

No. 20-17422

---

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

---

CHATTANOOGA PROFESSIONAL BASEBALL LLC, ET AL.  
*Plaintiffs-Appellants,*

v.

NATIONAL CASUALTY COMPANY, ET AL.  
*Defendants-Appellees.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA  
No. 2:20-cv-01312-DLR  
HON. DOUGLAS L. RAYES

---

**APPLICATION FOR LEAVE TO FILE AMICUS BRIEF AND BRIEF OF  
AMICUS CURIAE UNITED POLICYHOLDERS  
IN SUPPORT OF APPELLANTS' MOTION FOR PANEL REHEARING  
AND REHEARING *EN BANC***

---

AMBER S. FINCH  
NICOLAS A. PAPPAS  
KATHERINE J. ELLENA  
REED SMITH LLP  
355 SOUTH GRAND AVE.  
SUITE 2900  
LOS ANGELES, CA 90071  
(213) 457-8000  
afinch@reedsmith.com  
npappas@reedsmith.com  
kellena@reedsmith.com

JOHN N. ELLISON  
RICHARD P. LEWIS  
REED SMITH LLP  
599 LEXINGTON AVENUE  
NEW YORK, NY 10022  
(212) 521-5400  
jellison@reedsmith.com  
rlewis@reedsmith.com

*Attorneys for Amicus Curiae*

---

## **CORPORATE DISCLOSURE STATEMENT**

United Policyholders (“UP”) is a nonprofit, 501(c)(3) corporation and has no public ownership.

**TABLE OF CONTENTS**

|  | <b>Page</b> |
|--|-------------|
| APPLICATION FOR PERMISSION TO FILE <i>AMICUS CURIAE</i> BRIEF .....            | 1           |
| LEGAL STANDARD FOR APPOINTING <i>AMICUS CURIAE</i> .....                       | 3           |
| STATEMENT ON THE AUTHORSHIP OF THIS BRIEF .....                                | 4           |
| CONSENT TO FILE PURSUANT TO FED. R. APP. PROC. 29(A)(2) .....                  | 4           |
| SOURCE OF AUTHORITY TO FILE PURSUANT TO FED. R. APP. PROC.<br>29(A)(4)(D)..... | 4           |
| BRIEF OF <i>AMICUS CURIAE</i> .....  | 5           |
| STATEMENT OF INTEREST OF THE <i>AMICUS CURIAE</i> .....                        | 5           |
| STATEMENT OF THE CASE.....   | 5           |
| ARGUMENT .....   | 6           |
| CONCLUSION.....  | 14          |

**TABLE OF AUTHORITIES**

|   | <b>Page(s)</b> |
|---|----------------|
| <b>Cases</b>  |                |
| <i>Am. Alliance Ins. Co. v. Keleket X-Ray Corp.</i> ,<br>248 F.2d 920 (6th Cir. 1957) .....   | 12             |
| <i>Bd. of Educ. v. Int’l Ins. Co.</i> ,<br>720 N.E.2d 622 (Ill. App. Ct. 1999) .....  | 12             |
| <i>Chattanooga Prof’l Baseball LLC v. Nat’l Cas. Co.</i> ,<br>Case No. 20-17422, 2021 U.S. App. LEXIS 29632 (9th Cir. Aug.<br>11, 2021) ..... | 6              |
| <i>Columbiaknit, Inc. v. Affiliated FM Ins. Co.</i> ,<br>Case No. 98-434-HU, 1999 WL 619100 (D. Or. Aug. 4, 1999) .....                       | 12             |
| <i>Gen. Mills, Inc. v. Gold Medal Ins. Co.</i> ,<br>622 N.W.2d 147 (Minn. Ct. App. 2001).....   | 12             |
| <i>Gregory Packaging, Inc. v. Travelers Prop. Cas. Co.</i> ,<br>Case No. 2:12-cv-04418, 2014 WL 6675934 (D.N.J. Nov. 25,<br>2014) .....       | 13             |
| <i>Henri’s Food Prods. Co. v. Home Ins. Co.</i> ,<br>474 F. Supp. 889 (E.D. Wis. 1979) .....  | 12             |
| <i>Hoptowit v. Ray</i> ,<br>682 F.2d 1237 (9th Cir. 1982) .....   | 3              |
| <i>HotChalk, Inc. v. Scottsdale Ins. Co.</i> ,<br>736 Fed. App’x 646 (9th Cir. 2018) .....  | 3              |
| <i>Ins. Co. of N. Am. v. Elec. Purification Co.</i><br>67 Cal.2d 679 (1967) .....   | 1              |
| <i>Joy Technologies, Inc. v. Liberty Mutual Insurance Co.</i> ,<br>421 S.E.2d 493 (W. Va. 1992).....  | 5, 8, 9        |
| <i>Miller v. Republic Nat’l Life Ins. Co.</i> ,<br>714 F.2d 958 (9th Cir. 1983) .....   | 1              |

