

Appeal No. 15-35101

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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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SCHNITZER STEEL INDUSTRIES, INC. AND MMGL CORP.,  
Plaintiffs-Appellees,

v.

CONTINENTAL CASUALTY CO. AND  
TRANSPORTATION INSURANCE COMPANY,  
Defendants-Appellants.

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On Appeal From The United States District Court  
For The District Of Oregon  
Case No.: 3:10-CV-01174  
The Honorable Michael Mosman

**MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OF UNITED  
POLICYHOLDERS, THE MARINE GROUP, LLC, SILTRONIC  
CORPORATION, PORT OF PORTLAND, EVRAZ, INC. NA, AND  
OREGON-COLUMBIA CHAPTER OF ASSOCIATED GENERAL  
CONTRACTORS, IN SUPPORT OF PLAINTIFFS-APPELLEES  
SCHNITZER STEEL INDUSTRIES, INC. AND MMGL CORP.**

Seth H. Row  
Christopher Rycewicz  
Miller Nash Graham & Dunn LLP  
111 S.W. Fifth Avenue, Suite 3400  
Portland, Oregon 97204  
(503) 224-5858  
seth.row@millernash.com  
christopher.rycewicz@millernash.com

Attorneys for *Amici Curiae* United  
Policyholders, The Marine Group, LLC,  
Siltronic Corporation, Port of Portland,  
Evraz, Inc. NA, and Oregon-Columbia  
Chapter of Associated General Contractors

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## **I. MOTION**

Proposed *Amici Curiae* listed above hereby file this motion for leave to file a Brief *Amici Curiae* of United Policyholders, The Marine Group LLC, Siltronic Corporation, Port of Portland, Evraz, Inc. NA, and Oregon-Columbia Chapter of Associated General Contractors in Support of Plaintiffs-Appellees Schnitzer Steel Industries, Inc. and MMGL Corp. (the "Proposed Brief"). Together with this motion, proposed *Amici Curiae* have conditionally filed their Brief *Amici Curiae* in this Court's docket. *See* Fed. R. App. P. 29(b). Consistent with Ninth Circuit Rule 29-3, proposed *Amici Curiae* attempted to obtain the consent of all parties to this action prior to filing this motion; however, Appellants did not give consent. Proposed *Amici Curiae* respectfully request that this Court accept the Proposed Brief for filing.

## **II. POINTS AND AUTHORITIES**

### **A. Identification and Interest of Proposed *Amici Curiae***

United Policyholders ("UP"), a non-profit 501(c)(3) organization, is a resource for insurance consumers in all 50 states. UP's reputation as a valuable information source for courts was confirmed when the Supreme Court cited its amicus brief in *Humana v. Forsyth*, 52 U.S. 299, 314 (1999). UP has filed amicus briefs on behalf of insureds in this and other courts in over 350 cases.

UP has appeared as *amicus curiae* in a number of Oregon state-court appeals on issues of Oregon insurance law, including: *Strawn v. Farmers Insurance Company of Oregon et al.*, Case No. S057520 (Oregon Supreme Court 2008); *St. Paul Fire & Marine v. McCormick & Baxter Creosoting Company*, Case No. S541584 (Oregon Supreme Court, 1998); *Groshong, vs. Mutual Enumclaw Insurance Company*, Case No. S43912 (Oregon Supreme Court, 1996); and *Fleming vs. USAA*, Case No. S44805 (Oregon Supreme Court, 1996). UP has also appeared as *amicus curiae* in a number of cases before this Court concerning Oregon insurance law, including *Ash Grove Cement Co. v. Liberty Mutual Ins. Co. et al.*, Case No. 13-35900 (2014, appeal pending), and *Medallion Industries, Inc. v. Atlantic Mutual Ins. Co.*, Case No. 97-35317 (1996).

Insurance regulators, academics and journalists routinely seek UP's input on insurance and legal matters. UP's Executive Director has been appointed an official consumer representative to the National Association of Insurance Commissioners for six consecutive years. Accordingly, UP offers expertise on insurance policy matters from both the commercial and individual perspective that will greatly assist the court.

The Marine Group, LLC, Siltronic Corporation, Port of Portland, and Evraz, Inc. NA, are entities which the U.S. Environmental Protection Agency ("EPA") has identified as potentially responsible parties at the Portland Harbor

Superfund Site, and are, have been, or expect to be engaged in litigation with their liability insurers over coverage for enforcement actions under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), or other statutes, in which they have or will be seeking attorney fees pursuant to ORS 742.061. Each entity also has specific experience regarding the role of attorney-fees exposure in coverage disputes in general as a commercial policyholder. Thus, these individual proposed *Amici Curiae* have separate, independent interests in this appeal.

