

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

LOUISE M. HARRIS, M.D.,

Plaintiff-Appellant,

- against -

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

Defendant-Appellees.

Docket No. 05-4265

**REPLY TO DEFENDANTS-APPELLEES' OPPOSITION TO UNITED  
POLICYHOLDERS' AMICUS CURIAE APPLICATION**

United Policyholders submits this reply to the insurance company's opposition to United Policyholders' application to submit a brief in this litigation as amicus curiae dated November 9, 2005. Moreover, United Policyholders respectfully requests a reasonable extension of time to file its amicus brief. United Policyholders seeks to further inform the Court about the potential widespread impact that any decision of this Court will have on the insurance policyholders nationwide. The District Court decision, if adopted by this Court, would be detrimental to policyholders nationwide. United Policyholders is uniquely situated to provide the court with its insight on these issues.

A motion for leave to file an amicus brief should be granted, when, as here, the amicus has a unique perspective or 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. v. Comm'r of Labor & Industry, Montana, 694 F.2d 203, 204 (9th Cir. 1982).

Under Federal Rule of Appellate Procedure (“FRAP”) 29(e), a court may grant leave for later filing of an amicus brief, adjusting the briefing schedule to allow more time for an opposing party to answer. FRAP § 29(e). The extent and manner of an amicus curiae’s appearance is entirely within the discretion of the court. See generally 4 Am.Jur.2d, Am.Cur § 3. The Court should exercise its discretion to grant United Policyholders permission to file an amicus brief for several reasons. United Policyholders can (1) demonstrate that UnumProvident has a history littered with policyholders lawsuits for denied claims; (2) demonstrate why corporate structure reshuffling of Appellees’ UnumProvident Corporation and affiliates should not be a license to revisit prior jury determinations, such as Harris v. Provident, No. 02-CV-300, 2004 WL 1242415 (N.D.N.Y. June 4, 2004); (3) reveal patterns of denial or termination of benefits based on the opinions of certain records-reviewing physicians and (4) highlight the impact that this Court’s decision will have on the Appellees’ general practices in handling disability benefits claims throughout the country.

United Policyholders’ unique perspective will help the Court beyond the memoranda of law of the parties. Despite Appellees’ insistence to the contrary, United Policyholders’ position is not redundant. See Affidavit in Opposition to Amicus Curiae Application, dated November 9, 2005 (“Opp.”), 2. United Policyholders is not seeking to argue the details of Dr. Harris’ medical condition. Instead, United Policyholders requests that the court exercises its discretion and allow leave to file an amicus brief to further inform the Court on issues giving rise to this appeal.

The Court should exercise its discretion and permit United Policyholders to submit an amicus brief in this litigation despite the exclusion of the actual amicus brief

with United Policyholders' application. United Policyholders did not have an opportunity to submit its proposed brief with its application for leave to appear as amicus curiae because United Policyholders did not become aware of the District Court's decision and its potential impact until after Appellant's brief was filed on October 20, 2005. Therefore, the Court should grant an extension to file an amicus brief.

Moreover, Appellees' attempt to derive significance from the fact that Appellant's counsel is competent is misplaced and should have no bearing on whether leave to file an amicus brief should be granted. See Opp. at 2. See, e.g., Neonatology Assoc. v. Comm'r of Internal Revenue, 293 F.3d 128, 132 (3d Cir. 2002) (finding that amicus seeking leave to file need not show that the party to be supported is inadequately represented). The Third Circuit Court further noted that "requiring a prospective amicus to undertake the distasteful task of showing that the attorney for the party that the amicus wishes to support is incompetent is likely to discourage amici in instances in which ... would be valuable to the court." Id. Following Appellees' misguided reasoning, parties would rarely be granted leave to file an amicus brief. Denying motions for leave to file an amicus brief would "deprive the court of valuable assistance." Id. Therefore, the Court should allow United Policyholders to file its brief.

Additionally, many courts have found United Policyholders' amicus curiae briefs helpful in the past. Specifically, United Policyholders has previously appeared as amicus curiae in over one hundred and thirty cases throughout the United States. Moreover, United Policyholders has appeared as amicus curiae in cases before the United States Supreme Court. See Humana, Inc. v. Forsyth, 525 U.S. 299 (1999); FL Aerospace v. Aetna Casualty and Surety Co., 498 U.S. 911 (1990). Further, United

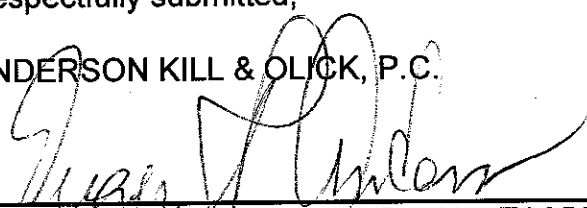
Policyholders was the only national consumer organization to submit an amicus brief in the landmark case of State Farm v. Campbell, 538 U.S. 408, 123 S. Ct. 1513 (2003) on punitive and extra-contractual damages issues. United Policyholders has also submitted briefs on ERISA-related matters and in disability insurance claim disputes in which there were conflicting opinions by medical and insurance company personnel.<sup>1</sup>

The impact that the District Court's erroneous holding would have on sick and disabled policyholders, in the context of disability claims benefits, would be widespread and detrimental. United Policyholders respectfully requests that the Court grant its application for leave to file an amicus brief. United Policyholders further respectfully requests that the Court grant United Policyholders an extension of time to file its brief.

Dated: November 16, 2005

Respectfully submitted,

ANDERSON KILL & OLICK, P.C.



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<sup>1</sup> See Aetna Health Inc., v. Juan Davila, 542 U.S. 200 (2004), Tommie Glanton, on behalf of the Alcoa Prescription Drug Plan, and other similarly-situated plans, and, Tara Mackner, on behalf of the Kmart Comprehensive Health Plan, Case No. 04-15328, United States Court of Appeals For the Ninth Circuit. UP brief filed May, 2004, Francie E. Harrison v. Unum Life Ins. Co. of America US Court of Appeals, First Circuit, Docket No. 05-1577.

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