

**NO. A166946**  
**IN THE COURT OF APPEAL OF THE STATE OF**  
**CALIFORNIA**  
**FIRST APPELLATE DISTRICT, DIVISION 5**

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NALINI KUMAR ET AL.,  
*Plaintiffs and Respondents,*

v.

NATIONWIDE MUTUAL INSURANCE COMPANY,  
*Defendant and Appellant.*

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On Appeal from the Superior Court for the County of Alameda  
Honorable Tara M. Desautels  
Case No. 22-CV-011144

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**UNITED POLICYHOLDERS' APPLICATION FOR LEAVE TO**  
**FILE AMICUS CURIAE BRIEF IN SUPPORT OF**  
**PLAINTIFFS-RESPONDENTS**

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**APPLICATION FOR LEAVE TO FILE  
AMICUS CURIAE BRIEF**

Pursuant to California Rule of Court 8.200(c), United Policyholders (“UP”) respectfully applies for this Court’s permission to file the accompanying amicus curiae brief in support of Plaintiffs-Respondents.

**STATEMENT OF INTEREST OF AMICUS CURIAE UNITED  
POLICYHOLDERS**

Founded in 1991, UP is a highly respected 501(c)(3) non-profit organization based in California that educates, assists, and is a voice for the interests of insurance policyholders with a special focus on disaster preparedness and recovery. In support of its mission, UP assists and informs consumers, and coordinates with state regulators, public officials and agencies, other non-governmental organizations, lenders, insurance professionals, claim professionals, legal professionals, and trade associations to problem solve on matters related to insurance.

Grants, donations, and volunteers support UP’s work in three program areas: *Roadmap to Recovery*—insurance claim guidance, tools, and resources for individuals and businesses in the aftermath of wildfires, floods, earthquakes, hurricanes and isolated catastrophes; *Roadmap to Preparedness*—outreach and education aimed at helping renters, home owners, and business owners keep their assets insured and be resilient to adversity; and *Advocacy & Action*—advocating for fair sales and claim practices as well as policy and legal outcomes that uphold policyholders’ reasonable expectations of coverage and the principle of indemnification that underlies our insurance system.

California property owners have been regularly seeking guidance from United Policyholders on their rights and duties related to Examinations Under Oath starting with the 1991 Oakland/Berkeley firestorm and continuing through other catastrophic wildfires in 2003, 2007, 2009, 2017, 2018 and 2020, the 1994 Northridge Earthquake, mudslides and landslides, flooding events, and catastrophes of all shapes and sizes.

UP serves on the Federal Advisory Committee on Insurance, which briefs the Federal Insurance Office and, in turn, the U.S. Treasury Department. UP's Executive Director has been an official consumer representative to the National Association of Insurance Commissioners since 2009. In these roles, UP is a conduit for information on insurance policy language, sales, and claim handling practices that often undermine consumers' reasonable expectations of coverage. Consumer reports of abusive practices by insurers and their counsel in connection with Examinations Under Oath compelled UP to create informational publications about the process and engage in a California legislative reform effort in 2001.

Since 1991, UP has filed numerous amicus briefs in federal and state appellate courts across the country. The United States Supreme Court, the California Supreme Court, and other state supreme courts have cited UP's amicus briefs in their opinions. (*See, e.g., Humana Inc. v. Forsyth* (1999) 525 U.S. 299, 314 [favorably citing UP's amicus brief]; *Pitzer Coll. v. Indian Harbor Ins. Co.* (2019) 8 Cal.5th 93, 104-105 [favorably citing UP's amicus brief]; *Ass'n of Cal. Ins.*

*Cos. v. Jones* (2017) 2 Cal.5th 376, 382-383 [favorably citing UP studies].)<sup>1</sup>

UP continues its mission of supporting policyholders through its amicus efforts here in support of Respondents.

### **UP’S AMICUS CURIAE BRIEF WILL ASSIST THIS COURT**

Ensuring that insurance consumers are treated fairly is central to UP’s core mission. UP hosts extensive libraries of educational materials including an online library of claim tips, sample letters, reports, instructional videos, a professional help directory, and articles written by leading experts in personal finance, construction, and the law. Although UP does not represent individuals in claim or litigation matters, consumers use our “Ask an Expert” and other channels to report issues and provide us with claim-related documents on a regular basis.

