NOS. 09-0012 & 09-0013

IN THE SUPREME COURT OF TEXAS

LM ERICSSON TELEFON, AB AND ERICSSON INC.,
Petitioners,

v.

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON SUBSCRIBING TO POLICY NO. 509/QF037603,
Respondents,

AND

LM ERICSSON TELEFON, AB AND ERICSSON INC.,
Petitioners,

v.

AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE COMPANY,
Respondent.

FROM THE FIFTH COURT OF APPEALS, DALLAS, TEXAS
NOS. 05-07-01467-CV & 05-07-1747-CV

UNITED POLICYHOLDERS' AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS LM ERICSSON TELEFON, AB AND ERICSSON INC.'S PETITION FOR REHEARING

OF COUNSEL
John N. Ellison
Toki Rehder
Whitney D. Clymer
REED SMITH, LLP

Amy Bach
UNITED POLICYHOLDERS
222 Columbus Ave., #412
San Francisco, CA. 94133
Telephone: (415) 393-9990
Fax: (415) 677-4170

Lorena Trujillo
State Bar No. 24056454
and
REED SMITH, LLP
2500 One Liberty Place
1650 Market Street
Philadelphia, PA 19103
Telephone: (251) 851-8000
Fax: (215) 851-1420

Counsel for *Amicus Curiae*
United Policyholders

IDENTITY OF PARTIES AND COUNSEL

Pursuant to Rules 11 and 55.2(a) of the Texas Rules of Appellate Procedure, the following is a complete list of all parties and counsel.

Petitioners:	**Petitioners' Counsel:**
Ericsson Inc. and LM Ericsson Telefon, AB	Ernest Martin, Jr. Micah Skidmore HAYNES AND BOONE, L.L.P. 2323 Victory Avenue, Suite 700 Dallas, Texas 75219-7673
Respondents:	**Respondents' Counsel:**
Certain Underwriters at Lloyd's, London Subscribing to Policy No. 509/Qf037603	A. Erin Dwyer Parker D. Young FIGARI & DAVENPORT, L.L.P. 901 Main Street, Suite 3400 Dallas, Texas 75202
American International Specialty Lines Insurance Company	Ben Taylor FULBRIGHT & JAWORSKI, LLP 2200 Ross Avenue, Suite 2800 Dallas, Texas 75201-2784 Reagan M. Brown FULBRIGHT & JAWORSKI, LLP 1301 Mckinney, Suite 5100 Houston, Texas 77010-3095

Amicus Curiae:

United Policyholders

Amicus Curiae Counsel:

Lorena Trujillo
John N. Ellison
Toki Rehder
Whitney D. Clymer
REED SMITH, LLP
2500 One Liberty Place
1650 Market Street
Philadelphia, Pa 19103

Amy Bach
United Policyholders
222 Columbus Ave., #412
San Francisco, Ca. 94133

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STATEMENT OF INTEREST OF AMICUS CURIAE

United Policyholders ("UP") is a not-for-profit corporation founded in 1991 as an educational resource for the public on insurance issues and insurance consumer rights. The organization is tax-exempt under Internal Revenue Code § 501(c)(3). UP is based in California but operates nationwide and is funded by donations and grants from individuals, businesses, and foundations and governed by an eight-member Board of Directors. UP contributes on an ongoing basis to the formulation of insurance-related public policy at both the national and state level. For over ten years, UP has been filing *amicus curiae* briefs with the Supreme Court of Texas on behalf of policyholders, the most recent being *Excess Underwriters at Lloyd's of London v. Frank's Casing Crew & Rental Tools, Inc.*, No. 02-0730 (Tex. filed Aug. 4, 2005) and *Fairfield Ins. Co. v. Stephens Martin Paving*, No. 04-0728 (Tex. filed Oct. 15, 2004).

UP exists because businesses and individuals rely on the insurance they buy to protect themselves, their property, and their livelihoods against the risk of loss, and insurance companies are in business to earn profits by assuming that risk. Insurance is a regulated industry because the financial security that insurance policies provide is an integral part of the fabric of our society and economy. UP monitors the insurance sector, works with public officials, has a nationwide network of volunteers and affiliate organizations, publishes written materials, files *amicus* briefs in cases involving coverage and claim disputes and is a general information clearinghouse on consumer issues related to commercial and personal lines insurance products. UP provides disaster aid to

property owners across the United States via educational activities designed to illuminate and demystify the claim process.

