
SUPREME COURT OF THE STATE OF CONNECTICUT

S.C. 19291

RECALL TOTAL INFORMATION MANAGEMENT, INC., ET AL.
V.
FEDERAL INSURANCE COMPANY, ET AL.

APPLICATION OF UNITED POLICYHOLDERS FOR PERMISSION TO APPEAR AS, AND
FILE A BRIEF OF, *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS'
BRIEF ON THE MERITS

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Pursuant to Rule 67-7 of the Connecticut Rules of Appellate Procedure, United Policyholders respectfully requests permission to appear as *amicus curiae* and file an *amicus curiae* brief in this action in support of Plaintiffs-Appellants Recall Total Information Management, Inc. and Executive Logistics Services, Inc.

BRIEF HISTORY

On or about July 24, 2009, Plaintiffs-Appellants filed an action against Defendant-Appellees alleging, among other things, breach of contract based upon obligations assumed in the insurance policies under which Plaintiffs'-Appellees were insured. On or about January 17, 2012, the Connecticut Superior Court, Complex Litigation Docket at Hartford released a decision granting the Defendant insurance companies' Motion for Summary Judgment on the breach of insurance contract issue. The Plaintiffs-Appellants appealed to the Connecticut Appellate Court, claiming that the trial court erred in concluding that (1) the defendants did not have a duty to defend, and (2) the losses associated with a data-loss incident were not personal injuries covered by the insurance contract. On January 14, 2014, the Appellate Court released its decision affirming the trial court's grant of summary judgment in favor of the insurance companies. Plaintiffs-Appellants filed a Petition for Certification to this Court, which Petition was granted on March 5, 2014, limited to the following issue: "Did the Appellate Court properly affirm the trial court's summary judgment entered in favor of the defendants?" United Policyholders seeks to submit *amicus* briefing to assist the Court in deciding this question.

SPECIFIC FACTS

United Policyholders hereby adopts the "Statement of Facts and Nature of Proceedings" set forth in the Brief of the Plaintiffs-Appellants, Recall Total Information

Management, Inc. and Executive Logistics Services, Inc., filed on May 21, 2014, and refers the Court thereto for a detailed recitation of the factual history of this case.

QUALIFICATIONS AND STATEMENT OF INTEREST

United Policyholders ("UP") is a federal 501(c)(3) tax-exempt organization founded in 1991 that is a voice and an information resource for insurance consumers in Connecticut and throughout the United States. Dedicated to educating the public on insurance issues and consumer rights, UP assists and informs disaster victims and individual and commercial policyholders with regard to every type of insurance product. Grants, donations, and volunteers support our work. UP does not accept funding from insurance companies. UP is based in California but operates nationwide.

UP's work is divided into three program areas: *Roadmap to Recovery*[™] (disaster recovery and claim help), *Roadmap to Preparedness* (insurance and financial literacy and disaster preparedness), and *Advocacy and Action* (advancing pro-consumer laws and public policy). UP hosts a library of tips, sample forms and articles on commercial and personal lines insurance products, coverage and the claims process at www.uphelp.org.

UP has Connecticut-based volunteers and serves Connecticut residents on an ongoing basis. UP's most recent work in the state has been directed at property owners impacted by Superstorm Sandy. In addition to the resources offered through its website, print publications and tools, UP is partnering with Disaster Case Managers and other non-profit groups and faith-based organizations in the state, and participated earlier this year in a large "Resource Fair" in Bridgeport that was hosted by FEMA and the Red Cross.

UP's Executive Director has been selected for six consecutive terms to be an official consumer representative to the National Association of Insurance Commissioners where

she works with insurance regulators, including the Connecticut Insurance Commissioner Leonardi and his staff. Academics and journalists throughout the U.S. routinely engage with UP on insurance and legal matters. UP receives frequent invitations to testify at legislative and other public hearings, and to participate in regulatory proceedings on rate and policy issues. In fact, UP regularly contributes to the formulation of insurance-related public policy at both the national and state levels. UP can, therefore, provide important topical information to courts via the submission of *amicus curiae* briefs in cases involving insurance principles that will likely impact large segments of the public. This is one such case.

