

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LOUISE M. HARRIS, M.D.,

Plaintiff-Appellant,

v.

FIRST UNUM LIFE INSURANCE COMPANY,
UNUM LIFE INSURANCE COMPANY OF AMERICA and
UNUMPROVIDENT CORPORATION,

Defendants-Appellees.

AFFIDAVIT IN OPPOSITION
TO AMICUS CURIAE
APPLICATION

Docket No. 05-4265

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

ARTHUR J. SIEGEL, being duly sworn, deposes and says that he is a member of Bond, Schoeneck & King, PLLC, attorneys for defendants-appellees First Unum Life Insurance Company, Unum Life Insurance Company of America and UnumProvident Corporation; he is fully familiar with the facts and circumstances of this action; and he submits this affidavit in opposition to the application of United Policyholders (“United”) to file an amicus curiae brief.

1. The first question to ask in considering the amicus curiae application in this garden variety insurance dispute is what role United properly may play here. What important issue does United wish to weigh in on? It has not said with any specificity. Rather, as discussed below, it has not followed the rule requiring that its brief be filed with its application. In failing to follow this simple rule, it has deprived the Court of the opportunity to consider whether the issue United wishes to weigh in on warrants extra briefing.

2. At page 2 of its application, United says that it has submitted briefs on disability insurance claim disputes in the past where “there were conflicting opinions by medical

and insurance company personnel” (Application, p. 2). It writes that it “has an interest in ensuring that insurance companies live up to their promises to their policyholders” (*Id.*). Thus, United, in essence, wants to address the very same issue that plaintiff’s counsel is addressing – whether Dr. Harris’ medical and vocational circumstances qualified her as disabled under the terms of a particular policy of insurance. This is the issue that Judge Hurd considered in deciding in favor of appellees.¹ In reaching his determination, Judge Hurd, in a well reasoned 16 page decision, observed that, among other things, the results of numerous objective tests showed that appellant was not disabled as claimed and, indeed, had “demonstrated the ability to engage in vigorous activities” and had shown “extraordinary capacity.”

3. To be sure, United says in *conclusory fashion* that the issues in this action will affect policyholders in New York and nationwide. Yet, this Court regularly hears appeals from ERISA claim determinations. United has not shown that this case presents issues any different from the other garden variety benefits decisions that have been reviewed in the district courts and appealed to this Court. Nor, for that matter, has United shown how a dispute that is fact specific, *i.e.*, based on the claimant’s particular medical and vocational circumstances, and the terms of a particular insurance policy, has any impact whatever beyond its impact on the particular claimant (here, Dr. Harris) and the insurer.

4. Appellant, a medical doctor, has retained competent counsel, Whiteman Osterman & Hanna LLP, to press her appeal. The Whiteman firm has diligently briefed the appeal and submitted a 76 page principal brief, in which it has framed eight issues. The Whiteman firm contends that the district court gave too much deference to the administrator

¹ Judge Hurd reviewed the administrative record, which exceeds 700 pages, in rendering his determination. United does not say whether it has access to the record, or whether it has reviewed it, though it apparently wants to contend that the insurer should have paid benefits to plaintiff. As such, United appears to want to submit a brief very similar to the brief appellant’s counsel already submitted.

under the facts and circumstances in this case; improperly imposed a burden on appellant to prove her disability; failed to properly weigh appellant's condition against the duties of her occupation; and did not give enough weight to the opinions of appellant's treating physicians. The Whiteman firm also contends that the district court should have adopted in this case the verdict of a jury in another case involving appellant. As is readily apparent, the issues in this case turn on the specifics of appellant's occupation and medical condition and other factors particular to appellant and her claim.

5. Pursuant to Federal Rules of Appellate Procedure ("FRAP") 29(e), "[a]n amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed." Here, appellant filed her 76 page principal brief on or about October 19, 2005, and United filed its application *without its proposed brief* (in violation of FRAP 29(b)) on or about November 3, 2005 (in violation of FRAP 29(e)). Accordingly, United's application, which was served more than 7 days after appellant filed her principal brief, is untimely. It also, as noted, is defective in that it was not accompanied by the proposed brief.

6. Appellees' brief is due on November 21, 2005, and the aspiring amicus, as noted, has yet to submit its brief. Thus, if the aspiring amicus is permitted to file a brief at this late date, appellees will be prejudiced in that they would have very little, if any, time to respond under the current briefing schedule. It appears, therefore, that not only has the aspiring amicus left the Court and appellees guessing as to what it could add to this appeal, it also has timed its application such that, if granted, it would file its brief either shortly before or sometime after appellees file theirs, leaving appellees very little or no time to respond.

WHEREFORE, deponent requests that United's application for leave to file a brief as amicus curiae in this garden variety benefits action be denied in its entirety.



ARTHUR J. SIEGEL

Sworn to before me this
9th day of November, 2005.


Notary Public

JOY REEVES TELESE
Notary Public, State of New York
No. 01TE6066447
Qualified in Saratoga County
Commission Expires November 13, 2009

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CERTIFICATE OF SERVICE

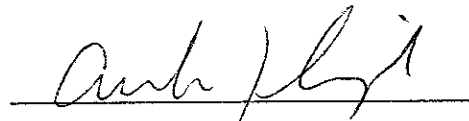
I hereby certify that on November 9, 2005, I served the foregoing with the Clerk of the United States Court of Appeals for the Second Circuit via Federal Express.

And, I hereby certify that I have also mailed the documents upon:

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Arthur J. Siegel