

No. 19-56320

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ADIR INTERNATIONAL, LLC, a
Delaware Limited Liability Company,
DBA Curacao, FKA La Curacao; RON
AZARKMAN, an individual,

Plaintiffs/Counterdefendants/
Appellants,

v.

STARR INDEMNITY AND
LIABILITY COMPANY, a Texas
corporation,

Plaintiffs/Counterclaimant/
Appellants.

No. 19-56320

D.C. No. 2:19-cv-04352-R-PLA
U.S. District Court for Central
California, Los Angeles

**AMICUS CURIAE BRIEF
OF UNITED POLICYHOLDERS
IN SUPPORT OF
PLAINTIFFS/COUNTERDEFENDANTS/APPELLANTS
AND
IN SUPPORT OF REVERSAL**

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Corporate Disclosure Statement

Under Fed. R. App. Proc. 26.1(a) and 28(a)(1), Amicus Curiae United Policyholders states that it is a non-profit 501(c)(3) consumer organization, that it has no parent corporation, and that no publicly-traded corporation owns 10% or more of the stock of United Policyholders.

DATED this 23rd day of March, 2020.

/s/ David L. Abney, Esq.
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Statement of Amicus Curiae

Consent to filing. All parties have consented to United Policyholders filing this amicus curiae brief. Fed. R. App. Proc. 29(a)(2).

The parties this brief supports. This brief supports Adir International, LLC and Ron Azarkman, but only because, in this dispute, they are on the right side of the issues. United Policyholders has no relationship with those parties.

Source of authority to file. United Policyholders' executive management has authority to authorize filing this amicus curiae brief, and has done so. Fed. R. App. Proc. 29(a)(4)(D).

Independence of Amicus Curiae. United Policyholders certifies that no party and no party's counsel authored this amicus curiae brief in whole or in part. Fed. R. App. Proc. 29(a)(4)(E)(i). United Policyholders further certifies that no party and no party's counsel has contributed any money intended to fund preparing or submitting the brief. Fed. R. App. Proc. 29(a)(4)(E)(ii). United Policyholders finally certifies that no person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief. Fed. R. App. Proc. 29(a)(4)(E)(iii). In fact, counsel for United Policyholders prepared and submitted this brief pro bono publico.

Interest of Amicus Curiae. United Policyholders is a non-profit 501(c)(3) organization whose mission is to be a trustworthy and useful information resource

and an effective, well-informed advocate in all 50 states for consumers of all types of insurance. Founded in 1991, United Policyholders helps level the playing field between insurers and insureds.

Among other things, United Policyholders: (1) provides tools and resources for solving insurance problems after an accident, loss, illness, or other adverse event; (2) promotes disaster preparedness and insurance literacy through outreach and education in partnership with civic, faith-based, business, and other nonprofit associations; and (3) advances pro-consumer laws and public policy related to insurance matters.

United Policyholders speaks for a wide range of policyholders. It has filed over 400 amicus curiae briefs in state and federal courts, including in the U.S. Supreme Court. United Policyholders has a strong interest in ensuring that all insureds are able to obtain the benefits they paid to receive to protect them in time of need. In particular, as a matter of public policy and constitutional principle, United Policyholders has an interest in ensuring that insurance companies pay for the legal representation that insureds desperately need when government agencies bring administrative and/or judicial proceedings against them.

Preparing for the Amicus Curiae brief. Counsel for Amicus Curiae United Policyholders has researched California and federal constitutional and statutory law on the meaning and application of Section 533.5 of the California Insurance

Code and on the constitutional right of access to the courts and to justice.

Desirability of accepting the brief. Amicus Curiae United Policyholders submits that this Court should grant it leave to file an amicus curiae brief in this matter because it can provide information, perspective, and argument that can help the Court beyond the help the parties' lawyers have provided.

Legal Argument

1. California Insurance Code § 533.5.

For ease of reference, this is the text of California Insurance Code § 533.5:

- (a) No policy of insurance shall provide, or be construed to provide, any coverage or indemnity for the payment of any fine, penalty, or restitution in any criminal action or proceeding or in any action or proceeding brought pursuant to Chapter 5 (commencing with Section 17200) of Part 2 of, or Chapter 1 (commencing with Section 17500) of Part 3 of, Division 7 of the Business and Professions Code by the Attorney General, any district attorney, any city prosecutor, or any county counsel, notwithstanding whether the exclusion or exception regarding this type of coverage or indemnity is expressly stated in the policy.
- (b) No policy of insurance shall provide, or be construed to provide, any duty to defend, as defined in subdivision (c), any claim in any criminal action or proceeding or in any action or proceeding brought pursuant to Chapter 5 (commencing with Section 17200) of Part 2 of, or Chapter 1 (commencing with Section 17500) of Part 3 of, Division 7 of the Business and Professions Code in which the recovery of a fine, penalty, or restitution is sought by the Attorney General, any district attorney, any city prosecutor, or any county counsel, notwithstanding whether the exclusion or exception regarding the duty to defend this type of claim is expressly stated in the policy.
- (c) For the purpose of this section, "duty to defend" means the insurer's

right or obligation to investigate, contest, defend, control the defense of, compromise, settle, negotiate the compromise or settlement of, or indemnify for the cost of any aspect of defending any claim in any criminal action or proceeding or in any action or proceeding brought pursuant to Chapter 5 (commencing with Section 17200) of Part 2 of, or Chapter 1 (commencing with Section 17500) of Part 3 of, Division 7 of the Business and Professions Code in which the insured expects or contends that (1) the insurer is liable or is potentially liable to make any payment on behalf of the insured or (2) the insurer will provide a defense for a claim even though the insurer is precluded by law from indemnifying that claim.

