

**THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

MATTHEW GRAYSON,
Plaintiffs/Appellants,

vs.

ALLSTATE INSURANCE COMPANY, ET AL.,
Defendants/Appellees.

On Appeal from a Decision
of the United States District Court
for the Central District of California
Case No. CV 13-05324 BRO (JCGx)
The Honorable Beverly Reid O'Connell, Judge

**MOTION FOR LEAVE TO FILE A BRIEF OF
AMICUS CURIAE UNITED POLICYHOLDERS IN
SUPPORT OF APPELLANT GRAYSON**

Amy Bach, Esq. (CA #142029)
Daniel Wade, Esq. (CA #296958)

UNITED POLICYHOLDERS

381 Bush Street, 8th Floor
San Francisco, CA 94104
Telephone: 415-393-9990

Amy.bach@uphelp.org

Dan.wade@uphelp.org

Attorneys for Amicus Curiae United Policyholders

MOTION FOR LEAVE TO FILE A BRIEF OF AMICUS CURIAE

Pursuant to F.R.A.P. 29(a) and Circuit Rule 29-2, United Policyholders (“UP”) hereby moves this Court for an order allowing UP to file an *amicus curiae* brief in support of appellant Grayson. The motion and the attached proposed *amicus curiae* brief are being filed well within the seven-day deadline set forth in Circuit Rule 29-2(e)(1). UP sought the consent of Allstate’s counsel on November 6, 2014 but received no response, making this motion necessary.

This Court has broad discretion to allow amicus status to a party with a valid interest and timely, relevant information. *Gerritsen v. De La Madrid Hurtado*, 819 F.2d 1511, 1514 n. 3 (1987). Courts generally exercise liberality in granting amicus status when, as here, the matter is one of public concern. S. Thomas, *Corpus Juris Secundum*, “Amicus Curiae,” §3 (2012); see *Neonatology Associates, P.A. v. Commissioner of Internal Revenue*, 293 F. 3d 128, 133 (3rd Cir. 2002) (opinion by Circuit Judge Samuel Alito: “skeptical scrutiny of proposed amicus briefs may equal, if not exceed, the time that would have been needed to study the briefs at the merit stage if leave had been granted”).

UP submits this brief of amicus curiae in support of Appellant Grayson and asks this Court to reverse the District Court’s Order granting summary judgment in favor of Allstate Insurance Company (“Allstate”). Allstate engaged in

conduct during settlement negotiations was inconsistent with its legal duties to its insured. Those duties clearly required Allstate to head off litigation against its insured by accepting underlying plaintiff Grayson's policy limits settlement demand. By counter-offering, Respondent Allstate caused settlement negotiations to fail, and in so doing, breached the covenant of good faith and fair dealing implied in all insurance contracts.

INTEREST OF THE PROPOSED AMICUS CURIAE

UP is a non-profit organization that is a voice and an information resource for policyholders in all 50 states and dedicated to maintaining integrity and fairness in insurance transactions. UP's work is supported by donations, grants, and volunteer labor. UP does not sell insurance or accept funding from insurance companies. Much of Up's work gives individuals and businesses guidance and tools for buying suitable insurance and repairing, rebuilding, and recovering after disasters through its *Roadmap to Preparedness* and *Roadmap to Recovery* Programs. UP also engages with regulators, public officials, academics, and various stakeholders in legal and marketplace developments matters relevant to all policyholders and all lines of insurance. UP is an official consumer representative to the National Association of Insurance Commissioners where claims handling rules and the duty of good faith and fair dealing are routinely discussed.

A diverse range of individual and commercial policyholders throughout

the United States regularly communicate their insurance concerns to UP which allows UP to submit amicus curiae briefs to assist state and federal courts in deciding cases involving important insurance principles. UP has filed more than 360 cases throughout the United States since the organization's founding in 1991. UP's amicus curiae brief was cited in the United States Supreme Court's opinion in *Humana, Inc. v. Forsyth*, 525 U.S. 299 (1999). 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).

UP has been assisting policyholders, regulators and courts since the organization was founded in 1991 after the Oakland-Berkeley Hills Firestorm. Accordingly, 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).

WHY AN AMICUS CURIAE BRIEF IS DESIRABLE AND RELEVANT

It is fundamentally true that insurers "hold the cards" during settlement negotiations and have substantial power to affect the outcome. Both tortfeasors and loss/accident victims rely on the tortfeasor's insurance company to cooperate and pay valid claims and refrain from exploiting their economic power to place their financial interests above their insureds'.