Oregon-Columbia Chapter of Associated General Contractors ("AGC") is a nonprofit Oregon corporation that serves as the principal trade association of the construction industry in Oregon and Southwest Washington. It exists, in part, as the "voice and choice" of the commercial construction industry to represent the interests of the construction industry in administrative, legislative, and judicial proceedings. Approximately 1,100 Oregon construction contractors belong to AGC, including both general contractors and specialty contractors (subcontractors) in all areas of commercial construction work. AGC's member-contractors are frequently parties to insurance coverage disputes, and sometimes litigation, in both state and federal courts due to the boom in "construction defect" claims over the past fifteen years. As a result, AGC's member-contractors have a wide range of experiences in multiple settings with the role that attorney fee exposure under ORS 742.061 plays in the

resolution of coverage disputes in Oregon. AGC therefore has a significant and independent interest in this appeal.

**B. Summary of Information that Proposed *Amici* Will Present to the Court to Assist in Resolution of this Appeal**

This diverse group of proposed *Amici Curiae* is concerned that Appellants' suggested interpretation of Or. Rev. Stat. § 742.061 (2013) would upend decades of settled practice, and undermine the purposes of the statute by putting policyholders at even more of a disadvantage than they currently are with regard to their negotiating position with insurers. This would undermine the purposes of the statute, which are to prompt early and fair resolution of coverage claims without litigation, by removing any incentive on insurers to resolve claims promptly or fairly, and would encourage more coverage litigation.

The Proposed Brief will provide information regarding the over-arching purposes of the statute recognized by Oregon courts since its adoption in 1919. Proposed *Amici* will also provide analysis of the current state of the law and practice regarding the role of attorney fees exposure under the statute in prompting fair resolution of coverage disputes involving both individual policyholders and commercial policyholders. The brief will point out that Appellants' proposed interpretation would remove such incentives for insurers, disadvantaging policyholders, contrary to the purposes of the statute. Finally,

the Proposed Brief provides information regarding the highly negative impact that Appellants' proposed interpretation of the statute would have on efficient non-judicial resolution of coverage disputes, including the perverse incentives that Appellants' proposed rule of law would create for insurers – who already possess, in general, greater resources and sophistication – to initiate early, preemptive coverage litigation rather than engage in negotiation, and the resulting requirement that policyholders themselves move quickly to litigation to preserve the status quo. The Proposed Brief argues that the overall result will be more litigation and less negotiation, greater delays in payment of meritorious claims, fewer fair settlements, and more administrative burden on the courts and therefore the populace as a whole.

WHEREFORE, proposed *Amici Curiae* respectfully request leave to appear as *Amici Curiae* and to file the accompanying Proposed Brief.

Respectfully submitted this 15th day of July, 2015.

s/Seth H. Row  
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Seth H. Row, OSB No. 021845  
Miller Nash Graham & Dunn, LLP  
111 S.W. Fifth Avenue, Suite 3400  
Portland, Oregon 97204  
Telephone: (503) 224-5858  
Facsimile: (503) 224-0155  
Email: seth.row@millernash.com

Attorneys for *Amici Curiae* United  
Policyholders, The Marine Group, LLC,  
Siltronic Corporation, Port of Portland,  
Evraz Inc. NA, and Oregon-Columbia  
Chapter of Associated General  
Contractors

### **CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OF UNITED POLICYHOLDERS, THE MARINE GROUP, LLC, SILTRONIC CORPORATION, PORT OF PORTLAND, EVRAZ, INC. NA, AND OREGON-COLUMBIA CHAPTER OF ASSOCIATED GENERAL CONTRACTORS IN SUPPORT OF PLAINTIFFS-APPELLEES SCHNITZER STEEL INDUSTRIES, INC. AND MMGL CORP. with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 15, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED this 15th day of July, 2015.

s/Seth H. Row  
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Seth H. Row, OSB No. 021845  
Miller Nash Graham & Dunn, LLP  
111 S.W. Fifth Avenue, Suite 3400  
Portland, Oregon 97204  
Telephone: (503) 224-5858  
Facsimile: (503) 224-0155  
Email: seth.row@millernash.com

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