e have taken the law of insurance practically out of the category of contract, and we have established that the duties of public service companies are not contractual, as the nineteenth century sought to make them, but are instead relational; they do not flow from agreements which the public servant may make as he chooses, they flow from the calling in which he has engaged and his consequent relation to the public.<sup>4</sup>

Another commentator has noted:

The insurers' 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 expectation of coverage. The obligation of good faith and fair dealing encompass qualities of decency and humanity inherent in the responsibilities of a fiduciary.

<sup>3</sup> Speech by B.P. Russell, the President of Crum and Forster Insurance Company, delivered Sept. 22, 1970 (Add. 3)

<sup>4</sup> Roscoe Pound, The Spirit of the Common Law 29 (Marshall Jones Co. 1921). (Add. 4)

Insurers hold themselves out as fiduciaries, and with the public's trust must go private responsibility consonant with that trust.<sup>5</sup>

A standard textbook used to train insurance industry personnel has emphasized the need to monitor and enforce the special duties of the insurance industry:

Notwithstanding the often stated opinion that the insurance contract is a contract affected with a public interest, insurers often view their policies as simple contractual obligations between parties. While an insurance policy does represent a contractual commitment, the attitudes of the general public, the legislatures, and the courts make clear that the insurance agreement is viewed as having broader ramifications than a mere contract. The public has a definite interest in the reliability of the insurance product. Insurance involves an obligation that affects the public interest as well as the policyholder and therefore is necessarily subject to certain restrictions.<sup>6</sup>

Insurance protects not only policyholders, but also injured parties, neighbors, the community, creditors and employees. To the extent insurance does not deliver the promised peace of mind to the policyholder – whether through the actions or inaction of the seller or claim administrator of the insurance policy – there are and should be legal consequences. Policyholders like Mr. Jeffcoat should not be the ones to suffer the consequences if entities like Defendant-Appellant cannot live up to the standards inherent in the insurance policies under which they

<sup>5</sup> Goodman & Seaton, Forward, Ripe for Decision. Internal Workings and Current Concerns of the California Supreme Court, 62 Cal. L. Rev. 309, 346-47 (1974) (Add. 5)

<sup>6</sup> James J. Lorimer et al., The Legal Environment of Insurance 38 (3d ed. American Institute For Property And Liability Underwriters 1987) (emphasis added) (Add. 6)

agree to, and are paid for, administering claims. Another standard insurance textbook, published by the Insurance Institute of America, described the benefits of insurance this way:

In addition to eliminating or reducing the financial uncertainty of risks to individuals and businesses, insurance benefits society by paying for losses, providing funds for investments, controlling losses, supporting credit, allocating resources, and satisfying legal and business requirements.<sup>7</sup>

The Insurance Institute of America is located in Malvern, Pennsylvania and, directly or indirectly, trains tens of thousands of students of insurance. Its textbooks are standard works in the field. Insurance benefits no one if valid claims are not administered properly.

## II. Insurance Regulations

The "public service" nature of insurance is manifest in the myriad of state laws governing insurance. For example, automobile, uninsured motorist and workers' compensation insurance coverage are required by most states. Another text used to train insurance industry claims personnel notes that statutes concerning the handling of claims "have been enacted by state legislatures in order to control the activities of the insurance companies and their relationships with policyholders."<sup>8</sup> Yet another text used to train insurance industry professionals states:

<sup>7</sup> James J. Markham et al., The Claims Environment 2 (1st ed. Insurance Institute of America 199 (Add. 7))

<sup>8</sup> Id. at 347 (Add. 7)

Insurance contracts are different from other commercial contracts because insurance is more a necessity than a matter of choice. Therefore, insurance is a *business affected with a public interest*, as reflected in legislative and judicial decisions.<sup>9</sup>

Defendant-Appellant's business administering claims is affected with a public trust. TPAs are not merely servants of their insurance company masters. TPAs take on independent obligations and have independent obligations as a result. To the extent Defendant-Appellant argues that it is the insurance company that should take the blame or that release of the insurance company inures to Defendant-Appellant's benefit, Defendant-Appellant ignores its own independent obligations. In agreeing to investigate and adjust claims for money, Gallagher Bassett Services, Inc. is not merely part of an insurance company, but also undertakes an independent fiduciary obligation to any policyholder making a claim.

