IN THE
INDIANA COURT OF APPEALS

CASE NO. 49A04-1302-PL-00084

COMMONWEALTH LAND TITLE INSURANCE COMPANY Appellant
(Petitioner Below)

vs.

STEPHEN W. ROBERTSON, INSURANCE COMMISSIONER OF THE STATE OF INDIANA, in his official capacity only and not in his individual capacity, on behalf of the INDIANA DEPARTMENT OF INSURANCE,
Appellee (Respondent Below)

Appeal from Final Judgment of Marion Superior Court,
Judge Michael Keele, case No. 49D07-1112-PL-048514

BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF APPELLEE

Stephen J. Peters
HARRISON & MOBERLY, LLP
10 West Market Street, Suite 700
Indianapolis, IN 46204
(317) 639-4511/(317) 639-9565 (Fax)

Counsel For *Amicus Curiae*, United Policyholders

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Indianapolis, IN 46204
(317) 639-4511/(317) 639-9565 (Fax)

Counsel For *Amicus Curiae*, United Policyholders

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I.

STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

United Policyholders, ("UP") is a non-profit 501(c) (3) organization founded in California 1991 that is a voice and an information resource for insurance consumers throughout the United States. The organization advances the interests of individual and commercial policyholders with regard to every type of insurance product with a focus on fair claim practices. Grants, donations and volunteers support our work. UP does not accept funding from insurance companies.

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.

State insurance regulators, academics and journalists throughout the U.S. routinely seek UP's input on insurance and legal matters. UP have been appointed for six consecutive years as an official consumer representative to the National Association of Insurance Commissioners. UP works with insurance regulators, including the Indiana Department of Insurance, on matters that impact insureds.

In 2006 UP filed comments related to title insurance rates with the California Department of Insurance. UP cited the following in support of its contention that title insurance rates (and profits) were excessive:

- *"In 2003 and 2004, underwritten title insurance companies in CA earned after-tax profits of 49% and 32.3 % respectively--excessive by any reasonable measure".* (Birnbaum report as quoted by Kathleen Doler in **Investors Business Daily**, July 7, 2006)
- **A 1980 Peat Marwick Study for the Dept. of Housing and Urban Development** as cited in Mr. Birnbaum's report (p. 32) found," *The total cost of title assurance and conveyance services in the Los Angeles area was the highest among the eight selected sample cites.*"
- The number of title insurers had reduced in the last ten years while title insurance premiums grew larger in California than any other state (Birnbaum, p. 79)
- "*Claims are so rare in fact, that insurers spend as little as 5 cents to 10 cents of every premium dollar to pay them*", (Kiplingers Personal Finance Magazine entitled, **Home Buyers Beware Title Insurance,** October, 2001). In general, the Property and Casualty industry pays out over 90% of premiums in losses.
- "*Each year people like us pay $12 billion for home title insurance to a small club of insurers. And a club it is indeed--seven firms control 90 percent of the national market*" (A Bizarre Bazaar, **Risk and Insurance Magazine**, June, 2004

The contentions UP advanced in 2006 remain true to this day: Title insurance rates (and profits) continue to rise despite the fact that expenses have dropped considerably due to automation. With the more frequent turnover of homes nationwide, the risk on many new title policies has lessened due to the existence of prior title insurance on the same property. Only a few years of title research is necessary and losses can potentially be tendered back to the prior title carrier.