Additionally, UP staff and volunteers host numerous workshops, survivor forums, and legal clinics for individuals who have suffered dwelling and personal property losses. UP is uniquely suited to provide information and insights relating to the roadblocks experienced by insurance consumers both generally and in the context of the specific Examination Under Oath procedure at issue in this appeal.

In 2001, in response to widespread abuses of the Examination Under Oath and Appraisal process in the aftermath of large natural disasters including the 1991 Oakland firestorm and the 1994

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<sup>1</sup> A list of amicus curiae briefs filed by UP can be found at <https://www.uphelp.org/resources/amicus-briefs>.

Northridge earthquake, UP participated in negotiations in the California Legislature that resulted in amendments to the Insurance Code to strengthen policyholder protections while still allowing insurers to conduct necessary fact-finding on claims.

Among the protections provided by the 2001 amendments is the text of Insurance Code § 2071.1. This section is in essence a “Bill of Rights” for Examinations Under Oath, providing process protections for policyholders who are called to provide testimony in an examination conducted by an attorney retained by an insurance company. UP’s proposed amicus brief will assist this Court by providing history and context relating to why the specific right given to policyholders to “record the examination proceedings in their entirety” provided by Section 2071.1(a)(4) encompasses the video recording of insurance company representatives and attorneys and accordingly why the Judgment of the Superior Court should be affirmed.

### **RULE 8.200(c)(3) DISCLOSURE**

Consistent with California Rule of Court 8.200(c)(3), UP states that no party or any counsel for any party authored this amicus brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of this brief. No other person or entity made a monetary contribution to fund the preparation or submission of the brief other than the amicus curiae and its counsel.

### **CONCLUSION**

UP respectfully asks the Court to grant this application and permit UP to file the accompanying amicus curiae brief.

DATE: June 5, 2023    Respectfully submitted,

UNITED POLICYHOLDERS

By: /s/ Richard Oatis

Richard B. Oatis

*Attorney for Amicus Curiae*

*United Policyholders*

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**[PROPOSED] AMICUS CURIAE BRIEF OF UNITED**  
**POLICYHOLDERS IN SUPPORT OF PLAINTIFFS-**  
**RESPONDENTS**

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES..... 9

INTRODUCTION..... 10

ARGUMENT..... 11

    A.    California Insurance Law Prioritizes Protecting Insureds  
          ..... 11

    B.    Examinations Under Oath, While A Legitimate Part of  
          Claims Investigation, Are Sometimes Used As An  
          Intimidation Tactic..... 14

CONCLUSION..... 17

CERTIFICATE OF COMPLIANCE ..... 18

PROOF OF SERVICE..... 19



## TABLE OF AUTHORITIES

### Cases

<i>20th Century Ins. Co. v. Superior Ct.</i> (2001) 90 Cal.App.4th 1247 .....	13, 16
<i>Bank of the West v. Superior Ct.</i> (1992) 2 Cal.4th 1254 .....	13
<i>Calfarm Ins. Co. v. Deukmejian</i> (1989) 48 Cal.3d 805 .....	12
<i>Delgado v. Heritage Life Ins. Co.</i> (1984) 157 Cal.App.3d 262 .....	13
<i>Egan v. Mut. of Omaha Ins. Co.</i> (1979) 24 Cal.3d 809 .....	12
<i>Garvey v. State Farm Fire &amp; Cas. Co.</i> (1989) 48 Cal.3d 395 .....	13
<i>German All. Ins. Co. v. Lewis</i> (1914) 233 U.S. 389 .....	12
<i>Lungren v. Deukmejian</i> (1988) 45 Cal.3d 727 .....	16
<i>Montrose Chem. Corp. v. Admiral Ins. Co.</i> (1995) 10 Cal.4th 645 .....	13
<i>People v. Valencia</i> (2000) 82 Cal.App.4th 139 .....	16
<i>Pollock v. Fed. Ins. Co.</i> (N.D. Cal. July 14, 2022) No. 21-CV-09975-JCS Dkt. 47 Order Granting Motion to Compel Arbitration.....	14
<i>Powerine Oil Co. v. Superior Ct.</i> (2005) 37 Cal.4th 377 .....	13
<i>Vu v. Prudential Prop. &amp; Cas. Ins. Co.</i> (2001) 26 Cal.4th 1142 .....	12

