IN THE SUPREME COURT

STATE OF ARIZONA

SCOT and JOANNA SOBIESKI, husband and wife, Petitioners/Plaintiffs/Appellees, vs. AMERICAN STANDARD INSURANCE COMPANY OF WISCONSIN, a Wisconsin Corporation; AMERICAN FAMILY MUTUAL INSURANCE COMPANY, a Wisconsin Company, Respondents/Defendants/Appellants.	No. CV-16-0253-PR Court of Appeals Division One No. 1 CA-CV 14-0416 Maricopa County Superior Court No. CV2010-092624

BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS IN SUPPORT OF PETITION FOR REVIEW

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INTRODUCTION

Insurance is different. Unlike other private commercial transactions, insurance is a compulsory purchase. Arizona, like every other state except New Hampshire, has Motor Vehicle laws that require every car owner to purchase automobile insurance which is offered on a take it or leave it basis by companies such as American Family whom consumers must patronize to comply with these laws.[1] These powerful corporations then establish the terms and conditions of this mandatory product. They also serve as the primary arbiter and enforcer of their own non-negotiable policy terms. This system creates an enormous disparity of power between the insurance company and its captive customer. The insurance consumer's ability to access our civil justice system through competent legal

[1] "The fundamental reason which explains…judicial predisposition toward the insured is the deep-seated often unconscious but justified feeling or belief that the powerful underwriter, having drafted its several types of insurance contracts with the aid of skillful and highly paid legal talent, from which no deviation desired by an applicant will be permitted, is almost certain to overreach the other party to the contract. The established underwriter is magnificently qualified to understand and protect its own selfish interests. In contrast, the applicant is a shorn lamb driven to accept whatever contract may be offered on a 'take-it-or-leave-it' basis if he or she wishes insurance protection. In other words, insurance policies, while contractual in nature, are certainly not ordinary contracts, and should not be interpreted or construed as individually bargained for, fully negotiated agreements, but should be treated as contracts of adhesion between unequal parties. This is because… insurance contracts are generally not the result of the typical bargaining and negotiating processes between roughly equal parties that is the hallmark of freedom of contract." See 16 Richard A. Lord, *Williston on Contracts* 49:15 (4th Ed. 2014).

counsel is imperative to the maintenance of any semblance of an even playing field. Because the monetary amount in dispute in most insurance claims by individuals is often small, the availability of a real punitive damages remedy, as determined by a jury of an insurance consumer's peers, provides the only "key to the courtroom" for the vast majority of consumers who cannot afford to hire an attorney on an hourly basis. The Arizona Court of Appeals opinion in this case takes that key away from Arizona insurance consumers by substituting its own judgment for that of the Sobieskis' peers and the trial judge who heard the trial testimony. In so doing, the Court fundamentally re-wrote the rules under which Arizona trial court judges have given appropriate deference to the broad discretion our civil justice system gives to a jury to use its own judgment in evaluating the evidence presented at trial. United Policyholders urges this Court to accept review so that this state's highest court can determine whether such a major shift in the balance of power between an insurance company and its insured is warranted by either legal precedent, or by Arizona public policy.

ISSUE PRESENTED FOR REVIEW

Petitioners phrase the issue for review as follows: "Did the Court of Appeals disregard this Court's standards for punitive damage awards and create a new heightened standard that is in conflict with existing law?"

STATEMENT OF FACTS

UP adopts the statement of facts presented in the petition for review.

ARGUMENT

A. BECAUSE INSURANCE IS A UNIQUE PRODUCT, THIS COURT SHOULD REVIEW THE COURT OF APPEALS' EXTREME RESRICTIONS ON A JURY'S DISCRETION TO MAKE FINDINGS OF FACT RELATIVE TO AN INSURER'S CONDUCT.

An insurance policy is a product that is differs from other consumer goods, services or contracts in significant ways. Insurance plays a distinctive role in our society: it spreads risk *and* provides financial security, making it possible for people and businesses to thrive and not fear the risk of economic ruin resulting from unpreventable events.[2] The processing of insurance claims by private corporations has profound implications on many important public interests. The Delaware Supreme Court, in *E.I. du Pont de Nemours and Co. v. Pressman,* 679 A.2d 436, 447 (Del. 1996), stated it this way:

> Insurance is different. Once an insured files a claim, the insurer has a strong incentive to conserve its financial resources balanced against the effect on its reputation of a 'hard-ball' approach. Insurance contracts are also unique in another respect. Unlike other contracts, the insured has no ability to 'cover' if the insurer refuses without justification to pay a claim. Insurance contracts are like many other

[2] *See* Lorelie S. Masters, Amy R. Bach, and Daniel R. Wade, *The American Law Institute Principles/Restatement of the Law of Liability Insurance: Part III—Selected Comments From a Policyholder Perspective,* Lexis Nexis – Current Critical Issues (2015) (discussing the idea that insurance is purchased and designed to protect consumers from potentially financially ruinous injuries or damage).

