UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case No. 05-5428

RICHARD D. WEISS

Plaintiff-Appellant,

v.

FIRST UNUM LIFE INSURANCE COMPANY, a member company of UNUMPROVIDENT CORPORATION; J. HAROLD CHANDLER, as Chairman, President and Chief executive Officer of UnumProvident Corporation; LUCY E. BAIRD-STODDARD; GEORGE J. DIDONNA, M.D.; KELLY M. SMITH; JOHN AND JANE DOES 1-100,

Defendants-Appellants.

AMICUS BRIEF ON BEHALF OF PLAINTIFF-APPELLANT ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED ON NOVEMBER 22, 2005, IN CIVIL ACTION NO. 02-4249 (GEB)

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STATEMENT REGARDING CONSENT TO FILE AMICUS BRIEF

Counsel for Appellant Weiss has consented to the filing of this amicus brief. Counsel for Appellee First Unum Life Insurance Company has refused to consent. This brief is therefore accompanied by a motion for leave to file pursuant to F.R.App.P.29(b).

STATEMENT OF IDENTITY AND INTEREST OF AMICI

United Policyholders (United) was founded in 1991 as a not-for-profit, 501(c)(3) organization dedicated to educating the public on insurance issues and consumer rights. United is funded by donations and grants from individuals, businesses, and foundations. United aids home, property and business owners who have suffered major losses, and is a policyholder-oriented information resource on all types of coverage and claim issues. The organization monitors legal and marketplace developments that impact insureds and participates in forums aimed at formulating public policy on insurance transactions. United publishes materials that give practical guidance on coverage and claim issues to property and business owners and advocates, including disaster relief personnel, attorneys and adjusters.

United has previously appeared as amicus curiae in over one hundred and thirty cases throughout the United States, including numerous cases in California

courts.[1] United has appeared as amicus curiae in cases before the United States Supreme Court. See Humana, Inc. v. Forsyth, No. 97-303 (U.S. Sept. 18, 1998); FL Aerospace v. Aetna Casualty and Surety Co., No. 90-289 (U.S. Sept. 13, 1990). The United States Supreme Court cited United's brief in Humana, Inc. v. Forsyth, 525 U.S. 299 (1999) and United was the only national consumer organization to submit an amicus brief in the landmark case of State Farm v. Campbell, 538 U.S. 408, 123 S. Ct. 1513 (2003). United has submitted numerous briefs on ERISA-related matters and in disability insurance claim disputes in which there were conflicting opinions by medical and insurance company personnel. [2]

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[1] *County of San Diego v. Ace Property & Cas. Ins. Co.* (2005) 37 Cal.4th 406 [33 Cal.Rptr.3d 583]; *Powerine Oil Co., Inc. v. Superior Court* (2005) 37 Cal.4th 377 [33 Cal.Rptr.3d 562]; *Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191 [29 Cal.Rptr.3d 401]; *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379]; *Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747 [27 Cal.Rptr.3d 648]; *Garamendi v. Golden Eagle Ins. Co.* (2005) 127 Cal.App.4th 480 [25 Cal.Rptr.3d 642]; *American Ins. Ass'n v. Garamendi* (2005) 127 Cal.App.4th 228 [24 Cal.Rptr.3d 905]; *Watts Industries, Inc. v. Zurich American Ins. Co.* (2004) 121 Cal.App.4th 1029 [18 Cal.Rptr.3d 61]; *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780 [16 Cal.Rptr.3d 374]; *Marselis v. Allstate Ins. Co.* (2004) 121 Cal.App.4th 122 [16 Cal.Rptr.3d 668]; *Hameid v. National Fire Ins. of Hartford* (2003) 31 Cal.4th 16 [1 Cal.Rptr.3d 401]; *Rosen v. State Farm General Ins. Co.* (2003) 30 Cal.4th 1070 [135 Cal.Rptr.2d 361]; *County of San Diego v. Ace Property & Casualty Ins. Co.* (2002) 103 Cal.App.4th 1335 [127 Cal.Rptr.2d 672]; *Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059 [124 Cal.Rptr.2d 142].

