



UP Director Amy Bach photo by Mike Kahn

## BACH TALK...

Dear Friends:

The bad news in this issue is about the U.S. Supreme Court's gift to corporations that break the law to increase profits, and the message it delivered to courts throughout our nation. The good news is that United Policyholders is gaining momentum and growing in important ways.

see **BACH TALK** page 12

## US SUPREME COURT BOWS TO THE BIG BOYS

Our nation's highest court showed a shocking disregard for protecting the public interest in its recently published opinion in State Farm v. Campbell, 538 U.S. \_\_\_(2003). Although this case got little press outside legal circles, it is arguably the most radical reduction in consumer legal protections to date.

The *Campbell* decision undermines decades of case law on deterring and punishing serious corporate misconduct via punitive damage awards. The evidence in *Campbell* was that State Farm's top management had implemented a national program with the "explicit objective of using the claims-adjustment process as a profit center...The program was functioning as an unlawful scheme to deny benefits owed to consumers by paying out less than fair value in order to meet preset arbitrary payout targets designed to enhance corporate profits." [Dissent of Justice Ginsburg].

see **BIG BOYS** page 13

## HIGH REFI T.I. WON'T FLY

UP recently joined Consumers Union in writing to ask California Insurance Commissioner John Garamendi to investigate title insurance premiums and take action to increase competition in the title insurance industry. UP agreed to sign the letter after learning that many of the homeowners now taking advantage of low mortgage rates by refinancing are paying the same title insurance rates as homebuyers. This makes no sense. Garamendi agreed to launch a comprehensive review to determine if title rates in California are excessive.

see **HIGH REFI** page 10

## GET A CLUE

More and more insurers are using the CLUE and A-Plus databases to gather information about policyholders. Insurers submit information about their policyholders to these databases. They also gather information from the databases to evaluate new and renewal policy applications. See the example below to understand how this works.

We recommend that every insured obtain a copy of their CLUE or A-Plus report and review it for accuracy. You may find errors.

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## UP HOSTS NETWORKING PARTY

On **July 20th, 2003, at 5:15 p.m.** at the **Serrano Hotel** in **San Francisco**, United Policyholders will hold a Networking Cocktail party during the American Trial Lawyers Association convention in San Francisco. UP will honor four firms that donated extensive trial materials to our Info Sharing Project, the firm that has written the most *amicus* briefs *pro bono* for our Amicus Project, and announce the establishment of a fund to honor the memory of recently deceased colleague **Dan King**. Please call Deborah Dudley for sponsorship information at (916) 531-1273 or email [info@unitedpolicyholders.org](mailto:info@unitedpolicyholders.org).

## CAMPBELL IN PERSPECTIVE

By, Ray Bourhis, Alice Wolfson, and David Lilienstein, Bourhis & Wolfson, S.F., CA

Insurance company defense lawyers are working overtime to twist *Campbell* into what it is not, and to settle cases on the basis of absurd statements as to alleged changes in the law. Many of them are trying to use ratios of 9 to 1 and less, to cap insurer's exposure for punitive damages. It's important for policyholder attorneys to promote a more accurate and balanced message about *Campbell*.

1. *Campbell* involved conduct that the Supreme Court says was NOT illegal in many states. This makes it very distinguishable from many cases, particularly in California. *Campbell* should not be applied to situations in which the conduct in question IS illegal everywhere.

2. The Supreme Court in *Campbell* opined that the claims procedures complained of were not relevant to what State Farm did to the plaintiffs. In other words most of what State Farm was being punished for were things not involved in the *Campbell's* case. This, again, makes *Campbell* very distinguishable. Most punitive damages cases do not involve such a situation.

3. The *Gore* and *Campbell* three part "instructions to lower courts" list does not even mention "the amount necessary to deter" standard. Yet this is precisely the law in California (and I'm sure many other states.) Where that standard is the law, that changes the Supreme Court's "instructions" to the lower courts as to what they should take into account in determining the appropriateness of an award.

4. *Campbell* was a "punishment" case, not a "prevention" case. The distinction is crucial. Where the conduct goes beyond defrauding a single insured you are no longer just seeking to punish the defendant's conduct, you are seeking to stop it. If the company is making X million dollars per year by cheating people out of their benefits the question is NOT how much should you PUNISH him, instead, it's what will it take to STOP him? How much will it take to make the profitable conduct, UNprofitable?

5. Both the discussion of a "Ratio," a "Multiplier" or the other factors listed as relevant to the appellate consideration of punitive damages awards are described as "guidelines." The Court makes clear that these are not cut-and-dried maximum limits. The Court said that single digit is closer than 145 to 1. That certainly doesn't mean that (regardless of the facts) it's the highest ratio permissible.

6. Our colleague **Jeff Rubin** and others have noted that *Campbell* makes discovery of prior similar acts within any jurisdiction more relevant and also makes prior punitive awards against a defendant that did not impact subsequent conduct more relevant. Similarly settlements for extra-contractual amounts become more relevant since these relate to recidivism as well.

7. Even if *Campbell* sets some kind of standard (at least for cases where the conduct was not illegal, the facts were irrelevant to the plaintiffs' harm and the relevant law did not involve an "amount needed to deter" statute or standard,) certain facts remain.

We urge policyholder attorneys to consider the above points, and bear the following in mind:

- First and foremost, any judge who shares the *Campbell* majority's point of view would never approve a thirty+ million dollar, 145 to 1, award in the first place;
- Second, judges who would have allowed the *Campbell* award to stand will have little trouble distinguishing other cases on their merits;
- Third, there is no basis for a judge to be pre-instructing a jury on ratios or anything similar. Their verdicts will still be evaluated after the fact. If anything, judges may be more willing now than in the past to allow exemplary damage questions to go to the jury.
- Fourth, the Supreme Court is not going to become a Court of Last Resort for every con artist and crook in America who wants to reduce a punitive damages award. They will hardly be granting cert in every punitive damages case brought to them. The power will continue to reside with our juries and the judges looking over their shoulders.

Authors Ray Bourhis and Alice Wolfson are partners with Bourhis & Wolfson, a San Francisco firm exclusively representing policyholders in insurance disputes. David Lilienstein is an associate with the firm. Alice Wolfson also serves on the Board of Directors of United Policyholders. ●



Robert Crown of Consolidated Adjusting discussed property insurance issues with California Commissioner John Garamendi and Bill Hedden, UP Director, at the Commissioner's inauguration.