> contracts in that one party (the insured) renders performance first (by paying premiums) and then awaits the counter-performance in the event of a claim. Insurance is different, however, if the insurer breaches by refusing to render the counter-performance.

Given the public interests at stake, it is crucial for this Court to weigh in on an appellate decision that materially shifts the balance of power in the insurance transactions towards corporate interests in maintaining profits, and away from public interest in maintaining a fair and even playing field.

The California Supreme Court acknowledged the reason for such purchases in the seminal case *Egan v. Mutual of Omaha Ins. Co*., 620 P.2d 141, 146, 24 Cal.3d 809, 819 (1979): "The insured in a contract like the one before us does not seek to obtain a commercial advantage by purchasing the policy - rather, he seeks protection against calamity. As insurers are well aware…the purchase of such insurance provides peace of mind and security." The *Egan* court went on to say:

> [A]s a supplier of a public service rather than a manufactured product, the obligations of insurers go beyond meeting reasonable expectations of coverage. The obligations of good faith and fair dealing encompass qualities of decency and humanity inherent in the responsibilities of a fiduciary. Insurers hold themselves out as fiduciaries, and with the public's trust must go private responsibility consonant with that trust.

Id. at 147, 24 Cal.3d at 820. The U.S. Supreme Court has also long recognized that insurance transactions are imbued with the public interest.[3] 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 policyholder claims. Legislatures have enacted statutes, and courts have rendered decisions, that define the standards that insurance companies are expected to adhere to when processing and paying insurance claims. In the end, however, individual access to the civil justice system is the most important mechanism for consumers to enforce these standards of conduct.

Petitioners have undertaken the monumental task of instituting litigation against an insurance company that not only breached the terms and conditions of its insurance policy, but did so in bad faith. This task requires a tremendous amount of time, money and resources, and involves great risk. Because of this reality, Arizona recognizes that there must be meaningful and enforceable

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[3] *See, e.g*., *Cal. State Auto. Ass'n Inter-Ins. Bureau v. Maloney*, 341 U.S. 105, 109-10 (1951) (insurance has always had special relation to government); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 415-16 (1946) ("[insurance] business affected with a vast public interest"); *Robertson v. California*, 328 U.S. 440, 447 (1946); *United States v. South-Eastern Underwriters Ass'n.*, 322 U.S. 533, 540 at n.14 (1944) ("evils" in the sale of insurance "vitally affect the public interest"); *Osborn v. Ozlin*, 310 U.S. 53, 65 (1940) ("Government has always had a special relation to insurance."); *O'Gorman & Young, Inc. v. Hartford Fire Ins. Co*., 282 U.S. 251, 257 (1931) ("The business of insurance is so far affected with a public interest that the State may Regulate the Rates").

remedies for the tort of bad faith that assure that access to the courts remain within the grasp of individuals of ordinary means.

This Court, in *Noble v. National American Life Ins. Co*., 128 Ariz. 188, 624 P. 2d 866 (1981), recognized the importance of providing meaningful remedies for an insurer's violation of its obligations under insurance contracts, and adopted the rule first announced by the California Supreme Court in *Gruenberg v. Aetna Ins. Co*., 9 Cal.3d 566, 575, 510 P.2d 1032, 1038 (1973):

> It is manifest that a common legal principle underlies all of the foregoing decisions; namely, that in every insurance contract there is an implied covenant of good faith and fair dealing. The duty to so act is imminent in the contract whether the company is attending to the claims of third persons against the insured or the claims of the insured itself. Accordingly, when the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort…

This rule is now a bedrock principle of insurance law. In almost every state, a first-party claimant has the ability to bring an action for breach of contract and breach of the covenant of good faith and fair dealing.[4] In all but a minority of states, an insured can collect punitive damages under statute or common law, which serves the important purpose of deterring an insurer that a jury determines

[4] See United Policyholders and Professor Jay Feinman *et al*, *50-State Survey of Bad Faith Laws and Remedies*, (October 24, 2014) http://uphelp.org/sites/default/files/publications/Final%20-%20Bad%20Faith%20Survey.pdf

has acted outrageously, from "future similar conduct" with its other insureds.[5] *See Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 497, 733 P.2d 1073, 1080 *cert. denied*, 484 U.S. 874, *reh'g denied* 484 U.S. 972 (1987).

Because of the economic reality that individual insurance disputes often involve relatively small monetary amounts, the punitive damage remedy administered by a jury is essential to insurance consumers' ability to access the courts and enforce their own rights. Few insureds have the wherewithal to endure the years of litigation necessary to expose schemes like American Family's that place profit interests over public interest. In those rare occasions where a jury does find that an insurer's conduct warrants an expression of societal disapproval, it is crucial that a reviewing court give the proper deference to the jury's right to draw its own inferences from the evidence. Therefore, it is important for this Court to accept review of the Court of Appeals' unprecedented infringement on a jury's discretion to determine whether an insurer's conduct meets the standards set for the punitive damage remedy under Arizona law.

