U.S. Court of Appeals Docket No. 17-36045

THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MIKE HOWISEY, as attorney in fact for WALLACE E. HOWISEY, an incapacitated person,
Plaintiffs/Appellants,

vs.

TRANSAMERICA LIFE INSURANCE COMPANY, a foreign corporation organized under the laws of the State of Iowa.,
Defendants/Appellees.

On Appeal from a Decision
of the United States District Court
for the Western District of Washington
Case No. 2:17-cv-00009 RSM
The Honorable Ricardo S. Martinez, Judge

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF APPELLANTS

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MOTION FOR LEAVE TO FILE A BRIEF OF AMICUS CURIAE

Pursuant to F.R.A.P. 29(a) and Circuit Rule 29-2, United Policyholders ("UP") hereby moves this Court for an order allowing UP to file an *amicus curiae* brief in support of Plaintiff/Appellant Mike Howisey ("Howisey). The Motion and the attached Proposed Brief of *amicus curiae* are being filed within the seven-day deadline set forth in Circuit Rule 29-2(e)(1). UP sought consent via email of Defendant/Appellee Transamerica Life Insurance Company's ("Transamerica") counsel on February 27, 2018 but received no response, making this motion necessary. UP received consent from Howisey on February 27, 2018.

This Court has broad discretion to allow amicus status to a party with a valid interest and timely, relevant information. *Gerritsen v. De La Madrid Hurtado*, 819 F.2d 1511, 1514 n. 3 (1987). Courts generally exercise liberality in granting amicus status when, as here, the matter is one of public concern. S. Thomas, Corpus Juris Secundum, "Amicus Curiae," §3 (2012); see *Neonatology Associates, P.A. v. Commissioner of Internal Revenue*, 293 F. 3d 128, 133 (3rd Cir. 2002) (opinion by Circuit Judge Samuel Alito: "skeptical scrutiny of proposed amicus briefs may equal, if not exceed, the time that would have been needed to study the briefs at the merit stage if leave had been granted"). UP submits this this

brief of *amicus curiae* in support of Howisey and asks this Court to reverse the District Court's Order granting summary judgment in favor of Transamerica.

INTEREST OF THE PROPOSED AMICUS CURIAE

UP is a non-profit organization dedicated to helping preserve the integrity of the insurance system by serving as a voice and an information resource for consumers in all 50 states. UP's work is supported by donations, grants, and volunteer labor. UP does not sell insurance or accept funding from insurance companies. While much of UP's work is aimed at helping individuals and businesses purchase appropriate insurance and repair, rebuild, and recover after disasters through its *Roadmap to Preparedness* and *Roadmap to Recovery* Programs, UP also engages with regulators, public officials, academics, and various stakeholders in connection with legal and marketplace developments relevant to all policyholders and all lines of insurance, including Long Term Care Insurance ("LTCI") which is at issue in the instant case.

UP's Executive Director, Amy Bach, is currently in her seventh consecutive term as an official consumer representative to the National Association of Insurance Commissioners ("NAIC"), where she works closely with Commissioner Mike Kriedler, who has served as the State of Washington's elected Insurance Commissioner since 2000 at the Washington State Office of the Insurance Commissioner. Thus, UP engages with regulators, public officials and various

stakeholders in connection with legal and marketplace developments relevant to all policyholders and all lines of insurance. At the NAIC, rising premiums, insolvency, and unfair claims practices related to LTCI are routinely the subject of hearings and model rule proceedings.[1]

A diverse range of individual and commercial policyholders throughout the United States regularly communicate their insurance concerns to UP which allows UP to submit *amicus curiae* briefs to assist state and federal courts in deciding cases involving important insurance principles. UP has filed more than 360 cases throughout the United States since the organization's founding in 1991. UP's *amicus curiae* brief was cited in the United States Supreme Court's opinion in *Humana, Inc. v. Forsyth*, 525 U.S. 299 (1999). Arguments from UP's *amicus curiae* brief were cited with approval by the California Supreme Court in *Vandenburg v. Superior Court*, 21 Cal.4th 815 (1999).

UP has been assisting policyholders, regulators and courts since the organization was founded in 1991 after the Oakland-Berkeley Hills Firestorm. In this brief, UP seeks to fulfill the "classic role of *amicus curiae* by assisting 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.*

[1] *See, e.g.*, Long Term Care Insurance (B/E) Task Force http://www.naic.org/cmte_b_e_ltc_tf.htm.

