No. A18-1081

STATE OF MINNESOTA
IN SUPREME COURT

Alison Joel Peterson,

Respondent,

vs.

Western National Mutual Insurance Company,

Appellant.

BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

United Policyholders respectfully submits this brief as *amicus curiae* in support of Respondent Alison Joel Peterson ("Peterson") to assist the Court in defining the "bad faith" standard of conduct pursuant to Minn. Stat. § 604.18, subd. 2(a) (2018).[1] The Appellant is Western National Mutual Insurance Company ("Western National").

United Policyholders is a non-profit 501(c)(3) organization founded in California in 1991 and is a voice and information resource for insurance consumers and policyholders in all fifty states, whether businesses or individuals. United Policyholders is dedicated to educating individuals and businesses about insurance issues and consumer rights. One of the ways that United Policyholders protects the interests of policyholders and advocates on their behalf is through participation as *amicus curiae* in insurance claim and coverage cases throughout the country. Donations, foundation grants, and volunteer labor support United Policyholders' work; it does not accept any funding whatsoever from insurance companies.

Information and arguments from United Policyholders' briefs have been cited by the United States Supreme Court, as well as numerous state and federal appellate courts.[2] In the instant matter, United Policyholders seeks to fulfill the "classic role of *amicus curiae* by assisting in a case of general public interest, supplementing the

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[1] This brief was authored by Smith Jadin Johnson, PLLC in its capacity as attorneys for Amici. Neither Respondent Alison Joel Peterson nor her counsel participated in the drafting of this brief in any way, in whole or in part. Respondent made no monetary contribution toward the preparation or submission of this brief. No person or entity other than *amicus curiae* United Policy Holders, its members, or its counsel made a monetary contribution intended to fund its preparation, contents, or submission.

[2] *See, e.g.*, *Humana, Inc. v. Forsyth*, 525 U.S. 299 (1999).

efforts of counsel, and drawing the court's attention to law that escaped consideration." *Miller-Wohl Co. v. Comm'r of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982). As commentators have stressed, an *amicus curiae* is often in a superior position to "focus the court's attention on the broad implications of various possible rulings." Robert L. Stern et al., *Supreme Court Practice*, 570-71 (6th ed. 1986) (quoting Bruce J. Ennis, *Effective Amicus Briefs*, 33 CATH U. L. REV. 603, 608 (1984)). United Policyholders' more than twenty-five years of experience leave it uniquely positioned to assist in this matter, as it knows all too well that a thorough and fair investigation of a claim can make all the difference in whether an insured receives a fair settlement. When an insurer fails to conduct such an investigation, it must be held accountable. This case presents an opportunity to clarify the consequences for insurers failing to abide by Minnesota's statutory standard of conduct.

INTRODUCTION

Amicus curiae United Policyholders submit this brief in order to assist the Court in defining and interpreting the bad faith standard of conduct applicable to insurers pursuant to Minn. Stat. § 604.18. This case demonstrate precisely the situation that the Minnesota Legislature sought to remedy when it crafted Minnesota's first-party bad faith statute. For the reasons set forth herein, this Court should affirm the judgment of the court of appeals.

ANALYSIS

I. THE COURT OF APPEALS CORRECTLY INTERPRETED AND APPLIED MINN. STAT. § 604.18, SUBD. 2(A).

A. The language of Minn. Stat. § 604.18, subd. 2(a) is ambiguous, and therefore the court was permitted to consider factors set forth by the legislature.

