U.S. Court of Appeals Docket No. 11-16272

THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHUBB CUSTOM INSURANCE COMPANY, ET AL.,
Plaintiffs/Appellants,

vs.

SPACE SYSTEMS/LORAL, INC., ET AL.,
Defendants/Appellees.

On Appeal from a Decision
of the United States District Court
for the Northern District of California,
San Jose Division
Case No. CV 09-04485 JF
The Honorable Jeremy D. Fogel, Judge

BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF APPELLEES

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CERTIFICATE OF CORPORATE DISCLOSURE

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amicus Curiae*, United Policyholders, states that it is a non-profit 501(c)(3) consumer organization, that it does not have a parent corporation, and that no publicly-traded corporation owns 10% or more of the stock of United Policyholders.

Dated: November 2, 2011

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF THE *AMICUS CURIAE*

United Policyholders ("UP") is a non-profit organization dedicated to helping preserve the integrity of the insurance system by serving as a voice and an information resource for insurance policyholders in all fifty states. United Policyholders' work is supported by donations, grants, and volunteer labor. This year marks the organization's twentieth year of service.

While much of UP's work is aimed at helping individuals and business repair, rebuild, and recover after disasters, UP monitors legal and marketplace developments affecting the interests of all policyholders and all lines of insurance. UP is frequently invited to testify at legislative and other public hearings and to participate in regulatory proceedings on rate and policy issues. UP publishes free-of-charge materials that give practical guidance on buying, coverage, and claim issues.

A diverse range of residential and commercial line policyholders throughout the United States regularly communicate their insurance concerns to UP. In turn, the organization advances policyholders' interests in courts nationwide by filing *amicus curiae* briefs in cases involving important insurance principles. UP advances the shared interest that commercial and individual policyholders have in equitable insurance practices.

UP has filed *amicus curiae* briefs on behalf of policyholders in more than 300 cases throughout the United States, including numerous cases before the United States Supreme Court[1] and the United States Court of Appeals for the Ninth Circuit.[2] UP's *amicus* brief was cited in the United States Supreme Court's opinion in *Humana, Inc. v. Forsyth*, 525 U.S. 299 (1999). Additionally, UP has been invited by several divisions of the California Court of Appeal to participate in oral argument as *amicus curiae*. Arguments from UP's *amicus curiae* brief were cited with approval by the California Supreme Court in *Vandenburg v. Superior Court*, 21 Cal. 4th 815 (1999).

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 stressed, an *amicus*

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1 *See, e.g., Cigna v. Amara*, 131 S. Ct. 1866 (2011); *Hardt v. Reliance Standard Life Ins. Co.*, 130 S. Ct. 2149 (2010); *Metro. Life Ins. Co. v. Glenn*, 128 S. Ct. 2343 (2008); *Philip Morris USA v. Williams*, 547 U.S. 1162, 126 S. Ct. 2329 (2006); *Aetna Health, Inc. v. Davila*, 540 U.S. 1175, 124 S. Ct. 1493 (2004); *FL Aerospace v. Aetna Cas. & Sur. Co.*, 498 U.S. 911, 111 S. Ct. 284 (1990); *Fuller-Austin Insulation Co., f/b/o Fuller-Austin Asbestos Settlement Trust v. Highlands Ins. Co.*, 549 U.S. 946, 127 S. Ct. 248 (2006).

2 *See, e.g., Hyundai Motor Am. v. Nat'l Union Fire Ins. Co.*, 600 F.3d 1092 (9th Cir. 2010); *Anderson v. Allstate Ins. Co.*, 45 F. App'x 754 (9th Cir. 2002); *Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928 (9th Cir. 2002); *Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814 (9th Cir. 2001); *Richards v. Lloyds of London*, 135 F.3d 1289 (9th Cir. 1998).

is often in a superior position to "focus the court's attention on the broad implications of various possible rulings."[3]

Insurance companies are in the business of earning profit through risk assumption. Among other things, permitting insurance companies to receive both a premium as well as reimbursement of any indemnification would provide insurance companies with a windfall potentially, at taxpayer expense, and would reduce the amount of money available to fund hazardous site cleanups.

No fee has been paid or will be paid for preparing this *amicus* brief.

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[3] ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 570-71 (6th ed. 1986) (*quoting* Bruce J. Ennis, *Effective Amicus Briefs*, 33 CATH. U. L. REV. 603, 608 (1984)).

BRIEF OF AMICUS CURIAE

I. SUMMARY OF ARGUMENT

Insurance companies are highly sophisticated assessors of risk. They underwrite policies and charge a premium that contemplates the possibility that they will have to defend or indemnify the policyholder in the full amount of the limits of the policy.

