SUPREME COURT OF LOUISIANA

CIVIL MATTER

DOCKET NO. 2007-C-2443 and 2007-C-2441

JOSEPH SHER
Plaintiff/Petitioner

VERSUS

LAFAYETTE INSURANCE COMPANY, et al.
Defendant/Respondent

AMICUS CURIAE BRIEF of UNITED POLICYHOLDERS IN SUPPORT OF PLAINTIFF/PETITIONER JOSEPH SHER

ON APPEAL FROM THE LOUISIANA FOURTH CIRCUIT COURT OF APPEAL,
NO. 2007-CA-0757, AND THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS
NO. 2006-9276, DIVISION "G", SECTION "L",
THE HONORABLE ROBIN M. GIARRUSSO PRESIDING

Deborah R. Trotter, Esquire (LA #29459)
William F. Merlin, Jr., Esquire
Mary Kestenbaum, Esquire
MERLIN LAW GROUP, P.A.
777 S. Harbour Island Blvd.
Suite 950
Tampa, Florida 33602

and

Amy Bach, Esquire
UNITED POLICYHOLDERS
222 Columbus Avenue, Ste. 412
San Francisco, CA 94133
Attorneys for Amicus Curiae, United Policyholders

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The financial security that insurance policies provide is critical to business and property owners and to the fabric of our economy and our society. United Policyholders ("UP") is a unique national non-profit organization founded in 1991 that helps preserve the integrity of the insurance system. Donations, grants and volunteer labor support the organization's work.

As the citizens of Louisiana have been reminded over and over since the 2005 hurricane season, the financial security that insurance policies provide is critical to business and property owners and to this state's economy. Since the 2005 hurricane season, United Policyholders has worked with elected officials, businesses and homeowners to help solve insurance problems in Louisiana. State senators, assembly members, Congressional representatives and state agency officials participated in public forums hosted by United Policyholders across the state to air and trouble-shoot insurance concerns and problems. United Policyholders' witnesses have participated in the legislative process by providing testimony at hearings on insurance matters and input into legislation. For more information, visit www.unitedpolicyholders.org. In November of 2005 United Policyholders set up a free on-line "Road Map to Recovery" for Florida, Louisiana and Mississippi, and created and is maintaining a Hurricane Claim Help Library for residents of the impacted states.

By submitting a brief in this matter, United Policyholders seeks to fulfill the "classic role of *amicus curiae* 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., Inc. v. Commissioner of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982). This is an appropriate role for *amicus curiae*. As commentators have often stressed, an *amicus* is often in a superior

position to "focus the court's attention on the broad implications of various possible rulings." R. Stern, E. Greggman & S. Shapiro, *Supreme Court Practice*, 570-71 (1986) (*quoting* Ennis, *Effective Amicus Briefs*, 33 Cath. U.L. Rev. 603, 608 (1984)).

United Policyholders has filed over two hundred and thirty-five *amicus* briefs, since it was founded, in state and federal appellate courts throughout the United States. United Policyholders' *amicus* brief was cited in the U.S. Supreme Court's opinion in *Humana Inc. v. Mary Forsyth*, 525 U.S. 299 (1999). The organization has participated by court invitation in briefing and oral argument, and many of the arguments from United Policyholders' *amicus curiae* briefs have been cited with approval by reviewing courts.

United Policyholders has previously been granted leave to file *amicus curiae* briefs in the United States Court of Appeals for the Fifth Circuit, in the matter of *Motiva Enterprises, LLC v. St. Paul Fire* and *Marine Ins. Co. and Nat'l Union Fire Ins. Co. of Pittsburgh, Pennsylvania*, Case No. 05-20139, and in *Mesa Operating Company v. California Union Insurance Company* (1998) No. 05-06-00986-CV Court of Appeals, 5th District, Texas.

The issue in this case concerns the interpretation of an exclusionary clause in an insurance policy in the scope of a first-party claim by a policyholder against his insurer, as well as the continuing conduct of the insurer while handling the claim, and has significant ramifications for insurance policyholders seeking to ascertain and understand their rights following wide-scale natural disasters, such as Hurricane Katrina. This matter will have a substantial impact on the abilities of policyholders to hold their insurers accountable, and will also impact the consistency of court decisions on a statewide and national basis, in determining how to review policy language and claim handling procedures. This is an area of the law in

which United Policyholders and the undersigned attorneys submit it would be useful to the Court to allow the insurance policyholders' perspective to be heard.

