APPLICATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Pursuant to California Rule of Court 29.1(f), and through this Application, United Policyholders (also referred to as "Amicus") hereby requests permission for leave to file an amicus curiae brief on the merits in the matter of Rosen v. State Farm General Insurance Company, Supreme Court Case No. S108308. A copy of Amicus' proposed brief is attached hereto.

United Policyholders is a national, non-profit organization formed to advocate the interests of insurance consumers in legislatures and courts. United Policyholders actively assists consumers with their insurance claims, frequently testifies at legislative and public hearings, and circulates several publications regarding the rights and duties of consumers who purchase insurance.

Amicus respectfully requests that you consider favorably this application because we believe our point of view is essential.

The pendulum has swung too far. Property insurance carriers have argued with unparalleled success over recent years that a particular issue should be resolved in their favor due to their fear of increased premiums, or even loss of profit. Enough is enough.

The ideal property insurance policy to the carrier would be one in which it never had to pay a claim. This would allow for very reasonable premiums and a healthy profit.

But it would overlook the fundamental societal reason for property insurance. People buy property insurance to have control over their lives. In ordinary times people get by. However, when the unforeseen tragedy or catastrophe occurs, people need help. This is why people buy property insurance.

Viewed properly, this is not a conservative v. liberal or pro-business v. anti-business issue. All types of people buy and need property insurance. Conservatives, wealthy people, judges, justices, no one is really exempt. The issue, rather, is basic fairness, remedying injustice.

Property insurance carriers run a business. When they lose a claim, or a judicial decision, they try to write their adhesive policy more narrowly. It is simply not feasible to wait for every state legislature to respond every time a property insurance carrier seeks to insert an unconscionable provision. The relief sought by the property insurance carrier in this case would abrogate an essential reason for our judicial system, the remedying of injustice. Courts must be allowed to refuse to enforce unconscionable adhesive contracts. This traditional judicial role is part of the essential checks and balances which has made our government effective and fair.

I. INTRODUCTION

As framed by the parties on appeal, this case presents two fundamental issues for the Court:

1. Whether this Court should reject the traditional rule which allows courts to decide against enforcing an adhesive contract provision which is unconscionable or may lead to serious injury or loss of life; and,

2. Whether this Court should determine not to enforce the adhesive insurance contract provision at issue which is unconscionable and may lead to serious injury or loss of life.

It is the position of United Policyholders ("Amicus") that adopting any rule which deprives the insured of the traditional, well-established protections afforded in the common-law would be a radical departure from the generally accepted principles of insurance contract law and would be grotesquely anti-consumer. Historically, because of the essential nature of insurance generally, and the adhesive nature of insurance contracts specifically, both the courts *and* the Legislature have promulgated decisions and regulations designed to protect the insured. Indeed, it is common for the Legislature to codify into statute principles created by the judiciary in the common-law.[1] Unlike State Farm, Amicus does not believe that courts are too capricious to be allowed to invalidate insurance contract provisions that are directly contrary to judicially created public policy. On the contrary, Amicus believes this is a basic judicial function.

[1] For instance, it is recognized that Insurance Code Section 533, and its predecessor statute, is a codification of public policy principles developed in the common-law. See, *e.g.*, Arenson v. National Auto & Cas. Ins. Co (1955) 45 Cal.2d. 81, 84; American States Ins. Co. v. Borbor by Borbor (9th Cir. 1987) 826 F.2d 888, 894.

As a result, Amicus argues that the new rule proposed by State Farm would unnecessarily place the judiciary into an analytical straightjacket. In effect, State Farm wants courts who are interpreting unambiguous adhesion contracts to defer to the legislature every single time they come across unfair, illegal or socially unacceptable terms which have been inserted by the drafter. State Farm believes that if the legislature has not yet created policy on a particular issue, then the judiciary should always wait for it to do so. This is not the law and should never be the law.

Judicial public policy created the well known doctrine of unconscionability, which provides a critical consumer safety valve against adhesive contract terms. The recent unconscionability case of Armendiaz v. Foundation Health Psychare Services, Inc. (2000) 24 Cal.4th 83, where this Court declined to enforce an adhesive and unconscionable arbitration provision, is a prime example of where judicial intervention is sometimes necessary, even without direct guidance from the Legislature. Without unconscionability as a stop gap, employers could bind employees to literally any terms as long as they stayed one step ahead of the legislature.

