

U.S. Court of Appeals Docket No. 16-14225

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

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JESUS CAMACHO, surviving spouse of Stacey Camacho  
and LeJEAN NICHOLS, administratrix of the Estate of  
Stacey Camacho  
*Plaintiffs/Appellees,*

v.

NATIONWIDE MUTUAL INSURANCE COMPANY  
*Defendant/Appellant.*

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On Appeal from a Decision  
of the United States District Court  
for the Northern District of Georgia, Atlanta Division

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**CORRECT MOTION FOR LEAVE TO FILE A  
BRIEF OF *AMICUS CURIAE* IN SUPPORT OF  
APPELLEES**

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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: March 1, 2017

Respectfully submitted,

/s/ *Jeffrey D. Diamond*

Jeffrey D. Diamond

Attorney for *Amicus Curiae* United Policyholders

**CERTIFICATE OF INTERESTED PERSONS**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and 11<sup>th</sup> Cir. R. 26.1-1, 26.1-2, 26.1-3, I hereby certify the following persons or entities have an interest in the outcome of this case:

Allston & Bird LLP (counsel for Defendant-Appellant)

Bryan Cave LLP (counsel for *amicus curiae* Georgia Chamber of Commerce)

R. Tyler Bryant (counsel for Defendant-Appellant)

Jesus Camacho (Plaintiffs-Appellees)

Brandon Cathey (counsel for Plaintiffs-Appellees)

Robert Malcolm Darroch (counsel for Defendant-Appellant)

Jeffrey D. Diamond (counsel for *Amicus Curiae* United Policyholders)

Richard English Dolder, Jr. (counsel for Defendant-Appellant)

Georgia Chamber of Commerce (*Amicus Curiae*)

Stephanie F. Glickauf (counsel for Defendant-Appellant)

Goodman McGuffey Lindsey, Johnson, LLP (counsel for Defendant-Appellant)

Darrell Wayne Hinson (counsel for Plaintiffs-Appellees)

Michael P. Kenny (counsel for Defendant-Appellant)

Bryan W. Lutz (counsel for Defendant-Appellant)

Charles H. McAleer (counsel for Plaintiffs-Appellees)

McAleer Law Firm (counsel for Plaintiffs-Appellees)

Shukura Ingram Millender (counsel for Defendant-Appellant)

Nationwide Mutual Insurance Company (Defendant-Appellant)

LeJean Nicholes (Plaintiffs-Appellees)

Seung Chung Park (insured and assignee)

Tiffany L. Powers (counsel for Defendant-Appellant)

James N. Sadd (counsel for Plaintiffs-Appellees)

Slappey and Sadd, LLC (counsel for Plaintiffs-Appellees)

Swope, Rodante, P.A. (counsel for Plaintiffs-Appellees)

Thomas, Kennedy, Sampson, Tompkins, LLP (counsel for Defendant-Appellant)

Jeffrey Emery Tompkins (counsel for Defendant-Appellant)

Hon. Amy Totenberg (U.S. District Judge)

Andrew J. Tuck (counsel for Defendant-Appellant)

Tyrone Law Firm (counsel for Plaintiffs-Appellants)

Nelson O. Tyrone (counsel for Plaintiffs-Appellants)

United Policyholders

Dated: March 1, 2017

Respectfully submitted,

/s/ Jeffrey D. Diamond

Jeffrey D. Diamond

Attorney for *Amicus Curiae* United Policyholders

**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.

Respectfully submitted,

Dated: March 1, 2017

/s/ Jeffrey D. Diamond

Jeffrey D. Diamond

*Attorney for United Policyholders*

**MOTION FOR LEAVE TO FILE A BRIEF OF *AMICUS CURIAE***

Pursuant to F.R.A.P. 29(a) and 11<sup>th</sup>. Cir. R 35-6, United Policyholders (“UP”) hereby moves this Court for an order granting leave to UP to file a brief of *Amicus Curiae* brief in support of Plaintiffs/Appellees. UP submits this brief of *Amicus Curiae* in support of Plaintiffs/Appellees Camacho, *et. al.*, urging this Court to affirm the judgment of the District Court.

