COLORADO SUPREME COURT 2 East 14th Avenue, Denver, CO 80203	
DISTRICT COURT, CITY AND COUNTY OF DENVER STATE OF COLORADO Case No. 2011cv1387 The Hon. A. Bruce Jones, District Court Judge 1437 Bannock Street, Denver, CO 80202	_________________________ Case Number: 2016SA38
IN RE: STEPHEN RUMNOCK, the plaintiff vs. DENNIS ANSCHUTZ, and AMERICAN FAMILY MUTUAL INSURANCE COMPANY, a Wisconsin Company licensed to do business in Colorado, defendants	
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AMICUS CURIAE BRIEF OF UNITED POLICYHOLDERS IN SUPPORT OF STEPHEN RUMNOCK

CERTIFICATION

I hereby certify that this brief complies with all requirements of C.A.R. 29 and C.A.R. 32, where applicable, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The amicus brief complies with the applicable word limit set forth in C.A.R. 29(d).

It contains 3,578 words (does not exceed 4,750 words).

The amicus brief complies with the content and form requirements set forth in C.A.R. 29(c).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

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Amicus curiae United Policyholders submits this brief in support of the position of Stephen Rumnock, the plaintiff below. Counsel hopes that its efforts will assist both the attorneys and this court, by focusing on public policy considerations surrounding the analysis of whether an absolute non-sharing protective order should be granted to American Family Mutual Insurance Company (AMFIC).

Non-sharing protective orders with no exceptions in cases involving insurance disputes are often sought by insurers. These orders prevent policyholders from sharing and vetting the transparency of evidence and information produced in discovery with anyone not involved in their lawsuit, including other litigants who have a similar claim against the protected party. Insurers defending claims practice methodologies often seek non-sharing protective orders covering internal corporate documents produced in discovery. If insurers raise the protective order issue in many different filings, but still fail to state appropriate reasons why such protective orders should be granted, courts must examine and question the motives for the requests.

On one level, a non-sharing protective order prevents plaintiffs and potential plaintiffs, and their attorneys, with claims against the defendant insurer from sharing information relevant to their cases. That isolation ensures that some

legitimate claimants will not realize that they have been subject to wrongful claims practices and that there are causes of action to remedy the conduct. For those that do file suit, their litigation costs increase, discovery efforts remain relatively ineffective, and judicial time is wasted because everybody must reinvent the discovery wheel each time a lawsuit is filed alleging similar claims against the same insurer.

Allowing discovery material to be shared in such cases will level the playing field, promote openness and honesty, and efficiently allow justice to be administered.

UNITED POLICYHOLDERS

United Policyholders is a non-profit charitable organization founded in 1991 to preserve the integrity of the insurance system by serving as an information resource and a voice for policyholders' interests. Its work is done with the aid of donations, grants, and volunteer labor.

United Policyholders has filed over two hundred and thirty-five *amicus* briefs in state and federal appellate courts throughout the United States. The organization has participated by court invitation in briefing and oral argument, and many arguments from United Policyholder's *amicus* briefs have been cited with approval by reviewing courts, including the U.S. Supreme Court.

United Policyholders seeks to fulfill the "classic role of *amicus curiae* 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 (9th Cir. 1982).

Rumnock and his counsel did not draft any part of this brief or contribute any money that was intended to fund the preparation or submission of this brief. This brief was drafted and funded by Merlin Law Group, a law firm that is a member of United Policyholders, has no direct interest in this lawsuit, and is filing this brief *pro bono*.

ARGUMENT

I. THE BUSINESS OF INSURANCE AND THE PUBLIC TRUST.

Historically, insurance was first developed as a product to protect business interests in commerce through spreading the risk of known perils and preventing businesses from going into bankruptcy. Jeffrey W. Stempel, *Stempel on Insurance Contracts* § 1.02 (3d ed. 2009). The product itself was then more recently developed for sale to individuals, as those individuals gained more affluence and needed the protection of their assets.