The undersigned counsel for United Policyholders have significant experience in first-party insurance litigation against major insurance companies, and believe that they will be able to provide assistance in analyzing the issues in this case and their public policy implications in a way that compliments the arguments raised by counsel for the parties to this appeal. Counsel for United Policyholders are retained *pro bono*, and will accept no money for their legal work in this case. The issues before this Honorable Court are of great importance to the citizens of the State of Louisiana.

ARGUMENT

III. The business of insurance serves the public trust. Courts and legislatures recognize the unique nature of insurance policy interpretation.

The field of insurance is different from any other business involving commercial contracts, based on its high degree of interaction with a potentially vulnerable portion of the consuming public. As explained in an insurance industry treatise, *The Legal Environment of Insurance,* in its chapters on Insurance Contract Law:

> **Public Interest**
>
> Insurance contracts are different from other commercial contracts because insurance is more a necessity than a matter of choice. Therefore, insurance is a *business affected with a public interest,* as reflected in legislative and judicial decisions.
>
> State laws restrict contractual rights for insurers in the public interest. For example, insurers cannot consider an applicant's race or religion in determining acceptability or rate classification. Many jurisdictions have adopted legislation limiting the insurers' rights to reject, cancel, or refuse to renew certain types of insurance....

James J. Lorimer et al., *The Legal Environment of Insurance* 179 (American Institute for Chartered Property Casualty Underwriters, 4th ed. 1993).

The insurance industry is highly regulated, in part, because of the public importance of insurance in today's modern society. From one industry expert's perspective:

> Because the essence of the insurance contract is a promise to provide benefits in the future, perhaps years after the premiums are paid, the essence of insurance regulation is the enforcement of that promise in real, practical terms by making certain that insurers have adequate, liquid funds to pay claims, whether days or decades after the corresponding premiums have been paid. In addition to solvency, insurance regulation is largely devoted to making certain that all legitimate needs for insurance are met, and to promoting fairness and equity on the part of insurers in their dealings with policyholders and claimants, with regard to the content of policies, premium classifications and rates, and marketing and claim practices.

Peter M. Lencsis, *Insurance Regulation in the United States, an Overview for Business and Government* viii (Quorum Books 1997).

Courts throughout the country and state departments of insurance recognize this public importance of insurance contracts, as well as, the vulnerability of consumers in dealing with insurance companies and the policies those companies sell. The regulatory scheme surrounding insurance has a long history and its effect and importance are widely accepted.

> ... [R]egulation of the insurance industry is necessary. As the United States Supreme Court has long recognized, insurance is a business coupled with a public interest. Consumers invest substantial sums in insurance coverage in advance, but the value of the insurance lies in the future performance of the various contingent obligations. Because the interests protected are so important – including an individual's future ability ... to replace damaged or destroyed property – regulation of the industry furthers public welfare. Related reasons for insurance regulation center on the complexity of insurance and consumers' inability to obtain and understand information about insurance. Consumers are ill-equipped to assess a company's future solvency, to compare the coverage of various policies, or to evaluate a company's claim service. Theoretically, government regulation of insurance eliminates these problems. Regulation can ensure solvency and the insurer's ability to pay claims in the future, standardize policy coverage, require minimum coverage, and require fair claims processing.

Susan Randall, *Article: Insurance Regulation in the United States: Regulatory Federalism and the National Association of Insurance Commissioners,* 26 Fla. St. U. L. Rev. 625, 627 (1999) (footnotes omitted).

The federal government recognizes that states must regulate the insurance industry. According to the McCarran-Ferguson Act, the business of insurance will be subject to state law:

> ...Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

15 U.S.C. § 1011 (2006).

Because of this unique nature of insurance, courts and legislators have promulgated a specialized field of common law and numerous safeguards, rules, statutes, and regulations to provide protection to consumers. Most law schools teach "insurance law" as a specialized study.

IV. Insurance policies are complicated contracts of adhesion. The public needs the protection of specific rules of insurance policy interpretation and insurance claims handling.