*Miller-Wohl Co. v. Commissioner of Labor & Industry*,  
694 F.2d 203 (9th Cir. 1982) .....3

*Morton International, Inc. v. General Accident Insurance Co.*,  
629 A.2d 831 (N.J. 1993) .....*passim*

*Office Depot, Inc. v. AIG Specialty Ins. Co.*,  
Case No. 17-55125, 2018 U.S. App. LEXIS 12191 (9th Cir. 2018).....3

*Oregon Shakespeare Festival Ass’n v. Great Am. Ins. Co.*,  
Case No. 1:15-cv-01932-CL, 2016 WL 3267247 (D. Or. June 7,  
2016), *vacated by joint stipulation*, 2017 WL 1034203 (Mar. 6,  
2017) .....13

*Pillsbury Co. v. Underwriters at Lloyd’s, London*,  
705 F. Supp. 1396 (D. Minn. 1989).....12

*Probuilders Specialty Ins. Co. v. Phoenix Contracting, Inc.*,  
743 Fed. App’x 876 (9th Cir. 2018) .....3

*Prudential Prop. & Cas. Ins. Co. v. Lillard-Roberts*,  
Case No. CV-01-1362-ST, 2002 WL 31495830 (D. Or. June 18,  
2002) .....12

*Richardson v. Nationwide Mut. Ins. Co.*,  
826 A.2d 310 (D.C. 2003), *vacated pursuant to settlement*, 844  
A.2d 344 (D.C. 2004) .....8

*Schlamm Stone & Dolan, LLP v. Seneca Ins. Co.*,  
Case No. 603009/2002, 2005 WL 600021 (N.Y. Sup. Ct. Mar. 16,  
2005) .....12

*Sentinel Mgmt. Co. v. Aetna Cas. & Sur. Co.*,  
615 N.W.2d 819 (Minn. 2000) .....12

*W. Fire Ins. Co. v. First Presbyterian Church*,  
437 P.2d 52 (Colo. 1968).....12

*Yale Univ. v. CIGNA Ins. Co.*,  
224 F. Supp. 2d 402 (D. Conn. 2002).....12

**Rules**

Fed. R. App. P. 29(a)(2).....4

Fed. R. App. P. 29(a)(4)(D) .....4

**Other Authorities**

4 Am. Jur. 2d *Amicus Curiae* § 6 (2004) .....3

*American Law Institute, Restatement of the Law, Liability Insurance* §  
2, cmt. c (2019) .....1

Lucca de Paoli, et al., *Insurance Unlikely to Cushion Coronavirus*  
*Losses – But There Are Exceptions*, *INS. J.*, Mar. 4, 2020 .....11

Stephen M. Shapiro *et al.*, *SUPREME COURT PRACTICE* 753 (10th ed.  
2013) .....3

Todd C. Frankel, *Insurers Knew the Damage a Viral Pandemic could*  
*Wreak on Businesses. So They Excluded Coverage*, *WASH. POST*,  
Apr. 2, 2020 .....11

## **APPLICATION FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF**

UP respectfully applies for permission to file the attached *Amicus Curiae* Brief in support of Appellants, and avers as follows:

Policyholders across the country – like Appellants – purchase insurance policies to protect against unexpected disasters. Although insurance companies are in business to make a profit for their shareholders, it is most crucial that insurance fulfill its dominant purpose “to indemnify the insured in case of loss.” *Ins. Co. of N. Am. v. Elec. Purification Co.*, 67 Cal.2d 679, 689 (1967); *see also American Law Institute, Restatement of the Law, Liability Insurance* § 2, cmt. c (2019) (insurance-policy interpretation helps “effect[] the dominant protective purpose of insurance”).

