No. 99-15802

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNIGARD INSURANCE COMPANY AND
UNIGARD SECURITY INSURANCE COMPANY,
Plaintiff/Appellant,

v.

THE CITY OF LODI, CALIFORNIA, et al.,
Defendants/Appellees.

Appeal from United States District Court for the
Eastern District of California
Honorable Frank C. Damrell, Jr.

BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS IN SUPPORT OF THE CITY OF LODI

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PRELIMINARY STATEMENT

United Policyholders as an amicus curiae submits this brief in support of The City of Lodi.

The City of Lodi has found one of the ways to help solve the litigation morass that has long stymied environmental clean-up. The insurance industry is opposed.

United Policyholders requests that the Court affirm the District Court with the modifications suggested by the City of Lodi.

CORPORATE DISCLOSURE STATEMENT

United Policyholders has no corporate affiliates.

STATEMENT OF RELATED CASES AND PROCEEDINGS

Counsel for United Policyholders is aware of the following cases that fall within the ambit of Ninth Circuit Rule 28-2.6:

1. Fireman's Fund Insurance Co. v. City of Lodi, California , No. 99-15614.

2. Unigard Insurance Co. v. City of Lodi, California, No. 99-15802.

INTEREST OF AMICUS CURIAE

United Policyholders respectfully submits this brief in support of the City of Lodi. In this brief, United Policyholders seeks to fulfill "the classic role of amicus curiae by assisting 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 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)). In Humana, Inc. v. Forsyth, 119 S. Ct. 710, 719 (U.S. 1999), Justice Ginsberg cited the amicus curiae brief prepared by Anderson Kill & Olick, P.C., attorneys for United Policyholders in that case.

United Policyholders is a non-profit corporation dedicated to educating policyholders about their rights and duties under their insurance policies. Specifically, United Policyholders engages in charitable and educational activities by promoting greater public understanding of insurance issues and policyholder rights. United Policyholders' activities include organizing meetings, distributing written materials, and responding to requests for information from individuals, elected officials, and governmental entities. These activities are limited only to the extent that United Policyholders exists exclusively on donated labor and contributions of services and funds.

Amicus curiae has a vital interest in seeing that the standard form insurance policies sold to countless policyholders are interpreted properly and consistently by insurance companies and the courts. As a public interest organization, United Policyholders seeks to assist and to educate the public and the courts regarding policyholders' insurance rights and to have them

enforced consistently throughout the country. This brief focuses on insurance industry practices over the last 30 or so years.

This brief was prepared by Eugene R. Anderson, a partner in the New York City law firm of Anderson Kill & Olick, P.C. He is the author of numerous articles on insurance law, as well as a recent two volume treatise on insurance coverage litigation: Eugene R. Anderson et al., Insurance Coverage Litigation (1997). Mr. Anderson has been called the "dean of insurance policyholder attorneys" by Business Week magazine.[1]

No fee has been paid or will be paid for preparing this amicus brief.

POINT I.

UNREASONING ANTI-POLICYHOLDER BIAS

The American Insurance Association ("AIA") is a national trade organization representing over 250 insurers writing property and liability coverages for businesses, homeowners, automobile drivers, and others. As of 1992, AIA companies together wrote more than $60 billion in premiums annually, representing 27 percent of all property and casualty insurance underwritten in the United States.[2]

The problem the City of Lodi is seeking to address is illustrated by the American Insurance Association's position on

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1. See Michael Schroeder & Tim Smart, "The Toxic Waste Battle is Boiling Over," Business Week, Aug. 3, 1987, at 73.

2. Brief of Amicus Curiae American Insurance Association in Support of Petition for Rehearing With Suggestion For Rehearing En Banc at 1 (dated Aug. 28, 1998), Eljer Manufacturing, Inc. v. Liberty Mutual Insurance Co., Nos. 91-3203, 91-3251, 91-3298 (7th Cir.).

the Dow-Corning breast implant insurance coverage case. The American Insurance Association characterized the jury's decision finding that Dow-Corning's product liability insurance covered its breast cancer legal liability as "a bail-out for irresponsible manufacturers."[3]

It is now fairly well established that Dow Corning's breast implant was, in fact, benign.[4] The liability insurance companies involved with Dow-Corning and their friend, the American Insurance Association, actively harmed the policyholder. This characterizes the infamous insurance industry activities the City of Lodi is attempting to ameliorate.