- (d) Any provision in a policy of insurance which is in violation of subdivision (a) or (b) is contrary to public policy and void.

Added by Stats. 1988, ch. 489, § 1; amended by Stats. 1990, ch. 1512 (Assembly Bill 3334), § 1; Stats.1991, ch. 1195 (Senate Bill 709), § 4.

2. Section 533.5(b) hinders exercise of the right to counsel and conflicts with the presumption of innocence and burden of proof.

Section 533.5(b) of the California Insurance Code is exceptionally broad. Read literally, it purports to forbid any insurance policy from providing any defense against any claim where recovery of a fine, penalty, or restitution is sought by the California Attorney General or a district attorney, city prosecutor, or county counsel in any:

- (1) criminal action;
- (2) action or proceeding brought under the California Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code §§ 17200 to 17210; or
- (3) action or proceeding brought under the California False Advertising

Law (“FAL”), Cal. Bus. & Prof. Code §§ 17500 to 17509.

Section 533.5(b) is, however, unconstitutional since it obstructs and can even completely prevent a person or a corporation from being able to afford legal counsel if the California Attorney General or a district attorney, city prosecutor, or county counsel brings administrative or legal proceedings seeking recovery of a fine, penalty, or restitution in any criminal action, or in any action or proceeding under the UCL or FAL.

Lawyers cost a lot. For decades, researchers have recognized that few individuals in our nation can afford to pay for lawyers when they have a civil legal problem. *See, e.g.*, James W. Meeker & John Dombrink, *Access to the Civil Courts for Those of Low and Moderate Means*, 66 So. Cal. L. Rev. 2217, 2218 (July 1993). But no matter the cost, only a fool represent himself or herself against the many lawyers and virtually unlimited resources that a city, county, or state can bring to bear.

“Particularly in view of the complexity of civil litigation in California courts, [rights] “‘like access to the courts’ and the opportunity ‘to be heard in court to defend one’s property’ can only be realized if a litigant has ‘the guiding hand of counsel at every step of the proceedings.’” *Quail v. Municipal Court*, 171 Cal.App.3d 572, 584, 217 Cal.Rptr. 361, 369 (2nd Dist. 1985) (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932)). In civil cases, lay persons “cannot be expected

to know how to protect their rights when dealing with practiced and carefully counselled adversaries.” *Brotherhood of Railroad Trainmen v. Virginia*, (1964) 377 U.S. 1, 7 (1964). “The right to a hearing,” of course, “includes the right to appear by counsel.” *Mendoza v. Small Claims Court of Los Angeles Judicial Dist.*, 49 Cal.2d 668, 673, 321 P.2d 9, 12 (1958).

“Even a skilled lawyer who represents himself is at a disadvantage in contested litigation.” *Kay v. Ehrler*, 499 U.S. 432, 437 (1991). “The adage that ‘a lawyer who represents himself has a fool for a client’ is the product of years of experience by seasoned litigators.” *Id.* at 437-38. In its various iterations, the adage is over two centuries old. *See* Henry Kett, *The Flowers of Wit, or a Choice of Bon Mots* 185 (1814) (“I hesitate not to pronounce, that every man who is his own lawyer, has a fool for a client.”).

Notably, in California and in many states, “a corporation, unlike a natural person, cannot represent itself before courts of record in propria persona, nor can it represent itself through a corporate officer, director or other employee who is not an attorney. It must be represented by licensed counsel in proceedings before courts of record.” *CLD Construction, Inc. v. City of San Ramon*, 120 Cal.App.4th 1141, 1145, 16 Cal.Rptr.3d 555, 557 (1st Dist. 2004). *See also Taylor v. Knapp*, 871 F.2d 803, 806 (9th Cir. 1989) (“The general rule, widely recognized in federal and state courts, is that a corporation can appear only through an attorney.”).

Indeed, Local Rule 82-2.2.2, a rule adopted by the underlying court in the present case—the U.S. District Court for the Central District of California—directs that: “Only individuals may represent themselves pro se. No organization or entity of any other kind (including corporations, limited liability corporations, partnerships, limited liability partnerships, unincorporated associations, trusts) may appear in any action or proceeding unless represented by an attorney permitted to practice before this Court under [Local Rule] 83-2.1.” Thus, Adir International, as a limited-liability company, had to pay for a lawyer.

Indeed, a company that the government sues within the purview of the limits that California Insurance Code § 533.5(b) imposes not only cannot use any legal-defense insurance it may have bought—it cannot defend itself pro per. It has four main choices. It can:

- (1) capitulate,
- (2) seek whatever protection is available under the bankruptcy laws, which probably will not be much, when the government is the plaintiff and it seeks punitive measures and sanctions;
- (3) represent itself by its general counsel, who probably has no expertise or resources sufficient for that task, or
- (4) pay the costs of hiring outside lawyers to defend itself.