Since the pandemic began in 2020, UP has played an important role in assisting business owners, whose operations have been significantly impacted by SARS-CoV-2 and resulting public safety orders, with their claims for insurance coverage. But the application and interpretation of insurance contracts requires special judicial handling. Insurance contracts are adhesive in nature, which compels judicial balancing and places the burden squarely on the insurer – as the drafters of the contract – to show that their interpretation of the contract terms is the only reasonable interpretation. *See Miller v. Republic Nat’l Life Ins. Co.*, 714 F.2d 958, 961 (9th Cir. 1983) (“[I]nsurance policies are ‘contracts of adhesion,’ i.e.,

standardized contracts prepared entirely by one party to the transaction for acceptance by the other.”).

The public at large has a significant interest in this matter, which is being actively litigated in other SARS-CoV-2 coverage disputes across the country, and this Court’s disposition of this matter has the potential to affect thousands of policyholders, not only in the Ninth Circuit, but nationwide. Due to the public interest and the importance of this Court’s decision, UP has a special interest in fulfilling the traditional role of *amicus curiae* by supplementing the efforts of counsel and drawing the Court’s attention to law that may have escaped consideration. The Court will benefit by reviewing the perspective of UP, who has considerable experience in briefing courts on insurance coverage issues and an interest in ensuring a proper ruling under the well-established principles of policy interpretation.

Accordingly, UP respectfully seeks to assist this Court in relation to its decision, that will be influential around the country on insurance coverage for SARS-CoV-2 (and on policy interpretation more generally), which will provide guidance to other federal courts as they attempt to determine how these important issues should be decided under state law.

### **LEGAL STANDARD FOR APPOINTING *AMICUS CURIAE***

“The district court has broad discretion to appoint *amicus curiae*.” *Hoptowitz v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982). The purpose of an *amicus curiae* is “to call the court’s attention to law or facts or circumstances in a matter then before it that may otherwise escape consideration.” 4 Am. Jur. 2d *Amicus Curiae* § 6 (2004). An *amicus curiae* “assist[s] in a case of general public interest, supplement[s] the efforts of counsel, and draw[s] the court’s attention to law that escaped consideration.” *Miller-Wohl Co. v. Commissioner of Labor & Industry*, 694 F.2d 203, 204 (9th Cir. 1982). As commentators have explained, an *amicus* is often in a superior position to focus the court’s attention on the broad implications of various possible rulings. Stephen M. Shapiro *et al.*, SUPREME COURT PRACTICE 753 (10th ed. 2013).

The Ninth Circuit frequently grants leave to nonprofit organizations like UP with industry familiarity and perspective that may assist in the resolution of a case. *See Office Depot, Inc. v. AIG Specialty Ins. Co.*, Case No. 17-55125, 2018 U.S. App. LEXIS 12191 (9th Cir. 2018) (granting UP’s motion for leave to file *amicus curiae* brief); *Probuilders Specialty Ins. Co. v. Phoenix Contracting, Inc.*, 743 Fed. App’x 876, 877 n.1 (9th Cir. 2018) (same); *HotChalk, Inc. v. Scottsdale Ins. Co.*, 736 Fed. App’x 646, 649 n.4 (9th Cir. 2018) (same).

**STATEMENT ON THE AUTHORSHIP OF THIS BRIEF**

UP confirms that: (1) no party's counsel authored any part of this brief; (2) no party or party's counsel contributed any money to fund preparation of submission of this brief; and (3) no person, other than UP and UP's counsel, contributed any money to prepare or submit this brief.