[2] *Aetna Health Inc., v. Juan Davila, (and related case) Cigna Healthcare of Texas, Inc., v. Ruby R. Calad, et al,* In the Supreme Court of the United States, Nos. 02-1845 & 03-83 on Writs of Certiorari To The United States Court of Appeals For the Fifth Circuit, *Tommie Glanton, on behalf of the Alcoa Prescription Drug Plan, and other similarly-situated plans, and, Tara Mackner, on behalf of the Kmart Comprehensive Health Plan*, Case No. 04-15328, United States Court of Appeals For the Ninth Circuit. United brief filed May, 2004*, Francie E. Harrison v. Unum Life Ins. Co. of America,* United States Court of Appeals For the First Circuit, Docket No. 05-1577.

Amici Susan B. Rudrud (Rudrud), Barbara Schwartz (Schwartz), Thomas P. Davis (Davis), Bruce D. Reitman (Reitman), Marvina Jenkins (Jenkins) and Anne Coolidge Gerken (Gerken) are individual participants in ERISA-governed, long term disability plans sponsored by their employers or ex-employers. Each plan makes use of an insurance product sold by one of the insuring subsidiaries of UnumProvident Corporation (UP), the parent company of Appellee First Unum Life Insurance Company and related disability insurance companies. UP's website identifies these insuring subsidiaries: "UnumProvident is the marketing brand of UnumProvident Corporation's insuring subsidiaries including: Provident Life and Accident Insurance Company, Chattanooga, Tennessee – Unum Life Insurance Company of America, Portland, Maine – The Paul Revere Life Insurance Company, Worcester, Massachusetts – Provident Life and Casualty Insurance Company, Chattanooga, Tennessee – [and] First Unum Life Insurance Company, New York, New York." See www.unum.com.

Each individual amicus, excepting only Davis, whose benefits were re-instated by his self-underwriting employer, made a claim for benefits under his or her respective plan; but the UP insurer, excepting Davis in whose case UP acted only as administrator, either denied the claim for benefits outright, or terminated the benefits following a period of payment. Each amicus has exhausted intra-plan avenues for relief, claims that the denial or termination of disability benefits was contrary to the evidence, and has filed suit as a class action representative plaintiff

for benefits and other relief, either in the United States District Court for the Eastern District of Pennsylvania, see Davis, et al. v. UnumProvident Corp., No. 03-cv-940 (JD) (E.D. Pa.), or the District of Massachusetts, see Rudrud, et al. v. UnumProvident Corp., No. 03-40070-NMG (D. Mass.).

The Judicial Panel on Multidistrict Litigation transferred both the Davis and Rudrud actions to the Eastern District of Tennessee pursuant to 28 U.S.C. § 1407, where they were consolidated with about 8 other class benefits denial actions and 10 shareholder actions for pretrial purposes. The class certification motion in the benefit denial class actions, In re UnumProvident Corp. ERISA Benefits Denial Actions, MDL No. 1552, Lead Case No. 1:03-cv-1000 (E.D. Tenn.), was fully briefed by July of 2004 and has been pending since that date.

Although the Administrative Office of the United States Courts does not compile civil case commencement statistics for particular categories of ERISA cases, it is believed that suits involving claims for disability benefits represent the largest portion of ERISA filings. During the period 1999 to 2003, the number of ERISA cases filed each year has increased by 21.5%, from 9,298 actions commenced during the 12 months ending September 30, 1999, to 11,304 actions commenced during the 12 months ending September 30, 2003. During the same period, civil filings overall declined by 3%. See Administrative Office of the U.S. Courts, "Table C-2A, U.S. District Courts, Civil Cases Commenced, By Nature of Suit During the 12 Month Periods Ended Sept. 30, 1999 Through 2003" (available

on request from Administrative Office of the U.S. Courts).

