

U.S. Court of Appeals Docket Nos. 16-1111 and 16-1215

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

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DALE SNYDER, et al., individually, and on behalf of all  
others similarly situated,  
*Plaintiffs/Appellants,*

vs.

ACORD CORPORATION, a Delaware non-profit  
corporation, et al.,  
*Defendants/Appellees.*

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On Appeal from a Decision  
of the United States District Court  
for the District of Colorado  
Case No. 1:14-CV-01736-JLK  
The Honorable John L. Kane, Jr., Judge

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**BRIEF OF *AMICUS CURIAE* UNITED  
POLICYHOLDERS IN SUPPORT OF APPELLANTS**

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*10<sup>th</sup> Circuit admission pending*

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## CERTIFICATE OF CORPORATE DISCLOSURE

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amicus Curiae*, United Policyholders, states that it is a non-profit 501(c)(3) consumer organization, that it does not have a parent corporation, and that no publicly-traded corporation owns 10% or more of the stock of United Policyholders.

Dated: July 26, 2016

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## **I. INTEREST OF THE AMICUS CURIAE**

United Policyholders (“UP”) is a non-profit organization dedicated to helping preserve the integrity of the insurance system by serving as a voice and an information resource for insurance policyholders in all 50 states, including Colorado. United Policyholders’ work is supported by donations, grants, and volunteer labor. This year marks the organization’s 25th year of service. UP does not sell insurance or accept funding from insurance companies.

Much of UP’s work is aimed at helping individuals and businesses be properly insured and successfully navigate the claim process after disasters. UP monitors legal and marketplace developments affecting the interests of all policyholders and all lines of insurance. UP is frequently invited to testify at legislative hearings and participate in regulatory proceedings on rate and policy issues. UP has partnered with county officials in El Paso, Boulder and Larimer counties to provide long term wildfire and flood recovery services, and following a series of devastating wildfires, helped draft the Colorado Homeowners Insurance Act of 2013 (House Bill 12-1225, signed on May 10, 2013 by Governor John Hickenlooper). UP also publishes free-of-charge materials that give practical guidance to consumers in print and online at [www.uphelp.org](http://www.uphelp.org)

UP advances policyholders’ interests in courts across the U.S. by filing *amicus curiae* briefs in cases involving important insurance principles. UP has

filed *amicus curiae* briefs on behalf of policyholders in more than 400 cases throughout the United States, including numerous cases before the United States Supreme Court, U.S. Courts of Appeal, the courts of the state of Colorado. UP's *amicus* brief was cited in the United States Supreme Court's opinion in *Humana, Inc. v. Forsyth*, 525 U.S. 299 (1999). UP has been invited by many courts to participate in oral argument as *amicus curiae* and UP's arguments have been cited with approval in opinions issued by numerous state and federal courts.

In this brief, UP 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. 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 curiae* is often in a superior position to "focus the court's attention on the broad implications of various possible rulings."<sup>1</sup> UP's 25 years of experience aiding underinsured disaster victims and seeking solutions to this chronic problem makes it well suited to aid this Court. No fee has been paid or will be paid by any party, interested or otherwise, for preparing this *amicus curiae* brief.

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<sup>1</sup> Robert L. Stern et al., *Supreme Court Practice* 570-71 (6th ed. 1986) (quoting Bruce J. Ennis, *Effective Amicus Briefs*, 33 CATH. U. L. REV. 603, 608 (1984)).

## **II. FACTS AND PROCEDURAL HISTORY**

For purposes of this *amicus curiae* brief, *amicus curiae* UP adopts the Statement of the Case and Facts of Plaintiff/Appellants (Snyder *et al.*).

## **III. SUMMARY OF ARGUMENT**

The important role that property insurance plays in the economic health of households and communities is uniquely so in the wildfire-prone state of Colorado. Insurance spreads risk and provides financial security, making it possible for people and businesses to thrive. Insurance protection and coverage after an adverse event makes the difference between recovery and ruin.

Because insurance is so important, it is a carefully regulated industry. Oversight agencies in every state have the authority to regulate the financial affairs of insurance companies, the rates they charge, and the way they sell their products and process claims made by policyholders. Legislatures have enacted statutes and courts have rendered decisions that define the standards that companies must adhere to when dealing with their insureds. In the end, however, it is up to private litigants and state and federal courts to enforce those standards.