UP has appeared in state and federal courts as *amicus curiae* in over three hundred (300) appellate proceedings throughout the United States. Specifically, UP has appeared as *amicus* in

ten (10) appeals before the Supreme Court the United States; in various appeals before the United States Court of Appeals for the First, Second, Third, Fifth, Sixth, Eight, Ninth, Tenth, Eleventh and Federal circuits; and in numerous appeals before the highest or intermediate appellate courts in thirty-five (35) States and the District of Columbia.[1] A complete listing of these cases can be found in UP's online *Amicus* Project library. *See,* http://www.uphelp.org/library/amicus.[2] In 2012 UP weighed in on a title insurance claim matter in the Hawaii Supreme Court where the policyholders secured a favorable result. *See, Charles Mitchell Hart and Lisa Marie Hart v. TICOR Title Ins. Co.,* 272 P.3d 1215 (Haw. 2012). UP seeks *amicus curiae* admission because this case involves the complex field of title insurance in which it has expertise. UP seeks to assist this Court in this case because of its potential impact on Indiana consumers and policyholders of title insurance policies.

II.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Whether the Indiana Department of Insurance ("IDOI") properly investigated and instituted remedial measures for violations of Indiana Law found pursuant to its investigation of Appellant Commonwealth Land Title Insurance Company ("Commonwealth").

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[1] United Policyholders has been granted leave to appear as *amicus* in appeals involving important insurance issues in Alabama, Arizona, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Louisiana, Main, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Virginia, West Virginia, Wisconsin, Wyoming, and the District of Columbia.

[2] Also, available through UP's online *Amicus* Project Library, is a report entitled "Twenty Years Protecting, Defending and Advancing Policyholder's Rights" which summarizes the topics covered in over three (300) *amicus* briefs UP has filed between 1991 to 2011.

III.

SUMMARY OF ARGUMENT

This appeal is primarily based upon the contention that the trial court failed to meet its burden when it upheld the IDOI's remedial measures. Commonwealth ignores relevant analysis performed by the trial court and simply disagrees with the conclusions reached by the court. These disagreements are not grounds for overturning the findings of the trial court.

Contrary to the position taken by the Amicus Curiae brief submitted by The Indiana Legal Foundation, the court of appeals' primary concern must be with fairly and properly determining whether the IDOI has the authority to implement the remedial scheme at issue in this case, not to determine whether or not the remedial scheme will disincentivize title insurance business in Indiana. Primarily, The ILF argues that regulatory intervention has a "deleterious effect on investment, production and employment;" however, this argument and the studies cited for support would similarly support a proposal to eliminate the Indiana Department of Insurance and a host of other regulatory agencies without giving due weight to the legislature's decision to create and empower these governmental organizations. This kind of slash-and-burn approach fails to account for the benefits regulation provides to consumers and insureds in Indiana. To the contrary, the IDOI has a mandate to provide oversight and regulatory protections to the insurance industry including title insurance providers. I.C. § 27-1-3.1-8(a)(2).

Commonwealth's brief spends quite some time discussing the genesis of their practices and the timing of their acquisition by Fidelity in connection with those

practices. This brief primarily addresses and focuses on the authority of the IDOI to impose the November 23, 2011 administrative order and the propriety of the trial court's findings.

First and foremost, the Indiana Code vests the Indiana Insurance Commissioner with regulatory authority over a company engaging in or proposing or attempting to engage in any kind of insurance or surety business. I.C. §27-1-3.1. The IDOI is empowered to conduct an examination of an insurance company, including a title insurance company, by appointing an examiner to conduct the examination. I.C. §27-1-3.1. It is beyond dispute that the IDOI undertook the proper procedures to investigate Commonwealth. However, Commonwealth attempts to divert this Court's attention from this fact, by attacking instead the findings of the examiners.

IV.

ARGUMENT

A. Issues Related To Commonwealth's Indication Of The Standard For Review

Under the proper standard of review for an administrative act, that act can be deemed arbitrary and capricious "only where it is willful and unreasonable, without consideration and in disregard of the facts and circumstances in the case, or without some basis which would lead a reasonable and honest person to the same conclusion." *Dep't of Natural Res. v. Ind. Coal Council, Inc.*, 542 N.E.2d 1000, 1007 (Ind. 1989). Also, "In reviewing an administrative decision, a court is not to try the facts de novo or substitute its own judgment for that of the agency." I.C. § 4-21.5-5-11. On appeal, the Court of

