Appeal No. 15-35101

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

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

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

BRIEF OF *AMICI CURIAE* 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.

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DISCLOSURE STATEMENT

Pursuant to Rule 26.1(a) of the Federal Rules of Appellate Procedure, *Amici* state as follows:

Amicus United Policyholders is a non-profit 501(c)(3) organization, has no parent corporation, and no publicly-held corporation owns 10 percent or more of its stock.

Amicus The Marine Group, LLC is a California limited liability company, has no parent corporation, and no public held corporation owns 10 percent or more of its stock.

Amicus Siltronic Corporation is a Delaware corporation which is a wholly-owned subsidiary of Siltronic Holding International BV, a Netherlands company. Siltronic Holding International BV is a member of the Siltronic AG group of companies headquartered in Munich, Germany. Siltronic AG is a publicly traded company in Germany.

Amicus Port of Portland is a port district of the State of Oregon, has no parent corporation, and no publicly-held corporation owns 10 percent or more of its stock.

Amicus Evraz, Inc. NA is a wholly owned subsidiary of Evraz North America Plc which is a wholly-owned subsidiary of Evraz Group SA which is a wholly-owned subsidiary of Evraz Plc.

Amicus Oregon-Columbia Chapter of Associated General Contractors is a non-profit organization, has no parent corporation, and no publicly-held corporation owns 10 percent or more of its stock.

DATED: July 15, 2015 MILLER NASH GRAHAM & DUNN LLP

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I. INTEREST OF 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. 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 that will greatly assist the court.

The Marine Group, LLC, Siltronic Corporation, Port of Portland, and Evraz, Inc. NA, are entities identified by the U.S. Environmental Protection Agency ("EPA") as potentially responsible parties ("PRPs") 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"), and other statutes, in which they have or will be seeking attorney fees pursuant to Or. Rev. Stat. § 742.061 (2013).

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. AGC's member-contractors therefore have a considerable interest in maintaining the role that attorney fee exposure under Or. Rev. Stat. § 742.061 plays in the resolution of coverage disputes in Oregon.

Appearing in support of Appellees Schnitzer Steel Industries, Inc. and MMGL Corp. ("Schnitzer"), *Amici* submit that this Court should affirm the District Court's holding that Or. Rev. Stat. § 742.061 entitles a policyholder that is the prevailing party in litigation with an insurer to recover its attorney fees even if the litigation in which fees are sought was initiated in federal court.

II. PRELIMINARY STATEMENT[1]

Since 1919, Oregon law has provided policyholders with the right to recover attorney fees from insurers who fail to pay claims in a timely manner.

[1] Pursuant to FRAP 29(c), *Amici* state that no party or person other than *Amici* authored or contributed funding for this brief.

Over the intervening decades, scores upon scores of lawsuits have been filed in federal court either by insurance companies or policyholders in which the policyholder sought to recover attorney fees under the statute. Time and again federal courts, including this Court, have awarded attorney fees under the statute.

Over that period of time, the law has also been amended and re-codified numerous times without the legislature *once* expressing any concern that the federal courts were applying the statute to claims brought under the courts' original jurisdiction.

Oregonians currently have few protections available to them when insurance companies refuse to honor their contractual obligations. Indeed, as Oregon insurance law has developed, the entitlement to attorney fees has emerged as essentially the only tool available to Oregon policyholders to prevent abusive practices by insurers.

The interpretation of Oregon law advanced by Appellants would upend all of that. Appellants' proposed interpretation ignores decades of established practice, would remove the only practical tool available to Oregon policyholders to encourage insurers to comply with their contractual obligations, and would result in a "rush to the courthouse" as insurers seeking "first-to-file" advantage file declaratory judgment actions in federal court to

avoid exposure to attorney fees. That result would undermine the statute's purpose, and is not sound policy when viewed from any perspective.