POINT II.

CASE CITATIONS ARE NOT FACTS

Determining the weight of authority with respect to insurance coverage matters is impossible. Fifty percent of the pro-policyholder judicial decisions are wiped off the law books by the insurance industry. Judges find that the fact that there is a "rigging" of the cases to be counter culture. Judges have a very hard time believing that their "stock in trade" has suffered from tampering. The writings of Professor Jill E. Fisch of Fordham Law School have had a major impact on awakening the judiciary. See Philip Carrizosa, Making the Law Disappear:

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3. See American Insurance Association Press Release, dated Feb. 14, 1994, which is attached to United Policyholders' Request for Judicial Notice.

4. See "Silicone Implants Unrelated to Disease," Claims, July 1999, at 103, a copy of which is attached to United Policyholders' Request for Judicial Notice.

Appellate Lawyers Are Learning to Exploit the Supreme Court's Willingness to Depublish Opinions, Cal. Law., Sept. 1989, at 65; Roger Parloff, Rigging the Common Law, Am. Law., Mar. 1992, at 74; Stacy Gordon, "Vanishing Precedents: Policyholders Can Get Better Deal - If Rulings Are Erased," Bus. Ins., June 15, 1992, at 1; Jill E. Fisch, Rewriting History; The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur, 76 Cornell L. Rev. 589 (1991). (These articles and any other miscellaneous documents cited herein, are available upon request).

POINT III.

INSURANCE COMPANIES OWE A FIDUCIARY DUTY TO THEIR POLICYHOLDERS

Insurance companies owe a fiduciary duty to their policyholders. This Court should not ignore the unique public and fiduciary nature of insurance.

A. Insurance Industry and Judicial Recognition That Insurance Companies are Fiduciaries

Insurance companies have repeatedly asserted that they owe their policyholders a fiduciary duty. See, e.g.,:

Fireman's Fund:

> An insurer stands in a fiduciary relationship to its insured; when an insurer chooses his interests over the interests of his insured his actions are indeed "intentional and deliberate;" and . . . when a case can be settled with no personal liability to said insured, [failure to do so] has the "character of outrage frequently associated with crime".[5]

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5. Cross Petition for Certification and Brief in Opposition to Defendant-Appellant Petition for Certification at 13 (filed Dec. (continued...)

Note that insurance companies often argue for a fiduciary duty when suing their insurance companies, e.g. an excess, umbrella or co-insurance company.

> The primary carrier owes the excess carrier the same fiduciary obligation which the primary insurer owes its insured, namely, a duty to proceed in good faith and in the exercise of honest discretion, the violation of which exposes the primary carrier to liability beyond its policy limits (citations omitted).[6]

Insurance companies clearly understand the fiduciary duties owed to their policyholders. So do the courts.[7] The

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5.(...continued)
7, 1976), Fireman's Fund Ins. Co. v. Security Ins. Co. of Hartford, 367 A.2d 864, 866 (N.J. 1976) (court finding that the insurance company acted "in disregard to its acknowledged fiduciary duty to its insured"). This brief is discussed in 2 Eugene R. Anderson et al., Insurance Coverage Litigation § 11.6, at 17-18 n.60 (1997). This textbook was written by counsel from Anderson Kill & Olick, P.C.

6. Brief of Plaintiff-Respondent at 11 (dated Feb. 8, 1984), Hartford Accident & Indem. Co. v. Michigan Mut. Ins. Co., (N.Y.), quoting Hartford Accident & Indem. Co. v. Michigan Mut. Ins. Co., 93 A.D.2d 337, 341 (N.Y. App. Div. 1st Dep't 1983), aff'd, 468 N.E.2d 608 (N.Y. 1984). This brief is discussed in 2 Eugene R. Anderson et al., Insurance Coverage Litigation § 11.6, at 17-18 n.60 (1997). This textbook was written by counsel from Anderson Kill & Olick, P.C.