The complex nature of insurance was explained in *The Legal Environment of Insurance* as follows:

"Flood of Darkness"

> In reviewing the language of a fire insurance policy in 1873, a court stated as follows:
>
> > Whether [people] ought to be what they are, or not, the fact is, that in the present condition of society, men in general cannot read and understand these insurance documents...Forms of applications and policies, of a most complicated and elaborate structure, were prepared, and filled with covenants, exceptions, stipulations, provisos, rules, regulations, and conditions, rendering the policy

> void in a great number of contingencies...The compound, if read by [an insured], would, unless he were an extraordinary man, be an inexplicable riddle, a mere flood of darkness and confusion...It was printed in such small type, and in lines so long and so crowded, that the perusal of it was made physically difficult, painful, and injurious. Seldom has the art of typography been so successfully diverted from the diffusion of knowledge to the suppression of it. There was ground for the premium payer to argue that the print alone was evidence, competent to be submitted to a jury, of a fraudulent plot ....[1]

In another court case, in 1975, the court decided that the holders of an insurance policy were not bound by its provisions because its printing was of "a size type that would drive an eagle to a microscope." The court added the following:

> It cannot be reasonably assumed that the insured having average sight of a human being would be aware of the content of the questioned clause, at least in the absence of special optical equipment...It should not be necessary for the insured to provide himself with a microscope in order to inspect the small print contained within his insurance policy. Neither should it be necessary for an insured to provide himself with an insurance policy to protect himself against the provision to be found within such small print of his insurance policy.[2]

A state insurance department study of the readability of insurance policies measured the standard automobile policy by the Flesch Readability Scale. This scale assesses the readability of written documents by assigning point values for length and complexity of sentence structure. The higher the total score, the more readable the document. For the passage selected for this particular study, the Bible received a readability score of 66.97, and Einstein's Theory of Relativity scored 17.72. Both scored higher as to readability then the standard automobile policy at 10.31.

Current trends in insurance policy construction are toward more simplified language. Any new language in insurance contracts, however, requires interpretation by the courts. Therefore, the success of efforts at clearer expression remains to be seen.

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[1] *De Lancy v. Ins. Co.*, 52 N.H. 581 (1873).

[2] *Drake v. Globe American Casualty Company,* Ohio 10th Circuit Court of Appeals, unreported case No. 74AP-472, March 11, 1975.

> ... Insurance contracts cover fortuitous events, are contracts of adhesion and indemnity, must have the public interest in mind, require the utmost good faith, are executory and conditional, and must honor reasonable expectations.

The Legal Environment of Insurance 176-77.

A particularly scholarly discussion explaining why insurance is treated differently by courts is found in an article written by Professor Henderson of the University of Arizona College of Law, which includes the following discourse:

> In a free enterprise system, economic development steadily increases the number of situations in which individuals can suffer "loss." At the same time, economic development enhances the ability to avoid the prospect of "loss." In other words, in a relatively affluent society, there is much more to lose in the way of property and other economic interests as the human condition improves. In such a society, however, individuals are more likely to have the requisite discretionary income to transfer and to spread the attendant risks of loss. Disruptive losses to society, as well as to the individual, are obviated or minimized by private agreements among similarly situated people. In this way, the insurance industry plays a very important institutional role by providing the level of predictability requisite for the planning and execution that leads to further development. Without effective planning and execution, a society cannot progress.
>
> ...
>
> This perceived social significance has set apart insurance contracts from most other contracts in the eyes of the law. Insurance is purchased routinely and has become pervasive in our society. It protects against losses that otherwise would disrupt our lives, individually and collectively. The public interest, as well as the individual interests of millions of insureds, is at stake. This is the foundation for the general judicial conclusion that the business of insurance is cloaked with a public purpose or interest. This perception also explains the extensive regulation of the insurance industry in the United States, not just through legislative and administrative processes, but also through the judicial process.
>
> ...
>
> The insureds' disadvantage persisted as insurance took on more and more importance in this country. In order to purchase a home or a car, or commercial property, most people had to borrow money, and loans were not obtainable unless the property was insured. In addition, the lender often required that the life of the borrower be insured. ... The purchase of insurance was no longer a matter of prudence; it was a necessity. Then losses occurred and the inevitable disputes