Plaintiff/Appellants share the common bond of having experienced a catastrophic loss and the after-shock of learning their insurance safety net was grossly inadequate to cover their losses. These disaster victims, now litigants, experienced the second nightmare of finding out they'd been misled at the point of

sale, and the policies sold to them as providing “replacement cost” protection did not in fact provide that protection.<sup>2</sup> They are by no means alone. Post-disaster underinsurance is such a severe and chronic problem that cities, counties, the American Red Cross and other charitable entities partner with UP to help solve it.<sup>3</sup> Some states, such as California, have enacted regulations to address it.<sup>4</sup> Colorado, despite its many consumer protections, has no regulation that speaks *specifically* to the obligation of an insurance company to set adequate coverage limits.<sup>5</sup>

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<sup>2</sup> See post-disaster surveys of *e.g.*, Waldo Canyon and High Park fire victims, conducted by local governments and community organizations in partnership with United Policyholders ([http://www.uphelp.org/library/resource/survey\\_results#a](http://www.uphelp.org/library/resource/survey_results#a), last visited July 13, 2016).

<sup>3</sup> See *Partnering with the Red Cross, What’s UP?* Newsletter of United Policyholders, May 2010) (<http://www.uphelp.org/library/partnering-red-cross-great-grant-news/2010-05-01>, last visited July 13, 2016).

<sup>4</sup> See, *e.g.*, Cal. Code Regs., tit. 10 §2695.198 which requires, *inter alia*, that insurers consider an exhaustive list of factors such as foundation type, square footage, number of stories and quality of materials in determining dwelling coverage limits at the point of sale.

<sup>5</sup> See COLORADO HOMEOWNER’S INSURANCE REFORM ACT OF 2013 (H.B. 12-1225); See also Code Colo. Reg. 702–6, § 3 (prior to Sept. 25, 2015 at the time of Waldo Canyon and High Park Fires), the Colorado Division of Regulatory Agencies (“DORA”) made it the responsibility of insurance companies to fully inform their policyholders of the coverages available in their policies. In any event, there is no specific obligation placed on insurance companies to set coverage limits that are adequate to rebuild the insured property in the event of a total loss.

In a nutshell, the problem is this: Dwelling coverage limits are set by computer software that is highly susceptible to error and consistently underestimates the replacement value of the insured property. In virtually every property insurance sale situation, the consumer reasonably relies on an agent or insurer's superior knowledge and expertise and never challenges the estimated replacement value of their home. Disaster victims bear the brunt of this flawed estimating and underwriting and chronically find their coverage limits too low to rebuild when it is too late to increase their coverage because their property has been destroyed.<sup>6</sup> Thus, many find that no contractor can or will rebuild their home even if they collect the maximum coverage available under their policy.

But insurers contend they are not intentionally underinsuring homes. Insurers say they are doing their part by recommending that their policyholders consult with a local contractor about rebuilding costs in their area – an admission that the computer estimating software that sets the dwelling limits does not tell the whole story.

UP seeks to appear as *amicus curiae* in the instant case for the limited purpose of educating the Court about the severity of the underinsurance problem that afflicted Plaintiffs/Appellants. The Colorado Division of Regulatory Agencies

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<sup>6</sup> See, e.g., “Avoiding Underinsurance,” “Underinsurance 101, Causes and Solutions”, “Underinsurance Help” and other related UP reports and publications ([http://uphelp.org/library/guide/underinsurance\\_help](http://uphelp.org/library/guide/underinsurance_help), last visited July 13, 2016).

has not been able to remedy the situation, nor is it feasible for each individual homeowner affected by underinsurance to pursue an individual lawsuit against each of their respective insurance agents or insurers. The instant case, however, is in fact the most judicially efficient method for Plaintiffs/Appellants to seek recourse. Without commenting specifically on the merits of the Plaintiffs/Appellant's conspiracy claims (18 U.S. Code §§ 1961-1968), UP respectfully requests that this Court reverse the District Court's dismissal in favor of Defendants/Respondents so that the instant case may proceed to a full and fair trial to explore the issues raised in the Plaintiffs/Appellants' complaint.