### Statutes

California Insurance Code § 2071.1(a)(4).....	15
California Insurance Code § 2071.1 .....	11, 16
California Insurance Code § 2071 .....	15

## **INTRODUCTION**

While insurance companies have the right and duty to conduct timely and thorough investigations of the claims their customers submit, they do not have the right to use intimidation and other abusive tactics to do so. The requirement that insurers handle claims fairly is deeply embedded in California statutory and decisional law. As explained below, the trial court's ruling correctly balances consumer and insurer rights in the claims investigation process.

Insurers draft the terms in their policy contracts, field armies of lawyers, largely control the claim process, and can use their superior financial and professional resources to scare, bully, and intimidate claimants. Insurance and the claim process are foreign to the average consumer, and even a well-educated consumer is at a significant disadvantage in the claim process. Enforcing laws that level the playing field and uphold the indemnification purpose of insurance is critical.

While insurance funds are typically the most important and valuable source of recovery help, history has shown those funds do not always flow as they should. Insurance companies are competitive, for-profit businesses, with complicated rules and procedures relating to claims investigation. At the same time, insurance policies are detailed and voluminous contracts of adhesion, confusing to even the most sophisticated of individual consumers. As a consequence, policyholders often do not know the rules or their rights, making them overwhelmed and vulnerable to abuse by the process and by the attorneys retained by insurance companies.

The present appeal arises from insurance claims pursued by Plaintiffs-Respondents relating to a fire loss for Kumar and a water loss for Myasnyankin. In both claims: Nationwide demanded that the claimant submit to an Examination Under Oath pursuant to California Insurance Code § 2071.1; the claimant attempted to have the examination conducted in a reasonable and fair manner by video recording the entire proceedings; Nationwide unreasonably refused to cooperate in those requests; and the parties reached impasses. The pattern of insurance company attorneys and claims investigators using the claims handling process to gain tactical advantages is one that is all too familiar in California and is precisely the type of behavior Section 2071.1 was enacted to prevent.

### **ARGUMENT**

#### **A. California Insurance Law Prioritizes Protecting Insureds**

Before addressing the specific issues relating to Examinations Under Oath and Section 2071.1, United Policyholders (“UP”) respectfully urges this Court to consider the important role the judiciary plays in regulating insurance companies and ensuring a fair and equal playing field in a domain of contract marked by inequality between the parties.

As California courts have recognized, insurance is unlike any other commercial activity. Insurers’ obligations are “rooted in their status as purveyors of a vital service labeled quasi-public in nature. Suppliers of services affected with a public interest must take the public’s interest seriously, where necessary placing it before their

interest in maximizing gains and limiting disbursements.” (*Egan v. Mut. of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 820 [quotations and citations omitted].) Accordingly, the business of insurance is “‘clothed with a public interest,’ and therefore subject ‘to be controlled by the public for the common good.’” (*German All. Ins. Co. v. Lewis* (1914) 233 U.S. 389, 415.)

Furthermore, the relationship between insurers and insureds is “‘inherently unbalanced; the adhesive nature of insurance contracts places the insurer in a superior bargaining position.’” (*Egan v. Mutual of Omaha Ins. Co.*, *supra*, 24 Cal.3d at 820.)

For these reasons, the California legislature and the courts have traditionally viewed the relationship between insurers and insureds with a critical eye. (*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 830 [insurance is “a highly regulated industry”].) Insurance companies, while not fiduciaries *per se*, are held to a higher standard than traditional contracting parties and courts have imposed “special and heightened” duties on insurers, which “arise because of the unique nature of the insurance contract[.]” (*Vu v. Prudential Prop. & Cas. Ins. Co.* (2001) 26 Cal.4th 1142, 1151 [quotations omitted].)