## HOMEOWNERS INSURANCE UPDATE

Prices Up, Coverage Shrinking, No Availability Crisis

The buzz in the insurance world last year was a non-renewal plague affecting homeowners. Rumors spread of a "crisis." TV news reports told of policyholders whose insurance companies dropped them after they filed claims. We heard how those who were dropped couldn't find replacement policies. We heard about insurers refusing to sell new policies and pulling out of states like Texas and California. The phrase "use it and

lose it" was born: use your policy, lose your coverage.

We are skeptical. If insurance was truly impossible to find, realtors would be up in arms. We surveyed insurance agents and brokers and learned that large insurers were pulling back but smaller ones were stepping in. United Policyholders has worked consistently to assuage consumers and public officials' fears by presenting factual information in

see *HOMEOWNER'S INS.* page 11

## DISABILITY INSURANCE UPDATE

Fines And Big Verdicts Roll In, UNUM Ceo Rolls Out In Style

UP continues to get frequent reports of disability claim denials from policyholders insured by UNUM/Provident Corp. or one of its affiliates. Courts and regulators across the country are evaluating evidence of a profit-boosting scheme by the company to pressure medical personnel to deny claims by the purchasers of high payout disability policies. Policyholder attorneys are doing an outstanding job of uncovering this evidence, networking with each other, educating courts and successfully prosecuting the company. UP is assist-

ing in this effort through our **Info Sharing Project**.

Regulators in many states are investigating the company's claims practices, including its home state of Tennessee and our home state of California. The State of Georgia recently fined UNUM \$1 million for actively seeking ways to deny claims. UP has agreed to provide materials to assist all governmental investigations through its Info Sharing Project, found on the web at [www.unitedpolicyholders.org](http://www.unitedpolicyholders.org).

see *DISABILITY INS.* page 9

## MORE UNUM INFO AVAILABLE

A central part of our mission is to educate and unite insureds with current information on insurance issues. Consistent with that mission, UP established an Info Sharing Project through which policyholders and their advocates can purchase documents relating to disability insurance claims. The **Info Sharing Project** is providing both a public service and important financial support for our ongoing work.

The documents currently available through UP's Info Sharing Project include transcripts, evidence, whistleblower and other deposition testimony and jury instructions used in the *Ceimo, Chapman, Hangarter and McGregor* trials against UNUM-related defendants. The true value of these documents in terms of the time and effort expended by the attorneys who obtained them is far in excess of the price at which UP is providing them to the public. UP recently reduced its pricing structure to make the documents more widely accessible.

Arizona policyholder attorney **Steve Dawson** of **Dawson & Rosenthal** and his co-counsels **Rick Friedman** and **Jeff Rubin** of the Alaska and Southern CA. firm of **Friedman, Rubin & White** generously agreed to donate extensive materials to UP from their recent trial against several UNUM affiliates in the matter of *Ceimo v. General American Life Ins. Co.* Policyholder **Joanne Ceimo** was a cardiologist who became disabled after a neck injury caused her hand to shake and prevented her from performing delicate procedures.

see *UNUM INFO* page 6

## WE WANT TO HEAR FROM YOU

Please complete the enclosed Reader's Survey and return it with or without a donation in the envelope provided. Thank you!

## IN MEMORIAM



Daniel King, recently deceased, was an outstanding policyholder attorney practicing with King, King and Fishleder in Oakland, California.

**Dan King**

We are deeply saddened to report the sudden death of our esteemed colleague and friend, Dan King, at age 43. Dan was an outstanding policyholder attorney practicing with his father George and partner Marc Fishleder with the firm of King, King & Fishleder in Oakland, California. Dan was a very valuable and oft-used source of information for United Policyholders and a regular attendee at our Policyholder Attorney Luncheons in San Francisco. K,K & F provided UP with a \$10,000 grant last year after the firm secured a substantial victory for a policyholder client. We honor his memory and will miss him terribly. We wish his widow Simone and three young children, Elijah, Aidan and Ezra strength and good health.

**Sheldon Messinger**

Sheldon L. ("Shelly") Messinger provided critically important counsel and volunteer support to United Policyholders during our early years from 1992 through 1997. Shelly was a distinguished scholar in the fields of criminology and sociology and professor emeritus in the School of Law (Boalt Hall). He died in Berkeley on Thursday, March 6, of complications related to lymphoma. He was 77 years old. ●

## AMICUS PROJECT UPDATE

United Policyholders has now filed more than 100 briefs on behalf of policyholders on a wide range of insurance issues in State and Federal appellate courts and the U.S. Supreme Court. Visit our website to see a listing of the cases. Our aim is to weigh in for policyholders in important cases wherever our resources permit. The majority of UP *amicus* briefs are written *pro bono* by an expanding group of volunteer attorneys. We could not be covering the waterfront as we are without the support and extraordinary dedication of Amicus Project Chair **Eugene Anderson**, and his firm, **Anderson, Kill & Olick**, or without the financial and volunteer support of our donors. UP again thanks our generous Amicus Project supporters.

**US SUPREME COURT**

State Farm Mut. Auto Ins. Co. v. Campbell, 583 U.S. \_\_\_\_ (2003).

**(Auto/Bad Faith/Punitive Damages)**

Arguably the most radical reduction in consumer legal protections to date, this decision by our nation's highest court undermines decades of evolving case law on punishing corporations for serious misconduct. The primary issue before the nation's highest court in *Campbell* was whether punitive damage awards that are set in relation to the wrongdoers net worth so as to provide true deterrence will stand, even if such awards are very high dollar amounts. The Court essentially said no, they will not. UP was the only national consumer group to file an *amicus* brief in the case. We regret to report that UP's extraordinary *amicus* effort in this case did not yield the desired result. The *Campbell* case was so significant to policyholders that UP took the unusual step of retaining Supreme Court appellate specialist **Tom Goldstein** to prepare our brief so as to maximize our potential impact. You can read UP's brief at <http://www.unitedpolicyholders.org/newsletters/winter02.html#court>.

**ARIZONA**

Carla Liristis et al v. American Family Mutual Ins. Co., Decided by Ariz. App. Div. 1, Case No.1, CA-CV 00-0539.

