No. 20-55868

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ELAINE MARIE WALKER EARLE

Plaintiff and Appellant,

vs.

UNUM LIFE INSURANCE COMPANY OF AMERICA

Defendant and Appellee.

Appeal from the United States District Court
for the Central District of California
Case No. 2:19-cv-02903-JFW-AFM

BRIEF OF *AMICUS CURIE* UNITED POLICYHOLDERS IN SUPPORT OF THE APPEAL OF PLAINTIFF-APPELLANT ELAINE MARIE WALKER EARLE

Glenn R. Kantor, SBN 122643
Kantor & Kantor, LLP
19839 Nordhoff Street
Northridge, CA 91324
Tel: (818) 886-2525
Email: gkantor@kantorlaw.net

Attorneys for Amicus Curiae
United Policyholders,
a non-profit 501(c)(3) consumer organization

CORPORATE DISCLOSURE STATEMENT

Under Fed. R. App. Proc. 26.1(a) and 28(a)(1), Amicus Curiae United Policyholders states that it is a non-profit 501(c)(3) consumer organization, that it has no parent corporation, and that no publicly-traded corporation owns 10% or more of the stock of United Policyholders.

DATED this 4th day of January, 2021.

/s/ *Glenn R. Kantor, Esq.*
Glenn R. Kantor
Attorney for Amicus Curiae
United Policyholders

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

STATEMENT OF AMICUS CURIAE

Appellant has consented to United Policyholders filing this amicus curiae brief. Fed. R. App. Proc. 29(2)(2). Appellee UNUM Life Insurance Company of America has not so consented, and as such, a motion for leave to file has been submitted contemporaneously herewith.

The parties this brief supports. This brief supports Appellant Elaine Marie Walker Earle, but only because, in this dispute, she is on the right side of the issues. United Policyholders has no relationship with either party.

Source of authority to file. United Policyholders' executive management has authority to authorize filing this amicus curiae brief and has done so. Fed. R. App. Proc. 29(a)(4)(D).

Independence of Amicus Curiae. United Policyholders certifies that no party and no party's counsel authored this amicus curiae brief in whole or in part. Fed. R. App. Proc. 29(a)(4)(E)(i). United Policyholders further certifies that no party and no party's counsel has contributed any money intended to fund preparing or submitting the brief. Fed. R. App. Proc. 29(a)(4)(E)(ii). United Policyholders finally certifies that no person - other than the amicus curiae, its members, or its counsel - contributed money that was intended to fund preparing or submitting the brief. Fed. R. App. Proc. 29(a)(4)(E)(iii). In fact, counsel for United Policyholders prepared and submitted this brief pro bono publico.

Interest of Amicus Curiae. United Policyholders is a non-profit 501(c)(3) organization whose mission is to be a trustworthy and useful information resource and an effective, well-informed advocate in all 50 states for consumers of all types of insurance. Founded in 1991, United Policyholders helps level the playing field between insurers and insureds.

Among other things, United Policyholders: (1) provides tools and resources for solving insurance problems after an accident, loss, illness, or other adverse event; (2) promotes disaster preparedness and insurance literacy through outreach and education in partnership with civic, faith-based, business, and other nonprofit associations; and (3) advances pro-consumer laws and public policy related to insurance matters.

United Policyholders speaks for a wide range of policyholders. It has filed over 400 amicus curiae briefs in state and federal courts, including in the U.S. Supreme Court. United Policyholders has a strong interest in ensuring that all insureds are able to obtain the benefits they paid to receive to protect them in time of need. In particular, as a matter of public policy and constitutional principle, United Policyholders has an interest in ensuring that insurance companies pay for the legal representation that insureds desperately need when government agencies bring administrative and/or judicial proceedings against them.

Preparing for the Amicus Curiae brief. Counsel for Amicus Curiae United

Policyholders has researched California and federal constitutional and statutory law on the meaning and application of Section 10110.6 of the California Insurance Code and on interplay between the statute and the choice-of-law provision in the UNUM policy.

Desirability of accepting the brief. Amicus Curiae United Policyholders submits that this Court should grant it leave to file an amicus curiae brief in this matter because it can provide information, perspective, and argument that can help the Court beyond the help the parties' lawyers have provided.

Question Presented:

1) Does the unpreempted California Insurance Code §10110.6 represent the fundamental policy of the State of California such that a contrary choice-of-law provision cannot circumvent it?

