IN THE
COURT OF APPEALS OF MARYLAND

September Term, 2014

No. 21

PEOPLE'S INSURANCE COUNSEL DIVISION.

Petitioner,

v.

STATE FARM CASUALTY AND INSURANCE CO.,

Respondent.

On Writ of Certiorari to the Court of Special Appeals

BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS IN SUPPORT OF PETITIONER

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STATEMENT OF THE CASE

This is an insurance coverage action in which Petitioner People's Insurance Counsel Division ("PICD"), on behalf of Moira and Gregory Taylor, seeks review of the decision of the Court of Special Appeals denying coverage under a homeowner's insurance policy issued by State Farm Fire & Casualty Insurance Company ("State Farm") for damage to a carport that collapsed as a result of a severe snowstorm. The decision was based on the court's erroneous conclusion that an undefined policy term ("building") was unambiguous, and its subsequent failure to construe the ambiguous term against the insurance company that drafted the policy language. The Court of Special Appeals may have been constrained to rule in this way by this Court's precedents, but those precedents are no longer applicable to modern insurance transactions, which are stacked in the insurance industry's favor and against the policyholder. This Court should modify Maryland common law to require (as do most other jurisdictions) that, once a term in an insurance policy is found to be ambiguous, that ambiguous term must be construed strictly against the insurer, under the doctrine of *contra proferentem*.

INTEREST OF AMICUS CURIAE

United Policyholders ("UP") files this brief with the parties' consent. UP is a non-profit organization founded in 1991 and dedicated to educating the public on insurance issues and consumer rights. UP serves as an information resource and a voice for a diverse range of insurance consumers across the United States, from low income homeowners to international businesses. Donations, foundation grants and volunteer labor support the organization's work, which is divided into three program areas:

Roadmap to Recovery (helping disaster victims navigate the insurance claim process and recover fair settlements), Roadmap to Preparedness (promoting disaster preparedness and insurance literacy for homeowners and businesses), and Advocacy and Action (advancing the interests of insurance consumers in courts of law and before regulators).

UP serves an important purpose by representing the interests of policyholders. Most consumers can scarcely afford legal counsel to pursue their rights under their insurance policies, whereas insurance companies have extensive resources to retain lawyers at major law firms to oppose providing coverage to their policyholders. In coverage disputes, the insurers also enjoy a major advantage because their policies are written on standardized forms, which individual policyholders have no power to revise. UP seeks to level the playing field by offering similar resources and comparable counsel to represent otherwise vulnerable policyholders in cases raising important insurance coverage issues.

UP has been active since its founding in helping a diverse range of policyholders throughout the United States. UP's Executive Director has been appointed for six consecutive terms as an official consumer representative to the National Association of Insurance Commissioners, and works closely with State Insurance Commissioners on issues affecting insurance consumers. Media and academics also regularly seek UP's input on insurance consumer issues. Since its founding, UP has filed *amicus curiae* briefs in numerous federal and state courts in over 350 cases.[1]

[1] UP's arguments were adopted by the Texas Supreme Court in *Excess Underwriters at Lloyd's, London v. Frank's Casing Crew & Rental Tools Inc.*, 246 S.W.3d 42 (Tex.

INTRODUCTION

This appeal involves an issue of critical importance to United Policyholders and to insurance consumers across Maryland: whether Maryland courts should allow an insurance company's post-claim interpretation of ambiguous policy terms to govern coverage determinations or—as a majority of other states have done—should instead require that ambiguous policy terms be construed most strongly against the insurer that drafted the policy language.

In this brief, UP seeks to assist the Court by explaining why, consistent with widely recognized insurance law principles and as a matter of sound public policy, Maryland courts should apply the rule of construction known as *contra proferentem* when an insurer attempts to evade its coverage obligations by relying on unclear policy language. Maryland's present approach to insurance policy construction is outdated and contrary to the interests of consumers. It mistakenly presumes equal bargaining power between policyholder and insurer, fails adequately to protect Maryland policyholders from a forfeiture whenever an insurer re-interprets its own ambiguous policy terms at the point of claim to defeat coverage, and is out of step with the vast majority of states that apply *contra proferentem* in interpreting ambiguous terms in insurance contracts.