In this brief, UP seeks to fulfill the "classic role of *amicus curiae* by assisting 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. Commissioner of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982). This is an appropriate role for *amicus curiae*. As commentators have often stressed, an *amicus* is often in a superior position to "focus the court's attention on the broad implications of various possible rulings." R. Stern, E. Greggnian & S. Shapiro, *Supreme Court Practice*, 570-71 (1986) (quoting Ennis, *Effective Amicus Briefs*, 33 Cath. U.L. Rev. 603, 608 (1984)).

Pursuant to Texas Rule of Appellate Procedure 11, Reed Smith, LLP and United Policyholders have not and will not be paid any fee for preparing this *amicus curiae* brief.

STATEMENT OF THE CASE

Amicus Curiae, United Policyholders, incorporates by reference Petitioners' LM Ericsson Telefon, Ab and Ericsson Inc.'s Statement of the Case as if set forth herein.

STATEMENT OF JURISDICTION

Amicus Curiae, United Policyholders, incorporates by reference Petitioners LM Ericsson Telefon, Ab and Ericsson Inc.'s Statement of Jurisdiction as if set forth herein.

ISSUES PRESENTED

Amicus Curiae, United Policyholders, incorporates by reference Petitioners LM Ericsson Telefon, Ab and Ericsson Inc.'s Issues Presented as if set forth herein.

STATEMENT OF FACTS

Amicus Curiae, United Policyholders, incorporates by reference Petitioners LM Ericsson Telefon, Ab and Ericsson Inc.'s Statement of Facts as if set forth herein.

SUMMARY OF THE ARGUMENT

The Fifth Court of Appeals' decision in this case represents a major departure from fundamental principles of insurance policy construction that will have wide-ranging effects for Texas policyholders of all types: commercial businesses as to themselves, their executives and their employees, and to individuals, including those in group programs and those purchasing insurance policies directly. The Court of Appeals' decision is wholly inequitable because it would allow insurance companies to benefit from incorporating an application into an insurance policy, while stripping that right from policyholders. Just as insurance companies routinely do when the applications' terms benefit them in some way, policyholders should be entitled to rely on the provisions in their policy applications, particularly where the application is incorporated into the policy, as proof that insurance companies have indeed issued the policy that was purchased and will cover losses pursuant to the provisions in both the application and the policy. To allow an insurance company to avoid paying a covered loss simply by pointing to inconsistencies in the application and the policy documentation, while disallowing the policyholder to do the same is inequitable and harmful to the rights of millions of Texas policyholders. If the Court of Appeals' decision is not reviewed and reversed, Texas law will take a large step backwards in terms of protecting the interests

of its corporate and individual citizens, a step that citizens of the other forty-nine states have not had to suffer.

The Court's decision in this case will affect millions of Texas policyholders who applied for, obtained and now depend on the coverage of various types of insurance policies. There are many types of insurance that are obtained after the policyholder fills out an application with information such as the policyholder's health status, properties owned, additional parties to be insured, or prior loss history. Just as the insurance companies depend on the veracity and thoroughness of a policyholder's answers in a policy application, the policyholder depends on the insurance company to provide coverage based on what was requested and disclosed in the application. If this Court determines that policyholders are not entitled to the same security afforded to the insurance companies, an endless list of Texas businesses and individuals will be unable obtain and enforce the insurance coverage for which they specifically applied, and which the insurance company agreed to provide.

Under these circumstances, *Amicus Curiae*, United Policyholders, respectfully submits that the Petition for Review should be granted.

ARGUMENT

A. The Court of Appeals' Ruling Is Inequitable Because It Prevents Policyholders From Enjoying The Benefit Of Relying On Provisions And Statements In A Policy Application, Even Though Insurance Companies Routinely Enjoy That Benefit.

The Court of Appeals' decision in this case creates a one-sided interpretation of provisions incorporating the application into the policy such that insurance companies may use these provisions in their favor while policyholders may not. It is an inequitable result that an insurance company may use a policy application as a means to deny policy coverage or benefits but then allow the insurance company to ignore the application when the provisions or answers are not in its favor.

Insurance companies routinely use statements made by an insured in an application to deny coverage to Texas policyholders. *See, e.g., Protective Life Ins. Co. v. Russell*, 119 S.W.3d 274 (Tex. App. 2003); *Darby v. Jefferson Life Ins. Co.*, 998 S.W.2d 622 (Tex. App. 1995); *Fidelity Union Fire Ins. Co. v. Hicks,* 250 S.W. 1084 (Tex. Civ. App. 1923). Insurance companies frequently argue that misrepresentations made by the policyholder in the application void the policy, and have prevailed on this issue before Texas courts. *See, e.g., Levy v. Hunt*, No. 14-00-00549-CV, 2001 WL 306149 (Tex. App. Mar. 29, 2001).