**(Homeowners/Mold)** A pro-policyholder result. Carla Liristis' home became contaminated with mold after being damaged by a fire. Her roof was not repaired properly so it leaked, and her family became ill with allergic reactions and respiratory problems. Environmental inspections revealed the presence of *Stachybotrys*, a mold strain that is a known health hazard. Her insurer asserted mold is an excluded peril and denied her claim for clean-up and repairs. She sued, but the insurer convinced a Superior Court Judge to throw out her case. Division One of the Arizona Court of Appeals reinstated her case, stating that if mold occurs because of a covered loss, the cost of removing the mold is covered. UP's *amicus* brief was written *pro bono* by New York attorney **Eugene Anderson** with assistance from Phoenix, Arizona counsel **Richard Treon**.

**ILLINOIS**

Avery v. State Farm, Pending in the Illinois Supreme Court, S109711,

**(Auto/Class Action)** UP filed an *amicus* brief in support of the policyholder class who successfully challenged State Farm's practice of paying only for "after market" auto parts instead of fulfilling its contractual promise to pay to restore vehicles to their original pre-loss condition. UP's brief was written by Executive Director **Amy Bach** with assistance from **Lawrence Fisher** in **Anderson, Kill & Olick's** Chicago office.

**CALIFORNIA**

Cassim v. Allstate Pending in CA. Supreme Court, Case No. S109711, 100 Cal.App. 4th 776.

**(Homeowners Ins/Atty Fees)** In *Cassim*, a family sued their insurer for bad faith after it refused to cover their claim for fire damage to their home. They won the trial and the jury awarded them compensatory and punitive damages. The Court of Appeal reversed the jury's verdict on the grounds that the policyholders' attorney had made an improper clos-

see **AMICUS** page 8

## STEADY DROP IN EARTHQUAKE POLICIES

Nine years have passed since California's last severe earthquake in a populated area. It's not a question of whether there'll be another one, but when. United Policyholders is working to promote better options for consumers because we are deeply concerned over how few people now carry earthquake insurance protection. Toward that end, UP Executive Director Amy Bach agreed to serve on the California Earthquake Authority's (CEA's) Consumer Advisory Panel and Product Review Committee to help improve the CEA's product offerings.

UP continues to monitor the private earthquake insurance market and publicize the availability of non-CEA policies. (See past newsletters at <http://www.unitedpolicyholders.org/newsletters/winter01.html#new> and <http://www.unitedpolicyholders.org/newsletters.html#eq>).

We fully recognize that for most people, buying a quake policy does not seem worth the money. We can't deny that CEA and private policies are expensive with high deductibles and significant exclusions, but we feel compelled to remind homeowners of some basic facts. Our goal is not to scare but to educate homeowners to make the right individual decisions.

1) **Only one in eight insured homes in CA currently carry earthquake protection on their residences.** [Source: Actuarial Report Regarding the California Earthquake Authority's 2002

see *EARTHQUAKE INS.* page 7

## TOP ATTORNEYS SCHOOL INSURERS

Many of the nation's top policyholder attorneys sparred with insurance defense attorneys in an unusually spirited analysis of the Supreme Court's *Campbell* decision at a recent conference in San Francisco. The **American Conference Institute**, ("ACI"), sponsored the conference. a for-profit company based in Canada. The policyholder attorney panelists offered many specific suggestions for pursuing justice in spite of the unjust *Campbell* decision. (See "US Supreme Court Bows to the Big Boys" p. 1.)

Insurance industry employees comprised the vast majority of attendees, so it was the industry that gained the benefit of the policyholder attorneys' analyses. We encourage policyholder attorneys who were deterred by the steep

tuition fee or otherwise unable to attend to order a copy of the program materials. They can be purchased from ACI for by emailing **Jennifer B. Lehner** at [jenniferL@americanconference.com](mailto:jenniferL@americanconference.com). The price of the bad faith manuals is \$299.00 plus shipping and handling, for a total of \$343.85.

Please identify yourself with UP when ordering the materials. UP thanks ACI for granting our representative a tuition waiver to attend the seminar.

ACI assembles panels of the nation's leading insurance litigators, mediators and experts for periodic conferences on the hot topics in the field. Recent conferences focused on Disability Insurance Disputes and Bad Faith and Punitive Damages. ●

## FULL COURT PRESS ON MERCURY

Consumer advocate **Jaime Court** took legislators and Mercury Insurance Company to task at a recent California Senate Insurance Committee hearing. Court confronted Senate Democrats for accepting campaign contributions from Mercury Insurance Company CEO **George Joseph** in return for voting for his way on two proposed bills sponsored by Mercury. One Mercury bill would legalize the company's now-illegal practice of charging unauthorized broker fees on auto policies. Long time consumer advocate and committee chair **Sen. Jackie Speier** rebuked Court for his testimony, but we laud him, and so did the Los Angeles Times. The Times editorialized that perhaps the embarrassment Court caused will suffice to kill the bills. We fear not.

Mercury was recently found by the **Honorable Robert Dondero** to have charged consumers illegal broker fees on auto policies, but while the Judge in the case prepares to order a remedy, Mercury has been busy pushing through legislation to legalize the practice. The case is titled Robert Krumme v. Mercury Ins. Co. S.F. Sup. Ct. Case No. 313367. Los Angeles attorney **Norman Goldman** and San Francisco co-counsel **Arthur Levy** prosecuted Mercury in the case and are working hard in Sacramento to thwart Joseph's legislative efforts. ●

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San Francisco, CA 94111

**PRO-POLICYHOLDER 9TH CIR. DECISION REVIVES GARVEY**

UP member and San Francisco policyholder **Lee Harris** reports that he and fellow UP member **Elizabeth Bader** recently received a wonderful result for consumers in *Conestoga Services v Executive Risk Indemnity*, 312 F.3d 976. Lee's client was an insurance broker who was sued after allegedly making a mistake. The broker sent the claim to his own insurance company and asked them to hire an attorney and agree to pay for any possible judgment. The insurance company refused, pointing to an exclusion in the policy. The Ninth Circuit held that the liability insurance company was wrong in refusing to defend or indemnify its policyholder, citing the famous California Supreme Court case of *Garvey v. State Farm* and an earlier case, *State Farm v. Partridge*. By applying the *Garvey/Partridge* "concurrent causation" theory, the court limited the ability of insurance companies to pick an exclusion they like while ignoring covering language elsewhere in the policy. The decision breathes new life into the *Garvey* decision and gives an important tool to policyholder attorneys. **Justice Betty Fletcher** wrote the decision for the court.

