SUPREME COURT

OF THE

STATE OF CONNECTICUT

S.C. 19978

EDITH R. JEMIOLA,
TRUSTEE OF THE EDITH R. JEMIOLA LIVING TRUST
PLAINTIFF-APPELLANT

V.

HARTFORD CASUALTY INSURANCE COMPANY

BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS

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UNITED POLICYHOLDERS

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STATEMENT OF INTEREST OF THE *AMICUS CURIAE*[1]

United Policyholders ("UP") is a non-profit 501(c)(3) organization, founded in 1991, whose mission is to be an information resource and effective voice for consumers of all types of insurance in all 50 states — including the policyholder at issue in this case. UP was founded after the 1991 Oakland-Berkeley Firestorm to assist homeowners with property insurance issues. Over the past 26 years, the organization's scope has grown to all lines of insurance, nationwide. UP serves Connecticut residents, has volunteers based in Connecticut, and interfaces with the Connecticut Department of Insurance on various initiatives.

UP's work is divided into three program areas: *Roadmap to Recovery*™ (claim assistance to disaster victims), *Roadmap to Preparedness* (promoting insurance and financial literacy), and *Advocacy and Action* (advancing the interests of insurance consumers in courts of law, before regulators and legislators, and in the media). Donations, grants, and volunteer labor support the organization's work. UP does not sell insurance or accept funding from insurance companies.

Advancing the interests of policyholders through participation as *amicus curiae* in insurance-related cases throughout the country is an important part of UP's work. UP has filed *amicus curiae* briefs on behalf of policyholders in more than 450 cases throughout the United States and has appeared in six appeals before this Court and the Connecticut Appellate Court. See Recall Total Information Management, Inc. v. Federal Insurance Company, 317 Conn. 46 (2015); Fireman's Fund Insurance Co. v. TD Banknorth Ins. Agency, Inc., 309 Conn. 449 (2013); Security Insurance Co. of Hartford v. Lumbermens

[1] Pursuant to Practice Book § 67-7, UP represents that this brief was written entirely by its counsel. No party to the appeal wrote the brief in whole or in part, nor contributed any costs for the preparation of this brief.

Mut. Cas. Co., 264 Conn. 688 (2003); Buell Industries, Inc. v. Greater New York Mut. Ins. Co., 259 Conn. 527 (2002); R.T. Vanderbilt Co., Inc. v. Hartford Accident & Indem. Co., 171 Conn. App. 61 (2017); and Capel v. Plymouth Rock Assur. Corp., 141 Conn. App. 699 (2013). A UP amicus brief was cited in the U.S. Supreme Court's opinion in Humana v. Forsyth, 525 U.S. 299 (1999). In addition, UP's arguments have been cited with approval by numerous state and federal courts.

In this appeal, UP seeks to fulfill the "classic role of *amicus curiae* by assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." Miller-Wohl Co. v. Comm'r of Labor & Indus., 694 F.2d 203, 204 (9th Cir. 1982). As commentators have stressed, an *amicus curiae* is often in a superior position to "focus the court's attention on the broad implications of various possible rulings." Robert L. Stern et al., Supreme Court Practice 570-71 (6th ed. 1986) (quoting Bruce J. Ennis, "Effective Amicus Briefs," 33 Cath. U. L. Rev. 603, 608 (1984)). UP's 25 years of experience advocating for the interests of insurance policyholders and its extensive knowledge of insurance law makes it well suited to aid this Court in this case.

A 26-year history of advocating for the interests of insurance consumers in disaster areas, legislative and regulatory forums and as amicus curiae allows UP to have a "unique perspective or specific information that can assist the court beyond what the parties can provide." See Voices for Choices v. Illinois Bell Telephone Co., 339 F.3d 542 (11th Cir. 2003) (citing National Organization for Women, Inc. v. Scheidler, 223 F.3d 615, 616 (7th Cir. 2000). UP's broad experience working with individual consumers should prove helpful to the Court in understanding the equities involved in the instant case and others like it.