The field of insurance is different from any other business involving commercial contracts, based on the high degree of interaction with a potentially

vulnerable portion of the consuming public. As explained in an insurance industry treatise, *The Legal Environment of Insurance,* in its chapters on Insurance Contract Law:

> Insurance contracts cover fortuitous events, are contracts of adhesion and indemnity, must have the public interest in mind, require the utmost good faith, are executory and conditional, and must honor reasonable expectations . . . .
>
> Insurance contracts are different from other commercial contracts because insurance is more a necessity than a matter of choice. Therefore, insurance is a business affected with a public interest, as reflected in legislative and judicial decisions.
>
> State laws restrict contractual rights for insurers in the public interest . . . .

James J. Lorimar, *The Legal Environment of Insurance* 179, 180 (American Institute for Chartered Property Casualty Underwriters, 4th ed. 1993).

The insurance industry is highly regulated, in part, because of the public importance of insurance in today's modern society. From one industry expert's perspective:

> Because the essence of the insurance contract is a promise to provide benefits in the future, perhaps years after the premiums are paid, the essence of insurance regulation is the enforcement of that promise in real, practical terms by making certain that insurers have adequate, liquid funds to pay claims, whether days or decades after the corresponding premiums have been paid. In addition to solvency, insurance regulation is largely devoted to making certain that all legitimate needs for insurance are met, and to promoting fairness and equity on the part of insurers in their dealings with policyholders and

> claimants, with regard to the content of policies, premium classifications and rates, and marketing and claim practices.

Peter M. Lencsis, *Insurance Regulation in the United States, an Overview for Business and Government* viii (Quorum Books 1997).

Because of this unique nature of insurance, jurists, regulators and legislators have promulgated a specialized field of law with numerous safeguards, rules, statutes and regulations that all must follow. The current insurance system of regulation and state common law rules benefit insurers, policyholders, and the general public. Stempel, *supra*, at § 1.02. Accordingly, public policy and the longstanding common law rules cited by the insured in this case are extremely critical, because insurance companies conducting business in the various states know that the products they are selling are subject to and involved with the public trust.

II. AMFIC SHOULD NOT BE GRANTED A NON-SHARING PROTECTIVE ORDER BECAUSE IT PREVENTS INFORMATION FROM BEING SHARED WITH OTHER PLAINTIFFS WHO HAVE A LEGITIMATE NEED FOR THE EVIDENCE, IT PROMOTES DISCOVERY ABUSE, IT UNNECESSARILY INFLATES LITIGATION COSTS AND IT WASTES JUDICIAL RESOURCES.

A. Where a Party Provides No Appropriate Reason for a Non-Sharing Protective Order the Court Should Assume that the Stated Reasons are Pretextual.

The rules regarding protective orders are straightforward.

> [A] party seeking an order of protection over discovery material pursuant to Rule 26 must demonstrate that "good cause" exists for that protection. Fed.R.Civ.P. 26(c)[1]; *Smith v. BIC Corp.,* 869 F.2d 194, 199 (3d Cir.1989). The burden of establishing good cause is on the party seeking the protective order. *Cipollone v. Liggett Group, Inc.,* 785 F.2d 1108 at 1121 (3d Cir.1986), *cert. denied,* 484 U.S. 976 (1987).

Mine Safety Appliances Co. v. N. River Ins. Co., 73 F. Supp. 3d 544, 562-63 (W.D. Pa. 2014).

Courts require a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements, to establish good cause for a protective order. Wright & Miller, 8A Fed. Prac. & Proc. Civ. § 2035 (3d ed.). "Good cause is established on a showing that disclosure will work a clearly defined and serious injury to the party seeking closure. The injury must be shown with specificity. Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning will not suffice." *Mine Safety Appliances Co.*, *supra*, at 563 (internal citations and quotations omitted). A motion for a protective order is properly denied where a party has put forth no specific instances where trade secrets will be disclosed or where it will be put at a competitive disadvantage.

[1] Like Fed. R. Civ. P. 26(c)(1), C.R.C.P 26(c)(1) requires "good cause" for a protective order.

See, e.g., United States v. Hooker Chemicals & Plastics Corp., 90 F.R.D. 421, 425 (W.D.N.Y. 1981).