> arose. These disputes, however, were not about an even exchange in value. Rather, they were about something quite different.
>
> Insureds bought insurance to avoid the possibility of unaffordable losses, but all too often they found themselves embroiled in an argument over that very possibility. Disputes over the allocation of the underlying loss worsened the insureds' predicament. In most instances, insureds were seriously disadvantaged because of the uncompensated loss; after all, the insured would not have insured against this peril unless it presented a serious risk of disruption in the first place. The prospect of paying attorneys' fees and other litigation expenses, in addition to the burden of collecting from the insurer, with no assurance of recovery, only aggravated the situation.
>
> These additional expenses could prove to be a formidable deterrent to the average insured. For most insureds, unlike insurers, such expenses were not an anticipated cost of doing business. Insureds did not plan for litigation as an institutional litigant would. Insurers, on the other hand, built the anticipated costs of litigation into the premium rate structure. In effect, insureds, by paying premiums, financed the insurers' ability to resist claims. Insureds, as a group, were therefore peculiarly vulnerable to insurers who, as a group, were inclined to pay nothing if they could get away with it, and, in any event, to pay as little as possible. Insurance had become big business.

Roger C. Henderson, *The Tort of Bad Faith in First-Party Insurance Transactions: Refining the Standard of Culpability and Reformulating the Remedies By Statute*, 26 U. Mich. J.L. Reform 1, 10-14 (1992).

These points, as well as, an explanation of how courts should perceive the parties to an insurance relationship, have been summed up as follows:

> [A]n insurance policy is not an ordinary contract. It is a complex instrument, unilaterally prepared, and seldom understood by the assured... The parties are not similarly situated. The company and its representatives are experts in the field; the applicant is not. A court should not be unaware of this reality and subordinate its significance to strict legal doctrine.

Prudential Ins. Co. v. Lamme, 425 P.2d 346, 347 (Nev. 1967).

III. The Insurance Industry Recognizes that it has a Special Relationship with Policyholders and Obligation of Good Faith and Ethical Claims Conduct.

Respectfully, for the same reason one would not expect to learn medicine by reading malpractice cases, no person can expect to learn how adjusters are taught to treat policyholders by only reading bad faith case law. Claims representatives are taught honest and honorable ways to handle claims. The standard of textbook for claims handlers, which leads to an Associate in Claims designation, has been James J. Markham, et al., *The Claims Environment* (1st ed., Insurance Institute of America 1993). There is now a second edition of *The Claims Environment,* which was followed by a new volume.[3]

The Markham textbook for claims handlers and students of insurance sets forth simple, clear claims handling principles. Some of these principles are:

> "Claims representatives....are the people responsible for fulfilling the insurance company's promise."

Markham at vii.

> "When a covered loss occurs, the insurance company's obligation under its promise to pay is triggered. The claim function should ensure the prompt, fair, and efficient delivery of this promise."

Markham at 6.

> "Therefore, the claim representative's chief task is to seek and find coverage, not to seek and find coverage controversies or to deny or dispute claims."

Markham at 13.

> "...the insurance company should not place its interests above the insured's."

Markham at 13.

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[3] Doris Hoopes, *The Claims Environment*, (2d ed., Insurance Institute of America 2000); Donna J. Popow, *Claim Handling Principles and Practices* (1st ed., Insurance Institute of America 2006).

> "The claim professional handling claims should honor the company's obligations under the implied covenant of good faith and fair dealings."

Markham at 13.

> "No honest and reputable insurer has either explicit or implicit "standing orders" to its claim department to delay or underpay claims."

Markham at 274.

> "When an insurance company fails to pay claims it owes or engages in other wrongful practices, contractual damages are inadequate. It is hardly a penalty to require an insurer to pay the insured what it owed all along."

Markham at 277.

> "All insurance contracts contain a covenant of good faith and fair dealing."

Markham at 277.

> "If bad faith is a tort in a third-party claim, it should be a tort in a first-party claim as well."

Markham at 277.

> "Insurance is a matter of public interest and deserves special consideration by the courts to protect the public."

Markham at 277.

