EXHIBIT 1

10-4389

In The
United States Court of Appeals
FOR THE SECOND CIRCUIT

THOMAS WOODHAMS and CHARLENE CONNORS,
individually and on Behalf of all others similarly situated

Plaintiffs-Appellants,

-against-

ALLSTATE FIRE AND CASUALTY COMPANY, et al.

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF *AMICUS CURIAE*, UNITED POLICYHOLDERS, IN SUPPORT OF THE PLAINTIFFS-APPELLANTS THOMAS WOODHAMS AND CHARLENE CONNORS and all others similarly situated, SEEKING REVERSAL OF THE DECISION OF THE SOUTHERN DISTRICT COURT OF NEW YORK

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

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) consumer organization, that it does not have a parent corporation, and that no publicly-traded corporation owns 10% or more of the stock of United Policyholders.

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I. UNITED POLICYHOLDERS ADOPTS THE STATEMENT OF FACTS AS SET FORTH BY THE POLICYHOLDERS, THOMAS WOODHAMS, CHARLENE CONNORS AND ALL OTHERS SIMILARLY SITUATED

United Policyholders[1] adopts the Statement of Facts of the policyholders, Thomas Woodhams and Charlene Connors, individually and on behalf all others similarly situated, as set forth in their brief submitted to the Second Circuit. *See Appellants' Brief*, filed Mar. 9, 2011, at 8-19.

ARGUMENT

I. ALLOWING INSURANCE COMPANIES TO DENY COVERAGE BECAUSE POLICYHOLDERS CANNOT COMPLETELY REBUILD THEIR HOMES WITHIN 180 DAYS IS AGAINST THE PURPOSE OF INSURANCE

Insurance transfers risk, and a policyholder pays a premium in order to transfer "the risk of a loss or the responsibility for certain costs and expenses" to an insurance company. ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCUMENTS, AND COMMERCIAL

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[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(4), for *amicus curiae* United Policyholders' concise statement of its interest in the case and the source of its authority to file, please see the Declaration of William G. Passannante, Esq., filed herewith. Moreover, pursuant to Federal Rule of Appellate Procedure 29(c)(5), counsel for *amicus curiae* United Policyholders states that all of the legal research and writing in this brief has been performed by unpaid volunteer counsel, and that no person, party or party's counsel to this appeal participated in the drafting of this brief or funded the preparation or submission of this work.

PRACTICES 11 (West Publishing Co. 1988). Rather than an isolated contract for money, New York state courts have recognized that "the primary purpose of insurance is to insure..." *Rubin v. Empire Mut. Ins. Co.*, 57 Misc. 2d 104, 106, 290 N.Y.S. 2d 241, 243 (Civ. Ct. New York Cnty. 1967), *rev'd,* 32 A.D.2d 1, 3, 299 N.Y.S.2d 1, 3 (1st Dep't 1969), *rev'd,* 25 N.Y.2d 426, 430, 255 N.E.2d 154, 156, 306 N.Y.S.2d 914 (1969).

Beyond the mere purpose to "insure," New York's Insurance Law and Regulation have further sought to *ensure* that policyholders are protected from the overreaching effects inherent in the unbalanced relationship with insurance companies. First, insurance companies cannot "knowingly misrepresent[] to claimants pertinent facts or policy provisions relating to coverages at issue." N.Y. Ins. Law. § 2601 (2010). Second, specific to the facts here, in order to protect policyholders, the New York Insurance Department asked Allstate to change the language in their Indemnity Standard Select Value Homeowners Policy (the "Allstate Policy" or "Policy") to the standard language utilized by the rest of the insurance industry, which "does not impose a limit on the timeframe for the actual repair prior [to] the payment of the full claim." Wilkofsky Decl., Ex. C at A598.

Indeed, this approach is necessary to assist the policyholder, since "[i]nsurance contracts are usually contracts of adhesion in that their terms are generally dictated rather than negotiated." *Am. Home Prods. Corp. v. Liberty Mut.*

Ins. Co., 565 F. Supp. 1485, 1492 (S.D.N.Y. 1983), *aff'd,* 758 F.2d 760 (2d Cir. 1984); *Klos v. Polskie Linie Lotnicze*, 133 F.3d 164, 168 (2d Cir.1997) ("[t]ypical contracts of adhesion are standard-form contracts offered by large, economically powerful corporations to unrepresented, uneducated, and needy individuals on a take-it-or-leave-it basis, with no opportunity to change the contract's terms."); *First Fin. Ins. Co. v. Allstate Interior Demolition Corp.*, 193 F.3d 109, 118 (2d. Cir. 1999) ("As this Court has recognized, '[b]ecause insurance contracts are inevitably drafted by insurance companies, New York law construes insurance contracts in favor of the insured and resolves all ambiguities against the insurer...'").

