Nos. 02-57082, 03-55394

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SILVER SAGE PARTNERS, LTD., a California limited partnership, ROBERT E. FILLET, PAUL SABEN, RICHARD L. EARLIX, general partners and individually, MICHAEL S. LINSK,
Appellees-Plaintiffs,

v.

CITY OF DESERT HOT SPRINGS,
Defendant

PUBLIC ENTITY RISK MANAGEMENT AUTHORITY,
Appellant-Garnishee.

United States District Court for the Central District of California
Case No. 91-6804 CBM
Honorable Consuelo B. Marshall, United States District Judge

BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS IN SUPPORT OF CO-APPELLEE CITY OF DESERT HOT SPRINGS

Amy Bach, Esq.
Law Offices of Amy Bach
42 Miller Avenue
Mill Valley, CA 94941
Tel: (415) 381-7627
Fax: (415) 381-5572

Of Counsel:
Eugene R. Anderson, Esq.
John G. Nevius, Esq.
Anderson Kill & Olick, P.C.
1251 Avenue of the Americas
New York, NY 10020
Tel: (212) 278-1751
Fax: (212) 278-1733
Attorneys for Amicus Curiae
United Policyholders

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PRELIMINARY STATEMENT

United Policyholders as an amicus curiae submits this brief in support of co-appellee City of Desert Hot Springs, ("the City"). The City is an insured under a Master Memorandum of Liability Coverage, ("MOC"), and the defendant in the underlying civil action from which this appeal is taken.

United Policyholders, ("UP"), respectfully requests the Court to uphold the decision of Chief District Judge Consuelo Marshall that the MOC covers the City for plaintiffs' claims and that the City was not bound by an arbitration decision to the contrary.

CORPORATE DISCLOSURE STATEMENT

United Policyholders has no corporate affiliates.

INTEREST OF AMICUS CURIAE

In this brief, United Policyholders 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. Commissioner of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982). This is an appropriate role for amicus curiae. As commentators have often stressed, an amicus 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, 608 (1984)).

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 Internal Revenue Code §501(c)(3). UP is funded by donations and grants from individuals, businesses, and foundations.

UP's first major project was working with thousands of home and business owners whose properties were destroyed in a devastating firestorm in the Oakland/Berkeley, California hills. Since that time, UP has conducted educational meetings and workshops on insurance issues in New Mexico, Florida, Texas, Michigan, Washington State, Oregon and throughout California.

While much of our work is aimed at individuals and businesses affected by disasters, UP actively monitors legal and marketplace developments affecting the interests of all policyholders. UP 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 UP. UP advances policyholders' interests in courts throughout the country by filing *amicus curiae* briefs in cases involving important insurance principles.

UP's *amicus* brief was cited in the U.S. Supreme Court's opinion in *Humana Inc. et al v. Mary Forsyth*, 525 U.S. 299 (1999) We have been invited by several divisions of the California Court of Appeal, to participate in oral argument as *amicus curiae.* Arguments from our *amicus curiae* brief were cited with approval by the California Supreme Court in *Vandenburg v. Superior Court*, 21 Cal.4th 815 (1999). UP has filed *amicus* briefs on behalf of policyholders in over one hundred and twenty cases throughout the United States in the past six years.

Amicus Curiae has a vital interest in seeing that policy exclusions continue to be narrowly interpreted in a manner that reflects the reality of insurance purchase transactions, policyholders' reasonable expectations, and insurers' drafting choices. Where an insurer chooses to draft an exclusion that does not clearly and unambiguously apply to a specific claim, (here a claim of discrimination), it cannot argue, after the fact, for a contrary interpretation. Poor draftsmanship cannot support an insurer's argument for a narrow, limiting construction of coverage.

Further, amicus curiae has a vital interest in upholding the established rule in California that arbitration results are not binding on third parties absent a specific agreement. *Vandenberg v. Superior Court*, 21 Cal. 4th at 843.

