

COMMONWEALTH OF KENTUCKY
SUPREME COURT
No. 2020-SC-0260-D

ASHLAND HOSPITAL CORPORATION D/B/A
KING'S DAUGHTERS MEDICAL CENTER, et al.

APPELLANTS

V. On Discretionary Review from the KY Court of Appeals
Case Nos. 2016-CA-372-MR and 2016-CA-396-MR
Boyd Circuit Court No. 15-CI-00070

DARWIN SELECT INSURANCE CO. N/K/A
ALLIED WORLD SURPLUS LINES INSURANCE
CO., et al.

APPELLEES

**MOTION BY UNITED POLICYHOLDERS FOR LEAVE TO FILE BRIEF AS
AMICUS CURIAE**

United Policyholders moves pursuant to CR 76.12(7) for leave to file a brief as Amicus Curiae in support of the Appellant Ashland Hospital Corporation d/b/a King's Daughters Medical Center in this case – that an insurer should not be allowed under Kentucky law to recoup costs spent defending a claim against its insured, where such defense is subject to a unilateral reservation of rights by the insurer.

United Policyholders (UP) is a national 501(c)(3) non-profit consumer organization founded in 1991 whose purpose is to support the loss indemnification purpose for which people and businesses buy insurance. UP educates and assists consumers on insurance matters and advocates for fair insurance sales, rating, underwriting and claim practices. The organization is funded by donations and grants from individuals, businesses, and foundations. United Policyholders works in partnership with insurance and banking regulators, local, state and federal government officials and agencies and community and trade associations. The purpose of this brief is to assist the court in considering how a decision in this case may impact insureds and insurers beyond the parties here.

An insured Kentucky business in this case was compelled *sua sponte* by a lower court to reimburse its insurer for substantial legal fees expended in a multi-year legal proceeding. That significant and erroneous holding could have a dramatic financial impact on insured businesses large and small *and* individuals in the Kentucky for years to come. As such, we respectfully seek to offer this Court additional points for consideration including relevant case law from sister jurisdictions and public policy reasons articulating why the rule adopted by the Court of Appeals will hurt business and individual Kentucky policyholders, both large and small.

As an official consumer representative to the National Association of Insurance Commissioners, UP has engaged for many years with Kentucky's insurance regulator Sharon Clark. UP is an information resource on sales, coverage, claims and litigation-related issues pertaining to the full range of insurance products with a special focus on property/casualty matters. UP is a member of the Federal Advisory Committee on Insurance to the U.S. Treasury, and a regular participant in the proceedings of the National Association of Insurance Legislators. Active in disaster-impacted regions, UP has Platinum status on the Guidestar charity rating platform. In the past year, over 600,000 Americans visited the libraries, reports and resource materials available on UP's website.

A wide range of policyholders and stakeholders communicate on a regular basis with UP. UP routinely conducts consumer surveys and collaborates with stakeholders to monitor the insurance marketplace and the claim and coverage issues that end up in litigation. Since 1992 UP has sought to assist courts across the nation by submitting *amicus* briefs that are primarily drafted by volunteers *pro bono*. UP's *amicus curiae* briefs have been cited favorably by the United States Supreme Court in *Humana, Inc. v. Forsyth*, 525

U.S. 299 (1999), and numerous state Supreme Courts. *See Sproull v. State Farm Fire & Casualty Company*, 2020 IL App (5th) 180577, 172 N.E.3d 1186 (Ill. 2020); *Vandenberg v. Superior Court*, 982 P.2d 229 (Cal. 1999); *TRB Invs., Inc. v. Fireman's Fund Ins. Co.*, 145 P.3d 472 (Cal. 2006). UP has appeared in cases involving Kentucky insurance issues. *See Hicks v. State Farm Fire and Casualty Company*, 965 F.3d 452, 455 (6th Cir. 2020); *Knotts v. Zurich Ins. Co.*, 197 S.W.3d 512 (Ky. 2006); and *Ky. Farm Bureau Mut. Ins. Co. v. Rodgers*, 179 S.W.3d 815 (Ky. 2005).

In this matter, UP seeks to help the Court in its decision that will impact Kentuckians far into the future. As a consumer advocate, UP is concerned about the ramifications to individual and commercial insureds from the Court of Appeals' ruling permitting insurers to recoup previously paid defense costs from their insureds. UP's *amicus curiae* brief should prove helpful to the Court in equitably resolving this case.¹

WHEREFORE, United Policyholders respectfully moves for leave to file a brief as *amicus curiae* and tenders said brief with this motion.

Respectfully submitted,



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¹ Please note UP's *amicus curiae* brief was not authored in whole or part by counsel for either party. Further, no monetary contribution was made by counsel for either party to fund the preparation or submission of the brief.

CERTIFICATE OF SERVICE

I certify that on the 8th day of November 2021, the original foregoing motion with attached *amicus* brief and ten copies of thereof were served via U.S. Registered Mail on Kelly Stephens, Clerk of the Supreme Court of Kentucky, State Capitol, Room 235 700 Capital Ave., Frankfort, KY 40601-3415, and one copy via Mail on the following: Kimberly S. McCann, W. Mitchell Hall Jr., VanAntwerp Attorneys, LLP, 1544 Winchester Avenue, 5th Floor, Ashland, KY 41105-1111; Perry M. Bentley, Todd S. Page, Stoll Keenon Ogden PLLC, 300 West Vine Street, Suite 2100, Lexington, KY 40507; Jamie Wilhite Dittert, Sturgill, Turner, Barker & Moloney, PLLC, 333 West Vine Street, Suite 1500, Lexington, Kentucky 40507; Jonathan D. Hacker, O'Melveny & Myers LLP, 1625 Eye Street, N.W., Washington, D.C. 20006; Jeffrey Michael Cohen, Carlton Fields Jordan, Burt, PA, 100 S.E. Second Street, Suite 4200, Miami, FL 33131; D.C. Offutt, Jr., Offutt Nord Burchett, PLLC, 949 Third Avenue, Suite 300, Huntington, WV 25701; Charles E. Spevacek, Meagher & Geer, PLLP, 33 South Sixth Street, Suite 4400, Minneapolis, MN 55402; The Honorable George W. Davis, III, Chief Judge, Boyd Circuit Court, Second Division, 2805 Louisa Street, Catlettsburg, Kentucky 41129; and Boyd Circuit Court Clerk, Judicial Center, 2805 Louisa Street, P.O. Box 688, Catlettsburg, Kentucky 41129-0688.



Tyler J. Wicker