2008), as well as by the California Supreme Court in *Vandenberg v. Superior Court*, 88 Cal. Rptr. 2d 366 (1999) and numerous other proceedings including *TRB Investments, Inc. v. Fireman's Fund Insurance Co.*, 145 P.3d 472 (Cal. 2006) and *In Re Salem Suede, Inc.*, 221 B.R. 586 (D. Mass. 1998). UP has also been granted leave to file briefs as an *amicus curiae* in numerous U.S. Supreme Court cases, including the following: *Heimeshoff v. Hartford Life & Accident Insurance Co.*, 134 S. Ct. 604 (2013); *US Airways, Inc. v. McCutchen*, 133 S. Ct. 1537 (2013); *Hardt v. Reliance Standard Life Insurance Co.*, 130 S. Ct. 2149 (2010); *Metropolitan Life Insurance Co. v. Glenn*, 554 U.S. 105 (2008); *Aetna Health, Inc. v. Davila*, 542 U.S. 200 (2004); and *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002).

Maryland should shed its antiquated approach and join the majority of U.S. jurisdictions that have adopted a robust application of the *contra proferentem* doctrine for insurance contract interpretation.

QUESTION PRESENTED ADDRESSED BY AMICUS CURIAE[2]

Should this Court reexamine Maryland common law on construing insurance contracts and, recognizing that such contracts are not the product of equal bargaining, hold that terms contained in an insurance policy must be strictly construed against the insurer?

STATEMENT OF FACTS[3]

State Farm issues homeowner's insurance throughout the United States to thousands of individuals and families, including the policyholders in this case, Moira and Gregory Taylor, who own a home in West River, Maryland. For years, the Taylors insured their home through State Farm, paying thousands of dollars in premiums in exchange for a standard homeowner's insurance policy. (E. 55-81, E. 150, PICD Br., at 5). During the winter of 2009-2010, which included the February 2010 blizzard that became locally known as "Snowmageddon," the Taylors' carport collapsed as a result of the weight of ice and snow. (PICD Br., at 9). The Taylors submitted a claim to State Farm seeking compensation for the loss of their carport. State Farm denied the claim.

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[2] UP only addresses the first of two questions raised by the Petitioners. This brief does not address whether the Commissioner erred in allowing State Farm to deny coverage.

[3] UP incorporates by reference the full Statement of Facts from Petitioner People's Insurance Counsel Division's ("PICD") Brief in this Court, at 5-12.

A. The Insurance Policy

The Taylors' policy is a 25-page standard form policy that was drafted by the insurance company and that contains a complex web of sections and sub-sections that cross-reference and modify one another. (E. 55-81). The contract provision at issue insures "physical loss to covered property involving the sudden, entire collapse of a building or any part of a building." (E. 62). The term "building," which appears in the policy multiple times, is not defined. (E. 57-58).

The policy expressly provides that a collapse is covered if caused by certain conditions, including the "weight of ice, snow, sleet, or rain" (E. 62, PICD Br., at 7). Certain structures are excluded from collapse coverage: an "awning, fence, patio, pavement, swimming pool, underground pipe, flue, drain, cesspool, septic tank, foundation, retaining wall, bulkhead, pier, wharf, or dock." The policy does not, however, exclude carports or similar structures. (E. 62).

In 2007, the Taylors consulted with their State Farm agent about whether a carport they wanted to build on their property would be covered under their policy. The State Farm agent assured the Taylors that their policy would cover a carport. (E. 160). Soon thereafter, the Taylors built a carport, which was a permanent structure with a metal roof and supporting metal poles. (PICD Br., at 8).

B. The Claim and Denial of Coverage

Shortly after the carport's collapse, the Taylors submitted their claim to State Farm. Internal State Farm records confirm that both the Taylors' State Farm agent and her supervisor interpreted the policy to provide coverage for the collapse. (E. 90-91,

E. 310). State Farm subsequently dispatched a claims adjuster to inspect the Taylors' property, with oral instructions that a "building" was "something with a roofing structure along with at least three enclosed walls that would form the part of a building." (E. 194). This wording does not appear in the Taylors' policy or in any other State Farm document, and the adjuster admitted that she had never before been instructed to interpret "building" this way in the context of collapse coverage. (E. 197-99). Applying this *ad hoc* definition of "building," State Farm formally denied the Taylors' claim on March 2, 2010. (E. 280-82).

C. Review of State Farm's Coverage Denial

Between May 2010 and February 2012, the Taylors sought review of State Farm's claim denial from the Maryland Insurance Administration and the State Insurance Commissioner. (E. 6, E. 118). In its decision, the Commissioner noted that Maryland courts do not follow the majority rule that policy terms should be construed strongly against the insurer. (E. 318-19).

In April 2012, the PICD petitioned on behalf of the Taylors for judicial review in the Circuit Court for Baltimore City. (E. 324). The Circuit Court upheld State Farm's denial of the claim, similarly noting that "Maryland has not adopted the rule followed in other jurisdictions, that an insurance policy is to be most strongly construed against the insurer." (E. 387). The Court of Special Appeals affirmed. (PICD Pet. for Cert., Ex. 1). This Court granted PICD's petition for a writ of certiorari. 436 Md. 501 (2014).

