Appeal No**. A143190**

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION TWO

FAIR PLAN OF CALIFORNIA

Plaintiff/Cross Defendant/Respondent,

v.

MARLENE GARNES,

Defendant/Cross-Complainant/Appellant.

CONTRA COSTA COUNTY
JUDGE: STEVEN AUSTIN
SUPERIOR COURT NO. C1102417

AMICUS BRIEF OF UNITED POLICYHOLDERS IN SUPPORT OF MARLENE GARNES

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I. INTRODUCTION

This dispute involves a government-sponsored, privately administered program harming the very constituents it was created to help. Our State legislature established Respondent California FAIR Plan ("FAIR Pan") to make insurance available to homeowners who want and/or need to buy a policy that will protect their assets and pay benefits to repair and replace property in case of a fire or other tragedy. The FAIR Plan fills availability gaps in the private marketplace. The cost of its policies are not subsidized. FAIR Plan policyholders, including Appellant, pay full price for their coverage.

In the instant case, and presumably in many similar situations, FAIR Plan is stubbornly and incorrectly interpreting its policy to justify paying less than it owes. In this case, it only tendered one third of the cost of repairing an elderly African-American widow's fire-damaged home, basing its decision on the fact that she lives in an economically challenged neighborhood where homes are undervalued.

The FAIR Plan is doing this by claiming it can calculate benefits owed by using the (low) market value of her home instead of the actual value cost of repairing the fire damage. In so doing, the Fair Plan is violating the fundamental legal principle that an insurer cannot

place it's own financial interests above those of its insureds. *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 818-819.[1] It is also violating Fair Claim Settlement Practices regulations that expressly apply to the FAIR Plan. See 10 Cal. Code Regs. 2695.2(i).[2]

Appellant paid non-subsidized, substantial premiums to the FAIR Plan to insure her home, primarily because the modest homes in her economically challenged neighborhood are not attractive to private insurers. She paid for the security of knowing that if a catastrophe were to strike and her home was destroyed or seriously damaged, she could afford to repair or rebuild. But when disaster did strike, her insurer –acting under the state of California's *imprimatur*, withheld two-thirds of the repair funds she needed. We fully concede that Appellant had an actual cash value – not replacement value policy. But that does not give the FAIR Plan the right to engage in semantics to justify the lowest possible payment.

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[1] "For the insurer to fulfill its obligation not to impair the right of the insured to receive the benefits of the agreement, it again must give at least as much consideration to the latter's interests as it does to its own."

[2] (i) "Insurer" means a person licensed to issue or that issues an insurance policy or surety bond in this state, or that otherwise transacts the business of insurance in the state…The term "insurer" for purposes of these regulations includes non-admitted insurers, the **California FAIR Plan**…"

Our state leads the nation in both consumer protection standards and construction costs. California insurers cannot be permitted to collect premiums for post-loss economic recovery support, then turn around and creatively argue their way out of that support. The stakes for our great state's residents who rely on that support and the economy at large are simply too high to allow that to happen.

United Policyholders ("UP") respectfully submits this brief of amicus curiae in support of Defendant/Cross-Complainant/Appellant Marlene Garnes ("Garnes"). We strongly support Garnes' view that Respondent FAIR Plan's loss settlement protocol is illegal and void as against public policy. UP's amicus curiae brief seeks to assist this Court in evaluating the equities and precedent applicable to the issue in this case: whether it is legal and fair for the FAIR Plan to save its member companies untold sums of money by depriving its policyholders, typically low-income homeowners, of funds to repair or rebuild after loss or damage to their property?

If the ruling of the Trial Court stands, it will seriously erode the safety net value of the policies purchased by California residents, and will be detrimental to our state's economy. It will undermine a clear regulatory directive and incentivize insurance companies to

semantically argue their way out of coverage obligations. Thus, this Court should find that FAIR Plan's loss settlement valuation for actual cash value insurance policies is illegal under California law.

II. STATEMENT OF INTEREST

UP is a national non-profit organization dedicated to promoting and preserving integrity in insurance transactions and protecting the reasonable expectations of insurance consumers. The organization is funded by donations and grants. UP does not sell insurance or accept financial support from insurance companies.