NATURE OF THE PROCEEDINGS AND STATEMENT OF FACTS

The following procedural history and facts are relevant to UP's *amicus* position:

The plaintiff, Edith R. Jemiola, Trustee of the Edith R. Jemiola Living Trust, is one of the approximately 34,000 homeowners in northeastern Connecticut who learned that their basement walls were constructed with concrete provided by J.J. Mottes Concrete Company and are now crumbling. See L. Foderaro & K. Hussey, "Financial Relief Eludes Connecticut Homeowners with Crumbling Foundations," N.Y. Times (Nov. 14, 2016). The cause – iron sulfide minerals in the cement – can go undetected for many years but, unchecked, will inevitably undermine the structural integrity of the entire home. See K. Willie and R. Zhong, "Investigating the Deterioration of Basement Walls Made of Concrete in CT" (Report prepared for Attorney General, Aug. 31, 2016). Because this problem can only be resolved by removing and replacing the basement walls, the expense is extraordinary – estimated at $100,000 to $200,000 – and beyond the reach of many homeowners. See K. Hussey and L. Foderaro, "With Connecticut Foundations Crumbling, 'Your Home Is Now Worthless,'" N.Y. Times (June 7, 2016).

Defendant, Hartford Casualty Insurance Company has been collecting premiums from and insuring plaintiff's home since 1986. Id. at 2. From 1986 to March 2014, the plaintiff's homeowner's policies expressly provided coverage for "collapse." Memorandum of Decision ("Mem. Dec.") at 2. This lawsuit alleges that the defendant breached these homeowner's insurance policies when it denied a claim for collapse coverage. Id. at 1.

From 1986 to March 2005, plaintiff's policies did not define the term "collapse." Id. Thirty years ago, in Beach v. Middlesex Mut. Assur. Co., 205 Conn. 246 (1987), this Court broadly construed the term "collapse" in a homeowner's insurance policy. The plaintiffs in Beach noticed a crack in their foundation wall, and the damage worsened over time such

that the home would have fallen to the ground had plaintiffs not repaired the damage. Id. at 248-249. The insurer asserted that there had been no "collapse" because there had been no "sudden and complete falling in of a structure." Id. at 250. This Court determined that the term "collapse" in the policy was ambiguous: "collapse" was, as argued by the insurer, susceptible to meaning a "catastrophic breakdown," but it was also susceptible, as argued by plaintiffs, to meaning a "breakdown or loss of structure strength." Id. at 250-51. Because "collapse" was ambiguous, it was construed in favor of coverage for plaintiffs. This Court further held that the collapse provision "include[d] coverage for any substantial impairment of the structural integrity of a building ... even though no actual caving-in occurred and the structure was not rendered completely uninhabitable." Id. at 252-53. Importantly, this Court reasoned that "[r]equiring the insured to await an actual collapse would not only be economically wasteful ... but would conflict with the insured's contractual and common law duty to mitigate damages." Id. at 253 n.2 (citing Nationwide Mut. Fire Ins. Co. v. Tomlin, 352 S.E.2d 612 (Ga. Ct. App. 1986)).

Since Beach, some insurers, like the defendant in this case beginning with the 2005 policy, changed their policy language by, among other things, purporting to define "collapse" to mean "an abrupt falling down or caving in." On March 2, 2017, the trial court (*Cobb, J.*) entered summary judgment in favor of the defendant. The court concluded that the plaintiff's loss did not occur prior to October 2006, when the plaintiff first observed cracking in her basement walls. Mem. Dec. at 14. Based on this finding, the court determined that coverage was dependent on the definition of "collapse" that is found in the post-2005 insurance policies. Id. Holding the post-2005 "collapse" language to be unambiguous, the court concluded that the loss was not covered because there had not been a "sudden or abrupt falling down or caving in." Id. at 23-24. As the court observed,

this is the first state court decision upholding an insurance company's denial of collapse coverage for crumbling basement walls with J.J. Mottes concrete. Mem. Dec. at 18.

