Court of Appeal, Second District, Division 5, California.
Bahram HAKIMFAR, an individual, Plaintiff,
v.
ROC DESIGN, INC., a California Corporation, Dominique Rocoffort De Vinniere, Defendants and Appellants,
Demler Armstrong & Rowland, LLP Real Party in Interest and Respondent.
No. B228541.
May 27, 2011.

Appeal From The Superior Court For Los Angeles County Honorable Allan J. Goodman Superior Court No. SC 106414

Application for Leave to File Amicus Curiae Brief and Amicus Curiae Brief of United Policyholders in Support of Appellants Roc Design, Inc. and Dominique Rocoffort De Vinniere's Opposition to Motion to Dismiss

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TREATISES

INTRODUCTION

Pursuant to California Rules of Court, Rule 8.2000(c), United Policyholders respectfully requests leave to file the attached Amicus Curiae Brief in support of Defendants and Appellants, ROC Design, Inc. and Dominique Rocoffort de Vinniere in opposition to a motion to dismiss the appeal filed by Lexington Insurance Company. This application is timely made within 30 days after Lexington filed its motion to dismiss and before the filing of any Reply Brief.

THE AMICUS CURIAE

The financial security that insurance policies provide is vital to consumers and is an integral part of the fabric of our economy and our society. United Policyholders, ("UP") is a non-profit 501(c)(3) organization founded in 1991 that is an independent information resource and a voice for insurance consumers in all 50 states. Donations, foundation grants and volunteer labor support the organization's work.

United Policyholders' work is divided into three program areas: *Roadmap to Recovery*, (resources to help policyholders navigate and resolve large loss claims), *Roadmap to Preparedness*, (promoting disaster preparedness and insurance literacy) and *Advocacy and Action* (advancing the interests of insurance consumers in courts of law, before regulators, legislators, and in the media). UP monitors the national insurance marketplace with a particular focus on California and areas impacted by natural disasters. UP offers a library of tips, sample forms and articles on commercial and personal lines insurance products, coverage and the claims process at *www.uphelp.org.*

United Policyholders is based in California and interfaces with the California Insurance Commissioner and his staff on a weekly basis. The organization's Executive Director was recently re-appointed to a two year term as an official consumer representative to the National Association of Insurance Commissioners, and is currently serving on the American Law Institute's Advisory Panel on the Principles of Liability Insurance. UP receives frequent invitations to speak to trade and civic associations and testify at public hearings on insurance rate and policy issues.

United Policyholders has appeared as *amicus curiae* in over three hundred cases throughout the United States in state, federal and the U.S. Supreme Court.[FN1] Arguments from our *amicus curiae* brief were cited with approval by the California Supreme Court in TRB Investments, Inc. v. Fireman's Fund Ins. Co. (2006) 40 Cal4th 19, 145 P.3d 472, Vandenburg v. Superior Court (1999) 21 Cal.4th 815, 982 P.2d 229, and Julian v. Hartford (2005) 35 Cal.4th 747, 110 P.3d 903. United Policyholders has appeared as amicus curiae in the United States Supreme Court. (See e.g. MetLife v. *5 Glenn (2008) 554 U.S. 105, 128 S.Ct. 2343; Campbell v. State Farm (2003) 538 U.S. 408, 123 S.

Ct. 1513; FL Aerospace v. Aetna Casualty and Surety Co. (6th Cir. 1990) 897 F.2d 214, cert. denied, October 9, 1990); and Humana, Inc. v. Forsyth (1999) 525 U.S. 299, in which United Policyholders' brief was cited in the published opinion.