Civil disputes with government agencies impose significant penalties and

costs on civil adversaries. Although a corporation is a juridical person, for those “who work for, manage, and own them, companies are combinations of people. Their behavior is drawn into question by the civil lawsuit. Their freedoms are curtailed by judicial process. Their time is imposed upon. Their level of stress is raised. Of course, they may well be liable. But they should not be presumed so.” J. Harvie Wilkinson, III, *Presumption of Civil Innocence*, 104 Va. L. Rev. 589, 618 (June 2018).

California Insurance Code § 533.5(b) interferes with a private person’s or corporation’s right to defend itself against government accusations of wrongdoing. If a person or corporation sued by the government was presumed to be guilty, that might not matter.

But the “presumption of innocence applies in civil as well as criminal matters.” *People ex rel. City of Dana Point v. Holistic Health*, 213 Cal.App.4th 1016, 1025 n. 2, 153 Cal.Rptr.3d 810, 816 n. 2 (4th Dist. 2013). That traditional presumption of innocence is consistent with California law providing that: “The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue.” Cal. Evid. Code § 520.

The civil presumption of innocence and the burden of proof placed on the government, however, do not matter if the civil defendant does not have enough money to retain competent legal representation.

3. Section 533.5(b) unconstitutionally interferes with the right of access to the courts.

For civil cases, the United States Supreme Court’s decisions “have grounded the right of access to courts” in the:

- privileges and immunities clause, U.S. Const. art. 4, § 2, cl. 1;
- the petition clause, U.S. Const. amend 1;
- the 5th Amendment due process clause, U.S. Const. amend. 5;
- the 14th Amendment due process clause, U.S. Const. amend. 14; and
- the 14th Amendment equal protection clause, U.S. Const. amend. 14.

Christopher v. Harbury, 536 U.S. 403, 415 n. 12 (2002).

“The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship.” *Chambers v. Baltimore & Ohio Railroad Co.*, 207 U.S. 142, 148 (1907). “The right of access to the courts is basic to our system of government, and it is well established today that it is one of the fundamental rights protected by the Constitution.” *Ryland v. Shapiro*, 708 F.2d 967, 971 (5th Cir. 1983).

The California Court of Appeals has recognized that access to the courts is “a right guaranteed to all persons by the federal and state Constitutions.” *Jersey v.*

John Muir Medical Center, 97 Cal.App.4th 814, 821, 118 Cal.Rptr.2d 807, 812 (1st Dist. 2002). In particular, it is protected by Article I, § 3 of the California Constitution, which provides that the people of California have the right to “petition government for redress of grievances.” *Id.*

Without money to pay for competent lawyers, the defendant’s presumption of innocence and the government’s burden of proof matter little. In its text and in its operation, California Insurance Code § 533.5(b) denies to those individuals and corporations who had the foresight to buy insurance to cover legal-defense costs the financial means to have meaningful access to justice and to the courts.

The statute thus directly and compendiously obstructs the constitutional right of access to justice and to the courts. “Regulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid.” *Procunier v. Martinez*, 416 U.S. 396, 419 (1974).

A “client’s fundamental right of access to the courts” is something that “necessarily includes the right to be represented by the attorney of his or her choice,” which is impossible for many clients if they cannot have the benefit of the insurance they bought to defend themselves when the government sues them in the type of cases that Section 533.5(b) encompasses. *See Taheri Law Group v. Evans*, 160 Cal.App.4th 482, 491, 72 Cal.Rptr.3d 847, 854 (2nd Dist. 2008).

Conclusion

People and companies that buy insurance to protect themselves from the cost of being sued by others, including by governments, depend on that insurance to pay for their legal representation. Without that vital coverage, many insureds will have no meaningful access to the courts and no chance for justice.

Section 533.5(b) of the California Insurance Code infringes on and abridges the right of insureds to obtain the insurance-funded defense for which they paid premiums and which they need to protect themselves and to obtain meaningful access to the courts. Section 533.5(b) of the California Insurance Code is therefore unconstitutional.

DATED this 23rd day of March, 2020.

/s/ David L. Abney, Esq.
David L. Abney
Attorney for Amicus Curiae United Policyholders

Certificate of Compliance

**Pursuant to 9th Circuit Rules 28-1.1(f),
29-2(c)(2) and (3), 32-1, 32-2, or 32-4 for Case No. 19-56320**

I certify that this brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 2,519 words long, excluding the portions exempted by Fed. R. App. Proc. 32(f). The brief's type size and type face comply with Fed. R. App. Proc. 32(a)(5) and (6).

DATED this 23rd day of March, 2020.

/s/ David L. Abney, Esq.
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Certificate of Service

I certify that I electronically filed the foregoing brief with the Clerk of the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system on this 23rd day of March, 2020. I certify that all participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF service.

DATED this 23rd day of March, 2020.

/s/ David L. Abney, Esq.
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