Appeals can engage in a de novo review of the record. *Equicor Development, Inc. v. Westfield-Washington TO. Plan Com'n*, 758 N.E.2d 34, 37 (Ind. 2001). Contrary to Commonwealth's assertions, neither the *Equicor* case nor the *First American Title Insurance Co. v. Robertson*, 990 N.E.2d 9, 11-12 (Ind. Ct. App. 2013) case state that the court here owes no deference to the Department's findings. See Appellant's Brief ("AB") at p. 15. The court below conducted a hearing on the submitted verified petition and to the extent the Court made any factual findings as a result of that hearing, the trial court's findings are entitled to deference on appeal. *Equicor Development, Inc. v. Westfield-Washington TO. Plan Com'n*, 758 N.E.2d 34, 37 (Ind. 2001).

B. The Trial Court Properly Reviewed and Issued Findings and Law and Fact Related to the Appellants Violation of Indiana Law

Commonwealth's argument that the trial court, as a preliminary matter, failed to interpret the applicable Indiana statutes is inappropriate. The standard for whether or not the trial court must engage in a detailed review of a statutory scheme, including reference to outside sources such as legislative history, etc. is not whether not there are two reasonable interpretations of a statute (AB p. 16), but instead, the standard is whether or not the statute is ambiguous under the circumstances and requires the court to engage in statutory interpretation analysis. The trial court here, found the statutory scheme unambiguous and agreed with the reasonable interpretation provided by the IDOI, the agency charged with enforcing the scheme.

> When a court is faced with two reasonable interpretations of a statute, one of which is supplied by an administrative agency charged with enforcing the statute, the court should defer to the agency. If a court determines that an agency's interpretation is

> reasonable, it should terminate its analysis and not address the reasonableness of the other party's proposed interpretation. Terminating the analysis recognizes the general policies of acknowledging the expertise of agencies empowered to interpret and enforce statutes and increasing public reliance on agency interpretations.

Dev. Servs. Alts., Inc. v. Family & Soc. Servs. Admin., 915 N.E.2d 169, 181 (Ind. Ct. App. 2009) *trans. denied*, 929 N.E.2d 784 (Ind. 2010) (quoting *Pierce v. State Dep't of Correction*, 885 N.E.2d 77, 89 (Ind. Ct. App. 2008)). Commonwealth states that this deference is only appropriate where the interpretation is found to be consistent with the statute itself. AB, p. 17. However, Commonwealth does not identify any inconsistencies, and the trial court found the IDOI's interpretation of the statutory scheme to be reasonable. This fact is evidenced by the trial court's statements on page 18 of its findings. The trial court concluded that it only has the ability to utilize the administrative agency statutory interpretation if it finds that interpretation "reasonable." Finding of Fact, Conclusions of Law and Order, p. 18, ¶10. Then the trial court continues by stating the conclusion of its analysis was that the IDOI's interpretation was indeed the reasonable reading of the statutory scheme. Id. at 19, ¶11 and Id. at 19, ¶14.

Thus, contrary to Commonwealth's assertion, the Court's Finding of Fact, Conclusions of Law and Order, dated January 29, 2013 does address and analyze the applicable Indiana laws.

C. The Trial Court Properly Issued Findings and Law and Fact Related to the Remedial Scheme Imposed by the Indiana Department of Insurance

As a result of the findings of the trial court and the interpretation of Indiana law, the trial court found that the oversight responsibilities of the IDOI are broad.

Specifically, the IDOI is empowered by Indiana law to ensure that insurance companies operating in Indiana "conduct and transact business in a safe and prudent manner." I.C. §27-1-3-4(1).

The trial court next found that the IDOI has the authority to ensure that insurance companies establish and maintain safe and sound methods for the conduct of such insurance company and its business and prudential affairs. I.C. §27-1-3-4(3). The IDOI is given similarly broad power to adopt remedial measures.