On March 22, 2017, plaintiff filed this appeal with the Appellate Court. On October 19, 2017, pursuant to Practice Book § 65-1, this Court transferred the appeal to itself. On February 28, 2018, UP's application to appear as an *amicus curiae* party was granted.

ARGUMENT

I. THE HOMEOWNER'S POLICIES SHOULD BE CONSTRUED TO PROVIDE COVERAGE FOR CRUMBLING BASEMENT WALLS

The trial court rejected the plaintiff's claim that the pre-2005 policies applied in this case and, instead, concluded that the post-2005 polices applied and that those policies did not provide coverage for the plaintiff's crumbling basement walls. UP agrees with the plaintiff that the trial court erred in granting summary judgment in light of the fact that there is at least a material question of fact as to when the loss occurred and, thus, whether the pre-2005 policies applied. Pl.Br. at 26-34. However, this *amicus* brief will focus on the post-2005 policies and posits that coverage should have been afforded under those policies.

A. The Policies Should Be Enforced To Provide The Collapse Coverage That Was Reasonably Expected By The Homeowner Because, To Hold Otherwise, Would Make The Policies' Collapse Coverage Illusory

The trial court in this case failed to recognize the significance of the reasonable expectations of the policyholders in connection with coverage under homeowner's policies for crumbling basement walls, and the illusory nature of the collapse coverage at issue.[2] The plaintiff, and the thousands of homeowners whose basement walls are crumbling, reasonably expected that they would not have to wait until their homes inevitably fall to the

[2] UP agrees with the plaintiff that the policies are ambiguous for the reasons set forth in the plaintiff's brief, and herein, and should be construed in favor coverage. However, as explained below, a showing of ambiguity is not necessarily required when a policyholder reasonably expected coverage.

ground before they are entitled to coverage under their policies – policies that expressly cover collapse. Indeed, these policies contemplate coverage for something far short of the plaintiff's home falling to the ground. Through both an exclusion and a condition, these policies require the plaintiff to take steps to ensure the home never falls to the ground.

The defendant would have this Court construe the policies so as to make its promise to cover a collapse of all ***or part of*** a home illusory because it would exclude coverage when the policyholder fails to keep the home from falling to the ground at his or her own expense. Such a construction, that renders the collapse coverage illusory, violates the reasonable expectations of the plaintiff, who, like the thousands of similarly situated homeowners, reasonably expected coverage for the cost to ensure that this home does not inevitably fall to the ground (an effort that is expressly required under the policies).

The "reasonable expectations" doctrine was explained by Professor Keeton in his seminal law review article as follows: "The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations." R. Keeton, *Insurance Law Rights at Variance with Policy Provisions,* 83 HARV. L. REV. 961, 967 (1970). The doctrine protects "the policyholder's expectations as long as they are objectively reasonable from the layman's point of view, in spite of the fact that had he made a painstaking study of the contract, he would have understood the limitation that defeats the expectations at issue." Id. at 967.[3]

Courts nationwide have applied varying versions of the reasonable expectations doctrine. One court has categorized the varying approaches as follows: (1) invoking the

[3] Because the reasonable expectations doctrine is a rule unique to interpreting insurance policies, and is not used for general contracts, it is not dependent on a finding of ambiguity. See Id. at 968.

doctrine regardless of whether the policy language is unambiguous and determining that a policyholder's reasonable expectations control when they conflict with terms that negate coverage; (2) considering an insured's reasonable expectations when "a hidden 'trap or pitfall,' or fine print ... [takes] away the protection seemingly given by the large print."; (3) invoking the rule only when the meaning of the term in dispute is ambiguous; and (4) rejecting the doctrine outright. See Gregorio v. GEICO Gen. Ins. Co., 815 F. Supp. 2d 1097, 1101–02 (D. Ariz. 2011), aff'd, 535 Fed. Appx. 545 (9th Cir. 2013).