**CONSENT TO FILE PURSUANT TO FED. R. APP. PROC. 29(a)(2)**

Counsel for Appellees declined to consent to the filing of this *amicus curiae* brief. UP has requested leave from this Court to file. Fed. R. App. Proc. 29(a)(2).

**SOURCE OF AUTHORITY TO FILE PURSUANT TO FED. R. APP. PROC. 29(a)(4)(D)**

UP's executive management has authority to authorize filing this *amicus curiae* brief, and has done so. Fed. R. App. Proc. 29(a)(4)(D).

**BRIEF OF AMICUS CURIAE**

**STATEMENT OF INTEREST OF THE AMICUS CURIAE**

UP is a non-profit organization whose mission is to serve as an effective voice and a source of information and guidance for insurance consumers around the country. UP is funded by donations and grants. It does not sell insurance or accept money from insurance companies.

Unlike insurers, individual policyholders are not repeat players on insurance-coverage issues. UP works to provide an intellectual counterweight to the claims of the insurance industry, in order to help facilitate the evenhanded development of insurance law. During the COVID-19 pandemic, UP’s commitment to advocating for policyholders’ rights to coverage for their devastating losses is more vital than ever. Here, UP seeks to assist the Court on an issue of immense public importance – coverage for losses caused by SARS-CoV-2 and COVID-19 – by identifying arguments and authorities that have escaped the Courts’ attention to date.

**STATEMENT OF THE CASE**

A rehearing or a rehearing *en banc* is necessary for several reasons, which will be addressed by Appellants. UP files this brief in support of rehearing on a narrow issue, being this Court’s statement that the decision in *Joy Technologies, Inc. v. Liberty Mutual Insurance Co.*, 421 S.E.2d 493 (W. Va. 1992), which recognized the doctrine of regulatory estoppel, was distinguishable because “the Teams do not allege that the Insurers, themselves, are attempting to rely on an interpretation of the

virus exclusion that is contrary to one they earlier advocated.” *Chattanooga Prof'l Baseball LLC v. Nat'l Cas. Co.*, Case No. 20-17422, 2021 U.S. App. LEXIS 29632, at \*8 (9th Cir. Aug. 11, 2021). As demonstrated below, this statement fundamentally misconstrues the doctrine of regulatory estoppel. As such, this statement, from a United States Court of Appeal, will have a broad impact on efforts by policyholders to secure insurance coverage for losses associated with SARS-CoV-2, the COVID-19 Pandemic, and consequent orders of civil authorities. Outside the context of a pandemic, the Court’s statement dangerously complicates and confuses an important and long-standing doctrine of state law.

Accordingly, UP respectfully submits this *amicus curiae* brief in support of Appellants’ Petition for Panel Rehearing and Rehearing *En Banc*.

### **ARGUMENT**

The process by which insurance industry drafting organizations draft and seek approval to sell standard-form insurance policy language is set forth in detail in *Morton International, Inc. v. General Accident Insurance Co.*, 629 A.2d 831 (N.J. 1993). First, typically based on their review of evolving case law, the insurance industry drafting organizations will identify a change they wish to make to standard forms, such as an exposure they wish to exclude, and will draft the change. *Id.* at 849-50. The insurance industry drafting organizations, as agents for virtually all of the major insurance industry organizations doing business throughout the United

States, will then seek regulatory approval, typically by submitting the same change along with an identical explanatory memorandum, to each of the state regulators, and will meet or correspond with individual regulators as necessary. *Id.* at 851. The insurance industry drafting organizations will then negotiate with the insurance regulators with regard to the changes they seek to make and whether those changes will require adjustment of insurance premium rates for any impact on the coverage being sold to policyholders. *Id.* at 851-52.