No fee has been paid or will be paid for preparing this amicus brief.

POINT I.
PERMA'S STATUS AS A QUASI-INSURER JPA DOES NOT GIVE IT CARTE BLANCHE TO IMPOSE ITS UNILATERAL, POST-CLAIM INTENT UPON ITS POLICYHOLDER.

Although PERMA concedes that "the MOC is interpreted under basic contract law," the specifics of PERMA's argument are at odds with basic contract law. For instance, PERMA contends that "strict rules of construction against insurers do not apply" (AOB 35), but ignores the fundamental rule of construction that applies to **all** policies that **all** policies be interpreted "most strongly against the party who caused the uncertainty to exist" (*Civil Code* § 1654). Likewise, PERMA boldly suggests that its decision to deny coverage, after the claim was presented, is dispositive of PERMA's intent at the time of contract formation. This has never been the law in California. *Civil Code* § 1636 states:

> A contract must be so interpreted as to give effect to the *mutual intention* of the parties as it existed *at the time of contracting*, so far as the same is ascertainable and lawful. (Italics added).

PERMA does not want the parties' "mutual intention" to be effectuated; rather, it wishes for its own intent, as expressed after the claim was presented, to prevail.

This is not what the law envisions, nor could such a rule reasonably govern insurer-insured relations.

PERMA's record on appeal demonstrates that PERMA's actual intent when the contract was made was to conform its coverage and the language of its insurance policy to the coverage and language commonly found in standard-form commercial insurance policies, the meaning of which have been interpreted on many previous occasions by the courts of California. Thus, PERMA's meeting minutes of June 7, 1989 state, in relevant part:

> Arthur R. Gibbons, General Counsel for the CVJPIA, stated that the Memorandum of Coverage, as amended by the Board, is consistent with other insurance authorities and with the insurance industry itself. The decision to change the Memorandum of Coverage was made only after careful deliberation by the Board over an extended period of time. (Tab 737, 179).

POINT II.
PERMA IS ACTING AS AN INSURANCE COMPANY. THE DRAFTING HISTORY OF PERMA'S INSURANCE POLICY CONFIRMS PERMA'S FAILURE TO INCLUDE DISCRIMINATION CLAIMS IN THE LAND USE EXCLUSION.

PERMA suggests that the 1989 drafting history of the MOC shows an intent that "all claims" arising out of land use/planning activities be excluded, apparently even those involving otherwise covered civil rights/discrimination acts or omissions. (AOB 36, citing to Tab-737, 160-176). However, a close reading of the materials upon which PERMA relies demonstrates precisely the opposite or, at

best, from PERMA's perspective, a failed effort to properly craft such an exclusion.

On May 9, 1989, PERMA's counsel, Mr. Gibbons, transmitted a proposed re-draft of the MOC to PERMA's Board to review in advance of a pending May 16 Board meeting at which the draft would be voted upon. (Tab 737, 165-177). That draft included proposed additional language to Exclusion 13 (formerly Exclusion 12) such that the exclusion, if implemented, would read as follows:

> (13) Claims arising out of or in connection with land use regulation, land use planning, the principles of eminent domain, condemnation proceedings or inverse condemnation (*California Constitution*, Article I, sec. 19, U.S. Constitution, 5th and 14th Amendments) by whatever name called, and whether or not liability accrues directly against the City by virtue of any agreement entered into by or on behalf of the City. (Proposed additional language underscored). Tab 173.

This language was approved at the meeting of May 16, 1989 (Tab 737, 160-161) and is in fact the language which was adopted, and which is found in the MOC which governs the present dispute. Manifestly, there is no language in the exclusion that states, in effect, that the exclusion would apply to racial discrimination. Yet, how easy it would have been to have included such language if, in fact, it had represented the intent of PERMA's Board.