UP has previously appeared as *amicus curiae* in more than 300 cases across the country, including the following Connecticut cases: Sharen Capel PPA Donte Capel v. Plymouth Rock Assurance Corp (Case No. AC 34524, Connecticut Court of Appeal, 2012); Security Insurance Co. of Hartford v. Lumbermen's Mutual Casualty Company (Case No. AC 21960, Connecticut Court of Appeal, 2002); Fireman's Fund Insurance Co. v. TD Banknorth Insurance Agency Inc. (Case No. S.C. 18796, Connecticut Supreme Court, 2011); and Buell Industries, Inc. vs. Greater Mutual New York Ins. Co. (Case No. SC 16464, Connecticut Supreme Court, 2001). UP's briefs have been cited with approval by the United States Supreme Court in Humana Inc. v. Forsyth, 525 U.S. 299 (1999) and numerous state and federal courts; See, e.g., Vandenberg v. Superior Court of California, 21 Cal.4th 815 (1999); In re Sale Suede, Inc. 219 B.R. 922 (U.S. Bankruptcy Court, D. Mass. 1998).

UP has a particular interest in promoting the rights of policyholders and seeing that policyholders obtain the full measure of the insurance they purchase. The question

presented in this case is of importance to insurance consumers across the nation, particularly consumers of commercial general liability policies, because data security is continuing to rise as an issue that corporations confront in day-to-day operations. Corporations are required under state laws to take immediate mitigating measures when a data breach occurs, which can cost hundreds of thousands of dollars or more. These corporations, as consumers of commercial general liability policies, reasonably rely upon their commercial general liability insurance – and the personal and advertising injury coverage in particular – to protect them in the event of such a losses for invasions of privacy. The Connecticut Appellate Court’s interpretation of “publication” puts commercial general liability policyholders at risk of having to bear the burden of data breach losses on their own, even if they have already purchased an insurance policy with the expectation of protection. UP can explain how the Appellate Court’s interpretation of “publication” is incorrect and could have detrimental consequences for commercial policyholders in Connecticut going forward.

LEGAL GROUNDS


The legal grounds for this Application are contained in Rule 67-7 of the Connecticut Rules of Appellate Procedure. Further, such an application may be granted where amicus curiae can provide assistance in cases of general public interest, supplement the efforts of counsel in the case, and draw the court's attention to legal arguments that may have escaped consideration. *Wilderness Society v. U.S. Bureau of Land Mgmt.*, No. 09-CV-08010-PCT-PGR, 2010 U.S. Dist. LEXIS 74709, at *1 (D. Ariz. Jun. 21, 2010) (copy attached hereto); *Miller-Wohl Co., Inc. v. Comm’r of Labor & Indus. State of Mont.*, 694

F.2d 203, 204 (9th Cir. 1982) (citations omitted) *vacated on other grounds*, 479 U.S. 1050 (1987). United Policyholders' brief will serve just such a function.

CONCLUSION

For all of the foregoing reasons, United Policyholders respectfully requests permission to appear as *amicus curiae* and to file the Brief of *Amicus Curiae* (submitted herewith) with this court.

AMICUS CURIAE,
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CERTIFICATION OF SERVICE

The undersigned certifies that, pursuant to the Rules of Appellate Procedure § 62-7, on the 10th day of June, 2014, a copy of the foregoing was served on the below-listed counsel of record via first class United States mail, postage prepaid:

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CERTIFICATION OF COMPLIANCE

The undersigned hereby certifies that the foregoing complies with the requirements of the Rules of Appellate Procedure §§ 66-3, 62-7, and 67-2, that the font is Arial 12, and that all other Appellate rules have been satisfied.