The Supreme Court's refusal to hear this case allows an unfair and anti-Texas dichotomy to stand: out-of-state insurance companies can use insurance applications to defeat or eliminate coverage under an insurance policy sold to a Texas business or a

Texas citizen, but those Texas policyholders cannot use an insurance application to obtain and enforce its insurance coverage they requested and purchased when the application was completed. This result is detrimental to millions of policyholders in Texas. The Court of Appeals' ruling creates a double standard by which insurance companies may routinely use statements made in an application against a policyholder, but a policyholder may not use statements made in an application to establish coverage even where the insurance policy specifically incorporates the terms of the application. The ruling also conflicts with Texas precedent that provides that conflicts between the application and policy should be resolved in favor of coverage. *See, e.g., Royal Maccabees Life Ins. Co. v. James*, 146 S.W.3d 340, 347-48 (Tex. App. 2004).

B. If This Court Allows The Court of Appeals' Decision To Stand, It Will Mark A Departure From The Generally Prevailing National View That Policy Application Provisions Or Information May Be Relied Upon By Both Insurance Companies and Policyholders In Insurance Disputes.

The Court of Appeals' decision is an across the board alteration of insurance law that would unfavorably and unfairly distinguish Texas on this issue. By allowing the decision to stand, this Court would be taking away a fundamental and recognized right of its corporate and individual citizens and policyholders to claim coverage based on the provisions and contents in applications for insurance. As it stood up to the date of the decision under review, Texas courts have found that both policyholders and insurance companies are entitled to use the provisions and content of policy applications to establish or contest coverage; however, if the Court does not review and reverse the Court of Appeals' decision it may eradicate that right for Texas policyholders.

Although courts in other states have also found that statements made by a policyholder in the application for insurance may be used as a reason for denying coverage, those states routinely allow policyholders to use the contents of the application to establish coverage. For example, the application may be used to ascertain the identity of the named insured. In *West v. Rudd*, 249 S.E.2d 76 (Ga. 1978), the court looked to the application to determine the beneficiary of a life insurance policy. The policy's beneficiary was merely identified as "Insured Wife." *Id.* at 78. The application, however, identified Pamela P. Rudd as the "Proposed Insured Wife." *Id.* at 77. The court found that, even in the absence of an express incorporation provision, "it is well settled that an application for insurance becomes a part of the insurance contract itself where the application is attached to the policy of insurance." *Id.* at 78. Therefore, Ms. Rudd was entitled to the policy proceeds even though she was divorced from the insured at the time of his death. *Id.* at 79.

Similarly, in *New York Life Ins. Co. v. Rak*, 180 N.E.2d 470 (Ill. 1962), the Illinois Supreme Court accepted the designation of the beneficiary set forth in the application for life insurance over the designation in the policy. The court held that:

> It is, of course, true, that, until accepted by the company, the application was merely an offer or proposal. Here, however, the application was accepted and the policies were issued. A copy of the application was attached to each of the policies, and each policy expressly provided that the application should be a part of the policy. **Under these circumstances, the application, when accepted, became more than a mere offer and must be construed together with the policy as part of the entire contract.**

Id. at 471 (emphasis added).

Not only is the incorporation of the application into the policy accepted in other states, but the application is also used to establish the identities of the named insureds under the policy. A decision by this Court to let the Court of Appeals' ruling stand is fundamentally unfair because it denies Texas policyholders the same benefits that policyholders enjoy in other states; namely, the ability to rely on the contents of the application to establish coverage it has requested and purchased.

C. This Court Should Review And Reverse The Court of Appeals' Ruling Because Of The Decision's Wide-Ranging Effect On Millions of Texas Policyholders Who Have Applied For Insurance.

Although the instant case involves an Errors and Omissions liability policy, there are many other types of insurance policies the purchase of which begins with a written application. Some policy applications, like Ericsson's, are specifically incorporated into the policy whereas others form the basis of the insurance company's decision whether to insure and the amount of the premium. However, all types of policy applications have been used by insurance companies for years as a means to deny claims based either on what the policyholder included or omitted in the application.