Poor draftsmanship has never been known to support an insurer's argument for a narrow, limiting construction of its coverage. Thus, in *Reserve Ins. Co. v. Pisciotta*, 30 Cal.3d 800, 810 (1982), the California Supreme Court rejected the arguments of an insurer which "could easily have clarified the intended scope of its exclusion," but failed to do so, stating further:

> . . . [C]ourts are unable to effectuate [the insurer's] intent unless the insurer chooses language which is clearly adequate to inform the insured of the precise restrictions it intends to place on the scope of the policy's coverage.

Similarly, in *Interstate Fire & Cas. Co. v. Stuntman, Inc.*, 861 F.2d 203 (9th Cir. 1988), the insurer had provided coverage for "bodily injury, shock, sickness or disease" in its insuring agreement, but had addressed only "bodily injury" in its exclusion. Accordingly, this Court ruled that the exclusion was ineffectual as respects "shock, sickness and disease." *Id.* at 204. PERMA's suggestion that it never intended to cover losses involving both land-use and racial discrimination components is inconsistent with the policy language PERMA drafted and approved. In the words of another federal court:

> It is true that what happened here may be far from what the insurer contemplated, but <u>having adopted the pertinent language the insurer is bound to comply with its terms</u>. It would have been relatively simple (though perhaps harsh) for the insurer simply to have specified that it would not provide coverage when a claim arises directly or indirectly from an insured's business activities. Instead the insurer chose to create an

> exception to the business exception which, fairly construed, covers the activities in this case.

State Farm Mutual Auto. Ins. Co. v. Gengelbach, 664 F. Supp. 1275, 1277 (W.D. Mo. 1987).

Here, PERMA expressly extended coverage to "discrimination" in its insuring agreement, but then neglected--or intentionally omitted--to address it again in Exclusion 13. PERMA cannot now enforce an exclusion it did not draft. It must live with the one it sold to its policyholder.

PERMA's counsel apparently expressed the opinion that the purpose of the amended language in Exclusion 13 was to "broaden inverse condemnation exclusion to include land use planning/regulation activities related to civil rights." *See*, Tab 737, 164, item 6. Yet, there is no reference at all in the final draft of Exclusion 13 to "civil rights," let alone "discrimination." Read in context, the references to specific provisions of the United States and California Constitutions in the final draft of Exclusion 13 refer back to the words "eminent domain, condemnation proceedings or inverse condemnation," and, therefore, are not intended to wipe out coverage for racial discrimination claims, which are not mentioned. PERMA's counsel's reference to "civil rights" claims must be understood in the same sense, if it is to make any sense at all.

Of course, PERMA could have drafted Endorsement 13 so as to expressly exclude those losses arising out of racial discrimination, which also arise out of land use planning or regulation. This would have dispelled the doubt which even the most sympathetic audience would experience upon being asked to apply an exclusion that does not mention discrimination, to a loss which resulted in a discrimination verdict. Yet PERMA sold its insurance policy, containing Exclusion 13 which in hindsight it characterizes as defective, to its policyholders, including DHS.

POINT III.
UNDER CALIFORNIA'S "CONCURRENT CAUSATION" DOCTRINE, APPLICABLE TO THIRD-PARTY LIABILITY CASES, THERE IS COVERAGE FOR SILVER SAGE'S CLAIM OF DISCRIMINATION, AN EXPRESSLY COVERED RISK, EVEN IF IT IS FOUND THAT THE CLAIM ALSO AROSE OUT OF EXCLUDED LAND USE PLANNING AND/OR REGULATION ACTIVITIES.

PERMA argues that because the claim arose out of land use planning and/or regulation activities, there can be no coverage under Exclusion 13. However, assuming for the sake of argument that the claim arose out of land use planning and/or regulation activities, it also indisputably arose out of disparate-impact racial discrimination. "Discrimination" is an expressly covered risk under the policy.

