

CASE NO. 10-10960 - GG

IN THE UNITED STATES COURT OF APPEAL
FOR THE ELEVENTH CIRCUIT

AMELIA ISLAND COMPANY, Appellant,

COPY

v.

AMERISURE MUTUAL INSURANCE COMPANY
and AMERISURE INSURANCE COMPANY, Appellees.

On Appeal From the United State District Court
for the Middle District of Florida

NATIONAL ASSOCIATION OF HOME BUILDERS,
FLORIDA HOME BUILDERS ASSOCIATION AND UNITED
POLICYHOLDERS' MOTION TO APPEAR AND FILE BRIEF AS
AMICI CURIAE IN SUPPORT OF APPELLANT FOR REVERSAL

David K. Miller, P. A. (FB#213128)
Broad and Cassel
215 South Monroe Street, Suite 400
Tallahassee, FL 32301
Telephone: (850) 681-6810
Facsimile: (850) 521-1448

Mark A. Boyle, Sr., Esq. (FB#0005886)
Boyle & Gentile, P.A.
2050 McGregor Boulevard
Fort Myers, Florida 33901
Telephone: (239) 337-1303
Facsimile: (239) 337-7674

Keith Hetrick, Esq. (FB#0564168)
Florida Home Builders Association
201 East Park Avenue
Tallahassee, FL 32301
Telephone: (850) 224-4316
Facsimile: (850) 224-7933

Michael F. Huber, Esq. (FB#765171)
Ver Ploeg & Lumpkin, P.A.
100 S.E. 2nd Street, 30th Floor
Miami, FL 33131
Telephone: (305) 577-3996
Facsimile: (305) 577-3558

CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

Movants (seeking to appear as *Amici*), the Florida Home Builders Association and National Association of Home Builders, pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1 through 26.1-3 and 27-1, certify that the following is a complete list of the trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations known to Movants that have an interest in the outcome of the particular case or appeal, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock and other identifiable legal entities related to a party:

1. Amelia Island Company, Defendant/Appellant;
2. Amerisure Insurance Company, Plaintiff/Appellee;
3. Amerisure Mutual Insurance Company, Plaintiff/Appellee;
4. Bachara, Henry G., Jr., Esq., Counsel for Appellant;
5. Bachara Construction Law Group, P. A., Counsel for Appellant;
6. Boyle, Mark A., Sr., Esq., Counsel for Amicus Curiae;
7. Boyle & Gentile, P.A., Counsel for Amicus Curiae;
8. Broad and Cassel, Counsel for Amicus Curiae;

9. Caven, John, Esq., Registered Agent for Auchter Company;
10. Corrigan, The Honorable Timothy J., United States District Judge, Middle District of Florida;
11. Creed, Rebecca Bowen, Esq., Counsel for Appellant;
12. Elder, Donald E., Esq., Counsel for Appellee;
13. Florida Home Builders Association, Amicus Curiae;
14. Hassell, F. Bradley, Esq., Counsel for Appellees;
15. Hassell, Moorehead & Carroll, P.A., Counsel for Appellees;
16. Hetrick, Keith, Esq., General Counsel for Amicus Curiae, Florida Home Builders Association;
17. Huber, Michael F., Esq., General Counsel for Amicus Curiae, United Policyholders;
18. Jaffe, David S., Esq., General Counsel for Amicus Curiae, National Association of Home Builders;
19. Markey, Bradley R., Esq., Bankruptcy Counsel for Appellant;
20. Miller, David K., P.A., Counsel for Amicus Curiae;
21. Mills Creed & Gowdy, P.A., Counsel for Appellant;
22. Morris, The Honorable Thomas E., United States Magistrate Judge, Middle District of Florida;
23. National Association of Home Builders, Amicus Curiae;
24. Sears, Julie G., Esq., Counsel for Appellant;

25. Smith, Thomas C., Esq., Counsel for Appellees;
26. Stutsman, Thames and Markey, P.A., Bankruptcy Counsel for Appellant;
27. Thames, Richard R., Esq., Bankruptcy Counsel for Appellant;
28. The Auchter Company, Defendant;
29. Tressler LLP, Counsel for Appellee;
30. United Policyholders, Amicus Curiae; and
31. Ver Ploeg & Lumpkin P.A., Counsel for Amicus Curiae.