Separately, the authorities principally relied upon by State Farm to "tether" public policy to statute, Gantt v. Sentry Insurance (1992) 1 Cal.4th 1083 and Aas v. Superior Court (2000) 24 Cal.4th 627, are tort cases involving tort principles that should not be applied to contract law. This Court need not rewrite contract law, as State Farm proposes, to decide the merits of this case.

Amicus agrees with the Respondent, the Trial Court, and the Court of Appeals, that requiring insureds to sit idly by and wait for buildings to actually collapse in order to receive insurance benefits creates the unnecessary threat of substantial additional property damage, bodily harm, and loss of human life. Accordingly, Amicus believes that the terms of State Farm's collapse coverage contravene the public welfare and should be stricken.

As a matter of public policy, collapse must include not only actual collapse, but collapse which is "imminent" or "likely to happen at any moment, impending." Doheny West Homeowners' Assn v. American Guarantee Liability Ins. Co. (1997) 60 Cal.App.4th 400, 406, citing The Random House College Dict. Revised ed. 1975). This removes the "absurdity" of requiring an insured to wait for his building to fall before receiving benefits. Id. at 406.

II. STATEMENT OF THE CASE

The facts and procedural history of this case are well known to the Court, having been fully set forth by the Petitioner and the Respondent. As a result, Amicus hereby incorporates by reference the facts and procedural history set forth in the Opening Briefs on the Merits submitted by State Farm and George Rosen.

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III. ARGUMENT

A. The Court Should Not Depart From the Well-Settled Principles of Contract Law Which Prohibit Contracts That Are Unconscionable or Harm Human Life

1. The New Rule Proposed By State Farm Would Rewrite Basic Contract Law and Encourage Insurance Companies to Draft Insurance Provisions to be As Adhesive As Possible

In Gantt v. Sentry Insurance (1992) 1 Cal.4th 1083, one of the cases principally relied on by State Farm, this Court stated: "We have . . . long declined to enforce contracts inimical to law or the public interest." Id., at 1093 (citations omitted). This Court then quoted, with approval, the principle set forth in Maryland C. Co. v. Fidelity etc. Co. (1925) 71 Cal.App. 492, 497: "It is primarily the prerogative of the legislature to declare what contracts and acts shall be unlawful; *but* courts, following the spirit and genius of the law, written and unwritten, of a state, may declare as against public policy contracts which, though not in terms specifically forbidden by legislation, are clearly injurious to the interests of society." Gantt, supra, at 1093, fn. 6. (Emphasis added).

State Farm, however, urges this Court to adopt a new rule that would make courts powerless to invalidate an unambiguous insurance contract provision absent a legislative or a constitutional source which specifically tells it to do so. This rule would apply even when a court concludes, as the Rosen court did, that application of the provision will result in serious injury or loss of human life. In that instance, the court would have no choice but to mechanically enforce the offending

insurance provision, absent a specific statute to the contrary. The creation of this sort of analytical straitjacket is inimical to both contract law and the court process.

Indeed, adopting State Farm's rule would only give insurance companies incentive to cherry-pick those areas of insurance law not currently directly regulated by the Legislature, and then write corresponding policy provisions to be as adhesive as possible. Insurance companies could do this with the full confidence that, no matter how injurious or unconscionable a policy provision might be, courts would be powerless to do anything but enforce the provision as long as it was unambiguous. Accepting State Farm's rule would only encourage insurance companies to: "[C]ontinue tinkering with their policy language in the hope that they will stumble across the magic formula which will absolve them of all liability." Howell v. State Farm Fire and Casualty Company (1990) 218 Cal.App.3d 1446, 1457, fn. 5.

The position advocated by State Farm does considerable violence to the traditional laws of contract. Moreover, it is beyond cavil to assume that the Legislature has the ability to anticipate every situation where an insurance contract provision might violate fundamental public policy. It is precisely in those areas where the Legislature has yet to step in where an insured most needs the traditional protections afforded by the courts against contract provisions that are unconscionable or injurious.

