IN THE
INDIANA SUPREME COURT

Cause No. _____

TOM SEEBER,	) Appeal from Court of Appeals) Cause No. 53A01-1405-PL-00208)
Appellant (Plaintiff below)	) Monroe Circuit Court) Cause No. 53C01-1011-PL-2790)
-vs-	) Hon. E. Michael Hoff, Judge)
GENERAL FIRE AND CASUALTY COMPANY, INDIANA INSURANCE COMPANY, and PEERLESS INDEMNITY INSURANCE COMPANY,	)))))
Appellees (Defendants below)	)

BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS IN SUPPORT OF APPELLANT'S PETITION TO TRANSFER

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I. STATEMENT OF THE INTEREST OF THE AMICUS CURIAE

United Policyholders ("UP") is a non-profit 501(c)(3) organization founded in 1991 that is a voice and an information resource for insurance consumers in Indiana and throughout the United States. Grants, donations, and volunteers support the organization's work. UP does not sell insurance or accept funding from insurance companies. UP is based in San Francisco, California, and operates nationwide.

UP assists and informs individual and commercial policyholders with regard to every type of insurance product, but the organization's focus is on property insurance. Through a Roadmap to Recovery™ program, UP staff and volunteers travel to disaster areas and partner for up to 24 months with local officials and impacted property owners during the long-term recovery process. Through twenty-two years of doing this work, UP has developed extensive expertise in the nuances of the issues involved in this case. UP's primary interest in this case relates to preserving the integrity of insurance promises and the value of insurance policies as an essential source of loss recovery and replacement financing.

UP's Executive Director, Amy Bach, is in her sixth consecutive term as an official consumer representative to the National Association of Insurance Commissioners where she works with regulators, including Indiana Insurance Commissioner Stephen Robertson and his staff. Bach is a member of the Advisory Board to the American Law

Institute's Principles of Liability Insurance Project. UP hosts a library of guides, research, *amicus curiae* briefs and articles on coverage, and claims at www.uphelp.org.

UP strives to assist courts as *amicus curiae* in insurance-related appellate proceedings throughout the U.S. UP's *amicus curiae* brief was cited with approval by the United States Supreme Court in its opinion in *Humana Inc. v. Forsyth*, 525 U.S. 299, 314 (1999). UP has been granted leave to appear as *amicus curiae* in a number of Indiana cases, including *Commonwealth Land Title Ins. Co. v. Robertson* (No. 49A04-1302-PL-00084, Ind. Ct. App. 2013); *Wellpoint Inc., Anthem Ins. Co v. Nat. Union. Fire Ins. Co.* (No. 49A05-1202-PL-92, 2013); and most recently, *Thomson, Inc. et al v. American Ins. Co. et al* (No. 49A05-1109-PL-470, 2014).

II. QUESTION PRESENTED ON TRANSFER

Whether Indiana law allows an insurance company to deny replacement cost coverage payments to its policyholder, after the policyholder has purchased replacement property, based solely on the use or character of the replacement property, where the insurance policy is silent as to any limitation or definitions of "replacement property."

III. REASONS TO GRANT TRANSFER

UP is a direct recipient of information about the problems that routinely manifest themselves during the adjustment of total loss property claims throughout the United States. One of these problems is disputes over the amounts owed by insurers under

policies that provide replacement cost coverage. Insureds pay extra for these type of policies. Yet, insurers often attempt to underpay claims by paying only actual cash value (*i.e.*, depreciated value) instead of replacement value. Insurers use various techniques to do this; imposing unreasonable time requirements, or, as here in Seeber's case, inventing requirements that are not found anywhere in the policy, and that may be impossible for the insured to comply with. If courts endorse these techniques, the very purpose of insurance, i.e., to recover promptly from loss or injury, is frustrated, and insureds do not receive the full benefits for which they paid.