### **III. Insurance Policy Claim Handlers are Fiduciaries**

Insurance companies and their TPAs are fiduciaries. Who says?:

#### Fireman's Fund:

An insurer stands in a fiduciary relationship to its insured; when an insurer chooses his interest over the interests of his insured his actions are indeed 'intentional and deliberate' . . . and when a case can be settled with no personal liability to said insured, [failure to do so] has

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<sup>9</sup> James J. Lorimer, et al., The Legal Environment of Insurance 179 (4th ed. 1993) (emphasis in original) (Add. 8)



the 'character of outrage frequently associated with crime'.<sup>10</sup>

#### Home Insurance Company:

Under Oregon law an insurer is in a fiduciary relationship to its insured. A fiduciary is one who is in a position of trust and confidence with another, usually called a principal, while acting for and on behalf of the other. A fiduciary is legally bound in equity and good conscience to act in good faith and for the best interest of the principal.... Any conduct which is intended to place a fiduciary's own interest or the interests of any other party ahead of the best interests of the principal is a breach of the fiduciary's duty.<sup>11</sup>

#### National Union:

Underlying all forms of insurance is a fiduciary duty to some extent simply because of the insurer's expertise in the area of its business. In the public liability area the fiduciary duties are heavier because the insurance company is an expert in the litigation arena in all parts of the country since it has thousands of cases nationwide and trained personnel to handle them.<sup>12</sup>

These are but a few of examples. The insurance industry clearly understands the fiduciary duties owed to their policyholders. Some commentators disagree and so

<sup>10</sup> Civil Action--Cross Petition for Certification and Brief in Opposition to Defendant-Appellant Petition for Certification at 13, 16 (filed Mar. 4, 1975) Fireman's Fund Ins. Co. v. Security Ins. Co. of Hartford, 367 A.2d 864 (N.J. 1976) (Add. 9)

<sup>11</sup> Defendant's [Home Insurance Company's] Proposed Jury Instruction No. 2, submitted on September 8, 1988. Georgetown Realty, Inc. v. The Home Insurance Company (Mult. County Circuit) (No. A8708-05098) (emphasis added) (Add. 10)

<sup>12</sup> Memorandum in Opposition To Columbia Casualty Company's Motion For Summary Judgment at 18-19 (dated Dec. 16, 1989) Columbia Cas. Co. v. National Union Fire Ins. Co. of Pittsburgh, (E.D. Pa.) (No. 89-3506) (Add. 11)



do some courts,<sup>13</sup> however, jurors in Mississippi have recognized this simple truth. Their verdict should stand.

#### IV. 'Good Hands' Become Clenched Fists

For policyholders making a claim for insurance coverage, the cooperation to be expected from a fiduciary is often simply not there. Instead, the policyholder may be confronted by a colossus with unmatched expertise in insurance coverage litigation and the time and inclination to avoid paying claims.

Indeed, as Liberty Mutual Insurance Company recognized:

[the policyholder] is likely not as familiar with litigation and claims evaluation and disposition as is the insurance company [or its TPA] . . . [T]he insurer is a professional defender of lawsuits . . . Unlike the insured, an [insurance company or its TPA] is not a novice as to matters involving litigation.<sup>14</sup>

The insurance industry does not limit anti-policyholder activities to little people; it applies the practice of opportunistic breach to policyholders of all sizes. As a sadly disillusioned policyholder, the chairman of Dow Corning Corporation lamented that "it has become standard operating procedure for some . . . [when investigating and handling an insurance claim] to procrastinate and dispute

<sup>13</sup> See Randy Papetti, Note, The Insurer's Duty of Good Faith in the Context of Litigation, 60 Geo. Wash. L. Rev 1931, 1933 at n.10 (1992) (Add. 12) (listing cases) (Note that Mr. Papetti supports the positions of the insurance industry); See also United States v. Brennan, 183 F.3d 139 (2d Cir. 1999).

<sup>14</sup> Liberty Mutual Insurance Company's Memorandum in Support of Motion for Partial Summary Judgment at 7 (filed July 5, 1988) National Union Ins. Co. v Liberty Mut. Ins. Co., 696 F. Supp. 1099 (E.D. La. 1988) (No. 86-2000) (Add. 13). Liberty Mutual has been sanctioned for being a "major league team" in the game of "hardball litigation." See Adolph Coors Co. v. American Ins. Co., et al., 164 F.R.D. 507, 509 (D. Colo. 1993).

rather than honor policies with companies that become embroiled in litigation.”<sup>15</sup>

In fact, the property and casualty insurance industry has admitted that it now spends over \$1 billion a year litigating against its policyholders.<sup>16</sup>

Uninsured Motorist Insurance is designed to protect responsible drivers like Bo Jeffcoat from the acts of drivers without insurance. Mr. Jeffcoat should have been made as whole as possible. Instead, he got procrastination, delay and litigation.<sup>17</sup> Mr. Jeffcoat is entitled to legal redress from Defendant-Appellant. To the extent Gallagher Bassett Services, Inc. blames another entity for its bad faith, Gallagher Bassett Services, Inc. should present evidence that it has taken steps to address the problem or terminated its relationship with such other entity rather than implicitly admitting that Mr. Jeffcoat was subject to improper insurance-industry claim handling tactics in several of its arguments.