III. ARGUMENT

A. The Enforcement History of Oregon's Law on Attorney Fees Has Established the Law as a Broadly Applicable Deterrent Against Insurer Abuses

Oregon courts have consistently held that Oregon's attorney fee-shifting statute is intended to protect businesses and individuals who have suffered an insured loss, and to discourage insurers from improperly rejecting claims. *See Murray v. Firemen's Ins. Co. of Newark, N.J.*, 121 Or. 165, 172, 254 P. 817 (1927) (attorney fee statute was intended "to protect an insured who has suffered a loss from annoying and expensive litigation" and from "unnecessary and wrongful delay" in coverage payments); *Chalmers v. Oregon Auto. Ins. Co.*, 263 Or. 449, 452, 502 P.2d 1378 (1972) (purpose of statute "is to encourage the settlement of claims without litigation and to reimburse successful plaintiffs."); *see also Heis v. Allstate Ins. Co.*, 248 Or. 636, 643-44, 436 P.2d 550 (1968) (policy behind statute is to encourage settlement and to discourage insurers' unreasonable rejection of claims); *Dockins v. State Farm Ins. Co.*, 329 Or. 20, 29, 985 P.2d 796 (1999) (attorney fee statute "seeks to protect insureds from the necessity of litigating their valid claims"); *Haynes v. Tri-County Metro. Transp. Dist. of Or.*, 337 Or. 659, 666, 103 P.3d 101 (2004)

(statute "was designed to expedite the processing of claims and reduce litigation by providing an incentive for efficient claim resolution.")

As Schnitzer pointed out in its response brief, since the statute's enactment this Court and federal trial courts in Oregon have repeatedly concluded that federal courts have the authority to award fees under the statute. *See, e.g., Anderson Bros., Inc. v. St. Paul Fire and Marine Ins. Co.*, 729 F.3d 923 (9th Cir. 2013) (affirming trial court's award of fees); *Port of Portland v. Water Quality Ins. Syndicate*, 796 F.2d 1188 (9th Cir. 1986) (affirming district court's award of attorney fees under statute); *Horwitz v. New York Life Ins. Co.*, 80 F.2d 295 (9th Cir. 1935) (awarding fees on appeal under statute); *Hoffman v. Foremost Signature Ins. Co.*, Case No. 6:12-cv-01534-MC, 2014 WL 911274 (D. Or. Mar. 10, 2014) (same); *Kennedy v. Pacific Indemnity Co.*, 267 F. Supp. 16 (D. Or. 1967) (same).

Over the decades Oregon's Supreme Court and Court of Appeals have also interpreted the statute broadly, consistent with the purposes established by the early case law. *See, e.g., Morgan v. Amex Assur. Co.*, 352 Or. 363, 368-69, 298 P.3d 1038 (2012) (legislature showed no intent to narrow the broad reach of the attorney fee statute when a later statute was enacted purportedly restricting a policyholder's attorney fee entitlement); *ZRZ Realty Co. v. Beneficial Fire & Cas. Ins. Co.*, 351 Or. 255, 261, 266 P.3d 61 (2011) (resolving a dispute over whether a statute that purportedly limited a

policyholder's right to fees applied retroactively in favor of the policyholder's fee entitlement, in part based on the legislative intent behind the attorney fee statute); *Wilson v. Tri-County Metro. Transp. Dist. of Oregon*, 234 Or. App. 615, 625, 228 P.3d 1225 (2010) (in order to give the attorney fees statute its "full effect," the statute had to be read broadly as trumping a procedural rule relating to offers of judgment).

That broad interpretation of the statute – requiring consideration of its purposes – has become part of the statue itself when divining how an Oregon court would resolve the interpretive issue raised by Appellants here. "In construing [the] text [of the statute in question], we also consider its context, including 'prior opinions of this court interpreting the same statutory wording.'" *Powers v. Quigley*, 345 Or. 432, 438, 198 P.3d 919 (2008). "The Supreme Court's prior construction of a statute is considered part of the text of the statute itself." *Wilson*, 234 Or. App. at 622, *citing Stephens v. Bohlman*, 314 Or. 344, 350, 838 P.2d 600 (1992).

B. Adopting Appellants' Position Would Undermine the Purposes of the Attorney Fee Statute by Undermining Policyholders' Leverage, and Encouraging Coverage Litigation and a "Race to the Courthouse"

Adopting Appellants' proposed interpretation of Or. Rev. Stat. § 742.061 would undermine one of the only leverage points that Oregon policyholders have with insurance companies, and would encourage more coverage litigation and a "race to the courthouse," producing an anomalous result contrary to the

established intent and public policy behind the statute of encouraging efficient, non-judicial resolution of coverage disputes.