7. See Gibson v. Western Fire Ins. Co., 682 P.2d 725, 730 (Mont. 1984); Stetler v. Fosha, 809 F. Supp. 1409, 1422 (D. Kan. 1992), aff'd without op., 7 F.3d 1045 (10th Cir. 1993); Village of Morrisville Water & Light Dep't v. United States Fidelity & Guar. Co., 775 F. Supp. 718, 734 (D. Vt. 1991); Corrado Bros. v. Twin City Fire Ins. Co., 562 A.2d 1188, 1192 (Del. 1989) (insurance company-policyholder relationship is analogous to fiduciary relationship); Florida Farm Bureau Mut. Ins. Co. v. Rice, 393 So. 2d 552, 555 (Fla. Dist. Ct. App. 1980); Illinois Masonic Medical Ctr. v. Turegum Ins. Co., 522 N.E.2d 611, 613 (Ill. App. Ct. 1988); Pareti v. Sentry Indem. Co., 536 So. 2d 417, 423 (La. 1988); Fireman's Fund Ins. Co. v. Continental Ins. Co., 519 A.2d 202, 204 (Md. 1987); Lisiewski v. Countrywide Ins. Co., 255 N.W.2d 714, 717 (Mich. Ct. App. 1977); Varnal v. Weathers, 619 S.W.2d 825, 828 (Mo. Ct. App. 1981); Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 323 A.2d 495, 504 (N.J. 1974). But see Rawlings v. Apodaca, 726 P.2d 565, 571 (continued...)

aviation segment of the insurance industry has been particularly informed about its fiduciary status. An article in the Journal of Air Law and Commerce discussed the "acknowledged public interest character of the insurance industry," stating that:

> fiduciary responsibilities of the insurer (particularly the liability insurance carrier) has served as a vehicle for imposing extra-contractual responsibilities on insurers and has resulted in corresponding extra-contractual recovery by insureds.

Russell H. McMains, Bad Faith Claims Handling--New Frontiers: A Multi-State Cause Of Action In Search Of A Home, 53 J. Air L. & Com. 901, 905 (1988).

B. Insurance Company Marketing and Litigation Strategies Exploit Fiduciary Ideals For Their Benefit

Insurance companies have adopted the fiduciary duty principle as both a marketing tool and a litigation tactic.

Insurance companies do openly argue that insurance companies are fiduciaries -- usually when they step into the shoes of a policyholder or are forced to sue their own insurance company. Insurance companies are also quick to reveal the tell-tale mark of a fiduciary duty -- a "relationship of trust and confidence" -- when policyholders in litigation request documents or interrogatories from them. In a litigation tactic designed to shield their files from discovery, insurance companies routinely deny requests for documents by claiming that disclosure would violate the trust or confidences of their policyholders. A

7.(...continued)
(Ariz. 1986) ("[A]lthough the insured is entitled to expect that the insurer will be 'on his side'. . . we do not go so far as to hold that the insurer is a fiduciary.").

litigation tactic which claims a fiduciary regard for some policyholders, but none for others, speaks for itself.

Insurance companies use advertisements to create a fiduciary relationship between itself and the policyholder. In 1981, the Appleman insurance treatise noted "dog eat cat" is outmoded.[8] Appleman wrote that:

> Particularly is the approach outmoded when television advertising repeatedly refers to "the good hands" of the insurer or how it is "like a good neighbor", implying an ability to place trust and reliance upon the broad shoulders of the kindly company. Some decisions impose a fiduciary relationship; others disagree.[9]

Courts around the country have found that insurance company advertisements tell people what to expect from insurance:

> Allstate's slogan "You're in Good Hands," Travelers' motto of protection "Under the Umbrella," and Fireman's Fund symbolic protection beneath the "Fireman's Hat," exemplify the industry's own efforts to portray itself as a repository of the public trust . . . It is noteworthy that the insurance company involved in this appeal promotes itself in national advertisements with the slogan, "Like a good neighbor, State Farm is there."[10]

The unfortunate truth is that insurance companies do the opposite of what they promised when they cultivated the policyholder's trust and expectations of insurance coverage:

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8. 12 John Alan Appleman & Jean Appleman, Insurance Law & Practice § 7004 at 52 (1981).