AMICUS CURIAE,
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Positive
As of: Jun 09, 2014

The Wilderness Society, Arizona Wilderness Coalition, Sierra Club, Grand Canyon Wildlands Council, and National Trust for Historic Preservation, Plaintiffs, vs. U.S. Bureau of Land Management; Ron Wenker, in his official capacity as Acting Director of U.S. BLM; James Kenna, in his official capacity as BLM Arizona State Director; Tom Edgerton, in his official capacity as Grand Canyon-Parashant National Monument Manager; Linda Price, in Her Official Capacity as Vermilion Cliffs National Monument Manager; and Lorraine M. Christian, in Her Official Capacity as Arizona Strip Field Manager, Defendants.

No. 09-CV-08010-PCT-PGR

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

2010 U.S. Dist. LEXIS 74709

June 21, 2010, Decided
June 21, 2010, Filed

SUBSEQUENT HISTORY: Summary judgment denied by, Summary judgment granted by, Judgment entered by *Wilderness Soc'y v. United States BLM, 2011 U.S. Dist. LEXIS 113961 (D. Ariz., Sept. 30, 2011)*

COUNSEL: [*1] For Wilderness Society, Arizona Wilderness Coalition, Sierra Club, Grand Canyon Wildlands Council, National Trust for Historic Preservation, Plaintiffs: McCrystie J Adams, LEAD ATTORNEY, James S Angell, Earthjustice Legal Defense Fund, Denver, CO; Robin L Cooley, Earthjustice, Denver, CO.

For United States Bureau of Land Management, Defendant: Luther Langdon Hajek, US Dept of Justice ENRD, Washington, DC; Sue A Klein, US Attorney's Office, Phoenix, AZ.

For Ron Wenker, In his official capacity as Acting Director of U.S Bureau of Land Management, James Kenna, In his official capacity as BLM Arizona State Director, Tom Edgerton, In his official capacity as Grand Canyon-Parashant National Monument Manager, Linda Price, In her official capacity as Vermilion Cliffs National Monument Manager, Lorraine M Christian, In her

official capacity as Arizona Strip Field Manager, Defendants: Luther Langdon Hajek, US Dept of Justice ENRD; Washington, DC; Sue A Klein, US Attorney's Office, Phoenix, AZ.

For Arizona, State of, Amicus: Linda J Pollock, Office of the Attorney General, Environmental Enforcement Section, Phoenix, AZ.

JUDGES: Paul G. Rosenblatt, United States District Judge.

OPINION BY: Paul G. Rosenblatt

OPINION

ORDER

Currently [*2] before the Court is the Motion for *Amicus Curiae* Status (Doc. 42) filed by the State of Arizona *ex rel.* the Arizona Game and Fish Commission and the Arizona Game and Fish Department (hereinafter referred to as "the State of Arizona"). The motion is briefed and ready for consideration. ¹

1 The State of Arizona did not file a Reply brief in support of its motion.

In its Motion, the State of Arizona asserts significant and unique interests in defending its role in wildlife management in the Grand Canyon-Parashant and Vermillion Cliffs National Monuments. Plaintiffs do not oppose the motion, however they seek to limit the State of Arizona's participation to the remedy stage, such that the Court bifurcate briefing of the merits of the case and briefing of the remedy of the case.

I. LEGAL STANDARD AND ANALYSIS

A district court has broad discretion to permit individuals or entities to participate in a case as *amici curiae*. *Hoptowitz v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982). An *amicus curiae* is not a party to the case. *Miller-Wohl Co. v. Comm'r of Labor and Indus.*, 694 F.2d 203, 204 (9th Cir. 1982). Rather, the role of an *amicus curiae* is to provide assistance in a case of general interest, supplement [*3] the efforts of counsel in the case, and draw the court's attention to legal arguments that have escaped consideration. *Id.*; *Funbus Sys., Inc. v. Cal. Pub. Utils. Comm'n*, 801 F.2d 1120, 1125 (9th Cir. 1986).