ARGUMENT

I. STANDARD OF REVIEW

When reviewing the final decision of an administrative agency, this Court looks "through the circuit court's and intermediate appellate court's decisions, although applying the same standards of review, and evaluates the decision of the agency." *People's Counsel for Balt. Cnty. v. Loyola Coll. in Md.*, 406 Md. 54, 66 (2008) (internal quotation marks and citation omitted). Although this Court must afford deference to the agency's findings of fact, it reviews legal decisions *de novo* and need not afford deference to erroneous conclusions of law. *See id.* at 68 (stating that the administrative agency's "legal conclusions, if erroneous, are entitled to no deference"); *Ins. Comm'r v. Engelman*, 345 Md. 402, 411 (1997) ("reviewing courts are under no constraint to affirm an agency decision premised solely upon an erroneous conclusion of law"). The first issue in this case, which requires this Court to consider whether it should reexamine Maryland common law on construing insurance contracts, presents only a question of law. Accordingly, this Court's standard of review on this issue is *de novo*.

II. WELL-SETTLED INSURANCE LAW PRINCIPLES MANDATE THAT AMBIGUOUS POLICY TERMS MUST BE STRICTLY CONSTRUED AGAINST THE INSURER.

A. A Policy Term That Is Susceptible To Two Or More Reasonable Interpretations Is Ambiguous.

The principles governing whether a contract term is ambiguous are well-settled. Words in an insurance policy are to be given their "customary, ordinary, and accepted meaning." *Cole v. State Farm Mut. Ins. Co.*, 359 Md. 298, 305 (2000) (internal quotation mark and citation omitted). The test for determining ambiguity "'is not what the insurer

intended its words to mean, but what a reasonably prudent person applying for insurance would have understood them to mean. The criterion is ambiguity from the standpoint of a layman, not from that of a lawyer.'" *C & H Plumbing & Heating, Inc. v. Emp'rs Mut. Cas. Co.*, 264 Md. 510, 515 (1972) (quoting 1 *Couch on Insurance 2d* §15:83 (1959)).[4] A term is ambiguous if, to a reasonable person, it is "susceptible to more than one meaning." *Cole*, 359 Md. at 305-06 (citing *Pac. Indem. Co. v. Interstate Fire & Cas. Co.*, 302 Md. 383, 389 (1985)); *St. Paul Fire & Marine Ins. Co. v. Pryseski*, 292 Md. 187, 198 (1981); *Truck Ins. Exch. v. Marks Rentals, Inc.*, 288 Md. 428, 433 (1980); *see also* 1 Jeffrey E. Thomas, *Appleman on Insurance Law & Practice* § 5.02[2][c] (2014) ("The predominant test for ambiguity is whether the policy, under the circumstances of the case, is susceptible to two or more reasonable interpretations.").

B. The Term "Building" In The State Farm Policy Is Ambiguous.

As explained in detail by the Petitioner, the term "building" in the State Farm policy is susceptible to more than one meaning and could reasonably be understood to include a carport. *See* PICD Br. at 32-36, citing statutes and building codes defining "building" as including a structure used to shelter personal property. Consistent with this understanding, the State Farm policy covers loss of personal property contained in a building in certain situations. (E. 64, Section I, Coverage B.10, 11). More tellingly, State Farm's own employees stated that the Taylors' carport would be covered under the

[4] *See also* 2 Steven Plitt *et al.*, *Couch on Insurance* § 21:14 (3d ed. Supp. 2014) ("The test to be applied by the court in determining whether there is ambiguity is not what the insurer intended its words to mean but what a reasonably prudent person applying for insurance would have understood them to mean.").

policy—first, before the Taylors constructed the carport (E. 160), and later after the carport's collapse. (E. 90-91, E. 310). State Farm only took a different position when, before the claims adjuster left to inspect the damage to the carport, her supervisor informed her (for the first time) that, to qualify for collapse coverage, a "building" must have at least three walls. In the context of this case, therefore, the term "building" is ambiguous.

State Farm could have eliminated any ambiguity at the outset by including a definition of "building" in its policy, as other insurers have done. (*See* E. 185 (Allstate policy includes definition of "building structure")). It chose not to do so. Now, after receiving a claim for loss under the policy, the insurer seeks to benefit from its failure to use clear language that would have put the policyholder on notice of a coverage restriction. In this situation, allowing the insurer to escape its coverage obligations would be an untenable result. *See Allstate Ins. Co. v. Humphrey*, 246 Md. 492, 497-98 (1967) (refusing to construe policy in insurer's favor where insurer "could have incorporated in the policy the restrictions on the meaning of 'regularly used' which it now asks the Court to find implied in the language actually used"); *Fought v. Unum Life Ins. Co. of Am.*, 379 F.3d 997, 1013 (10th Cir. 2004) (observing that the insurer "had every opportunity" to add words clarifying an ambiguity in the policy but did not do so and concluding that it would be "unreasonable to allow it to do so *post facto*, to the detriment of [the insured]").