> FN1. E.G. *L.A. Checker Cab Co-op., Inc. v. First Specialty Ins. Co. (2010) 186 Cal.App.4th 767, 112 Cal.Rptr.3d 335 (ordered not to be officially published October 27, 2010); Hyundai Motor America v. National Union Fire Insurance Company (2009) 600 F.3d 1092; Kwikset Corp. v. S.C. (Benson) (2009) 211 P.3d 1060, 97 Cal.Rptr.3d 271 (petition for review granted); Meyer v. Sprint Spectrum L.P. (2009) 45 Cal.4th 634, 88 Cal.Rptr.3d 859; Everett v. State Farm General Ins. Co. (2008) 162 Cal.App.4 th 649, 75 Cal.Rptr.3d 812; Medina v. Safe-Guard Products International, Inc. (2008) 164 Cal.App.4th 105, 78 Cal.Rptr.3d 672 (review denied); Cold Creek Compost, Inc., et. al v. State Farm Fire & Casualty (2006) 156 Cal.App.4th 1469, 68 Cal.Rptr.3d 216, review denied; First American Title Ins. Co. v. Superior Court (2007) 146 Cal.App.4th 1564, 53 Cal.Rptr.3d 734; Hailey v. California Physicians'Service dba Blue Shield of California (2007) 158 Cal.App.4h 452, 69 Cal.rptr.3d 789; Padilla Construction Company, Inc., v. Transportation Insurance Company (2007) 150 Cal.App.4th 984, 58 Cal.Rptr.3d 807; Medill v. Westport Insurance Corporation (2006) 143 Cal.App.4th 819, 49 Cal.Rptr.3d 570; County of San Diego v. Ace Property & Cas. Ins. Co. (2005) 37 Cal.4th 406, 33 Cal.Rptr.3d 583; Powerine Oil Co., Inc. v. Superior Court (2005) 37 Cal.4 th 377, 118 P.3d 589; Johnson v. Ford Motor Co. (2005) 35 Cal.4th 1191, 29 Cal.Rptr.3d 401; Simon v. San Paolo U.S. Holding Co., Inc. (2005) 35 Cal.4th 1159, 29 Cal. Rptr.3d 379; Julian v. Hartford Underwriters Ins. Co. (2005) 35 Cal.4th 747, 27 Cal.Rptr.3d 648; Garamendi v. Golden Eagle Ins. Co. (2005) 128 Cal.App.4th 452, 27 Cal.Rptr.3d 239; American Ins. Ass'n v. Garamendi (2005) 127 Cal.App.4th 228, 24 Cal.Rptr.3d 905 (ordered not to be officially published October 12, 2005); Watts Industries, Inc. v. Zurich American Ins. Co. (2004) 121 Cal.App.4th 1029, 18 Cal.Rptr.3d 61; Cassim v. Allstate Ins. Co. (2004) 33 Cal.4th 780, 16 Cal.Rptr.3d 374; Marselis v. Allstate Ins. Co. (2004)121 Cal.App.4th 122, 16 CaI.Rptr.3d 668; Hameid v. National Fire Ins. of Hartford (2003) 31 Cal.4th 16, 1 Cal.Rptr.3d 401; Rosen v. State Farm General Ins. Co. (2003) 30 Cal. 4th 1070, 135 Cal.Rptr.2d 361; County of San Diego v. Ace Property & Casualty Ins. Co. (2002) 103 Cal.App.4 th 1335, 127 Cal.Rptr.2d 672; Dart Industries, Inc. v. Commercial Union Ins. Co. (2002) 28 Cal.4th 1059, 124 Cal.Rptr.2d 142; Bialo v. Western Mut. Ins. Co. (2002) 95 Cal.App.4th 68, 115 Cal.Rptr.2d 3; Vu v. Prudential Property & Casualty Ins. Co. (2001) 26 Cal.4th 1142, 113 Cal.Rptr.2d 70; 20th Century Ins. Co. v. Superior Court (2001) 90 Cal.App.4 th 1247, 109 Cal.Rptr.2d 611; and AICCO, Inc. v. Insurance Co. of North America (2001) 90 Cal.App.4th 579, 109 Cal.Rptr.2d 359,review* denied.

NEED FOR FURTHER BRIEFING

United Policyholders believes the motion to dismiss this appeal should be denied for at least two compelling reasons:

First, the issues addressed in this appeal are of important public interest. They affect policyholders, both individual and corporate, simple and sophisticated. They also directly affect how justice is administered by our judges and the lawyers that appear before them. The situation in which an insurer undertakes to provide a defense to its insured, while reserving the right to later deny coverage, is a common practice. Is *insurer-selected* defense counsel bound by the ethical obligations of the Rules of Professional Conduct, including Rule 3-310? Do insurer-selected lawyers enjoy some special exemption to these ethical mandates? Is there some principle in law or is there any reason in logic that operates to limit application of the Rules of Professional Conduct to all *other* lawyers but not to insurer-selected lawyers? Respectfully, this court can illuminate these important issues for the bench, bar, insurers and the insured public.

Second, it is not often that appellate courts are presented with facts for such judicial review. This record illustrates how disturbingly facile it is for the insurer to settle the case and then claim that appellate review is moot. This case, even if technically moot, should nevertheless be decided on its merits. (Tracy A. v. Sup. Ct. [Pauline I.] (2004) 117

Cal.App.4th 1309, 1314.)

Amicus Curiae believes that further briefing is necessary to address matters not fully addressed by the parties' briefs on this motion, and not yet addressed by the briefs on the merits on the appeal.

AUTHORSHIP AND FUNDING OF PROPOSED BRIEF

The proposed Amicus Curiae Brief In Opposition To Motion To Dismiss was authored by the undersigned counsel. No party, counsel for any party, or any other person has made any monetary contribution intended to fund the preparation or submission of the proposed brief.