Commissioner of Labor & Indus., 694 F.2d 203, 204 (9th Cir. 1982). Accordingly, UP will bring its unique consumer perspective to this very important case.

WHY AN AMICUS CURIAE BRIEF IS DESIREABLE AND RELEVANT

Insurance products have a unique role in our society: Americans who want to drive cars, operate businesses or borrow money to purchase a home are legally required to buy insurance. Automobile insurance policyholders know that when an accident occurs, insurance can make the difference between recovery and ruin. An injured or sick party also relies on insurance – to make them whole after tragedy strikes, or to provide care for a degenerative illness, such is the case for Mr. Howisey, who suffers from dementia.[2]

However, a perennial conflict exists: to an insurer, the paramount purpose of selling their product is to generate revenues to support a profitable, solvent business enterprise. To an insured, the economic safety net function of insurance is paramount. For these reasons, a decades-old body of Washington case law governs the integrity of the products that insurers sell and imposes duties upon them that are higher than those imposed on their commercial peers. *See*, *e.g., Van Noy v. State Farm*, 16 P.3d 574, 579 n.2 (Wash. 2001) (…where the insurer's

[2] An estimated 5.5 million Americans suffer from dementia, according to the non-profit Alzheimer's Association, underscoring the important of ensuring that Long Term Care Insurance providers honor their obligations. *See*: https://www.alz.org/facts/.

interests might be opposed to the insured's and the insured is particularly vulnerable and dependent on the insurer's honesty and good faith.)

Washington also recognizes that insurance contracts – contracts of adhesion – must be interpreted in favor of coverage for the policyholder. The Washington Supreme Court has endorsed the "well settled" doctrine of *contra proferentum* in the interpretation of insurance contracts with any ambiguities "resolved against the drafter-insurer and in favor of the insured." *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 15 P.3d 115, 122 (Wash. 2000). The public policy rationale is to balance insurers' legitimate profit with their customers' legitimate interests that payment on their claim will come without a fight at claim time.[3]

In addition to Washington, the U.S. Supreme Court has recognized the special nexus between the business of insurance and the public interest for almost 80 years. *See, e.g., Cal. State Auto. Ass'n Inter-Ins. Bureau v. Maloney*, 341 U.S. 105, 109-10 (1951) (insurance has always had special relation to government); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 415-16 (1946) ("[insurance] business affected with a vast public interest"); Robertson v. California, 328 U.S..

[3] As the California Supreme Court stated in the seminal insurance case: "[I]nsurers' 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... [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." (citations omitted) *Egan v. Mut. of Omaha Ins. Co.*, 620 P.2d 141, 146 (Cal. 1979)

440, 447 (1946); *United States. v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 540 at n.14 (1944) ("evils" in the sale of insurance "vitally affect the public interest"); *Osborn v. Ozlin*, 310 U.S. 53, 65 (1940) ("Government has always had a special relation to insurance."); *O'Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251, 257 (1931) ("The business of insurance is so far affected with a public interest that the State may Regulate the Rates").

As such, insurance is a unique product imbued with state public policy concerns. Washington law recognizes that consumers purchase it for peace of mind. Whether the insurance is for property, liability, or health, the basic idea for its existence and purpose remains the same: recovery for loss and coverage for financially catastrophic events. Consumers do not purchase insurance with the expectation that they will find themselves in litigation with their insurer because their insurer breached its duty of good faith and fair dealing by interpreting its policy – one which also happens to violate state law – to avoid providing the bargained for protection. *See* WAC 284-54-300; 350.

Here, Transamerica sold Mr. Howisey a LTCI policy that is required under Washington law to provide coverage for the Aegis facility Mr. Howisey requires due to his dementia. Instead, Transamerica has denied coverage under the Nursing Home Benefit and forced Mr. Howisey into litigation. Unfortunately, the District Court improperly granted Transamerica's Motion for Summary Judgment.

Accordingly, for the reasons set forth above, UP respectfully requests that the Court grant UP's Motion for Leave to File a Brief of *amicus curiae*.

Dated: March 5, 2018

s/ Kyle C. Olive

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CERTIFICATE OF SERVICE

I, Victoria Blasdell, declare:

I am employed in Seattle, Washington. I am over the age of 18 and not a party to this action; my business address is 1218 Third Avenue, Suite 1000 Seattle, WA 98101, Phone: 206.629.9909, e-mail: victoria@olivelawnw.com.