*Lee Harris is a partner with Goldstein, Gellman, Melbostad, Gibson & Harris in San Francisco, California. Tel.415-621-5600, e-mail: lharris@g3mh.com, Website: www.g3mh.com* ●

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**Reseaching an insurance issue? Want information on getting a fair settlement? Need tips on fire, earthquake, disability, flood or mold claims? Need professional help with a claim? Visit us online:**

**www.unitedpolicyholders.org**  
email  
**info@unitedpolicyholders.org**

**UP JOINS ACCO, AIR**

United Policyholders recently joined the **American Congress of Consumer Organizations**, ("ACCO"). ACCO is comprised of National and State Consumer Organizations including AARP, Consumer Federation of America, Consumers Union, Public Citizen, and Public Interest Research Groups (PIRGs) throughout the U.S. See [www.acco.org](http://www.acco.org).

UP is also a member of a coalition titled **Americans For Insurance Reform** that is doing excellent work correcting tort "reformers" misinformation and educating the public through the media. See <http://www.centerjd.org/air/index.html>. ●

**WHAT IS UP?**

United Policyholders is a non-profit tax-exempt organization founded in 1991 and dedicated to educating the public on insurance issues and consumer rights. UP is a practical resource and a respected voice for insurance consumers throughout the United States. We provide claim assistance to disaster victims, monitor marketplace developments and publish materials on personal and business insurance topics. We file pro-policyholder briefs in precedent-setting insurance cases in every major state. We speak on behalf of insurance consumers in public policy forums. ●

**READER SURVEYS ARE KEY**

We periodically survey our readers to determine their priorities in connection with our work and update our records. We thank all those who took the time to complete and return our last survey for giving us feedback and supporting us through donations.

We particularly appreciate contacts our readers have at organizations that might have an interest in insurance issues. We use this information to approach groups that may want to co-sign our amicus briefs and bolster our impact with courts.

Reader donations help us approach our goal of covering the costs of producing our newsletters. We have not yet met that goal so we truly appreciate your help.

Change of address information helps us avoid wasting postage and keep our costs down. Please notify us if you have moved by completing and returning the survey in the envelope provided, by sending an e-mail to [info@unitedpolicyholders.org](mailto:info@unitedpolicyholders.org), or by leaving us a message at (510) 763-9740. ●

*MORE UNUM INFO from page 3*

California policyholder attorneys **Arnie Levinson** and his partner and co-counsel **Terry Coleman of Pillsbury & Levinson** generously donated their work product and transcripts and exhibits from the trial in *Chapman v. UnumProvident* to UP. Whistleblower **Patrick McSharry** and Disability Claims Expert **Mary Fuller** provided key evidence in the Chapman trial on behalf of an eye surgeon whose disability claim was unfairly denied.

San Francisco policyholder attorney **Ray Bourhis** and his partner, **Alice Wolfson**, sparked the Project by donating materials from their landmark case of *Hangarter v. Paul Revere* and from *McGregor v. UnumProvident et al.* [See articles in previous issues of *What's UP!* Newsletters]

Policyholders and their advocates can get further information and purchase copies of these materials by sending an email to **Machelle Jaarsma**, [mpjaarsma@aol.com](mailto:mpjaarsma@aol.com), visiting our website at [www.unitedpolicyholders.org](http://www.unitedpolicyholders.org), or by leaving a voice mail message at (510) 763-9740. ●

EARTHQUAKE INS. from page 5

Proposed Rate Application by **J. Robert Hunter**, FCAS, MAAA in association with **J.W. Wilson & Associates, Inc.**]

The risk of earthquake damage is not being spread evenly around the state. This is a problem for consumers and insurers. There are many reasons why this is so. Some feel the possibility of damage is very remote; some have ret-rofitted and feel secure. But for many, it's out of shake, out of mind.

2) **More people drop EQ coverage each year than buy it.** The CEA is losing 2.4% of its policyholders per year, and most of them are dropping coverage, not buying it elsewhere.

3) **Uninsured California homeowners will need substantial cash to finance repairs.** UP worked closely with victims of the Loma Prieta and Northridge earthquakes, so we are familiar with the nature and cost of earthquake damage. Structural damage is generally expensive to fix. People who buy earthquake coverage tend to be "folks who have experienced earthquake damage in the past." [Source: "Quake Coverage Shakes Many Buyers" by Deborah Lohse, San Jose Mercury News, 5/02/03].

4) **Even homeowners who carry EQ policies will need substantial amounts of cash to pay for repairs below their deductible.** Two thirds of the one million homeowners who carry EQ policies are insured by the CEA or "mini-policies" with 15% deductibles, unexpected exclusions such as fences, swimming pools, garages, etc. and low limits. UP surveyed Napa, CA.

homeowners after the September 2000 quake and found CEA policies virtually "useless" to most insureds because of high deductibles. See article at <http://www.unitedpolicyholders.org/newsletters/witner01.html#CEA>.

5) **Uninsured and underinsured California homeowners will likely need governmental aid to repair quake damage.** This will delay repairs, causing economic ripple effects and will put a strain on government aid programs such as FEMA and SBA. Those are the two programs uninsured and underinsured homeowners turn to for help in paying for disaster repairs.

6) **Federal tax cuts may reduce governmental aid resources. FEMA and the SBA are likely targets for reductions.** Even if FEMA remains funded, a FEMA grant rarely covers full repair costs.

7) **There are serious financial downsides to allowing your home to go into foreclosure or not rebuilding and selling your land.** Land values in post-disaster areas drop precipitously and foreclosures create irreparable credit damage.

**How to make the right personal decision**

You need to evaluate your financial situation, the amount of equity in your home, the structure and age of your house, the quantity and quality of your personal property, the amount of retrofitting that has or can be done, and your proximity to known earthquake faults.

In April, 2003, the U. S. Geological Survey (USGS) announced that there was a 62% chance of an earthquake greater than 6.7 in the San Francisco Bay Area by 2032. The last big earthquake to hit the San

Francisco Bay Area was the Loma Prieta in 1989. This 6.9 trembler was centered in the lightly settled Santa Cruz Mountains but it made over 16,000 buildings uninhabitable. According to this new report from USGS, the most hazardous quake region in the Bay Area is the combined Rogers Creek and Hayward fault systems, which run from Santa Rosa to south of Fremont through densely populated areas. Maps and other information on all significant Bay Area faults can be found at the USGS earthquake site: [www.quake.usgs.gov](http://www.quake.usgs.gov).