1. Oregon Policyholders Rely on Insurers' Attorney Fee Exposure to Curb Abusive Practices and Level the Playing Field - Appellants' Interpretation of the Statute Would Undermine That, Without Any Evidence of Legislative Intent

As detailed above, Oregon courts have consistently held that the attorney fee statute was intended to serve important public-policy goals, namely protecting policyholders and other claimants from abusive insurance practices and to encourage the prompt resolution of claims, in recognition that consumers (both commercial and individual) are at a distinct disadvantage in dealing with insurers. For those same public-policy reasons, many other states have adopted statutes or court-made rules providing that a policyholder may recover attorney fees in coverage litigation.[2] As explained in *Olympic Steamship Co., Inc. v.*

[2] Statutes: *see, e.g.,* Ark. Code Ann. §23-79-208 (West 2010); Del. Code Ann. Tit. 18, §4102 (West 2011); Neb. R. Stat. Ann. §44-359 (2010); Tex. Ins. Code Ann. §542.060(2) (2011); NH Rev. Stat. Ann. § 491:22-b (West 2011); Kan. Stat. Ann. § 40-201 (West 2010); *see also* Alan D. Windt, 2 *Insurance Claims and Disputes* 5th §9:24 n.1 (2010). Court-made rules: *see, e.g., Morrison v. Swenson*, 274 Minn. 127, 138, 142 N.W.2d 640, 647 (1966); *Cohen v. American Home Assur. Co.*, 255 Md. 334, 363, 258 A.2d 225, 239 (1969); *Gordon-Gallup Realtors, Inc. v. Cincinnati Ins. Co.*, 274 S.C. 468, 265 S.E.2d 38, 40 (1980); *Brandt v. Superior Court*, 37 Cal. 3d 813, 817, 210 Cal. Rptr. 211, 693 P.2d 796, 818 (1985); *City of Willoughby Hills v. Cincinnati Ins. Co.*, 26 Ohio App. 3d 146, 148, 499 N.E.2d 31, 34 (1986); *McGreevy v. Oregon Mut. Ins. Co.*, 128 Wash. 2d 26, 28, 904 P.2d 731, 736 (1995); *Gibson v. Farm Family Mut. Ins. Co.*, 673 A.2d 1350, 1355 (Me. 1996); *Miller v. Fluharty*, 201 W. Va. 685, 694, 500 S.E.2d 310, 319 (1997); *Hanover Ins. Co. v. Golden*, 436 Mass. 584, 586-87, 766 N.E.2d 838, 840 (2002); *Ledman v. State Farm Mut. Auto. Ins. Co.*, 230 Wis. 2d 56, 70, 601 N.W.2d 312, 230 (Wis. Ct. App. 1999); *Jones v. Wainwright*, 149 N.C. App. 869, 872, 561 S.E.2d 594, 596 (2002); *U.S. Underwriters Ins. Co. v. City Club Hotel, LLC*, 3 N.Y.3d 592, 597, 822 N.E.2d 777, 780 (2004).

Centennial Ins. Co., 117 Wash. 2d 37, 811 P.2d 673, 681 (1991):

> [D]isparity of bargaining power between an insurance company and its policyholder makes the insurance contract substantially different from other commercial contracts. When an insured purchases a contract of insurance, it seeks protection from expenses arising from litigation, not vexatious, time-consuming, expensive litigation with his insurer. Whether the insured must defend a suit filed by third parties, appear in a declaratory action, or . . . file a suit for damages to obtain the benefit of its insurance contract is irrelevant. In every case, the conduct of the insurer imposes upon the insured the cost of compelling the insurer to honor its commitment and, thus, is equally burdensome to the insured. Further, allowing an award of attorney fees will encourage the prompt payment of claims.

Accord, *Gibson v. Farm Family Mut. Ins. Co.*, 673 A.2d 1350 (Me. 1996) (awarding attorney fees when duty to defend is clear as an element of damages; insurer is "liable to pay such damages as will place the insured in a position equally as good as the insured would have occupied had the insurance contract been fully and properly performed from the beginning."); *Hanover Ins. Co. v. Golden*, 436 Mass. 584, 586-87, 766 N.E.2d 838 (Mass. 2002) (awarding attorney fees as damages in any suit to establish coverage; "to impose upon the insured the cost of compelling his insurer to honor its contractual obligation is effectively to deny him the benefit of his bargain."); *City of Willoughby Hills v. Cincinnati Ins. Co.*, 26 Ohio App.3d 146, 148, 499 N.E.2d 31 (1986) (affirming award of attorney fees to "put [the insured] in a position as good as that which he would have occupied if the insurer had performed its duty.") (internal citations and punctuation omitted).

