

IN THE COURT OF APPEALS  
FOR THE STATE OF GEORGIA

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APPEAL CASE NO. A04A0134

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DAVID M. HOFFMAN,

Appellant,

v.

STATE OF GEORGIA, OFFICE OF INSURANCE COMMISSIONER,  
and JOHN W. OXENDINE,

Appellees.

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**Brief of the Amicus Curiae  
United Policyholders**

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### INTRODUCTION

United Policyholders, as amicus curiae, respectfully submit this brief in support of Plaintiff-Appellant, David Hoffman.

### STATEMENT OF INTEREST OF AMICUS CURIAE

United Policyholders is a non-profit organization founded in 1991 and dedicated to education on insurance issues and consumer rights. The organization is tax-exempt under §501(c)(3) of the Internal Revenue Code. United Policyholders is funded by donations and grants from individuals, businesses, and foundations.

While much of our work is aimed at individuals and businesses affected by disasters, United Policyholders actively monitors legal and marketplace developments affecting the interests of all policyholders. United Policyholders receives frequent invitations to testify at legislative and other public hearings and to participate in regulatory proceedings on rate and policy issues.

A diverse range of residential and commercial policyholders throughout the United States communicate their insurance concerns on a regular basis to United Policyholders. United Policyholders advances policyholders' interests in courts throughout the country by filing amicus curiae briefs in cases involving important insurance principles.

United Policyholders' amicus brief was cited in the U.S. Supreme Court's opinion in Humana, Inc. v. Forsyth, 525 U.S. 299 (1999). United Policyholders was the only national consumer organization to submit an amicus brief in the landmark case of State Farm v. Campbell, 358 U.S. \_\_\_, 123 S.Ct. 1513 (2003). United Policyholders has filed amicus briefs on behalf of policyholders in over one hundred and twenty cases throughout the United States in the past six years. These activities are limited only to the extent that United Policyholders exists exclusively on donated labor and contributions of services and funds.

United Policyholders has a vital interest in seeing that insurance companies do not attempt to shift risk assumed in insurance policies back to their policyholders through schemes unsupported by insurance policies or public policy. United

Policyholders has an interest in ensuring that insurance companies live up to their promises to their policyholders.

United Policyholders seeks to appear as amicus curiae to address certain issues presented by this appeal that are of significance well beyond the application of law to the specific facts of this case. These issues raised by the Hoffman decision are important public health matters that will affect policyholders throughout the State of Georgia and nationwide.

Responsible people who buy disability insurance are among the most solid citizens; they are primarily independent business people and professionals. They are people who plan ahead. UNUMProvident ("UNUM") is preying on tens of thousands of its disabled policyholders. Responsible people are being cheated and attacked by their ersatz protectors. The widespread nature of these wrongs is apparent from the publicly available information below.

#### **STATEMENT OF THE CASE AND FACTS**

Amicus Curiae United Policyholders adopts the Statement of the Case contained in the Brief of the Appellant, David M. Hoffman.

## ARGUMENT

### **I. UNUM IS CURRENTLY BEING INVESTIGATED BY A MINIMUM OF FIVE DIFFERENT STATES AND IN CONNECTION WITH MULTIPLE LAWSUITS ACROSS THE NATION**

#### **A. UNUM is Currently Under Investigation by Multiple States for its Claims Handling Practices**

In addition to UNUM's numerous policyholder suits across the nation for its poor claims handling practices, insurance regulators in approximately 40 states are "taking part and sharing data in a probe of UnumProvident Corp.'s insurance and claims handling [sic] practices."<sup>1</sup>

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<sup>1</sup> Matt Brady, Southeast Zone: Tenn. UnumProv Probe Grows, Insurance Accounting, Sept. 15, 2003, at 5. See also, Christopher Oster, UnumProvident Faces Jury Award in Disability Case, Wall St. J., Jan. 27, 2003, at B4 (citing scrutiny of claims-handling procedures by Georgia, California and Tennessee); Julie Appleby, UnumProvident to pay \$1M fine in Ga., USA Today, Mar. 18, 2003 (noting UNUM investigation in Florida), available at <http://www.usatoday.com/money/industries/insurance/2003-03-18->

According to a representative state's Department of Commerce and Insurance, "[W]e're looking at specific kinds of conduct in claims practices, as are these other departments, so it makes sense that there is some comparing of notes as you take a sample of claims to determine whether there is a pattern."<sup>2</sup> In conjunction with this combined effort, several states are embarking upon market-conduct examinations.<sup>3</sup>

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unum\_x.htm.; Market Conduct Report of Examination on UNUM Life Insurance Company of America, June 30, 2001, available at [http://www.state.me.us/pfr/ins/2001UNUM\\_MCReport.htm](http://www.state.me.us/pfr/ins/2001UNUM_MCReport.htm).