1. Health Insurance

The most visible subset of policyholders that would be affected by a decision in favor of the insurance companies is individuals or businesses that purchase health insurance in Texas. Insurance companies routinely deny claims under health insurance policies based on the information contained in the policyholder's application. *See Bosch v. Dallas Gen. Life Ins. Co.*, No. 14-01-00661-CV, 2005 WL 757254 (Tex. App. Apr. 5,

2005) (recognizing well-settled Texas law that statements in health insurance policy applications are representations and could form basis for insurance companies' denial, rescission or void of policies). In fact, the application for a health insurance policy is so important that courts reviewing insurance disputes look to both the policy and the application to find a resolution. *See Southern Sur. Co. v. Butler*, 247 S.W. 611, 613-14 (Tex. Civ. App. 1923) (holding that insurance company could not deny benefits where statements on application did not contribute to the "contingency upon which the policy became due and payable"). The Court of Appeals' decision would affect every single citizen or business in Texas that purchases health insurance and depend on insurance companies to provide insurance based on the provisions in their policy applications.

2. Life Insurance

As in the health insurance context, an application for life insurance is of the utmost importance for the determination of coverage and/or benefits. Life insurance is purchased not only by individual citizens of Texas, but also provided by businesses across the state to their employees. Families all over Texas depend on life insurance to help pay bills and ongoing expenses after a member of their family passes away. In addition, policyholders depend on their life insurance policies to help care for and protect their loved ones in the event they pass away unexpectedly leaving their family with no primary income. As with health insurance, a policyholder's statements included or omitted on life insurance applications are primarily the reason why insurance companies deny benefits to rightful beneficiaries after a death. *See Gaston v. Woodmen of World Life Ins. Soc'y*, 167 S.W.2d 263 (Tex. Civ. App. 1943) (holding that policyholder's

untrue statements in application justified insurance company's denial of liability and return of premiums); *Wichita Falls Protective Ass'n v. Lewis*, 52 S.W.2d 134, 135-36 (Tex. Civ. App. 1932) (stating that pursuant to provision in application, upon which policy was issued, insurance company can properly invalidate policy only where untrue statements in application were made with fraudulent intent).

Although fraudulent and materially false statements made by a policyholder in an application may afford insurance companies a plausible reason for denying benefits, often courts hold that insurance companies' denials based on applications are improper. *See People's Mut. Life Ass'n v. Cavender*, 46 S.W.2d 723, 723-24 (Tex. Civ. App. 1932) (holding that insurance company could not deny coverage to policyholder based on statements made in application because they did not materially affect issuance of policy); *Rodriguez v. W.O.W. Life Ins. Co.*, 145 S.W.2d 1077 (Tex. Comm'n App. 1941) (holding that beneficiary was entitled to benefits under life insurance policy where policyholder's statements on application were not found to have been material). The decision by the Court of Appeals will curtail the ability of policyholders' to contest a coverage or benefit denial by insurance companies based on the provisions and answers they provided in policy applications. As a result, rightful beneficiaries will be denied the benefits or coverage intended for them.

3. Directors And Officers Insurance

Policy applications are also used and incorporated into insurance policies sold to Texas businesses, such as directors and officers insurance. *See Enserch Corp. v. Shand Morahan & Co.*, 952 F.2d 1485 (5th Cir. 1992) (finding in favor of policyholder where

insurance company denied coverage under directors and officers professional services policies based on alleged misrepresentations in policy applications); *Great American Ins. Co. v. Christopher*, No. 3:02-CV-2112-P, 2003 WL 21414676, at * 1 (N.D. Tex. June 13, 2003) (explaining that insurance company sought to rescind directors and officers liability policy based on statements or omissions in policy application). Every corporation or company doing business in Texas who purchases insurance to protect its directors and officers will be negatively affected if this Court denies to review the Court of Appeals' decision in this case.

Insurance companies that sell directors and officers liability policies frequently argue that the policy is void because of alleged misrepresentations or omissions in the policyholder's application. *See Continental Cas. Co. v. Allen*, 710 F. Supp. 1088 (N.D. Tex. 1989) (applying Texas law); *see generally Pacific Ins. Co. v. Louisiana Auto. Dealers Ass'n*, 273 F.3d 392 (5th Cir. 2001) (holding under Louisiana law that insurance company could rescind directors and officers insurance policies based on material misrepresentations by policyholders in applications for insurance). In *Continental*, the insurance company issued a directors and officers policy to a bank. *See Continental*, 710 F. Supp. at 1090-91. The insurance company argued, among other things, that the policy was void because of the bank's failure to notify the insurance company that the Comptroller of the Currency had issued a temporary cease and desist order against the bank. *Id.* at 1091. The court found that the insurance company could not succeed on theories of fraud or material misrepresentation because the jury found that defendants had

not made a material false representation or omission with intent to deceive and upon which the insurance company relied. *Id.* at 1092.