C. Ambiguous Insurance Policy Terms Should Be Construed Against The Insurer, As The Party Who Drafted The Language, And In Favor Of Coverage.

Maryland's approach to interpreting ambiguous insurance policy language is the product of a bygone era and should be revised to accord with modern reality, in which the insurer controls the policy drafting process and the policyholder has little, if any, input. Maryland should join the vast majority of other jurisdictions and construe ambiguous policy language strictly against the insurer and broadly in favor of coverage. This result would protect the policyholder, consistent with the purpose of insurance.

1. Maryland law on insurance policy construction is outmoded and unsupported by modern commercial reality.

Maryland common law on policy construction is based on the flawed premise that modern-day insurance contracts are negotiated at arms' length by parties with equal bargaining power. Based on this premise, Maryland courts follow ordinary principles of "construction of contracts generally" when construing the meaning of an insurance policy:

> Maryland does not follow the rule, adopted in many jurisdictions, that an insurance policy is to be construed most strongly against the insurer. Rather, following the rule applicable to the construction of contracts generally, we hold that the intention of the parties is to be ascertained if reasonably possible from the policy as a whole. In the event of an ambiguity, however, extrinsic and parol evidence may be considered. If no extrinsic or parol evidence is introduced, or if the ambiguity remains after consideration of extrinsic or parol evidence that is introduced, it will be construed against the insurer as the drafter of the instrument.

Cheney v. Bell Nat'l Life Ins. Co., 315 Md. 761, 766-67 (1989). Thus, to construe ambiguous terms, Maryland courts consider extrinsic and parol evidence to determine the "intention of the parties" first, and apply the rule of *contra proferentem* only as a last resort.

This methodology assumes that insurance policies are like all other contracts, where both parties have equal bargaining power and share in the negotiation and drafting of the contract's terms, starting with a blank page. *See Maryland Ins. Co. v. Bossiere*, 9 G. & J. 121 (1837) (19th-century insurance arrangement proposed by cargo ship agent and accepted by insurer, which prepared a customized policy to insure the voyage). Maryland courts have faithfully followed the line of cases that started with *Bossiere*, decided 177 years ago, without articulating a rationale for construing insurance contracts in the same manner as arms-length contracts. If this in fact were the way that modern insurance contracts are drafted and agreed upon, then the "intention of the parties" might still be paramount.

Today, however, the drafting of insurance contracts has little in common with the arms-length negotiations of the nineteenth century. Individual consumers, while able to select basic terms like the upper limits of coverage and the amount of their deductible, have virtually no say in the wording of the policies. As a rule, the language of insurance policies is not negotiated; rather, insurance policies are issued on pre-printed, standardized forms with language drafted by the insurance industry. Indeed, one commentator refers to this modern phenomenon as the "super-standardization" of policy forms. *See* Daniel Schwarcz, *Reevaluating Standardized Insurance Policies*, 78 U. Chi.

L. Rev. 1263, 1270-77 (2011). The balance of power in the circumstances of an insurance contract strongly favors the insurer. *See* 16 Richard A. Lord, *Williston on Contracts* § 49:15 (4th ed. 2014) ("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."). For example:

Policyholder	**Insurer**
• Required by mortgage company or by law to purchase insurance.[5]	• Not required to write insurance of any particular kind.
• Has no role in drafting policy language; often does not see policy until after purchase.[6]	• Sole drafter of all policy language—or uses forms drafted by insurance industry representatives—for all coverage provisions as well as riders and endorsements.[7]

[5] *See* Maryland Insurance Administration, *A Consumer Guide to Homeowners Insurance* 2 (2013), *available at* http://www.mdinsurance.state.md.us/sa/docs/documents/consumer/publicnew/homeownersinsguide.pdf ("Most mortgage holders require you to have homeowners insurance and that the policy name the mortgage holder as an additional insured under the policy in order to protect their financial interests in their home."); *see also* Thomas, *Appleman on Insurance Law & Practice* § 5.01 ("[Insureds] tend to buy insurance because it is required (by lenders, parties to a contract, or by law).").

[6] *See* Susan Randall, *Freedom of Contact in Insurance*, 14 Conn. Ins. L. J. 107, 107-08 (2007).