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2. That Insurance Policies Are Contracts of Adhesion Only Underscores the Importance of Retaining Public Policy Rooted in the Common-Law

Contracts of adhesion have been described as "a standardized contract, which imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." Neal v. State Farm Ins. Cos. (1961) 188 Cal.App.2d 690, 694.[2] Special considerations are given to contracts of adhesion because there is a clear danger of oppression, and both the courts and the legislature have acted to prevent abuses. Graham v. Scissor-Tail, supra, 28 Cal.3d at 818. It is well-settled that an insurance policy is a contract of adhesion. Gray v. Zurich Insurance Co. (1966) 65 Cal.2d 263, 269; Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal.3d 809, 820.

As explained in Scissor-Tail, a contract of adhesion is fully enforceable unless "established legal rules – legislative or judicial – operate to render it otherwise." Scissor-Tail, supra, 28 Cal.3d at 820. This requires a two-part analysis: (1) If the contractual provision does not fall within the reasonable expectations of the weaker party; or, (2) if the provision violates principles of equity such as unconcionablity. Id.[3] The rule that ambiguities must be interpreted against the insurer derives its source from the first part of the analysis that the

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[2] Quoted with approval by this Court in Graham v. Scissor-Tail, Inc. (1981) 28 Cal.3d 807, 817.

[3] Scissor-Tail drew these legal principles, in part, from insurance contract cases. See, e.g., Gray, supra, at 271-272, and Steven v. Fidelity & Casualty Co. (1962) 58 Cal.2d 862, 869-870.

reasonable expectations of the insured should not be defeated. California Casualty Indemnity Exchange v. Freichs (1999) 74 Cal.App.4th 1446, 1450.

It is the second part of the adhesion analysis – judicial oversight over the enforceability of unambiguous provisions – that State Farm seeks to do away with. However, the danger in rewriting contract law to support State Farm's position is illustrated by this Court's recent decision in Armendariz. In Armendariz, this Court did not shy away from applying public policy considerations to mandatory arbitration provisions in employment contracts, framing the essential issue as: "Are there reasons, based on general contract law principles, for refusing to enforce the present arbitration agreement? In the present case, the answer turns on whether and to what extent the arbitration agreement was unconscionable or contrary to public policy, questions to which we now turn." Armendariz, supra, 24 Cal.4th at 99.

In its analysis of mandatory arbitration provisions in general, this Court applied the "judicially created doctrine of unconscionability." Id., at 114. First, this Court found that the arbitration agreement at issue was a contract of adhesion. Id., at 114, 115. Second, this Court found that the arbitration agreement was unconscionable because it did not require the employer, unlike the employee, to submit to arbitration: "Although parties are free to contract for asymmetrical remedies and arbitration clauses of varying scope . . . . the doctrine of unconscionability limits the extent to which a stronger party may, through a

contract of adhesion, impose the arbitration forum on the weaker party without accepting that forum for itself." Id., at 118.[4]

As Armendiaz demonstrates, use of common-law principles such as the doctrine of unconscionability is particularly important for contracts of adhesion. As with the relationship between the employee and the employer, the insured is always weaker than the insurance company. The consumer needs to purchase insurance but has no ability to bargain over terms. The consumer must take it or leave it. Accordingly, the consumer desperately needs the traditional protections given by the courts.

Under State Farm's proposed rule, the judicially created doctrine of unconscionability as used in Armendiaz could never be applied to adhesive insurance contract provisions. A court could reach the conclusion that a given insurance contract provision is both procedurally and substantively unconscionable under the common-law, but would then be powerless to invalidate it absent a corresponding legislative rule.

State Farm's solution to the problem – that the consumer insured can always try to lobby the legislature for a new law – makes no sense. What are courts for?

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[4] This sort of overall analysis is popularly referred to as "procedural" and "substantive" unconscionability. Id., see also, e.g., Kinney v. United Healthcase Services, Inc. (1999) 70 Cal.App.4th 1322, 1329.