9. Id. (footnotes omitted). Cf. Dornberger v. Metropolitan Life Ins. Co., 961 F. Supp. 506, 547 n.39 (S.D.N.Y. 1997).

10. State Farm Fire & Cas. Co. v. Nicholson, 777 P.2d 1152, 1156 n.6 (Alaska 1989) (quoting McMains, Bad Faith Claims Handling -- New Frontiers: A Multi-state Cause of Action in Search of a Home, 53 J. Air L. & Com. 901, 904 (1988) (recognizing the insurance company duty of good faith in first-party cases).

> The insurer's promise to the insured to "simplify his life," to put him "in good hands," to back him with "a piece of the rock" or to be "on his side" hardly suggest that the insurer will abandon the insured in his time of need.[11]

Abandon the policyholder in his time of need is exactly what insurance companies frequently do. When this happens, an insurance policy is not a shield, a safe hand, a kindly neighbor or a rock. Not only does this abandonment violate the insurance company's fiduciary duty, it violates the policyholder's fundamental expectation of peace of mind which insurance is meant to provide:

> That insurers sell their product as being not only an agreement to indemnify the insured for certain kinds of loss but also to relieve the purchaser from anxiety concerning all aspects of claims is readily apparent in our society. One cannot watch televised entertainment for very long without being exposed to commercials for the sale of insurance which, for example, indicate that the purchaser will be in "good hands," that he will have the assistance of a troop of mounted cavalry, that he [will have] "a piece of the rock," or "like a good neighbor" the insurer will be there. As such advertisements reflect, the relationship between insurer and insured does not merely concern indemnity for money loss . . . .[12]

Insurance company advertising reveals that the insurance industry itself "recognizes that the insurance

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11. D'Ambrosio v. Pennsylvania Nat'l Mut. Cas. Ins. Co., 431 A.2d 966, 972 (Pa. 1981) See also Irion v. Prudential Ins. Co., 765 F. Supp. 337, 338 (N.D. Tex. 1991), rev'd, 964 F.2d 463 (5th Cir. 1992) ("Plaintiff, at the inducement of Prudential, got herself a 'piece of the rock,' and now that it's time for the insurance company to pay, Prudential wants to take its rocks and go home."); Tom Baker, Symposium on the Law of Bad Faith in Contract and Insurance Agreements: Theory: Constructing the Insurance Relationship; Sales Stories, Claim Stories, and Insurance Contract Damages, 72 Tex. L. Rev. 1395, 1396-97 (1994).

12. Andrew Jackson Life Ins. Co. v. Williams, 566 So. 2d 1172, 1175 n.5 (Miss. 1990) quoting Farris v. United States Fidelity & Guar. Co., 587 P.2d 1015, 1028 n.4 (Or. 1978).

relationship is more than the company's promise to pay certain claims when forced to do so:

> Advertising programs portraying customers as being "in good hands" or dealing with a "good neighbor" emphasize a special type of relationship between the insured and insurer -- one in which trust, confidence and peace of mind have some part . . . . We hold, therefore, that one of the benefits that flow from the insurance contract is the insured's expectation that his insurance company will not wrongfully deprive him of the very security for which he bargained or expose him to the catastrophe from which he sought protection.[13]

Insurance companies do not merely acknowledge their fiduciary duties -- they openly tout them and use the principle to its advantage. By acknowledging, and exploiting, their fiduciary duties to policyholders, insurance companies recognize that their responsibilities to policyholders go far beyond the letter of the policy. Insurance company marketing techniques and litigation tricks reveal the lengths that insurance companies will go to exploit the image while avoiding the realities of their fiduciary duties. Insurance companies should not be allowed to mock a duty which they repeatedly use to their advantage, and which they recognize is crucial to the proper operation of insurance.

As the present case has made all too clear, "the insurance company's fiduciary role lies in perpetual conflict with its profit-making role as a business," ultimately creating

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13. Rawlings v. Apodaca, 726 P.2d 565, 570-71 (Ariz. 1986), citing Egan v. Mutual of Omaha Ins. Co., 620 P.2d 141, 145-46 (Cal. 1979), cert. denied, 445 U.S. 912 (1980).

an "inherent conflict of interest" between an insurance company's fiduciary duties and financial interests.[14]

The "anomaly" in this case is that the insurance industry in this country en mass would try to marginalize and ridicule a legal position the industry has so carefully cultivated and sold to the courts and the public.

