

Docket No. 05-1577

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

FRANCIE E. HARRISON
Plaintiff - Appellant,

vs.

UNUM LIFE INSURANCE COMPANY OF AMERICA
Defendant - Appellee.

On Appeal From the United States District Court
For the District of New Hampshire (Concord)

**Brief of United Policyholders as *Amicus Curiae*
on Behalf of Francie E. Harrison, Plaintiff-Appellant
Supporting Reversal**

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

United Policyholders is a non-profit organization founded in 1991 and dedicated to education on insurance issues and consumer rights. The organization is tax-exempt under §501(c)(3) of the Internal Revenue Code. United Policyholders is funded by donations and grants from individuals, businesses, and foundations.

While much of its work is aimed at individuals and businesses affected by disasters, 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.

A diverse range of personal and commercial line policyholders throughout the United States communicate their insurance concerns on a regular basis to United Policyholders. United Policyholders advances policyholders' interests in courts throughout the country by filing *amicus curiae* briefs in cases involving important insurance principles.

United Policyholders' amicus brief was cited in the U.S. Supreme Court's opinion in Humana, Inc. v. Forsyth, 525 U.S. 299 (1999). United Policyholders has filed *amicus curiae* briefs on behalf of policyholders in over one hundred and twenty cases throughout the United States in the past six years. These

activities are limited only to the extent that United Policyholders exists exclusively on donated labor and contributions of services and funds. No party to this case has contributed directly or indirectly to the preparation of this brief.

United Policyholders has a vital interest in seeing that insurance companies do not attempt to shift risk assumed in insurance policies back to their policyholders through schemes unsupported by insurance policies or public policy. United Policyholders has an interest in ensuring that insurance companies live up to their promises to their policyholders.

United Policyholders seek to appear as *amicus curiae* to address certain issues presented in this case that are of significance well beyond the application of law to the specific facts of this case. These issues are important public health matters that will affect policyholders nationwide.

PRELIMINARY STATEMENT

The insurance company should not be allowed to brand Ms. Harrison as a criminal in clear contradiction of New Hampshire law, which provides that a violation is not a crime, in order to deny her long-term disability benefits. *Amicus Curiae*, United Policyholders, respectfully petitions this Court for a reversal of the District Court's rulings.

POINT I.
BRANDING

The New Hampshire law has designated Ms. Harrison's act as a violation; the law did not designate the act as criminal. The State of New Hampshire has been careful not to brand first offenders convicted for driving while intoxicated as criminals. The law of that state provides that "[a] violation does not constitute a crime and conviction of a violation does not give rise to any disability or legal disadvantage based on conviction of a criminal offense." N.H. Rev. Stat. Ann. § 265:82. This is salutary. A violation is not a crime, it is something less. Violators of minor infractions thus have the opportunity to live a normal life without carrying the lifelong stigma of a criminal label.

There is an intentional distinction between violations and crimes. A violation is defined as "an infraction or breach of the law; a transgression," a crime, in contrast, constitutes "an act that the law makes punishable." Black's Law Dictionary (8th ed. 2004). Offenses designated as violations authorize only a fine or other civil penalty, as opposed to offenses designated as crimes, that typically require incarceration. See Model Penal Code § 1.04 (2001). Conviction of a violation does not have the weighty consequences associated with a criminal conviction.

The New Hampshire Legislature has labeled Ms. Harrison's act as a violation; it did not label the act as criminal. Unum's policy only excludes

coverage for a claim arising out of the commission of a “crime” for which the policyholder was “convicted under state or federal law.” New Hampshire’s law clearly defines the term “crime” to exclude “violations” of state law. As Ms. Harrison was convicted of a violation of state law, Unum’s denial of benefits was incorrect.

The insurance company should not be allowed to trump the legislature. Unum does not define the term “crime” in their policy. The exclusion clearly links the term to a criminal code as the language requires that the claimant be convicted of a crime. New Hampshire law provides that a violation is not a crime. Unum should not be permitted to circumvent the New Hampshire Legislature’s definition of “crime” by interpreting its policy language to deny the policyholder’s claim.