<sup>2</sup> R.J. Lehman, State Regulators Share Notes in Unum Claims Probe, Best's Insurance News, June 24, 2003, available at 2003 WL 4281620.

<sup>3</sup> Id. (Massachusetts Division of Insurance spokesman states that his state is conducting a market-conduct examination into Paul Revere Life Insurance Co., a subsidiary of UNUM); Monthly Enforcement Actions: October 2002, available at <http://www.insurance.state.pa.us/html/enf2002oct.html> (Portland, MD Market Conduct Examination of UNUM resulted in \$17,500 fine).



Additionally, the U.S. Securities and Exchange Commission has also initiated investigations into UNUM.<sup>4</sup> This investigation led to UNUM's restating three years of earnings to show a net reduction of \$29.1 million.<sup>5</sup>

**B. UNUM's Past - and Present - is Littered with Policyholder Lawsuits for Denied Claims**

One source estimates that between January 1997 and August 2002 more than 2500 policyholders have sued UNUM, accusing them of fraud and breach of contract.<sup>6</sup> In the vast

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<sup>4</sup> John Hillman, UnumProvident Shakes Management Tree, Best's Insurance News, Mar. 31, 2003, available at 2003 WL 4280396.

<sup>5</sup> UnumProvident to Restate Earnings, APOne, Mar. 23, 2003, available at 2003 WL 17301859.

<sup>6</sup> Surgeon Wins \$31 Million in UnumProvident Suit, Jan. 27, 2003 available at

[http://www.consumeraffairs.com/news03/unum\\_verdict.html](http://www.consumeraffairs.com/news03/unum_verdict.html). This

high estimate is, in fact, echoed by UNUM in one of their

filings in Hangarter v. Paul Revere Life Insurance Co.. Michael

Liedtke, Insurer Faces Barrage of Complaints; Hundreds of Angry

Disability Policyholders Battle to Collect Benefits, Akron

majority of lawsuits filed throughout the nation, policyholders repeatedly contend that UNUM has "cheated them out of their disability payments in an aggressive campaign to boost profit."<sup>7</sup> Despite the negative light cast on these practices and despite the fact that they represent a deviation from proper industry standards, UNUM has persevered.<sup>8</sup> Further, these deviations continue to be perpetuated, as evidenced by the multitude of lawsuits initiated against UNUM each year.<sup>9</sup>

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Beacon J., Dec. 15, 2002, available at 2002 WL 6748735.

<sup>7</sup> Lisa Girion, Insurer's Tactics Rebuked, A Judge has Ordered UnumProvident to 'obey the law' and Make Disability Payments, Los Angeles Times, Nov. 15, 2002, available at <http://www.bourhis-wolfson.com/press/LATIMES/InsurersTacticsRebuked.htm>.

<sup>8</sup> "[M]ost people are familiar with the habit of the insurance industry, or some parts of it, to ask for money promptly when it is due as premium and to pay rather more slowly in response to claims." Charter Reinsurance Co. Ltd. v. Fagan, 1 Lloyd's Rep. 261, 271 (1996).

<sup>9</sup> A search on Westlaw produces decisions in some of the most



To highlight some of the most egregious, and most frequently uncovered, harms:

1. In Chapman v. UnumProvident, the jury returned an initial \$31.7 million damage verdict against UNUM after it failed to pay Chapman's \$11,600 monthly benefits under his long-term disability policy. An award of punitive damages represented \$30 million of this verdict.<sup>10</sup>

2. A class-action lawsuit filed in New York has charged UNUM with wrongful denial of thousands of claims, in order to cut costs. The suit alleges that UNUM has "illegally victimized, and continues to victimize, many thousands of

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recent cases filed against UNUM (results from January 2000 - October 2003). This list alone has 122 cases filed against UNUM. A list of one year's worth of federal cases filed against UNUM can be found online; this list contains an additional 994 cases filed against UNUM. See UNUMProvident, One year of Federal litigation cases filed, Oct. 5, 2002, available at <http://www.100insurers.com/wwwboard/messages/6141.html>.

<sup>10</sup> It should be noted that this verdict was appealed by UNUM and subsequently reduced to \$5 million.

disabled Americans."<sup>11</sup>

3. The Magistrate Judge in Hangarter v. Paul Revere Life Insurance Co.<sup>12</sup> issued an injunction ordering UNUM to "obey the law" and cease targeting particular categories of claims for cancellation, employing biased medical examiners, destroying medical reports and withholding from policyholders information about their benefits. Judge Larson also upheld a \$7.56 million jury verdict (\$5 million of which were punitive damages) for a policyholder who lost her home and went on welfare after UNUM cut off her disability benefits.<sup>13</sup>

4. UNUM's own former medical director, Dr. Patrick F. McSharry, sued UNUM, alleging the company encouraged him to help deny disability claims and subsequently fired him when he refused to do so. McSharry alleges that UNUM uses medical advisors to "provide language and conclusions" in their reports that support the denial of disability claims. Further,

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<sup>11</sup>Devlin Barrett, Insurer Sued Over Disability Denials; Cost-cutting Led to Rejections, Plaintiffs Say, The Rec. N. N.J., Nov. 6, 2002, at A4 (emphasis added).