STATEMENT OF POSITION

Amicus Curie United Policyholders seeks reversal of the decision in *Earle v. UNUM*, on the basis that the District Court erred in its failure to apply a *de novo* standard of review in compliance with California Insurance Code §10110.6. United Policyholders also seeks reversal of the Districts Court implicit, and incorrect determination that California Insurance Code §10110.6, which bans discretionary clauses in insured disability policies, is not a fundamental policy of

the State of California and that California does not have a greater material interest in the issue than the State of Maine.

STANDARD OF REVIEW TO BE APPLIED TO THE QUESTIONS PRESENTED

A Court of Appeals reviews *de novo* a district court's choice and application of the standard of review to decisions by fiduciaries in ERISA cases; it reviews for clear error the underlying findings of fact. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq. *Estate of Barton v. ADT Sec. Services Pension Plan*, 820 F.3d 1060, 1065 (9th Cir. 2016).

ARGUMENT

I. THE CALIFORNIA SUPREME COURT WOULD HOLD THAT THE MAINE CHOICE-OF-LAW PROVISION IN THE USC'S BENEFITS PLAN IS CONTRARY TO THE FUNDAMENTAL PUBLIC POLICY EXPRESSED IN CAL. INS. CODE §10110.6.

The California Supreme Court has had the opportunity speak on what laws qualify as the "fundamental public policy" of the State of California. *Pitzer Coll. v. Indian Harbor Ins. Co.,* 845 F.3d 993, 994 (9th Cir. 2017), *certified question answered,* 8 Cal. 5th 93, 447 P.3d 669 (2019). In *Pitzer*, the college sued its insurer after it denied coverage for pollution remediation. *Id.* The insurer denied the claim, relying on the policy's notice provision. *Id.* at 994-995. Pitzer argued that California's notice prejudice rule, which required the insurer to prove it was actually prejudiced by the late notice, should apply. *Id.* at 995. The District Court

agreed with the insurer and applied instead the New York choice-of-law provision. *Id.* However, this Court concluded that the case turned on how the California Supreme Court would answer the following question:

> 1. Is California's common law notice-prejudice rule a fundamental public policy for the purpose of choice-of-law analysis? May common law rules other than unconscionability not enshrined in statute, regulation, or the constitution, be fundamental public policies for the purpose of choice-of-law analysis?

Id. at 994. While the first prong of the question addresses whether the common law was fundamental public policy, the second prong concerns itself with whether a judicially created rule - as opposed to a statute that comes along with the legitimacy of the democratic process - is ever capable of being an expression of that fundamental public policy.

In deciding that the common law notice prejudice rule *is* an expression of California's fundamental public policy, the California Supreme Court applied Restatement (Second) of Conflict of Laws §187 and focused on the rule's goal, *i.e.,* "to protect insureds against inequitable results that are generated by insurers' superior bargaining power" and to counteract that insurance contracts are "typically 'inherently unbalanced: and 'adhesive' which 'places the insurer in a superior bargaining position.'" *Pitzer Coll. v. Indian Harbor Ins. Co.*, 8 Cal. 5th 93, 103 (2019). Relying on a comment to §187, the court noted that "policies 'designed to protect a person against the oppressive use of superior bargaining

power' may be considered fundamental and unwaivable." *Id.* The court also held that the notice prejudice rule was "fundamental policy" because "it protects the public from bearing the costs of harm that an insurance policy purports to cover. *Id.*

The insurer argued that the court's previous decision, that the covenant of good faith and fair dealing was *not* fundamental public policy, would be inconsistent with holding that the notice prejudice rule *was* fundamental. *Id.* at 105. But the court rejected this argument. *Id.* In doing so, the court explained that notice prejudice was different than the implied covenant because notice prejudice overrides a contractual term and is "designed to restrict freedom of contract." *Id.* In other words, laws that are designed to protect consumers by leveling the playing field in a form that alters the terms of an insurance contract are expressions of fundamental policy.

As for the second prong of the certified question, the court held that fundamental public policy did not necessarily require the imprimatur of the legislature. *Id.* at 104.