Federal Courts have broad discretion to allow *amicus* status to a party with a valid interest and timely relevant information. (*See, e.g., Gerritsen v. De La Madrid Hurtado*, 819 F.2d 1511, 1514 n. 3 (9<sup>th</sup> Cir. 1987).) Courts generally exercise liberality in granting *amicus* status when, as here, the matter is one of public concern. (S. Thomas, *Corpus Juris Secundum*, “Amicus Curiae,” §3 (2012); *see also, e.g., Neonatology Associates, P.A. v. Comm’r of Internal Revenue*, 293 F. 3d 128, 133 (3rd Cir. 2002) (opinion by Circuit Judge Samuel Alito: “skeptical scrutiny of proposed amicus briefs may equal, if not exceed, the time that would have been needed to study the briefs at the merit stage if leave had been granted”).)

**INTEREST OF THE PROPOSED *AMICUS CURIAE***

United Policyholders (UP) is a non-profit organization that is a voice and an information resource for policyholders in all 50 states and dedicated to maintaining integrity and fairness in insurance transactions. UP’s work is supported by donations, grants, and volunteer labor. UP does not sell insurance or accept

funding from insurance companies. Much of UP's work gives individuals and businesses guidance and tools for buying suitable insurance and repairing, rebuilding, and recovering after disasters through its *Roadmap to Preparedness and Roadmap to Recovery* Programs. UP also engages with regulators, including Georgia Insurance and Safety Fire Commissioner, the Hon. Ralph T. Hudgens, public officials, academics, and various stakeholders in legal and marketplace developments matters relevant to all policyholders and all lines of insurance. UP is an official consumer representative to the National Association of Insurance Commissioners where claims handling rules and the duty of good faith and fair dealing are routinely discussed.

A diverse range of individual and commercial policyholders throughout the United States regularly communicate their insurance concerns to UP which allows UP to submit *Amicus Curiae* briefs to assist state and federal courts in deciding cases involving important insurance principles. UP has filed briefs in more than 400 cases throughout the United States since the organization's founding in 1991. UP's *Amicus Curiae* brief was cited in the United States Supreme Court's opinion in *Humana, Inc. v. Forsyth*, 525 U.S. 299 (1999). Arguments from UP's *Amicus Curiae* brief were cited with approval by the California Supreme Court in *Vandenburg v. Superior Court*, 21 Cal.4th 815 (1999) and many other courts.



UP has been assisting policyholders, regulators and courts since the organization was founded in 1991 after the Oakland-Berkeley Hills Firestorm and has assisted many victims of natural disasters and individual policyholders across the country. Accordingly, in this proposed 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. Comm’r of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982).) UP’s more than twenty-five years of experience advocating for the interests of insureds makes it well suited to aid this Court in this case. UP has filed numerous briefs in the U.S. Court of Appeals for the 11<sup>th</sup> Circuit. (c.f. *Southern Realty Mgm’t Inc. et. al. vs. Aspen Specialty Ins. Co. et. al.* Case No. 10-11513-G, 2010.)

### **WHY AN AMICUS BRIEF IS DESIRABLE AND RELEVANT**

UP seeks to appear as *Amicus Curiae* in the instant case in order to more fully explore the public policy concerns surrounding an insurance company’s duty to act in good faith when settling third party liability claims against its insured. Generally, insurance spreads risk and provides financial security, making it possible for people and businesses to exist and thrive. Insurance protection and coverage after a calamitous event makes the difference between recovery and ruin. Because insurance is so important, it is a carefully regulated industry and imbued

with the public interest.<sup>1</sup> Oversight agencies in every State have the authority to regulate the financial affairs of insurance companies, the rates they charge, the way they sell their products and process claims submitted 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.

Ultimately, however, it is up to private litigants, such as Plaintiffs/Appellees, as well as the State and Federal courts to enforce those standards.