Connecticut has applied the reasonable expectations doctrine. See Northrop v. Allstate Ins. Co., 247 Conn. 242, 251 (1998) (holding in a case concerning whether an insured needed to pay out-of-pocket before a homeowner's insurer must pay an otherwise covered repair claim that "[i]t would defy the reasonable expectations of the insured, and in many cases place undue burdens on him, to require the insured to finance the withheld depreciation portion of the repair or replacement of a fire loss in order to secure the replacement cost coverage for which an additional premium had been paid. Indeed, if the insured first were required to pay out the money for the repair or replacement, rather than merely to incur a valid debt for the completed repair, in a case in which the damaged building was quite old and the loss extensive, the withheld depreciation could be so great as to make the replacement cost coverage largely illusory. We will not interpret insurance policy language to yield such a result."); see also Agosto v. Aetna Cas. & Sur. Co., 239 Conn. 549, 552 (1996) (citing R. Keeton & A. Widiss, Insurance Law (1988) § 6.3(a)(3), p. 633). Yet, no Connecticut appellate court has expressly explained to what extent the reasonable expectations doctrine may be limited.[4] In any event, this Court's recent decision

[4] UP contends that the reasonable expectations rule should not be limited, and may be applied even without a finding of ambiguity. To be sure, one district court judge has opined that the rule is extremely limited, applying it only if there is an ambiguity. See Progressive

in Nationwide Mut. Ins. Co. v. Pasiak, 327 Conn. 225, 258–59 (2017) (addressing conflict between express coverage for false imprisonment and mental abuse exclusion), suggests that Connecticut should subscribe to the reasonable expectations doctrine in the instant matter, particularly in order to protect against "illusory" coverage:

> Applying the District Court's definition of abuse to the policy in the present case would render the promise of coverage for false imprisonment largely illusory, as almost every such tort would involve some form of physical or mental "abuse" as defined in Vecsey.... Even assuming it is technically possible to commit false imprisonment without inflicting physical or mental maltreatment, we are not persuaded that a layperson would understand the coverage to be so limited. See Northrop v. Allstate Ins. Co., 247 Conn. 242, 251, 720 A.2d 879 (1998) (declining to interpret policy to yield result that would render coverage "largely illusory"); Hansen v. Ohio Casualty Ins. Co., 239 Conn. 537, 544, 687 A.2d 1262 (1996) ("[i]n general, courts will protect the reasonable expectations of applicants, insureds, and intended beneficiaries regarding the coverage afforded by 907 insurance contracts" [internal quotation marks omitted]).

Pasiak, 327 Conn. at 258–59.

As in Pasiak, the application of the reasonable expectations doctrine is required in this case, especially because the failure to do so results in illusory coverage. If the trial court's decision is correct, then the result is that there is no coverage if a home has not yet fallen to the ground; but, on the other hand, an insurance company might still have the right

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Cas. Ins. Co. v. Marnel, 587 F. Supp. 622, 623 (D. Conn. 1983) (*Underhill, J.*). However, that court also acknowledged that such ambiguity would be resolved by the *contra proferentem* rule. Id. Thus, if Connecticut recognizes the reasonable expectations rule, then it should not be limited to cases of ambiguity because there is already a dispositive rule for that scenario. As one Connecticut superior court noted, the rule should apply "irrespective of whether the contract language itself is ambiguous." Priority Finishing Corp. v. Hartford Steam Boiler Inspection & Ins. Co., No. CV 940544055S, 1998 WL 731081 (*Satter, J.*). This Court's decision in Hammer v. Lumberman's Mut. Cas. Co., 214 Conn. 573, 590 (1990), rejected a policyholder's reasonable expectations claim and determined that an unambiguous insurance policy did not provide coverage. But the Court did not expressly address or limit the scope of the rule and, if even if it had, such a limitation would be consistent with Nationwide Mut. Ins. Co. v. Pasiak, 327 Conn. 225, 258–59 (2017).

to deny coverage when the home does eventually fall to the ground as a result of a homeowner's failure to prevent this from happening. This would be an absurd result.