Just like any other party, insurers are required to show good cause for a protective order. *See Nestle Foods Corp. v. Aetna Cas. & Sur. Co.,* 129 F.R.D. 483, 485 and fn. 5 (D. N.J. 1990) (denying insurer's motion for a protective order covering claim and underwriting manuals and other internal documents where insurer made "only general and vague references to harm," including that it seeks to preserve the confidentiality of documents so that its market position and competitive advantage are not jeopardized, and that the documents contain proprietary information); *Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 817 (Ky. 2004) (denying protective to insurer with respect to training manuals, reserve setting data, policy and procedure manuals, and other internal documents, where insurer has offered only conclusory statement that the documents contain trade secrets).

AMFIC has offered no clearly defined and serious injury that it would allegedly suffer if its internal documents were disseminated. Allegedly, these documents were "developed at great expense, are not made available to the public, and are maintained as confidential documents." (Petition of AMFIC to show cause, at p. 20.) It has not shown, or attempted to show, that its procedures in this

case are unique and should not be provided to other AMFIC policyholders seeking similar relief.

AMFIC has not truly supported its argument for a non-sharing protective order. It joins many other litigants who bring similar motions when they are defending themselves in court.

> District courts are today being bombarded by an ever increasing number of requests for protective orders. Some of the increase may be attributed to legitimate attempts by litigants to stem the increasing use of abusive discovery tactics. Much of the increase, though, must be attributed to a practice among some attorneys to automatically seek protective orders in every case where any potential for embarrassment or harm, no matter how slight, exists.

Ericson v. Ford Motor Co., 107 F.R.D. 92, 94 (E.D. Ark. 1985).

Insurers such as AMFIC seek non-sharing protective orders to maintain advantages over their customers who do not have the same financial resources. Often, they seek to prevent policyholders from sharing the documents with attorneys who represent others in cases against them with similar allegations. Keeping such attorneys isolated from each other means they may not realize that their clients have viable claims. When they do file suit, their attempts to obtain discovery remain relatively ineffective, their discovery costs remain high, their ability to vet matters is hampered, and judges repeatedly must rule on the same

objections about the same evidence and discovery. Insurers may seek protective orders to force plaintiffs to expend substantial costs during litigation and keep similarly situated counsel from sharing analysis and information gleaned from similar discovery procedures. In the uneven playing field of financial resources, higher litigation costs have a more detrimental impact on policyholder plaintiffs.

B. Policyholders and Insureds Should Be Permitted to Share an Insurer's Discovery Responses with Others Who Have or May Have Similar Claims Against the Insurer.

Legal scholars have suggested that the true motivation behind the tactics utilized by large corporate defendants, including insurance companies, in seeking to cloak information with the robe of secrecy is to deny plaintiffs the benefit of coordinating discovery efforts, thereby decreasing the likelihood that other potential plaintiffs will learn they have a potentially valid case. This increase the cost of suit for plaintiffs who do go forward, and makes their individual efforts to obtain discovery less effective.

Arthur H. Bryant, a former Executive Director of the Trial Lawyers for Public Justice, has noted:

> The reason [proliferation of protective orders] is such a terrible problem is several-fold. First, the immediate effect that it has on the judicial system is that everybody who represents the plaintiffs has to reinvent the wheel. The defendants know this. That is why they ask for it.

> The basic result is people with claims can't get into court because they can't afford the cost of discovery. Other people with claims can't get into court because they don't even know they have claims. The whole thing has been hushed up and kept secret.
>
> Other people who have claims get into court, they do get a lawyer, they prosecute the claims; but they all recover less money than they should because each person has to pay the same cost over and over and over again of getting hold of discovery. That is just the effect of the system on specific plaintiffs.

Proceedings of the Fifty-First Judicial Conference of the District of Columbia Circuit and Criminal Procedure, and Rules Governing Section 2255, 134 F.R.D. 321, 389-90 (1991).

> Although legitimate trade secrets ought to be protected from public disclosure, the primary reason a defendant …seeks a protective order is to prevent plaintiffs from sharing information. In some cases, plaintiffs seek a compromise order prohibiting them from sharing information with a defendant's competitors or others, such as the press, but allowing disclosure to other plaintiffs. Defendants typically refuse to agree to such an order. Clearly, their motivation is to isolate plaintiffs from each other.