The policyholder's expectation that he or she will have piece of mind that the policy bargained for will protect against the sudden occurrence of liability, is reinforced by the well-established principle that the insurance company has an implied duty of good faith to carry out its obligations under the policy. *Bi-Economy Mkt., Inc. v. Harleysville Ins. Co. of N.Y.*, 10 N.Y.3d 187, 194, 886 N.E.2d 127, 131, 856 N.Y.S.2d 505, 509 (2008) ("implicit in contracts of insurance is a covenant of good faith and fair dealing, such that 'a reasonable insured would understand that the insurer promises to investigate in good faith and pay covered claims.'").

Indeed, insurance companies' obligation to act in "[g]ood conscience and fair dealing require that the [insurer] pursue a course that is not advantageous to

itself while disadvantageous to its policyholder." *Tank v. State Farm Fire & Cas. Co.*, 715 P.2d 1133, 1139 (Wash. 1986). Nevertheless, that is exactly what an insurance company is doing when it restricts the policyholder to an arbitrary and unreasonable time restriction within which to rebuild his or her house in order to obtain the replacement costs of those repairs. The end result is illusory coverage that the insurance company improperly attempts to avoid providing to the policyholder, while requiring that the policyholder pay a premium because of that expectation of coverage. *See Allstate Ins. Co. v. Hilley*, 595 So. 2d 873, 879 (Ala. 1992) (agreeing with trial court's finding that, where Allstate refused to pay the full cost of the policyholder's rebuilding costs, Allstate essentially made a "profit" of $25,000).

The language at issue in the Allstate Policy is contained in two provisions. Section I Conditions, Number 5(b), entitled "Actual Cash Value," provides:

> If you do not repair or replace the damaged, destroyed or stolen property, payment will be on an actual cash value basis. This means there may be a deduction for depreciation...
>
> You may make a claim for additional payment as described in paragraph "c" and paragraph "d," if you repair or replace the damaged, destroyed or stolen covered property within 180 days of the actual cash value payment.

Section I, Conditions, Number 5(c), entitled "Building Structure Reimbursement," provides:

> Under Coverage A – Dwelling Protection and Coverage B – Other Structures Protection, we will make additional payment to reimburse you for cost in excess of actual cash value if you

> repair, rebuild or replace damaged, destroyed or stolen covered property within 180 days of the actual cash value payment. This additional payment includes the reasonable and necessary expense for treatment or removal and disposal of contaminants, toxins or pollutants as required to complete repair or replacement of that part of a building structure(s) damaged by a covered loss (emphasis added).

Allstate contends that this language mandates that the policyholder cannot receive replacement cost benefits (specifically the "holdback" or "recoverable depreciation" of the damaged property or actual replacement cost) unless he or she completes all repairs to his or her damaged home within 180 days of receiving the actual cash value ("ACV") payment.

Allstate's erroneous interpretation of this 180-day provision in the Allstate Policy turns many claims unfairly against the policyholder. Allstate would prefer to collect premiums for coverage that likely would never go into effect. Allstate's erroneous interpretation forces the policyholder to: (1) hire architects or engineers to prepare the requisite plans, obtain the required permits, solicit bids from contractors to rebuild the structure, and then commence construction; and (2) pray that somehow no delays, even those outside the policyholder's control such as inclement weather, strikes, and unavailability of materials, push the completion date past 180 days. This scenario assumes, of course, that the policyholder can financially afford to rebuild the destroyed home solely using the ACV payment (or his or her own money), with only the possibility that he will be reimbursed later by

Allstate upon completion. At the policyholder's weakest moment, Allstate requires the policyholder to be financially capable of paying to rebuild their own home in order to receive full coverage under his homeowners' policy.