#### **IV. ARGUMENT**

##### **A. THE HOMEOWNERS UNDERINSURANCE PROBLEM IS PERVASIVE AND HARMFUL TO DISASTER VICTIMS**

The underinsurance problem has been extensively documented in the media, industry publications, and law review articles.<sup>7</sup> Legal scholars contend: “[i]nsurers have both the incentive and ability to set low policy limits...and...homeowner’s insurance policyholders are ill-equipped to determine the appropriate limits for

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<sup>7</sup> See *Softening the Short Shrift: Regulating Homeowner’s Insurance Limits as Causes of Underinsurance*, Joshua Fox, 46 Cal. W. L. Rev. 369 (Spring 2010). See also *When Enough is Not Enough: Correcting Market Inefficiencies in the Purchase and Sale of Residential Property Insurance*, Kenneth S. Klein, 18 Va. J. Soc. Pol’y & L. 345 (Fall 2011).

their insurance policies.”<sup>8</sup> Many of these scholars agree that underinsurance is in fact pervasive and any effective proposal for remedial action must include insurers providing complete information to potential customers for homeowners insurance regarding total-loss rebuilding costs at the point-of-sale.<sup>9</sup> So although UP and others are engaged in encouraging consumers to get second opinions on the replacement values of their properties when insuring them, Defendant/Appellees must do their part, and they have not done so to date.<sup>10</sup>

The insurance industry acknowledges that material and labor costs to rebuild after a total loss are higher than new construction.<sup>11</sup> Some of these reasons include:

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<sup>8</sup> Fox, *supra* at pp. 4-11.

<sup>9</sup> See generally Klein, *supra*.

<sup>10</sup> See, e.g., *How to find the replacement cost of your home for insurance*, Kathleen Pender, San Francisco Chronicle, July 2, 2016 (<http://www.sfchronicle.com/business/networth/article/How-to-find-the-replacement-cost-of-your-home-for-8337289.php?t=8095075e610a4808f6&cmpid=twitter-premium>, Last visited July 12, 2016).

<sup>11</sup> See, e.g., *Identifying True Insurance Needs Based on Realistic Rebuilding Costs*, Core Logic via Insurance Journal, last visted July 11, 2016 (<http://www.insurancejournal.com/blogs/corelogic/2016/07/11/419356.htm>) (“Because the reconstruction cost to rebuild a home is generally higher than the original cost to build that same home, the topic often leads to difficult conversations between the insurance agent and homeowner. That’s why it’s important for both insurance agents and homeowners to understand why reconstruction often costs more than new construction—even if the home is still relatively new. **Many homeowners do not realize that the sale price, the appraisal value and the mortgage amount are all somewhat irrelevant when it**

“Less buying power and fewer efficiencies and economies of scale; Top-down construction: new construction begins at the foundation and builds upward, but repairing a house that is not totally destroyed often means removing the roof and rebuilding from the top down; a far more time-consuming and labor-intensive procedure; Scheduling of work, particularly with skilled labor, is more difficult with single projects; Limited or difficult access to the worksite; More intensive homeowner involvement slows production; Code compliance, demolition and debris removal; Landscaping and other site improvements.”<sup>12</sup>

The underinsurance problem, however, occurs at, and can be remedied at, the point-of-sale. The typical scenario goes something like this: Unsuspecting homeowners meet with an insurance agent, the insurance agent collects some details about the property to be insured, a dollar amount of coverage is set (based on both the price the consumer is willing to pay and what the insurer’s computer estimating software suggests), the homeowner pays the premium, and files the insurance policy away until it’s needed after a fire – only then does homeowner discover that their limits are too low to rebuild the house they lost in the fire.

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**comes to determining how much insurance coverage is required. The appropriate insurance coverage for a home is the actual cost to rebuild after a total loss; a number that can be significantly different than purchase or construction price.”** (emphasis added).