These legislative pronouncement are found under the heading "Business practices of insurance companies" and is not limited as Appellant argues to only a determination of whether the insurance company is financially viable. See AB p. 31. The statutory scheme at issue is in place to protect the business of insurance in the State of Indiana including both the insurers and the insureds. I.C. 27-1-3, et al.

Upon the finding that an insurance "is operating in violation of any law, regulation, or prior order of the commissioner, the commissioner may order the company to take any action the commissioner considers necessary and appropriate to cure that violation." I.C. §27-1-3.1-11(b).

The methods by which the IDOI undertake to carry out its mandate should be given deference. A court is not empowered to substitute its own remedial ideas for that imposed by the IDOI, an executive agency. *Commissioner of Labor v. Gary Steel Products Corp.*, 643 N.E.2d 407, 410 (Ind. Ct. App. 1994).

Commonwealth's argument that the trial court failed to meet its burden in determining whether section 27-1-3.1-11(b) allowed for the remedial action taken by the

IDOI is inappropriate. Commonwealth argues that interpreting this cure statute is a matter of statutory construction, and thus concludes "Courts, rather than administrative agencies, resolve questions of statutory construction." AB, p. 24.

The plain, straight forward language of this cure statute contains no ambiguity or necessity on the facts of this issue that require the "statutory construction" analysis demanded by Commonwealth. Moreover, even if the Court were to find that Statutory Interpretation were appropriate, the trial court performed this analysis, by undertaking a review and citing to the *State Farm Mut. Auto. Ins. Co. v. Mortell*, 667 N.E.3d 192 (Ind. Ct. App. 1996) case. While Commonwealth disagrees with the conclusion reached by the trial court, claims that the trial court performed no analysis are belied by the trial court's statements in its Order at pages 17 – 19.

Commonwealth improperly attempts to downplay the violations noted in the IDOI's findings. Commonwealth repeatedly identifies one finding in the IDOI's report that notes that Commonwealth "...intentionally created an environment where agents were not required to report to [Commonwealth] the premiums actually charged to consumers." Findings of Fact, Conclusions of Law and Order, p. 12 ¶51(a).

Commonwealth fails to mention that the IDOI also found that Commonwealth violated I.C. §27-1-3.1-9(a), that during the examination period Commonwealth under reported premium for tax purposes by an estimated $4,780,468 (Findings of Fact, Conclusions of Law and Order p. 10, ¶37), under reported premium from 2005-2008 by an estimated $3,732,616 (*Id.* at 10, ¶42), failed to ensure compliance with procedures for compliance with HUD-1 forms (*Id.* at 12, ¶51(c)), violated I.C. § 27-1-3-4(1) by failing

to conduct and transact its business in a safe and prudent manner (*Id.* at 14, ¶60), violated I.C. § 27-1-3-4(3) by failing to establish and maintain safe and sound methods for the conduct of the insurance company and its business and prudential affairs (*Id.* at 14, ¶60), violated I.C. § 27-4-1-4(a)(7)(c) by failing to ensure that rates charged by insurers are not excessive, inadequate, or unfairly discriminatory (*Id.* at 14, ¶60.) The IDOI found that Commonwealth's procedures were "...intended as a way to allow agents to charge varying premiums to consumers based on factors such as the consumer's sophistication, property location, and negotiations, rather than risk borne by [Commonwealth] in writing the title insurance." *Id.* at 14, ¶59.

Commonwealth rests on the assertion that there was no finding that "even a single Indiana consumer paid a premium that was excessive or unfairly discriminatory." AB, p 2. However, the trial court noted that IDOI found the procedures adopted by Commonwealth resulted in an underpayment of premium taxes in an amount between $54,115 and $62,146 for the examination period. Findings of Fact, Conclusions of Law and Order, p. 15 ¶61. The trial court also noted the IDOI found specific violations of I.C. § 27-4-1-4 and § 27-1-3-4 as well as § 27-1-18-2.