If an insurance company is permitted an unfairly narrow interpretation of a provision in the insurance policy entitling the policyholder to recover replacement costs, but the timing of the clause makes it almost impossible to reap the benefits, this result would subject every future policyholder to hidden, crippling costs as merely "the business of insurance." Such an inappropriate result is not in line the with purpose of insurance, or the purpose of New York's Insurance Law.

II. ALLSTATE'S MISTAKEN INTERPRETATION THAT THE POLICYHOLDER COMPLETELY REBUILD ITS PROPERTY WITHIN 180 DAYS IN ORDER TO OBTAIN REPLACEMENT COSTS EXEMPLIFIES ILLUSORY COVERAGE

Allstate's position creates illusory coverage by denying payment of replacement costs unless the policyholder can meet Allstate's arbitrary requirement of completely rebuilding within 180 days. Insurance coverage is illusory "where part of [an insurance] premium is specifically allocated to a particular type or period of coverage and that coverage turns out to be functionally nonexistent." *Jostens, Inc. v. Northfield Ins. Co.*, 527 N.W.2d 116, 119 (Minn. Ct. App. 1995); *see Thomas J. Lipton, Inc. v. Liberty Mut. Ins. Co.*, 34 N.Y.2d 356, 361, 314 N.E.2d 37, 357 N.Y.S.2d 705, 708 (1974) ("To say that the ... damage[s] claimed ... do not fall within such coverage would appear to exclude what, as a practical

matter, would usually be some of the largest foreseeable elements of such damage[s] [and] ... would render the coverage nearly illusory.").

Indeed, as stated by the court in *Slayko v. Security Mutual Insurance Co.*, 183 Misc. 2d 688, 693, 705 N.Y.S.2d 528, 532 (Sup. Ct. St. Lawrence Cnty. 2000) (internal citations omitted), *rev'd on other grounds,* 98 N.Y.2d 289, 774 N.E.2d 208, 746 N.Y.S.2d 444 (2002):

> Illusory, or nearly so, coverage is not favored at law. Construction of a clause so broad that it would appear to exclude what, as a practical matter, would be some of the largest foreseeable elements of damages would render the coverage nearly illusory ... [t]o construe an insuring clause as incapable of affording coverage for perils reasonably intended, by virtue of exclusionary language, is illogical.

In *Nationwide Mutual Insurance Co. v. Davis*, 195 A.D.2d 561, 562, 600 N.Y.S.2d 482, 482 (2d Dep't 1993), the policyholder was involved in an automobile accident, received the $10,000 coverage limit from the tortfeasor's insurance company, and then sought underinsurance coverage from her own insurance company. Her insurance company argued that it was allowed to offset the $10,000 recovery from the tortfeasor against the $10,000 limit of plaintiff's underinsurance coverage. *Davis*, 195 A.D.2d at 562, 600 N.Y.S.2d at 482. The court disagreed, stating that allowing the reduction would render coverage illusory "by stripping the policyholder of underinsurance benefits which were paid for as part of the policy." *Davis*, 195 A.D.2d at 562, 600 N.Y.S.2d at 483.

Similarly here, Allstate's improper interpretation of its Policy, requiring the policyholder to completely rebuild his or her home within 180 days, essentially strips the policyholder of the right to replacement costs which were paid for as part of the Policy. Given all the possible instances of delay and uncertainty in the rebuilding process, it is almost impossible to completely rebuild within 180 days of receiving the ACV payment, especially when often the ACV payment is necessary to even begin repairs. Indeed, this reality was not lost on the court in *Bonde v. Illinois Farmers Insurance Co.*, No. C7-95-1957, 1996 WL 422504, at *2 (Minn. Ct. App. July 30, 1996). In *Bonde*, the Minnesota Court of Appeals was presented with an insurance policy that contained provision similar to the 180-day provision present in the Allstate Policy, and stated that:

> We have studied on review both the doctrines of impossibility and voidness and find merit in the general proposition that an insurer that relies strictly on a 180-day clause is vulnerable to these arguments in an appropriate case. There is merit in an impossibility argument where an insured demonstrates that the failure of full payment rendered it infeasible to repair or replace within 180 days. Likewise, it is imaginable on larger claims that the clause could be void as routinely frustrating. In fact, in defending the 180-day clause, the insurer on appeal relies on its proposed openness to a case where repairs start but are not finished within 180 days or the insured requests an extension of the 180-day limit.