3. There Is No Good Authority To Support the Proposition that Court's Should Abandon the Common-Law

State Farm cites considerable authority in support of the proposition that unambiguous contract provisions should generally be enforced absent any policy analysis. See, e.g., Underwriters at Lloyd's of London v. Superior Court (Powerine Oil Co., Inc.) (2001) 24 Cal.4th 945, 971; Aerojet-General Corp. v. Transport Indemnity Co. (1997) 17 Cal.4th 38, 76. Amicus agrees. It is undisputed that a court should give every conceivable deference to unambiguous contract provisions. But it is equally undisputed that courts reserve the power to invalidate contract provisions, even if unambiguous, on the basis of public policy, either judicially created or from the Legislature. See, Gantt, supra; see also, generally, Spangenberg v. Spangenberg (1912) 19 Cal.App. 439. This is particularly true for contracts of adhesion. Scissor-Tail, supra.

Indeed, Gantt is not good authority for State Farm to rely upon because Gantt specifically recognized the court's power to invalidate contracts based on judicial public policy considerations. Gantt, supra. Separately, Gantt also considered what public policy principles might support the tort of wrongful discharge. Id., at 1090. In rendering its decision, this Court was careful not to blur the distinction between tort and contract, specifically narrowing its ruling to the tort of wrongful discharge: "These wise caveats against judicial policymaking are unnecessary if one recognizes that courts in *wrongful discharge actions* may not

declare public policy without a basis in either constitutional or statutory provisions." Id., at 1095 (Emphasis in original).

State Farm argues that the rule regarding public policy considerations formulated in Gantt for the tort of wrongful discharge should now be applied to contract law. But State Farm's one-size fits all argument ignores the unique circumstances of tortious discharge. First, the tort of wrongful discharge is predicated on an employer's breach of duty as derived from fundamental public policy. Tameny v. Atlantic Richfeld Company (1980) 27 Cal.3d 167, 176. In that respect, it is analytically distinct from the obligations imposed by contract. Id. Secondly, it is well-recognized that the tort of wrongful discharge creates a narrow exception to the general rule that employment is at-will. Stevenson v. Superior Court (Huntington Memorial Hospital) (1997) 16 Cal.4th 880, 887. That exception is when an employer violates fundamental public policy. Id. But because the tort of wrongful discharge itself is entirely a creature of public policy, and is based on a narrowly drawn exception to the rule of at-will employment, this Court has been careful to permit a cause of action for this tort only when four particular factors are met.[5] Mandating that public policy considerations be "tethered" to a regulation, statute, or constitutional provision is just one of those factors. Id., at 889, 890.

[5] The policy must be supported by either constitutional or statutory provisions; the benefits of policy must be for the public, as opposed to the individual; the policy must have been articulated at the time of discharge; and, the policy must be fundamental or substantial. Stevenson, supra, 16 Cal.4th at 889, 890.

The point is that narrow exceptions should be construed narrowly. Applying a rule formulated in tort – and a rarefied tort at that – to contract law ignores the traditional distinctions between contract law and tort law. It would also radically alter the traditional analysis used in examining contracts of adhesion. State Farm argues that tethering public policy to a statutory or constitutional provision would promote certainty of contract. This ignores the fact that common-law, public policy measures preventing the enforcement of contracts which are unconscionable or injurious to others are well-known and well-established. Removing the common-law from public policy decisions would not create more certainty of contract; it would instead deprive the insured of one of the most traditional and fundamental protections offered by the courts against adhesive insurance policy provisions.[6]

In sum, State Farm's knee-jerk, one size fits all approach to public policy is meritless. Courts should continue to follow the well-established principles of contract law and look to the factual circumstances of each case.

This point is only further underscored by State Farm's erroneous examination of Aas v. Superior Court (2000) 24 Cal.4th 627. Aas is exclusively a

[6] State Farm also advocates tethering because the insurance industry is already heavily regulated. This regulation, however, is in large part because it is recognized that the insureds are vulnerable to insurance companies and that the business of insurance should be controlled by the public for the public good. 20th Century Insurance Company v. Superior Court (Ahles) (2001) 90 Cal.App.4th 1247, 1265, 1266. Accepting State Farm's rule would have the anomalous result of actually giving the insured *less* protection than that enjoyed by parties to ordinary contracts.

tort case, not a contract case. This Court made this distinction very clear before launching into its comprehensive negligence analysis: "Strict liability is not here at issue … Nor, finally, does the ruling prevent plaintiffs from introducing any evidence relevant to their claims for breach of contract or warranty, assuming those claims survive to trial, even if that evidence has been excluded for the purposes of plaintiffs' tort claims. Aas, supra, 24 Cal.4th at 635. Thus, while this Court ruled in Aas that defects which had not yet caused property damage did not support a cause of action for negligence, it also found that those very same defects may support a contract cause of action, even absent resultant property damage. Aas, supra, 24 Cal.4th at 632, 635.