At minimum, insurers should be prohibited from using semantic discussions of undefined policy terms to avoid their contractual responsibility to pay undisputedly covered claims. In the instant case, Seeber, holder of two replacement cost insurance policies, expected to recoup the replacement cost value of his destroyed commercial building when he presented his fire loss claim.[1] Instead, the insurers chose to pay him only actual cash value, because Seeber used the depreciated cash value proceeds to purchase a different building rather than rebuild at the original location. Although Seeber paid additional premium for replacement cost value policies, the appellee insurers applied an extra-contractual *use and character* test and determined that the building Seeber purchased as a substitute investment property did not qualify as

[1] UP adopts Seeber's Background and Prior Treatment of Issues on Transfer.

"replacement property" under their policies. The Court of Appeals erroneously agreed with the insurers.

This case presents an opportunity for this Court to make a definitive statement on what constitutes "replacement property" when standard form policies do not specify otherwise. Transfer will uphold the reasonable expectations of insureds who paid extra for such policies, and it will promote sound public policy with respect to consumer choice.

A. The Court of Appeals Erred in Adopting Texas Law to Determine What Constitutes Replacement Property under Seeber's Replacement Cost Value Policies.

Having no applicable Indiana law to determine what constitutes replacement property, the Court of Appeals relied on a 2008 decision from an intermediate appellate court that applied Texas law, *Fitzhugh 25 Partners, L.P. v. KILN Syndicate KLN 501*, 261 S.W.3d 861 (Tex. App. 2008). As Seeber explains in his transfer petition, the Court of Appeals wrongly applied *Fitzhugh*, because it conflated the policy's repair or replacement requirement with the policy's calculation of benefits provision. In *Fitzhugh*, the Court of Appeals of Texas stated:

> We agree with Fitzhugh's contention that the policy's limitation on recovery of replacement costs to "the cost of repair or replacement with similar materials on the same site and used for the same purpose" is merely a method of calculating damages and not a requirement that Fitzhugh replace the apartment complex with substantially identical buildings at the same physical location. We disagree, however, with Fitzhugh's contention that it may spend the money it recovers under this

> measure of damages on anything it chooses. Such an interpretation reads the condition that the property be "replaced" out of the policy.

Id., 261 S.W.3d at 864-865. The Indiana Court of Appeals, although quoting this language from *Fitzhugh*, erroneously confused the calculation and replacement requirement language of the policies to conclude that "a replacement property must be '[u]sed for the same purpose' as the original property." Oct. 29, 2014 Opinion at 17.

The Indiana Court of Appeals' decision below is much less persuasive on what constitutes "replacement property" than the opinions of appellate courts in many other jurisdictions. Some of those cases affirm judgments for insurers, but all of them make clear that replacement cost policies entitle an insured to full payment of the hypothetical cost of replacing the identical property at the original location once the insured rebuilds at a different location or purchases substitute property. *See, e.g., Hess v. North Pacific Ins. Co.*, 859 P.2d 586, 588 (Wash. 1993) (*en banc*) ("the insured may then take that amount and build a structure on another site, or use the proceeds to buy an existing structure as the replacement, but paying any additional amount [above the replacement cost] from his or her own funds."); *Kumar v. Travelers Ins. Co.*, 211 A.D.2d 128, 132 (N.Y. App. Div. 1995) ("The insured is not required, however, to replace the damaged dwelling on the same premises in order to recover replacement cost."); *Davis v. Allstate Insurance Company*, 781 So.2d 1143 (Fla. 3d DCA 2001) (replacement cost measured by the hypothetical cost to rebuild identical house on the same premises without deducting depreciation); *SR Int'l Bus. Ins. Co. v. World Trade Center Properties,*

LLC, 445 F.Supp.2d 320 (S.D.N.Y. 2006) (commercial property owner can use funds on a larger building on a different site); *S&S Tobacco and Candy Co. v. Greater New York Mut. Ins. Co.*, 617 A.2d 1388 (Conn. 1992) (larger warehouse built in a different location could be replacement property under the policy); *Ruter v. Northwestern Fire and Marine Ins. Co.*, 178 A.2d 640 (N.J. Super. Ct. App. Div. 1962) (a different use building may qualify as replacement property).

