

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MEDALLION INDUSTRIES, INC. an
Oregon Corporation,

Plaintiff-Appellant

C.A. No. 97-35317

v.

ATLANTIC MUTUAL INSURANCE COMPANY,

Defendant-Appellee

BRIEF OF AMICUS CURIAE, UNITED POLICYHOLDERS

Appeal from the Judgment of the United States
District Court for the District of Oregon
Before the Honorable Donald C. Ashmanskas, Judge
Trial Court File 96-1615-AS

Jordan S. Stanzler, CSB No. 54620
John A. MacDonald PASB No. 47892
Deborah Mongan, CSB No. 172295
ANDERSON KILL & OLICK, P.C.
Citicorp Center
One Sansome Street, Suite 1610
San Francisco, California 94104
415-677-1450

Amy S. Bach, Esq.
United Policyholders
Citicorp Center
1 Sansome Street, Suite 1610
San Francisco, California 94104
Telephone: (415) 393-9990

Attorneys for Amicus Curiae, United Policyholders

I. INTEREST OF AMICUS CURIAE

Amicus curiae United Policyholders ("United Policyholders" or "Amicus") is a non-profit corporation dedicated to educating policyholders about their rights and duties under their insurance policies. United Policyholders' activities include organizing meetings, distributing written materials, and responding to requests for information from individuals, elected officials, and governmental entities. United Policyholders also seeks to file amicus curiae briefs in insurance coverage cases of public importance and its amicus curiae briefs have been accepted by federal and state appellate courts across the country. These activities are limited only to the extent that United Policyholders exists exclusively on donated labor and contributions of services and funds.

Amicus curiae has a vital interest in seeing that the standard form liability insurance policies sold to countless policyholders, including policyholders in Oregon, are interpreted properly and consistently by insurance companies and the courts. As a public interest organization, United Policyholders seeks to assist and to educate the public and the courts on policyholders' insurance rights and their efforts to have them enforced throughout the country. Thus, United Policyholders has a direct and vital interest in the resolution of the issue of the scope of the "duty to defend" under insurance policies in Oregon.

II. STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Amicus curiae incorporates and relies on the Statement of Subject Matter and Appellant Jurisdiction of of Appellant.

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

Amicus curiae incorporates and relies on the Statement of Issues Presented for Review of Appellant.

IV. STATEMENT OF THE CASE

Amicus curiae incorporates and relies on the Statement of the Case of Appellant.

V. SUMMARY OF ARGUMENT

This appeal involves the important question of whether, under Oregon law, public policy prevents an employer that is charged with sexual harassment, either directly or through vicarious liability for the acts of its employees, from securing a defense under its insurance policy. The district court below answered yes to this question. In doing so, it followed a thirty-five-year-old Oregon Supreme Court decision that suggested that a person could not recover under its insurance contract for liability imposed for its intentional misconduct. See Isenhardt v. General Casualty Co., 233 Or. 49, 53 (1962) ("Isenhardt"). This doctrine is known as the doctrine or public policy against insurability.

The underlying complaint in this action charged plaintiff-appellant Medallion Industries, Inc. ("Medallion") with liability for the alleged sexual harassment and constructive discharge of one its employees, Hurd, resulting from the actions of