<sup>12</sup> 236 F.Supp.2d 1069 (N.D. Cal. 2002).

<sup>13</sup> Id. n. 6.

if the reports crafted by these advisors could not be used to support denials, McSharry contends that the advisors "were asked to delete and reword phrases so as not to compromise a denial."<sup>14</sup>

The examples above represent merely a sample of the claims lodged against UNUM. Given the multitude of claims against UNUM for their poor claims handling practices, to permit the results of Georgia's investigative study regarding these precise practices by UNUM to remain confidential is deplorable. It is unbelievable that the Commissioner of Insurance would protect UNUM's behavior when such behavior places policyholders within the State at risk. Instead, by releasing the results of this investigation into UNUM's claims handling practices, policyholders who have paid premiums to receive protection by

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<sup>14</sup> Doctor Sues UnumProvident for Encouraging Him to Deny Disability Claims, available at <http://info.insure.com/health/unumsuit702.html>. Without reaching the merits of these claims, the Court found that they were preempted by ERISA. 237 F.Supp.2d 875, 882 (E.D. Tenn. 2002).

virtue of their insurance policies with UNUM can finally receive what they are due.

## **II. INSURANCE IS VESTED WITH THE PUBLIC INTEREST**

### **A. The Public Service Nature of Insurance**

UNUMProvident Corporation ("UNUM") has held itself out to the people of Georgia, the public, insurance regulators, legislators, courts and public officials as a public service organization. Based upon their claimed roles as public servants and protectors against death, disaster, destruction, disability and disease, insurance companies receive the benefit of preferential treatment from the public, insurance regulators, legislators, courts and public officials. Favorable tax and other special benefits financially advantage the officers, directors, controlling persons and stockholders of many insurance companies. In short, insurance companies and persons associated with them have long received advantages not afforded other corporations or citizens.

The public service benefits long touted by the insurance industry include:

1. jobs for citizens of the State;
2. support for businesses in the State via investments;
3. safety studies;
4. safety programs;
5. safety legislation;
6. promoting safety;
7. education programs;
8. protecting the public; and
9. eliminating hazards.

The insurance industry has repeatedly acknowledged its special public nature. In 1981, the then-Chairman of the American Insurance Association stated:

Insurance leaders are fond of saying, without exaggeration, that the insurance industry is imbued with the public interest - that insurance is essential to commercial activity and necessary to daily living.

We focus the spotlight on ourselves. We convince others of the leading role insurance plays in society. We encourage

them to expect superior performance from us.<sup>15</sup>

Such opinions from within the industry were stated as early as 1944. In an address, an attorney for the National Bureau of Casualty Underwriters acknowledged that those "in the business" of insurance "are trustees of the public interest."

The insurance industry has continued to view itself through the years as an industry intrinsically intertwined with the public good. In the mid-nineties, one insurance company noted:

The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters.<sup>16</sup>

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<sup>15</sup> "The Burgeoning of Litigation," Proceedings of American Insurance Association Annual Meeting, New York City, May 28-29, 1981, at 62.

<sup>16</sup> Century Indem. Co. v. Truck Ins. Exch. Of the Farmers Ins. Group, 887 P.2d 455 (Wash. Ct. App. 1995).



This long-standing philosophy viewing insurance companies as public servant, rather than corporate giant, continues to the present day, and UNUM is one of the many insurance companies that holds itself out to the public in this way.<sup>17</sup>

**B. The Special Public Service Nature of Insurance Underlies Insurance Companies' Fiduciary Duties**

The special public nature of insurance places insurance companies in a unique position of trust with respect to their policyholders, and the public, which rises to the level of a fiduciary relationship.

In a case involving the solvency of insurance companies, the United States Supreme Court recognized that insurance companies were essentially trustees over a fund of assurance and credit:

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<sup>17</sup> See, About Us - UnumProvident Corporation (2003) ("At its heart, UnumProvident is a company of people serving people...we provide a wide range of benefits and services designed to help people during what is often the most trying time of their lives..."), available at

The contracts of insurance may be said to be interdependent. They cannot be regarded singly, or isolatedly, and the effect of their relation is to create a fund of assurance and credit, the companies becoming the depositories of the money of the insured, possessing great power thereby, and charged with great responsibility.<sup>18</sup>

Subsequent Supreme Court decisions have reemphasized the "specialness" of the insurance industry and of the persons who work within the industry.<sup>19</sup>

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<http://www.unumprovident.com/aboutus/ourcompanies/htm>.