Given its position on California's notice prejudice rule, the California Supreme Court would hold that §10110.6 is the fundamental policy of the State of California. There is little question that discretionary clause bans were enacted to address the same sorts of concerns highlighted by the California Supreme Court in

Pitzer. In fact, this Court has already likened bans on discretionary clauses to notice prejudice rules and has appreciated the inequities caused by discretionary clauses:

> [l]ike the notice-prejudice rule at issue in *[Unum v. Ward],* Morrison's disapproval of discretionary clauses 'dictates to the insurance company the conditions under which it must pay for the risk it has assumed.' *Std. Ins. Co. v. Morrison,* 537 F.Supp.2d 1142, 1151(D.Mont.2008)(quoting *Kentucky Ass'n,* 538 U.S. at 339 n. 3, 123 S.Ct. 1471). One could go even further: consumers can be reasonably sure of claim acceptance only when an improperly balking insurer can be called to answer for its decision in court. By removing the benefit of a deferential standard of review from insurers, it is likely that the Commissioner's practice will lead to a greater number of claims being paid. More losses will thus be covered, increasing the benefit of risk pooling for consumers.

Standard Ins. Co. v. Morrison, 584 F.3d 837, 845 (9th Cir. 2009). This Court's acknowledgement that "[disapproval of discretionary clauses] is grounded in policy concerns specific to the insurance industry, such as ensuring fair treatment of claims by insurers with potential conflicts of interest" is essentially identical to reasons that the California Supreme Court gave for concluding that notice prejudice rule was fundamental policy. *Id.* at 844. Both the rule and the statute correct an imbalance that otherwise gives insurers a litigation advantage, where the scales were already tipped in their favor by virtue of their superior bargaining power.

More recently this Court acknowledged that states' bans on discretionary clauses were enacted "[i]n response to a particularly notorious example of an insurer who had used discretionary clauses to boost its profits by intentionally denying valid claims," an explicit statement that statutes such as §10110.6 are fundamental state policy because they were enacted to correct misbehavior by the insurance industry.[1] *Orzechowski v. Boeing Co. Non-Union Long-Term Disability Plan, Plan No. 625,* 856 F.3d 686, 692 (9th Cir. 2017). Meanwhile, §10110.6 survived a wide variety of technical challenges, none of which concerned whether the legislature meant what it said about prohibiting grants of discretionary authority in policies or plans. 856 F.3d 686.[2]

And the Ninth Circuit is not alone in observing the harsh inequities that result from the imposition of discretionary clauses in ERISA benefits plans. *Gibbs ex rel. Estate of Gibbs v. CIGNA Corp.,* 440 F.3d 571, 577-78 (2d Cir. 2006)(holding the standard of review affects a participant's substantive rights,

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[1] Ironically, that "particularly notorious" insurer mentioned in *Orzechowski* was Unum, itself. See *Saffon v. Wells Fargo & Co. Long Term Disability Plan*, 522 F.3d 863, 867 (9th Cir. 2008).

[2] Attacks on §10110.6 have included arguments that contrary choice-of-law provisions could circumvent the statute, and District Courts in California have rejected these. *Snyder v. Unum Life Ins. Co. of Am.*, No. CV 13 07522 BRO (RZx), 2014 U.S. Dist. LEXIS 181886 (C.D. Cal. 2014); *Hirschkron v. Principal Life Ins. Co.*, 141 F. Supp. 3d 1028, 1031 (N.D. Cal. 2015); and *Bowlin v. Prudential Ins. Co.* of Am., No. 8:16 cv 00937 JLS PLA, 2017 U.S. Dist. LEXIS 221994, at *8-9 (C.D. Cal. Mar. 9, 2017).

since abuse of discretion review allows a court to uphold erroneous decisions); *Brigham v. Sun Life of Canada,* 317 F.3d 72, 86 (1st Cir. 2003)(explaining that though "it seems counterintuitive that a paraplegic suffering serious muscle strain and pain, severely limited in his bodily functions would not be deemed totally disabled," the deferential standard of review permits it); *Johnson v. Allsteel, Inc.,* 259 F.3d 885, 887-889 (7th Cir. 2001)(holding that there was injury-in-fact where a plan administrator amended a plan to increase discretion even before the administrator exercised its discretion); *Herzberger v. Standard Ins. Co.*, 205 F.3d 327, 331 (7th Cir. 2000)("[t]he very existence of 'rights' under such plans depends on the degree of discretion lodge in the administrator. The broader that discretion, the less solid an entitlement the employee has and the more important it may be to him, therefore, to supplement his ERISA plan with other forms of insurance."); *Cosey v. Prudential* 735 F.3d 161, 167(4th Cir. 2013)(discussing need for discretionary language to be clear because of disadvantages is creates for claimants, including the need for a claimant to be represented by counsel during the administrative process to prepare for a court's circumscribed review).

It is widely understood that discretionary clauses place insureds at a disadvantage. And should a state choose to somehow mitigate that disadvantage, the California Supreme Court would likely label that effort an expression of "fundamental policy."