Bonde, 1996 WL 422504 at *2 (emphasis added). Ultimately, the court held that plaintiff's failure to make any repairs despite receiving some reimbursement foreclosed his impossibility argument. *Bonde*, 1996 WL 422504 at *3.

Nevertheless, the court was clear that it could envision other circumstances where it would be impossible for the policyholder to comply with the 180-day provision in the Allstate Policy.

Allstate is aware that its interpretation renders coverage illusory, in that, except in rare circumstances, the policyholder will not be able to meet the 180-day deadline and obtain the replacement costs associated with rebuilding.[2] When rebuilding their homes, policyholders are at the mercy of delays in the building permit process, delays inherent in the construction process, and their own lack of financial ability to fund construction. As discussed below, all of these factors, in addition to other unforeseen setbacks, make it functionally impossible for policyholders to comply with the 180-day provision and obtain replacement costs.

A. Delays Inherent in the Permit Application Process Make Complying with Allstate's 180-day Provision Functionally Impossible

Obtaining a city or town permit to begin new construction or repair or improve an existing building can often be the most time-consuming, arduous aspect of the construction process. Indeed, lawsuits often are filed between contracting parties for delay damages or breach of contract resulting from one

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[2] Indeed, Maryland's state legislature, also aware of the unlikelihood of completing repairs within 180 days, recently passed legislation that the policyholder be given at least two years from the date of the loss to complete repairs and receive the replacement costs. Md. Code Ann., Ins. § 19-213 (2011).

party's failure to obtain the necessary permits before construction. *See, e.g., Brockway-Smith Co. v. Greene*, 179 A.D.2d 922, 923, 578 N.Y.S.2d 700, 701 (3d Dep't 1992); *Felix Contracting Corp. v. Oakridge Land and Prop. Corp.*, 106 A.D.2d 488, 489, 483 N.Y.S.2d 28, 29 (2d Dep't 1984) (finding that plaintiff suffered additional damages due to delay from defendant's failure to obtain required building permits).

For example, the New York City Department of Buildings ("DOB") requires that one or more permits be obtained before starting construction work. In order to receive a work permit, either (1) the architect or engineer responsible for the application can "self-certify" the application, or (2) the application is subject to review by a DOB plan examiner. Affidavit of Domenick J. Schinco (the "Schinco Aff.") ¶ 3, attached as Exhibit 2. Mr. Domenick J. Schinco, Senior Vice President of Design 2147 Ltd., has filed over 10,000 DOB applications on behalf of property owners and professionals. Schinco Aff. ¶¶ 1-2. He states in his affidavit that a self-certified application can be approved in ten days, but they are rare because (1) the professional's "errors and omissions" insurance policy will not cover a claim, and (2) many issues in an application are subject to judgment calls that may be reversed if the DOB later audits the application. Schinco Aff. ¶ 3. Alternatively, below is a description of the "general process" at the DOB for obtaining a permit by review from a DOB plan examiner:

NYC BUILDINGS

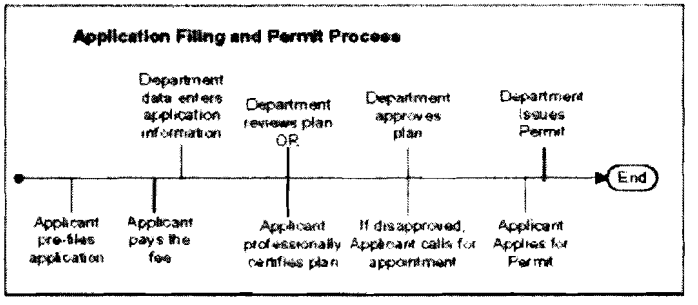
New York City Department of Buildings

Application Filing and Permit Process
FACT SHEET

Issued April 2005

New York City laws require that one or more permits be obtained before starting construction work (refer to NYC Building Code §27-126 for work that requires a permit). This fact sheet describes the general process at the Department of Buildings for filing an application and obtaining a permit for jobs that are not Professionally Certified.

For more information on obtaining a permit, please refer to our Building Knowledge brochures about "Construction Permits", "Plumbing Work" and "Electrical Permits" located on our web site www.nyc.gov/buildings, under "Guides and Publications".