As a result, “the rights and obligations of the insurer cannot be determined solely on the basis of rules pertaining to private contracts negotiated by individual parties of relatively equal bargaining strength.” (*Barrera v. State Farm Mut. Auto. Ins. Co.* (1969) 71 Cal. 2d 659, 669.) Instead, “statutes pertaining to, and contractual provisions contained within, insurance policies must be construed in light of applicable public policy, promoting the protection of the

insured and the public at large.” (*20th Century Ins. Co. v. Superior Ct.* (2001) 90 Cal.App.4th 1247, 1266).

Outside the context of statutory interpretation, there are a variety of examples of California’s focus on protecting the insureds. For example, California requires insuring clauses to be interpreted broadly. (*Montrose Chem. Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, 667, as modified on denial of reh’g (Aug. 31, 1995).) If an insurer attempts to enforce an exclusion or limitation in a policy, that exclusion or limitation is “strictly construed against the insurer and liberally interpreted in favor of the insured.” (*Delgado v. Heritage Life Ins. Co.* (1984) 157 Cal.App.3d 262, 271.) The burden is on the insurer to prove that any such exclusion or limitation applies. (*Garvey v. State Farm Fire & Cas. Co.* (1989) 48 Cal.3d 395, 406.)

While insurance policies are contracts, and many rules of contractual interpretation apply with equal force to policies, if a policy is ambiguous, the reasonable expectations of the insured will be enforced. (*Bank of the West v. Superior Ct.* (1992) 2 Cal.4th 1254, 1265.) If the “reasonable expectations” doctrine does not resolve the ambiguity, the rule of *contra proferentem*, or contra-insurer, provides that “ambiguities are generally construed against the party who caused the uncertainty to exist (i.e., the insurer)[.]” (*Powerine Oil Co. v. Superior Ct.* (2005) 37 Cal.4th 377, 391, as modified (Oct. 26, 2005).)

In short, the insurance relationship, particularly in first-party coverage situations such as this one, is one where the courts have traditionally interpreted statutes and regulations relating to insurance as well as the insurance contracts themselves in favor of insureds, and for good reason. “[T]he object of California insurance law generally,

and statutory incorporation more specifically, is to protect the insured, not the insurer.” (*Pollock v. Fed. Ins. Co.* (N.D. Cal. July 14, 2022) No. 21-CV-09975-JCS Dkt. 47 Order Granting Motion to Compel Arbitration at \*14.)

**B. Examinations Under Oath, While A Legitimate Part of Claims Investigation, Are Sometimes Used As An Intimidation Tactic**

While Examinations Under Oath are a perfectly legitimate part of an insurer’s duty to investigate an insurance claim, they can be foreign, formal, and nerve-wracking experiences for the policyholder. Insurance companies often demand examinations when they suspect fraud or concealment. But even in situations where the insurer does not communicate any suspicion of fraud, many policyholders feel on edge and suspect when called in to answer questions under penalty of perjury. In such situations, an insurance company’s refusal to allow its own attorneys and other representatives to be video recorded serves no meaningful purpose other than to add to the interrogatory and accusatory feel of the examination.

Though intimidation is by no means the purpose of all examinations, overzealous claims handlers, investigators, and attorneys retained by insurance companies all too often deploy Examinations Under Oath for precisely this purpose. And even when there is no bad faith motive on the part of the insurer, attorneys and claims handlers can often fail to consider the impact of an Examination Under Oath (which to them are routine matters) on a person struggling to rebuild their home in the wake of a total loss and

who feels routinely discounted, distrusted, and overwhelmed by the insurance claims process.

The relevant 2001 legislative amendments to California Insurance Code § 2071 came about because of reports of the following types of abusive behavior by insurer counsel in connection with Examinations Under Oath:

- Refusal by insurer counsel to conduct the Examination Under Oath at a convenient time or place;
- Refusal by insurer counsel to allow an insured to raise objections during the Examination Under Oath;
- Unprofessional conduct by insurer counsel such as yelling, accusing, insinuating and frightening insureds to deter them from pursuing their legitimate claims; and
- Issuing overbroad, harassing requests for documents designed to deter and scare the insured.

