IN THE UTAH SUPREME COURT

UNITED STATES FIDELITY AND GUARANTEE CO., Plaintiff v. UNITED STATES SPORTS SPECIALTY ASSOCIATION, Defendant.	Case No. 20090657-SC Civil No. 2:07CV0096

MOTION OF UNITED POLICYHOLDERS FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF ON BEHALF OF DEFENDANT, UNITED STATES SPORTS SPECIALTY ASSOCIATION

On Certification from the United States District Court
for the District of Utah

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Dated: March 12, 2010

STATEMENT OF INTEREST OF AMICUS CURIAE

Attorneys for *Amicus Curiae* United Policyholders respectfully move pursuant to Utah Rule of Appellate Procedure 25 for permission to file an *amicus* brief in support of Defendant United States Sports Specialty Association. With regard to the twenty-one day requirement for filing under Rule 25, the amicus party just became aware that the filing deadline of March 31, 2010 is now the official deadline instead of April 16, 2010, as previously stated in the record, and immediately seek leave to file this Motion. The amicus party will be prepared to file its brief on March 31, 2010. In support of this Motion, *amicus curiae* United Policyholders states the following facts:

United Policyholders is a non-profit 501(c) (3) consumer organization founded in 1991 that has eighteen years of experience helping solve insurance problems and advocating for fairness in insurance transactions. Donations, foundation grants and volunteer labor fuel the organization. United Policyholders' Board of Directors includes the former Chief Justice of the Arizona Supreme Court and the former Washington State Insurance Commissioner.

United Policyholders' work is divided into three program areas: *Roadmap to Recovery* provides tools and resources that help individuals and businesses solve insurance problems that can arise after an accident, illness, disaster, or other adverse event. The *Roadmap to Preparedness* program promotes insurance and financial literacy as well as disaster preparedness. The *Advocacy and Action* program advances policyholders' interests in courts of law, legislative and public policy forums, and in the

media. United Policyholders participates in the proceedings of the National Association of Insurance Commissioners as an official consumer representative. United Policyholders offers an extensive library of publications, legal briefs, sample policies, forms and articles on commercial and personal lines insurance products, coverage and the claims process at www.unitedpolicyholders.org.

In addition to serving as a resource on insurance claims for individuals and commercial policyholders, United Policyholders monitors legal and marketplace developments affecting the interests of all policyholders. United Policyholders receives frequent invitations to testify at legislative and other public hearings, and to participate in regulatory oversight proceedings.

Since 1992, United Policyholders has filed more than 280 *amicus curiae* briefs on behalf of policyholders in courts throughout the United States, [1] including the United States Court of Appeals for the 10th Circuit in *State of Wyoming v. Federated Services Insurance Company*, 211 F.3d 1279 (1999). Moreover, United Policyholders has filed *amicus curiae* briefs in numerous cases before United States Supreme Court.[2]

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[1] *See e.g., Pincheira v. Allstate Ins. Co., Allmerica Fin. Corp. v. Certain Underwriters at Lloyd's, London*, 449 Mass. 621 (2007); *Vandenberg v. Superior Court*, 88 Cal. Rptr. 2d 366 (Cal. 1999); *Allstate Ins. Co. v. Gregory* Serio, No. 97 CIV-0670 (RCC), United States District Court, Southern New York District; *Knotts v. Zurich Ins. Co.*, 197 S.W.3d 512 (Ky. 2006); *Advance Watch Co., v. Kemper Nat'l Ins. Co.*, 99 F.3d 795 (6th Cir. 1996); *Aircraft Holdings, LLC v. XL Specialty Ins. Co.*, 935 So.2d 1219 (Fla. 2006); *SCI Liquidating Corp. v. Hartford Ins. Co.*, 272 Ga. 293 (2000); *Pilkington N. Am. v. Travelers*, 106 Ohio. St. 3d 1451 (Ohio 2005); *Excess Underwriters Lloyd's, London v. Frank's Casing Crew & Rental Tools, Inc.*, 246 S.W.3d 42 (2004)

[2] *See, e.g., Fuller-Austin Insulation Co., v. Highlands Ins. Co.*, 549 U.S. 946 (2006); *Philip Morris USA v. Mayola Williams*, 547 U.S. 1162 (2006); *Aetna Health, Inc. v. Juan Davila*, 542 U.S. 200 (2004); *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *Rush*

Indeed, the U.S. Supreme Court cited United Policyholders' *amicus curiae* in *Humana, Inc. v. Forsyth*, 525 U.S. 299 (1999). United Policyholders was the only national consumer organization to submit an amicus curiae brief in the landmark case of *State Farm v. Campbell*, 538 U.S. 408 (2003).