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

COME NOW, the Movants, the National Association of Home Builders (NAHB), Florida Home Builders Association (FHBA) and United Policyholders (UP), by and through their undersigned counsel, pursuant to Federal Rules of Appellate Procedure 29 and Eleventh Circuit Rule 29-1, move for leave to appear as *amici curiae* and submit a joint brief in support of the Appellant, Amelia Island Company, seeking reversal of the District Court's ruling on the following issue:

Whether, under Florida law applying the standard 1986 form Commercial General Liability (CGL) policy containing products-completed operations hazard coverage, a carrier must cover an insured contractor's liability for property damage occurring after the structure is complete, when such damage is caused by a subcontractor's defective work installing non-defective materials, which results in damage to these materials and to the functionality of the structure, requiring repair or replacement to correct the damage and avoid further damage. Amici would answer this issue in the affirmative, in favor of coverage, contrary to the District Court's ruling.

In support thereof, the Movants state as follows:

1. NAHB, FHBA and UP each have substantial interests in this matter.
2. NAHB is a non-profit professional and trade association whose mission is to enhance the climate for housing and the building industry. NAHB's goals are to promote home ownership; foster a healthy and efficient housing industry; and, promote policies that will keep safe, decent, and affordable housing a national priority. NAHB's membership is comprised of more than eight

hundred (800) state and local building associations representing over one hundred seventy-five thousand (175,000) members throughout all fifty (50) states, the District of Columbia, and Puerto Rico. One-third of NAHB's members are home builders and/or remodelers. The remaining members are associates working in closely related fields within the housing industry, such as mortgage finance and building products and services. NAHB's builder members construct about 80 percent of the new homes built each year in the United States. NAHB's website is www.nahb.org.

3. FHBA is an affiliate of NAHB and shares its goals and objectives. FHBA is a nonprofit professional and trade association representing approximately nine thousand (9,000) corporate members who are involved in Florida's home building and remodeling industry. FHBA's affiliate members include all twenty-eight (28) local home builders associations in Florida. The FHBA has appeared as *amicus* in many Florida cases related to the construction industry and has standing in its own right to represent members in certain types of actions. See Florida Home Builders Ass 'n v. Dept. of Labor and Empl. Security, 412 So. 2d 351 (Fla. 1982).

4. UP is a national nonprofit 501(c)(3) organization dedicated to helping solve insurance problems and advocating for individual and commercial insurance consumers. The organization serves Florida residents and

businesses through three programs: Roadmap to Preparedness (encouraging disaster loss reduction through mitigation and proper insurance), Roadmap to Recovery, (helping consumers secure full and timely insurance settlements so as to be able to recover from adverse and catastrophic events), and the Advocacy & Action program (advocating for insurance consumers through *amicus curiae* briefs, legislative advocacy and participation in the National Association of Insurance Commissioners). For more information, visit www.unitedpolicyholders.org.

5. This appeal involves the interpretation of the standard 1986 Commercial General Liability (CGL) insurance policy, which is commonly purchased by home builders and related trades in Florida and nationwide.
6. This Court is being asked to decide whether the standard CGL policy, which includes "products completed operations hazard" coverage, provides coverage to a general contractor who is sued for faulty work done by a subcontractor.
7. The Florida Supreme Court recently decided similar issues in United States Fire Ins. Co. v. JSUB, Inc., 979 So. 2d 871 (Fla. 2007); and Auto-Owners Ins. Co. v. Pozzi Window Co., 984 So. 2d 1241 (Fla. 2008) (revised opinion, resolving certified question from this Court), 294 Fed. Appx. 588 (11th Cir.

- 2008) (deciding case based on Florida Supreme Court's revised opinion).
8. FHBA appeared as *amicus* in both these leading cases, in the Florida Second District Court of Appeal and the Florida Supreme Court in JSUB; and in this Court and the Florida Supreme Court in Pozzi.
 9. NAHB appeared with FHBA as *amicus* in this Court and the Florida Supreme Court, and has also appeared as *amicus* on these issues in appellate cases nationwide.
 10. The United States Supreme Court and Appellate courts throughout the country consider and often adopt insurance principles that are advocated in UP *amicus* briefs.
 11. In JSUB, both the Second District and the Florida Supreme Court found the organizations' *amicus* briefs sufficiently helpful to merit express reference in the opinion deciding the case in favor of the insured party. See JSUB, Inc. v. United States Fire Ins. Co., 906 So. 2d 303, 310 (Fla. 2d DCA 2005) and JSUB, 984 So. 2d at 885.
 12. FHBA and NAHB have also recently appeared as *amici* in cases on other issues, both before this Court, Publiese v. Pukka Development, Inc., 550 F.3d 1299 (11th Cir. 2008) and in the state appellate court, where FHBA's *amicus* argument persuaded the court to grant rehearing based on new authority, Home Devoc/Tivoli Isles LLC v.