> "Insurance contracts are not like other contracts because insurers have an advantage in bargaining power. Insurers should therefore be held to a higher standard of care."

Markham at 277.

> "The public's expectations are elevated by insurers' advertising, slogans, and promises which give policyholders the impressions that they will be taken care of no matter what happens."

Markham at 277.

> "Policyholders buy peace of mind and are not seeking commercial advantage when they buy a policy. In addition, they are vulnerable at the time of the loss."

Markham at 277.

> "Policy language is sometimes difficult to understand. The benefit of interpretation should be given to the policyholder."

Markham at 277-278.

> "Upper management also has a responsibility to maintain proper claim-handling standards and practices."

Markham at 300.

The Second Edition of *The Claims Environment* explains, in part, various aspects of good faith claims handling:

> **Unbiased Investigation**
>
> Claim representatives should investigate in an unbiased way, pursuing all relevant evidence, especially that which establishes the legitimacy of a claim. Claim representatives should avoid using leading questions that might slant the answers. In addition, they should work with service providers that are unbiased. As mentioned previously, courts and juries might not look sympathetically on medical providers or repair facilities that favor insurers. Investigations should seek to discover the facts and consider all sides of the story. Claim representatives should not appear to be looking for a way out of the claim or for evidence to support only one side.

Doris Hoopes, *The Claims Environment* 10.7 (2d ed., Insurance Institute of America 2000).

The man on the street knows that it is far more profitable for an insurance company to take a person's money and not pay, rather than to promptly and fully pay what is owed. That this financial incentive conflicts with the extreme public trust placed in the insurance industry is the reason why codes of ethics, good faith duties and statutory remedies are imposed upon insurers. Public policy demands that these practical and generally-recognized duties are followed so that

the citizens of Louisiana are not mistreated at the very time they need the best treatment from their insurers.

IV. As a result of the complexities of insurance and the need for consumer protection, courts have created and recognize special rules for dealing with insurance contract interpretation, and Louisiana law follows these traditional rules.

Importantly, insurers sell standardized insurance policy forms, and the ability of a potential policyholder to negotiate the policy's terms or to comparison shop for an insurance policy is unrealistic in today's marketplace. Because of the complex nature of the business of insurance, and to protect policyholders and create consistency, courts utilize recognized rules of policy construction in their dealings with insurance policy litigation.

In the matter before this Court, Louisiana's Fourth Circuit Court of Appeals noted these general rules of policy construction when it granted the policyholder's motion for partial summary judgment on the ambiguity of the insurance policy's "flood" exclusion. The exclusion at issue provides there will be no coverage for "flood, surface water, waves, tides, tidal waves, overflow of any body of water, or other spray, all weather driven by wind or not". *See Sher v. Layfette Ins. Co.,* 2007 La. App. LEXIS 2245 (La. App. 4th Cir. Nov. 19, 2007).

As noted by the court, insurance policies are deemed contracts under Louisiana law. *See id.* The Fourth Circuit explained:

> Provisions of a contract must be interpreted along with the contract in totem. La. C.C. art. 2050. Although worded in general terms, a contract "must be interpreted to cover only those things it appears the parties intended to include." La. C.C. art. 2051. "When the parties made no provision for a particular situation, it must be assumed that they intended to bind themselves not only to the express provisions of the contract, but also to whatever the law, equity, or usage

> regards as implied in a contract of that kind, or necessary for the contract to achieve its purpose." La. C.C. art. 2054. Ultimately, if doubt exists, "a provision in a contract must be interpreted against that party who furnished its text." La. C.C. art. 2056. Thus, "[a] contract executed in a standard form of one party must be interpreted, in case of doubt, in favor of the other party." La. C.C. art. 2056.

Id. at.*11-12.

The Fourth Circuit then considered La. R.S. § 29:762, which defines a "flood" as a natural disaster. *See id.* at *13. Since the court found that the policy was ambiguous as to whether natural or man-made floods are excluded, the court strictly construed the policy against the insurer, and found that the insured was covered for damage to the basement level of his building, based on the type of circumstances giving rise to the water damage. *See id.* at *14.