After evaluating your needs, you can better compare the policies. Insurance companies have different criteria for what they will insure. Some considerations are age and type of structure, your zip code, degree of retrofitting, and slope of the land. The CEA may be the only option for some homeowners.

You can search the Internet to compare prices and coverages. California residents can visit the California Department of Insurance site for comparative prices at [www.insurance.ca.gov](http://www.insurance.ca.gov). Residents of any state can check with independent agents and brokers who offer various policies.

**10-15% vs. a 100% Deductible**  
When comparing EQ policies, cost should not be your only consideration. You need to evaluate how much risk of loss you can tolerate. After a disaster, the federal government may provide low interest rate loans; they still have to be paid back. If your \$300,000 home, insured with a 15% deductible policy, were completely destroyed in an earthquake, you would be responsible for \$45,000 toward the rebuilding of that home. Without

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**AMICUS** from page 4

ing argument. The Court further held that policyholders who hire counsel to recover their insurance benefits may recover contingent attorney fees on all compensatory damages, (not including punitive damages), as opposed to just on the amount of policy benefits. This ruling is pro-policyholder in that it arguably expands current law, but it does not take into account the fact that most contingency fees are set as a percentage of the total amount the attorney recovers, including punitive damages. The attorney fee aspect of the opinion is very good for policyholders, particularly given today's politicized judicial climate, because it recognizes the reality of insurance litigation economics. UP's *amicus* brief was written by Executive Director **Amy Bach**.

County of San Diego v. Ace Property & Casualty Ins. Co. Pending in CA. Supreme Ct., Case No. S114778, 103 Cal.App.4th 1335. **(CGL/Definition of damages)** The Supreme Court has granted review of this unfortunate Court of Appeal coverage decision. UP filed an *amicus* brief in the Court of Appeal, and will be filing another brief in the Supreme Court. The policyholder, the County of San Diego, sought coverage for amounts it paid to settle claims and comply with an administrative order to remediate groundwater contamination and third party property damage claims arising from the contamination. The carrier asserted it had no duty to cover the claims because they were not sums ordered by a court thus were outside the ambit of damages under a CGL policy. UP's *amicus* brief argued the contrary and was drafted *pro bono* by **Alex Hardiman**, and **Bill Passannante** of **Anderson, Kill & Olick's** New York office.

Hale v. Provident Life & Accid. Co., Publication of decision pending, CA. Ct. App. Case A092548, A092833 **(Punitive Damages/Disability Bad Faith)** UP filed a letter brief in this case supporting Loretta Hale's claim against UnumProvident. Ms. Hale became disabled from her job as a

real estate broker after she was diagnosed with terminal cancer. Unum began paying benefits but when her cancer went into remission, made increasing demands for documentation and personal information, conducted undercover surveillance of Hale and subjected her to "hardball" tactics to discourage her from pursuing her disability claim. Despite ample evidence similar to that proffered in *Ceimo*, *Chapman*, *Hangarter* and scores of other Unum cases, Contra Costa County Judge Barbara Zuniga refused to allow the jury to consider punitive damages. The First District of the California Court of Appeal reversed her ruling and reinstated Hale's claim. UP Executive Director **Amy Bach** wrote to request publication of the Court of Appeal decision. No decision has been entered yet on the request.

Rosen v. State Farm, Pending in CA. Supreme Ct. No. S108308 **(Property Ins./Collapse)** A property owner learned from construction professionals that his deck was in imminent danger of collapsing, so he submitted a claim to State Farm for the necessary repairs. State Farm denied the claim under an exclusion that it contends limits collapse coverage to actual collapse, defined as "actually fallen down or fallen into pieces." The Court of Appeal determined that State Farm's position would lead to an unconscionable result, (massive property damage, personal injury or death), and refused to uphold the basis for the claim denial. State Farm appealed to the CA. Supreme Court.

UP's brief in support of the Court of Appeal opinion was the only pro-policyholder *amicus* brief, in contrast to the numerous pro-insurer *amicus* briefs submitted to the Supreme Court. UP's *amicus* brief was written *pro bono* by **Brian Miles** and **Joel Westbrook** of the Walnut Creek firm, **Chipman Miles & Associates**. The Supreme Court's decision is imminent.

Tran v. Farmers 104 Cal.App.4th 1202 (2002) **(Alter Ego/Enterprise Liability)** Policyholders won one in this case. Farmers Insurance Group has

adopted a complex structure of interlocking affiliates with similar names that breeds confusion among policyholders, courts, and even its own employees. Although the entire structure is controlled by the entity named "Farmers Group, Inc.", that entity consistently seeks to avoid liability in litigation by claiming it only serves as an attorney in fact, and has no claims-handling responsibilities. Policyholders generally challenge this claim on the basis of oral and written representations. The Court of Appeal followed the "ordinary rule" that an attorney-in-fact is an agent owing a fiduciary duty to the principal and applied basic corporate law in holding that where an insured establishes the conditions for application of the "alter ego" or "single enterprise" doctrine, an attorney-in-fact may be liable for a breach of the covenant of good faith and fair dealing. In so holding, the Court provided important clarification on an issue that frequently arises in litigation involving the Farmers Group, Inc. and its corporate affiliates but that has been resolved inconsistently by trial courts. The Supreme Court denied review. UP's *amicus* brief before the Supreme Court was written by Executive Director **Amy Bach** with assistance from **Jeff Ehrlich** of **Shernoff, Bidart & Darras** who wrote UP's brief in the Court of Appeal.

#### **Pennsylvania**

Wagner v. Erie Insurance Co., No. 15 EAP 2003. **(CGL/Pollution Exclusion/Gasoline Station)** UP filed a brief as *amicus curiae* in the intermediate appellate court on behalf of a policyholder, an owner of a gasoline station, who filed a claim relating to damages allegedly caused by gasoline from his station. His insurance company asserted that the claim was excluded under pollution exclusions in his policies. United Policyholders, in its brief, argued that the policyholder's reasonable expectations were that he would have coverage for this type of claim, and, thus, under Pennsylvania law, the claim should be covered. In addition, and

see **AMICUS** page 12

**EARTHQUAKE INS.** from page 7

the insurance, you would be responsible for the total \$300,000. That's a 100% deductible.

