

IN THE
INDIANA SUPREME COURT

No. _____

Court of Appeals Cause No. 23A-PL-01343

NIBCO, INC.,

Plaintiff-Appellee,

v.

STARR INDEMNITY & LIABILITY
COMPANY, STARR SURPLUS LINES
INSURANCE COMPANY, OHIO
CASUALTY INSURANCE COMPANY,
MT. HAWLEY INSURANCE
COMPANY, NATIOANL FIRE
MARINE INSURANCE COMPANY,

Defendants-Appellants.

Appeal from the
Elkhart Superior Court 5

Trial Court Casuse No.
20D05-1708-PL-000178

The Honorable Christopher J.
Spataro, Judge

**MOTION FOR LEAVE TO APPEAR AS *AMICUS CURIAE*
AND FILE BELATED BRIEF IN SUPPORT OF
APPELLEE'S PETITION TO TRANSFER**

Pursuant to Indiana Appellate Rule 41, United Policyholders respectfully requests that the Court grant it leave to appear as *amicus curiae* and to file a belated *amicus curiae* brief in the above-captioned matter. In support of this Motion, United Policyholders states:

1. United Policyholders is a unique non-profit, tax-exempt, charitable organization founded in 1991 that educates and assists individual and business consumers on insurance matters and works to secure the loss indemnity objective for which people buy insurance. United Policyholders monitors legal developments in the

insurance marketplace and serves as a voice for policyholders in legislative and regulatory forums. United Policyholders helps preserve the integrity of the insurance system by advocating for fair sales and claims practices. Grants, donations, and volunteers support the organization's work. United Policyholders does not accept funding from insurance companies.

2. In furtherance of its mission, United Policyholders cautiously chooses cases and regularly appears as *amicus curiae* in courts nationwide to advance the policyholder's perspective on insurance cases likely to have widespread impact. United Policyholders has been advocating for policyholders' rights in the courts for decades. Since 1991 United Policyholders has filed hundreds of amicus curiae briefs in federal and state appellate courts across the country. A list of United Policyholders amicus submissions can be found here: <https://uphelp.org/advocacy/amicus-library/>. Amicus briefs filed by United Policyholders have been expressly cited in the opinions of state supreme courts as well as the U.S. Supreme Court. *See Humana Inc. v. Forsyth*, 525 U.S. 299, 314 (1999); *Julian v. Hartford Underwriters Ins. Co.*, 110 P.3d 903, 911 (Cal. 2005); *Cont'l Ins. Co. v. Honeywell Int'l, Inc.*, 188 A.3d 297, 322 (N.J. 2018); *Allstate Prop. & Cas. Ins. Co. v. Wolfe*, 105 A.3d 1181, 1185-6 (Pa. 2014). United Policyholders' amicus brief has also been referenced by the Indiana Court of Appeals in *Commonwealth Land Title Ins. Co. v. Robertson*, 5 N.E.3d 394 (Ind. Ct. App. 2014).

3. By submitting a brief in this matter, United Policyholders seeks to fulfill the classic role of *amicus curiae* in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped

consideration. This is an appropriate role for *amicus curiae*. As commentators have often stressed, an amicus is often in a superior position to “focus the court’s attention on the broad implications of various possible rulings.” R. Stern, E. Greggman & S. Shapiro, *Supreme Court Practice*, 570-71 (1986) (quoting Ennis, *Effective Amicus Briefs*, 33 Cath. U.L. Rev. 603, 608 (1984)).

4. In this matter, United Policyholders seeks to assist the Court on an issue of immense public importance—an insurer’s obligation to deal in good faith and fair dealing with its policyholder—by identifying arguments and authority that have escaped the lower courts’ attention to date.

5. As compared to parties to a non-insurance contract, in Indiana an insurer has a duty of good faith and fair dealing towards its policyholder. In *Erie v. Hickman*, this Court declined to define the precise limits of an insurer’s duty to deal in good faith, but it did find that “[t]he obligation of good faith and fair dealing with respect to the discharge of the insurer’s contractual obligation includes the obligation to refrain from . . . deceiving the insured[.]” 622 N.E.2d 515, 519 (Ind. 1993). In *Cosme v. Clark*, this Court reaffirmed the insurer’s responsibility to “avoid deceiving the insured” as part of its duty of good faith. 2024 Ind. LEXIS 284, *25 (Ind. May 6, 2024). The Indiana Court of Appeals has further held that an insurer must act in good faith even after coverage litigation has commenced and that its post-litigation conduct can give rise to a bad faith claim. *Gooch v. State Farm Mut. Auto. Ins. Co.*, 712 N.E. 2d 38, 42-43 (Ind. Ct. App. 1999).

6. The issue of the Defendants/Appellants' Insurers' duty of good faith and fair dealing was not considered by the lower courts. United Policyholders believes it must be a central consideration of the resolution of this case. If the Insurers knew about the dismissal when it was issued or shortly thereafter, they remained silent about it during two update calls in April 2021 and October 2021. They wrote only a few sentences concerning the dismissal order in lengthy reservation of rights letters sent in June 2022 and July 2022, over a year after the dismissal was issued. The time limitation to bring a Trial Rule 60(B)(1) motion – a motion to relieve a party from a judgment because of mistake, surprise, or excusable neglect – is one year. The Insurers made no mention of the dismissal orders until after that one-year period. If this was a deliberate decision on their part, then they have violated their duty of good faith and fair dealing to their policyholder. Any withholding of such information served only the interests of the Insurers to the detriment of NIBCO.

7. The magnitude of the damage to NIBCO also must be highlighted. Policyholders should have their coverage claims decided on the merits, rather than being dismissed because counsel made an inadvertent mistake. Here, the end result of counsel missing two emails was that the Insurers who sold policies to NIBCO with combined limits of \$60 million get to escape their coverage obligations for underlying class action product liability claims. This is a shockingly unfair result and undermines the important purpose of insurance—to provide indemnity whenever possible.

8. United Policyholders is substantially aligned with NIBCO.

9. Good cause exists to permit a belated filing of United Policyholders' *amicus curiae* brief. Although United Policyholders makes every attempt to monitor cases around the country and timely identify those that could benefit from *amicus curiae* support, United Policyholders first discovered this matter on Monday, May 6, 2024. United Policyholders worked quickly to investigate the applicable facts and law, determine this case is exceptionally worthy of its *amicus curiae* support, and hire local Indiana counsel, but it could not reasonably do so and submit a brief in one week. United Policyholders requests a short, 14-day extension to file its brief of *amicus curiae*.

Wherefore, United Policyholders respectfully requests that the Court grant it leave to appear and file a belated brief of *amicus curiae* in this matter.

Respectfully submitted,

/s/ Thao T. Nguyen

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CERTIFICATE OF SERVICE

Pursuant to Indiana Appellate Rule 24(A)(1), I certify that on May 13, 2024, I electronically filed the foregoing document using the Indiana E-Filing System (IEFS).

I also certify that on May 13, 2024, the foregoing document was served upon the following via IEFS:

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