But most states, recognizing the limited leverage provided by an attorney fee entitlement, add an additional layer of protection for policyholders. In those states the availability of "bad faith" tort damages operates as a significant deterrent against insurers trying to escape their coverage obligations.[3]

But insurance companies have long argued that in Oregon, unlike other states, holders of liability policies may not bring tort-based claims if the carrier fails to comply with its obligation to provide a defense. So far, Oregon courts have largely agreed. *See Farris v. United States Fidelity and Guaranty Co.*, 284 Or. 453, 587 P.2d 1015 (1978) (holding that in general tort claims are not available in coverage actions arising out of a liability policy, absent a fiduciary relationship created by the insurer accepting defense of the claim). Oregon courts have also concluded that Oregon's Unfair Claims Settlement Practices statue, Or. Rev. Stat. § 746.230, contains no private right of action.[4] *Id.*, 284 Or. at 458. As a practical matter, this has deprived policyholders of the threat of a "bad faith" claim as a deterrent, resulting in less leverage with carriers.

Policyholders (and other claimants) are therefore left with just a single point of leverage with insurers: the attorney fees statute. Since the enactment of the Oregon attorney fees statute, insurers have at least had to consider the

[3] *See* Lee R. Russ, 14 *Couch on Insurance* § 204:11 *et seq* (3d. ed. 2010); *Insurer's tort liability for consequential or punitive damages for wrongful failure or refusal to defend insured*, 20 A.L.R. 4th 23 (1983).

[4] In 2013 the Oregon legislature created a limited private right of action for certain unfair claim settlement practices, but that statute only applies to coverage disputes arising out of some kinds of environmental liabilities. *See* Or. Rev. Stat. § 465.484 (2013).

risk that attorney fees will be awarded if a policyholder or other claimant sues to enforce the terms of the policy. Without the threat that attorney fees will be awarded, the insurer has absolutely no incentive to perform as promised – at worst it will be required merely to perform as it should have in the first place. There will be no downside for the insurer if it breaches the contract – it will get, in effect, a free breach.

Moreover, if litigation ensues, the insurer will have absolutely no incentive to minimize the burden on the court or the policyholder. To the contrary, and particularly in higher-stakes litigation, the insurer will have an incentive to prolong and complicate the litigation, because its litigation costs will be less than its earnings on the money that it ultimately may owe to the policyholder (i.e. "the float"). This will further exacerbate the problem of the already lopsided playing field on which disputes between out-of-state insurers (often the largest financial institutions in the world) and Oregon insureds take place.

It is important to note that unlike other breach-of-contract situations, insureds cannot "cover" in the event of a breach. The insured cannot procure a substitute policy and sue for the difference in premium, because the loss is no longer a fortuity, a necessary element of every insurance bargain. Once a loss has occurred, the insured's sole recourse generally is to the policy that was "on the risk" at the time of the loss. In the case of "occurrence-based" policies, the

policy "on the risk" will most likely be the policy that was in effect when the injury or damage took place. In the case of "claims-made" policies, it will likely be the policy in effect when the claim against the insured was made. In no case can the insured simply go to market and purchase another insurance product to provide coverage for an occurrence or a claim that has already occurred or been made.[5] If the carrier for the policy that was "on the risk" denies coverage, the insured is stuck.[6] That is why legislatures across the

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[5] In particular, the insured cannot go to market and buy a policy issued by an Oregon-resident insurer, so as to protect the availability of attorney fees in the event of a dispute.

[6] As a justice of the West Virginia Supreme Court of Appeals memorably stated:

> Some of the bandits in the insurance business, a minority of companies I am happy to point out, predicate their company policy on the proposition that a person cannot sue them, realistically, for property damage. They offer settlements accordingly.
>
> Insurance is different from any other business. If a man goes into a butcher shop, asks for two pounds of ground meat, and tenders $2.89 in payment, he will expect his meat to be forthcoming from the grinder. Imagine the scene were the customer to ask for his meat, and be answered that the butcher has no intention to deliver the same. 'Where is my meat?'; the customer would reply, possibly in other than dulcet tones. 'I won't give you any meat,' replies the butcher firmly. 'Then give me back my $2.89 and I shall go elsewhere,' says the customer. 'I won't give you the $2.89 either,' replies the butcher, 'for you must bring a law suit to get it from me.' Sock! Pow! Blam! And much property damage of a different sort.
>
> Yet such a colloquy proceeds with regularity in the area of insurance. The case of fire insurance leaps instantly to mind when companies frequently deny liability under contracts with their own insureds. Furthermore, if a man's car is damaged negligently by another party, the tort-feasor's insurance carrier, recognizing full well the liability, may well decline to pay forthwith, relying instead upon its ability to wear the injured victim down with legal expenses and the cost of stamps for the exchange of meaningless correspondence.