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") was not intended to punish owners or operators, but rather to provide funding for remediation of environmental contamination. While potentially responsible parties ("PRPs") under CERCLA are empowered to recover their "response costs" from other PRPs, insurance companies that indemnify such PRP policyholders cannot, nor should they be allowed to, offset their losses without any showing of wrongdoing.

In addition to being contrary to the legislative intent behind CERCLA and the lower Court's decision here, a rule permitting insurance companies to recover under this section of CERCLA is bad public policy for at least two reasons. First, if allowed to make such claims, insurance companies would obtain a windfall as a result of the combined receipt of invested premiums and offset of the indemnification obligation purchased by such premium. Second, unlike other

subrogation situations, the insurance companies would be availing themselves of a federal statutory scheme that permits the government to regulate the activities of PRPs. This would allow the insurance industry to "have its cake and eat it too" in a manner not envisioned by Congress. Despite standing in the shoes of the policyholder, a subrogating insurance company is not subject to government regulation as a PRP. As just one example of the potential unintended consequences of allowing private insurance companies to use CERCLA to offset their losses, an insurance company that brings a successful subrogation claim has no continuing obligation to respond to future contamination at the site. Under these circumstances, the insurance company reaps a windfall and the resources intended by Congress to address legacy environmental damage are no longer available - leaving the taxpayer and other PRPs (who may have done nothing wrong) "holding the bag."

Accordingly, United Policyholders urges this Court to uphold to opinion of the District Court and prevent the insurance industry from obtaining an unintended windfall at the expense of the environment.

II. INSURANCE COMPANIES PRICE POLICIES BASED ON THEIR POTENTIAL LIABILITY

Insurance is an agreement whereby parties give valuable consideration for protection from, and indemnification against, loss, damage, injury, or liability.

The rights and duties of the parties to an insurance contract are set forth in the insurance policy, which is a contract of adhesion.

The purpose of insurance is to insure. Insurance is a means of risk transference whereby a policyholder transfers the risk of loss or the responsibility for certain costs and expenses to an insurance company in exchange for payment of a premium.[4] American industry today faces a wide-range of business-threatening disasters. When dealing with such catastrophes—natural and man-made—businesses turn to the insurance industry to provide peace of mind and save the day - and restore their pre-catastrophe financial health. Liability insurance is purchased by virtually every business organization in the United States as protection. It covers a broad range of claims resulting from real or imagined bodily injury or property damage or financial crises. In addition, although the main objective of an insurance policy is to transfer the risk of a specified loss, an incidental benefit a policyholder obtains by shifting the risk of loss is avoidance of sustaining further losses.[5] In the absence of insurance, a policyholder may be unable to minimize the spread of contamination or be forced to sell assets to meet the liability arising from a loss.

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4 *See* ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW 11 (1988).

5 *See id.*

An insurance company is in the business of analyzing and absorbing risk. Experience cautions that corporations are exposed to major disaster about once every thirty years. Insurance companies, in contrast, are faced with claims for disasters every day. Accordingly, the insurance industry is uniquely situated to deal with the uncertainty of whether a given policyholder will sustain a loss by combining the risks of loss for many ventures of a given type into a pool. Risk is uncertainty. If all the facts about a given venture or environmental liability could be known and fully understood, it would be possible to know whether a loss would or would not occur. However, because only a fraction of the facts that affect an endeavor can ever be known, predictions about the occurrence of a potential loss inevitably are based partly on estimates or guesswork during underwriting. "This speculative aspect is generally understood as the 'element of risk' in an insurance transaction."[6] Through risk distribution, insurance companies are able to successfully and profitably manage risk of loss.

One way insurance companies profitably manage risk of loss is through "float"—the ability to invest premium, or "free money," received from policyholders. Warren Buffett, in his most recent letter to shareholders of Berkshire Hathaway, referred to the concept of "float" and noted, "This float is 'free' as long as insurance underwriting breaks even meaning that the premiums

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6 *Id.*

[received] equal the losses and expenses [incurred]."[7] "If … premiums exceed the total of … expenses and eventual losses, [insurance companies] register an underwriting profit that adds to the investment income that … float produces. When such a profit occurs, [insurance companies] enjoy the use of free money."[8] Thus, as sophisticated risk assessors, insurance companies are able to invest carefully calculated premiums, or "free money," and lose money only when the amount of invested premium (combined with any return) fails to exceed the payout of losses. Environmental insurance is underwritten by pooling risks and estimating outcomes. When an insurance company receives a windfall, resources that could properly be brought to bear elsewhere are directed to provide added float income. Where there is no wrongdoing on the part of a third party, to expect that third party to offset a loss already paid and accounted for by the insurance industry stands the concept of equitable subrogation on its head.