[7] *See* Thomas, *Appleman on Insurance Law & Practice* § 5.02 ("[M]any of the forms and much of the policy language is used industry wide. . . . Indeed, many insurance forms are developed by the Insurance Services Office, Inc. ("ISO"), an entity owned by insurers that collects and analyzes data about insurance policy forms."); *see also* Schwarcz, *Reevaluating Standardized Insurance Policies*, 78 U. Chi. L. Rev. at 1270-77 (identifying the "super-standardization" insurance policies).

Policyholder	Insurer
• Must accept terms of contract without variation (contract of adhesion); the only available variations are provided by other standard form endorsements, also drafted by the insurer.[8]	• May offer insurance on "take it or leave it" basis.[9]
• No expertise with subject matter.	• Employs experts to draft forms to insurer's benefit; shares expertise, information and experience with other sophisticated members of insurance industry.[10]

Under these circumstances, the contractual "intent of the parties" is impossible to discern. *See* Thomas, *Appleman on Insurance Law & Practice* § 5.02 (observing that the search for the parties' "intention" is strained and artificial in the insurance context because policyholders have little, if any, opportunity for negotiation). Insurers unquestionably dominate the formation of their contracts, whereas policyholders often can do little more than pay their premiums and hope for the best.

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[8] *See* 43 Am. Jur. 2d Insurance § 174 (2d ed. 2014) ("Generally, while an insurance policy is contractual in nature, it is not an ordinary contract but a 'contract of adhesion,' meaning that the insurance company controls the language and the insured has no bargaining power.").

[9] *See Hoang v. Assurance Co. of Am.*, 149 P.3d 798, 802 (Colo. 2007) (en banc) ("[An] insurance policy [is] offered on a take it or leave it basis, rather than being fully negotiated by the parties.").

[10] *See* Plitt, *Couch on Insurance* § 22:18 ("[P]olicies of insurance are made on printed forms carefully prepared in the light of the insurer's wide experience, by experts employed by the insurer, and in the preparation of which the insured has no voice.").

2. As the sole drafters of policy language, insurers must be subject to the doctrine of *contra proferentem.*

Contra proferentem literally means "ambiguities are to be construed unfavorably to the drafter." Black's Law Dictionary (9th ed. 2009). It is a primary rule of construction that should—and in most states does—govern insurance contracts before other factors are considered.[11] The doctrine is particularly applicable when one party has outsized economic resources and the dominant bargaining position. *See United States v. Seckinger*, 397 U.S. 203, 216 (1970) (giving doctrine of *contra proferentem* "considerable emphasis" in construing a government contract "because of the government's vast economic resources and stronger bargaining position").

As compared to the insurance company, most policyholders have very little bargaining power. *See* Thomas, *Appleman on Insurance Law* § 5.02. This relative disparity is well-documented by numerous courts and commentators. *See, e.g., Goodson v. Am. Standard Ins. Co. of Wis.*, 89 P.3d 409, 414 (Colo. 2004) (en banc) ("[T]here is a disparity of bargaining power between the insurer and the insured . . . because the insured cannot obtain materially different coverage elsewhere."); *Villa v. Short*, 947 A.2d 1217, 1222 (N.J. 2008) ("[B]ecause of the vast differences in the bargaining positions between an insured and an insurance company in the drafting of an insurance policy, [the court] pay[s] special attention and applies special rules of interpretation to such contracts."); *see also* Schwarcz, *Reevaluating Standardized Insurance Policies*, 78 U. Chi. L. Rev. at 1319

[11] *See* Thomas, *Appleman on Insurance Law & Practice* § 5.02; Plitt, *Couch on Insurance* §22:14 (observing that "The words, 'the contract is to be construed against the insurer' comprise the most familiar expression in the reports of insurance cases.") (citations omitted).

("Even an incredibly informed and vigilant consumer would face virtually insurmountable obstacles in attempting to comparison shop on the basis of different insurers' policy terms."). Insurance companies are precisely the economically advantaged parties to which the *contra proferentem* doctrine ought to apply.

Contra proferentem also is particularly well-suited to insurance contracts because of "the difference between the parties in their acquaintance with the subject matter." *Gaunt v. John Hancock Mut. Life. Ins. Co.*, 160 F.2d 599, 602 (2d Cir. 1947) (Learned Hand, J.). Insurance companies are experts in the subject matter of their contracts; ordinary consumers are not. *See* Thomas, *Appleman on Insurance Law & Practice* § 5.02 ("Insureds have much less bargaining power, less information, and less expertise than insurers."); Lord, *Williston on Contracts* § 49:15 ("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."). Accordingly, "insurers who seek to impose upon words of common speech an esoteric significance intelligible only to their craft, must bear the burden of any resulting confusion." *Gaunt,* 160 F.2d at 602.