**The Current EQ Market**

The CEA is working on improving its offerings and lowering its rates. You can currently choose a CEA policy with a dwelling limit equal to your HO policy, a 10% or a 15% deductible, up to \$100,000 in contents coverage, up to \$15,000 in loss of use coverage and up to \$10,000 for building code coverage.

**CEA Alternatives**

In addition to companies that offer earthquake insurance along with their homeowner's policies, e.g. Fireman's Fund, there are some companies who offer "stand-alone" earthquake policies. In other words, you can have your homeowner's policy with one company and earthquake insurance from one of the "stand-alone" companies.

There are several companies that offer stand-alone earthquake policies that are more comprehensive and at lower prices than the CEA. Competitive prices can be found through GeoVera (member of the St. Paul Companies), ACE American, Pacific Select (also a member of the St. Paul Companies) and Pacific Specialty. These are all "A" rated and "Admitted" carriers. As such, they are protected under the California State Guarantee Fund. Additional sources are Lloyds of London and other non-admitted carriers. In addition to the more comprehensive policies, they also offer a standard policy similar to the CEA policy and Condo coverage.

GeoVera issues a Comprehensive Policy to residents of California and Washington that offers a combined single limit for your dwelling, other structures, personal property

and additional living expenses. The comprehensive with a 10% deductible is not available in all areas.

**Deductible Alert**

Be aware that a combined single limit deductible means you must hit a higher damage threshold before collecting insurance benefits to repair damage. Here's how it works:

**EXAMPLE:** Combined single limit of \$500,000 in coverage, (\$300,000 dwelling, \$150,000 contents, \$50k ALE) 10% deductible is \$50,000. Under that scenario, you'll have to sustain \$50,000 in earthquake damage before recovering any benefits. You'll have to pay the first \$50,000 of repairs, or negotiate a less costly or smaller scope of repairs after settling with your insurer.

**EXAMPLE:** Standard policy, same limits, 10% deductible applies to the \$300,000 dwelling limits only. Under that scenario, you'll have to sustain only \$30,000 in earthquake damage before you recover any benefits. You'll have to pay the first \$30,000 of repairs, or negotiate a less costly or smaller scope of repairs after settling with your insurer.

Pacific Select offers a variety of packages, including one similar to the basic CEA policy. The Premier EQ Protector is their most comprehensive product and offers coverage of separate structures, up to \$25,000 for additional living expenses, 50% of dwelling coverage amount for personal property and building code upgrades of \$10,000.

ACE America has various policies. The most comprehensive is the Superior EQ Plus, which includes up to \$100,000 for loss of use, \$25,000 for pools and spas, and \$10,000 for personal computers.

Pacific Specialties' Premium

Protection Package includes coverage for the dwelling up to \$600,000 in value with a 10% deductible; personal property up to 50% of the value, loss of use up to 20% of the dwelling value, and maximum \$25,000 building code upgrade.

UP continues to monitor the private earthquake insurance market and publicize the availability of non-CEA policies. Please help us raise awareness by emailing [info@unitedpolicyholders.com](mailto:info@unitedpolicyholders.com) if you have additional information about earthquake insurance and policy options. ●

**DISABILITY INS.** from page 3

Evidence of the company's practices has led many Judges and Juries across the U.S. to enter substantial verdicts against UNUM/Provident Corp. These include the most recent case, *Ceimo v. General American Life Ins. Co.* (\$84.5 million verdict in the State of Arizona), *Chapman v. UNUM/Provident* (\$31.7 million verdict by a Marin County, California jury), and *Hangarter v. Paul Revere* (\$7.7 million verdict by a unanimous Federal jury in San Francisco, California, upheld by **Judge James Larson** in an order requiring the company to start obeying fair claims practices laws). See article from Winter 2002 **What's UP!** and read Judge Larson's complete order at <http://www.unitedpolicyholders.org/newsletters/winter02.html#revere>.

The company recently fired Harold Chandler, its chairman, chief executive and president, but gave him approximately \$17 million in severance and pension benefits. Maybe a gold watch would have sufficed. Some would say a matching pair of attached bracelets are in order. ●

*HIGH REFI from page 1*

Title insurers are experiencing what is surely unwelcome public scrutiny. Title insurance is one of those products that you have to buy but never use and you have only the most general idea of what it actually covers.

#### Ask for a "Reissue Rate" when Refinancing

It can't cost an insurer the same amount of time and money to search the title of a home that isn't changing ownership as it does to search a home being sold to a new owner. Title insurance policies on refinanced homes should be far cheaper. They can be when consumers know to ask for a "reissue rate" prior to closing. It doesn't help to complain about the title insurance premium when you're sitting down to sign the closing papers. While some brokers say they routinely ask for reissue rates on refs, others admit that unless an applicant asks, they don't mention the reissue rate option.

[Source: "How to Save 50 to 60 Percent on Title Insurance When Refinancing", Realty Times, June 17, 2002].

**Title Ins. buyers don't shop so don't benefit from competition**  
Because consumers don't shop for title insurance, the normal competitive forces that keep prices low are not in play. Most professionals who engineer refinance transactions don't volunteer the information because they have no incentive to do so. The financial incentives for title and escrow agents are heavily weighted to non-disclosure. [See Realty Times article referenced above]. That is because the title/escrow agents split the premium payment with the title insurance company. The larger the title

insurance premium the larger the compensation to the title/escrow agency.

#### Wining and dining wipes out incentive to save

Mortgage brokers do have an incentive to seek lower title insurance premiums for their refinancing clients so they can offer lower closing costs, but it seems they get winned and dined by title agents and rarely do. Most homeowners who refinance are concerned with the rate they'll be getting and ballpark closing costs, and don't even consider the title insurance premium they'll be paying until they're sitting down to sign the closing papers. It is clear that some light needs to be shed on this situation.

The CU letter was co-signed by **UP**, the **Consumer Federation of America**, the **Foundation for Taxpayer and Consumer Rights**, and the **Congress of California Seniors**. It was released publicly, drawing fire from the American Land Title Association (ALTA). ALTA is the "voice of the title insurance industry."

ALTA responded to CA Insurance Commissioner Garamendi that Consumers Union does not "fully grasp the practical realities of the title insurance industry." ALTA claims full title insurance on a refinance loan can cost as little as \$275 to \$364. Despite ALTA's claim, UP's Executive Director was charged \$750 for a policy when refinancing for the second time in four years. A full title search had been done on her home ten years prior, then four years prior, with no changes in ownership, yet she was charged twice the rate ALTA quoted to the Commissioner. ●

*GET A CLUE from page 1*

A common error is an inquiry that gets recorded by CLUE as a claim, which then becomes a "strike" on the policyholder's record. These "strikes" can mean higher premiums, non-renewals and difficulty finding an insurer willing to sell you a policy. If you find errors on your CLUE or A-Plus report, report them immediately and follow through until you are sure the error has been corrected. Insurers have testified before lawmakers that they will readily correct errors when consumers bring them to their attention.