Appellant Chubb Custom Insurance Company ("Chubb") has neither shown any Congressional intent that would support its position nor an entitlement to its interpretation pursuant to the language of the policy at issue. Having evaluated the risk and taken premiums to accept it, Chubb should not now be allowed to float that risk at the expense of other PRPs.

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7 *See* Letter from Warren Buffett to Shareholders of Berkshire Hathaway, Inc., at 6 (Feb. 26, 2011), *available at* http://www.berkshirehathaway.com/letters/2010ltr.pdf.

8 *Id.* at 10.

III. CONSTRUING INSURANCE COMPANIES AS "ANY OTHER PERSON" UNDER CERCLA WOULD RESULT IN A WINDFALL FOR THE INSURANCE INDUSTRY AND FURTHER COMPLICATE CLEANUP EFFORTS

Under CERCLA, potentially responsible parties are liable for "(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; [and] (B) any other necessary costs of response incurred by any other person consistent with the National Contingency Plan." 42 U.S.C. 9607(a)(4)(A)-(B) (emphasis added). The United States District Court for the Eastern District of California, in a decision directly on point, has held that "the phrase 'any other person' does not include insurers who have no responsibility to engage in remediation by virtue of the statute." *California Dept. of Toxic Substances Control v. City of Chico*, 297 F. Supp. 2d 1227, 1232 (E.D. Cal. 2004) ("*City of Chico*"). Any contrary interpretation will result in a windfall for insurance companies and will add "yet another layer of parties and issues to the litigation, thus complicating the litigation." *City of Chico*, 297 F. Supp. 2d at 1235.

Appellants, however, would have this Court interpret "any other person" to include an insurance company that indirectly pays for remediation based on a claim filed by a policyholder. This interpretation oversimplifies the situation and ignores the contractual obligations of the insurance company vis-à-vis the policyholder. In making their arguments, Appellants make frequent reference to

United States v. Atlantic Research Corp., 127 S. Ct. 2331 (2007) ("*Atlantic Research*"). In *Atlantic Research*, the Supreme Court held that the phrase "any other person" "authorizes cost-recovery actions by any private party." *See id.* at 2336. The Supreme Court, however, did not analyze the language in the context of whether it applied to an insurance company, as required in the present context. The issue, however, was specifically addressed in *City of Chico*, and the *City of Chico* Court clearly articulated the manner in which a pro-insurance company construction would subvert the purposes of CERCLA. There is no basis to overturn the lower Court's decision.

In *City of Chico*, the Court based its holding on the narrow issue of whether insurance companies constitute "any other person" under CERCLA and held that they did not. The Court unequivocally held that, "Read within the statutory context, the phrase 'any other person' does not include insurers who have no responsibility to engage in remediation by virtue of the statute." 297 F. Supp. 2d. at 1232. "The reason for this is straightforward; the statute provides for three different forms of recovery, and [the insurance company's] rights are provided for under a section other than § 9607." *Id.*

If insurance companies were considered "any other person" for purposes of CERCLA § 9607(a)(4)(B), then they would receive a windfall, the legislative intent behind CERCLA would be undermined, and valuable dollars that

could have assisted remediation efforts would be diverted instead to increase profits of insurance companies at the expense of owner/operators who may have done nothing wrong.

Here, policyholder Taube-Koret Campus for Jewish Life paid premiums to Chubb to cover exactly the type of loss suffered as a result of the requirement to remediate contaminated property. As is the nature of insurance, Chubb assumed the risk that it would have to pay on the policy, and received premium payments to compensate it for assuming that risk. If Chubb was deemed to be "any other person," with the correlated right to recover under § 107, Chubb could potentially be compensated for the money it contractually paid out on the policy in addition to the premium Chubb received. As a consequence, Chubb would be paid by a party other than the policyholder for a risk that Chubb took. Such a scheme undermines CERCLA, which was designed to promote cleanup and remediation,[9] not to provide a mechanism through which insurance companies can be unduly rewarded.

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[9] "Congress enacted CERCLA, 42 U.S.C. Secs. 9601-9675, in December, 1980, to initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites. Congress intended that CERCLA facilitate the prompt cleanup of hazardous waste sites by placing the ultimate financial responsibility for cleanup on those responsible for hazardous wastes." *Washington State Dept. of Transp. v. Washington Natural Gas Co.*, 59 F.3d 793, 799 (9th Cir. 1995) (internal citations and quotations omitted).