The individual amici have authorized the filing of this brief due to their strong personal interest in the resolution of this appeal and the rights of ERISA Disability Benefit Claim Plaintiffs to secure some effective relief from bad faith claim handling; relief under ERISA alone providing nothing beyond the benefits the insurers should have paid without litigation, giving those malefactor insurers every incentive to deny claims in bad faith with impunity. With class actions not being allowed to proceed and State regulators generally ineffective or co-opted, the only possibility of enforcing any effective prohibition against insurer bad faith is the ability of the occasional benefit claimant with a powerful case to obtain RICO damages.

Amici believe that the legal questions presented by the appeal are basically well addressed in the brief filed by Appellant Weiss. Amici therefore submit this brief to: first, emphasize to the Court the overwhelming contextual need to allow worthy Plaintiffs an effective remedy; and second, to indicate to the Court that allowing relief pursuant to the Federal RICO statute is clearly desirable from a policy perspective as well as being technically sound.

As set forth below, UP has compiled a notorious record of improperly denying or terminating disability benefits through judicially documented bad faith practices. The gravity of these abuses and the present inability of the ERISA statute to effectively deter or remedy these abuses are matters which should inform

this Court's deliberations in deciding this appeal.

SUMMARY OF ARGUMENT

The traditionally stated purpose of the ERISA statute is "to promote the interest of employees and their beneficiaries in employee benefit plans," Shaw v. Delta Airlines, Inc., 463 U.S. 85, 90 (1983). This purpose, so stated by the United States Supreme Court, is defeated to the extent employee benefit plan beneficiaries are prevented from seeking statutory remedies.

Defendant-Appellant UP's argument that differences in the form of remedy, standing via private cause of action and right to exemplary damages, should prevent benefit plan beneficiaries from pursuing their statutory remedies under RICO; has been, as detailed below, rejected by the United States Supreme Court in Humana v Forsyth, 525 U.S. 299 (1999) and by the New Jersey Supreme Court in Lemelledo v. Beneficial Management, 150 N.J. 255 (1997).

Employees insured for disability by UP and governed by ERISA are supposed to be treated as beneficiaries by UP as statutory fiduciary. Instead, UP's abundantly documented and totally reprehensible claim handling has long victimized UP's vulnerable policyholders. Pursuit of their RICO remedies may be the only effective remedy available to the disabled benefit claimants and equity mandates that they be allowed to seek that remedy.

ARGUMENT

POINT I

THE ERISA STATUTE DOES NOT PROVIDE ADEQUATE PROTECTIONS OR DETERRENTS TO BAD FAITH INSURANCE PRACTICES. DISABILITY INSURERS, ESPECIALLY UNUMPROVIDENT CORPORATION, HAVE EXPLOITED THIS WEAKNESS TO ENHANCE THEIR ABILITY TO AVOID BENEFITS OBLIGATIONS.

Although ERISA was enacted to "to promote the interest of employees and their beneficiaries in employee benefit plans," Shaw, supra, at 90, it does not provide the means to adequately police and deter the types of misconduct documented in the disability benefits cases. The shortcomings of the statute with respect to claims for "welfare" benefits such as medical and disability benefits have been fully catalogued by the Court. See DiFelice v. Aetna U.S. Healthcare, 346 F.3d 442, 453-59 (3d Cir. 2003) (Becker, J., concurring).

These shortcomings of the statute also are well known to insurers, and they have exploited these shortcomings to avoid paying valid claims. The best evidence of this subversion of ERISA into a shield against claims comes from the files of UP itself. In an internal memorandum by Jeff McCall, an assistant vice president for claims at Provident Corp., the company plainly stated its practice of targeting ERISA-governed disability claims to avoid paying claims that otherwise would be payable under state insurance law. The memo, written in 1995, says Provident Corp., which merged with Unum Corp. in 1999, had formed a "task force" to