<sup>12</sup> *Id.*

Only in rare cases, will an insurance company retroactively adjust coverage limits when they are inadequate to rebuild the destroyed home. UP, as an organization that works with victims of natural disasters, typically only sees this occur when there is a technical or clerical error (*e.g.*, when the agent inputs incorrect square footage on the application). In general, however, insurance companies take the position that the premium charged relates directly to the amount of coverage available under the policy and thus no additional coverage is warranted, even if the homeowner is grossly underinsured. And despite their expertise and sophistication, the insurance industry takes the position that the homeowner is solely responsible for setting adequate coverage limits.<sup>13</sup>

Specific to the circumstances of the Plaintiffs/Appellants, UP conducted recovery services for High Park and Waldo Canyon fire victims throughout 2012-2013. UP counseled hundreds of homeowners who found that they did not have adequate insurance coverage to rebuild their home. Colloquially, UP and others have referred to this phenomenon as “twice burned” – once by the wildfire, a

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<sup>13</sup> See, *e.g.*, *Homeowners responsible for proper insurance*, Bryan Grossman, The Colorado Springs Business Journal, April 11, 2016 (<http://www.csbj.com/2016/04/11/homeowners-responsible-for-proper-insurance/>, Last Visited July 12, 2016).

second time by their insurance company.<sup>14</sup> High Park and Waldo Canyon fire victims told UP same story, over and over again: They trusted their insurance company to set adequate replacement cost coverage limits, in some cases asked for coverage increases which they did not receive, but they ended up underinsured anyway.<sup>15</sup> Thus, the underinsurance problem is a real threat to the economic security of homeowners in Colorado, including Plaintiffs/Appellants.

**B. IN THE ABSENCE OF APPROPRIATE REGULATION,  
COURTS ARE THE ONLY VENUE FOR RELIEF FOR  
INNOCENTLY UNDERINSURED PROPERTY OWNERS**

The legal system is the only remedial venue for these victims of underinsurance. Plaintiffs have advanced a number of viable legal theories their complaint that support the notion that a full and fair trial is warranted. Under Colorado law, insurance companies owe a quasi-fiduciary duty to their policyholders. *See Bailey v. Lincoln Gen. Ins. Co.*, 255 P.3d 1039 (Colo. 2011)

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<sup>14</sup> *See Twice Burned, Homeowners become lobbyists, help push bills in Sacramento*, By Jeanette Steele, San Diego Union Tribune, Oct. 24, 2014 ([http://www.sandiegouniontribune.com/uniontrib/20041024/news\\_mz1b24twice.html](http://www.sandiegouniontribune.com/uniontrib/20041024/news_mz1b24twice.html), Last Visited July 12, 2016 ); *See also Twice Burned*, November 13, 2009 (<http://www.uphelp.org/sites/default/files/111309FireAnniversaryPressRelease.pdf>, Last Visited July 12, 2016).

<sup>15</sup> *See UP surveys, supra* at fn. 2, showing that 54% of High Park Fire survey respondents reported being underinsured on their dwelling by an average of \$101,000 while 27.2% of survey respondents reported being underinsured on their dwelling by an average of \$77,000. A UP survey following the subsequent Black Forest Fire of 2013 Revealed that 46% of survey respondents did not have enough insurance to cover the cost of repairing, replacing or rebuilding their house.

("In Colorado, the doctrine of reasonable expectations is one of the principles of fairness to which insurance policies are subject, as it is designed to protect insureds from the dangers inherent in standardized insurance policies. UP has earlier noted that public policy itself "favors protecting consumers by requiring those who sell insurance to disclose fully and fairly to the purchasing public what insurance protection is actually being provided for the premium charged.") (citing *Davis v. M.L.G. Corp.*, 712 P.2d 985, 990 n.6 (Colo.1986)) (citing *Newton v. Nationwide Mut. Fire Ins.*, 594 P.2d 1042 (Colo. 1979)).