I certify that on March 5, 2018, I caused the attached **MOTION FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF APPELLANT HOWISEY** to be electronically submitted to the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I declare that all participants in the case are registered CM/ECF users and that service of this document will be accomplished by the appellate CM/ECF system. I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct, and I am employed in the office of a member of the bar of this Court at whose direction this service was made.

Executed on March 5, 2018, in the city of Seattle, Washington.

s/Victoria Blasdell

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CERTIFICATE OF CORPORATE DISCLOSURE

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amicus Curiae*, United Policyholders states that it is a non-profit 501(c)(3) charitable organization, that it does not have a parent corporation or shareholders.

Dated: March 5, 2018

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INTEREST OF THE AMICUS CURIAE

United Policyholders ("UP") respectfully requests leave to file this brief *amicus curiae* in support of Appellants. Pursuant to Fed. R. App. Proc. 29(a)(2), UP sought and received consent of the plaintiffs/appellants. UP has not received consent from Defendant/Appellee, thus this brief will be accompanied by a motion for leave.

UP is a non-profit organization founded in 1991 and dedicated to educating the public on insurance issues and consumer rights. The organization is tax-exempt under Internal Revenue Code §501(c)(3). UP is funded by donations and grants and does not sell insurance or accept money from insurance companies. UP serves as an information resource and a voice for a diverse range of insurance consumers across the United States, from low income homeowners to international businesses to claimants under long term care policies. Donations, foundation grants and volunteer labor support the organization's work.

UP's work is divided into three program areas: *Roadmap to Recovery* (helping disaster victims navigate the insurance claim process and recover fair settlements), *Roadmap to Preparedness* (promoting disaster preparedness and insurance literacy for policyholders of all types), and *Advocacy and Action* (advancing the interests of insurance consumers in courts of law and before regulators and legislatures). UP hosts a library of tips, sample forms and articles

on commercial and personal lines insurance products, including long term care insurance ("LTCI"), coverage and the claims process at www.uphelp.org.

UP's Executive Director, Amy Bach, is currently in her seventh consecutive term as an official consumer representative to the National Association of Insurance Commissioners ("NAIC"), where she works closely with Commissioner Mike Kriedler, who has served as the State of Washington's elected Insurance Commissioner since 2000 at the Washington State Office of the Insurance Commissioner. Thus, UP engages with regulators, public officials and various stakeholders in connection with legal and marketplace developments relevant to all policyholders and all lines of insurance. At the NAIC, rising premiums, insolvency, and unfair claims practices related to LTCI are routinely the subject of hearings and model rule proceedings.

A diverse range of individual and commercial policyholders throughout the United States regularly communicate their insurance concerns to UP. The organization advances policyholders' interests in courts nationwide by filing *amicus curiae* briefs in cases involving important insurance principles. UP has been an *amicus curiae* on behalf of policyholders in nearly 500 cases throughout the United States since 1991. UP's *amicus* brief was cited in the United States Supreme Court's opinion in *Humana, Inc. v. Forsyth*, 525 U.S. 299 (1999), and in numerous state and federal court opinions. Arguments from UP's *amicus curiae*

briefs have been adopted and cited by many state and federal courts, including, *e.g., Vandenberg v. Superior Court,* 982 P.2d 229 (Cal. 1999).

UP has been assisting policyholders, regulators and courts in regard to LTCI policies, premiums and claims since 2003. In 2005, we established an online LTCI information clearinghouse under a grant from the California Healthcare Foundation that lives on our website www.uphelp.org. In recent years UP has been working with regulators to contend with skyrocketing LTCI premiums[1] while educating consumers on useful, but expensive product.[2]

In this brief, UP seeks to fulfill the "classic role of *amicus curiae* by assisting 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 of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982). Accordingly. UP brings a unique consumer perspective to the issue of why, as here, Transamerica must not be allowed to deny claims against its LTCI policyholders for "assisted living facilities" coverage for dementia patients, by adopting a narrow reading of "nursing home" to require "skilled nursing care" in contravention of Washington statute and principles of fairness imbued in case law.