In this important area – providing insurance protection to those that are managing and directing Texas corporations – Texas citizens should not be deprived of the same rights insurance companies possess in relying on and enforcing the application's provisions.

4. Other Types Of Insurance

Individual citizens purchasing health or life insurance are not the only policyholders that will be affected if the Court of Appeals' decision is allowed to stand. Countless other types of insurance policies are sold based on written applications: flood insurance, livestock insurance, commercial general liability insurance, automobile insurance, commercial fleet insurance, homeowners insurance, pollution insurance, and property insurance, among others. *See Hanak v. Talon Ins. Agency, Ltd.*, 470 F. Supp. 2d 695, 703-07 (E.D.Tex. 2006) (holding that policyholders not listed in application could not recover under policy because application becomes part of flood insurance policy and application "provides the insurer with the information used to determine the eligibility of the risk, the type of policy that will be insured, and the correct premium payment"); *Indiana & O. Live Stock Ins. Co. v. Keiningham*, 161 S.W. 384, 386 (Tex. Civ. App. 1913) (stating that policy application provision incorporating application into policy means that "application is thus made as much a part of the policy as if its very terms were written into the body of the policy," and insurance company cannot deny benefits afforded in application); *Alliance Gen. Ins. Co. v. Club Hospitality, Inc.*, No.

CIV. 3:97-CV-2448-H, 1999 WL 118798 (N.D. Tex. Mar. 2, 1999) (setting aside verdict in favor of insurance company on breach of contract claim based on policyholder's alleged misrepresentations in application where there was no proof of policyholder's intent to deceive); *Stephens v. Gilpin*, No. A14-89-00739-CV, 1990 WL 119531 (Tex. App. Aug. 16, 1990) (insurance company declared policy covering trucking business null and void and/or rescinded based on policyholder's omission of prior loss history in application for insurance); *Hopkins v. Highlands Ins. Co.*, 838 S.W.2d 819 (Tex. App. 1992) (finding that truck driver, who was listed on sheet submitted to insurance company during application process, was named insured and covered under policy at time of its issuance pursuant to insurance company's internal guidelines); *Vanguard Underwriters Ins. Co. v. Vecellio Ins. Agency, Inc.*, No. 01-98-00986-CV, 1999 WL 159833 (Tex. App. 1999) (insurance company intended to deny claim under homeowner's policy based on contents of policy application).

Essentially, every Texas-based policyholder, from a Dallas resident purchasing homeowners insurance to a Texas corporation purchasing directors and officers or errors and omissions coverage, will be affected by this Court's decision. In short, every single one of these policyholders will have fewer rights and fewer protections in the insurance they expected to purchase than policyholders in the rest of the United States, a result that this Court should not allow to stand without, at a minimum, careful and considered reflection on such a dramatic change to the interests of Texas' residents. The result as it presently stands will have a far-reaching and negative impact on Texas policyholders.

PRAYER

For these reasons, *Amicus Curiae*, United Policyholders, respectfully request that this Court grant Petitioners' Motion for Rehearing.

Respectfully Submitted,

Dated: November 9, 2009

Lorena Trujillo
State Bar No. 24056454
REED SMITH, LLP
2500 One Liberty Place
1650 Market Street
Philadelphia, PA 19103
Telephone: (215) 851-8000
Fax: (215) 851-1420

John N. Ellison
Toki Rehder
Whitney D. Clymer
REED SMITH, LLP

Amy Bach
UNITED POLICYHOLDERS
222 Columbus Ave., #412
San Francisco, CA. 94133
Telephone: (415) 393-9990
Fax: (415) 677-4170

Counsel for *Amicus Curiae*
United Policyholders

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing *Amicus Curiae* Brief has been served on the following counsel of record, by certified mail, return receipt requested, on this 9th day of November, 2009.

Ernest Martin, Jr.
Micah Skidmore
HAYNES AND BOONE, L.L.P.
2323 Victory Avenue, Suite 700
Dallas, Texas 75219-7673

A. Erin Dwyer
Parker D. Young
FIGARI & DAVENPORT, L.L.P.
901 Main Street, Suite 3400
Dallas, Texas 75202

Ben Taylor
Reagan M. Brown
FULBRIGHT & JAWORSKI, LLP
2200 Ross Avenue, Suite 2800
Dallas, Texas 75201-2784

Whitney Clymer by permission
Whitney D. Clymer, Esq.
by Hal Hendrix
SBT# 1760750