CONCLUSION

For the foregoing reasons, United Policyholders respectfully requests the Court accept its brief for filing in this case.

INTRODUCTION

Lexington Insurance Company's motion to dismiss this appeal as moot should be denied. An issue raised in this appeal, whether *insurer-selected* counsel must follow the Rules of Professional Conduct, inc luding Rule 3-310, is of "broad public interest and will likely recur." (Cucamongans United for Reasonable Expansion v. City of Rancho Cucamonga (2000) 82 Cal.App.4th 473, 479-480.)

This is an issue of interest to every policyholder sued as a defendant and represented by insurer-selected counsel. It is critical to policyholders' perception of the California justice system that they have confidence their *insurer-selected* counsel is following the exact same ethical rules as other counsel. These rules include the duties to (a) identify and (b) disclose in writing conflicts of interest and (c) to not accept or continue representation of clients absent an informed written consent by both the insured and the insurer. Policyholders are entitled to expect transparent fidelity.

The Rules of Professional Conduct are the "rules of the road" for attorneys. They govern attorneys' conduct and interaction with clients. They do not apply only to *some* attorneys. They have universal application to *all* attorneys in *all* situations.

In this appeal, the record reveals that Lexington admits its reservation of rights letter created conflicts of interest between Lexington and Appellants. (2 Appellants' Appendix ["A.A."] p. 352.) Yet the Demler firm, representing both Lexington and Appellants as attorneys of record, refused to comply with Rule 3-310 and provide any written disclosures identifying the conflicts and explaining the implications on the firm's fiduciary duties or on the appellants' insurance coverage. The Demler Firm is not alone. The record reflects that named partner, Robert Armstrong, does not believe that client disclosure (the type implicit in any meaningful conflict of interest letter) "is required and [he has] never seen a similar letter sent by an insurance defense firm in any of the thousands of cases I have litigated or with respect to which I have been consulted." (2 A.A. p.389.) Just so, Bjorn Green, partner with the Demler Firm, declared, "the practices of the Demler office are [consistent] with the hundreds of similarly situated lawyers that comprise the insurance defense bar in California." (2 A.A. p.432.) That these views are neither aberrational nor untruthful is the entire point. A vast majority of insurer-selected counsel have "learned" not to follow the rules they once knew.

Rule 3-310, disparaged or overlooked by insurance-selected counsel, details when and how an attorney must provide written disclosures of conflicts and obtain informed written consent from clients. Rule 3-310 lies at the heart of every attorney's duty of loyalty to a client.

This appeal presents the facts upon which the Court may decide the issue of whether insurer-selected counsel must follow Rule 3-310 where the insurer has sent a broad, general reservation of rights, invoking the right to withdraw the defense at any time without stating any grounds, *and* insurer-selected counsel is representing both the insured and the insurer.

Amicus believes that despite Lexington's settlement with Plaintiff Hakimfar, this case is the best vehicle to permit resolution of this issue.

Amicus United Policyholders respectfully requests this Court deny Lexington's motion to dismiss and allow this appeal to continue to resolution.

LEGAL ARGUMENT

1. The Law Is Well Established That The Rules Of Professional Conduct Substantially Define The Fiduciary Duties Attorneys Owe Clients

The Rules of Professional Conduct do not relate solely to ethical matters over which only the State Bar has jurisdiction (3 A.A. p. 602 [trial court's ruling, reason (2)].) Rather, "[t]he scope of an attorney's fiduciary duty may be determined as a matter of law based on the Rules of Professional Conduct which ... help define the duty component of the fiduciary duty which an attorney owes to his [or her] client." (Stanley v. Richmond (1994) 35 Cal.App.4th 1070, 1086, 41 Cal.Rptr.2d 768). Stanley involved a client's lawsuit against his former attorney for breach of fiduciary duty and legal malpractice. At trial, plaintiffs expert testified that defendant attorney violated Rule 5-510 (renumbered Rule 3-310) in continuing representation while failing to disclose a conflict of interest. (*Id.* at p. 1087.) One issue on appeal was whether plaintiff had presented substantial evidence to support a prima facie case for breach of fiduciary duty. (*Id.* at p. 1086.) The Appellate Court explained that expert testimony regarding Rule violations was "plainly sufficient to establish the first two elements of a cause of action for breach of fiduciary duty. Indeed ... [the expert's] testimony was more than sufficient to raise questions of fact whether ... [Defendant attorney] breached her fiduciary duties...." (*Id.* at p. 1087.) The Rules, in effect, were the *yardstick* by which *Stanley* could measure the attorney's breach of the fiduciary duty.[FN2]

> FN2. *Stanley* is not alone in this respect. See also, for example, Mirabito v. Liccardo (1992) 4 Cal.App.4th 41, 46-47 [undisclosed conflict of interest]; Day v. Rosenthal (1985) 170 Cal.App.3d 1125, 1147 ["the rules, together with statutes and general principles relating to other fiduciary relationships, all help define the duty component of the fiduciary duty which the attorney owes to his or her client."]