Make sure you notify the agency in your state that regulates insurance companies if you find errors in your CLUE record and report any problems you encountered in seeking to correct them. Home sellers and buyers are advised to obtain a copy of these reports as well.

Any consumer can order a copy of their CLUE report for a fee at: [www.choicetrust.com](http://www.choicetrust.com). If your carrier uses A-Plus instead of CLUE, request a free copy of your report from your carrier.

**A typical scenario reported to UP**  
A couple in Grass Valley, CA, built a new home in 2001. During construction, someone stole \$1,000 worth of lumber from the site. They called State Farm to see if their homeowners' policy would cover the loss. State Farm denied coverage because the policy excluded construction materials lost before the home was completed. In January 2003, the couple began the process of building yet another home. This time they purchased a construction in progress policy from Farmers. Days after agreeing to provide the coverage,

GET A CLUE from page 10

Farmers sent them a cancellation notice explaining that their previous "theft" claim with State Farm disqualified them. Farmers had apparently used a database of claims maintained by the American Insurance Services Group known as A-Plus. (A ChoicePoint competitor). The report stated that State Farm had reported a theft on a certain date and that the amount of the loss was zero.

The A-Plus operation is a credit reporting agency within the meaning of the Fair Credit Reporting Act, 15 U.S.C. § 1681. The victims asked A-Plus to reinvestigate the matter by contacting State Farm, which they have a right to do under the Act. State Farm confirmed the report was accurate. However, the Act requires that credit reporting agencies use reasonable procedures to assure maximum possible accuracy. The A-Plus report was incomplete and misleading. An insurance carrier will in all likelihood read the report to mean the insureds made a theft claim which the carrier rejected. In fact, the insureds merely asked if there would be coverage and there was no "claim" made at all. Attorney **Mark F Anderson, of Kemnitzer, Anderson, Barron & Ogilvie** in San Francisco, is continuing to investigate this matter. ●

HOMEOWNER'S INS. from page 3

historical perspective. Many insurers over-react to new developments (e.g., increased knowledge about the risks of mold growth), and economic changes (e.g., weak investment returns), by cutting way back. Yet, policies remain available to those who have the time to search. Insurers **want** to do business in lucrative large markets.

During this recent market contraction, United Policyholders gave detailed suggestions to California Department of Insurance staff on surveying insurers to determine the true nature of the problem. The CDI then put out a comprehensive "data call" (survey) to homeowners' insurers and is awaiting the responses.

**"Use it and Lose it" is anathema to insurance**

Nothing could be more at odds with the basic concept of insurance than the notion that filing a claim will cause you to lose your coverage. Insurance is supposed to buy you the peace of mind that you'll be protected when you suffer a loss. If filing a claim gets your policy non-renewed, what are you buying? To his credit, California Insurance Commissioner John Garamendi came out strongly against this practice in a published advisory to California insurers in April 2003.

This year the buzz is all about insurers using credit reports as a basis for selecting and rejecting customers. We're learning about the growth of TRW-style companies that collect data about policyholders' claims and credit histories from insurers. (See "Get a Clue" p. 1).

Yet despite all the reports, hype and fear, policies are still available to those who know how to find them. Real estate deals continue to close, and smaller insurers are getting a

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valuable chance to increase their market share by selling policies to homeowners who've been dropped by major carriers. There is no crisis.

**Disturbing trends in homeowners insurance**

In addition to "use it or lose it," there are other disturbing market trends in homeowners insurance.

- **Eroding coverage, (more and broader exclusions and narrower coverage)**
- **Rapidly escalating premiums**
- **The increased use of credit and claim records to reject new and renewal policy applications**

The last one is disturbing because insurers have offered little information to substantiate their claim that people with bad credit histories are more likely to file insurance claims, or that filing one claim makes it more likely that a person will file another in the future. Thus it appears insurers may be using these non-risk predictive factors to accomplish a business objective other than controlling their loss exposure. In other words, insurers appear to be up to no good.

UP will continue to monitor the marketplace and provide the policyholders' perspective on these issues to public officials and the public at large. ●

*AMICUS* from page 8

based in part on the drafting history of the pollution exclusions, United Policyholders argued that gasoline is not unambiguously excluded from coverage under the pollution exclusions at issue. United Policyholders' brief was filed by the Philadelphia, PA office of **Anderson Kill & Olick, P.C.**, with **John N. Ellison, Timothy P. Law**, and **Nicholas M. Insua** on the brief.

### MONTANA

Ned C. Hardy v. Progressive Specialty Ins. Co., Montana Sup. Ct. No. 02-448, 2003 MT 85, Decided April 18, 2003. **(Auto/Stacking/UIM Offset)** Montana resident Joel Hardy sued his auto insurance company for refusing to provide him with \$150,000 in benefits by stacking three \$50,000 underinsured motorist coverages for which he had paid three separate premiums. The Montana Supreme Court historically had invalidated policy anti-stacking provisions if the policyholder paid multiple premiums. However, in 1997, the Montana Legislature adopted a statute prohibiting any form of stacking. In *Hardy v. Progressive*, the court held the statute unconstitutional for violation of substantive due process, since prohibiting stacking for motorists who pay multiple premiums is not rationally related to making insurance affordable. Also, the Court struck as invalid the definition of UIM that limits UIM to the difference between the tortfeasor's insurance and the insured's limit of UIM coverage and the accompanying clause that reduced the UIM coverage by the recovery from the tortfeasor. UP was monitoring this case. The Montana Trial Lawyers Association submitted an *amicus* brief written by Billings, Montana attorney **L. Randall Bishop**, and **Prof. Greg Munro**, U of M School of Law with assistance from Amicus Project Director **Eugene Anderson**.