[5] *Id.*

B. THE COURT OF APPEALS' OPINION INFRINGES ON A JURY'S BROAD DISCRESTION TO "EXPRESS SOCIETY'S DISAPPROVAL OF OUTRAGEOUS CONDUCT" THAT THIS COURT HAS LONG PROTECTED.

A meaningful punitive damages remedy for insurance consumers is essential to their practical ability to access the courts and hold their insurers accountable to their duty of good faith and fair dealing in handling claims. Arizona law is clear:

> Tort recovery for bad faith is allowed if an insurer intentionally breaches the implied covenant of good faith and fair dealing in the insurance contract by denying the insured the security and protection from calamity that is the object of the insurance relationship.

See Hawkins v. Allstate Ins. Co., 152 Ariz. at 496-97, 733 P.2d at 1079-80 (*citing Rawlings v. Apodaca*, 151 Ariz. 149, 726 P.2d 565 (1986)). It is the finder of fact that must consider the evidence and determine whether an insurer has complied with the obligations imposed by this Court to "immediately conduct and adequate investigation, act reasonably in evaluating the claim, and act promptly in paying a legitimate claim." *See Zilisch v. State Farm Mut. Auto. Ins. Co.*, 196 Ariz. 234, 238, 995 P.2d 276, 280 (2000). In the current case, the Court of Appeals found adequate evidence to support the jury's conclusion that American Family breached these standards and "either knew or was conscious of the fact that its conduct was unreasonable." *See id.* The Petitioners' brief also cites ample evidence from which a reasonable jury could infer that the Sobieskis' claim was denied in furtherance of a corporate strategy instituted to maximize

American Family's own profits. It was well within the discretion of this jury to be outraged by the evidence of American Family's proven bad faith, and clear error for the Court of Appeals to draw its own inferences, and substitute its own judgment, for that of the jury and trial judge. *See Thompson v. Better-Bilt Aluminum Products Co., Inc.*, 171 Ariz. 550, 558, 832 P.2d 203, 211 (1992) ("the choice among reasonable inferences is one properly reserved for the jury").

This Court has repeatedly recognized "punishment, societal condemnation, deterrence, and public policy" as valid grounds for assessing punitive damages. *Haralson v. Fisher Surveying, Inc.*, 201 Ariz. 1, 3, 31 P.3d 114, 116 (2001). Even in circumstances where the public's interest in punishment and deterrence are not implicated, this Court has agreed that punitive damages may be "appropriate, and perhaps even necessary," as a vehicle within our civil justice system to allow juries "to express society's disapproval of outrageous conduct." *Id*. (*citing*, *Hawkins*, 152 Ariz. at 497, 733 P.2d at 1080).

Under the standards set by this Court, punitive damages were available to the Sobieskis if reasonable jurors could have concluded that the evidence was clear and convincing that American Family acted to serve its own pecuniary interests in "conscious disregard" of a known risk that the Sobieskis would be seriously harmed. *See Hawkins*, 152 Ariz. at 498 733 P.2d at 1081. The jury's determination that American Family did deny the Sobieskis' claim in bad faith has

been upheld. The record summarized in Petitioners' Brief is replete with evidence from which the jurors could have reasonably inferred that the denial of their claim was the result of a corporate strategy to arbitrarily drive down average claim payments as a means of increasing corporate profits. A juror who did draw the inference that the Sobieski claim was denied to serve a profit motive, would be entitled to be outraged. Indeed, Arizona courts have affirmed punitive damages where corporate strategies encourage underpaying or denying legitimate claims. *See, e.g., Nardelli v. Metropolitan Group Property and Cas. Ins. Co*., 230 Ariz. 592, 277 P.3d 789 (App. 2012). This Court has also held that the public's interest in expressing societal outrage by way of a jury's punitive damages verdict is protected by the laws of this state. *See Haralson*, 201 Ariz. at 3, 31 P.3d at 116. Therefore, it is extraordinarily important that this Court accept review, and review *de novo* the Court of Appeals' unprecedented limitations on a jury's discretion to draw its own inferences from the evidence in determining an insurer's intent and state of mind as it acted in proven bad faith in carrying out its fundamental duties and obligations under its insurance contract.

CONCLUSION

In light of the overriding public interest in preserving Arizona insurance consumers' access to the civil justice system through a meaningful punitive damages remedy administered by juries sitting as finders of fact, United

Policyholders respectfully requests that the Court grant review in the above-captioned matter.

Respectfully submitted this 22nd day of December, 2016.

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CERTIFICATE OF COMPLIANCE

The below-signing lawyer certifies that this document: (1) uses Times New Roman 14-point proportionately spaced typeface for text *and* footnotes; (2) contains 2,517 words (by computer count); and (3) averages less than 280 words per page, including footnotes and quotations.

Dated this 22nd day of December, 2016.

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CERTIFICATE OF SERVICE

On this date, the above-signing lawyer e-filed this document with the Arizona Supreme Court via TurboCourt, and served copies via U.S. Mail to the following:

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