In such circumstances, where there are two concurrent causes or risks which combine to produce the loss, one of which is expressly covered, and the

other of which is expressly excluded, the loss is covered. *State Farm Mutual Auto. Ins. Co. v. Partridge,* 10 Cal. 3d 94 (1973). In an apparent effort to evade application of the concurrent causation doctrine of *Partridge* (which is never mentioned in PERMA's opening brief), PERMA argues that the land use planning aspect of the loss was so pervasive and dominant as to completely overshadow any racial discrimination aspect of the loss. This argument, however, is devoid of legal support. In essence, PERMA champions a rule which only applies to the concurrent causation analysis in first-party property insurance cases, not in third-party liability insurance cases such as that before the Court.

In the first-party property insurance context, i.e., involving a claim under one's own policy for damage to one's own property, the rule is that the loss is covered *only* if the *insured* peril is the "efficient proximate cause" of the loss. *Garvey v. State Farm Fire & Cas. Co.,* 48 Cal.3d 395, 412 (1989). In that context, the Court explained that "efficient proximate cause" means "the *predominating*" cause of the loss. *Garvey, supra,* 48 Cal. 3d at 403 (italics added). Under *Garvey,* there is no coverage where, in a first-party property insurance claim, the insured peril is a mere "remote" cause of the loss.

Assuming that the "predominating cause" test of *Garvey* applied here, and assuming that land use planning was the "predominating cause" of the loss,

and assuming that racial discrimination was a mere "remote cause" of the loss, the Silver Sage claim would not be covered under the *Garvey* analysis. PERMA appears to have made all of these assumptions in the present case (AOB 37-42). However, as the California Supreme Court was careful to point out in *Garvey*, the standard to be applied in third-party liability cases is the *Partridge* "concurrent causation" standard, not the "predominating cause" standard applicable to first-party property insurance claims. *Garvey, supra*, 48 Cal. 3d at 408. As this Court has held in a third-party liability case, the *Partridge* standard is satisfied so long as the insured risk is "minimally connected" to the tort claimant's injury. *State Farm Mut. Auto. Ins. Co. v. Davis*, 937 F.2d 1415, 1420 (9th Cir. 1991). Even PERMA would have to admit that racial discrimination, an expressly insured risk, was at least "minimally connected" to Silver Sage's alleged loss. Thus, PERMA's effort to diminish the significance of "racial discrimination" in a racial discrimination case misses the mark, even if the gambit might have worked in a first-party property insurance dispute.

PERMA's further suggestion that the loss could not have occurred without land use planning or regulation is likewise unavailing. A similar "but for" argument was rejected by the Supreme Court in *State Farm Mutual Auto. Ins. Co.*

v. Patridge, supra, 10 Cal.3d at 105, fn. 11, citing *Sabella v. Wisler* (1963) 59 Cal.2d 21, 32.

PERMA could have drafted an exclusion specifically targeting losses involving land use planning or regulation, irrespective of any other contributing or concurring causes or risks. Instead of Exclusion 13 as PERMA drafted it, such an exclusion might have read as follows:

> Claims arising out of, or in connection with land use regulation, land use planning, the principles of eminent domain, condemnation proceeds or inverse condemnation (*California Constitution*, Article I, sec. 19, *U.S. Constitution*, 5th and 14th Amendments) and by whatever name, and whether or not liability accrues directly against the City by virtue of any agreement entered into by or on behalf of the City. ***This exclusion shall apply irrespective of whether the claim also arises directly, indirectly, proximately or remotely out of one or more causes or risks otherwise covered by this policy.*** (Added material bolded and italicized.)

This language would have plugged what PERMA in hindsight undoubtedly considers to be a "concurrent causation loophole." This, or similar language, could have been used by PERMA when (as its counsel said of the 1989 re-draft) the final amendments were made "only after careful deliberation of the Board over an extended period of time." (Tab 737, 179.) Yet, "after careful deliberation," PERMA did not choose to use such language. Instead, PERMA

used only language which fails to effectuate PERMA's post-claim alleged intent as a matter of law.