Montana policyholders got a further boost from their Supreme Court last week when the Court adopted an "insurance exception" to the American Rule that you don't get attorney fees absent statute or contract. The new

exception says that whenever a policyholder has to sue his or her own insurance company to get promised benefits, and the insured prevails, the insured gets attorney fees. (Mountain West Farm Bureau v. Brewer, Montana 2003)

### The Value of Amicus Briefs

The purpose of UP's Amicus Project is to provide judges with a balanced perspective when they review cases involving insurance questions. Judicial decisions define insurance consumers' rights and insurance companies' obligations, so they are critically important and have long lasting impact. Insurers and their trade associations routinely deluge courts with briefs arguing their views. In the majority of cases, judges get no briefs at all that advance the perspective of insureds/insurance consumers. Predictably, the results often favor the insurance industry. UP is striving to change this imbalance through our Amicus Project.

### The Amicus Project Benefits Everyone

We are increasingly serving as the voice for policyholders in cases all over the country where the rights of insureds are at stake. Unlike insurance companies, however, we do not have unlimited resources to pay attorneys to submit our *amicus* briefs. UP's Amicus Project is growing because of the generosity of a very small number of attorneys who are providing legal services free of charge. We need your help. We need to expand our base of pro bono counsel and secure donations to cover our expenses. All policyholders benefit from this Project. All policyholders should support this Project.

### Your Eyes and Ears can Help

Help us identify cases for UP's Amicus Project. If you know of a case on appeal involving important insurance principles where policyholder *amicus* support is needed, contact UP online at [info@unitedpolicyholders.org](mailto:info@unitedpolicyholders.org) or call Amy Bach at (415) 381-7627. ●

*BACH TALK* from page 1

We are an increasingly well respected resource on insurance information for the public, public officials and the judiciary. Our Amicus Project resources are expanding. We have strengthened our Info Sharing Project and our website, and added key support staff.

Our work in disseminating information from the policyholder's perspective and in facilitating the sharing of information among insureds and their advocates is paying off. The founding principles of our organization are bearing fruit.

In this issue, we offer a range of information on practical issues for consumers and policyholder advocates. We welcome your comments and feedback via email to [info@unitedpolicyholders.org](mailto:info@unitedpolicyholders.org), or U.S. mail to: PMB 110, 262 Pacific Ave., S.F. CA. 94111.

Sincerely,

*Amy Bach,*

Executive Director and Co-Founder

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BIG BOYS from page 1

The issue before the U.S. Supreme Court was whether punitive damage awards that are set in relation to the defendant's net worth so as to provide true deterrence will stand, even if such awards are very high dollar amounts. The Court essentially succumbed to business interests and said no, they will not.

#### Fact over Fiction

Civil jurors are among the few lawmakers left who are free from the corrosive impact of campaign donations and politics. The buck truly stops in the jury room. Jurors are not concerned about running for or staying in office so they will hold insurance companies accountable when they cheat consumers. Punitive damage verdicts are never awarded casually and where they are not based on solid evidence they are overturned on appeal.

Because these verdicts hit corporations where it counts, business interests have long been attacking the laws that allow them. Well-financed and meticulously orchestrated media and lobbying campaigns have succeeded in creating the commonly held but fictional notion that punitive damage awards are out of control and ruining our economy. The facts about punitive damage verdicts are; they are awarded very infrequently, rarely upheld on appeal, but provide **a very potent consumer protection remedy.**

Only one of the nine Supreme Court Justices, Justice Ginsburg, credibly examined and analyzed the evidence of State Farm's widespread unfair claims-handling practices in *Campbell*. This evidence had led a Utah jury to enter a punitive damage award against the nation's wealthiest P/C insurer

that was large enough to get the insurer's attention so it would stop engaging in the practices. The evidence was so compelling that the Utah Supreme Court upheld the jury's verdict in its entirety. The evidence was apparently not compelling enough to U.S. Supreme Court Justices who appear intent on promoting a political agenda.

To read the Court's decision, visit <http://www.supremecourtus.gov/opinions/02pdf/01-1289.pdf>. To read policyholder attorney **Arnie Levinson's** analysis visit <http://www.mealeys.com/attorney%20views/badcom.html>. To read United Policyholders' *amicus* brief in *Campbell* visit [http://www.unitedpolicyholders.org/amicus\\_filed.html](http://www.unitedpolicyholders.org/amicus_filed.html).

#### CAMPBELL IN PLAIN ENGLISH: ***Campbell* lets insurers off cheap for cheating.**

The Supreme Court strongly suggests to trial court judges in its *Campbell* opinion that no punitive damage award that is more than nine times compensatory damages will be upheld on appeal. This dramatically reduces insurance companies punitive damages exposure and lets insurers off cheap for cheating.

#### ***Campbell* breaks the critical link between a punitive damages award and the wrongdoer's net worth.**

That link is critical because it makes the insurer take notice and care so it makes the punitive damages award an effective punishment and deterrent. Punitive damages must be set with consideration of the insurer's individual financial condition. Insurers with very substantial net worth will only care about substantial awards. Without that link, punitive damages lose their deterrent function. An insurer with a \$21 billion surplus

will not be deterred from cheating policyholders via a million dollar punitive damage award.

#### ***Campbell* allows insurers to predict their downside risk of cheating.**

In addition to drastically reducing insurance companies' punitive damage exposure, *Campbell* allows insurance companies to predict their maximum punitive damages exposure. Insurers now have reason to feel confident that the largest punitive damage award they will face will be no more than nine times the amount of compensatory damages. Compensatory damages in non-commercial bad faith cases rarely exceed \$1 million, which means punitive damage awards will rarely exceed \$9 million. That is far below what it takes to motivate companies the size of Allstate, State Farm, and UNUM/Provident to alter their business practices. A State Farm employee testified in *Campbell* that it takes a \$100 million punitive damages award to get management's attention.

#### ***Campbell* allows insurers to build in the downside risk of cheating as a cost of doing business.**

Now that insurers can predict the largest fine they will face they can simply build and absorb that into their costs of doing business. Removing the uncertainty factor neutralizes the deterrent effect of punitive damage verdicts. ●

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3) Has your homeowners insurance been recently non-renewed or cancelled? Yes No

4) If you answered "Yes", please identify the name of the insurance company that non-renewed or cancelled you:  
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\_\_\_\_\_

5) Has your homeowners insurer notified you of any changes to your policy, e.g. newly added water damage exclusions?  
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6) Please circle all of the following that describe you:

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7) Are you a member of a professional or trade association that might have an interest in insurance issues? (Please identify name of organization and contact phone number)  
\_\_\_\_\_

8) Are you interested in volunteering with UP? Yes No

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