As this Court explained in Beach: "Requiring the insured to await an actual collapse would not only be economically wasteful . . . but would conflict with the insured's contractual and common law duty to mitigate damages." 205 Conn. at 253 n.2 (citing Tomlin, 352 S.E.2d 612). Moreover, most homeowner's insurance policies providing collapse coverage, including the post-2005 policies at issue in this case, contain some variant of the following provisions:

> We do not insure for loss caused directly or indirectly by any of the following[:]
>
> **... Neglect**, meaning neglect of the "insured" to use all reasonable means to save and preserve property at and after the time of a loss.

Pl. Appendix at A164.

> In the case of a loss to which this insurance may apply, you shall see that the following duties are performed:
>
> * * *
>
> d. Protect the property from further damage. If repairs to the property are required, you must:
>
> (1) Make reasonable and necessary repairs to protect the property; and
> (2) Keep an accurate record of repair expenses ....[5]

Pl. Appendix at A.165.

No Connecticut state court appears to have been affirmatively presented with this obvious contradiction in the policies in connection with crumbling basement wall cases. However, the issue was spotted by Judge Arterton in Adams v. Allstate Ins. Co.,:

> Allstate's approach of narrowing kinds of collapses to only those that occur suddenly does not give recognition to the reasoning in [Beach] which relied on the doctrine of avoiding economic waste to justify an expansive definition of collapse. In addition, Beach leaves open how or whether an insurer may raise the common law duty to mitigate damages as a defense when it

[5] That the defendant requires the plaintiff to keep records of expenses evidences the insurer's intent to pay for such expenses.

> reasoned that "requiring the insured to await collapse would not only be economically wasteful; but would also conflict with the insured's contractual and common law duty to mitigate damages." If Allstate were to raise such a defense after the eventual and inevitable collapse of the [Insured's] house, it may render the Policy's promise to provide coverage for sudden collapse illusory. (internal citations omitted.)

2017 WL 3763837, at *4 n.3 (and several similar cases).

That the defendant included provisions requiring mitigation of damages in the homeowner's policies it sold supports the position that, no matter what language is used to describe collapse coverage, the defendant contemplated coverage for something far short of homes falling to the ground. To hold otherwise – that collapse is not covered either in the present, when the house is not entirely on the ground, or in the future, because the collapse was not prevented, would render collapse coverage largely illusory, and at the very least, ambiguous. As noted above, this Court should reject constructions of policies that make coverage largely illusory and in contravention of the reasonable expectations of the policyholder. See Pasiak, 327 Conn. at 258–59. The policies here should be enforced based on the reasonable expectations of the plaintiff, and not in a manner that renders collapse coverage illusory. A reasonable person would certainly expect their home insurance policy to indemnify them for the loss of their home's structural integrity under these circumstances.

B. The Collapse Coverage Is Also Otherwise Ambiguous

Even if the Court does not fully apply the reasonable expectations doctrine, or otherwise find the policies to be ambiguous based on the illusory nature of collapse coverage, it may find coverage based on the fact that, contrary to the trial court's finding, the specific collapse language in the post-2005 policies is ambiguous and should be read

to provide coverage for the plaintiff's crumbling baseball walls.[6] See Pl. Br. at 9-25. To be sure, these policies attempt to provide an express definition to the term "collapse" but, based on insurance law principles governing the construction of policies, must read in favor of coverage. As an initial point, "abrupt" should be given its ordinary meaning and interpreted to mean "unexpected." "The ordinary meaning of 'abrupt' is 'characterized by or involving action or change without preparation or warning.'" England, 2017 WL 3996394, at *5 (quoting Merriam Webster's Collegiate Dictionary (10th ed. 1994)). Interpreting the word "abrupt" as meaning "unexpected" is reasonable in the context of the post-2005 policies which specifically provide coverage for causes of loss which are gradual and hidden. See, e.g., Dalton v. Harleysville Worcester Mut. Ins. Co., 557 F.3d 88, 93 (2d Cir. 2009); Kelly v. Balboa Ins. Co., 897 F. Supp. 2d 1262, 1268 (M.D. Fla. 2012). "Abrupt" is thus ambiguous and should be construed to cover the claims here.[7]