<sup>18</sup> German Alliance Ins. Co. v. Lewis, 233 U.S. 389, 414 (1914).

<sup>19</sup> See, e.g., La Tourette v. McMaster, 248 U.S. 465, 467, 39 S.Ct. 160 (1919) ("[A]s insurance is affected with a public interest, those engaged in it or who bring about its consummation are affected with the same interest and subject to regulation as it is."); O'Gorman & Young, Inc. v. Hartford Fire Ins. Co., 282 U.S. 251, 257, 51 S.Ct. 130 (1931) ("The business of insurance is so far affected with a public interest that the state may regulate the rates and likewise the relations of those engaged in the business."); Osborn v. Ozlin, 310 U.S. 53, 65, 60

Given that insurance companies have a "special relationship of trust" with regard to their policyholders, there is a need to monitor and enforce the special duties incumbent upon insurance companies:

Notwithstanding the often stated opinion that the insurance contract is affected with a public interest, insurers often view their policies as simple contractual obligations between parties. While an insurance policy does represent a contractual commitment, the attitudes of the general public, the legislatures and the courts make clear that the insurance agreement is viewed as having broader ramifications than a mere contract. The public has a definite interest in the reliability of the insurance product.

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S.Ct. 758 (1940) ("Government has always had a special relation to insurance."); Robertson v. California, 328 U.S. 440, 447, 66 S.Ct. 1160 (1946) ("evils" in the sale of insurance "vitally affect the public interest"); California State Auto. Ass'n Inter-Ins. Bureau v. Maloney, 341 U.S. 105, 109-10, 71 S.Ct. 601 (1951) (insurance has always had special relation to government).

Insurance involves an obligation that affects the public interest as well as policyholders and therefore is necessarily subject to certain restrictions.<sup>20</sup>

Policyholders have only the courts to rely upon for relief when their insurance sellers "run for cover rather than coverage," or when their conduct has followed a calculated course undermining the "test of the integrity of the insurance industry."<sup>21</sup> If a forum is not provided where insurance companies can be held accountable for their closed-door practices, it is without doubt that policyholders will gravely suffer.

By narrowly interpreting Plaintiff/Appellant's Open Records Request, the Trial Court has effectively enabled UNUM to hide its persistent practice of injuring its policyholders - the very same people UNUM is invested with the responsibility to protect. Given the fact that the Insurance Commissioner of the

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<sup>20</sup> 1 Lorimer et al., The Legal Environment of Insurance, at 37-38 (3 ed. 1987).

<sup>21</sup> Sandoz, Inc. v. Employers Liab. Assurance Corp., 554 F. Supp. 257, 258-59 (D.N.J. 1983).

State of Georgia imposed a \$1 million fine and a two-year administrative probation "for [the] protection of Georgia consumers,"<sup>22</sup> it can be reasonably inferred that the results of the Commissioner's investigation led to the discovery of deleterious information regarding UNUM's disability claims handling practices. In support of this contention is the statement of Georgia Insurance Commissioner John Oxendine: "[T]hey (UNUM) were systematically looking for any possible shred of data or excuse to deny a policy."<sup>23</sup>

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<sup>22</sup> Defendants' Response to Plaintiff's Statement of Material Facts as to which there is no Genuine Dispute at 89.

<sup>23</sup> Julie Appleby, UnumProvident to Pay \$1M Fine in Ga., USA Today, Mar. 18, 2003, available at [http://www.usatoday.com/money/industries/insurance/2003-03-18-unum\\_x.htm](http://www.usatoday.com/money/industries/insurance/2003-03-18-unum_x.htm). See also, UnumProvident Fined \$1M by Georgia Insurance Officials, The Associated Press, Mar. 19, 2003, available at <http://www.legalnewswatch.com/news/163.html>; UnumProvident Ordered to Pay \$1 Million Fine By Georgia Insurance Commissioner, Mar. 19, 2003, (quoting Commissioner Oxendine as saying "People were being denied claims unfairly.")

Without the mandate of further disclosure regarding UNUM's unfair claims handling practices, as effectuated by public disclosure of the results of this investigation, insurance companies such as UNUM will be allowed to remain at an unfair advantage. UNUM has been given the best of all worlds by having its past misdeeds sealed from policyholder knowledge, yet it has been permitted to continue holding itself out to its policyholders as protector and public servant.

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available at

[http://www.chattanooga.com/articles/article\\_34008.asp.htm](http://www.chattanooga.com/articles/article_34008.asp.htm).



### CONCLUSION

For the foregoing reasons, Amicus Curiae United Policyholders respectfully requests this Court reverse the decision of the Trial Court and order the Commissioner to provide a copy of the complete investigatory file regarding the claims handling practices of UNUMProvident.

Respectfully submitted,

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