Furthermore, the concern this Court had in *Pitzer* – whether judicial doctrine versus a statute could rise to the level of fundamental policy – does not exist here. California's policy of banning discretionary clauses is expressed in the strongest manner, by statute. The California legislature, the body representing the people of California, has spoken, and it has chosen to level the playing field for its citizens by forbidding discretionary clauses.

Not only is California's policy in the strongest form possible, its language could not be stronger. Indeed, it is hard to imagine what more a state legislature could have done to express its fundamental policy on this issue. By its own terms, the statute is a comprehensive repudiation of the practice of including discretionary clauses in insurance contracts or ERISA plans. It repeatedly states that no language may result in deferential review by any court. §10110.6(a), (c), (d). It calls out every type of document that could conceivably include this type of language. §10110.6(a). It makes clear that the statute applies regardless of where the policies or other documents are issued, if they are intended to insure California residents §10110.6(a). It includes the *types* of determinations that cannot be reviewed deferentially, *i.e.*, neither "eligibility" nor "interpretation" determination may be reviewed deferentially. *Id.* It renders "void" any discretionary language and provides that the parties and the court shall treat it as such. §10110.6(g).

Given the opinion of the Supreme Court of California in *Pitzer*, it is clear that California's §10110.6 reflects the fundamental policy of the State of California.

II. CALIFORNIA HAS A FAR GREATER INTEREST THAN MAINE IN ENFORCEMENT OF ITS FUNDAMENTAL POLICY OF PROHIBITING DISCRETIONARY CLAUSES

Once it is determined that §10110.6 is a matter of California's fundamental policy, there remains the question whether California has a materially greater interest in the determination of the issue. 8 Cal. 5th 93, 101(2019). If so, the choice-of-law provision cannot be enforced. *Id.* While the District Court held that "Maine has a continuing substantive interest in seeing that its laws are applied to a contract that was entered into by Maine entities – the Trust and Unum – in Maine,"[3] there are several problems with this statement.

First, to the extent that Maine has any "*continuing* substantive interest" that interest would be to *prohibit* discretionary clauses. As the District Court acknowledged, the Maine legislature has enacted a ban similar to §10110.6, and like California, it expressed antipathy toward discretionary clauses by banning them. 24-A M.R.S. §2847-V. The Maine statute had already progressed through

[3] *Walker Earle v. UNUM Life Ins. Co. of Am.,* No. CV 19-2903-JFW(AFMX), 2020 WL 4434951, at *11 (C.D. Cal. July 23, 2020), *judgment entered sub nom. Earle v. Unum Life Ins. Co. of Am.,* No. 219CV02903JFWAFMX, 2020 WL 4429574 (C.D. Cal. July 30, 2020).

the legislative process and had gone into effect by September 19, 2019, only months after Earle learned that Unum had denied his internal appeal. *Id*. at *1. By the time the District Court rendered its decision, Maine's expression of its policy on discretionary clauses had gone from silence to loud disapproval. Under the circumstances, it is difficult to imagine what interest of Maine's the District Court was considering when it decided to honor the Maine choice-of-law provision. Imposing the Maine choice-of-law provision on Earle, simply because her case fell into a chronological crack between Maine's silence on the subject and expression of its clear fundamental policy, makes little sense. Moreover, the District Court's imposition of the choice-of-law provision during this narrow period of time appears to be more of a technical forfeiture than an appraisal of the relative interests of the states of Maine and California. As such, it contravenes the strong public policy of California described in *Pitzer* of favoring compensation of insureds over technical forfeiture. 8 Cal. 5th at 102.

Second, the District Court's holding that Maine has in interest in the contract entered into by Unum and the Trust is non-sensical. The Trust is not the subject of Maine's fundamental interest; it is a mechanism for UNUM to issue one policy, which will be then used to fund a variety of ERISA plans, some of which concern California citizens. The fundamental policy analysis focuses on a state's protection of consumers and not abstractions such as insurance trusts created for the

convenience of insurance carriers. Therefore, there is no question that California's interest is greater. And as discussed above, Maine wasn't far behind in outlawing discretionary clauses.

Finally, it strains logic to apply a Maine choice-of-law provision to a California employee of a California entity, who suffered her accident in the State of California and was treated for it in California. Earle could not have expected, and no USC employee would expect, that when push came to shove important rights to benefits would be determined by the policy of a state nearly as far away as it is possible to get in the contiguous United States. Earle had no voice in the negotiation of the contract that funds her ERISA AD&D plan and was completely unable to protect her own right to a fair adjudication of her ERISA claim. Although USC was free to offer a generous or ungenerous ERISA plan, California says it was not free to offer a plan that would provide for deferential review in court. California came in to remedy her lack of bargaining power, at least to some extent. California has a far stronger interest in the issue of the standard of review a court should apply in adjudicating her claim.