State Farm itself has acknowledged that "[t]he principal rationale for the [majority] rule is that, as a matter of fairness, because the insurer prepared the policy, it is just and reasonable that the drafter's own words should be construed against it." Appellee's Answer to Pet. for Cert., at 6-7.

3. The courts should construe an insurance policy to effectuate its purpose—to provide protection for the insured.

Courts rigorously apply *contra proferentem* in insurance cases for another reason: to effectuate the purpose of the policy, *i.e.*, to provide coverage. *See Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034, 1041 (D.C. Cir. 1981) ("[O]ur objective must be to give effect to the policies' dominant purpose of indemnity."); *Kalell v. Mut. Fire & Auto Ins. Co.*, 471 N.W.2d 865, 868 (Iowa 1991) ("This interpretation is consistent with the general rule that insurance policies are read to effect the policy's dominant purpose of indemnity or payment to the insured." (internal quotation marks and citation omitted)); *Penn-Air, Inc. v. Indem. Ins. Co. of N. Am.*, 269 A.2d 19, 22 (Pa. 1970) (holding that if plain language alone does not resolve the construction of the policy term, then it should be construed in the policyholder's favor, "so as to effect the dominant purpose of indemnity"); *United Servs. Auto. Ass'n v. Webb*, 369 S.E.2d 196, 198 (Va. 1988) ("[B]ecause the principal purpose of insurance is protection and insurance policies are drafted by insurance companies, if the language of a policy is capable of different interpretations, we will construe it in favor of coverage or indemnity and against a limitation of coverage."). A leading treatise on insurance law agrees:

> The soundest basis for the rule of construction against the insurer is that it comports with the standard requiring that policies be construed according to the object of the contract, that is, in the light of the purpose of the contract to give protection.

Plitt, *Couch on Insurance* § 22:19.

In Maryland, the courts will "examine the character of the contract [and] its purpose" to determine its meaning. *Cole*, 359 Md. at 305 (quoting *Pac. Indem.*, 302 Md. at 388). For instance, in *Cole,* the court found that an automobile policy that covered "accidents" applied in the case of a policyholder who was intentionally shot and murdered, because the policy had to be viewed from the policyholder's perspective as the insured victim. *Id.* at 318. The doctrine of *contra proferentem* similarly advances the purpose of the insurance contract by protecting the policyholder against the insurer's post-hoc rationalizations against coverage.

4. Rigorous Application of the *contra proferentem* doctrine is necessary to protect Maryland policyholders.

At one time insurance was a simple risk-sharing venture, whereby many people paid to cover the losses of a few. Today, the business of insurance is a highly profitable, multi-billion dollar industry. There is a fundamental tension between the security promised to the insurance consumer, often reflected in the sales and marketing of insurance products (*e.g.*, "Like a good neighbor"[TM]), and the business goals of insurers, which may seek to increase their profits by avoiding claim payments. It is no secret that insurance companies become more profitable by denying claims and thereby holding on to policyholder premiums.[12] As one commentator has noted: "All that an insurance

[12] Warren Buffet, Chairman of Berkshire Hathaway, refers to the profitable lag between premium collection and claim payment as the "float." As described in his 2009 letter to shareholders:

> Insurers receive premiums upfront and pay claims later. . . . This collect-now, pay-later model leaves us holding large sums — money we call "float"— that will eventually go to others. Meanwhile, we get to invest this float for Berkshire's benefit. . . .

company has to sell is its promise to pay. Yet, all other things being equal, the better an insurance company is at avoiding that promise, the more money it makes." Tom Baker, *Constructing the Insurance Relationship. Sales Stories, Claims Stories, and Insurance Contract Damages*, 72 Tex. L. Rev. 1395, 1401 (1994).

Further, the obligations undertaken by the parties to an insurance contract create additional incentives for unscrupulous insurer behavior:

> Also consider that insurance transactions are completed sequentially, with the policyholder first paying the premium, in exchange for the insurance company's promise to provide insurance coverage in the future. Sequencing has many advantages, but it creates an unfortunate incentive. Having received its benefit from the bargain, the party who is to perform last may be tempted to renege on its obligations. Law and economics scholars often describe the conduct of a reneging party in these situations as "opportunistic." The reneging party, perceiving an opportunity to increase its gain, yields to temptation and refuses to perform.

John N. Ellison *et al., Bad Faith and Punitive Damages: The Policyholder's Guide to Bad Faith Insurance Coverage Litigation - Understanding the Available Recovery Tools*, SN050 ALI-ABA 149, 154 (2008).

