

Case No. 16-16056

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

HARTFORD FIRE INSURANCE COMPANY,

Plaintiff–Appellant,

v.

TEMPUR-SEALY INTERNATIONAL, INC., et al.,

Defendants–Appellees

On Appeal from the United States District Court
For the Northern District of California

**JOINT MOTION OF UNITED POLICYHOLDERS AND
INTERNATIONAL SLEEP PRODUCTS ASSOCIATION FOR LEAVE
TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF APPELLEES
REQUESTING AFFIRMANCE OF LOWER COURT’S DECISION**

Pursuant to Federal Rule of Appellate Procedure 29(b), United Policyholders (“UP”) and International Sleep Products Association (“ISPA”) respectfully request leave to file an *amici curiae* brief in support of the Defendants-Appellees in this case. The proposed brief is attached to this motion.

Amici's participation in this appeal will help inform this Court's disposition of the pertinent issues. *Amici* and their counsel all have extensive experience in cases regarding insurance recovery issues.

Pursuant to Ninth Circuit Rule 29-3, *amici* can state that the Defendant-Appellees consent to this filing. *Amici* requested consent from Plaintiff-Appellant, but have not received a response to that request as of the filing of this motion.¹

INTEREST OF THE AMICI CURIAE

The proposed *amici* are non-profit organizations that are dedicated to preserving the integrity of the insurance system and to ensuring commercial policyholders are represented, especially as it concerns allegedly defective products. UP in particular seeks to assist courts in their understanding and examination of essential insurance recovery principles. ISPA supports the mattress industry through public policy, public affairs and education initiatives, and the availability of liability insurance for its members is of critical importance.

¹ Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), no counsel for a party authored this brief in whole or in part. Other than *amici* and their counsel, only CoNagra Grocery Products Company has offered to make a monetary contribution intended to fund the preparation or submission of this brief. CoNagara also is interested in preserving insurance for product manufacturers.

The issues before this Court are integral to commercial policyholders, specifically product manufacturers, and have the potential to greatly impact the important relationship between insurers and insureds in the future. This Court has been asked to examine the lower court's finding that the underlying suit triggered Appellant insurer's duty to defend.

Hartford Fire Insurance Company's ("Hartford") tenuous position that there is no duty to defend because the plaintiffs disclaimed certain damages would essentially make third party plaintiffs the "arbiters" of coverage in a manner that is contrary to longstanding coverage expectations of insured product manufacturers. The proposed *amici* are very concerned about the outcome of this case: UP provides nationwide support to consumers of insurance policies; ISPA's membership is concerned with the availability of liability insurance due to damages because of allegedly defective products and ensuring that insurance policies clearly delineate what is covered and what is not covered.

ARGUMENT

Amici's proposed brief will aid this Court in examining the complex issues before it. *Amici's* role in the insurance industry covers a wide range of experience, including regularly filing other *amici curiae* briefs addressing

important insurance principles. UP's briefs have been cited with approval by courts throughout the nation, including the United States Supreme Court and the California Supreme Court.²

Amici will provide additional and crucial perspectives regarding the ramifications of a reversal and the importance of clear coverage provisions. UP is dedicated to being a resource and an advocate to consumers of insurance nationwide, and ISPA provides a wide range of legislative, research, and educational services to its membership. Given *amici's* unique and varying perspective, their brief will address the broader context of the insurance principles at stake in this case.

In their proposed brief, *amici* will offer insight into the practical application of current case law and how from both a policy and legal perspective, this Court should affirm the lower court's holding that an insurer has a duty to defend in cases such as this. In so doing, *amici* will illustrate that "damages *for* physical injuries" is not the same as "damages *because of* bodily injury" and that Hartford both anticipated the type of claim at issue and also knew that manufacturers expected such coverage; thus, an insurer's duty to

² See, e.g., *Humana, Inc. v. Forsyth*, 525 U.S. 299 (1999); *Vandenburg v. Superior Court*, 21 Cal.4th 815 (1999).

defend is in fact triggered by policy provisions that, as here, can be read to provide a potential for coverage consistent with the insured's reasonable expectations. To hold otherwise would allow insurers to manipulate whether their insured's can obtain coverage. This would run afoul of longstanding insurance principles.

Amicus curiae briefs are important to assist courts in “case[s] of general public interest” and to “supplement[] the efforts of counsel . . . [in] drawing the court's attention to law that escaped consideration.” *Miller-Wohl Co. v. Commissioner of Labor & Industry*, 694 F.2d 203, 204 (9th Cir. 1982); *see also Community Ass'n for Restoration of the Env't v. Deruyter Bros. Dairy*, 54 F. Supp. 2d 974, 975 (E.D. Wash. 1999) (“*amicus curiae* . . . suggests the interpretation and status of the law, gives information concerning it, and advises the [c]ourt in order that justice may be done[.]”). *Amici* UP and ISPA aim to assist this Court, through their *amicus curiae* brief, in examining the important insurance principles at issue in this matter.

CONCLUSION

For these reasons, this Court should grant our motion for leave to file an *amici curiae* brief in the above-captioned case.

DATED this the 24th day of March, 2017.

/s/ David E. Weiss

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CERTIFICATE OF SERVICE

I certify that on March 24, 2017, I electronically filed a copy of the foregoing motion with the Clerk of Court for the U.S. Court of Appeals for the Ninth Circuit via the appellate CM/ECF system, which will send electronic notification to all registered CM/ECF users in this case.

/s/ David E. Weiss _____

David E. Weiss