COURT OF APPEAL

FIRST CIRCUIT

STATE OF LOUISIANA

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NUMBER: 2002-CA-0027
CIVIL PROCEEDING

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CARRIE WHITEHEAD AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY — APPELLEE

VERSUS

AMERICAN COACHWORKS, INC. — APPELLANT

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ON APPEAL FROM
THE 21ST JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF LIVINGSTON
STATE OF LOUISIANA
THE HONORABLE M. DOUGLAS HUGHES, JUDGE, PRESIDING

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# ORIGINAL BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS IN SUPPORT OF DEFENDANT-APPELLANT

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Respectfully Submitted:
**ANDERSON KILL & OLICK, P.C.**

**BY: EUGENE R. ANDERSON, Esq.**
KRISTA M. ABRAHAMS, ESQ.
1251 Avenue of the Americas
New York, New York 10020
212/278-1751

AMY BACH, ESQ.
UNITED POLICYHOLDERS
42 Miller Avenue
Mill Valley, CA 94941
415/381-7627

## TABLE OF CONTENTS

## INTRODUCTION

United Policyholders, as amicus curiae, respectfully submits this brief in support of the appeal of the defendant-appellant, American Coachworks, Inc.

Vehicle owners and insurance consumers need protection under their insurance policies with insurance companies that work performed on damaged vehicles by body repair shops, at the request of vehicle owners and in conformance with the direction provided by insurance companies of the vehicles, will be covered expenses according to the insurance policy.

## INTEREST OF AMICUS CURIAE

United Policyholders is dedicated to educating policyholders about their rights and duties under their insurance policies. United Policyholders engages in charitable and educational activities by promoting greater public understanding of insurance issues and policyholder rights. United Policyholders' activities include organizing meetings, distributing written materials, and responding to requests for information from individuals, elected officials, and governmental entities. These activities are limited only to the extent that United Policyholders exists exclusively on donated labor and contributions of services and funds.

Amicus curiae have a vital interest in seeing that policyholders have access to information so they can make informed decisions regarding, among other things, the safe repair of their automobiles. As a public interest organization, United Policyholders seeks to assist and to educate the public and the courts on policyholders' insurance rights and their efforts to have them enforced consistently

No party to this case has contributed directly or indirectly to the cost of this brief.

## ARGUMENT

### A. PUBLIC SERVICE NATURE OF INSURANCE

#### I. Insurance Is Special

Appellee State Farm has held itself out to the people of Louisiana, 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 get the benefits of very special treatment from the public, insurance regulators, legislators, courts and public officials. Favorable tax and other special benefits have financially benefited the officers, directors, controlling persons and stockholders of the insurance companies. The instances of insurance companies receiving special treatment not afforded to other corporations or citizens are legion.

The public service benefits promised by the insurance companies include:

a. jobs for citizens of the State;
b. support for businesses in the State via investments;
c. safety studies;
d. safety programs;
e. safety legislation;
f. promoting safety;
g. education programs;
h. protecting the public; and
i. eliminating hazards.

The insurance industry has *repeatedly* acknowledged and even touted the special public nature of insurance. In 1981, the then-Chairman of the

> 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.[1]

As far back as 1944, in an address on comprehensive general liability insurance (of which automobile insurance is a variant), an attorney for the National Bureau of Casualty Underwriters acknowledged that those "in the business" of insurance "are the trustees of the public interest." One insurance company recently 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.[2]

In a September 22, 1970 speech entitled "There's Got To Be A Better Way," the then President of Crum and Forster Insurance Company noted:

> If studied even casually, the history of our business proves that in the United States, as nowhere else in the world, insurance has functioned to set men's minds free from economic worry so they could think about more constructive things; it has functioned to maintain productive enterprise so that more people could enjoy the fruits of our enterprise system; it has provided the means to rebuild burned and shattered cities and towns — to replace property — both private and public — that has been destroyed, damaged, or wrongfully taken away; to relieve physical pain as well as economic distress.[3]

The specialness of insurance company relationships with its policyholders and the public has also been long recognized by insurance industry outsiders. Dean Roscoe Pound, almost 85 years ago in The Spirit of the Common Law (1921), noted:

> [W]e have taken the law of insurance practically out of the category of contract, and we have established that the duties of public service companies are not contractual, as the nineteenth century sought to make them, but are instead relational; they do not flow from agreements which the public servant may make as he chooses, they flow from the calling in which he has engaged and his consequent relation to the public.[4]

Another commentator has noted:

> The insurers' obligations are . . . rooted in their status as purveyors of a vital service labeled quasi-public in nature. Suppliers of services affected with a public interest must take the public's interest seriously, where necessary placing it before their interest in maximizing gains and limiting disbursements. . . . [A]s a supplier of a public service rather than a manufactured product, the obligations of insurers go beyond meeting reasonable expectation of coverage. The obligation of good faith and fair dealing encompass qualities of decency and humanity inherent in the responsibilities of a fiduciary. Insurers hold themselves out as fiduciaries, and with the public's trust must go private responsibility consonant with that trust.[5]

A standard textbook used to train insurance company personnel has emphasized the need to monitor and enforce the special duties of insurance companies:

> Notwithstanding the often stated opinion that the insurance contract is a contract 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. Insurance involves an obligation that affects the public interest as well as the policyholder and therefore is necessarily subject to certain restrictions.[6]

Insurance protects not only policyholders, but also injured parties,

textbook, published by the Insurance Institute of America, described the benefits of insurance this way:

> [I]n addition to eliminating or reducing the financial uncertainty of risks to individuals and businesses, insurance benefits society by paying for losses, providing funds for investments, controlling losses, supporting credit, allocating resources, and satisfying legal and business requirements.[7]

> Loss Control. By their nature, insurance companies deal with risks. Thus, they are actively and heavily involved in loss control, or the reduction in frequency and severity of losses. Insurers can correct or eliminate hazards or dangerous conditions, thereby reducing preventable losses and minimizing the impact of unavoidable losses. Society benefits by the reduction and elimination of risks. It is much better for the insured, the insurer, and society in general that a loss never occur than that it be covered by insurance.[8]

The Insurance Institute of America is located in Malvern, Pennsylvania and, directly or indirectly, trains tens of thousands of students of insurance. Its textbooks are standard works in the field.

## II. Insurance Regulations

The "public service" nature of insurance is manifest in the myriad of state laws governing insurance. For example, automobile insurance coverage and workers' compensation insurance coverage are required by most states. Another text used to train insurance company claims personnel notes that statutes concerning the conduct of insurance companies "have been enacted by state legislatures in order to control the activities of the insurance companies and their relationships with policyholders."[9] Yet another text used to train insurance industry professionals states:

> Insurance contracts are different from other commercial contracts because insurance is more a necessity than a

*affected with a public interest*, as reflected in legislative and judicial decisions.[10]

## III. Insurance Companies are Fiduciaries

Insurance companies are fiduciaries. Who says?:

American International Group:

> The ultimate objective of the Regional Claim Manager is to assist us in achieving major claim management objectives all over the world. Those objectives are: ...
>
> 6. Performance of our Fiduciary responsibility....[11]

Fireman's Fund:

> An insurer stands in a fiduciary relationship to its insured; when an insurer chooses his interest over the interests of his insured his actions are indeed 'intentional and deliberate' . . . and when a case can be settled with no personal liability to said insured, [failure to do so] has the 'character of outrage frequently associated with crime'.[12]

Home Insurance Company:

> Under Oregon law an insurer is in a fiduciary relationship to its insured. A fiduciary is one who is in a position of trust and confidence with another, usually called a principal, while acting for and on behalf of the other. A fiduciary is legally bound in equity and good conscience to act in good faith and for the best interest of the principal.... Any conduct which is intended to place a fiduciary's own interest or the interests of any other party ahead of the best interests of the principal is a breach of the fiduciary's duty.[13]

Continental Casualty:

> It has been held that an insurer who issues a [comprehensive general liability policy] is under a fiduciary duty to look after the interests of the insured as well as its own interests.[14]

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[10] 1 James J. Lorimer, et al., The Legal Environment of Insurance 179 (4th ed. 1993) (emphasis in original).