identify policies covered by the Employee Retirement Income Security Act of 1974. "The advantages of ERISA coverage in litigious situations are enormous," reads the memo, written by Jeff McCall, at the time an assistant vice president in the claims department at Provident. "There are no jury trials. There are no compensatory or punitive damages." UP said the memo was merely an attempt by the company to better comply with ERISA, which governs many of its claims practices. The 1995 Provident memo says that: "While our objective is to pay all valid claims and deny invalid claims, there are some gray areas, and ERISA applicability may influence our course of action." The memo then recites that a Provident manager had identified 12 claims settled for $7.8 million, that, if governed by ERISA, would have reduced the company's liability to between zero and $0.5 million. See C. Oster, "UnumProvident Memo Highlights Intent to Use Law to Save Money," *Wall Street Journal*, January 16, 2003, at p. C3; *see also* L. Girion, "Unum is Faulted for Claim Cutting," *Los Angeles Times*, June 30, 2003, at pp. C14 (quoting other portions of memo: "relief is usually limited to the amount of benefit in question. . . . The economic impact on Provident from having policies covered by ERISA could be significant.").

Given the gaps in the ERISA regulatory regime, meritorious claims for disability benefits, which would present no litigation issue under state law, are forced into federal court where relief is limited to the amount of benefits in question and possibly interest and statutory attorney's fees. The courts are not able

to prevent this scenario from being played out in case after case. The insurers have no reason other than frequently ephemeral "good faith" to act properly in accordance with their statutory obligations as fiduciaries under ERISA. Disability insurers, driven by the goal of ever-greater profits but unconstrained by a reasonably effective regime of regulation, engage in a "race to the bottom" which rewards those insurers that "deny claims most frequently." DiFelice, supra, 346 F.3d at 459. As the Court has previously concluded in the context of ERISA disability claims, market forces cannot be expected to rectify this problem due to imperfect information about the claims behavior of insurers. See Pinto v. Reliance Standard Life Ins. Co., 214 F.3d 377, 388 (3d Cir. 2000).

This vacuum in effective regulation should not be exacerbated by denying the injured a modicum of opportunity to obtain judicial relief. The Federal RICO statute, clearly applicable in only the most egregious circumstances, provides a minimal level of relief which should not be denied. Otherwise, insurers regularly engaging in bad faith claim handling will have no incentive to reform their corporate culture of "terminate and litigate".

POINT II

FEDERAL COURTS HAVE REPEATEDLY DOCUMENTED THE BAD FAITH PRACTICES OF UNUMPROVIDENT COMPANIES IN IMPROPERLY DENYING AND TERMINATING CLAIMS FOR DISABILITY BENEFITS.

This case does not involve a litigant who is attempting to obtain an excessive remedy. It is a situation where a litigant's remaining uncompensated damages are sought and where his insurer's reprehensible conduct is sought to be curtailed. Plaintiff-Appellant seeks to at least create a possibility of curtailing that reprehensible conduct through use of the RICO statute. Amici herein have identical interests.

Plaintiff-Appellant Weiss and Amici herein are not merely concerned with legal theories and factual possibilities. UP has compiled a voluminous record of bad faith conduct, well documented in the Courts, State and Federal. UP has been found to have improperly denied disability benefits due to a general practice of targeting disability claims for denial or termination to achieve internal fiscal goals and quotas, without regard to the actual merits of the claims for benefits. Its criminal corporate culture has been evidenced from prior to the January 1, 2000 merger of Unum and Provident; from Ingalls v Paul Revere Life, 1997 ND 32, (1997) to Hangarter v Paul Revere Life, 236 F.Supp.2d 1069 (N.D. Cal. 2002) and on to Radford Trust v First Unum Life, 321 F.Supp.2d. 226 (D.Mass. 2004), where Chief Judge Young, opining in an individual case, authored an extensive if not encyclopedic list of similar cases. Judge Young wrote on June 15, 2004 that:

> First Unum's conduct in denying Doe's claim was entirely inconsistent with the company's public responsibilities and with its obligations under the Policy. This is not the first time that First Unum has sought to avoid its contractual responsibilities, and an examination of cases involving First Unum and Unum Life Insurance Company of America, which like First Unum is an insuring subsidiary of

