

NO. 05-06-00986-CV

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IN THE COURT OF APPEALS  
FIFTH DISTRICT OF TEXAS AT DALLAS

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Mesa Operating Co. and Hugoton Capital Limited  
Partnership,

Appellants

vs.

California Union Insurance Company

Appellee

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BRIEF OF AMICUS CURIAE  
UNITED POLICYHOLDERS

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INTEREST OF AMICUS CURIAE

United Policyholders is a public interest organization formed in 1991. United Policyholders is incorporated as a not-for-profit educational organization and has tax exempt status under §501(c)(3) of the Internal Revenue Code. United Policyholders is funded by donations and grants, and has received thousands of donations from individuals and businesses, most of which range between \$25 and \$100. The fee for a basic membership in United Policyholders is \$35.00. United Policyholders' address is 110 Pacific Avenue, No. 262, San Francisco, California 94111.

United Policyholders' mission is to educate the public, legislators and the courts on insurance issues and consumer rights, and to assist policyholders in securing prompt and fair insurance settlements. United Policyholders provides educational materials, provides speakers at community and government forums, organizes meetings in disaster areas, and acts as a clearing house for information on insurance issues.

To this end, after a disastrous firestorm that destroyed over three thousand structures in Oakland and Berkeley Hills, California, in 1991, United Policyholders sponsored meetings, workshops, and seminars for the victims, and worked with local officials, insurers and relief agencies to facilitate claim settlements. United Policyholders has repeated this process in Florida for victims of Hurricane Andrew, in Texas, for victims of the Northridge Earthquake, and in Northern California, for victims of a wildfire.

United Policyholders also publishes a newsletter for insurance consumers, entitled What's UP, which is devoted to matters of general interest to insurance consumers. The newsletter is mailed to thousands of interested parties. Information obtained from accompanying surveys to United Policyholders' members is provided to legislators, courts, and other consumer groups.

United Policyholders also files amicus curiae briefs across the country on matters. United Policyholders amicus curiae activities depend upon donated labor and services. United Policyholders' amicus curiae briefs have been accepted by courts throughout the country. See e.g., Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Farmland Mut. Ins. Co., 568 N.W.2d 815 (Iowa 1997); Guaranty Nat'l Ins. Co. v. George, 953 S.W.2d 946 (Ky. 1997); Western Alliance Ins. Co. v. Gill, 686 N.E.2d 997 (1997); Town of Harrison v. Nat'l Union Fire Ins. Co., 675 N.E.2d 829 (N.Y. 1996).

United Policyholders is so highly regarded that the California Court of Appeals recently specifically solicited United Policyholders to file an amicus curiae brief and then to participate in an insurance coverage case with important public policy considerations. The Court of Appeals then invited United Policyholders to participate in oral argument. (The Downey Venture v. LMI Ins. Co., 2 Civ. B106304 (Cal. Ct. App. 1998).

United Policyholders has an interest in this appeal as the outcome will affect the rights of thousands of Texas policyholders. United Policyholders asserts that the position

taken by both of the parties herein on the trigger of coverage issue is incorrect and detrimental to the interest of Texas policyholders at large.

SUMMARY OF ARGUMENT

The "sudden and accidental" exclusion at issue herein incorporates an insurance term of art, "sudden and accidental," that had an established meaning in the insurance industry of "unexpected and unintended." "Sudden and accidental" was incorporated into pollution exclusions with the intent that it have this meaning.

Under Texas law, a court should consider evidence of the insurance regulators' intent when interpreting standard-form provisions approved by and prescribed by the State Board of Insurance. The evidence presented in this brief demonstrates that the insurance industry represented and the State Board of Insurance understood the "sudden and accidental" exclusion, clarify, but not reduce, existing insurance coverage for pollution damages that were neither expected nor intended. The insurance company herein should be regulatorily and judicially estopped from contradicting official representations made to the State Board of Insurance.

The insurance policy at issue herein, like all similar "occurrence" policies has what is known as a "continuous" trigger of coverage that extends from the moment of first injurious or damaging exposure through all policy periods during which bodily injury or property damage occurred or progressed. The manifestation trigger urged by Mesa Operating and the injury-in-