United Policyholders has a vital interest in ensuring that insurance companies fulfill the promises they make to their policyholders. While insurance companies are in business to earn profit through risk assumption, businesses and individuals rely on insurance to protect property and livelihoods. United Policyholders seeks to prevent insurance companies from shifting risk back to policyholders through schemes that are not authorized by insurance contracts or public policy. The organization works to counterbalance the widely-represented interests of insurance companies by serving as an advocate for large and small policyholders in forums throughout the country.

In the case at bar, United Policyholders seeks to appear as *amicus curiae* to address certain questions before the Court that are of significance well beyond the application of law to the specific facts of this litigation. These important issues will affect policyholders nationwide. All of the legal research and writing in this brief has been performed by unpaid volunteer counsel, and no party to this appeal participated in the drafting of this brief or funded this work.

Prudential HMO v. Debra Moran, 533 U.S. 948 (2001); *Humana Inc. v. Forsyth*, 525 U.S. 299 (1999).

Dated: March 12, 2010

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IN THE UTAH SUPREME COURT

UNITED STATES FIDELITY AND GUARANTEE CO., Plaintiff v. UNITED STATES SPORTS SPECIALTY ASSOCIATION, Defendant.	Case No. 20090657-SC Civil No. 2:07CV0096

BRIEF OF UNITED POLICYHOLDERS AS *AMICUS CURIAE* ON BEHALF OF DEFENDANT, UNITED STATES SPORTS SPECIALTY ASSOCIATION

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for the District of Utah, Magistrate Judge Brooke C. Wells

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Dated: April 9, 2010

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NATURE OF THE CASE AND STATEMENT OF FACTS

I. UNITED POLICYHOLDERS ADOPTS THE STATEMENT OF FACTS AS SET FORTH BY THE POLICYHOLDERS, UNITED STATES SPECIALTY SPORTS ASSOCIATION

United Policyholders adopts the Statement of Facts of the policyholders, United States Specialty Sports Association, as set forth in its brief on Certification to the Utah Supreme Court. *See Defendant's Brief on Certification*, filed Apr. 9, 2010, at 4-11.

ARGUMENT

I. ALLOWING INSURANCE COMPANIES TO HAVE AN UNWRITTEN, UNILATERAL RIGHT OF REIMBURSEMENT FROM THE POLICYHOLDER IS AGAINST THE PURPOSE OF INSURANCE

Insurance transfers risk, and a policyholder pays a premium in order to transfer "the risk of a loss or the responsibility for certain costs and expenses" to an insurance company. ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCUMENTS, AND COMMERCIAL PRACTICES 11 (West Publishing Co. 1988). Rather than an isolated contract for money, Utah state courts have recognized that "the purpose of insurance is to insure." *Dawson v. Dawson*, 841 P.2d 749, 750 (Utah Ct. App. 1992).

In fact, beyond the mere purpose to "insure," Utah's Insurance Code has further sought to *ensure* that policyholders are protected from the overreaching effects inherent in the unbalanced relationship with insurance companies. *See* UTAH CODE ANN. § 31A-1-102(2) (1985); *see also Derbidge v. Mut. Protective Ins. Co.*, 963 P.2d 788, 796 (Utah Ct. App. 1998) (recognizing Utah's "statutory mandate" of ensuring that claimants are treated fairly and equitably). This fact has even been acknowledged by

Utah's Insurance Commissioner, stating that discretionary clauses in insurance policies are inequitable and unfair, as they "attempt to give additional power to insurers who are already in a superior bargaining position." Discretionary Clauses Prohibited, Bulletin 2002-7 (Utah Dep't of Insurance July 29, 2002). Additionally, Utah's jurisprudence has also recognized this unequal relationship, and this Court's role in protecting the disadvantaged policyholder:

> We have frequently declared that because insurance policies are adhesion contracts, they are to be construed liberally in favor of the insured and their beneficiaries so as to promote and not defeat the purposes of insurance.

Farmers Ins. Exch. v. Versaw, 99 P.3d 796, 800 (Utah 2004). Indeed, this approach is necessary to assist the policyholder, since "insurance contracts are typically drafted by insurance company attorneys, are not negotiated by the insured, and are offered on a take-it-or-leave-it basis." *Versaw*, 99 P.3d at 800.