For these and similar reasons, the California Legislature adopted Section 2071 to curb insurance company delay, obfuscation, and intimidation tactics and specifically articulated the right of an insured to be represented by counsel at an Examination Under Oath and to “record the examination proceedings in their entirety.” (Cal. Ins. Code § 2071.1(a)(4).) The Legislature’s use of the word “entirety” is no accident. The point is to allow the insured to create a neutral and balanced record of *the whole* examination, including the mannerisms, dress, facial expressions, and other non-verbal communications of the insurer’s representatives as well as an accurate depiction of the number of people present in the room lodging questions at the insured.

Of course, this appeal can and should be disposed of in the same manner as done by the trial court—by recognizing that the plain meaning of the word “entirety” encompasses the whole of the Examination Under Oath. (*See Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 [“If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature”].)

But if this Court has any doubts as to whether Section 2071.1(a)(4) gives an insured the right to video record an insurance company’s examiners, it should interpret the subsection (1) in accord with legislative purpose and (2) in light of the statute as a whole. (*See People v. Valencia* (2000) 82 Cal.App.4th 139, 144.) Both of these principles weigh in support of Plaintiffs-Respondents.

First, the pro-policyholder legislative purpose is clearly articulated in the title of Section 2071.1 which reads: “*Rights of insured* required to submit to examination under oath.” (Emphasis added.) Second, all of the statute’s subsections relate to providing rights and special protections to policyholders, not insurance companies. Finally, even if the pro-policyholder legislative intent were not crystal clear, this Court should still interpret the text in favor of Plaintiffs-Respondents, for “statutes pertaining to ... insurance policies must be construed in light of applicable public policy, *promoting the protection of the insured* and the public at large. (*20th Century Ins. Co. v. Superior Ct.* (2001) 90 Cal.App.4th 1247, 1266 (emphasis added).)



**CONCLUSION**

For the reasons set forth above, UP respectfully submits that the trial court's judgment should be affirmed.

DATE: June 5, 2023    Respectfully submitted,

UNITED POLICYHOLDERS

By: /s/ Richard Oatis

Richard B. Oatis

*Attorney for Amicus Curiae*

*United Policyholders*

**CERTIFICATE OF COMPLIANCE**

Pursuant to California Rule of Court, rule 8.204(c), I certify that this brief is reproduced using Times New Roman 14-point type, a proportionately spaced typeface. The lines of text are 1.5 spaced and the word count is approximately 1735 words, including headings and footnotes, but excluding the items listed in rule 8.204(c)(3).

DATE: June 5, 2023    Respectfully submitted,

UNITED POLICYHOLDERS

By: /s/ Richard Oatis

Richard B. Oatis

*Attorney for Amicus Curiae*

*United Policyholders*

**PROOF OF SERVICE**

No. A166946

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action. My business address is 917 Irving Street, Suite 4, San Francisco, CA 94112. On June 5, 2023, I served the following document(s) described as:

**APPLICATION OF UNITED POLICYHOLDERS  
FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF  
IN SUPPORT OF RESPONDENTS**

**[PROPOSED] *AMICUS CURIAE* BRIEF OF UNITED POLICYHOLDERS  
IN SUPPORT OF RESPONDENTS**

on the interested parties in this action as follows:

Karen Uno, 5900 Hollis Street, Suite O, Emeryville, CA 94608

Mark G. Bonino, 333 Twin Dolphin Dr. Suite 230, Redwood City, CA 94065

(BY TRUEFILING) By filing and serving the foregoing through Truefiling such that the document will be sent electronically to the eservice list on June 5, 2023; and

Alameda Superior Court, Honorable Tara M. Desautels, 1221 Oak Street, Oakland, CA 94612

(BY MAIL) By causing the document to be sealed in an envelope addressed to the recipient above, with postage thereon fully prepaid, and placed in the United States mail at San Francisco, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this proof of service is executed at San Francisco, California on June 5, 2023.

*Richard Oatis*

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Richard Broer Oatis