Bruce Cramer and Elaine Sheng, *Busting Open the Big Box,* Trial, Dec. 2001 at 27-28.

> Defense attorneys often attempt to use protective orders in order to discourage discovery and prevent formal and informal plaintiffs' attorneys' groups from coordinating discovery among themselves. . . . If the defense is

> successful in instituting a protective order, depending on its scope, the plaintiff's attorney could be completely isolated from these coordinating groups and forced to incur considerable expense in order to gain otherwise readily available information.

Francis H. Hare, Jr., et al, *Full Disclosure: Combating Stonewalling and Other Discovery Abuses*, 161 (ATLA Press 1995), quoting Mark A. Dombroff, *Discovery*, §1.20 at 47-49 (1986 & Supp. 1990).

Some courts find that the risk of sharing discovery does not constitute good cause for a protective order. *See, e.g., Earl v. Gulf & Western Mfg. Co.*, 123 Wis. 2d 200, 208-09, *rev. denied*, 123 Wis. 2d 549 (1985). To the contrary, "[t]hat discovery might be useful in other litigation or other proceedings is actually a good thing because it furthers one of the driving forces behind the Civil Rules by allowing the cost of repeating the discovery process to be avoided and thereby encouraging the efficient administration of justice." *Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 814 (Ky. 2004) (denying insurer's request for protective order with respect to its methodologies for setting claim reserves).

Courts have overwhelmingly embraced the practice of sharing discovery among attorneys working on cases involving the same or similar allegations. *Charter Oak Fire Ins. Co. v. Electrolux Home Products, Inc.*, 287 F.R.D. 130, 134

(E.D.N.Y. 2012); *Idar v. Cooper Tire & Rubber Co.,* 2011 WL 688871, at *3 (S.D. Tex.) (unpublished).

> The value of information sharing among plaintiffs in similar cases has been broadly recognized in a growing body of case law in state and federal courts and in the legal literature. A review of the authorities makes clear that a consensus of legal opinion, from a wide variety of perspectives, strongly advocates the practice. Judges and scholars agree that sharing of discovery among plaintiffs is necessary to promote full, fair, and efficient access to information, to deter and detect stonewalling, and to advance the truth-finding function of the judicial system. A restrictive confidentiality order that precludes information sharing among counsel with similar cases is therefore in conflict with the purposes of the Federal Rules of Civil Procedure.

Full Disclosure: Combating Stonewalling and Other Discovery Abuses, *supra*, at 162 (footnote omitted).

> …while documents exchanged in discovery may not presumptively be matters of public record, that does not mean that ordinary discovery materials must be deemed confidential. Particularly where specialized counsel or repeat litigation players are involved, it is unrealistic to attempt to limit the use of discovery materials to a single case. Where the party seeking a protective order does not demonstrate the materials to be actually sensitive, courts are not obliged to enter orders that limit the freedom of opposing counsel and require the court to police future use or public disclosure of materials obtained in discovery.

Levy v. INA Life Ins. Co. of NY, 2006 WL 3316849 at *1.

As the United States District Court for the District of Colorado has held, "[e]ach plaintiff should not have to undertake to discover anew the basic evidence

that other plaintiffs have uncovered. To so require would be tantamount to holding that each litigant who wishes to ride a taxi to court must undertake the expense of inventing the wheel." *Ward v. Ford Motor Co.,* 93 F.R.D. 579, 580 (D.Colo.1982). *Accord, Baker v. Liggett Group, Inc.,* 132 F.R.D. 123, 126 (D.Mass.1990) ("[T]o routinely require every plaintiff ... to go through a comparable, prolonged and expensive discovery process would be inappropriate"); *Patterson v. Ford Motor Co.,* 85 F.R.D. 152, 154 (W.D.Tex.1980) ("[t]he availability of the discovery information may reduce time and money which must be expended in similar proceedings, and may allow for effective, speedy, and efficient representation"). *Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 814 (Ky. 2004) ("That discovery might be useful in other litigation or other proceedings is actually a good thing because it furthers one of the driving forces behind the Civil Rules by allowing the cost of repeating the discovery process to be avoided and thereby encouraging the efficient administration of justice.").

Sharing of discovery responses furthers the goals of the rules of civil procedure.