Yet, at the very least, the policyholder can trust that all of the parties' rights and duties are set forth in the insurance policy. This is done with purpose, so the policyholder can have "piece of mind" that the contract bargained for will protect against the sudden occurrence of liability. *Machan v. Unum Life Ins. Co. of Am.*, 116 P.3d 342, 345 (Utah 2005). The policyholder's expectation is reinforced by the well-established principle that the insurance company has a implied duty of good faith to carry out its obligations under the contract. *See Cannon v. Travelers Indem. Co.*, 994 P.2d 824, 828 (Utah Ct. App. 2000) ("the duty of good faith is the essence of what the insured has

bargained and paid for.") (internal quotations omitted); *see also Beck v. Farmers Ins. Exch.*, 701 P.2d 795, 801 (Utah 1985).

Indeed, insurance companies' obligation to act in "good conscience and fair dealing require that the [insurer] not pursue a course which is advantageous to itself while disadvantageous to its policyholder." *Tank v. State Farm Fire & Cas. Co.*, 715 P.2d 1133, 1139 (Wash. 1986). Nevertheless, that is exactly what an insurance company is doing when it seeks an unwritten, unilateral right to settlement reimbursement. The sooner an insurance company can settle a third-party claim, the sooner it can stop expending defense costs on behalf of the policyholder.

However, with a unilateral right to settlement reimbursement, the situation quickly turns unfairly disadvantageous for the policyholder, as the insurance company will settle above the policy limits (as to not risk possibly greater liability at trial) and then simply attempt to recoup that amount from the policyholder. Instead of the insurance company indemnifying the policyholder for an unforeseen accident, the policyholder is left indemnifying the insurance company for an unwritten, unilateral and unforeseen right to full settlement reimbursement.

If an insurance company is permitted unilaterally to claim reimbursement from its policyholder for settlement amounts, the result would not only rewrite the insurance promise, but subject every future policyholder to hidden, crippling costs as merely "the business of insurance." Such an inappropriate result is not in line the with purpose of insurance, or the purpose of Utah's Insurance Code.

II. AN INSURANCE COMPANY'S ATTEMPT TO OBTAIN REIMBURSEMENT UNDER A UNILATERAL RESERVATION OF RIGHTS NOT WRITTEN IN THE INSURANCE POLICY VIOLATES UTAH LAW AND IMPERMISSIBLY REWRITES THE INSURANCE POLICY

For the policyholder to gain the benefit of its bargain in an insurance contract, the insurance company cannot serve its own interest above that of the policyholder. *See City of Hobbs v. Hartford Fire Ins. Co.*, 162 F.3d 576, 582 (10th Cir. 1998) ("an insurance company acts in bad faith when it places its own interest ahead of the interests of the insured."). As discussed above, an insurance company is solely acting its own interest by unilaterally settling a claim with an injured third-party and then seeking reimbursement from the policyholder for that settlement.

However, such an inequitable result is not easily accomplished. It requires a court to first allow the insurance company to "reserve" a right which does not appear in the insurance policy, and then allow the insurance company to rewrite the insurance policy to include the right to reimbursement. The insurance company could have included the provision – but did not – in the policy from the start. The policy should be enforced as written, and as the drafter of the insurance policy, the absence of any right to reimbursement in the policy should he held against the insurance company instead of being created "in equity" to punish the policyholder. *See Utah Farm Bureau Mut. Ins. Co. v. Orville Andrews & Sons*, 655 P.2d 1308, 1309 (Utah 1983).

A. Allowing Settlement Reimbursement From The Policyholder Under A Unilateral Reservation of Rights Is Illogical And Sets A Dangerous Precedent

Insurance companies cannot retroactively amend the insurance policy to include reimbursement rights through a reservation of rights because "[a] unilateral reservation-of-rights letter cannot create rights not contained in the insurance policy." *Texas Ass'n of Counties County Gov't Risk Mgmt. Pool v. Matagorda County*, 52 S.W.3d 228, 231 (Tex. 2000). As the Eastern District for Pennsylvania stated in *Utica Mutual Insurance Company v. Rohm and Haas Company*, in the context of defense costs:

> Utica alleges that [the policyholder's] silence in response to Utica's reservation of rights created a new, implied contract between the parties. But this theory has been soundly rejected by courts: a reservation of rights cannot create a contract allowing an insurer to recoup defense costs from its insured because the purpose of a reservation of rights is to assert defenses and exclusions already set forth in the insurance contract.

No. 08-3812, 2010 WL 431442, at *6-7 (E.D. Pa. Feb. 5, 2010) (stating that, for the same reasons, insurance company could not recover settlement payments) (emphasis added).