[11] American International Companies, Manual No. CLMD-1, Date 20 Feb. 1985, Page 1.

Continental Insurance Company:

> Representing the insured is clearly a 'fiduciary' situation, especially in view of the fact that improper conduct by the insurer could expose the insured to liability beyond the amount of his insurance protection.[15]

National Union:

> Underlying all forms of insurance is a fiduciary duty to some extent simply because of the insurer's expertise in the area of its business. In the public liability area the fiduciary duties are heavier because the insurance company is an expert in the litigation arena in all parts of the country since it has thousands of cases nationwide and trained personnel to handle them.[16]

Liberty Mutual:

> [T]he cases have readily acknowledged that the insurer-insured relationship gives rise to a fiduciary duty.[17]

St. Paul Fire and Casualty:

> St. Paul owes a fiduciary duty to [the plaintiff]. We don't contest that . . . We owe a fiduciary duty to every one of our policyholders . . . .[18]

These are but a few of examples. Insurance companies clearly understand the fiduciary duties owed to their policyholders. Some commentators disagree and so do some courts.[19]

## IV. 'Good Hands' Become Clenched Fists

For policyholders making a claim for insurance coverage, the cooperation to be expected from a fiduciary is often simply not there. Instead, the policyholder may be confronted by a financial colossus with unmatched expertise in insurance coverage litigation.

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[15] Memorandum in Opposition to Plaintiff's Cross-motion to Dismiss Defendants' First and Second Defenses and Plaintiff's Request For Leave to Further Amend its Amended Complaint at 9-10, submitted Apr. 5, 1993, New York University v. Continental Ins. Co., (N.Y. Sup. Ct.) (No. 11627/92).

[16] Memorandum in Opposition To Columbia Casualty Company's Motion For Summary Judgment at 18-19, dated Dec. 16, 1989, Columbia Cas. Co. v. National Union Fire Ins. Co. of Pittsburgh (E.D.

Indeed, as Liberty Mutual Insurance Company recognized:

> [the policyholder] is likely not as familiar with litigation and claims evaluation and disposition as is the insurance company . . . [T]he insurer is a professional defender of lawsuits . . . Unlike the insured, an [insurance company] is not a novice as to matters involving litigation.[20]

The insurance industry does not limit anti-policyholder activities to little people; it applies the practice of opportunistic breach to policyholders of all sizes. As a sadly disillusioned policyholder, the chairman of Dow Corning Corporation lamented that "it has become standard operating procedure for some insurance companies to procrastinate and dispute rather than honor policies with companies that become embroiled in litigation."[21] Claims in excess of $10 million rarely get paid without litigation.[22] In fact, the property and casualty insurance industry has admitted that it now spends over $1 billion a year litigating against its policyholders.[23] The property and casualty insurance industry files "tens of thousands" of briefs against policyholders every year.[24]

## B. RELATIONS BETWEEN BODY-SHOP, POLICY HOLDER, AND INSURANCE COMPANY/PAYOR

### I. 'Tripartite' Arrangement

In addition to the special, public service nature of the insurance industry, in the context of property damage the relationship between the repairer, the policy

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[20] Liberty Mutual Insurance Company's Memorandum in Support of Motion for Partial Summary Judgment at 7, (filed July 5, 1988), National Union Ins. Co. v Liberty Mut. Ins. Co., 696 F. Supp. 1099 (E.D. La. 1988) (No. 86-2000). Liberty Mutual has been sanctioned for being a "major league team" in the game of "hardball litigation." See Adolph Coors Co. v. American Ins. Co., et al., 164 F.R.D. 507, 509 (D. Colo. 1993).

[21] See Richard Hazleton, The Tort Monster That Ate Dow Corning, Wall St. J., May 17, 1995, at A21.

[22] See Richard A. Archer, Preparing For A 'Mega-Loss,' Business Ins., Oct. 10, 1994, at 23. Mr. Archer is retired deputy chairman of Jardine Insurance Brokers, Inc. in Los Angeles.