> Rule 1 of the Federal Rules of Civil Procedure [like Rule 1 of the Colorado Rules of Civil Procedure] requires that the Rules be construed so as to foster the just, speedy, and inexpensive determination of every civil action. Collaborative use of discovery material fosters that purpose; the sharing of discovery materials ultimately

> may further the goals of Rule 1 by eliminating the time and expense involved in "re-discovery". . . . Maintaining a suitably high cost of litigation for future adversaries is not a proper purpose under Rules 1 or 26.

Wauchop v. Domino's Pizza, Inc., 138 F.R.D. 539, 546-47 (N.D. Ind. 1991).

More specifically, an insurer's internal documents, including claim and underwriting manuals, should not be subject to a blanket non-sharing protective order because "[u]sing fruits of discovery from one lawsuit in another litigation, and even in collaboration among various plaintiffs' attorneys, comes squarely within the purposes of the Federal Rules of Civil Procedure." *Nestle Foods Corp. v. Aetna Cas. & Sur. Co.*, 129 F.R.D. 483, 486 (D. N.J. 1990).

AMFIC should not be granted the relief it requests. Doing so will harm other insureds who do or may have similar claims against AMFIC from accessing information and prevents the trial court from permitting the vetting of the discovery and sharing it with similarly situated counsel, thereby rewarding secretive claims practices. Again, this practice will drive up the costs of litigation. The court can appropriately address any concerns regarding the possibility of documents being leaked to other insurers. AMFIC's position is contrary to the requirements of justice and to the goals of civil procedure: efficient disclosure of evidence at the heart of a dispute.

C. Insurers Should Not Be Encouraged to Over-litigate Motions for Protective Order.

Another motivation for seeking a protective order over internal documents, and over-litigating these issues, is to drive up the costs of prosecuting cases, discouraging others from bringing claims. *See Full Disclosure: Combating Stonewalling and Other Discovery Abuses*, *supra*, at 161, quoting Martin I. Kaminsky, *Proposed Federal Discovery Rules for Complex Civil Litigation*, 48 Fordham L. Rev. 907, 929 (1980) ("Frivolous claims of confidentiality have been asserted to cause delay and disruption, to drive up discovery expenses, and to make it difficult for opposing counsel to assimilate and understand the information being sought"); *see also Network Computing Servs. Corp. v. Cisco Sys., Inc.*, 223 F.R.D. 392, 399 (D.S.C. 2004) ("abusive discovery tactics are still a major problem in some cases. This court's experience has been that monetary sanctions are usually seen by the offending litigant as a cost of doing business").

In this case, it appears that AMFIC failed to respond to discovery requests, resulting in the trial court entering the entirely appropriate sanction that all objections and privileges were deemed waived. Although in his discovery requests Rumnock had invited AMFIC to propose a confidentiality order to protect the privacy of its employees and other claimants, AMFIC never responded to that invitation. Only after being ordered to produce discovery responses did AMFIC

move for a protective order. When the trial judge granted a protective order that would protect the privacy of employees, and that substantially limited disclosure, AMFIC filed the present petition. This process drives up the costs to policyholders and claimants with legitimate claims, and it should not be sanctioned or rewarded.

CONCLUSION

United Policyholders recognizes and appreciates the extremely important role insurance companies play in modern society. Profitable and financially stable insurance companies promote a healthy society, allowing risk of loss to be spread widely and fairly. When the system works, prompt and proper payment goes to those who suffer life-altering catastrophes affecting their persons and property.

Unfortunately, some insurance companies are tempted to get an "edge" when it comes to claims payment, as a way to bolster their bottom line. An insurance company can afford to engage in slow and obstructive claims handling. Plaintiffs and potential plaintiffs and their attorneys should be allowed to reasonably share information about an insurer's practices with others who have had a common experience.

Affording AMFIC the secrecy it seeks with respect to its company's policies and procedures will only make it more difficult for policyholders, claimants, and

the attorneys who represent them to learn and reveal the truth and promoting fairness throughout the process should be the ultimate goal.

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CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that a true and correct copy of the foregoing document was filed using the ICCES system and the following counsel of record was served electronically through the ICCES system on this 21st day of March, 2016, accordingly:

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