Silver, 26 So. 3d 718 (Fla. 4th DCA 2010).

13. If allowed to appear, the organizations plan to provide the Court not only with analysis of the JSUB and Pozzi cases; but also citations to Insurance Service Office (ISO) publications (cited by the Florida Supreme Court in JSUB) and scholarly works showing the history and intent of the standard CGL form, analysis of case precedents from other jurisdictions showing the trend in the courts, and analysis of policy arguments concerning the proper scope of coverage. Such arguments would not duplicate arguments of the appellant (the supported party).
14. This Court frequently grants leave to trade associations to appear as *amici* in cases involving issues of general interest to their members. This Court has discretion to allow NAHB, FHBA and UP to appear and argue legal issues that will have widespread impact on their members. The matters presented to this Court will have a very significant impact on the construction industry. NAHB, FHBA and UP are uniquely qualified, as representatives of the residential construction industry, to represent the interest of insured builders. Further, both the organizations have knowledge of the legal issues raised in the present proceeding, having appeared as *amici* in the leading Florida cases and other cases related to these issues, and can aid the Court in rendering a decision on the issues

presented.

15. Counsel for Appellant, Amelia Island Company, and Appellees, Amerisure Mutual Insurance Company and Amerisure Insurance Company, have been contacted in accordance with the Court's rules. Appellant Amelia Island Company has no objection to this Motion. Appellees do object to this Motion.

WHEREFORE, the National Association of Home Builders, Florida Home Builders Association and United Policyholders request this Court enter an Order allowing them to appear as *amicus curiae* and submit a joint brief in support of Appellant.

Respectfully submitted,



Counsel for *Amici*.

Florida Home Builders Association, National Home Builders Association and United Policy Holders

David K. Miller, P. A. (FB#213128)
Broad and Cassel
215 South Monroe Street, Suite 400
Tallahassee, FL 32301
Telephone: (850) 681-6810
Facsimile: (850) 521-1448

Mark A. Boyle, Sr., Esq. (FB#0005886)
Boyle & Gentile, P.A.
2050 McGregor Boulevard
Fort Myers, Florida 33901
Telephone: (239) 337-1303
Facsimile: (239) 337-7674

Keith Hetrick, Esq. (FB#0564168)
Florida Home Builders Association
201 East Park Avenue
Tallahassee, FL 32301
Telephone: (850) 224-4316
Facsimile: (850) 224-7933

Michael F. Huber, Esq. (FB#765171)
Ver Ploeg & Lumpkin, P.A.
100 S.E. 2nd Street, 30th Floor
Miami, FL 33131
Telephone: (305) 577-3996
Facsimile: (305) 577-3558


CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been provided via U.S. Mail to the following persons on this 15th day of June, 2010:

F. Bradley Hassell, Esq.
Thomas C. Smith, Esq.
Hassell, Moorhead & Carroll
Post Office Box 2229
149 S. Ridgewood Avenue, Suite 301
Daytona Beach, FL 32115-2229
Attorneys for Appellees

Rebecca Bowen Creed, Esq.
Mills Creed & Gowdy, P.A.
865 May Street
Jacksonville, FL 32204
Attorneys for Appellant

Henry G. Bachara, Jr., Esq.
Julie G. Sears, Esq.
Bachara Construction Law Group, P.A.
One Independent Dr., Suite 1800
Jacksonville, FL 32202
Attorneys for Appellant



Mark A. Boyle, Sr., Esq. (FB#0005886)
Boyle & Gentile, P.A.
2050 McGregor Boulevard
Fort Myers, Florida 33901
Telephone: (239) 337-1303
Facsimile: (239) 337-7674
Counsel for *Amici*:
Florida Home Builders Association,
National Home Builders Association and
United Policy Holders