Unum Provident Corporation, (FN 19) reveals a disturbing pattern of erroneous and arbitrary benefits denials, bad faith contract misinterpretations, and other unscrupulous tactics. (FN 20) These cases suggest that segments that have run in recent years on "60 Minutes" and "Dateline", alleging that Unum Provident "regularly declines disability claims as a way of boosting profits", may have been accurate. See Edward D. Murphy, *Unum Corp. Retirees Feeling a "Sense of Loss,"* Portland Press Herald, Apr. 29, 2003, at 1C. This Court cannot tell whether First Unum and other Unum Provident companies are considered pariahs in the industry, or whether their ability to retain customers is a result of low prices, market inefficiency, or other factors. In either case, employers have a duty to select insurers for their employees with care, and to avoid hiring insurers with reputations for shoddy and hostile claims administration, **although it may well be that suits based on violation of this duty are preempted under ERISA.** (emphasis supplied)

Footnote 20, penned by Judge Young within this devastating, full and unaltered paragraph, listed 33 cases of obvious misconduct as found by Federal Courts. Footnote 20 was gratuitous and extraordinary; obviously written out of a sense of outrage. Footnote 20 did not even purport to be an encyclopedic listing.

Perhaps most significantly, the Radford Trust case documents quite clearly and meticulously in its long and detailed opinion, the basic elements of a RICO scheme.

Fines and promises by UP to reform are submerged and forgotten. On March 19, 2003, UP agreed to an Order by the Department of Georgia Insurance Department rendering a 1 Million dollar fine capped by promises to reform. On or about November 18, 2004, UP entered into a Regulatory Settlement Agreement with the Federal Labor Department and 48 States, excluding California and Montana, capped by a 15 Million dollar fine and promises. On or about October 3,

2005, UP entered into a California Settlement Agreement (CSA) capped by an 8 Million dollar fine and promises. At the end of the day, at the press conference announcing the CSA, California Insurance Commissioner John Garamendi stated that: "UnumProvident is an outlaw company. It is a company that for years has operated in an illegal fashion". Los Angeles Times, October 3, 2005 Cf. generally, RICO Case Statements filed pursuant to Local Rule 16.1(4) and Appendix O of the New Jersey U. S. District Court in Hage v UnumProvident Corp., DNJ, Case No. 04-cv-5933 and Shields v UnumProvident Corp., DOhioSD, Case No. 05-cv-744.

Adverse decisions in particular cases do not deter UP from its reprehensible conduct. Plaintiff-Appellant Weiss should be entitled to his day in Court.

POINT III

EQUITY REINFORCES THE HOLDING OF THE SUPREME COURT IN HUMANA V FORSYTH THAT THE McCARRAN-FERGUSON ACT DOES NOT PREEMPT PURSUIT BY PLAINTIFF-APPELLANT OF HIS REMEDY UNDER THE FEDERAL RICO STATUTE.

Perhaps the most basic aim and principle of our legal system is that people who have been injured should have a remedy under the law. It is therefore axiomatic that remedies prescribed by statute should not lightly be withheld. In this case the Court must construe a statute, the McCarran-Feguson Act, to decide whether it permits a party to seek a statutorily provided, but difficult to prove

remedy; or relegates that party to no effective remedy at all.

Fortunately, the United States Supreme Court in Humana v Forsyth, 525 U.S. 299 (1999) and the New Jersey Supreme Court in Lemelledo v. Beneficial Management, 150 N.J. 255 (1997), have issued crystal clear decisions providing unimpeachable holdings supporting a just result which would permit Appellant Weiss to pursue his RICO remedy.

In Humana, Justice Ginsburg, writing for a unanimous Court, opined that the McCarran-Ferguson Act precluded pursuit of a RICO remedy only if that pursuit was in direct conflict with the ERISA statute. Justice Ginsburg was referring to an analogous potential preemption of SEC authority and to the instant potential preemption of a RICO claim when she stated that:

> We **hold** that RICO can be applied in this case in harmony with the State's regulation. When federal law is applied in aid or enhancement of state regulation, and does not frustrate any declared state policy or disturb the State's administrative regime, the McCarran-Ferguson Act does not bar the federal action." Humana, supra, at 303.