A statute is ambiguous when "the language is subject to more than one reasonable interpretation." *Hansen v. Robert Half Intern., Inc.*, 813 N.W.2d 906, 915 (Minn. 2012), *quoting Hans Hagen Homes v. City of Minnetrista*, 728 N.W.2d 536, 539 (Minn. 2007). "When the Legislature's intent is not clearly discernible from the explicit words of the statute, [the Court] advance[s] to other steps to ascertain the intent of the Legislature." *Id.*

Here, the court of appeals said it best when it explained that the very fact that the parties offer competing reasonable interpretations of the clause "absence of a reasonable basis" demonstrates that the statute is ambiguous. *Peterson v. Western Nat'l Mut. Ins. Co.*, 930 N.W. 2d 443, 448 (Minn. Ct. App. 2019). Specifically, Western National argues that in order to establish the first prong of Minn. Stat. § 604.18, subd. 2(a), Peterson was required to demonstrate that there were **no** facts, evidence or other information whatsoever that Western National could rely upon to deny coverage. *Id.* Alternatively, Peterson argues that under the first prong, a court must ask whether a reasonable insurer under same or similar circumstances would have denied or delayed payment of the claim, and whether the claim was properly investigated, evaluated, and reviewed. *Id.* at 449. Because at least two reasonable

interpretations of Minn. Stat. § 604.18, subd. 2(a) exist, it is ambiguous. *Id.*; *Hansen*, 813 N.W. at 915; *Hans Hagen*, 728 N.W.2d at 539.

When a statute is ambiguous, the court examines other factors including "the need for the law, the circumstances of its enactment, the purpose of the statute, and the consequences of a certain interpretation." *Kersten v. Minn. Mut. Life. Ins. Co.*, 608 N.W. 2d 869, 875 (Minn. 2000); *see* Minn. Stat. § 645.16 (2018) (providing factors to be considered in ascertaining legislative intent). Here, the court of appeals properly applied the interpretation factors by examining the testimony provided during the passage of the statute, including that of the Senators who drafted and amended the bill. *Peterson*, 930 N.W. 2d at 450.

B. The legislative history of Minn. Stat. § 604.18, subd. 2(a) supports the Appellate Court's application of the *Anderson* framework.

1. The legislative history clearly indicates that the intent was to adopt the *Anderson* standard.

The Minnesota legislature enacted Minn. Stat. § 604.18 in 2008 in order to create a cause of action for insurer bad-faith denial of first-party insurance benefits. 2008 Minn. Laws. ch. 208, §§ 1-2, at 1-3. In doing so, the explicit intent was to provide a "deterrent to those who may be making low settlement offers with no intention of making good on what the consumer's actual damages are under the policy." S. Floor Deb. On S.F. 2822 (Apr. 14, 2008) (statement of Sen. Clark). The bill's author explained that "the two-part test that is in the bill…is often known as the *Anderson* standard that

is in Wisconsin." S. Floor Deb. On S.F. 2822 (Mar. 18, 2008) (statement of Sen. Clark); *see also Anderson v. Continental Ins. Co*., 271 N.W.2d 368 (Wisc. 1978).

Even more clear were the statements of Senator Linda Scheid, who offered an amendment to the bill that was eventually adopted. She explained that her amendment "leaves the standard for showing lack of good faith as is currently included in Senator Clark's bill" and that such language "incorporate[es] in our statute what is common law in Wisconsin." S. Floor Deb. On S.F. 2822 (Mar. 18. 2008) (statement of Sen. Scheid).

While testimony and comments made during floor debates should be treated with caution, "statements made…by the sponsor of a bill or an amendment on the purpose or effect of the legislation are generally entitled to some weight." *Handle With Care, Inc. v. Dep't of Human Servs.*, 406 N.W.2d 518, 522 (Minn. 1987). Here, the testimony on the senate floor during the passage of Minn. Stat. § 604.18 makes it abundantly clear that the legislature's intention was to adopt the "specific test from that so-called *Anderson* case." S. Floor Deb. on S.F. 2822 (April 14, 2008) (statement of Sen. Scheid); *see also Anderson*, 271 N.W.2d 368.

2. The court of appeals was clear in explaining that its decision was not based on Wisconsin case law subsequent to *Anderson*.