A well-reasoned California decision provides a persuasive rationale for why an insured should be allowed to substitute a replacement property that is different in nature and yet still receive the full cost of replacing his destroyed property. In *Conway v. Farmers Home Mut. Ins. Co.*, 26 Cal. App.4th 1185, 1187 (1994), the court held that under a replacement cost policy "an insured...may recover the replacement cost of fire damage to an insured [property] by purchasing another [property] at another location." The court explained:

> The dictionary definition does not draw any distinction between what can be repaired and what cannot be repaired. More importantly, although the term replace certainly includes rebuilding on the same premises, the term also includes the notion of substituting for an original item another item which serves the same function as the original but is different in nature from the original.

Id. at 1191-1192.

Logic dictates that so long as the insured meets his obligation to purchase or construct some substitute for what was destroyed, as Seeber did here, then he should receive the full measure of replacement cost value that the policy provides. It should

not matter whether the insured rebuilds or purchases another structure, identical in *use and character* or not, and the insured's needs, uses, and intentions for the property should not be relevant to the insurer's determination of whether to pay. The only limitation that *Conway* and other similar decisions place on the insured is that an insurer will not pay full replacement cost value on a new structure that costs *less* than the depreciated actual cash value of the damaged or destroyed structure. Without that limitation, of course, the insured would receive a windfall. So long as the insured selects some substitute to replace his loss, the policy provides that the proper measure of his damage is the hypothetical cost of rebuilding on the original site.

Neither *Fitzhugh* nor the Court of Appeals relies on statutes (*e.g.*, Indiana Insurance Code, Title 27, *et seq.*), regulations, or other authority for its determination that substantially the same use and form of a replacement property is dispositive to an insured's recovery under a replacement cost policy.[2] The Court of Appeals also departed from long-held principles of contract law that all ambiguous terms are to be construed strictly against the drafter-insurer and in favor of the insured's reasonable expectations of coverage. *Auto-Owners Ins. Co. v. Harvey*, 842 N.E. 2d 1279 (Ind. 2006);

[2] Indiana's statutes prohibit insurers from misleading policyholders through unfair or deceptive acts or practices. IC 27-4-1-3. Insurers may not misrepresent the terms or scope of replacement cost policies in order to charge more premiums. IC 27-4-1-4. Insurers must promptly pay such claims in good faith once liability has become reasonably clear. IC 27-4-1-4.5.

Williston on Contracts 49:15).[3] It is worth pointing out that the Court of Appeals applied *Colonial Penn Ins. Co. v. Guzorek*, 690 N.E.2d 664, 667 (Ind. 1997) in its analysis that "failure to define a term in an insurance policy…[does not] necessarily make it ambiguous." *Guzorek*, however, is inapposite, because the discussion of what constituted "replacement" under the automobile liability policy at issue in the case related to a very different coverage dispute involving the multiple automobiles owned by the insured and an accident caused by the insured's husband driving with a suspended license. The auto policy permitted insureds to "replace a listed auto" with another "private passenger auto" during the policy period. This Court found that the insured's intention to "replace" the listed vehicle in the future when the policy came up for renewal meant that the car involved in the accident was not a "replacement vehicle" at the time of an accident. *Id.* at 670. With respect to Seeber's fire loss claim,

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[3] "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 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."

however, insurers dispute whether Seeber's actual investment of insurance proceeds in different property satisfied the policy's requirement that "replacement property" must be purchased before replacement cost value must be paid.

This Court has adopted the well-accepted principle that any coverage limitations and definitions must be "clearly expressed to be enforceable." *State Auto Mut. Ins. Co. v. Flexdar, Inc.*, 964 N.E. 2d 845, 848 (Ind. 2012). When insurers engage in semantic discussions and venture in the territory of inventing restrictions post-claim, it resembles a deceptive and unfair trade practice that courts should not condone. Basic principles of contract law do not allow one party to change or alter terms of the agreement after they are agreed. This Court should grant transfer to reject the Court of Appeals' conclusion that undefined terms like "replacement property" can spawn wholly new prerequisites for coverage regarding the use, character, purpose, and function of the property an insured acquired as a substitute.

This is a case of first impression in Indiana. The Court now has the unique opportunity to look more extensively at the legal basis for allowing replacement cost value to be applied toward the purchase of a replacement property. Transfer is necessary to protect policyholders from what insurers will be encouraged to do if the Court of Appeals decision is left in place.