STEP1: APPLICANT PREFILES APPLICATION IN A BOROUGH OFFICE

- Applicant meets with Department pre-filer and submits 3 copies of each of the following to pre-filer:
  - Complete set of drawings, including energy calculations
  - PW-1 form (attach Schedules A, B, and C if necessary)
  - Asbestos forms
- Pre-filer checks for completeness, estimates cost and determines job type
- Pre-filer enters basic job information into the Buildings Information System (BIS), assesses fee and assigns a BIS Job Number to the application.

☑ **Tip:** Refer to Building Knowledge brochure about "Construction Permits" for different categories of construction work.

➢ **Note:** *When the pre-filing phase is completed the application folder is given back to the applicant. Applicant will bring the application folder to the cashier when ready to pay the fee.*

STEP 2: APPLICANT GOES TO CASHIER AND PAYS THE FEE

- Applicant submits the application folder to the cashier and pays the fee.
- Cashier transfers folder to the DEAR section.

STEP 3: DEPARTMENT DATA ENTERS APPLICATION DETAILS

- DEAR checks the application information for completeness.
- DEAR data enters details of the application.
- DEAR transfers application folder to plan examiner.

☑ **Tip:** Applicant can use the BIS Job number assigned at pre-filing to check BIS-on-the-WEB for current application status under "Building Information Search" any time during the entire process.

STEP 4: DEPARTMENT REVIEWS APPLICATION PLAN

- A plan examiner reviews the plan for compliance with one of the requirements below:
  - Directive 14 requirements: zoning (use), egress and LL58/87 (disability) only.
  - Directive 2 requirements:
    - egress (Building Code)
    - fire protection (Building Code)
    - Multiple Dwelling Law
    - Housing Maintenance Code

- During review, the plan examiner data enters into BIS any "required items" needed for the construction work being described

  ☑ **Tip:** Refer to "Required Items Reference Guide" (on our web site under "Guides and Publications.")

> ➢ **Note:** *Sprinkler applications are filed under Directive 14 but receive a Directive 2 review in that, the water supply is checked for compliance with the Building Code.*

If the plan is approved:

- Plan examiner stamps and signs the 3 complete sets of approved plans and other appropriate paperwork.
- Plan examiner data enters approval status into BIS.
- Applicant is given the approved application (drawings and forms) to be perforated at the Record Room or other area designated by the borough

If the plan is disapproved:

- An objection sheet will be completed by the plan examiner and e-mailed to the applicant (or mailed when email address is not available) informing applicant of areas that do not conform to applicable laws.
- Plan examiner data enters disapproval status into BIS.
- Applicant calls 311 to make an appointment to resolve the objections.
- The process described above may be repeated until all objections are resolved and the plan is approved.

> ➢ **Note:** *If changes need to be made to the plan after it is approved, applicant may be required to file a "Post Approval Amendment" (PAA). For details, please refer to "PAA Fact Sheet" on Department's web site under "How To File An Application".*

> ➢ **Note:** *Department offers a **Professional Certification Program** which enables Registered Architects (RA) and Professional Engineers (PE) to certify that the plans they are filing with the Department are in compliance with applicable laws. Plans that are professionally certified do not go through plan review. Details on the program can be found on Department's web site under "Application and Permits".*

STEP 5: DEPARTMENT PERFORATES THE PLAN

- Applicant brings the folder to Record Room
- Record Room clerk perforates the plans and forms and returns them to the applicant
- Applicant is required to microfilm the approved application (plans and forms) and deliver them to the Record Room before obtaining a permit
- Record Room clerk files the microfilm and stamps the folder and returns it to the applicant. Application is now ready for permit

STEP 6: APPLICANT OBTAINS PERMIT

- Applicant submits to the permit clerk the approved folder with a stamp indicating that microfilm has been received, along with the documents below:
  - PW-2 (permit application) form (signed and notarized by contractor. If licensee, seal is required in lieu of notarization.)
  - A PW-3 (cost affidavit) form (signed and notarized by contractor. If licensee, seal is required in lieu of notarization.)
  - A check for thirty-five dollars (final microfilming fee)
- Permit clerk checks for fees due and valid insurance prior to producing the permit.
  - Any fees due, including balances and civil penalties for work without a permit, must be paid prior to permit issuance
  - Appropriate insurance must be held by all potential permittees unless the permittee is a homeowner who will be performing the work himself on his own home. In that case, a waiver from Worker's Compensation Board must be submitted.
- The permit is generated and the permit clerk enters the permit issuance date in BIS.
- The application folder is retained by the permit clerk and sent to the Record Room for filing.