Again, the point is that contract principles are different from tort principles, and courts perform fundamentally different analyses depending upon whether a cause of action stems in contract or tort. Whereas Aas involved product liability law and its application to homes, this case involves interpretation of a socially unacceptable term in an adhesion contract. Accordingly, State Farm incorrectly mixes apples with oranges, when it argues that Aas instructs this Court to defer this matter to the legislature. On the contrary, Aas is irrelevant to matters of contract interpretation such as this, which have always been the province of the judiciary, not the Legislature.

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B. This Court should Invalidate the State Farm Provision Which May Lead to Serious Injury or Loss of Human Life

1. Any Court Conducting A Policy Analysis Will Recognize That Policyholders Are Entitled To Insurance Coverage For Known Imminent Collapse

Amicus believes this Court should uphold Rosen v. State Farm Insurance Company, and invalidate State Farm's insurance provision which denies coverage for a known imminent collapse. Otherwise, the law will require an insured to wait for a building to actually fall down before receiving insurance benefits. This is untenable.

All can agree that the Rosen Trial Court and the Rosen Court of Appeals started their analyses differently. The Trial Court felt that the policy analysis in the Doheny case applied, and was not limited exclusively to ambiguous collapse provisions. Doheny, supra, 60 Cal.App.4th 400; Rosen v. State Farm General Insurance Company (2002) DJDAR 6151, 6152. On the other hand, the Court of Appeals believed Doheny's policy analysis did not apply because the provision at issue in Doheny was ambiguous. Rosen, DJDAR at 6152.

Despite their different starting points, close examination reveals that not only did the Trial Court and the Court of Appeals reach the same result, they applied the same logic to get there.

The Doheny court's policy analysis, adopted by the Trial Court, is perhaps best summarized by the following passage:

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> We cannot, however, interpret this policy to mean that there is coverage only if a building falls, and to exclude coverage for collapse which is inevitable but which has not taken place. First, as Doheny West argues, and many of the "broad definition" cases have pointed out, such an interpretation would require an insured seeking the benefits of its insurance coverage to neglect repairs and allow a building to fall, a course of action which could not possibly comport with the expectation and intent of the insured, or advance the best interests of the insured, the public, or even the insurer, if the actual collapse took place at a time which brought it under the insurer's coverage. As one court has said, such a construction 'would be unreasonable to say the least' [Citations].

Doheny, 60 Cal.App.4th at 404.

After expressly distinguishing Doheny, the Rosen Court of Appeals conducted its own separate, independent policy analysis and decided not to enforce State Farm's collapse provision:

> The notion that in the absence of coverage from imminent collapse an insured may wait until the full or partial actual collapse of a building simply to ensure coverage is troubling indeed. The actual collapse of a building or any part of a building tragically can result in serious injury or loss of human life, as well as substantial property damage. A requirement that an insurer provide coverage when collapse is imminent clearly is in the best interests not only of the insured and the insured's visitors but also of the insurer. Rectifying the problem prior to an actual collapse may well save lives and money. Moreover, our holding does not unduly burden the insurer because its liability is limited for a loss which is imminent, and, thus, soon to occur anyway. Surely, an insurer's exposure to liability will be far greater in the event of an actual collapse.

Rosen, DJDAR at 6153.

As the two block quotes indicate, the essential logic followed by Doheny, the Rosen Trial Court, and the Rosen Court of Appeals, is the same: denying coverage

for imminent collapse is dangerous, even reckless. All three courts concluded that providing coverage for imminent collapse is in the best interests of the insured, the insurer, and the public. The insured is encouraged to repair his building before it actually falls to the ground because he has insurance coverage. The insurer is protected from having to pay benefits for a building that has fallen to pieces, obviously a far greater catastrophe. Most importantly, lives are saved and serious injury is prevented.