And Justice Ginsburg wrote further that:

> There, as here, federal law did not "directly conflict with state regulation," application of federal law did not "frustrate any state policy," nor did it "interfere with a State's administrative regime." Humana, supra, at 311.

Thus, the standard is not whether remedies are different, as in whether one statute provides for a private right of action or punitive damages; but whether those disparate remedies produce a situation where enforcement of one "conflicts" with or "frustrates" enforcement of the other. We note that on a factual and practical

level, different regulatory statutes and rules are often operated and enforced in tandem and in a complementary fashion; from assault and battery, to SEC and IRS, to fraud and theft. The basic principle, equitably and logically, should be to permit the enforcement of both statutes unless one remedy precludes or conflicts with enforcement of the other. This is the teaching of Humana.

Moreover, the Supreme Court of the State of New Jersey in Lemelledo has adopted and articulated the same perspective as Humana. The Court specifically held that the statutory treble damages under New Jersey's Consumer Fraud Act (CFA) complemented and did not conflict with the regulations administered by the Department of Banking and Insurance in respect to loans and loan charges, even though those regulations prescribed no triple damages and no private right of action. Importantly, the New Jersey Supreme Court's language and clear perspective indicate strong support for the complementary and cumulative enforcement of remedies such as Appellant Weiss seeks to pursue. Addressing the precise point at issue, with the issue being whether one statute should preclude the enforcement of another, the New Jersey Supreme Court unanimously stated the unlikely prerequisite for that undesired result as follows:

We stress that the conflict must be patent and sharp, and must not simply constitute a mere possibility of incompatibility. Lemelledo, supra, at 270.

CONCLUSION

Amici therefore respectfully urge that the Court reverse the ruling below and permit the matter to proceed to the discovery stage so that Plaintiff Appellant may have his day in Court.

Respectfully submitted,

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COMBINED CERTIFICATION OF COMPLIANCE

David M. Hoffman, an Attorney at Law of New Jersey and of full age, hereby certifies as follows:

1. The Brief submitted in this matter on behalf of Amici United Policyholders, et al., complies with the page limitation of Fed. R. App. P. 32(a)(7)(A) because it contains no more than 15 pages under Rule 29(d); complies with the type-volume limitation of Rule 32(a)(7)(B(i) because it contains no more than 7,000 words; complies with Rule 32(a)(5)(A) because it uses a 14 point Times New Roman font; and complies with Rule 32(a) because it is double spaced, with required margins on appropriate 8.5 by 11.0 inch paper.

2. The electronic version of this amicus Brief is identical to the hard copy of said Brief. The electronic versin of this Amicus Brief was checked for computer viruses using Norton AntiVirus 2006 prior to transmittal.

3. This Amicus Brief was filed electronically on May 4, 2006 with the Office of the Clerk, U.S. Court of Appeals for the Third Circuit, 21400 U.S. Courthouse, 601 Market Street, Philadelphia, PA 19106-1790, Attention: Ms. Aina Law, Case Manager.

4. Ten copies of this Amicus Brief were filed with the Office of the Clerk via Fedex on May 4, 2006 and two copies to each were served on Avrom J. Gold, Esq., Mandelbaum Salsburg, P.C., 155 Prospect Avenue, West Orange, N. J. 07052, Counsel for Appellant and on Steven P. Del Mauro, Esq., McElroy Deutsch

Mulvaney & Carpenter, LLP., 1300 Mt. Kemble Avenue, P.O. Box 2075, Morristown, New Jersey 07962, counsel for Appellees.

5. I am a member in good standing of the Court of Appeals for the Third circuit, having been admitted to practice on February 22, 1996.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

_s/David M. Hoffman__

David M. Hoffman