STEP 7: POST PERMIT ACTIVITIES

Some applications require a new or amended Certificate of Occupancy, and others should simply be signed off when the work has been completed. For information on the Sign-Off and Certificate of Occupancy process go to Certificate of Occupancy.

As shown above, the first step alone requires that the applicant meet with the DOB pre-filer and submit three copies of: (1) the complete set of drawings, including energy calculations; (2) a PW-1 form (and schedules A, B, and C if necessary); and (3) asbestos forms. Only then can the DOB pre-filer check for completeness and estimate the cost, and enter basic job information into the system in order to assign a job number to the project. This is a *very* generalized description of the *first* step in receiving a permit to merely *begin* construction.

Once the construction plan is submitted, the examiner has forty days to review the plan for compliance with one the Building Code's requirements, and the examiner will enter into the system whether any "required items" are needed for the construction work. Schinco Aff. ¶ 3. If the plan is approved, the examiner stamps and signs the three complete sets of approved plans, and the applicant is notified and can move on to "Step 5."

However, if the plan is disapproved, the plan examiner completes a sheet of "objections," that is, comments on the application in the form of questions and challenges to interpretations of the Multiple Dwelling Law, Building Code and Zoning Resolution. Schinco Aff. ¶ 3. The objections sheet is then sent to the applicant requesting the additional information. Schinco Aff. ¶ 3. In Mr. Schinco's experience, an initial review by the examiner almost always produces "objections." Schinco Aff. ¶ 3. As such, the applicant must then respond to the

objections, and review of these responses occurs via twenty-minute appointments with a plan examiner that can take place weeks apart from one another. Schinco Aff. ¶ 3. Moreover, the review process itself can generate new, additional objections, and the back-and-forth process continues until all objections are resolved. Schinco Aff. ¶ 3. As a result, the approval process can amount to anywhere from two to four months, or even longer. Schinco Aff. ¶ 3. Only once the plan is approved, the necessary forms filed with the permit clerk, and the work permit issued (usually 5 days after approval), can the construction work finally commence. Schinco Aff. ¶ 3.

As onerous as the process is, there likely is no recourse against the plan examiner for failing to timely approve the plan, since it is well-established in New York that "[t]he decision whether to issue a permit is a discretionary determination and the actions of the government in such instances are immune from lawsuits based on such decisions." *City of New York v. 17 Vista Assocs.*, 84 N.Y.2d 299, 307, 642 N.E.2d 606, 609, 618 N.Y.S.2d 249, 252 (1994). Accordingly, the policyholder is left hoping that the examiner states as few objections as possible and documents them in significantly less time than forty days, and allows the policyholder to begin construction with at least a couple months to spare to meet Allstate's 180-day completion deadline. However, this is but one obstacle

preventing the policyholder from meeting Allstate's improperly imposed, unilateral 180-day deadline.

B. Delays Inherent in the Rebuilding Process Make Complying with Allstate's 180-day Provision Functionally Impossible

Delays inherent in the rebuilding process also make compliance with Allstate's improper 180-day interpretation impossible. Indeed, Mr. Schinco testifies in his affidavit that the reconstruction process can consume anywhere from several weeks to several years, depending on the size and complexity of the building, the extent and nature of the damage, the availability of contractors and materials, and the close out process with various agencies. Schinco Aff. ¶ 4. Even assuming contractors and subcontractors are available, this Court has, on several occasions, discussed the myriad delays that are associated with construction work.

For example, in *Thalle Construction Co. v. Whiting-Turner Contracting Co.*, 39 F.3d 412, 414 (2d Cir. 1994), subcontractor Thalle brought suit against general contractor Whiting-Turner, alleging that Whiting-Turner caused, or could have prevented, serious delays in constructing a complex for IBM, costing Thalle $4 million in additional costs. Thalle claimed that it was unable to complete its work timely because (1) a fellow subcontractor refused to execute its subcontract, operated with a reduced workforce, demanded more money and failed to meet its deadlines; (2) IBM failed to obtain the necessary permits; and (3) the electrical and waterproofing subcontractors performed too slowly. *Thalle Constr.*, 39 F. 3d at

414. Moreover, Thalle experienced its own delays, namely, it failed to perform "sheeting in shoring" in one location, it experienced labor unrest leading to a one-day strike, and it encountered ground water at various building sites that necessitated design changes. *Thalle Constr.*, 39 F. 3d at 414. Though the entire project was to begin in October, 1985 and conclude in December, 1987, because of delays, Thalle did not even begin work until April, 1986, and did not complete its work until November 1988. *Thalle Constr.*, 39 F. 3d at 414.