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[1] *See, e.g. February 2014 comments to the NAIC Health Actuarial Task Force by CA Healthcare Advocates and United Policyholders re: Proposed Changes to Section 20C, Revisions to MO 641*. (http://hphelp.org/sites/default/files/u4/HATF-LTCI%20Comments.pdf.

[2] *See, e.g. "Go Long?"*, United Policyholders, January, 2014. (http://www.uphelp.org/sites/default/files/january2013tipofthemonth.html).

Longstanding Washington law and policy prohibits restrictive conditions of coverage for LTCI policies and requires that insurance policies be construed against the drafter in favor of coverage. Washington State's legislative, executive and judicial branches have consistently worked to ensure that the consumers of insurance are treated fairly and equitably in Washington's insurance marketplace.

While the instant case presents important issues of Washington's statutory requirements for long-term care policies, UP believes that counsel for Appellant has more than adequately briefed these issues. Accordingly, UP will instead focus in its brief on questions of the policy interpretation and the public policy underlying construing ambiguous policy terms against the drafter of the contract – the insurer – in favor of coverage for the policyholder.

BRIEF OF AMICUS CURIAE

I. STATEMENT OF THE CASE

UP adopts the Statement of the Case set forth in Appellant's brief at pp. 3 -24, filed with this Court on Monday, February 26, 2018.

II. SUMMARY OF ARGUMENT

Insurance products have a unique and important role in our society: Americans that drive cars, operate businesses or borrow money to purchase a home may be *required by law* to purchase insurance. As those with aging or ill relatives in need of Long Term Care throughout Washington and the U.S. will confirm: insurance protection after a loss, illness, or incapacity requiring Long Term Care, makes the difference between recovery and ruin.

Yet, in the execution of an insurance contract (a *contract of adhesion*)[3] and at drafting and claim time, insurers have the upper hand. Courts, legislatures and other policy makers have long recognized the imbalance associated in the

[3] *See* Williston on Contracts 49:15 ("The fundamental reason which explains [*contra proferentem*] and other examples of judicial predisposition toward the insured is the deep-seated often unconscious but justified feeling or belief that the powerful underwriter, having drafted its several types of insurance contracts with the aid of skillful and highly paid legal talent, from which no deviation desired by an applicant will be permitted, is almost certain to overreach the other party to the contract. The established underwriter is magnificently qualified to understand and protect its own selfish interests. In contrast, the applicant is a shorn lamb driven to accept whatever contract may be offered on a 'take-it-or-leave-it' basis if he or she wishes insurance protection. In other words, insurance policies, while contractual in nature, are certainly not ordinary contracts, and should not be interpreted or construed as individually bargained for, fully negotiated agreements, but should be treated as *contracts of adhesion* [emphasis added] between unequal parties. This is because…insurance contracts are generally not the result of the typical bargaining and negotiating processes between roughly equal parties that is the hallmark of freedom of contract.").

insurance relationship because it is the insurer that drafts the contracts, manages the claims and controls the payouts. A perennial conflict exists: to an insurer, the paramount purpose of selling its product is to generate revenue. A profitable and solvent business enterprise requires this.[4] To the insured, the economic safety net function of insurance is paramount. Yet, the insured is effectively making a wager against himself. He is paying for a promise made by the insurer that he hopes he will never need to ask the insurer to honor. At the time the insured asks his insurer to honor its promise, something awful has likely happened in the life of the insured or to members of his family.

Because of the risks associated with this unbalanced relationship, a decades-old body of case law governs the integrity of the products that insurers sell and imposes duties upon them that are higher than those imposed on their commercial peers. Judicial safeguards - *e.g., contra proferentem* - keep insurers' legitimate profit motive balanced with their customers' legitimate interests.

As the California Supreme Court has stated:

> [I]nsurers' 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…[A]s a supplier of a public service rather than a manufactured product, the obligations of insurers go beyond meeting

[4] Tom Baker, *Constructing the Insurance Relationship. Sales Stories, Claims Stories, and Insurance Contract Damages*, 72 Tex. L. Rev. 1395, 1401 (May 1994).

> 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.