The State of Arizona is responsible for administering state laws relating to wildlife. *A.R.S. § 17-201(A)*. It shares cooperative management responsibility with the U.S. Fish and Wildlife Service for migratory, threatened, endangered, and candidate fish and wildlife species in Arizona. The State of Arizona worked closely with the U.S. Bureau of Land Management ("BLM") and the National Park Service as a designated cooperating agency in the preparation of the Environmental Impact Statement for the Arizona Strip, including the revisions to the Arizona Strip Resource Management Plan, the Vermillion Cliffs National Monument Resource Management Plan, and the Grand Canyon-Parashant Resource Management Plan for the BLM portion and the General Management Plan for the National Parks Service portion.

In its motion, the State of Arizona notes that, *of particular concern* is the request by Plaintiffs for an injunction ordering the BLM to immediately close primitive roads and trails to motorized [*4] and mechanized use within the Monuments. However, because *all* roads within the Monuments are "primitive", the State of Arizona's ability to manage fish and wildlife populations on the Monuments, including wildlife surveys, maintenance of water catchments and wildlife law enforcement would be seriously compromised. The State of Arizona's position and interests are unique and not represented by any parties thus far in the lawsuit. The issues raised are significant and would bring to light matters unfamiliar to the Court.

Plaintiffs respond that they do not oppose the State of Arizona's motion to participate in this case as *amicus curiae*. However, they request that the Court limit its participation to the remedy phase. Plaintiffs argue that the State of Arizona is *strictly* concerned with the injunctive relief sought by Plaintiffs, which would order BLM to close primitive roads and trails to motorized use.

In reading the motion carefully, although it is the relief sought that is "*of particular concern*" to the *amicus* (not unlike the other parties), that does not preclude an *amicus* from participating in the merits portion of the lawsuit. The role of an *amicus* is to provide assistance in matters [*5] of general interest and that bring light to legal considerations that the Court would otherwise not have considered. *Funbus Sys., Inc.*, 801 F.2d at 1125. The fact that the ultimate remedy sought is of particular concern does not infer that there are no other concerns or that nothing in the merits stage is implicated. More importantly, what is of particular assistance to this Court is information regarding the *specific interests* of the State of Arizona, which differ considerably to the parties and the other individual *amicus curiae* in this case. More specifically, this Court seeks information from the State of Arizona regarding the effect a ban on motorized travel would have on the State of Arizona's statutory obligations to conserve and protect fish and wildlife resources as a public trust responsibility within the Monuments and the actual effect on the Monuments and wildlife. Such considerations would not otherwise have been brought to this Court's attention and the State of Arizona is in a unique position to assist the Court in these matters. Moreover, the State of Arizona was a cooperating agency in the preparation of the Environmental Impact Statement for the Arizona Strip, including [*6] the revisions to the Arizona Strip Resource Management Plan, as well as the Monuments Resource Management Plan. The Court will not reserve consideration of such significant matters until the remedy phase. These matters are global and not confined to the remedy, despite the semantics proposed in the original motion.

II. CONCLUSION

The Court will not bifurcate the briefing of this case. The State of Arizona will be permitted to participate during the merits phase as it deems necessary to assist the Court. The State of Arizona will not be permitted to introduce extra-record materials outside of the administrative record prepared by the agencies, or to file pleadings, motions, or otherwise participate in a manner reserved for the parties in the case. It may file responsive briefs aimed at aiding the Court in analyzing *relevant issues* that have not been emphasized by the parties. Based upon its special expertise, it may explain the potential impact of decisions on a group, individuals, or on

the Monuments and wildlife. It is prohibited from filing duplicative arguments, as that will only serve to congest the court and waste valuable time and resources.

Accordingly,

IT IS HEREBY ORDERED GRANTING [*7] the State of Arizona's Motion for *Amicus Curiae* Status. (Doc. 42.)

IT IS FURTHER ORDERED that the State of Arizona may file responsive briefs according to a future briefing schedule.

IT IS FURTHER ORDERED that as stated in the previous scheduling order (Doc. 40), the parties and all *amici* and intervenors are to confer with each other, and **within 7 days of this order**, file a revised **joint** proposed briefing schedule for (1) challenges to the administrative record and (2) summary judgment motions.

DATED this 21st day of June, 2010.

/s/ Paul G. Rosenblatt

Paul G. Rosenblatt

United States District Judge