For present purposes, two points are critical. First, once approval is obtained, the standard-form is sold throughout the United States as is, with no practical ability of individual policyholders to negotiate changes. *Id.* at 851. The *Morton* court explained the insurance industry's efforts to seek approval to standard-forms, through the Insurance Rating Board ("IRB"), one of the predecessor organizations to the current Insurance Services Office ("ISO"), in relation to adding a pollution exclusion to the standard-form comprehensive general liability ("CGL") policy:

In considering the IRB's explanatory memorandum concerning the effect of the pollution-exclusion clause – which the record suggests was the only explanation offered to New Jersey insurance officials – we accord special significance to the process by which that clause gained approval in New Jersey and other states. Realistically, once the clause gained regulatory approval, it was uniformly adopted as an endorsement to the standard form CGL policies that were issued to innumerable commercial enterprises and governmental agencies for more than a decade. The abundant case law called to our attention by counsel for all parties may be regarded merely as an illustrative sample of the virtually universal inclusion of the standard clause, or one of its derivatives, in CGL policies issued throughout the United States. *Of*

*course, after regulatory approval the specific provisions of the pollution-exclusion clause ordinarily were not negotiable by purchasers of CGL policies. As some commentators observe, the typical commercial insured rarely sees the policy form until after the premium has been paid. Ballard and Manus, supra, 75 Cornell L. Rev. at 621; W. David Slawson, Mass Contracts: Lawful Fraud in California, 48 S. Cal. L. Rev. 1, 12 (1974). Accordingly, to the extent that the pollution-exclusion clause ever was subjected to arms-length evaluation by interests adverse to the insurance industry, that evaluation occurred only when the clause was submitted to and reviewed by state regulatory authorities.*

629 A.2d at 851-52 (emphasis added); *see also Richardson v. Nationwide Mut. Ins. Co.*, 826 A.2d 310, 320 (D.C. 2003), *vacated pursuant to settlement*, 844 A.2d 344 (D.C. 2004) (noting that, because policyholders had “no role in the drafting of such contracts,” the only “arms-length evaluation” of the policy language by “interests adverse to the insurance industry” was from “state regulatory authorities”).

Second, because the drafting organizations seek approval for a standard-form as agents on behalf of all of their member companies for sale throughout the United States, statements by those drafting organizations to any regulator as to the content of the standard form bind all of the member companies everywhere. This is why the *Morton* court looked to the IRB’s statements on behalf of its members in New Jersey, Georgia, West Virginia, Kansas, Puerto Rico, *etc.* *See Morton*, 629 A.2d at 851-54.

In *Joy*, the Supreme Court of Appeals of West Virginia considered the application of a “sudden and accidental” pollution exclusion drafted and presented to state insurance regulators in 1970. The insurance company took the position that

this exclusion barred gradual pollution. *Joy*, 421 S.E.2d at 497. In West Virginia, as elsewhere, the insurance industry drafting organizations informed the regulator that the exclusion was a clarification of pollution coverage, which was generally not covered under the present form because it was “expected or intended” and thus did not stem from an “accident.” *Id.* at 499. The Court attributed the representations of the insurance industry drafters to the insurance company, finding that the basic policy form covered gradual pollution, but that the “expected or intended” language and the “sudden and accidental” pollution exclusion both barred coverage for intentional pollution. *Id.* at 499. In *Joy*, then, at issue were statements to regulators and to courts that were in conflict.

But regulatory estoppel does not depend upon statements that conflict; rather, it is grounded in fraud of the type that would be actionable in relation to any individual contract. In *Morton*, the court held the standard-form “sudden and accidental” pollution exclusion to be clear and unambiguous, but barred insurance companies from relying upon it on the basis of misrepresentations it made to regulators. 629 A.2d at 875-76. The *Morton* court examined the standard insurance industry explanatory memoranda submitted to state insurance regulators in 1970 concerning the scope of the so-called “sudden and accidental” pollution exclusion added in 1970 to the 1966 “occurrence” policy. *Id.* at 874-75. The *Morton* court determined that the insurance industry, through its agents, IRB and the Mutual

Insurance Rating Bureau (“MIRB”), represented to state insurance regulators in 1970 that the “sudden and accidental” pollution exclusion merely clarified pre-existing insurance coverage. *Id.* The *Morton* court also found that in 1970 the insurance industry had failed to disclose its intent to restrict coverage for gradual pollution damage. *Id.* at 875-76. The court determined that, “[h]aving profited from that nondisclosure by maintaining pre-existing rates for substantially-reduced coverage, the industry justly should be required to bear the burden of its omission by providing coverage at a level consistent with its representations to regulatory authorities.” *Id.* at 876.

