No. 97-1440 (L)
97-1441

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

- v. -

Appellee,

JOHN BRENNAN, President and Chief Executive Officer of United States Aviation Underwriters, Inc.; and UNITED STATES AVIATION UNDERWRITERS, INC.

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS ON BEHALF OF APPELLEE, UNITED STATES OF AMERICA

Eugene R. Anderson, Esq.
Anderson Kill & Olick, P.C.
1251 Avenue of the Americas
New York, NY 10020-1182
(212) 278-1751
Attorney for Amicus Curiae
United Policyholders

Of Counsel

Amy Bach, Esq.
United Policyholders
Citicorp Center
1 Sansome Street, Suite 1610
San Francisco, CA 94104

James J. Fournier, Esq.
1251 Avenue of the Americas
New York, NY 10020-1182
(212) 278-1280

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SUMMARY OF ARGUMENT

The defendants-appellants and their amici are wrong about insurance law and lore in such a panoramic fashion that concise reply is difficult.

Hartford Accident and Indemnity Co. v. Michigan Mutual Insurance Co. was no anomaly. As fully set forth in this brief and in United Policyholders Memorandum of Law in Support of Motion for Leave to File an Appendix to this brief, the New York Court of Appeals was not unguided when it rejected arguments sub silentio that insurance companies were not fiduciaries.

Contrary to the arguments of defendant-appellants and their amici, the insurance industry will not come to a halt if the convictions and fines in this case are affirmed. In another example, the defendants-appellants and their amici have grossly overstated the extent of the insurance industries' McCarran-Ferguson Act exemption. These scare tactics reflect the insurance industry's well known ploy of "crying wolf".

Fraud is still fraud, even if within the norms of the insurance and reinsurance industry.

The defendants-appellants cannot rely on a phantom "sophisticated" policyholder exclusion to lessen the obligations to U.S. Air because no such exclusion exists. If the defendants-appellants had wanted to draft and include in the insurance policies an exclusion for "sophisticated" policyholders, they should have done so. Defendants-appellants should not importune this Court to draft an exclusion for them. Insurance companies often use their insurance litigation experience and sheer

financial power to overwhelm a policyholder -- regardless of the policyholder's size or purported "sophistication".

Regulation of claims handling practices are part of the fabric of the insurance industry. The world will not end if these regulations are enforced. Defendants-appellants and their amici's speculation of massive claims handling problems are contradicted by the real world, every day procedures presently operating in the insurance industry.

Insurance companies owe their policyholders a fiduciary duty. The insurance company's fiduciary duty has been repeatedly asserted by insurance companies, courts and commentators. Similarly, it has been widely recognized that insurance companies possess a special public nature and provide a public service function. Yet insurance companies wield a tremendous amount of financial might, claims handling skill and litigation experience. The insurance industry and its representatives also control the development of pro-policyholder insurance law by vacatur; that is, wiping fifty percent of the pro-policyholder decisions off the books.

All in all, insurance companies are supposed to be honest. With the overwhelming ability of the insurance industry to tip the scales in its favor in so many different ways, it is very telling that insurance organizations have developed codes of ethics for their members.

STATEMENT OF FACTS

To the extent the arguments in this brief are fact based, amicus curiae United Policyholders has referenced the portions of the defendants-appellants and their amici briefs upon which United Policyholders has based its arguments.