B. Public Policy Favors an Insured Collecting the Replacement Cost Value and Using Proceeds to Purchase Any Replacement or Substitute for Destroyed Property.

The decision of the Court of Appeals goes against contract law and the rights of property owners. Whether Seeber chose to replace his fire-damaged structure by rebuilding at its original location or by buying a substitute property of equivalent cost at a different location should be of no concern to his insurers – *as long as the costs are the same*. It is Seeber's personal financial decision, not the insurer's choice. Once the insured meets his obligation to prove the hypothetical cost to replace the destroyed property at the original premises – which amount was not disputed in this case – the insured is entitled to collect that amount in full when he establishes actual replacement - regardless of location. The insurer cannot be free to invent a *post-hoc* limitation that is not contained in the policy.

There are many reasons why an insured might choose to purchase replacement property and equally as many reasons why an insured might not want to rebuild. It may be a financial choice, a fear of rebuilding in an area prone to natural hazards, or difficulty in procuring reputable, reliable contractors to perform the work. All of these factors are common following hurricanes, tornadoes, floods, and wildfires. The Court of Appeals decision therefore risks encouraging insurers to deprive consumers of their full policy benefits under property policies for which insurers charged extra premiums.

Regardless of the insured's reasons for not wanting to rebuild an identical structure at the loss site, as discussed above, if an insured meets the obligation to prove the hypothetical cost to do so, the insurer should have no interest in how the funds are spent. In the instant case, Seeber chose to purchase replacement property that, in the Court of Appeal's words, was different in *use and character* than the property that was damaged in the fire. The Court of Appeals, relying on a misapplication of *Fitzhugh* and the language in Seeber's policies, applied a new *use and character* test – never before recognized in Indiana - to determine whether replacement cost value is owed. As Seeber correctly points out in his petition, this serves no public policy purpose. The consumer's free choice should rule, not the after-the-fact, financial preference of the insurer.

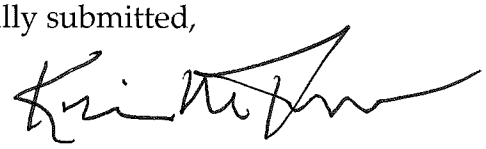
Replacement cost policyholders pay higher premiums for the expected additional value of replacement cost coverage. *Travelers Indem. Co. v. Armstrong*, 442 N.E. 2d 349 (Ind. 1982). The decision of the Court of Appeals encourages all property insurers operating in the state of Indiana to withhold monies owed by creating a new definition of replacement property out of thin air. If transfer is not granted, this result will have broad impacts on Indiana policyholders. The decision encourages insurers to argue semantics to stall the claims process and reduce their payouts. Policyholders large and small likely will feel the impacts of an unfair judicial disposition in favor of insurers. Both case law and public policy prohibit the insurers' strategy of advertising and selling replacement cost coverage but paying only for depreciated actual cost

values. Public policy therefore favors a different outcome, a just outcome, in Seeber's case and in all others where the issues of contractual ambiguity and omission are before this Court.

IV. CONCLUSION

Based on the foregoing, *amicus curiae* United Policyholders respectfully requests that the Court grant Appellant's petition to transfer.

Respectfully submitted,



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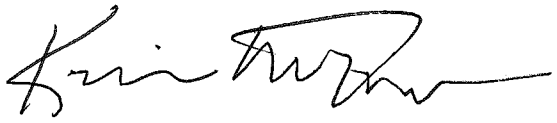
WORD COUNT CERTIFICATION

I verify that this brief contains no more than 4,200 words. I verify that this brief contains 3,123 words, exclusive of the items excluded from length limits in Appellate Rule 44(C).



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been deposited in the United States Mail, first-class postage prepaid, addressed to the following this 1st day of December, 2014.

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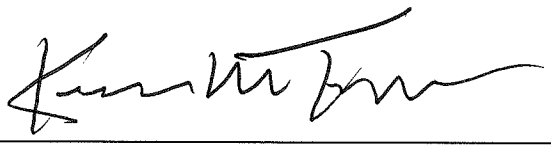

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