[23] See Brief of Amicus Curiae American Ins. Assoc. at 3, (filed 2/25/93) Affiliated FM Ins. Co. v. Constitution Reinsurance Corp., 626 N.E.2d 878 (Mass. 1994) (No. SJC-06165). See also Leslie Scism, Tight-Fisted Insurers Fight Their Customers To Limit Big Awards, Wall St. J., Oct. 15, 1996, at 1; Robert

holder, and the insurance company form a tripartite relationship. When an insured vehicle is damaged and brought to a body-repair shop for service, the body-repair shop owes a duty to perform repairs adequately to the policy-holder, and the insurance company owes a duty to provide adequate coverage under the insurance policy to the policyholder; because the insurance company controls the financial arrangements and is a sophisticated, experienced participant in automobile insurance coverage, the insurance company has an obligation as outlined above to be responsible for the foreseeable reliance of third parties on its decisions.

Certainly, United Policyholders does not wish to prevent individuals from freely contracting to perform work on the nation's automobiles; nor does United Policyholders wish to limit the availability of collision insurance. However, when an insured owner of a vehicle brings a damaged automobile to a body-repair shop for repairs following a collision, the policyholder and the body-repair shop enter the repair contract under the aegis of the policy – and necessarily the insurance company. The insurance company provides a floorplan for the repair work that the insurance company will cover through its estimates, and requires supplemental estimates for additional repairs suggested by the body-repair shop or requested by the policyholder. The involvement of the insurance company at each stage of the repair of damaged vehicles, from providing the initial estimate to supervising each additional supplemental estimate for further work, is due solely to the insurance company's financial stake in the repairs performed by the body-shop. The insurance companies are not providing their expertise as to what repairs are necessary as a charitable donation to body-repair shops nor insured owners; rather,

Insurance companies routinely deny coverage to repairs made outside of the scope of the estimates, forcing policyholders and body-repair shops to give great weight to the insurance companies' estimates. Indeed, insurance companies routinely impose body-repair shops and policyholders to follow proscribed mechanisms in order to reap the full benefit of an insurance policy, including requiring body-repair shops to efficiently and rapidly arrange for the delivery of parts listed on the insurance company's estimates.

In the facts in the instant case, the insurance company, Appellee State Farm, provided its policyholder, Appellee Carrie Whitehead, with a written estimate of cost and list of repairs to repair Appellee's automobile. The written estimate was presented to the body-repair shop by the policyholder, and sent by facsimile transmission by the insurance company. Thirty days later, the Appellee State Farm notified the Appellant that it was amending its repair estimate and instead had decided to provide replacement coverage, deeming the automobile "totalled." Appellees want this Court to believe that the situation where Appellee State Farm estimates and approves certain repairs, demanding in all cases that repairs be made in conformance with the estimate or risk losing coverage, is a mere bagatelle: and that if the insurance company changes its mind after four weeks and provides a different estimate, that the body-repair shop is left holding the bag.

Expectation of payment for work performed pursuant to a claim made under an insurance policy is fundamentally different from expectation of payment for work performed without recourse to an insurance policy. Costs of insured labor to repair vehicles are built into insurance premiums, already paid by a policyholder,

employ a body-repair shop to perform services necessary under his or her insurance policy to restore the vehicle to the condition for which the insurance company provides coverage has a reasonable expectation that the insurance company will honor the claim properly made under the insurance policy; the same vehicle owner does not have the same expectation of insurance coverage when seeking to employ workers to perform services on a vehicle unrelated to a claim under an insurance policy, such as customized painting, upgraded options or the like. The mechanic's shop in either case performs labor for the benefit of the vehicle-owner, and has a right to payment. The difference in the two scenarios is simply the parties' expectation of the insurance company's involvement with payment for those services.

Appellees want this Court to hold that regardless of whether a request for labor is made pursuant to a claim under an insurance policy or whether a request for labor is unrelated to a claim under an insurance policy, the expectation for payment should be identical: and that no party ever has a reasonable expectation that the insurance company will be involved in the payment for the repair services. This is simply wrong.