POINT IV.

THE SCALES ARE TIPPED IN FAVOR OF THE TRILLION DOLLAR INDUSTRY[15]

THE DICE ARE LOADED AGAINST POLICYHOLDERS!

THE DECK IS STACKED![16]

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14. See Kekis v. Blue Cross & Blue Shield, 815 F. Supp. 571, 583 (N.D.N.Y. 1993), quoting Wilson v. Group Hospitalization & Medical Servs., 791 F. Supp. 309, 312 (D.D.C. 1992); Brown v. Blue Cross & Blue Shield, 898 F.2d 1556 (11th Cir. 1990). It should be noted that while the perpetual conflict of interest between an insurance company's fiduciary duties and financial interests is a simple matter of fact, within the Second Circuit, "arbitrary and capricious" conduct is the appropriate standard, of review to determine whether a plan administrator has breached their fiduciary duty. See Whitney v. Empire Blue Cross & Blue Shield, 106 F.3d 475, 476-77 (2d Cir. 1997).

15. See Wishful Thinking - A World View of Insurance Insolvency Regulation, A report by the House Subcommittee, 103d Cong., 2d Session (Comm. Print 103-R, Oct. 1994). The insurance industry is described in this report as being:

1. "[A] 2.3 trillion financial Industry . . . ." Id. at III; and

2. "Premiums generated in the United States reached $482 billion in 1990, which was 35 percent of the $1.3 trillion world total." Id. at 51.

16. See Walter Updegrave, "Stacking the Deck," Money, Aug. 1986, at 50.

The standard textbook on claims handling which is used to train tens of thousand of claims handlers and claims handling supervisors[17] states:

"Claim representatives have a great deal of power."

Markham at 191.

> "**The Power of Money.** Everyone who submits a claim to an insurance company wants money. Because the claim representative controls the money, he or she is in a great position of power. Yet, this power must be used wisely and appropriately to prevent problems for the claim representative and the insurance company. Claim representatives are required to disperse money according to the insurance policy terms. A claim representative who refuses to perform his or her role properly can suffer discipline or sanctions."

Markham at 192.

> "**Waiting Power.** Insureds and claimants are usually much more eager than claim representatives to get claims resolved. Claim representatives can better afford to wait. This circumstance gives great power to claim representatives, but, as with money power, waiting power can be abused. Claim representatives who make insureds or claimants wait unnecessarily are likely to encounter hardened attitudes that make claim settlements more difficult and, ... are probably guilty of bad faith."

Markham at 192.

> "Claim representatives often have more of such information than they realize."

Markham at 193.

> "**Litigating Power.** Litigating power has two different dimensions: (1) the financial and emotional resources necessary to conduct litigation and (2) the willingness to risk whatever verdict results from the litigation process.

Markham at 194.

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17. James J. Markham et al., The Claims Environment, (1st ed. 1998) (hereinafter referred to as "Markham").

"Claim personnel can develop litigation power."

Markham at 195.

> "Even among conscientious, professional claim personnel, there is a lower level of concern than there is in the person who has experienced the loss and needs indemnification."

Markham at 196.

> "In general, a person who is less personally involved and cares less about a particular matter has power over the person who is personally involved and cares more. The person who cares more is willing to be more flexible and give more on other matters to get his or her way."

Markham at 196.

> "Power comes from money, but also from knowledge and from the abilities to wait and to litigate. Claim representatives have power based on being less personally involved in a claim than the party who suffered the loss."

Markham at 201.

The Insurance companies are in a "no lose" position and the policyholders are in a "no win" position.

CONCLUSION

United Policyholders respectfully urges this Court to affirm the judgment below with the modification suggested by the City of Lodi.

Dated: September 24, 1999

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the foregoing brief of amicus curiae United Policyholders is proportionally spaced, has a type face of 12 courier points and contains 4128 words.

CERTIFICATE OF SERVICE

I am a citizen of the United States, over eighteen years of age, not a party to this action and employed in New York, New York, at 1251 Avenue of the Americas, New York, New York, 10020. Today I served the foregoing:

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