In the instant matter, Western National makes particular mention of the fact that Sen. Scheid explicitly stated that it was *not* the legislature's intent to adopt the caselaw promulgated in Wisconsin subsequent to the *Anderson* case. However, the

court of appeals was careful to point that limitation out, and to explain that subsequent progeny was not used by the court to render its decision. *See Peterson*, 930 N.W.2d, FN2. This Court should not allow Western National to twist the clear holding of the court of appeals. The court of appeals followed *Anderson* and Minnesota's interpretation of that decision, and that holding should be upheld here.

3. The court of appeals' interpretation has been and should continue to be the standard in Minnesota.

After explaining that the legislative history of the statute clearly demonstrates that the legislature's intention was to adopt the *Anderson* standard from Wisconsin common law, the court of appeals clearly restated the rule as it applies in Minnesota. The court stated:

> Thus, pursuant to Minn. Stat. § 604.18, subd, 2(a), an insurer must conduct a reasonable investigation and fairly evaluate the results to have a reasonable basis for denying an insured's first-party insurance-benefits claim. If, after reasonable investigation and fair evaluation, a claim is fairly debatable, an insurer does not act in bad-faith by denying the claim.

Peterson, 930 N.W.2d at 450.

The "fairly debatable" language referenced by the court was taken directly from the *Anderson* decision, in which the court explained that "when a claim is 'fairly debatable,' the insurer is entitled to debate it" but "in a case where a claim was not fairly debatable, refusal to pay would be bad faith." *Anderson*, 271 N.W.2d at 374-76, *citing Drake v. Milwaukee Mut. Ins. Co.*, 236 N.W.2d 204, 208 (Wisc. 1975). The "fairly debatable" standard does not ask whether the insurer had **any** basis whatsoever to

deny the claim, however flimsy. Instead, insurance companies must engage in a reasonable investigation and reach their decisions on coverage and valuation based on the facts revealed in that investigation. They must uphold their duty of utmost good faith and fair dealing.

Here, the court of appeals held that the district court did not abuse its discretion when it found that Western National lacked a reasonable basis for denying Peterson's claim because Western National failed to properly investigate or fairly evaluate the claim. *Peterson*, 930 N.W.2d at 451. In doing so, the court referenced a number of facts, including that Western National delayed settling or denying Peterson's claim for nearly a year without proper investigation, ignored evidence supporting Peterson's claim, and prepared a claims summary that contained significant inaccuracies. *Id.* That finding clearly follows the *Anderson* standard, and the court of appeals was right to uphold it.

While there are, of course, instances when an insurer has the right to deny a claim, it must act in good faith when deciding whether to reject a claim, limit coverage, or reduce the damages sought. *See Lindstrom v. Yellow Taxi Co*., 214 N.W.2d 672, 676 (Minn. 1976). In carrying out its duty of good faith, an insurer should, *inter alia*, fully investigate and fairly evaluate the claim. *Kissoondath v. U.S. Fire Ins. Co.*, 620 N.W.2d 909, 916 (Minn. Ct. App. 2001). Those are fundamental duties of an insurer, which have been well established under the law and insurance industry custom and practice.

II. THE COURT OF APPEALS' DECISION PROPERLY BALANCES THE RIGHTS OF POLICYHOLDERS WITH THAT OF INSURERS.

A. Public policy supports requiring insurance companies to make reasonable investigations and claim decisions.

Insurers are (or should be) experts in claims handling. They have a significant advantage in expertise, financial means, and leverage over a policyholder While most insurance companies do not abuse that disparity in power, the bad faith statute is a necessary check against those few instances when it abused. The bad faith cause of action ensures that insurance companies use their expertise fairly and appropriately to achieve the purpose of the insurance relationship. This sentiment was aptly stated many decades ago by the California Supreme Court:

> [T]he object and purpose of insurance is to indemnify the policyholder in case of loss, and ordinarily such indemnity should be effectuated rather than defeated. To that end the law makes every rational intendment in order to give full protection to the interests of the policyholder.