Through its *Roadmap to Preparedness* program, UP guides consumers on buying insurance and being economically prepared for adverse events. UP's *Roadmap to Recovery™* program helps individuals and businesses navigate the insurance claims process and recover fair and timely settlements. UP's *Advocacy and Action* program works with public officials, other non-profits, faith-based organizations, and a diverse range of entities – including insurance producers and insurance trade associations – to solve problems related to claims and coverage. Since UP was founded in 1991 in Northern California, the organization has provided direct services to consumers

across the country after floods, winds, fires and other events have damaged and destroyed homes and businesses.

UP has a particular interest in this case because of our genuine concern over the harm the Trial Court's ruling could bring to California residents and communities impacted by wildfires. UP's Executive Director, Amy Bach, is uniquely qualified to speak to the issues contained herein, as she has advised California consumers and lawmakers on insurance issues for decades. Bach is serving her sixth consecutive term as an official consumer representative to the National Association of Insurance Commissioners ("NAIC"). UP coordinates with the California Department of Insurance and Commissioner Dave Jones on a variety of issues.

UP strives to aid courts via the submission of amicus curiae briefs in cases involving insurance principles that are likely to impact large segments of the general public and business communities. One of UP's amicus curiae briefs was cited in the U.S. Supreme Court opinion *Humana v. Forsyth*, 525 U.S. 299 (1999), and its arguments have been adopted by the California Supreme Court in TRB *Investments, Inc. v. Fireman's Fund Ins. Co.* (2006) 40 Cal.4th 19,

Vandenberg v. Superior Court (1999) 21 Cal.4th 815 and numerous other state and federal courts across the United States.

In this case, UP 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." *Miller Wohl Co. v. Commissioner o/Labor & Indus.*, 694 F.2d 203, 204 (1982). An *amicus curiae* such as UP is often in a superior position to "focus the court's attention on the broad implications of various possible rulings." Robert L. Stem, et al., Supreme Court Practice 570-71 (1986) (quoting Ennis, Effective Amicus Briefs, 33 CATH. U. L. REV. 603, 608 (1984)).

III. STANDARD OF REVIEW

Issues related to statutory and insurance policy interpretation present questions of law entitled to de novo review. *Mt. Hawley Ins. Co. v. Lopez*, 215 Cal.App.4th 1385, 1394 (2013) (citing *Bruns v. E-Commerce Exch., Inc.* (2011) 51 Cal.4th 717, 724 (“[s]tatutory interpretation is a question of law that we review de novo").

IV. ARGUMENT

A. THE CALIFORNIA FAIR PLAN'S LOSS VALUATION METHOD FOR ACTUAL CASH VALUE INSURANCE POLICIES IS NOT AUTHORIZED BY THE CALIFORNIA INSURANCE CODE

The crux of the issue in this case is the FAIR Plan's erroneous interpretation of California Insurance Code Section 2051(b) (" Cal. Ins. Code. § 2051") as it pertains to an Actual Cash Value ("ACV") insurance policy. Cal. Ins. Code § 2051 reads, in relevant part:

> In case of a partial loss to the structure, or loss to its contents, the amount it would cost the insured to repair, rebuild, or replace the thing lost or injured less a fair and reasonable deduction for physical depreciation based upon its condition at the time of the injury or the policy limit, whichever is less. In case of a partial loss to the structure, a deduction for physical depreciation shall apply only to components of a structure that are normally subject to repair and replacement during the useful life of that structure.

Cal. Ins. Code § 2051(b)(2) (2004 Amendments).

A natural reading of this passage by an ordinary policyholder would suggest that when a fire damages insured property, the FAIR Plan policy pays "the amount it would cost the insured to repair, rebuild, or replace the thing lost or injured less a fair and reasonable deduction for physical depreciation based upon its condition at the time of the injury or the policy limit." *Id*.

However, in the instant case, Garnes, a FAIR Plan policyholder, insured under an ACV insurance policy, received a settlement from the FAIR Plan in clear violation of Cal. Ins. Code § 2051. What the FAIR Plan did was take advantage of recession housing prices and

offer Garnes a meager settlement that would not even come close to repairing the damaged house or purchasing a new one.

For context, a brief summary of the relevant facts: Garnes buys a FAIR plain policy for $450,000 in coverage. She suffers $362,000 in damage in a partial-loss fire. FAIR plan instead tries to settle for $75,000 (the appraised value of the house at the bottom of the recession in a historically poor neighborhood in the "iron triangle" of Richmond). See Appellant's Opening Brief ("AOB") at 2.