D. Public Policy Supports The IDOI, Not Commonwealth Or Its *Amici*, And This Court Should Affirm The Trial Court's Rulings And The IDOI's Administrative Order.

UP's *amicus* projects shed needed light on public policy issues affecting insurance consumers nationwide. Here, the dispute centers on Commonwealth's title insurance practices in Indiana. Importantly, title insurance provides the basic social safety net for ordinary consumers and, through this *amicus* brief, UP provides a consumer's voice to this Court, counseling on

important insurance issues. Here, the IDOI has presented substantial evidence of Commonwealth's title insurance practices which are inimical to Indiana consumers of title insurance products. In urging reversal, Commonwealth raises public policy concerns that the "Administrative Order will create turmoil in the Indiana insurance market" AB, p. 40. Similarly, the ILF decries that "government regulations stifles economic growth and employment" and questions the IDOI's administrative order on public policy grounds. ILF Brief, pp. 4-6. Similarly, the ILTA muses that the IDOI's administrative order will lead to "regulatory uncertainty for Indiana consumers." *See*, ILTA's Brief, pp. 4-5. These public policy arguments are unavailing and should be rejected.

Properly viewed, public policy supports the IDOI, not Commonwealth or its *amici*. In 1913, Justice Louis Brandeis published "What Publicity Can Do" in Harper's Weekly. There, in support of the "struggle against the Money Trust," Justice Brandeis famously said:

> "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."[3]

At bottom, the IDOI's administrative order has brought needed "sunlight" to Commonwealth's secretive title insurance practices including its Cents Per Thousand program. These secretive practices were not disclosed to Indiana consumers, nor were accurate reports being disclosed or accurate premium taxes paid to the State of Indiana. The Court should affirm the robust powers of the IDOI to fashion curative relief to prevent these harm now and in the future. And reversal of these rulings will allow these practices to retreat into the shadows.

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[3] http://www.law.louisville.edu/library/collections/brandeis/nod/196. Justice Brandeis' article discussed excessive bankers' commissions and how to stop them. *Id.*

V.

CONCLUSION

For the foregoing reasons, Commonwealth's Brief challenging the trial court's Findings of Fact, Conclusions of Law and Order should be denied.

Respectfully submitted,

HARRISON & MOBERLY, LLP

By 

Stephen J. Peters
Attorney No. 6345-49
Counsel for *Amici Curiae*
United Policyholders

HARRISON & MOBERLY, LLP
10 W. Market Street
Suite 700
Indianapolis, IN 46204
(317) 639-4511
(317) 639-9565 (Fax)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served on September 3rd, 2013 by placing a copy of same in the U.S. first class mail, addressed to:

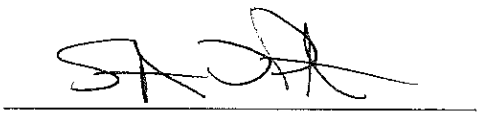
Gregory F. Hahn
Bryan H. Babb
Kevin M. Quinn
Joel T. Nagle
Bose McKinney & Evans LLP
11 Monument Circle, Suite 2700
Indianapolis, IN 46204

Wade D. Fulford
Indiana Department of Insurance
311 West Washington, Street, Suite 300
Indianapolis, IN 46204

David Steiner
Kate Shelby
Deputy Attorney General
Office of the Indiana Attorney General
Government Center South, 5th Floor
302 West Washington Street
Indianapolis, IN 46204

Thomas E. Wheeler, II
Frost Brown Todd LLC
201 North Illinois Street
Suite 1900
Indianapolis, IN 46204

Steven M. Badger
Benesch, Friedlander, Copland & Arnoff LLP
One American Square
Suite 2300
Indianapolis, IN 46282



Stephen J. Peters

HARRISON & MOBERLY, LLP
10 West Market Street
Suite 700
Indianapolis, IN 46204
(317) 639-4511
(317) 639-9565 (Fax)