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February 2, 2018

Hon. Presiding Justice J. Anthony Kline
and Hon. Associate Justices
First Appellate District, Division 2
350 McAllister Street
San Francisco, CA 94102-7421

Re: ***Massachusetts Mutual Life Ins. Co. v. Superior Court for the County of San Francisco***
Case No. A153198
Application and Letter of United Policyholders as *Amicus Curiae* in Support of Real Party in Interest, Carol Chang

To the Hon. Presiding Justice and Associate Justices of the First Appellate District, Division 2:

I write on behalf of *amicus curiae* United Policyholders to support Real Party in Interest, Carol Chang, as Guardian ad litem of Lisa Chang, in opposition to the Petition for Writ of Mandate filed by Petitioner, Massachusetts Mutual Life Insurance Company.

Where, as here, the Court notifies the parties that it is considering issuing a peremptory writ in the first instance, the Court has authority to permit the filing of amicus letters in such proceedings. (*See,* Advisory Committee Comments to Cal. Rules Court, Rule 8.487, subds. (d) and (e).) United Policyholders respectfully suggests that its experience will assist this Court in deciding the issues raised in the Petition.

Interest of the Amicus Curiae and Application to Comment

United Policyholders ("UP") is a non-profit organization based in California that serves as a voice and information resource for insurance consumers in all 50 states. The organization is tax-exempt under Internal Revenue Code §501(c)(3). UP is funded by donations and grants and does not sell insurance or

accept funds from insurance companies. UP's work is divided into three program areas: *Roadmap to Recovery*™ (disaster recovery and claim help for victims of wildfires, floods, and other disasters); *Roadmap to Preparedness* (insurance and financial literacy and disaster preparedness); and *Advocacy and Action* (advancing pro-consumer laws and public policy). UP hosts a library of tips, sample forms and articles on commercial and personal lines insurance products, coverage and the claims process at www.uphelp.org.

UP monitors the insurance sales, claims, and law sectors; conducts surveys; and regularly receives input from a diverse range of individual and business policyholders throughout California. The organization interfaces with state regulators in its capacity as an official consumer representative in the National Association of Insurance Commissioners.

UP also provides information to courts via the submission of *amicus curiae* briefs in cases involving insurance that are likely to affect large segments of the public and business community. The California Supreme Court recently cited UP's *amicus* brief in *Association of California Insurance Companies v. Dave Jones, Insurance Commissioner* (2017) 2 Cal.5th 376, 383 [212 Cal.Rptr.3d 395, 286 P.3d 1188] and has adopted its arguments in *TRB Investments, Inc. v. Fireman's Fund Ins. Co.* (2006) 40 Cal.4th 19 [50 Cal.Rptr.3d 597, 145 P.3d 472] and *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815 [88 Cal.Rptr.2d 366, 982 P.2d 229]. The Court of Appeal likewise recently adopted UP's arguments in *California Fair Plan Ass'n v. Garnes* (2017) 11 Cal.App.5th 1276, 1285 [218 Cal.Rptr.3d 246]. UP has filed *amicus curiae* briefs in 400 cases throughout the United States.

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. v. Commissioner of Labor & Indus.* (9th Cir. 1982) 694 F.2d 203, 204.) 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." (Robert L. Stern, et al., *Supreme Court Practice* 570-71 (6th ed. 1986), citation omitted.)

The undersigned is representing UP in this matter on a *pro bono* basis.

UP urges the Court not to grant the extraordinary relief requested, which would result in exactly the type of piecemeal litigation that appellate courts discourage. (*See, Omaha Indem. Co. v. Superior Court* (1989) 209 Cal.App.3d

1266, 1272 [258 Cal.Rptr. 66] [noting that "in an era of excessively crowded lower court dockets, it is in the interest of the fair and prompt administration of justice to discourage piecemeal litigation"].) However, to the extent the Court entertains issuing a peremptory writ in the first instance, this letter highlights the propriety of the trial court's ruling, which precludes long term care insurers from rescinding coverage based upon an application question that is barred by Insurance Code section 10232.3(a), particularly in light of the public danger of post-claims underwriting in the long term care insurance context.

The Public Danger of Post-Claims Underwriting
In the Long Term Care Insurance Context

Post-claims underwriting is widely recognized to be an invidious claims handling practice in which an insurer waits until after a claim is submitted to conduct underwriting and scrutinize an application in order to avoid coverage. (*See, e.g., Hailey v. California Physicians' Service* (2007) 158 Cal.App.4th 452, 465 [69 Cal.Rptr.3d 789] [discussing post-claims underwriting in the context of healthcare service plans].)

Long term care insurance claimants are particularly susceptible to insurance company abuse in this regard. Long-term care insurance protects against financial loss caused by chronic illness or severe disability. Specifically, it enables policyholders to pay some or all of the substantial costs of home care, nursing care and other services that they need when they can no longer care for themselves.

According to data compiled and maintained by the American Association for Long-Term Care Insurance, a trade association of long-term care insurers, 8.1 million Americans have long-term care insurance and, as of 2012, 63.7% of new insurance claims were submitted by policyholders who were 80 years old or above. Nearly 90% of claimants were age 70 or above. (*See,* http://www.aaltci.org/long-term-care-insurance/learning-center/fast-facts.php.)