The seminal Georgia decision *Southern General v. Holt*, 262 Ga. 267, 416 SE 2d 274 (1992) holds that "...[a]n insurance company may be liable for damages to its insured for failing to settle the claim of an injured person where the insurer is guilty of negligence, fraud, or bad faith in failing to compromise the claim. (*Id.* at 268 (citing *McCall v. Allstate Ins. Co.*, 251 Ga. 869, 870 (310 SE2d 513) (1984).) Further, the court held: "In deciding whether to settle a claim within the policy limits, the insurance company must give equal consideration to the interests of the insured. (*Great American Ins. Co. v. Exum*, 123 Ga. App. 515, 519 (181 S.E. 2d

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<sup>1</sup> 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").

704) (1971).) The jury generally must decide whether the insurer, in view of the existing circumstances, has accorded the insured "the same faithful consideration it gives its own interest."(Id. (citing U. S. *Fidelity &c. Co. v. Evans*, 116 Ga. App. 93 (156 S.E.2d 809), aff'd, 223 Ga. 789 (158 S.E.2d 243) (1967).) Stated another way, if an insurer negligently or intentionally refuses to settle a claim against its insured within policy limits, it may be liable for any excess judgment.

*Holt* and its progeny are now, however, under attack. The insurance industry and their *amici* generally contend that plaintiffs' attorneys are incentivized to "set up" insurance companies for bad faith lawsuits by "engineering" a dispute.<sup>2</sup> That contention could not be further from the truth. This ostensible justification for undermining *Holt* demonstrates that the insurance industry is on a virtual vendetta against the plaintiffs' bar despite the thoughtful consideration of juries and judges that lead to the findings of bad faith that the industry speciously contends are the product of "enterprising claimants" such as Camacho.<sup>3</sup>

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<sup>2</sup> See, e.g., *Holt* citing *Grumbling v. Medallion Ins. Co.*, 392 F. Supp. 717 (D. Or. 1975), "Nothing in this decision is intended to lay down a rule of law that would mean that a plaintiff's attorney under similar circumstances could "set up" an insurer for an excess judgment merely by offering to settle within the policy limits and by imposing an unreasonably short time within which the offer would remain open."

<sup>3</sup> See *Amicus Curiae* brief of the Georgia Chamber of Commerce (Motion for Leave at p. 7).

The ability of an insured (or an injured third-party claimant favored with an assignment of rights, as here) to hold an insurer accountable for bad faith is one of the most, if not the most, fundamental right in order to preserve the promise of the insurance contract. If this right is limited without proper cause, consumers will have little or no ability to enforce their rights, if their insurance company chooses to act unfairly in settling a claim.

Almost every state recognizes a cause of action for bad faith and in those states the insurance markets are healthy and competitive and consumers are generally treated fairly. Georgians count on the protections afforded to them in the civil justice system and they should not be eroded by powerful industry interests that fail to provide a compelling justification for doing so.

Because UP has filed over 400 briefs over its 25-year history of advocating for the interests of insurance consumers, proposed *Amicus Curiae* United Policyholders has a “unique perspective or specific information that can assist the court beyond what the parties can provide.” (*See Voices for Choices v. Illinois Bell Telephone Co.* 339 F.3d 542 (11<sup>th</sup> Cir. 2003) (citing *National Organization for Women, Inc. v. Scheidler*, 223 F.3d 615, 616 (7<sup>th</sup> Cir.2000).)

UP’s broad experience working with individual consumers, many of them victims of automobile injuries, should prove helpful to the Court in understanding the equities involved in the instant case and others like it. Accordingly, for the

reasons set forth above, UP respectfully requests that this Honorable Court grant UP's Motion for Leave to File a Brief of *Amicus Curiae*.

Dated: March 1, 2017

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

I certify that this *Correct Motion for Leave to File a Brief of Amicus Curiae in Support of Appellees* filed by United Policyholders complies with the type-volume limitations set forth in Rules 29(d) and 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font and contains 2,009 words, not including footnotes. Footnotes contain an additional 210 words.

Dated: March 1, 2017

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 1<sup>st</sup> day of March 2017, I electronically filed the foregoing *Correct Motion to File an Amicus Brief 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.

Respectfully submitted,

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