

Case No. 18-5104

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

SUSAN HICKS and DON WILLIAMS,

Plaintiffs-Appellees,

v.

STATE FARM FIRE AND CASUALTY COMPANY,

Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Kentucky, Ashland Division
Case No. 0:14-cv-00053-HRW

**UNITED POLICYHOLDERS'
MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE***

Pursuant to Fed. R. App. P. 27(a)(1) and 29(a)(2), United Policyholders (“UP”) hereby moves for leave to file an *amicus curiae* brief. In support of this motion, UP respectfully submits as follows:

A. Identity and Interest of United Policyholders

UP is a non-profit public interest consumer advocacy organization dedicated to helping preserve the integrity of the insurance system. Since 1991 UP has

provided insurance guidance to disaster victims, individual and businesses and been an advocate for insurance consumers throughout the United States. UP's work is supported by donations, grants, and volunteer labor. UP does not sell insurance or accept funding from insurance companies.

Through an *Advocacy and Action Program*, UP regularly engages with regulators, legislators, academics, journalists and stakeholders on legal and marketplace developments relevant to all policyholders and all lines of insurance. UP's Executive Director is an official consumer representative to the National Association of Insurance Commissioners. Our organization coordinates with and assists insurance regulators in Ohio, Kentucky, Michigan and Tennessee in solving consumer problems.

Much of UP's work is aimed at helping individuals and businesses purchase appropriate insurance and repair, rebuild, and recover after disasters through its *Roadmap to Preparedness* and *Roadmap to Recovery Programs*. In the course of our work in disaster areas UP has developed extensive technical knowledge of which items lose value over time and can be fairly depreciated, and which do not. Labor does not lose value over time and is not properly subject to depreciation.

When insurers reduce claim payouts by depreciating labor they are failing to meet their duty to indemnify insureds for a necessary cost of restoring insured assets to pre-loss condition. Improper depreciation of labor by insurance companies

creates shortfalls in repair and rebuilding financing for property owners *and* negatively impacts the local, state and federal government entities that have an interest in communities' successful economic recovery and the restoration of property tax bases. UP's library of publications, tools and guidance includes many publications that address the topic of proper and improper depreciation. See, e.g. "Depreciation Basics" at <https://www.uphelp.org/pubs/depreciation-basics>.

A diverse range of policyholders throughout the U.S. regularly communicate their insurance concerns to UP, which allows UP to submit informed *amicus curiae* briefs to assist state and federal courts in cases involving important insurance principles. UP has filed *amicus curiae* briefs in approximately 450 cases throughout the United States. 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) and arguments from UP's *amicus curiae* brief have been cited with approval by numerous state and federal appellate courts. See: <https://www.uphelp.org/resources/amicus-briefs>.

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., Inc. v. Comm'r. of Labor & Indus.*, 694 F.2d 203, 204 (8th 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.” R. Stern, E. Greggman & S. Shapiro, *Supreme Court Practice*, 570-71 (1986) (quoting Ennis, *Effective Amicus Briefs*, 33 *Cath. U.L. Rev.* 603 (1984)).

B. Assistance to the Court

UP submits that its participation and briefing will assist the Court in answering the question before this Court that has not yet been definitively answered in Kentucky. The issue involved in this case – depreciation of labor in the context of actual cash value adjustments of homeowners’ claims – has significant ramifications for Kentucky insurance policyholders. When insurers reduce claim payouts by depreciating labor they are failing to meet their duty to indemnify insureds for a necessary cost of restoring insured assets to pre-loss conditions. This is an area of law in which UP and the undersigned attorneys submit it would be useful to the Court to allow the insurance policyholders' perspective to be heard. As an advocate for insurance consumers around the country, UP has a vital interest in the outcome of this case. Its brief will assist the Court by setting forth viewpoints otherwise not advanced that should be considered by the Court.

The undersigned counsel for UP have significant experience in first-party property insurance litigation against major insurance companies, such as State Farm Fire & Casualty Company and honestly believe that they will be able to assist jurists analyzing the insurance issues of this case and their public policy implications in a

way that compliments and dovetails with the arguments raised by counsel for the parties to this case. Counsel for UP is retained *pro bono*, and will accept no money for their legal work in this case.

C. Timing of Brief

Federal Rule of Appellate Procedure 29(a)(6) provides an *amicus curiae* must file its brief “no later than 7 days after the principal brief of the party being supported is filed.” Plaintiffs’/Appellants’ brief was filed on April 12, 2018. UP is filing its brief by April 19, 2018. Accordingly, UP requests that this Court accept its brief as timely.

WHEREFORE, PREMISES CONSIDERED, United Policyholders respectfully requests that its motion be granted and the attached *amicus curiae* brief be deemed filed.

Dated: April 19, 2018

By: s/ William F. Merlin, Jr.

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CERTIFICATE OF COMPLIANCE
WITH RULE 27(d) AND RULE 32(a)

1. This motion complies with the type-volume limitation of Fed. R. App. 27(d)(2)(A) because this motion was produced using a computer and contains 870 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(f).

2. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14 point characters with Times New Roman font.

Dated: April 19, 2018

/s/ William F. Merlin, Jr.
Attorney for *Amicus Curiae*
United Policyholders

CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2018, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

Dated: April 19, 2018

/s/ William F. Merlin, Jr.
Attorney for *Amicus Curiae*
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