As a matter of fact, using nearly identical verbiage about “clarifying” the scope of coverage provided, what the drafting organizations told regulators in the course of securing regulatory approval for the Virus or Bacteria Exclusion was indistinguishable from what drafting organizations told regulators in the early 1970s in relation to the “sudden and accidental” pollution exclusion: the current policy does not cover damage/loss from virus or bacteria, the exclusion is thus a clarification, and there is no need to adjust rates. Regulatory estoppel does not require a change in position; rather, it is grounded on false representations to regulators. What ISO told regulators in 2006 – that the Virus or Bacteria exclusion was a clarification because the standard policy did not cover loss from “disease causing agents” – was false.

The insurance industry and the ratings organizations were well aware that policyholders had made successful claims for loss and damage from the presence of SARS coronavirus in the early 2000s; indeed, this was the primary motivation for ISO and AAIS to draft the Virus or Bacteria Exclusion in 2006.<sup>1</sup> As set forth in the Washington Post, in relation to coverage for COVID-19 claims:

The forced closure of businesses nationwide because of the novel coronavirus would seem to be the perfect scenario for filing a “business interruption” insurance claim.

But most companies will probably find it difficult to get an insurance payout because of policy changes made after the 2002-2003 SARS outbreak, according to insurance experts and regulators.

SARS, which infected 8,000 people mostly in Asia and is now seen as foreshadowing the current pandemic, led to millions of dollars in business-interruption insurance claims. Among the claims was a \$16 million payout to one hotel chain, Mandarin Oriental International.<sup>2</sup>

Not only did the insurance industry know that standard property insurance forms historically had responded to claims from disease-causing agents, it knew that members of the insurance industry had paid claims arising from a coronavirus when the industry sought regulatory approval for changes to its standard forms in 2006.

This represented the practice of insurance companies. That practice was no

---

<sup>1</sup> Lucca de Paoli, et al., *Insurance Unlikely to Cushion Coronavirus Losses – But There Are Exceptions*, INS. J., Mar. 4, 2020.

<sup>2</sup> Todd C. Frankel, *Insurers Knew the Damage a Viral Pandemic could Wreak on Businesses. So They Excluded Coverage*, WASH. POST, Apr. 2, 2020.

doubt a product of the law. By 2006, insurers were well aware that their property insurance policies had been found to cover a variety of claims involving disease causing agents. The cases putting the industry “on notice” were legion and spanned decades:

Bacteria (*Cooper v. Travelers Indem. Co.*, Case No. C-01-2400, 2002 WL 32775680, at \*5 (N.D. Cal. Nov. 4, 2002); *see also Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823, 827 (3d Cir. 2005));

Radioactive dust (*Am. Alliance Ins. Co. v. Keleket X-Ray Corp.*, 248 F.2d 920, 925 (6th Cir. 1957));

Noxious air particles (*Schlamm Stone & Dolan, LLP v. Seneca Ins. Co.*, Case No. 603009/2002, 2005 WL 600021, at \*3-\*5 (N.Y. Sup. Ct. Mar. 16, 2005));

Lead (*Yale Univ. v. CIGNA Ins. Co.*, 224 F. Supp. 2d 402, 413 (D. Conn. 2002));

Asbestos (*Yale Univ. v. CIGNA Ins. Co.*, 224 F. Supp. 2d 402, 413 (D. Conn. 2002); *Bd. of Educ. v. Int'l Ins. Co.*, 720 N.E.2d 622, 625–26 (Ill. App. Ct. 1999); *Sentinel Mgmt. Co. v. Aetna Cas. & Sur. Co.*, 615 N.W.2d 819, 825–26 (Minn. 2000));