Any reimbursement provision has no place in a reservation of rights letter, but rather must be included in the policy that was sold, at the time is was sold. Insurance companies cannot reserve a power that never existed to begin with in the insurance policy. Indeed, insurance companies already enjoy overwhelming advantages in coverage disputes. *See Miller v. Fluharty*, 500 S.E.2d 310, 318 n.10 (W. Va. 1997) (acknowledging disparity in resources "is apparent in the fact that insurance companies spend over $1 billion annually in litigation battles against policyholders.").

A national insurance company, already given the benefit of vast resources as compared to the policyholder, would be able to reserve its right to any right it deemed "equitable," even though such right is absent in the insurance policy. The door would thus be opened to insurance companies subjecting Utah policyholders to a penalty to which it never agreed. *See Given v. Commerce Ins. Co.*, 440 Mass. 207, 212, 796 N.E.2d 1275, 1279 (2003) ("Although insurance provisions that are plainly expressed must be enforced ... those that are conspicuously absent should not be implied.").

Moreover, such a result would create confusion and inefficiency in the court system, as each Utah court would have to conduct a case-by-case analysis to determine what rights the insurance company *could* reserve under the circumstances. As described in more detail below, such a result is against both Utah's jurisprudence and the Utah Insurance Code. Both bodies of law require that insurance companies first obtain the policyholder's consent before making any material change to the terms of the insurance policy, thereby disallowing any after-the-fact, unilateral right to settlement reimbursement.

B. A Unilateral Right To Reimbursement Is Against Utah Law And Policy, And Would Destroy The Concept Of Liability And Litigation Insurance

Utah law, as with most jurisdictions, recognizes that a bargained-for contract between the insurance company and the policyholder encapsulates the intent of the parties, and that absent ambiguity, courts will not change the written agreement without evidence of mutual consent. Utah's Insurance Code explicitly states that "a purported modification of a contract during the term of the policy may not affect the

obligations of a party to the contract unless the modification is (1) in writing, and (2) agreed to by the party against whose interest the modification operates." *See* UTAH CODE ANN. § 31A-21-106(2)(a)(i)-(ii) (1985).

An insurance company which unilaterally seeks a reimbursement for settlement costs from the policyholder through a reservation of rights is a modification of the insurance policy. Indeed, it purports to add terms to which the policyholder never agreed. Such a right would enable insurance companies to freely settle with third parties above the policy limits, and then automatically attempt to seek restitution from the policyholder, even though the policyholder did not agree to restitution and commonly is not involved in settlement discussions. Certainly, the "insurance policy should not be interpreted ... to enlarge or restrict its provisions beyond what is reasonably contemplated by its terms or so as to achieve an absurd conclusion." *Cyprus Plateau Mining Corp. v. Commonwealth Ins. Co.*, 972 F. Supp. 1379, 1382 (D. Utah 1997) (*citing LDS v. Hosp. v. Capitol Life Ins. Co.*, 765 P.2d 857, 859 (Utah 1988).

The Court cannot assist the insurance company in creating a right to settlement reimbursement, leaving the policyholder to not only pay premiums for the insurance it bargained for, but also to carry the burden of compensating the insurance company for settling over the policy limits without the policyholder's consent. *See Versaw*, 99 P.3d at 800 (stating that Utah, like many others jurisdictions, favors the insured in order to "accomplish the purpose for which the insurance was taken out and for which the premium was paid."). In fact, several jurisdictions already have rejected insurance companies' attempts to achieve this absurd conclusion, stating that to

"recognize an equitable right to reimbursement would require [the court] to rewrite the parties' contract or add to its language." *See, e.g., Utica Mut.*, 2010 WL 431442, at *7; *Excess Underwriters at Lloyd's, London v. Frank's Casing Crew & Rental Tools, Inc.*, 246 S.W.3d 42, 50 (Tex. 2008).

To allow the insurance company to rewrite the insurance policy, effectively binding the policyholder to costs it never agreed to "at a time when the policyholder is most vulnerable," would again be inconsistent with Utah's Insurance Code. *Frank's Casing*, 246 S.W.3d at 50; *see* UTAH CODE ANN. § 31A-21-303(6)(a)(i)-(ii) (1985) (requiring insurance company to give notice of any attempt to renew the policy "on less favorable terms or at higher rates," and allowing policyholder additional thirty days to cancel policy if insurance company fails to give timely notice).