How is it that the Trial Court and the Court of Appeals started in different places and still reached the exact same conclusion? Amicus submits that the explanation is simple: any policy analysis, by any California court, will conclude that policyholders are entitled to coverage for known imminent collapse. Any other result could cause massive property damage, personal injury, or death.

While courts should enforce unambiguous contract provisions whenever feasible, there are rare instances where enforcement of a contract term, particularly an adhesive contract term, would be so manifestly unjust and so contrary to the public interest that courts must step in and prevent enforcement. As every court thus far has concluded, State Farm's contract requirement that insureds must wait for their buildings to collapse in order to receive insurance benefits is one such rare instance. Accordingly, this Court should also prevent enforcement.

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C. State Farm's Argument That Coverage For Imminent Collapse Converts An Insurance Policy Into A Maintenance Agreement Is Not Well Reasoned And Contravenes Existing California Law

1. The Basic Nature Of Insurance Is Completely Different From A Maintenance Agreement

State Farm argues that coverage for imminent collapse would convert its insurance policy into a "maintenance agreement." (Petitioner's Opening Brief at p. 25). Quite frankly, Amicus is not even sure what this means. Amicus can say that the basic nature of insurance is totally contrary to its understanding of a maintenance agreement.

A building or part of a building may last for over 100 years. When an insurance company decides whether to insure for collapse, it does not make a 100 year commitment. Rather, its underwriting department has the opportunity to evaluate the underlying risk of a sudden, unexpected loss from collapse due to certain enumerated perils for one year at a time. It may inspect the building, evaluate the physical condition, and assess the design before doing so. This is the essence of insurance. The insured elects to pay a premium to protect against the risk of catastrophic loss. The insurer accepts the premium, committing to indemnify against that defined loss if it occurs during the policy period.

State Farm chose to take Mr. Rosen's premium and take the risk that a sudden, unexpected collapse could manifest during the policy year as a result of one of six enumerated perils. If collapse were to have occurred by something other than

these six enumerated perils, the loss would not have been covered. This is a far cry from a maintenance agreement.

Whatever the term maintenance agreement means to State Farm, or any other party, is irrelevant. State Farm chose to insure Mr. Rosen's property for a one year period, and chose to pay Mr. Rosen benefits if his property suffered a collapse caused by an enumerated peril. This is precisely what happened here. Accordingly, State Farm should honor its agreement with Mr. Rosen, and pay him the insurance benefits arising from this sudden, unexpected event.

2. The Doheny Court Already Wrestled With This Issue And Ruled Against State Farm

State Farm argues that any building or part of a building will collapse if an insured waits long enough. Accordingly, State Farm claims that coverage for imminent collapse would cause all maintenance to be deferred so that there could be coverage. This is absurd. State Farm ignores the meaning of the word "imminent" and it ignores collapse case law. Doheny, supra, 60 Cal.App.4th at 406; Stamm Theatres, Inc. v. Hartford Casualty Ins. Co. (2001) 93 Cal.App.4th 531, 541.

The Doheny court wrestled with the precise issue raised by State Farm over five years ago, and carefully crafted a collapse definition which keeps ordinary maintenance the responsibility of the homeowner, and keeps the duty to insure against sudden, unexpected collapse the responsibility of the insurance company.

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The court there noted as follows:

> [S]ince any of the excluded causes could result in collapse if the initial damage was neglected for a long enough period, an additional limitation is logically necessary if we are to avoid converting this insurance policy into a maintenance agreement.

Doheny, supra, 60 Cal.App.4th at 406.

In order to resolve this problem, the Doheny court concluded that a "collapse" must be actual or imminent, and not simply likely to occur. Id. Under Doheny's clear, bright line coverage test, mere "substantial impairment of structural integrity" by itself does not constitute "imminent collapse" because it does not always lead to an actual collapse. Id. at 408. Accordingly, the Doheny court found that a collapse did not occur, although emergency repairs were required to save a damaged swimming pool and parking structure at a condominium complex, because it was uncertain whether the damage would have lead to an actual collapse. Id. at 402, 406, 409-410.