Mold (*Prudential Prop. & Cas. Ins. Co. v. Lillard-Roberts*, Case No. CV-01-1362-ST, 2002 WL 31495830, at \*8-\*9 (D. Or. June 18, 2002); *Columbiaknit, Inc. v. Affiliated FM Ins. Co.*, Case No. 98-434-HU, 1999 WL 619100, at \*7–\*8 (D. Or. Aug. 4, 1999));

Mildew (*Columbiaknit, Inc. v. Affiliated FM Ins. Co.*, Case No. 98-434-HU, 1999 WL 619100, at \*7–\*8 (D. Or. Aug. 4, 1999));

“[H]ealth-threatening organisms” (*Pillsbury Co. v. Underwriters at Lloyd's, London*, 705 F. Supp. 1396, 1401 (D. Minn. 1989));

Vaporized agricultural chemicals (*Henri's Food Prods. Co. v. Home Ins. Co.*, 474 F. Supp. 889, 892 (E.D. Wis. 1979));

Gasoline vapors (*W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52 (Colo. 1968));

Pesticides (*Gen. Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147,

152 (Minn. Ct. App. 2001).

This fraud simply must have consequences.

For example, imagine if ISO had in 2015 introduced an exclusion for “Loss or Damage from Temporary Infusion of Substances that Dissipate Naturally,” and informed regulators that standard-forms have never covered loss or damage from naturally-dissipating substances because they do not require “repair or replacement” of any property. In those negotiations, so as to avoid a reduction in premium to match a reduction in coverage, the insurance industry drafters would have concealed from regulators the cases that found coverage in such circumstances. *See, e.g., Gregory Packaging, Inc. v. Travelers Prop. Cas. Co.*, Case No. 2:12-cv-04418, 2014 WL 6675934, at \*5-6 (D.N.J. Nov. 25, 2014) (concluding that “property can sustain physical loss or damage without experiencing structural alteration,” that “the heightened ammonia levels rendered the facility unfit for occupancy until the ammonia could be dissipated,” and therefore that the ammonia discharge caused direct physical loss or damage to the plant); *Oregon Shakespeare Festival Ass’n v. Great Am. Ins. Co.*, Case No. 1:15-cv-01932-CL, 2016 WL 3267247, at \*5-6 (D. Or. June 7, 2016), *vacated by joint stipulation*, 2017 WL 1034203 (Mar. 6, 2017) (smoke from wildfires). Such a material non-disclosure must have consequences. It would certainly have consequences if an insurance company defrauded one policyholder in

negotiations over one policy. The insurance industry should not be insulated here, where the fraud impacts tens of thousands of policyholders.

**CONCLUSION**

The Court should grant the motion for rehearing and rehearing *en banc*.

REED SMITH LLP

Dated: October 25, 2021

/s/ Amber S. Finch  
*Attorneys for Amicus Curiae*  
UNITED POLICYHOLDERS

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

**Form 8. Certificate of Compliance for Briefs**

*Instructions for this form:*

<http://www.ca9.uscourts.gov/forms/form08instructions.pdf>

**9th Cir. Case Number(s)**           No. 20-17422          

I am the attorney or self-represented party.

**This brief contains 3,089 words**, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief (*select only one*):

complies with the word limit of Cir. R. 32-1.

is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

complies with the longer length limit permitted by Cir. R. 32-2(b) because (*select only one*):

it is a joint brief submitted by separately represented parties;

a party or parties are filing a single brief in response to multiple briefs; or

a party or parties are filing a single brief in response to a longer joint brief.

complies with the length limit designated by court order dated \_\_\_\_\_.

is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

**Signature:**           /s/Amber S. Finch           **Date**           October 25, 2021

### **CERTIFICATE OF SERVICE**

On October 25, 2021, a copy of the foregoing brief was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the Court's appellate CM/ECF system, and that service will be accomplished by the appellate CM/ECF system.

/s/ Amber S. Finch  
Amber S. Finch