But because that perennial conflict exists: (to an insurer, the paramount purpose of selling their product is to generate revenues to support a profitable, solvent business enterprise, while to the insured, the economic safety net function of insurance is paramount), California law imposes duties upon insurers that are higher than those imposed on their commercial peers. As the California Supreme Court stated in the seminal insurance case: “[I]nsurers’ obligations are...rooted in their status as purveyors of a vital service labeled quasi-public in nature. Suppliers of services affected with a public interest must take the public’s interest seriously, where necessary placing it before their interest in maximizing gains and limiting disbursements...[A]s a supplier of a public service rather than a manufactured product, the obligations of insurers go beyond meeting reasonable expectations of coverage. The obligations of good faith and fair dealing encompass qualities of decency and humanity inherent in the responsibilities of a fiduciary.” (citations omitted) *Egan v. Mut. of Omaha Ins. Co.*, 620 P.2d 141, 146 (Cal. 1979).

In addition to California, the U.S. Supreme Court has recognized the special nexus between the business of insurance and the public interest for almost 80 years. *See, e.g., Cal. State Auto. Ass’n Inter-Ins. Bureau v. Maloney*, 341 U.S. 105, 109-10 (1951) (insurance has always had special relation to government); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 415-16 (1946) (“[insurance] business affected with a vast public interest”); *Robertson v. California*, 328 U.S..

440, 447 (1946); *United States. v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 540 at n.14 (1944) (“evils” in the sale of insurance “vitally affect the public interest”); *Osborn v. Ozlin*, 310 U.S. 53, 65 (1940) (“Government has always had a special relation to insurance.”); *O’Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251, 257 (1931) (“The business of insurance is so far affected with a public interest that the State may Regulate the Rates”).

As such, insurance is a unique product imbued with state public policy concerns. California law recognizes that consumers purchase it for peace of mind. Whether the insurance is for property, liability, or health, the basic idea for its existence and purpose remains the same: recovery for loss and coverage for financially catastrophic events. Consumers do not purchase insurance with the expectation that they will find themselves in litigation with an injured party because their insurer breached its duty of good faith and fair dealing.

In this case, Allstate breached its duty of good faith and fair dealing owed to its insured, Peper, when it rejected an injured party’s settlement demand and sent a counter-offer that sought a release of all claims – *knowing that the demand did not contemplate a full release*. The District Court correctly found that this was not a “mirror image” acceptance and thus, instead, was a rejection and counter-offer – a violation of basic tenets of contract law, but more importantly, here, a violation of Peper’s rights as an insured, and more broadly, the public trust.

In effect, the insurer tried to broaden the scope of the release and hoped the injured party, Grayson, would not notice. He did. The District Court incorrectly held that this did not amount to a breach of the covenant of good faith and fair dealing. However, California law is clear that the duty of good faith and fair dealing includes the duty to accept, in the mirror image, reasonable settlement offers and a breach of this duty subjects an insurer to liability for an excess judgment rendered against its insured in resulting litigation.

Accordingly, for the reasons set forth above, UP respectfully requests that the Court grant UP's Motion for Leave to File a Brief of *amicus curiae*.

Dated: December 30, 2014

/s Daniel Wade

Daniel R. Wade, Esq.
UNITED POLICYHOLDERS
381 Bush Street, 8th Floor
San Francisco, CA 94104
Dan.wade@uphep.org; 415-393-9990

Attorneys for United Policyholders

CERTIFICATE OF SERVICE

I, Daniel R. Wade, declare:

I am employed in San Francisco, California. I am over the age of 18 and not a party to this action; my business address is 381 Bush Street, 8th Floor, San Francisco, CA 94104, Telephone: 415-393-9990, email: dan.wade@uphelp.org

I certify that on December 30, 2014, I caused the attached MOTION FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF APPELLANT GRAYSON to be electronically submitted to the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I declare that all participants in the case are registered CM/ECF users and that service of this document will be accomplished by the appellate CM/ECF system.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct, and I am employed in the office of a member of the bar of this Court at whose direction this service was made.

Executed on December 30, 2014, in the city of Oakland, California.

Daniel R. Wade

s/Daniel R. Wade