The policy at issue is considered an "all-risk" insurance policy, which extends coverage for all fortuitous losses, unless the policy contains a specific exclusion precluding coverage for the loss at issue. Jane Massey Draper, "*Coverage Under All-Risk Insurance*", 30 A.L.R. 5th 170. Moreover, courts in other jurisdictions have found that a "flood" contemplates only a naturally occurring event. *See, e.g, Popkin v. Security Mut. Ins. Co.,* 48 A.D. 2d 46, 367 N.Y.S. 2d 492 (N.Y. App. Div. 1975).

Many courts in other jurisdictions have also addressed the meaning of exclusionary clauses when there is a question as to whether they are intended to apply to natural or man-made causes. When there is doubt, courts routinely rule in favor of the policyholder, finding ambiguity in a policy, when applying general rules of insurance policy construction. For example, in looking at an insurance policy's "earth movement" exclusion, the Florida Supreme Court noted that the term "earth movement" was defined to mean "earthquake, including land shock waves or

tremors before, during or after a volcanic eruption; landslide; mind subsidence; mudflow; earth sinking, rising or shifting". See *Fayad v. Clarendon Nat'l Ins. Co.,* 899 So. 2d 1082, 1088 (Fla. 2005). In *Fayad,* the Florida court was asked to determine whether this earth movement exclusion also applied to damage caused by blasting activity. *See id.* The insurer argued that "earth sinking, rising or shifting" should be construed to include a man-made activity such as blasting. *See id.* The trial court noted that "although such a construction is conceivable, it is by no means the most reasonable construction, given that the words proceeding 'earth sinking, rising or shifting,' such as 'earthquake,' 'landslide,' and 'mud flow,' generally connote natural events." *Id.* at 1088.

The Florida court also noted another reasonable interpretation would be that the exclusion applies only to earth movement brought about by natural events. *See id.* The court then applied the rule of construction of *ejusdem generis*, which provides that "where general words follow an enumeration of specific words, the general words are construed as applying to the same kind or class as those that are specifically mentioned." *Id.* at 1089. In applying the rule, the *Fayad* court noted that the concept of "earth sinking, rising or shifting" should be construed in conjunction with the other events listed in the exclusion, which were all naturally-occurring events. *See id. See also Peters Township School District v. Hartford Accident and Indem. Co.,* 833 F. 2d 32 (3d Cir. 1987); *Wyatt v. Northwestern Mut. Ins. Co.,* 304 F. Supp. 781, 782-82 (D. Minn. 1969); *Murray v. State Farm Fire and Cas. Co.,* 203 W. Va. 477, 509 S.E. 2d 1, 9 (W.Va. 1998)

(explaining the proper application of the legal doctrines of *noscitur a sociis* and *ejusdem generis*, in finding the policy language ambiguous).[4]

In light of Louisiana rules of insurance policy construction, and in light of how other courts have addressed similar policy exclusions, this Court should find no reason to reject the Fourth Circuit's finding of ambiguity and coverage under the Lafayette policy, when considering the "flood" exclusion of the Lafayette all-risk policy. If learned jurists studying an insurance clause can disagree about its meaning, it is no wonder that lay untrained persons may also find interpretations different than what the insurer has its attorneys argue in court. No controlling Louisiana authority contradicts the conclusion of the Fourth Circuit, and the court's finding of ambiguity was not inappropriate or improper. This Court's decision will have a far reaching effect on policyholders throughout the State, and an affirmance of coverage will advance the public purpose of indemnity for a covered loss and protection of the citizens of Louisiana.

V. The continuing duty of good faith recognized by courts in the context of insurance claim handling provides a foundation for applying the amendment to La. R.S. § 22:658 to this matter.

The devastation and destruction that occurred to the Gulf Coast states as a result of Hurricane Katrina is unprecedented. Although the insurance industry had much prior experience in handling hurricane claims before Hurricane Katrina struck, the unique nature of these claims presented major hurdles for all in dealing with the rights of policyholders. In order to appropriately protect the insureds of the State of Louisiana, the Louisiana Legislature amended its laws dealing with payment and the adjustment of claims in response to the problems that

[4] *Noscitur a sociis* is another legal rule of construction explaining that words placed together generally take meaning from one another.

arose following the storm. That amendment to La. R.S. § 22:658, effective August 15, 2006, provides for increased penalties and attorney's fees to successful policyholders who prove that their carrier did not adjust the insurance claim in the utmost of good faith.