Egan v. Mut. of Omaha Ins. Co., 620 P.2d 141, 146 (Cal. 1979) (ellipses in original) (citations omitted). The special nexus between the business of insurance and the public interest has also been recognized by the U.S. Supreme Court for nearly a century. *See, e.g.*, *California State Auto. Ass'n Inter-Ins. Bureau v. Maloney*, 341 U.S. 105, 109-10 (1951) (insurance has always had special relation to government); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 415-16 (1946) ("[insurance] business affected with a vast public interest"); *Robertson v. California*, 328 U.S. 440, 447 (1946); *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 540 n.14 (1944) ("evils" in the sale of insurance "vitally affect the public interest"); *Osborn v. Ozlin*, 310 U.S. 53, 65 (1940) ("Government has always had a special relation to insurance."); *O'Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251, 257 (1931) ("The business of insurance is so far affected with a public interest that the State may Regulate the Rates").

As such, insurance is a unique product imbued with state public policy concerns. The Washington State Supreme Court has stated that "the insurance contract brings the insured a certain peace of mind that the insurer will deal with it fairly and justly when a claim is made." *Coventry v. Am. States Ins. Co.*, 961 P.2d 933, 939 (Wash. 1998). Whether the insurance is for property or for health, the

basic idea for its existence and purpose remains the same: recovery for loss and coverage for financially catastrophic events. Consumers do not purchase insurance with the expectation that they will meet their insurance carrier in court to argue semantics or engage in any manner of unreasonable policy interpretation. At the time such a dispute is likely to arise, the insured is already likely in a financially vulnerable position. Policy makers have consistently and regularly attempted to ensure that the unequal playing field is leveled to ensure fairness and equity.

Washington law favors liberal interpretation of insurance policies to effectuate coverage. Ambiguous terms are strictly construed against the drafter-insurer, in favor of the policyholder. The Washington State Supreme Court has endorsed the "well settled" doctrine of *contra proferentem* in the interpretation of insurance contracts with any ambiguities "resolved against the drafter-insurer and in favor of the insured." *Weyerhaeuser Co. v. Commercial Union Ins. Co*., 15 P.3d 115, 122 (Wash. 2000). One of the primary reasons for this rule of fairness, is that the insured is generally financially vulnerable when it makes a claim, underscoring the quasi-fiduciary relationship between the insurer – the drafter of the contract and the insured – the one who seeks protection from calamity.

As the Washington Supreme Court has stated, a heightened level of trust exists in the first party context "where the insurer's interests might be opposed to the insured's and the insured is particularly vulnerable and dependent on the

insurer's honesty and good faith." *Van Noy v. State Farm*, 16 P.3d 574, 579 n.2 (Wash. 2001). In this case, Transamerica's policy provided coverage for dementia patients to seek treatment in an "institutional setting" – the Aegis Assisted Living Facility. It is difficult to conceptualize a more vulnerable insured than a person facing dementia and other end of life ailments for which LTCI is designed to lessen the financial stress on him and his family.

The District Court incorrectly granted Transamerica's Motion for Summary Judgment, holding that the Aegis Assisted Living Facility was not a "nursing home" within the meaning of the policy and that Transamerica was therefore not required to pay Howisey the policy's Nursing Home benefit. *See* Order Granting Defendant's Motion for Summary Judgment, Dkt. #40, Case No. C17-00009 RSM (W.D. Wash. Nov. 30, 2017).

Transamerica's policy is not permitted to define the Nursing Home benefit to require a different level of nursing care than required by Washington law. *See* WAC 284-54-300; 350. In addition, public policy, as enunciated by the Federal Government, favors the purchase and sale of LTCI policies to alleviate the burden on the social safety net. Policymakers have correctly resolved that consumers likely will not be incentivized to purchase LTCI policies if they fear litigating

semantics with their insurers to obtain coverage they reasonably believed was afforded.[5]

Policyholders must be protected against such *contracts of adhesion* because of and especially during periods of financial vulnerability. As such, *amicus curiae* UP urges the court to reverse the District Court and follow long-held principles of Washington insurance law that effectuate coverage by construing ambiguities against the drafter-insurer and in favor of the insured's reasonable expectations. Longstanding Washington law and public policy require it.

III. ARGUMENT

A. Washington Law Mandates Liberal Interpretation of Insurance Policies In Favor of Coverage, Construing Any Ambiguities Against the Drafter

The legal issue in this case is simple: whether Transamerica's LTCI policy benefit covers the Aegis Facility where Mr. Howisey resides. The answer is yes. Transamerica has attempted to argue for the narrow construction of its own policy and has delved into a semantic discussion that is at odds with the plain language of the policy, Washington state regulations, and Washington case law.