The *Bailey* court goes on to explain: "The reason [why insurance companies must fully and fairly disclos[e] what insurance protection is actually being charged for the premium charged] is because insurance is a unique product, which is purchased by insureds not to secure commercial advantage, but to protect "themselves from unforeseen calamities and for peace of mind." (citing *Goodson v. Am. Standard Ins. Co. of Wis.*, 89 P.3d 409, 414 (Colo.2004). "When insurers fail to fully and fairly convey the extent of coverage provided, they undermine one of the fundamental purposes behind insureds' purchase of insurance." *Id.*

The District Court disregarded this weight of authority and Colorado Supreme Court precedent, instead relying chiefly on *Kaercher v. Sater*, 155 P.3d 437 (Colo. App. 2006), a Colorado appellate decision discussing specifically the duties of insurance *agents* not insurance *companies*, which relies on *Estate of Hill*

*v. Allstate Ins. Co.*, 354 F. Supp. 2d 1192 (D. Colo. 2004), a Federal District Court case, which is not binding precedent in the District Court nor here. *See, e.g., Wade v. EMCASCO Ins. Co.*, 483 F.3d 657, 665-66 (10th Cir. 2007) ("The federal court must follow the most recent decisions of the state's highest court.").

The state agency charged with regulating the insurance industry, the Colorado Division of Regulatory Agencies ("DORA"), does not believe it has the authority to remedy the underinsurance problem. As part of the Colorado Homeowners Insurance Reform Act of 2013, Governor Hickenlooper appointed the Wildfire Insurance and Forest Health Task Force (Executive Order B 2013-002), which was charged to "look at how best to protect the citizens who live in the wildland-urban interface..."<sup>16</sup> The report found, *inter alia*, that coverage problems existed in high risk fire zones but the Colorado state government (*i.e.*, DORA) would be limited in its ability to require that insurance companies provide coverage in these areas or regulate individual company underwriting.

Thus, private litigation is the most effective vehicle for solving the problem

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<sup>16</sup> *See* Memo from DORA Executive Director Barbara J. Kelly to Governor Hickenlooper *et al.*, Wildfire Insurance and Forest Health Task Force Report to The Governor of Colorado, The Speaker of the House of Representatives and the President of the Senate, September 30, 2013 ([http://www.dora.state.co.us/taskforce/documents/final\\_report\\_with\\_appendices.pdf](http://www.dora.state.co.us/taskforce/documents/final_report_with_appendices.pdf), last visited July 13, 2016).

of underinsurance, which as Plaintiff/Appellants allege, may be a violation of the Colorado Consumer Protection Act (“CCPA”). *See, e.g., Showpiece Homes Corp. v. Assurance Co. of America*, 38 P.3d 47, 51 (Colo. 2001) (“The [CCPA § 6-1-101] provides both for enforcement by the attorney general and a private right of action to any person injured by the deceptive acts or practices committed by a [and insurance company].”). If the decision of the District Court stands, not only will Plaintiff/Appellants have no remedy for having been deceived at the point of sale, but it sets a precedent that may preclude underinsured victims of the next wildfire from using the civil justice system when confronted with the same problem.

## **V. CONCLUSION**

For the foregoing reasons, *amicus curiae* United Policyholders respectfully requests that this Court reverse the decision of the U.S. District Court for the District of Colorado and remand for further proceedings.

Dated: July 26, 2016

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 26th day of July 2016, I electronically filed the foregoing *Amicus Curiae Brief of United Policyholders in Support of Appellants*, with the Clerk of the Court of the United States Court of Appeals by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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STATEMENT OF *AMICUS CURIAE*

Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate

Procedure, I hereby certify:

A. a party's counsel did not author the brief in whole or in part;

B. a party or a party's counsel did not contribute money that was intended to fund preparing or submitting the brief; and

C. a person - other than the *amicus curiae*, its member, or its counsel - did not contribute money that was intended to fund preparing or submitting the brief.

Dated: July 26, 2016

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations set forth in Rules 29(d) and 32(a)(7)(B) of Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font and contains 2,293 words not including footnotes.

Dated: July 26, 2016

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**CERTIFICATE OF COMPLIANCE**

I certify that this brief complies with 10th Cir. Rule 25.3 and the ECF compliance requirements of Federal Rules of Appellate Procedure:

- a. All required privacy redactions have been made;
- b. The hard copies of this brief required to be submitted to the clerk's office are exact copies of the ECF filing; and
- c. The ECF submission was scanned for viruses with the most recent version of Microsoft Word for Mac 2011, lasted installed update version 14.6.0, and, according to the program is free of viruses.

Dated: July 26, 2016

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