The typical long-term care insurance claimant is elderly and physically disabled to the extent of requiring assistance with activities of daily living, such as toileting, bathing, and eating, or is cognitively impaired as the result of Alzheimer's, dementia, or other conditions. Nevertheless, in a rescission action brought by their long-term care insurer, these policyholders — who are unable to care for themselves — are required to defend against alleged fraudulent misstatements in policy applications submitted years or decades earlier. In this regard, the California Supreme Court's recognition in *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 820 [169 Cal.Rptr. 691, 620 P.2d 141], that "the

relationship of insurer and insured is inherently unbalanced" is particularly pronounced in the context of long-term care insurance. Indeed, unique to long-term care insurance, the Insurance Code expressly sets forth a *statutory* "duty of honesty, and a duty of good faith and fair dealing" on long-term care insurers." (Cal. Ins. Code, § 10234.8, subd. (b).)

Also unique to long-term care insurance is the Legislature's strict regulation of what questions long-term care insurers can and cannot ask in their policy applications. California Insurance Code section 10232.3 demands the utmost simplicity in long-term care insurance applications. Subdivision (a) specifies applications "shall contain clear, unambiguous, short, simple questions" and expressly requires that "[e]ach question shall contain only one health status inquiry and shall require only a 'yes' or 'no' answer…." (*Id*. at subd. (a).) Subdivision (f) further reinforces the protections afforded long-term care insurance policyholders by specifying a two-year contestability period "as defined in Section 10350.2." (*Id*. at subd. (f).) Insurance Code section 10350.2, in turn, provides that after the policy has been issued for a period of two years, "no misstatements, except fraudulent misstatements, made by the applicant *in the application for the policy* shall be used to void the policy…." (Cal. Ins. Code, § 10350.2, emphasis added.)

This framework guards against post-claims underwriting abuse of vulnerable policyholders. It prohibits open-ended, confusing, or "gotcha" questions that insurers could use as a means of voiding coverage after they have collected policy premiums for years or decades.

The Respondent Court Properly Ruled Petitioner Could Not Rescind Based Upon A Response To A Question It Was Statutorily Barred From Asking

The Respondent Court properly based its ruling, in part, on its view that the "legislative purposes of strictly limiting grounds for rescission after the contestability period and strictly prescribing permissible questions in an application for long-term care insurance would be undermined by allowing an insurer to rescind after the contestability period based on a response to an impermissible question."

Petitioner claims the trial court ignored the notion that "The fundamental task of statutory construction is to 'ascertain the intent of the lawmakers so as to effectuate the purpose of the law.'" (Petition at p.32, citation omitted.) Yet, the exact opposite is true. The purpose of Insurance Code section 10350.2 is to strictly limit the grounds for rescission after two years to fraudulent

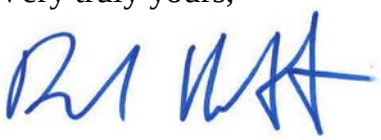
misrepresentations "in the application," and the purpose of Section 10232.3 is to prescribe the questions that may be asked in the application. The trial court's ruling advances those legislative aims whereas Petitioner's position undermines them.

Petitioner also argues that the consequences for a violation of Insurance Code section 10232.3, subdivision (a) are already set forth in the administrative penalties set forth in Sections 10234.3 and 10234.4. However, those administrative penalties are non-exclusive. Section 10234.2, subdivision (b) provides that, "Upon a showing of a violation of this chapter in any civil action, a court *may also* assess the penalties prescribed in this article." (Cal. Ins. Code § 10234.2, subd. (b), emphasis added.)

In this regard, the decision in *Malek v. Blue Cross of California* (2004) 121 Cal.App.4th 44 [16 Cal.Rptr.3d 687], is instructive. In *Malek*, the court rejected Blue Cross's argument that its violation of the arbitration disclosure requirements of Health & Safety Code section 1363.1 could only be remedied through administrative penalties imposed by the Department of Managed Health Care. (*Id.* at p. 69.) As the court in *Malek* noted, "It would be absurd to impose an administrative penalty on a health service plan provider for failure to comply with the arbitration disclosure requirements but permit arbitration to go forward." (*Ibid*.)

Under Petitioner's reasoning, it could be fined or suspended for including prohibited questions in its policy applications, yet use those same prohibited questions as the basis to wipe out coverage to disabled policyholders. Such a holding would encourage bad behavior by insurers and would contradict the purpose of Insurance Code sections 10232.3, subdivision (a) and 10350.2, which serve to protect consumers from potential post-claims underwriting misconduct by their insurers.

Very truly yours,



DANIEL J. VEROFF
Volunteer for United Policyholders

CERTIFICATE OF SERVICE

I, Ginie Phan, declare that I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 381 Bush Street, 8th Floor, San Francisco, CA 94104.

On February 2, 2018, I served the following document(s):

Application and Letter of United Policyholders as Amicus Curiae in Support of Real Party in Interest, Carol Chang

on the parties listed below as follows:

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☒ **By electronic service** by submitting a PDF or Microsoft Word file to the TrueFiling program

Hon. Mary Wiss
San Francisco Superior Court
Department 305
400 McAllister St.
San Francisco, CA 94102

☒ **By first class mail** by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid and placing the envelope in the daily mail processing center for mailing in the United States mail at San Francisco, California.

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

Executed on February 2, 2018, at San Francisco, California.

GINIE PHAN