POINT IV.
THE ARBITRATION RESULT ON COVERAGE IS NOT BINDING ON THIRD PARTY SILVER SAGE.

Insurers can require their policyholders to agree to arbitrate their disputes regarding the scope and nature of coverage under a policy. The California Supreme Court has made it clear, however, that such an arbitration proceeding is not binding on third parties "unless there was an agreement to that effect in the particular case." *Vandenberg v. Superior Court*, 21 Cal. 4th 815, 824 (1999).

As the Supreme Court recognized in *Vandenberg*, this result serves several important public policies. For example, arbitration proceedings are, by their very nature, informal and private than litigation. While this informal and private process has the advantage of speed and (often) efficiency among the parties, it affords third parties, and the public at large, no opportunity to participate or otherwise test or review an arbitrator's conclusions of fact or law. Typically, as in this case, even the parties required to arbitrate are precluded from judicial review of the arbitration decision. This insular process counsels against the use of arbitration awards vis-à-vis third parties: "[W]hile the informal and imprecise nature of private arbitration, and its insulation from judicial interference, are the very advantages the . . . parties [seek] to achieve in arbitrating their own claims,

these same features can be serious, unexpected disadvantages if issues decided by the arbitrator are given leveraged effect in favor of strangers to the arbitration." *Id.* at 831 (emphasis in original) (citation and quotation omitted).

One of the typical justifications for giving preclusive effect to a prior adjudication is protection of the integrity of the judicial system. In *Vandenberg*, however, the Court explained that this justification does not apply in the context of private arbitration proceedings: "[B]ecause a private arbitrator's award is outside the judicial system, denying the award collateral estoppel effect has no adverse impact on judicial integrity. Moreover, because private arbitration does not involve the use of a judge and a courtroom, later relitigation does not undermine judicial economy by requiring duplication of judicial resources to decide the same issue." *Id.* at 833 (emphasis in original).

These guiding principles are particularly important in the insurance context, where an insurer and its policyholder may agree that the benefits of informal arbitration regarding coverage issues outweigh the costs and risks of error that arise when proceeding in an informal manner, but they may not (and likely do not) agree that the results of the informal arbitration should be forever preclusive as to any and all claims by third parties. For example, absent an explicit agreement to do so, a policyholder cannot be held to have waived for all time any rights of

those who may obtain a judgment against it merely by agreeing to arbitrate a coverage dispute.

This case illustrates the very concerns that produced the result in *Vandenberg*. Here, PERMA apparently contends that a two-sentence, private arbitration award should be binding for all time against the City's judgment creditor Silver Sage and all other third parties. Yet, Silver Sage did not participate in the arbitration. The arbitration award contains no summary of the facts, no legal analysis, and no explanation of the basis for decision. There is absolutely nothing from which any outside party possibly could ascertain whether the arbitrators were correct or whether any rights, claims, or defenses were preserved.

A third party beneficiary under an insurance contract cannot be forced to abide by an arbitration proceeding in which they did not participate. *Thiokol Corp. v. CertainUnderwriters at Lloyd's London*, No. 1:96-CV-028B (D. Utah May 6, 1997), *reprinted in*, Mealey's Lit. Rpts. Vol. 11, *28 (May 28, 1997).

If *Vandenberg* means anything, it is that such a cursory "adjudication" cannot be binding as to outsiders like Silver Sage unless as a party to the arbitration Silver Sage expressly agrees to make it so. Here, far from expressing any such agreement to give an arbitration award broadly preclusive effect, the PERMA policy evinces a contrary intent. Specifically, the policy expressly gives

judgment creditors (like Silver Sage) a direct right of action, but one that arises only after the judgment creditors obtain a final judgment and thus well after any arbitration regarding the insurance policy would be concluded. If PERMA and the City truly intended for the arbitration to bind all third parties forevermore, this right of direct action would be a meaningless provision, rather than something for which the City, as insured, bargained and paid.