Washington State has taken a strong interest in regulating the business of insurance because it significantly impacts the public interest. Wash. Rev. Code §

[5] In fact, Mr. Howisey only requested his Nursing Home Benefit when he exhausted coverage under the Assisted Living Facility Benefit. Insurance carriers must disclose all available benefits to the insured, thus denying coverage for the Nursing Home Benefit, which should have afforded coverage for the Aegis facility, runs afoul Washington law. *See* WAC 284-30-330.

48.01.030. As a result, Washington State Courts have developed strong guidelines for interpreting insurance policies. Insurance policies are construed as contracts. *Austl. Unlimited, Inc. v. Hartford Cas. Ins. Co.*, 198 P.3d 514, 617 (Wash. App. 2008). The purpose of insurance is to insure, so courts must use a construction that *provides coverage*, rather than one that eliminates coverage. *Phil Schroeder, Inc. v. Royal Globe Ins. Co.*, 659 P.2d 509, 511 (Wash. 1983), modified on other grounds, 683 P.2d 186 (Wash. 1984). Insurance policies must be interpreted as they would be understood by the average purchaser of insurance. *McDonald v. State Farm Fire & Cas. Co.*, 733, 837 P.2d 1000, 1005 (Wash. 1992).

Courts are to presume the parties did not intend a construction which contradicts the general purpose of the policy or results in "hardship or absurdity." *Phil Schroeder, Inc.*, 659. P.2d at 511. If there is any ambiguity, it should be strictly construed against the insurance company – as the drafter of the policy - and in favor of the coverage for the policyholder. *See George v. Farmers Ins. Co. of Wash.*, 23 P.3d 552, 557-558 (Wash. App. 2001).

Applying those standards to Transamerica's policy here, the District Court improperly ruled there was no coverage for Mr. Howisey's stay at the Aegis Facility. However, Transamerica's policy pays for all levels of levels of care in a "nursing home" (now regulated as "assisted-living facilities" or "boarding homes" – *see* Wash. Rev. Code § 18.51.030; Laws of 1957, ch. 253, § 3; Laws of 2003, ch.

231, § 2; Laws of 2004, ch. 142 §§ 1, 5, 12). Further, Transamerica's policy improperly defines "nursing home" with relation to five factors: the facility (1) is licensed by the state as a *nursing home* (emphasis added); and (2) is engaged in providing, in addition to room and board accommodations, nursing care and related services on a continuing inpatient basis; and (3) provides, on a formal prearranged basis, a Nurse who is on duty or on call at all times; and (4) has a planned program of policies and procedures developed with the advice of, and periodically reviewed by, at least one Physician; and (5) maintains a clinical record of each patient.

Transamerica's denial of coverage stems from its erroneous conclusion that because Aegis was not licensed as a nursing facility, the Nursing Home benefit was not available to Mr. Howisey. Another District Court in this District has already found that Transamerica may not limit coverage under its policy for a type of care that the Aegis Facility would not be permitted to provide under Washington law. *See Pistorese v. Transamerica Life Ins. Co.*, No. C12-1083Z, 2013 U.S. Dist. LEXIS 109863 (W.D. Wash. Aug. 2, 2013); *see also Gutowitz v. Transamerica Life Ins. Co.,* 126 F. Supp. 3d 1128, 1131 (C.D. Cal. 2015).

But even if Transamerica was correct that the Aegis Facility was not a "licensed as a nursing home," within the meaning of its policy, that does not end the inquiry. Where there are two or more valid interpretations of an insurance policy, the language is ambiguous and is strictly construed against the insurance

company. *George*, 23 P.3d at 557. In effect, Transamerica is asking this Court to change the rules of how Washington State interprets insurance contracts to completely eliminate the established rule of *contra proferentem*.

The crux of the issue in this case is the construction of contracts and Washington State's strong history of interpreting ambiguous insurance policies in favor of the policyholder and against the drafter-insurer. By making the arguments it does, Transamerica now asks this Court – as it asked the District Court below – to help it revise its own contract. But that argument also goes against clearly stated Washington law that a court is *not* free to revise an insurance contract under the theory of construing it. *Findlay v. United Pac. Ins.,* 917 P.2d 116, 122 (Wash. 1996). An insurer, as a drafter of the contract, is primarily responsible for defining the scope of coverage. *Mission Ins. Co. v. Guarantee Ins. Co.*, 683 P.2d 675, 699 (Wash. App. 1980). An insured "has little choice but to accept the policy language the insurance company used." *See Greer v. Northwestern Nat'l Ins. Co.*, 743 P.2d 1244, 1252 (Wash. 1987) (Dore, J. concurring). It was this imbalance of power that led to the rule that ambiguity is construed against the insurer. *See also* Williston, *supra* at FN 3.