IV. UPHOLDING THE DECISION OF THE LOWER COURT WILL NOT AFFECT THE MARKET FOR ENVIRONMENTAL INSURANCE PRODUCTS

The brief of *Amicus Curiae* Chartis Specialty Insurance Company suggests that the lower Court's decision undermines the economic underpinnings of the insurance industry and that affirming the lower Court's decision "will have a detrimental effect on the availability of insurance used (directly or indirectly) to fund remediation." Chartis Br. at 30. On the contrary, the market for environmental insurance is robust and will not change as a result of this Court's decision. In fact, the insurance industry continues to post record profits and the number of companies selling "environmental" insurance continues to grow exponentially.

Since its introduction in the mid-1970s, the environmental insurance market has grown rapidly, and continues to do so today, despite economic challenges. Multiple sources confirm the strength of this market. "The environmental insurance market place continues to experience exceptional organic growth rates averaging between ten and fifteen percent annually[,] which is in sharp contrast to the three percent underlying organic growth rate of the traditional property and liability insurance market."[10] Despite an economic recession, "many

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[10] David J. Dybdhal, *American Risk Management Resources Network*, Environmental Risks and Insurance Market Place Update (2009), *available at* http://www.armr.net/EnvMar3-2009.pdf.

of the major environmental carriers are reporting increases in new business premium volume and growth in renewal premiums."[11] This remains true at present as "2010 saw a rapid expansion of the environmental insurance market in the face of daunting conditions."[12]

Not only are profits growing, but so is the number of companies providing environmental insurance. In 1990, there were four such companies; in 2000, there were nearly ten; and by 2010, there were at least forty, resulting in a "[o]ne thousand percent growth over twenty years."[13] More and more companies would not be providing environmental insurance if the market was not profitable. In fact, it is the environmental insurance market, and its strength, that is helping insurance companies bolster profits at a time when other insurance sectors and investments are declining in profitability. Indeed, "while there are exceptions in certain areas, the general consensus is that environmental risks are more profitable than many other mature market segments."[14]

The reasons for the growth of this market make it likely that that growth will continue: "A gradually increasing demand for these products is

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11 Willis, *Marketplace Realities & Risk Management Solutions*: Environmental (2010), *available at* http://www.willis.com/documents/publications/Services/Environmental/Marketplace_Realities_2010-Environmental.pdf.

12 William Pritchard Jr., *Pollution Solution*, AMERICAN AGENT & BROKER (2011).

13 *Id.*

14 *Id.*

expected to continue."[15] Because there is "a growing national awareness of environmental exposures,"[16] more policyholders are likely to purchase environmental insurance coverage. "The potential for a significant environmental event impacting a business or property is no longer perceived as a long shot."[17] In addition, by developing pollution exclusion language, the insurance industry has expanded the market for specialty environmental coverage. In other words, by "recognizing how broad the standard definition of a pollutant is," policyholders will seek environmental insurance coverage because of an awareness "of what might be a 'pollution' problem that was not expected to be one."[18]

Precluding insurance companies from recovering under CERCLA § 9607(a)(4)(B) will not affect the continued growth of this market. The growth of the market is attributed to the collection of premiums and the small likelihood of having to pay claims, rather than in a belief that insurance companies can recover monies paid to indemnify policyholders by subrogating against other contributors of cleanup resources. The environmental insurance market is, in fact, performing better than many other insurance markets, bringing in large profits for insurance

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15 William Pritchard Jr., *Awareness Prompts Growth for Environmental Insurance*, AMERICAN AGENT & BROKER (2010).

16 *Id.*

17 *Id.*

18 *Id.*

companies. To allow them to recover under CERCLA will only unjustly enrich insurance companies, and will come at the expense of actual cleanups and other contributors. This is not what Congress intended.

CONCLUSION

For the foregoing reasons, United Policyholders respectfully requests that this Court affirm the decision of the lower Court.

Dated: November 2, 2011

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STATEMENT OF *AMICUS CURIAE*

Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, I hereby certify:

A. a party's counsel did not author the brief in whole or in part;

B. a party or a party's counsel did not contribute money that was intended to fund preparing or submitting the brief; and

C. a person - other than the *Amicus Curiae*, its member, or its counsel - did not contribute money that was intended to fund preparing or submitting the brief.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations set forth in Rules 29(d) and 32(a)(7)(B) of Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font and contains 3766 words.

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of November, 2011, I electronically filed the foregoing *Amicus Curiae Brief of United Policyholders in Support of Appellees,* with the Clerk of the Court of the United States Court of Appeals by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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