

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

WEST AMERICAN INSURANCE
COMPANY,

No. S 049306

Plaintiff, Cross-Defendant,
and Appellant,

First District
Case No. A063994

v.

MARK R. FREEMAN, et al.,

San Mateo County
No. 36032

Defendant, Cross-Complainant,
and Respondent

Hon. Judith Whitmer
Kozlowski

BRIEF OF AMICUS CURIAE
UNITED POLICYHOLDERS
IN SUPPORT OF APPELLEE FREEMAN
AND IN SUPPORT OF AFFIRMANCE

From a Judgment of the California Court of Appeal,
First Appellate District, Division Four

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PRELIMINARY STATEMENT

Insurance companies' duty of good faith and fair dealing with its policyholder should continue into litigation, and should not be limited to the circumstances surrounding the insurance coverage litigation. To so limit this duty is contrary to insurance industry custom and practice, and it is contrary to statements made by insurance companies to courts in California and around the country. In addition, normal rules of contract law support the decision below that litigation conduct must comply with the contractual obligation of good faith and fair dealing. The overwhelming weight of authority has concluded that the insurance company's duty of good faith and fair dealing to its policyholders is continuous. In light of these factors and the need to control insurance company bad faith litigation tactics, this Court should affirm the decision of the Court of Appeals.

INTEREST OF AMICUS CURIAE

United Policyholders is a California non-profit corporation with offices in Oakland and Sacramento. United Policyholders engages in charitable and educational activities to promote greater public understanding of insurance issues and consumer rights. United Policyholders addresses issues affecting both residential and commercial policyholders. 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 have a vital interest in seeing that the standard form commercial general liability insurance policies sold to countless policyholders are interpreted properly and consistently by insurance companies and the courts. As a public interest organization, United Policyholders seek to assist and to educate the public and the courts on policyholders' rights and seeks to have these rights enforced consistently throughout the country.

United Policyholders files this amicus brief in support of the policyholder Mark A. Freeman and urges affirmance of the decision of the Court of Appeals.¹

1. The following industry finance groups regularly file amicus briefs supporting insurance companies in insurance coverage cases:

1. Defense Research Institute (see, e.g., amicus brief in West Virginia ex rel. United States Fidelity & Guar. Co. v. Canady, No. 22867 (W. Va. 1995)); 2. National Association of Independent Insurance which filed a letter brief in this case dated November 10, 1995 supporting the petition for review filed by West American insurance Company; 3. Alliance of American Insurers which filed an amicus brief in this case along with three insurance companies on March 29, 1996; 4. American Council of Life Insurance which filed an amicus brief in this case dated April 2, 1996; 5. American Council of Life Insurance which filed an amicus brief along with National Association of Independent Insurers and Crum & Forster Insurance Company in this case dated April 3, 1996; 6. Association of California Insurance Companies (see, e.g., amicus brief in Bank of the West v. Superior Court, No. S019556 (Sup. Ct. 1991)); 7. Brokers & Reinsurance Markets Association (see, e.g. amicus brief in Hartford Fire Ins. Co. v. California, No. 91-1111 (Sup. Ct. 1991) ("Hartford v. California")); 8. Georgia Association of Property & Casualty Insurance Companies (see, e.g., amicus brief in Atlantic Wood Indus., Inc. v. Lumbermen's Underwriting Alliance, Nos. A90A0100 (continued...))

STATEMENT OF FACTS

Inasmuch as this amicus brief is limited to the issues that were accepted for review, United Policyholders will not set forth a separate statement of facts.

ARGUMENT

POINT I

TRADITIONAL PRINCIPLES OF
CONTRACT LAW SUPPORT A CONTINUING
DUTY OF GOOD FAITH AND FAIR DEALING

General principles of contract law support a continuing duty of good faith and fair dealing. The Restatement (Second) of

1. (...continued)
and A90A0101 (Ga. Ct. App. 1990)); 9. Health Insurance Association of America (See, e.g., Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal Co., No. 88-556 (Sup. Ct. 1988) ("Browning")); 10. Independent Insurance Agents of America, Inc. (see, e.g., Hartford v. California); 11. Insurance Environmental Litigation Association; 12. National Association of Casualty & Surety Agents (see, e.g., Hartford v. California); 13. Council of Insurance Agents and Brokers; 14. National Association of Mutual Insurance Companies (see, e.g., Browning); 15. National Association of Professional Insurance Agents (see, e.g., Hartford v. California); 16. National Council on Compensation Insurance (see, e.g., Hartford v. California); 17. The Surety Association of America (see, e.g., Hartford v. California); 18. Wisconsin Insurance Alliance (see, e.g., Just v. Land Reclamation, Ltd., No. 88-1656 (Wis. 1989)).

In addition to those listed above, amicus briefs were filed on behalf of West American in this case by the following entities:

1. Products Liability Advisory Council, Inc., which filed its amicus brief on April 5, 1996; 2. Truck Insurance Exchange, which filed its amicus brief on April 3, 1996; 3. Affiliated FM Insurance Company, which filed its amicus brief on April 3, 1996.