Glickman v. New York Life Ins. Co., 107 P.2d 252 (Cal. 1940).

Insurance is a means of risk transference by which a policyholder transfers the risk of loss or the responsibility for certain costs and expenses to an insurer in exchange for the payment of a premium. *See* Robert E. Keeton and Alan I. Widiss, *Insurance Law: A Guide to Fundamental Principles, Legal Doctrines and Commercial Practices*. Individuals and businesses buy insurance to protect themselves from unexpected, and often devastating, occurrences. In Minnesota, everyone is legally

obligated to obtain insurance prior to driving a vehicle. *See* Minn. Stat. §§ 169.791-169.798.

It is the very nature of insurance that payment generally should be made without the need for litigation. No one buys insurance with the notion that it will be necessary to sue in order to get benefits. A policyholder buys an insurance policy, pays premiums up front, and expect claims to be paid if made. While the policyholder's requirements for making a claim are numerous (for example, they are required to pay premiums, cooperate, mitigate damages, maintain their property, provide documents, etc.), the insurer's duties are few. In fact, an insurer's only real duty is to fairly investigate the loss and pay benefits that are owed. The insurance-buying public, which is nearly every adult citizen of Minnesota, depends on insurance companies to fulfill those duties fairly and in good faith.

As explained in an article written by Professor Henderson of the University of Arizona College of Law:

> [T]he insurance industry plays a very important institutional role by providing the level of predictability requisite for the planning and execution that leads to further development. Without effective planning and execution, a society cannot progress.
> ….
> Insurance is purchased routinely and has become pervasive in our society. It protects against losses that otherwise would disrupt our lives, individually and collectively. The public interest, as well as the individual interests of millions of insureds, is at stake. This is the foundation for the general judicial conclusion that the business of insurance is cloaked with a public purpose or interest.

Roger C. Henderson, *The Tort of Bad Faith in First-Party Insurance Transaction: Refining the Standard of Culpability and Reformulating the Remedies By Statute,* 26 U. of Mich. J. L. Ref. 1, 9-11 (Fall 1992) (footnotes omitted).

Insurance is far from the market ideals of complete information and no transaction costs. Opportunistic breaches are especially likely because of the aleatory nature of those contracts, with the insurer's performance coming long after the policyholder has performed. *See* Mark Pennington, *Punitive Damages for Breach of Contract: A Core Sample from the Decisions of the Last Ten Years*, 42 ARK. L. REV. 31, 54 (1989); *see also Communale v. Traders & Gen. Ins. Co.*, 328 P.2d 198, 200-02 (Cal. 1958). As explained by the Delaware Supreme Court:

> Once an insured files a claim, the insurer has a strong incentive to conserve its financial resources balanced against the effect on its reputation of a "hard-ball" approach. Insurance contracts are also unique in another respect. Unlike other contracts, the insured has no ability to "cover" if the insurer refuses without justification to pay a claim. Insurance contracts are like many other contracts in that one party (the insured) renders performance first (by paying premiums) and then awaits the counter-performance in the event of a claim. Insurance is different, however, if the insurer breaches by refusing to render the counter-performance.

E.I. du Pont de Nemours & Co. v. Pressman, 679 A.2d 436, 447 (Del. 1996).

Insurance disputes are also unique due to the insurer's willingness and ability to litigate against the very people they are supposed to be protecting:

> Insureds bought insurance to avoid the possibility of unaffordable losses, but all too often they found themselves embroiled in an argument over that very possibility. . .

> …Insureds did not plan for litigation as an institutional litigant would. Insurers, on the other hand, built the anticipated costs of litigation into the premium rate structure. In effect, insureds, by paying premiums, financed the insurers' ability to resist claims. Insureds, as a group, were therefore peculiarly vulnerable to insurers who, as a group, were inclined to pay nothing if they could get away with it, and, in any event, to pay as little as possible. Insurance had become big business.