Stanley stressed that the attorney's duty of fidelity, or loyalty, was of paramount importance. (*Id.* at p. 1089.) This means, *at a minimum*, that in the presence of a conflict, an attorney must provide full and timely written disclosures and must obtain the client's intelligent, informed consent. (*Id.* at p. 1089.)

Every attorney owes his or her clients the duty of loyalty. This, in turn, requires allegiance to the ethical obligations of Rule 3-310.

2. Rule 3-310Requires Both Written Disclosures And Informed Written Consent In The Presence Of Potential Or Actual Conflicts Of Interests

California Rules of Professional Conduct, Rule 3-310 states in relevant part:

(A) For purposes of this rule:

(1) “Disclosure” means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client;

(2) “Informed written consent” means the client's or former client's written agreement to the representation following written disclosure;

(3) “Written” means any writing as defined in Evidence Code section 250.

(C) A member shall not, without the informed written consent of each client:

(1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or

(2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or

(3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.

(D) A member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients without the informed written consent of each client.

(E) A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.

(F) A member shall not accept compensation for representing a client from one other than the client unless:
(1) There is no interference with the member's independence of professional judgment or with the client-lawyer relationship; and
(2) Information relating to representation of the client is protected as required by Business and Professions Code section 6068, subdivision (e); and
(3) The member obtains the client's informed written consent, provided that no disclosure or consent is required if:
a. Such nondisclosure is otherwise authorized by law; or
b. The member is rendering legal services on behalf of any public agency which provides legal services to other public agencies or the public.[FN3]

> FN3. UP is mindful of the specific note to Paragraph (F) that it “is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured where there is no conflict of interest.” (Citing San Diego Navy Federal Credit Union v. Cumis Insurance Society (1984) 162 Cal.App.3d 358, 208 Cal.Rptr. 494; emphasis added.)

In order to fulfill the letter and spirit of Rule 3-310, confronted with a conflict of interest between two clients, as in the present case, the attorney must speak. The attorney who has undertaken to control the litigation must at least read the insurance policy, analyze the complaint and other facts known about the claim to determine specific conflicts and their possible consequences. The attorney must then communicate to the client sufficient information so that the client may make an intelligent, informed decision about whether to give “informed written consent” to the representation. A mere statement of conflict will not suffice. The attorney must *provide written disclosures* to the client “of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the

client." (Rule 3-310(A)(1).)

Given Lexington's admission of the existence of conflicts, the Demler firm's refusal to explain the conflicts *and their actual and reasonably foreseeable adverse consequences* puts the insured in the position of being a passenger in the backseat of a car in which the muted "driver" will not disclose the hoped-for destination, the planned route or even the likely road hazards along the way.

3. The Record Establishes The Pervasive Pattern of Carrier-Selected Counsel Simply Turning A Blind Eye To The Ethical Mandates of Rule 3-310

As mentioned above, the record in this matter contains the declaration of Robert Armstrong, named partner of the Demler firm. The declaration is powerful evidence why the motion to dismiss should be denied and the appeal go forward.

- Mr. Armstrong has handled "literally thousands of construction defect lawsuits, in which reservation of rights letters are sent by insurers in virtually every case...." (2 A.A. p. 388.)
- He is "familiar with the custom and practice of defense lawyers in the insurance defense bar." (*Ibid.*)
- "[T]he practices of the Demler office are [consistent] with the hundreds of similarly situated lawyers that comprise the insurance defense bar in California." (2 A.A. p. 432.)
- Mr. Armstrong has "consulted with multiple insurance defense attorneys [to conclude that he] has not breached any ethical duties to our clients in this case." (3 A.A. p. 463.)
- He does not believe that client disclosure by a conflict of interest letter "is required and [he has] never seen a similar letter sent by an insurance defense firm in any of the thousands of cases I have litigated or with respect to which I have been consulted." (2 A.A. p. 389.)

The cumulative effect of these admissions is that not only the Demler firm, but carrier-selected defense firms as a whole are ignoring Rule 3-310 and failing to make written disclosures when conflicts of interests arise. This situation cries out for judicial interpretation and intervention.

CONCLUSION

For the reasons set forth above, this Court should deny Lexington's motion to dismiss.