POINT II.

WORDS, WORDS, WORDS

Insurance companies are capable of remarkable feats of linguistic legerdemain. The word game costs American policyholders untold billions of dollars. This case is unique in one respect: the insurance company has swept into the word game words in the New Hampshire statutes.

In “Through the Looking Glass” Humpty Dumpty says:

‘When I use a word,’ Humpty Dumpty said in a rather scornful tone, ‘it means just what I choose it to mean – neither more nor

less.’ ‘The question is, said Alice, ‘whether you can make words mean so many different things.’ ‘The question is,’ said Humpty Dumpty, ‘which is to be the master – that’s all.’

It should pain this Court to see the Humpty-Dumpty Rule applied in a purportedly serious fashion.

Insurance companies continuously use implausible semantic distinctions to deny a policyholder the benefits of aleatory¹ contracts. In a recent New York case, *Gulf Insurance Company*, a subsidiary of Travelers, successfully argued that “all” did not mean “all.” Gulf effectively claimed that an agreement to produce “all” documents is an agreement to produce “all” documents except privileged documents. See *Gulf Ins. Co. v. Transatlantic Reinsurance Co.*, 13 A.D.3d 278, 788 N.Y.S.2d 44 (1st Dept. 2004).

Insurance companies have not been too successful when denying benefits based upon the injured person’s intoxication. In *West v. Aetna Life Ins. Co.*, 171 F.Supp.2d 856, 888 (N.D. Iowa 2001), the United States District Court for the Northern District of Iowa held that the insurance company wrongly denied the policyholder’s benefits by adopting an unreasonable definition of accident that

¹ Meaning that the policyholder performs first by paying its premium and the insurance company performs second by providing coverage. Aleatory contracts are different from ordinary contracts, where both parties perform simultaneously. It is this difference which grants the insurance company a great deal of leverage. Generally, where one contracts for a new Cadillac but is tendered a 12 year-old Yugo, one can cancel one’s check and go to another car dealership. Conversely, a policyholder who is promised Grade A insurance at the point of sale and receives Grade D- insurance at the point of claim cannot “cover” by going back in time and purchase alternative insurance. Additionally, the policyholder whose claim is improperly denied will typically have fewer resources to contest that denial, as it will simultaneously be under financial pressure from the very catastrophe which led to the claim.

purported that policyholder's intoxication rendered his automobile crash not an "accident."

Insurance companies should not be permitted to engage in linguistic gymnastics to escape their responsibilities and deny policyholders their rights.

POINT III.

UNUM IS IN ERROR: CASES DO COUNT

Unum and its subsidiaries have tried unsuccessfully to use "unscrupulous tactics" in the past. See Radford Trust v. First Unum Life Ins. Co. of America, 321 F.Supp.2d 226, 248-49 n.20 (D. Mass. 2004). In Radford Trust, Chief Judge Young of the United States District Court for the District of Massachusetts points out thirty-three cases involving Unum that "reveal[s] a disturbing pattern of erroneous and arbitrary benefits denials, bad faith contract misinterpretations, and other unscrupulous tactics." Id. Unum's brief in this case belittles the decision of Chief Judge Young in Radford Trust. This demeaning of the Chief Judge is in error and uncalled for. Cases such as Radford Trust are the substance of the law. Unum's brief hints that it has facts that trump the decision. These facts are not in the record.

CONCLUSION

The District Court's judgment should be reversed.

Dated: New York, New York
June 6, 2005

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TABLE OF CONTENTS

STATEMENT OF INTEREST OF *AMICUS CURIAE* 2
PRELIMINARY STATEMENT 3
POINT I. 4
BRANDING 4
POINT II. 5
WORDS, WORDS, WORDS 5
POINT III. 7
UNUM IS IN ERROR: CASES DO COUNT 7
CONCLUSION 8