Clearly, the profit motive can create perverse incentives. What better way to perpetuate this system than to use post-hoc rationalizations to bolster the insurer's

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> If premiums exceed the total of expenses and eventual losses, we register an underwriting profit that adds to the investment income produced from the float. This combination allows us to enjoy the use of free money — and, better yet, get paid for holding it.

See W. E. Buffet, Annual Letter to Berkshire Hathaway Shareholders at 6 (Feb. 26, 2010), *available at* http://www.berkshirehathaway.com/letters/2009ltr.pdf.

position at the point of claim, based on terms it deliberately left ambiguous during the underwriting process? Courts should not countenance this behavior.

It would be particularly unjust for a court to rewrite an insurance policy at the insurer's behest long after the policyholder has paid a premium for the coverage set forth in the policy. Yet, under the insurer's proposed interpretation, the policyholder, already unable to choose the terms of coverage from the outset, would not even be assured of coverage supported by a reasonable interpretation of those terms. This would lead to a particularly egregious result here, where the Taylors, stuck with a key undefined policy term, would lose not only the coverage they reasonably thought they had when they bought the policy, but also the coverage that State Farm *confirmed* after the collapse of their carport. A rigorous application of *contra proferentem* is required for exactly such situations. *See Fought*, 379 F.3d at 1013 (observing that that the insurer "had every opportunity" to add words clarifying an ambiguity in the policy but did not do so, and concluding that it would be "unreasonable to allow it to do so *post facto*, to the detriment of [the insured]"); *Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co.*, 505 F.2d 989, 1000 (2d Cir. 1974) ("*Contra proferentem* has special relevance as a rule of construction when an insurer fails to use apt words to exclude a known risk."); *Humphrey*, 246 Md. at 497-98 ("If Allstate had wished, it could have incorporated in the policy the restrictions on the meaning of 'regularly used' which it now asks the Court to find implied in the language actually used.").

5. Maryland common law is out of step with the overwhelming majority of jurisdictions that strictly construe ambiguous insurance policy terms against the insurer.

Contra proferentem is "a primary rule (perhaps even *the* primary rule) of interpretation for insurance policies." Thomas, *Appleman on Insurance Law & Practice* § 5.02 (emphasis added). The doctrine has been cited and used "in thousands of insurance cases." *Id.*[13] These myriad court opinions, cited in numerous treatises, reflect a clear mainstream approach to dealing with ambiguities in insurance policies. Maryland's approach, on the other hand, is decidedly in the minority: 44 other states apply the *contra proferentem* doctrine rigorously to interpret ambiguous policy language.[14] These states include Maryland's neighbors in Delaware, Pennsylvania, Virginia, West Virginia and the District of Columbia. *See Cont'l Ins. Co. v. Burr*, 706 A.2d 499, 500-501 (Del. 1998); *Peele v. Atl. Express Transp. Grp., Inc.*, 840 A.2d 1008, 1012-13 (Pa. Super. Ct. 2003);

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[13] For a full discussion of all the jurisdictions adopting the *contra proferentem* rule, *see* Eugene R. Anderson *et al.*, *Insurance Coverage Litigation* §§ 2-02, 2-04 (2d ed. Supp. 2014).

[14] UP incorporates by reference the list of out-of-state cases evidencing the majority rule, set forth in Appendix A to the Brief of Petitioner. A competing list, attached to the brief of insurance industry amici, lists cases from 26 courts that purportedly "apply the rule of contra proferentem only after considering extrinsic or parol evidence." Brief of Amici Curiae Property Casualty Insurers Ass'n of Am., *et al.*, at 10 and App. A (August 27, 2014). In fact, however, most of the listed cases do not support this proposition. *See, e.g., Davis v. United Am. Life Ins. Co.*, 111 S.E.2d 488,491-92 (Ga. 1959) (resolving coverage issue based on contra proferentem rule and finding that extrinsic evidence could not be considered); *Affiliated FM Ins. Co. v. Constitution Reinsurance Corp.*, 626 N.E.2d 878, 881 (Mass. 1994) (dispute about reinsurance between two insurers with equal bargaining power); *Allstate Ins. Co. v. Watson*, 195 S.W.3d 609, 612 (Tenn. 2006) (construing terms of lease, not insurance policy). In addition to being off point, some of the insurers' cases also predate more recent holdings of the highest state court. *Compare, e.g., Garcia v. Truck Ins. Exch.*, 682 P.2d 1100, 1105 (Cal. 1984) (extrinsic evidence allowed where policy language was "product of joint drafting") *with State v. Continental Ins. Co.*, 281 P.3d 1000, 1004 (Cal. 2012) (confirming rule that ambiguous insurance terms are construed against the insurer).