Indeed, the above concerns not only affect the policyholders of Utah, but allowing insurance companies this "equitable" right would adversely impact policyholders nationwide. Courts everywhere already recognize that "the bargaining power of an insurance carrier vis-à-vis the bargaining power of the policyholder is disparate in the extreme." *Hayseeds, Inc. v. State Farm Fire & Cas. Co.*, 352 S.E.2d 73, 77 (W. Va. 1986); *see also Lyons v. Lindsey Mordan Claims Mgmt., Inc.*, 985 S.W.2d 86, 91 (Tex. App. 1998) ("the insured and the insurer are parties to a contract that is a result of unequal bargaining power, and by its nature allows unscrupulous insurers to take advantage of their insured."); *Wathor v. Mut. Assurance Adm'rs, Inc.*, 87 P.3d 559, 561-62 (Okla. 2004). Therefore, allowing this extra-contractual right to reimbursement would only further the gap in fairness, practically inviting the insurance company to demand

settlement reimbursement for whatever amount it deems proper. As Supreme Court for Wyoming stated, in the context of an equitable right to reimbursement of defense costs:

> [T]o allow the insurer to force the insured into choosing between seeking a defense under the policy, and run the risk of having to pay for this defense ... or giving up all meritorious claims that a duty to defend exists, places the insured in a Hobson's choice. Furthermore, endorsing such conduct is tantamount to allowing the insurer to extract a unilateral amendment to the insurance contract. If this became common practice, the insurance industry might extract coercive arrangements from their insureds, destroying the concept of liability and litigation insurance.

Shoshone First Bank v. Pacific Employers Ins. Co., 2 P.3d 510, 516 (Wyo. 2000).

The same is true for reimbursement of settlement costs, where the policyholder is "forced to either accept the insurer's unilateral conditions on funding the settlement, fund the settlement itself, or forgo settlement altogether thereby risking loss of a potential reasonable settlement within the policy limits." *Utica Mut.*, 2010 WL 431442, at *7. Therefore, under a unilateral reservation of rights, if allowed, an insurance company could obligate the policyholder to endless payments, expenses, and duties that the policyholder never agreed to, with no other commercially reasonable alternative.

C. If Insurance Companies Wish To Seek Reimbursement From The Policyholder, They Are Capable Of Including Such A Clause In The Insurance Policy

If insurance companies seek reimbursement from their policyholders for the amount paid in settlement, then insurance companies are more than capable of drafting insurance policies containing such a clause, so that the policyholder may have the chance

to accept or reject such a condition. This presents a far superior alternative than the insurance company, already equipped with vast resources, being allowed to unilaterally modify the insurance policy any way it deems fit after it has been sold to the policyholder.

Utah courts have stated "rather than ... adopt a new doctrine with unknown ramifications ... [the Insurance] Code expresses an intent that 'freedom of contract' be maintained, and that written contracts be the primary means by which this freedom of contract be exercised." *Allen v. Prudential Prop. and Cas. Ins. Co.*, 839 P.2d 798, 806 (Utah 1992) (declining to adopt the reasonable expectations doctrine when the Utah Insurance Code already sets forth acceptable methods by which various clauses can be modified by the parties). Therefore, allowing a unilateral right to reimbursement would not only enable the insurance company to hold the policyholder responsible for settlement costs it never agreed to, it also would run the "risk of broadly undermining [the] legislative goals" behind the Utah Insurance Code. *Allen*, 839 P.2d at 807.

Instead of destabilizing the entire Insurance Code, a much simpler alternative is to merely require that insurance companies seeking a right to settlement reimbursement include a clear, unambiguous statement of that right in the policy. Indeed, several other jurisdictions have come to the same conclusion. *See, e.g., Gen. Agents. Ins. Co. of Am. v. Midwest Sporting Goods Co.*, 828 N.E.2d 1092, 1103 ("if an insurer wishes to retain its right to seek reimbursement ... [it] is free to include such a term in its insurance contract."); *Utica Mut.*, 2010 WL 431442 at *9 ("Utica could have included in the Contracts express provisions for the reimbursement of ... settlement payments, or

reached a subsequent bilateral agreement with [the policyholder] regarding these payments."); *Frank's Casing*, 246 S.W.3d at 46 ("at the outset, the insurer may include a reimbursement right in the policy, which may yield a lower premium than a policy that does not contain such a right."). Also, insurance regulators will then have a chance to review the insurance policy forms for approval. This way, policyholders everywhere can be advised when the policy is sold, instead of when they're most vulnerable, that if their insurance company settles with a third-party, it may be seeking reimbursement.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* United Policyholders respectfully requests this Court to hold that under Utah law, the insurance company does not have a unilateral right to settlement reimbursement.

Dated: April 9, 2010

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