In any event, even if "abrupt" has a temporal requirement, the sulfate attack (or hidden decay), occurring as a result of the use of defective material, has caused an "abrupt" "falling down" or "caving in" of a "part of a building" – the basement walls. The very essence of this matter involves concrete basement walls which are falling down or caving in. While such caving in is continuing and the impact is evidenced more obviously over time (e.g., new and more significant cracks), there are separate, abrupt instances of caving in each moment that the concrete crumbles from within the basement walls. Kelly, 897 F. Supp. 2d at 1268. There is no greater example of a "cave in" than the loss present in crumbling basement cases such as this one. Each "crack" means that a piece of the wall –

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[6] The ambiguous nature of the collapse language also supports the argument set forth in Section I.A.

[7] In Buell v. Greater New York Mutual Ins. Co., 250 Conn. 257 (1999), this Court utilized the term "abrupt" to include a temporal aspect but the meaning of "abrupt" was not analyzed.

a part of the building – has fallen to the ground. Also importantly, the policies use an active voice – the terms "falling in" and "caving in" connote something that is occurring as opposed to something that has already occurred. This rebuts any argument that the post-2005 policies require the basement walls to have already fallen to the ground.

Further, the phrase "cannot be occupied for its current intended purpose" is ambiguous, especially in the context of these claims.[8] The fact that homeowners may still reside in their homes (out of need) does not mean that they should be, or should have to be, residing in their homes. This provision may reasonably be construed as allowing a homeowner the ability to live in a home where the basement walls are free from substantial impairment to their structural integrity, to live safely in a home without concern that the home may fall on top of the residents while they sleep, and to have the ability to sell a home should one desire (and not for a major financial loss). That homeowners may still live in their homes with crumbling basements does not mean that a home's intended purpose has been achieved.

For the reasons set forth herein, the terms of the post-2005 are ambiguous and should be construed in favor of coverage.

CONCLUSION

The United Policyholders urge this Court to reverse the judgment of the trial court.

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[8] Several district courts have also held collapse coverage to be ambiguous and to be construed in favor of coverage. See Malbco Holdings, LLC v. AMCO Ins. Co., 629 F. Supp. 2d 1185, 1195, (D. Ore. 2009); Landmark Realty, Inc. v. Great American Ins. Co., No. JKS 10-278, 2010 WL 5055805, (D. Md. Dec. 3, 2010); Ken Johnson Properties, LLC v. Harleysville Worcester Ins. Co., No. 12-1582 (JRT/FLN), 2013 WL 5487444, (D. Minn. Sept. 30, 2013); Scorpio v. Underwriters at Lloyd's, London, C.A. No. 10-325 ML, 2012 WL 2020168 (D. R.I. June 5, 2012).

Respectfully Submitted,

AMICUS CURIAE

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CERTIFICATE OF SERVICE

Pursuant to Practice Book § 62-7 the undersigned certifies that a copy of the foregoing was mailed this 27th day of March 2018 to:

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CERTIFICATION

The undersigned attorney hereby certifies, pursuant to Connecticut Rule of Appellate Procedure § 67-2, that on March 27, 2018:

(1) the electronically submitted brief and appendix has been delivered electronically to the last known e-mail address of each counsel of record for whom an e-mail address has been provided; and

(2) the electronically submitted brief and appendix and the filed paper brief and appendix have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law; and

(3) a copy of the brief and appendix has been sent to each counsel of record and to any trial judge who rendered a decision that is the subject matter of the appeal, in compliance with Section 62-7; and

(4) the brief and appendix being filed with the appellate clerk are true copies of the brief and appendix that were submitted electronically; and

(5) the brief complies with all provisions of this rule.

Proloy K. Das, Esq.