Roger C. Henderson, *supra* at 13-14.

The insurance industry has admitted to spending (conservatively) a billion dollars a year fighting their policyholders in court. *See* Leslie Schism, *Tight-Fisted Insurers Fight Their Customers to Limit Big Awards*, Wall St. J., 1996 at A1; Robert H. Gettlin, *Fighting the Client*, Best's Rev. P/C, Feb. 1997, at 49-50. Large claims are rarely resolved without a lawsuit. *See* L. Brenner, *The Polluted Open Box*, Corp. Fin. June/July 1995 at 34-35; Richard A. Archer, *Preparing for a 'Mega-Loss',* Bus. Ins., Oct. 10, 1994, at 23. The enormous collective resources and litigation expertise of the insurance industry permit it to wage wars of attrition against individual policyholders, who frankly stand no chance against such vast war chests.

A battle between an insured and its insurer often truly is a battle between David and Goliath. There is no way that a policyholder can match the resources of the insurance industry. An insurer has all the resources that it needs to conduct a reasonable investigation, so when it does not do so, the law must demand some punitive measure to deter such conduct. A policyholder who has been dragged through the litigation process and forced to trial in the absence of a reasonable investigation has likely lost much of the benefit that it paid premiums to receive.

Where a jury finds that the insurer committed an unfair or deceptive act or practice by refusing to pay a claim without conducting a reasonable investigation, the insured should be fully compensated for its losses, including the cost of litigation, and the insurer should face punitive damages to deter the conduct.

B. Western National's proposed standard renders the statute meaningless.

In its brief, Western National argues that Minn. Stat. § 604.18, subd. 2(a) "involves an objective test" regarding whether "any reasonable insurer when faced with the facts and evidence at issue…would dispute the claim." App. Br. at 14. Western National goes on to argue that because the statute makes no mention of investigation or settlement practices, those issues must not affect a determination of whether there was an "absence of a reasonable basis" to deny the claim. App. Br. at 14.

However, this interpretation would render the statute meaningless. It would allow, and even incentivize, insurers to refuse to properly investigate claims in order to avoid unsavory facts that do not support their interpretation of what occurred. Additionally, it would allow insurers to use experts or other evidence that they know to be untrustworthy in order to create a basis for denial, with no way to regulate or ensure that such evidence is reliable.

Requiring the "absence of a reasonable basis" while simultaneously erasing any rubric for determining reasonableness would result in any excuse whatsoever allowing the insurer to deny coverage. This cannot possibly be the intent of the legislature, who specifically stated that the purpose of the bill was to provide a

"deterrent to those who may be making low settlement offers with no intention of making good on what the consumer's actual damages are under the policy." S. Floor Deb. On S.F. 2822 (Apr. 14, 2008) (statement of Sen. Clark).

The Court should not adopt Western National's proposed new rule. To do so would render Minn. Stat. § 604.18 futile, and in so doing would remove the only tool a policyholder has to combat an unreasonable claims denial. Such a change would only encourage unfair claims practices, when public policy demands the opposite. The legislature saw fit to curtail unfair claims practices and the Court must uphold its intent to the fullest. If anything, the Court should use this case as an opportunity to send a message to insurance companies that acting in good faith is a non-negotiable requirement for insurers in Minnesota, and failure to do so will result in serious financial consequences.

CONCLUSION

For the foregoing reasons, *amicus curiae* United Policyholders respectfully requests that this Court affirm the judgment of the court of appeals and adopt its interpretation of the *Anderson* framework as it relates to Minn. Stat. § 604.18. The Legislature intended to protect policyholders from unreasonable insurance claim denials. The judgment of the court of appeals does just that.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for *amicus curiae* United Policyholders certifies that this brief complies with the requirements of Minn. R. Civ. App. P. 132.01 in that it is printed in 13-point proportionally spaced typeface, and the length of this brief is 3399 words. This document was prepared using Microsoft Word 2010.

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