While this could easily have been the end of its analysis, the Doheny court went further. It concluded that if the swimming pool and parking structure had been in a condition such that collapse was "imminent" or "inevitable," there was no intelligent reason to treat the situation any differently than if they had "actually" collapsed. Id. at 404. What the Doheny court articulated, and State Farm ignores, is that a structure in a state of imminent collapse is a menace to society, threatening not only financial ruin but imminent loss of life.

To require an insured who had the good sense to purchase insurance against just such a catastrophe to wait until his building actually fell down before he could obtain the financial ability to fix it is simply to defy common sense.

3. Under California Law, Section B Exclusions Relate Only To Section A All-Risk Coverage And Do Not Limit Section D (Additional) Coverage

In closing, Amicus believes that to have an informed discussion about collapse coverage, it is absolutely imperative to understand the way State Farm has chosen to write its insurance policy. Separately, it is also critical to understand California case law which makes Section B Exclusions inapplicable to Section D "ADDITIONAL COVERAGES, Collapse" in property insurance policies. State Farm conveniently ignores both the language of its policy and the interpretive case law.

State Farm's argument that coverage for imminent collapse converts an insurance policy into a maintenance agreement is founded upon an exclusion in its policy for loss caused by inadequate or faulty maintenance. (Petitioner's Opening Brief at p. 26-27, footnote 12). Under California law, however, this exclusion is totally irrelevant to State Farm's "ADDITIONAL COVERAGES, Collapse" section. Doheny, supra, 60 Cal.App.4th at 406; Stamm Theatres, supra, 93 Cal.App.4th at 541.

Fortunately, the Rosen Court of Appeals explains the way State Farm's policy is written. The "Losses Not Insured" section of the policy expressly states that State Farm does not insure for any loss to the dwelling caused by "collapse, except as

specifically provided in SECTION I – ADDITIONAL COVERAGES, Collapse." Rosen, DJDAR at 6151. Thus, the only time coverage exists for Collapse is specifically provided in the ADDITIONAL COVERAGES section, which lists six extremely specific enumerated perils. However, in the rare instance where one of these six enumerated perils causes a collapse, coverage is triggered. This is the end of the analysis.

On this point, Doheny is again instructive. In Doheny, the court construed a similar "Part D" insuring clause for damage involving a collapse. The court noted that although seepage of water, wear and tear, decay, deterioration and faulty maintenance were all exclusions in the insurance policy, none were applicable if a covered structure was involved in a collapse. Doheny, supra, 60 Cal.App.4th at 405-406. Rather, in the event of a collapse, the sole analysis is whether the damage is caused by an enumerated peril. (Id. at 406.) In other words, under California law, Section B exclusions bear no relationship to Section D (Additional) Collapse Coverage.

The Stamm Theatres case involved collapse caused by an enumerated peril for "hidden decay." Stamm Theatres, supra, 93 Cal.App.4th at 541. The insurance company argued that a broad definition of "decay" would effectively convert its insurance policy into a maintenance agreement. The court was not persuaded:

> The exclusion for "wear and tear" does not impose or imply a restriction on the coverage for collapse caused by hidden decay. The "wear and tear" exclusion is immediately followed by an exclusion for damage caused by "rust, corrosion, fungus, *decay*, deterioration, hidden or latent defect or any quality in property that causes it to

> damage or destroy itself." (Italics added.) There is also an exclusion for "[c]ollapse, except as provided below in the Additional Coverage for Collapse." Obviously, Hartford's collapse coverage was not meant to be limited by the generally applicable policy exclusions.

Id. at 541; emphasis added.

Under Doheny and Stamm Theatres, the standard exclusions in State Farm's policy do not apply to its Additional Coverage for Collapse. This is what makes Collapse Coverage "Additional." Accordingly, for this separate and independent reason, State Farm's argument that coverage for imminent collapse converts its insurance policy into a maintenance agreement is meritless and should be summarily dismissed by this Court.

IV. CONCLUSION

For the forgoing reasons, Amicus urges this Court to affirm the holdings of the Trial Court and the Court of Appeals.

Dated: January 23, 2003

Respectfully submitted,

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