## II. These "Tripartite" Arrangements Foster The Control By The Insurance Company/Payor Of The Performance Of The Services Of The Body-Shop

The custom of the body-repair trade is that after a collision, the policyholder notifies the insurance company. The vehicle is removed from the scene of the accident, often to the site of a towing service or repair shop. The insurance company inspects the vehicle, investigates the collision, and prepares an estimate

estimate, the policyholder may then select a repair shop to handle the repairs and enters a contract with the repair shop. The repair shop, knowing that payment by the insurance company under the insurance policy is forthcoming according to the estimate, identifies specific parts required, arranges to order them from various third party sources, and begins to work on the vehicle. If, during the repair process, additional repairs are discovered to be needed, the body-repair shop knows to supply the insurance company with "supplemental estimates", and the insurance company will continue to inspect the vehicle as necessary to approve such supplemental repairs. If the cost of repair approaches a significant portion of the value of the vehicle, the insurance company may then decide to deem the vehicle a "total loss".

In such situations, repair shops find that while they have incurred expenses, ordered parts and performed work at the direction of the insurance company for the benefit of the policyholder, the repairs are abandoned. Neither the insurance company nor the owner of the vehicle are motivated to pay for outlays and services that, while once requested, are no longer of value to them.

The factual situation in the instant case is a common and unfortunate example of the adverse effects of Appellee State Farm's business practice of delaying decisions to approve a repair or to decide to deem the automobile a "total loss." Appellee's expenses are thus capped at the "totalled" value of the vehicle, regardless of the expenses incurred and services performed by third parties. However, while State Farm may be free to amend its estimates based on additional knowledge, the impact of such amendments should not be visited upon innocent

State Farm is a knowledgeable participant in the custom of the trade, and an expert on automobiles and automobile repair. As an expert party and dominant financial party, State Farm has an obligation to act in a way that is consistent with the size and sophistication of the players. And the Court ought to hold that there is a duty on State Farm's part to be responsible for the foreseeable reliance of third parties on its decisions.

The independence of professional judgment of body-repair shops in "tripartite" arrangements is sublimated to the shared interest of both the shop and policyholder to encourage the payment of costs by the insurance company. Certainly, the likelihood of a body-repair shop's judgment being compromised increases when it must seek approval for incurring costs in the repair of damaged vehicles. Such control of the payment of costs means that the insurance company has increasing control over the costs of repair, thereby increasing its profits.

Efforts by insurance companies to regulate repairs by controlling work performed by body-repair shops is surely to be at the expense of the insured's best interest. Most states recognize the absurdity of the proposition that insureds' interests and insurance companies' interests are in concert. See Union Ins. Co. v. The Knife Co., Inc. 902 F. Supp. 877, 881 (W.D. Ark. 1995); American Family Life Assurance Co. v. U.S. Fire Co., 885 F.2d 826, 831 (11th Cir. 1989).

The absurdity of the position taken by the Appellees regarding the commonality of interests of the insured and the insurance company has been the subject of judicial comment. Judge Greene of the Supreme Court of Missouri

not place the welfare of the corporation above that of the policy holder, who theoretically he represents, probably also believes in the Tooth Fairy and the Easter Bunny." In re Allstate Ins. Co. 722 S.W.2d 947, 959 (Mo. 1987) (Greene, J., dissenting).

## CONCLUSION

For all of the reasons set forth above, United Policyholders respectfully requests that this Court reverse the judgment below and find for the Appellant.

By Attorney:

**ANDERSON KILL & OLICK, P.C.**

**BY: EUGENE R. ANDERSON, Esq.**
KRISTA M. ABRAHAMS, Esq.
1251 Avenue of the Americas
New York, New York 10020
212/278-1751

AMY BACH, ESQ.
UNITED POLICYHOLDERS
42 Miller Avenue
Mill Valley, CA 94941
415/381-7627

## CERTIFICATE

I certify that a copy of the above and foregoing pleading was mailed to all counsel of record on this 10 day of October, 2002.

**EUGENE R. ANDERSON, Esq.**

Carrie Whitehead and State Farm Mutual Automobile Insurance Company through their counsel of record:

John T. Roethele
163 Del Orleans Avenue
Denham Springs, Louisiana 70726