Transamerica is essentially claiming that changes in regulatory provisions should be used to alter the meaning of the terms of the policy. As the District Court in *Pistorese* properly noted, amended regulatory provisions do not "shed

light on the intentions of the Parties when the contract was formed." *Pistorese*, 2013 U.S. Dist. LEXIS 109863, at *15-16. Further, while Transamerica's payment of the Alternate Care Benefit indicates that it tacitly acknowledged that Mr. Howisey's claims were covered, Transamerica attempted to illegally limit the maximum payout to the policyholder.

In sum, ambiguous clauses in insurance policies will be given the meaning and construction most favorable to the insured. Here, Transamerica asks this Court to write in a much more broad exclusion than it wrote into its own insurance policy. Mr. Howisey and any other reasonable consumer would expect that the plain, ordinary meaning of "nursing home" to include the Aegis Facility. An ordinary purchaser of insurance reasonably expects coverage under the circumstances and should not expect to litigate semantics with their insurer at claim time, particularly when the policy is illegal under Washington State law.

B. The Public Policy Behind Long Term Care Insurance Policies Also Supports The District Court's Interpretation, Thus Reversal Is Warranted

Public policy favors the purchase and sale of LTCI policies to alleviate the burden on the social safety net. Both the Federal Government and the State of Washington have partnerships with LTCI insurance providers to encourage the

purchase and sale of LTCI policies.[6] According to statistics, at least 70% of persons over the age of 65 will need some form of Long Term Care.[7]

Importantly, consumers will not be incentivized to purchase such policies if they fear litigating semantics with their insurance carrier over such provisions. Mr. Howisey purchased an LTCI policy from Transamerica with the *reasonable expectation* that he would have coverage for the Aegis Facility, thereby alleviating financial stress from his family and the government when he required Long Term Care. A favorable ruling for Transamerica in this case would have a chilling effect on the purchase and sale of LTCI and incentivize insurance companies to use the claim process to correct its underwriting mistakes.[8]

CONCLUSION

For the foregoing reasons, *amicus curiae* United Policyholders respectfully requests that this Court reverse the decision of the U.S. District Court for the

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[6] *See* Washington State Long Term Care Partnership Program https://www.insurance.wa.gov/washington-state-long-term-care-partnership-program. (last visited March 2, 2018).

[7] *See, e.g. Understanding Long Term Care Insurance*: The Basics of What You Need to Know, AARP (June 2012) (http://www.aarp.org/health/health-insurance/info-06-2012/understanding-long-term-care-insurance.html).

[8] It is public knowledge that many LTCI companies are facing financial hardship and are simultaneously seeking approval for premium increases and denying valid claims as a means to remedy overselling policies that were not actuarially sound. An insurer should not be permitted to do a *post hoc* revision of its policy because it discovers it did not properly evaluate its risk. Washington law prohibits this.

Western District of Washington in favor Defendant/Appellee and allow Plaintiff/Appellant's claims proceed.

Dated: March 5, 2018

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STATEMENT OF *AMICUS CURIAE*

Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, I hereby certify: (1) a party's counsel did not author the brief in whole or in part; (2) a party or a party's counsel did not contribute money that was intended to fund preparing or submitting the brief; and (3) no person – other than the *Amicus Curiae*, its member, or its counsel -- contributed money that was intended to fund preparing or submitting the brief.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations set forth in Rules 29(d) and 32(a)(7)(B) of Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font and contains 3,771 words.

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CERTIFICATE OF SERVICE

I, Victoria Blasdell, declare:

I am employed in Seattle, Washington. I am over the age of 18 and not a party to this action; my business address is 1218 Third Avenue, Suite 1000 Seattle, WA 98101, Phone: 206.629.9909, e-mail: victoria@olivelawnw.com.

I certify that on March 5, 2018, I caused the foregoing document to be electronically submitted to the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct, and I am employed in the office of a member of the bar of this Court at whose direction this service was made.

Executed on March 5, 2018, in the city of Seattle, Washington.

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