Similarly, in *Port Chester Electric Construction Corp. v. HBE Corp.*, 978 F.2d 820, 821 (2d Cir. 1992), *aff'd,* 89 F.3d 826 (2d Cir. 1995), the plaintiff subcontractor brought suit against defendant general contractor for damages it suffered as a result of its work at the hospital being delayed by (1) the ongoing operation of the hospital, (2) improper and laggardly work of other subcontractors; (3) the unexpected discovery of asbestos; and (4) inclement weather. Ultimately, the Court reversed the District Court's opinion, noting that many of the delays were not attributable to the general contractor. *Port Chester*, 978 F.2d at 822. Regardless of whether the general contractor was liable for the subcontractor's delay damages, the fact remained that the anticipated completion date for the hospital project was late 1984, but, because of delays, it was not completed until June 1986. *Port Chester*, 978 F.2d at 821.

Contractor and subcontracting agreements will, in some cases, explicitly state that "delays resulting from changes in the work, extreme weather, changes to the sequencing of the work ... and other causes of are inherent in the construction process." *McPhee Elec. Ltd. v. Konover Constr. Corp.*, No. CV075009694S, 2009 WL 4846555, at *31 (Conn. Super. Ct. Oct. 22, 2009). Often, the agreement between the contractors will include what is commonly referred to as a "no damage for delay" clause. A typical "no damage for delay" clause will read:

> The Contractor agrees to make no claim for damages for delay in the performance of this contract occasioned by any act or omission to act of the [contractee] or any of its representatives, and agrees that any such claim shall be fully compensated for by an extension of time to complete performance of the work as provided herein.

Corinno Civetta Constr. Corp. v. City of New York, 67 N.Y.2d 297, 308, 493 N.E.2d 905, 909, 502 N.Y.S.2d 681, 685 n.1 (1986). Given the nature of construction, and the fact that delays are inherent in the process and should not be the basis of a lawsuit, the New York Court of Appeals has held that such clauses are valid and enforceable and not contrary to public policy. *Corinno Civetta*, 67 N.Y.2d at 309, 493 N.E.2d at 909, 502 N.Y.S.2d at 685. As such, the aggrieved party may only recover damages if the delays were: (1) caused by the contractee's bad faith; (2) uncontemplated; (3) so unreasonable that they constitute intentional abandonment; or (4) caused by the contractee's breach of a fundamental obligation of the contract. *Corinno Civetta*, 67 N.Y.2d at 309, 493 N.E.2d at 910, 502

N.Y.S.2d at 686. Indeed, even where the contractee experiences a lack of funding which prevents the contractor from completing the work, delay damages will not be awarded to the contractor. *See Diontech Consulting, Inc. v. N.Y.C. Housing Auth.*, 78 A.D.3d 527, 528-29, 911 N.Y.S.2d 325, 327 (1st Dep't 2010).

Contractors and subcontractors can often escape liability for the inherent delays in the construction process, but what of the policyholder? These same delays, though not the policyholder's fault, will make it impossible for the policyholder to comply with Allstate's improperly imposed and unilateral 180-day deadline, and Allstate wrongfully will deny coverage for replacement costs.

C. The Policyholder's Lack of Financial Resources Make Complying with Allstate's 180-day Provision Functionally Impossible

All the delays discussed above, those associated with obtaining a permit for reconstruction and the reconstruction itself, all presume that the policyholder has the means for reconstruction. Allstate's improper position not only requires the policyholder to avoid delays in the permit and construction process, but also to be financially capable of seeing the process through to completion even without the replacement costs. This concept which presumes that a plaintiff has access to an "alternative source of funds from which to pay that which the insurer refuses to pay ... is frequently an inaccurate assumption." *Acquista v. N.Y. Life Ins. Co.*, 285 A.D.2d 73, 79, 730 N.Y.S.2d 272, 276 (1st Dep't 2001). Instead, "it seems clear

that in many cases a large part of an insured's motivation for acquiring an insurance policy is his expectation that he may well be unable to find an alternative source of funds to cover the loss that the policy is meant to cover." *Machan v. UNUM Life Ins. Co. of Am.*, 116 P.3d 342, 345 (Utah 2005) (citing *Acquista*, 285 A.D.2d at 79, 730 N.Y.S.2d at 276).