In assessing whether to apply the statutory amendment to this case, the Fourth Circuit failed to recognize the continuing duty of good faith and fair dealings incumbent upon an insurer that continues throughout litigation. *See, e.g., Theriot v. Midland Risk Ins. Co.,* 664 So. 2d 547, 550, rev'd on other grounds, 694 So. 2d 184 (La. 1997). Significantly, the requirement to adjust and handle claims in the utmost of good faith and fair dealing is "no less important after litigation has begun". *Harris v. Fontenot,* 606 So. 2d 72, 74 (La. App. 3 Cir. 1992). Thus, where an insurer's duty of good faith and fair dealing towards its insured continues beyond the effective date of the amendment to § 22:658, an insurer should be subject to the increased penalty of 50% and the associated attorney's fees, as a result of a continuing breach that followed the effective date of the amendment.

Such a holding has been recognized by numerous federal district trial courts addressing Hurricane Katrina litigation. *See, e.g., Conlee v. Fireman's Fund Ins. Co.,* 2007 U.S. Dist. LEXIS 52080 (E.D. La. July 17, 2007); *Evans v. Lafayette Ins. Co.,* 2007 U.S Dist. LEXIS 90865 (E.D. La. Dec. 11, 2007); *Kodrin v. State Farm Fire Ins. Co.,* 2007 U.S. Dist. LEXIS 86685 (E.D. La. Nov. 21, 2007); *Goodwyne v. State Farm Fire & Cas. Co.,* 2007 U.S. Dist. LEXIS 91228 (E.D. La. Dec. 11, 2007); *Dagiumol v. State Farm Fire & Cas. Co.,* 2007 U.S. Dist. LEXIS 55510 (E.D. La. July 30, 2007).

In considering whether the continuing duty of good faith should afford an insured the opportunity to recovery enhanced penalties under the 2006 statutory amendment, one can look at

how courts have addressed the concept of an insurer's continuing bad faith conduct after litigation has begun. "Courts and commentators generally agree that an insurer's duty of good faith continues even after an insured files suit." Douglas L. Christian & Nathan D. Meyer, *Continuing Bad Faith: Theory of Liability or Rule of Evidence?* 52 FDCC Quarterly 245, 248 (Winter 2002). Evidence of bad faith conduct on the part of an insurer can be evidenced by wrongful conduct occurring over the course of litigation. *See, e.g., Tucson Airport Authority v. Certain Underwriters at Lloyd's London,* 186 Ariz. 45, 918 P.2d 1063 (Ariz. Ct. App. 1996). *White v. Western Title Ins. Co.,* 40 Cal. 3d 870, 710 P.2d 309 (Cal. 1985).

In fact, some courts have allowed evidence concerning an insurer's litigation conduct in assessing whether the insurance company has acted in bad faith towards it insured. *See, e.g, T.D.S. Inc. v. Shelby Mut. Ins. Co.,* 760 F. 2d 1520, 1527 (11th Cir. 1985). The *T.D.S.* court noted:

> Certainly the litigation conduct of *Shelby* was relevant to the claim that *Shelby* or those acting on its behalf dealt dishonestly with *T.D.S.* Although this conduct occurred after the denial of *T.D.S.'s* claim, it did corroborate *T.D.S.'s* contention that *Shelby* deliberately deceived it while *Shelby* was investigating the fire. Additionally, much of the evidence concerning the recklessness of the investigation and the poor quality of the investigative reports *Shelby* stated it relied upon to deny *T.D.S.'s* claim is relevant to the issue of whether in fact the fire was the result of arson, and, if so, the identity of the arsonist. These are matters of consequence in an insurance suit where arson is a defense.

Id.

Similarly an Illinois appellate court explained that the totality of the circumstances will determine whether the insurer acted in bad faith, and those circumstances include whether the insured was forced to file suit to recover. *Norman v. American National Fire Ins. Co.,* 198 Ill. App. 3d 269, 555 N.E. 2d 1087, 144 Ill. Dec. 568 (1990). *See also* Randy Papetti, Note, *The*

Insurer's Duty of Good Faith in the Context of Litigation, 60 Geo. Wash. L. Rev. 1931, 1953. (August 1992)("The cases do appear to agree, however, that the duty of good faith continues through litigation and that, in many instances, an insurer's post filing conduct, including its litigation tactics, can be admissible as evidence in a related bad faith action").