Perhaps the best illustration of this is to envision a hypothetical in which PERMA had lost the coverage arbitration here and then had been sued by Silver Sage for enforcement of the judgment. In that case, there is no question that PERMA would be arguing, vigorously, that the arbitration award would not have preclusive effect in Silver Sage's favor. PERMA reasonably would want to adjudicate the coverage issues before a court in a formal proceeding with full procedural protections and appellate review.

PERMA, as a quasi-insurer, should not be permitted to hang its policyholders out to dry with such "heads I win, tails you lose" reasoning. The District Court was correct that, under *Vandenberg*, the arbitration award in this

case was not binding on the judgment creditor and that, as a consequence, coverage was available under the PERMA policy.

Dated: August 20, 2003

Respectfully submitted,

Amy Bach, Esq.
Law Offices of Amy Bach
42 Miller Avenue
Mill Valley, CA 94941
Tel: (415) 381-7627
Fax: (415) 381-5572

Attorneys for Amicus Curiae
United Policyholders

Of Counsel:
Eugene R. Anderson, Esq.
John G. Nevius, Esq.
Anderson Kill & Olick, P.C.
1251 Avenue of the Americas
New York, NY 10020
Tel: (212) 278-1751
Fax: (212) 278-1733

Attorneys for Amicus Curiae
United Policyholders

CERTIFICATE OF COMPLIANCE PURSUANT TO FRAP 32(a)(7)(B)

Pursuant to the Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the foregoing brief of amicus curiae is proportionately spaced, has a typeface of 14 points or more and contains 3,533 words.

8-30-16

Date

Amy Bach

PROOF OF SERVICE

I, Amy Bach, do hereby declare that I am a citizen of the United States. My business address is 42 Miller Ave., Mill Valley, California, 94941. I am over the age of 18 years, and not a party to this action. On August 20, 2003 following ordinary business practice, I served a copy of the foregoing document described as:

BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS IN SUPPORT OF THE CITY OF DESERT HOT SPRINGS

By causing such envelopes with postage thereon fully prepaid to be placed in the United States mail at Mill Valley, California addressed to each party identified on the following service list:

U.S. Trustee:
Office of the U.S. Trustee
Attn: Gary Dyer, Esq.
3685 Main Street, Suite 300
Riverside, CA 92501

Counsel for Public Entity Risk Management Authority:
Peter A. Urhausen, Esq.
Gibbons & Conley
1333 North California Boulevard
Walnut Creek, CA 94596

Silver Sage Partners:
Silver Sage Ltd., Edward Moore, et al.
c/o William Davis, Esq.
Davis & Company
333 South Grand Ave, Suite 4070
Los Angeles, CA 90017

Counsel to the Committee of Unsecured Creditors:
Richard K. Diamond, Esq.
Danning, Gill, Diamond & Kollitz, LLP
2029 Century Park East, 3rd Floor
Los Angeles, CA 90067

Counsel to Amici California Association of Joint Powers Authorities and California Joint Powers Insurance Authority:
Girard Fisher, Esq.
Pollak, Vida & Fisher
1800 Century Park East, Suite 400
Los Angeles, CA 90067

Counsel for Amicus Curiae League of California Cities:
Timothy T. Coates, Esq.
Greines, Martin, Stein & Richland LLP
5700 Wilshire Boulevard, Suite 375
Los Angeles, CA 90036-3659

Counsel to City of Desert Hot Springs:
James O. Johnston, Esq.
Hennigan, Bennett & Dorman LLP
601 South Figueroa Street, Suite 3300
Los Angeles, CA 90017

Counsel to City of Desert Hot Springs:
Steven L. Paine, Esq.
Cotkin, Collins & Ginsburg
300 South Grand Avenue, 24th Floor
Los Angeles, CA 90071-3134

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: August 20, 2003

By: _____
Amy Bach