Indeed, Allstate is keenly aware that, in addition to the delays inherent in permit application and construction, the policyholder's financial condition may also make it impossible for him to comply with Allstate's improper interpretation of its Policy's 180-day provision. In *Allstate Insurance Co. v. Hilley*, 595 So. 2d 873, 874-75 (Ala. 1992), the policyholders' home was destroyed in a fire, and they subsequently sought coverage under their Allstate deluxe homeowner's insurance policy which contained a 180-day provision similar to that here.[3] At the time of application, the Allstate agent had represented to the policyholders that, in the event their house burned, Allstate would rebuild the home, find a replacement, or pay the market value of the home (stated at $38,000). *Hilley*, 595 So. 2d at 876. However, after their home was destroyed by a fire, Allstate paid the actual cash value of the home ($13,000) and not the replacement cost, because, despite the

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[3] In contrast to the 180-day provision at issue here, the 180-day provision in *Hilley* explicitly stated that Allstate "will not pay more than the actual cash value of the damaged property until the repair, restoration or replacement is completed." *See Hilley v. Allstate Ins. Co.*, 562 So. 2d 184, 188 (Ala. 1990).

Hilleys' desire to rebuild, they could not obtain a loan to finance the rebuilding, and thus, were unable to meet the 180-day rebuilding deadline. *Hilley*, 595 So. 2d at 874-75.

The Supreme Court of Alabama upheld the jury's $2 million punitive damages award against Allstate based on the trial court's finding that "Allstate's wrong consisted of falsely representing to these policyholders the extent of coverage on their homes and concealing the necessity of obtaining financing prior to Allstate's paying." *Hilley*, 595 So. 2d at 879. Moreover, Allstate's awareness of the harshness that results from its improper interpretation of its Policy, and its subsequent profit from avoiding its coverage obligations, played an integral role in awarding punitive damages:

> Here, Hilley [and] his pregnant wife and children were left homeless after being assured by Allstate that they would be "fully protected" in the event of total loss. Also, there is ample evidence to support a conclusion that this [situation] happens to twenty to twenty-five percent of Allstate's policy holders who suffer a total loss. It is without dispute that this conduct by Allstate [toward] Hilley is not an isolated case, but to the contrary, the normal way a policy holder can expect to be treated if he cannot obtain financing to rebuild his own home. *Hilley*, 595 So. 2d at 879 (emphasis added).

So, when the policyholder's permit application is drawn out for months by the examiner's multiple rounds of objections (likely with no recourse), the policyholder's contractor and subcontractors experience the normal delays that are inherent in the construction process (again, no recourse), and the policyholder is

financially incapable of paying for the rebuilding because the ACV payment has been used up, what happens to the policyholder? What happens when, despite the policyholder's best efforts, he is unable to complete the intended repairs to the home within the 180 days because of circumstances outside his control? Instead of providing the coverage for which it received a substantial premium, Allstate profits from the policyholder's misfortune by not having to pay replacement costs. That is fine for Allstate's financial bottom line, but that is not the purpose of insurance, and Allstate's improper interpretation of its Policy, and its 180-day provision, should not be enforced under New York Law.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* United Policyholders respectfully requests this Court reverse the decision of the District Court for the Southern District of New York, and grant any such further relief as it deems proper.

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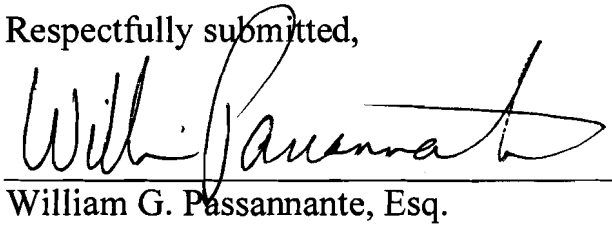
Respectfully submitted,



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