If courts agree that the continuing duty of good faith does not afford an insured the remedy of the Louisiana statute's amendment, then insurers could argue that their good faith obligations to their policyholders end as soon as a lawsuit is filed, notwithstanding the obligations imposed by Louisiana law. That rationale cannot possibly be sanctioned or condoned by this or any other court. An insurer's good faith obligations are ongoing and continuing in nature. Otherwise, an insurer could force premature litigation proceedings, by refusing to pay what is rightfully owed in the claim, and then do whatever the insurer wanted once litigation began, because the insurer would be immune from fault finding. However, as explained above, the relationship between the insured and the insurer is significant and highly regulated. An insurer in handling and litigating Katrina claims cannot be granted absolute immunity from their bad faith tactics merely because a lawsuit was necessarily filed. The continuing duty of good faith and fair dealing recognizes that an insurer's conduct following a Hurricane Katrina claim allows for the increased penalties of the statutory amendment.

CONCLUSION

In conclusion, for the reasons set forth above, this Court should adopt the reasoning set forth by the Plaintiff/Petitioner, Joseph Sher, in this appeal. An insurer should be held liable for the enhanced statutory penalties of the amendment to La. Rev. Stat. § 22:658 when the insurer's

bad faith conduct continued after the amendment was enacted. In addition, the Fourth Circuit appropriately found the "flood" exclusion ambiguous, when applied in the context of a loss occurring as a result of non-naturally occurring damage.

Respectfully submitted,

Deborah R. Trotter, Esquire (LA #29459)
William F. Merlin, Jr., Esquire
Mary Kestenbaum, Esquire
MERLIN LAW GROUP, P.A.
777 S. Harbour Island Blvd.
Suite 950
Tampa, Florida 33602

and

Amy Bach, Esquire
UNITED POLICYHOLDERS
222 Columbus Avenue, Ste. 412
San Francisco, CA 94133
Attorneys for Amicus Curiae, United Policyholders

CERTIFICATE OF SERVICE

I, Deborah R. Trotter, an attorney for United Policyholders, hereby certify that this 15th day of February, 2008, the *Amicus Curiae Brief* has been sent via US Mail to the following:

James M. Garner, Esquire #19589
Appeal Counsel
Darnell Bludworth, Esquire #18801
Timothy B. Francis, Esquire #14973
Ellen Pivach Dunbar, Esquire #30018
SHER GARNER CAHILL RICHTER
KLEIN & HILBERT, L.L.C.

909 Poydras Street, Suite 2800
New Orleans, LA 70112
Telephone: (504) 299-2102

Frank C. Dudenhefer, Jr., Esquire #5717
THE DUDENHEFER LAW FIRM, L.L.C.
601 Poydras Street, Suite 2655
New Orleans, LA 70130-6004
Telephone: (504) 525-2553

Robert McMahon, Jr., Esquire 10406
Howard B. Kaplan, Esquire #14414
William D. O'Regan, IV, Esquire #29730
BERNARD, CASSISA, ELLIOT & DAVIS, APLC
1615 Metairie Road, P.O. Box 55490
Metairie, LA 70055-5490
Telephone: (504) 834-2612

Ralph S. Hubbard III, Esquire
LUGENBUHL, WHEATON, PECK, RANKIN
& HUBBARD
601 Poydras Street, Suite 2775
Pan American Life Center
New Orleans, LA 70130
Telephone: (504) 568-1990

Deborah R. Trotter, Esquire (LA #29459)
William F. Merlin, Jr., Esquire
Mary Kestenbaum, Esquire
Merlin Law Group, P.A.
777 S. Harbour Island Blvd.
Suite 950
Tampa, Florida 33602
Telephone: (813) 229-1000
and
Amy Bach, Esquire
United Policyholders
222 Columbus Avenue, Ste. 412
San Francisco, CA 94133
Attorneys for Amicus Curiae, United Policyholders