Seals v. Erie Ins. Exch., 674 S.E.2d 860, 862 (Va. 2009); *Mooney v. Barton*, 184 S.E.2d 322, 326-27 (W. Va. 1971); *Quadrangle Dev. Corp. v. Hartford Ins. Co.*, 645 A.2d 1074, 1075 (D.C. 1994).

Further, courts in several jurisdictions have expressly rejected insurer attempts to use extrinsic evidence to resolve ambiguous policy language so as to deny coverage. *See, e.g., Wash. Nat'l Ins. Co. v. Ruderman*, 117 So.3d 943, 951-52 (Fla. 2013); *Burns v. Smith*, 303 S.W.3d 505, 512 (Mo. 2010) (en banc); *Beaufort Cnty. Sch. Dist. v. United Nat'l Ins. Co.*, 709 S.E.2d 85, 96 (S.C. Ct. App. 2011). In *Ruderman*, for example, the Florida Supreme Court recently rejected an insurer's attempt to introduce extrinsic evidence purporting to show various policyholders' understandings about their benefits under home health care policies. 117 So.3d at 947-48, 951-52. This evidence might have resolved in the insurer's favor an ambiguity concerning which benefits increased annually. *Id.* at 947-48. But the court rejected this approach, reasoning that the insurer, "as the writer of an insurance policy, is bound by the language of the policy," and that where "one reasonable interpretation of the policy provisions would provide coverage, that is the construction which must be adopted." *Id.* at 950 (internal quotation marks and citations omitted).

Similarly, in *Burns*, the Missouri Supreme Court rejected the insurer's attempt to avoid coverage by introducing an affidavit from the policyholder stating that he did not believe the policy provided coverage. 303 S.W.3d at 511-12 & n.4. The court stated that it "will not resort to extrinsic evidence offered to demonstrate their positions of coverage and non-coverage. Since the language used is uncertain, the well-established rule applies

that it will be construed against the insurer." *Id.* (internal quotation marks and citation omitted).[15]

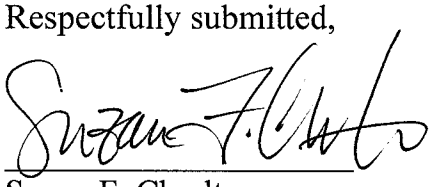
In sum, there are good reasons for interpreting ambiguous language in insurance policies in favor of coverage: the insurer drafts the policy language, which usually comes from standard, industry-wide forms; it receives payment up front for the promise of future performance; it has vastly greater resources than the typical policyholder; and it should not be permitted to avoid its coverage obligations at the point of claim by concocting post-hoc explanations of unclear policy language.

[15] At least one state construes all insurance policies strongly against the insurer, regardless of ambiguity. *See Erie Ins. Exch. v. Transamerica Ins. Co.*, 533 A.2d 1363, 1366 (Pa. 1987); *see also Tonkovic v. State Farm Mut. Auto. Ins. Co.*, 521 A.2d 920, 925-27 (Pa. 1987) (construing policy in accordance with policyholder's expectations even though policy language was unambiguous).

CONCLUSION

For the foregoing reasons, *amicus curiae* United Policyholders respectfully requests that this Court abrogate its prior precedents, including *Cheney v. Bell National Life Insurance Co.*, 315 Md. 761, 766-67 (1989), and formally adopt the doctrine of *contra proferentem* for the construction of insurance contracts.

Respectfully submitted,



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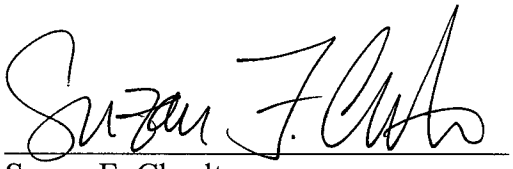
STATEMENT PURSUANT TO RULE 8-504(A)(9)

The foregoing Brief of *Amicus Curiae* United Policyholders in Support of Petitioner was prepared using a proportional font, Times New Roman, in 13-point typeface size.



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CERTIFICATE OF SERVICE

I certify that on August 29, 2014, I caused two copies of the Brief of Amicus Curiae United Policyholders in Support of Petitioner to be served on the People's Insurance Counsel Division and State Farm Fire and Casualty Insurance Company's counsel via first-class U.S. mail (postage pre-paid) at the following addresses:

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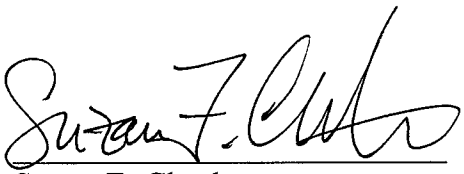

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