FAIR plan believes it is authorized to do so because its policy "…pays less than either appraised value or the cost of repair." Here, the damage to Garnes' home was $287,000 more than the appraised value. *Id*. But, as discussed above, the 2004 amendments to Ins. Code § 2051 establish a mandatory definition of ACV that requires the FAIR Plan to pay, regardless of what its policy language says:

> "…the amount it would cost the insured to repair, rebuild, or replace the thing lost or injured less a fair and reasonable deduction for physical depreciation based upon its condition at the time of the injury or the policy limit, whichever is less."

Thus, the settlement amount should have been $362,000, not $75,000 or the $111,000 FAIR Plan ultimately agreed to pay after negotiations. (Appellant's Appendices ["AA"] at 38; AOB at 4).

So how does the FAIR Plan reconcile its policy language with Cal Ins. Code § 2051? It does not. Instead, the FAIR Plan relies on cases that pre-date the 2004 Amendments to Cal Ins. Code. § 2051 to confuse the Court about whether Garnes is entitled to repair costs minus depreciation, which she is, or the fair market value of her home, the option that the FAIR Plan would prefer. *See, e.g., Jefferson Ins. Co. v. Superior Court*, (1970) 3 Cal.3d 398; *Cheeks v. California Fair Plan Assn. of CA*. (1998) 61 Cal.App.4th at 423.

The FAIR Plan misunderstands or ignores the fact that the 2004 Amendments to Cal Ins. Code § 2051 render *Jefferson* and *Cheeks* irrelevant. Since Garnes' loss occurred in 2011, the law existing at that time controls. AA at 38. *See Kirkwood v. California State Auto. Assn. Inter-Insurance Bureau* (2011) 193 Cal.App.4th 49, 54[3]; *see also* 1 California Ins. Law Dictionary & Desk Ref. § A17.1 (2014 ed.) [noting that in passing §2051(b)'s definition of ACV, "the Legislature partially repealed the holding in *Jefferson Ins. Co. v. Superior Court*, 3 Cal.3d 398, 402, 90 Cal. Rptr. 608, 475 P.2d 880 (1970)."]; Rutter Guide, Cal. Prac. Guide Ins. Lit. ¶ 6:358.4 ["Ins.C. § 2051(b),

[3] "In 2004, with the passage of Assembly Bill No. 2962 introduced as part of the Homeowners Bill of Rights following the 2003 wildfires in Southern California, section 2051 was amended to state exactly how the measure of [ACV] should be determined."

amended in 2004, 'states exactly how the measure of actual cash value should be determined,' *Kirkwood*, 193 Cal.App.4th at 54.

The FAIR Plan has also tried multiple times - unsuccessfully, to get the California Department of Insurance ("CDI") to sanction its illegal partial loss valuation method. By letter dated November 12, 2014, an attorney for the CDI Risa Salat-Kolm declined to approve FAIR Plan's "clarification" of its partial loss valuation method. Attorney Salat-Kolm noted that FAIR Plan's idea of a "constructive total loss" changes partial-loss from a "physical" standard to an "economic" standard, in clear contravention of § 2051.

The FAIR Plan also filed a new policy form with the CDI, as required by Cal. Ins. Code. §10095(f) but the CDI rejected the filing, citing the illegal policy language at issue in this case. In a letter dated June 18, 2015, attorney for the CDI Risa Salat-Kolm formally rejected filing #15-3405 citing again its clear contravention of § 2051(b). Thus, the decision of the trial court should be reversed as a matter of law. The legislative intent and recent (read: relevant and applicable) case is clear. Garnes is entitled to depreciated value on the cost of repair. FAIR Plan may have been successful in confusing the lower court about the applicable law, but its flawed argument on appeal is

more than adequate grounds for this Court to reverse its judgment and rule that FAIR Plan's approach is illegal.

B. THE CALIFORNIA FAIR PLAN IS AN IMPORTANT PUBLIC PROGRAM CREATED TO PROVIDE INSURANCE COVERAGE FOR HOMEOWNERS WHO CANNOT OTHERWISE OBTAIN IT

The FAIR plan is by definition:

> "…the insurer of last resort, that is…**statutorily mandated** to make available basic property insurance to any 'persons having an interest in real or tangible personal property who, after diligent effort…are unable to procure such insurance through normal channels from an admitted insurer.' (emphasis added).