III. AFFIRMANCE OF THE DISTRICT COURT WOULD EVISCERATE ERISA'S SAVINGS CLAUSE

Where a conflict exists between policy language chosen by an insurance company and unpreempted state law regulating the business of insurance, which is

to be enforced?[4] The Supreme Court held that unpreempted state law prevails, because to hold otherwise would nullify ERISA's savings clause. *UNUM Life Ins. Co. of America v. Ward*, 526 U.S. 358, 376 (1999).

Ward addressed the central issue of this case, albeit without addressing it in the context of a choice-of-law provision. *Ward* should, at a minimum, provide guidance to this Court. At a maximum, it is determinative.

In *Ward* the Supreme Court focused on whether a California's common law of notice prejudice rule fell within the parameters of the ERISA savings clause. *Id.* at 364. While concluding that the rule was saved from preemption, the Court went to great lengths to reject the argument advanced by UNUM, which would have permitted insurance carriers to avoid state regulation via self-serving drafting of policy language. The argument advanced by UNUM was that ERISA plan administrators are required to strictly comply with plan language, and that mandating that insurance companies comply with contrary state law would require them to violate this obligation. *Id*. at 375-76. The Supreme Court acknowledged and rejected UNUM's argument as follows:

> UNUM's "contra plan term" argument overlooks controlling precedent and makes scant sense. We have repeatedly held that state laws mandating insurance contract terms are saved from preemption under § 1144(b)(2)(A). **Under UNUM's interpretation of § 1104(a)(1)(D), however, States would be**

[4] There is no issue as to whether 10110.6 has been saved from preemption. See *Orzechowski at* 694.

> **powerless to alter the terms of the insurance relationship in ERISA plans; insurers could displace any state regulation simply by inserting a contrary term in plan documents. This interpretation would virtually "rea[d] the saving clause out of ERISA."** Metropolitan Life, 471 U.S., at 741, 105 S.Ct. 2380.6.

(*Id.* at 375-76)(internal citations omitted).

Interestingly, the notice prejudice doctrine at issue in *Ward* was the same one considered by the California Supreme Court in *Pitzer,* the latter of which which decided the doctrine was fundamental policy and unwaivable under the applicable choice-of-law analysis. *Pitzer Coll. v. Indian Harbor Ins. Co.*, 8 Cal. 5th 93, 103. Accordingly, the arguments above already provide this Court with a perfectly good rationale for concluding that §10110.6 cannot be displaced by the Unum's Maine choice-of-law provision. Nonetheless, it is significant that the Supreme Court would not countenance Unum's attempt to skirt unpreempted state law by relying on contrary plan terms. California's ban on discretionary clauses, §10110.6, is no exception.

Regardless of the reasoning adopted, the District Court's application of an abuse of discretion standard of review, rather than the *de novo* standard mandated by §10110.6, was clear error, and must be reversed.

CONCLUSION

The District Court should be reversed as to the standard of review that it applied.

Respectfully submitted,

Dated: January 4, 2021.

KANTOR & KANTOR, LLP

Glenn R. Kantor

Glenn R. Kantor
Attorneys for *Amicus Curie*
United Policyholders

CERTIFICATE OF COMPLIANCE

Pursuant to 9th Circuit Rule 32(a)(7)(C)(i) for Case No. 20-55868, I certify that this brief complies with the length limits permitted by Ninth Circuit Rule 32. The brief is 3,475 words long, excluding the portions exempted by Fed. R. App. Proc. 32(f). The brief's type size and type face comply with Fed. R. App. Proc. 32(a)(5) and (6).

DATED this 4th day of January, 2021.

/s/ *Glenn R. Kantor, Esq.*
Glenn R. Kantor
Attorney for Amicus Curiae
United Policyholders

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing BRIEF OF AMICUS CURIE UNITED POLICYHOLDERS IN SUPPORT OF THE APPEAL OF PLAINTIFF-APPELLANT ELAINE MARIE WALKER EARLE with the Clerk of the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system on this 4th day of January, 2021. I certify that all participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF service.

DATED this 4th day of January, 2021.

/s/ *Glenn R. Kantor, Esq.*
Glenn R. Kantor
Attorney for Amicus Curiae
United Policyholders