<sup>15</sup> See Richard Hazleton, The Tort Monster That Ate Dow Corning, Wall St. J., May 17, 1995, at A21.

<sup>16</sup> See Brief of Amicus Curiae American Ins. Assoc. at 3 (filed Feb. 25, 1993) Affiliated FM Ins. Co. v. Constitution Reinsurance Corp., 626 N.E.2d 878 (Mass. 1994) (No. SIC-06165) (Add. 14). See also Leslie Scism, Tight-Fisted Insurers Fight Their Customers To Limit Big Awards, Wall St. J., Oct. 15, 1996, at 1 (Add. 15); Robert H. Gettlin, Fighting The Client, BEST'S REVIEW P/C, Feb. 1997, at 49, 50 (Add. 16) (noting that the \$1 billion figure includes only what the insurance industry spends on property and casualty insurance litigation. When life and health insurance litigation expenditures are added, “the legal costs of coverage battles with policyholders may far exceed \$1 billion”). See also Richard A. Archer, Preparing For A ‘Mega-Loss.’ Business Ins., Oct. 10, 1994, at 23 (claims in excess of \$10 million rarely get paid without litigation). Mr. Archer is retired deputy chairman of Jardine Insurance Brokers, Inc. in Los Angeles.

<sup>17</sup> The property and casualty insurance industry files “tens of thousands” of briefs against policyholders every year. See Brief and Appendix of Amicus Curiae Insurance Environmental Litigation Association in Support of Continental Insurance Company, Aetna Casualty and Surety Company and Fireman's Insurance Company of Newark, N.J. (Aug. 24, 1992) at 25, 21 New York v. Continental Ins. Co., No. 65599 (N.Y. App. Div.).

**B. THIRD PARTY ADMINISTRATORS AND INSURANCE COMPANIES  
HAVE INDEPENDENT DUTIES OF GOOD FAITH**

**I. 'Tripartite' Arrangement**

In addition to the special, public service nature of the insurance industry, the activities involving the TPA, the policyholder, and the insurance company form a tripartite relationship. When an insured vehicle is damaged or a rider is injured, the TPA owes an independent duty to the policyholder to investigate and adjust the claim thoroughly and promptly, and the insurance company owes a similar duty to provide adequate coverage under the insurance policy to the policyholder. The policyholder has a right to expect that both the TPA and the insurance company will honor their respective duties. The policyholder should be made whole. If, as Gallagher Bassett Services, Inc. suggests, the TPA cannot fulfill its duty because of the actions of the insurance company, this would be a matter between the TPA and the insurance company – not a matter which should involve or prejudice the policyholder.

Certainly, United Policyholders does not wish to prevent individuals from freely contracting; nor does United Policyholders wish to limit the availability of uninsured motorist insurance. However, when an insured owner of a vehicle is hit by another uninsured vehicle, in Mississippi, uninsured motorist insurance should provide coverage, not obfuscation and delay.

Defendant-Appellant wants this Court to hold that regardless of the jury's verdict, the mis-handling of Mr. Jeffcoat's claim and the insurance company's implicit acknowledgement of problems by settling with Mr. Jeffcoat, Gallagher Bassett Services, Inc. is somehow blameless: and that no party can ever have a reasonable expectation that the independent administrator of its insurance claim has an obligation of good faith and fair dealing or can be held to account. This simply is wrong.

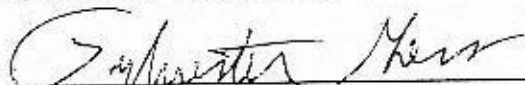
## CONCLUSION

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For all of the above reasons, United Policyholders respectfully requests that this Court uphold the jury's verdict as set forth in the judgment below and find for the Plaintiff-Appellee.

**By Attorney:**

**Davis, Goss & Williams, P.L.L.C.**

BY: 

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**CERTIFICATE OF MAIL SERVICE**

I, Tylvester O. Goss, do hereby certify that true and correct copies of the "Brief Of Amicus Curiae United Policyholders In Support Of Plaintiff-Appellee And Addendum To Brief Of Amicus Curiae United Policyholders", were deposited In the United States Mail, first class postage prepaid, addressed to:

Honorable Bobby DeLaughter, Circuit Judge  
Hinds County Courthouse  
Post Office Box 327  
Jackson, Mississippi 39205

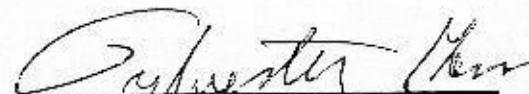
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DATED this the 23 day of July 2003.

  
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