St. Cyr et al. v. California FAIR Plan Assn. (2014) 223 Cal.App.4th 786, 793; *See also* Cal. Ins. Code § 10094.).

In 1968, the California Legislature recognized that insurers' reluctance to write "basic property insurance" to homeowners in high-risk or otherwise uninsurable areas was a significant problem. In response the Legislature enacted Ins. Code. §§10090-10100.2, which, *inter alia*, purports to do all of the following:

> (a) To assure stability in the property insurance market for property located in the State of California.
>
> (b) To assure the availability of basic property insurance as defined by this chapter.
>
> (c) To encourage maximum use, in obtaining basic property insurance, of the normal insurance market provided by admitted insurers and licensed surplus line brokers.

> (d) To provide for the equitable distribution among admitted insurers of the responsibility for insuring qualified property for which basic property insurance cannot be obtained through the normal insurance market by the establishment of a FAIR Plan (fair access to insurance requirements), an industry placement facility and a joint reinsurance association.

Id. at §10090; *See St. Cyr*, 223 Cal.App.4th at 794.

Thus, the FAIR Plan's policyholders tend to be vulnerable, both geographically and economically. Even more reason why a loss valuation method that deprives crucial insurance recovery funds from FAIR Plan's policyholders has been invalidated by the Legislature and the Department of Insurance. It appears the FAIR Plan is attempting to get a something through the judicial process that it could not get through the state's insurance regulator.

C. THE FAIR PLAN HAS BREACHED ITS TO DUTY OF GOOD FAITH AND FAIR DEALING BY USING AN ILLEGAL LOSS VALUATION METHOD

Insurance policies are a unique species of contract. They provide piece of mind and economic security in the case of loss or injury. They are also aleatory, *i.e*., the policyholder pays a premium for a future promise to pay. The expectation is that insurance company will keep that promise and the policyholder will be treated fairly and paid appropriately. When insurance companies breach this promise, it is more than a breach of contract; it is a breach of trust.

As the California Supreme Court said in the seminal 1979 insurance case, *Egan v. Mutual of Omaha Ins. Co.*:

> "…[a]s a supplier of a public service rather than a manufactured product, the obligations of insurers go beyond meeting reasonable expectations of coverage. The obligations of good faith and fair dealing encompass qualities of decency and humanity inherent in the responsibilities of a fiduciary. Insurers hold themselves out as fiduciaries, and with the public's trust must go private responsibility consonant with that trust…"

24 Cal.3d at 809, 821.

The FAIR Plan has failed in this regard, yet it seeks judicial approval of actions it took which are void as against public policy and plainly illegal. Ms. Garnes, as an insured, likely had no idea that the FAIR Plan would play games with insurance claim, rather she had a reasonable expectation that when she had a loss her insurance would pay. After all, she paid her premiums for many years. Instead, the FAIR Plan has trotted Ms. Garnes out in an egregious example of wasted judicial resources to make a point.

That point, however, is not justified by the regulations and statutes that are designed to protect consumers from unfair insurance practices. FAIR Plan is attempting to construe Ms. Garnes policy in a manner in which has been illegal since at least 2004 with the goal of depriving her a fair insurance settlement in order to save FAIR Plan's

member insurance companies money. This Court should not sanction this behavior. If the Court does not reverse the erroneous ruling of the Trial Court, it will send a strong signal to California insurance consumers that insurers have the upper hand and can set their own rules. This is not a result California residents can afford.

V. CONCLUSION

For the foregoing reasons, United Policyholders respectfully requests that this Court find that FAIR Plan's policy language is illegal and thus Ms. Garnes is entitled to $362,000.

DATED: August 18, 2015

UNITED POLICYHOLDERS

By___s/_____

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CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

Pursuant to California Rule of Court, 8.360 and 8.412, I certify that this **AMICUS BRIEF OF UNITED POLICYHOLDERS IN SUPPORT OF APPELLANT** is proportionately spaced, has a typeface of 14-point, 13-point footnotes, and contains 3,004 words according to the word count feature of Microsoft Word 2010.

DATED: August 18, 2015

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