country, including the Oregon legislature, have looked for mechanisms to discourage wrongful denials of coverage by insurance carriers, and have turned to tools such as attorney fees, and (in other states) to additional tools such as "bad faith" tort actions.[7]

Therefore, because the statute in question is an expression of Oregon's public policy of encouraging fair and timely resolution of coverage disputes, and is the sole effective means that consumers – businesses and individuals – have to "level the playing field" and discourage insurers from breaching their agreements to provide coverage, this Court should look with great skepticism at Appellants' claim that the Oregon legislature intended to *dilute* this protection indirectly and *sub silentio*, by basing the availability of fees on the fortuity of whether the insurer and the insured are citizens of different states. Because that result is so clearly opposite to the purposes of the statute, and there is in fact *no evidence* that was the result intended by the Oregon legislature, Appellants' interpretation is simply not reasonable.

Jarrett v. E. L. Harper & Son, 160 W. Va. 399, 405-406 (W. Va. 1977) (Neely, J., concurring), *modified on other grounds, Brooks v. City of Huntington*, 768 S.E.2d 97, 105 (W. Va. 2014).

[7] For example, the Washington Supreme Court, noting that "…bad faith requires us to set aside traditional rules regarding harm and contract damages because insurance contracts are different," has held that denial of defense coverage in bad faith will result in coverage by estoppel; that is, the carrier is estopped from raising any coverage defenses to payment of any judgment against the insured. *Kirk v. Mt. Airy Ins. Co.*, 134 Wash. 2d 558, 951 P.2d 1124, 1127 (1998).

2. Whether or Not an Insurance Coverage Dispute May be Subject to Federal Court Jurisdiction Is a Fortuity

There are very few insurers that are citizens of Oregon; of those, only a handful are property/casualty insurers.[8] The result is that Oregon personal-lines policyholders (such as home, auto and farm policyholders) will almost always have their coverage disputes initiated in or removed to federal court.

On the commercial policyholder side the likelihood of federal-court jurisdiction over a coverage dispute is even greater. Companies with significant operations in Oregon, and that purchase insurance policies for Oregon operations using revenue from those Oregon operations, are nevertheless sometimes "citizens" of another state.[9] And even Oregon-born businesses of all types are frequently acquired by out-of-state-companies,[10] effecting a change in corporate citizenship. Therefore even if an "Oregon" business buys insurance from an "Oregon" insurer, diversity jurisdiction may still exist.

Due to all of these factors, it will be the rare coverage dispute that pits an Oregon citizen policyholder against a domestic Oregon insurer; the vast

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[8] *See* http://www.oregon.gov/DCBS/insurance/insurers/regulation/Documents/domestic_list.pdf (last visited July 6, 2015). Several of Oregon's "domestic" property/casualty insurers are subsidiaries of liability insurers that are headquartered out of state. *Id.* Those subsidiaries could be folded into their parent insurers at any time, meaning that policies issued in the past when the insurer was a resident of Oregon would be litigated in federal court due to the change in citizenship of the insurer. The policyholder has no control over that eventuality and as explained above, has no ability to change to an Oregon insurer to cover a loss that has already happened.

[9] *See generally* Steven M. Klepper, *Choice of Law for CGL Insurance Policies: Toward a Uniform Rule*, 45 Tort Trial & Ins. Prac. L. J. 31 (2010).

[10] *See* http://www.bizjournals.com/portland/blog/2015/01/list-leaders-the-5-biggest-oregon-related-mergers.html (last visited July 6, 2015) (reporting that 52% of Oregon business acquisitions were purchases by non-Oregon companies).

majority of coverage disputes between Oregon policyholders and their property/casualty insurers will be subject to diversity jurisdiction. But perhaps more importantly for public-policy purposes, whether or not a coverage dispute will be heard in federal court is outside of the control of the policyholder and largely determined by market forces. It is, in essence, a fortuity. Therefore, conditioning the availability of attorney fees as a deterrent to insurer misbehavior on federal-court jurisdiction would further disempower the policyholder, contrary to the objectives of the attorney fee statute. *See Wilson*, 234 Or. App. at 627.

3. Adopting Appellants' Approach Will Result in More Coverage Litigation and a "Race to the Courthouse" as the Parties Seek Advantage Regarding Attorney Fee Exposure

As it stands now, insurers make coverage decisions within a context of a mild, but at least consistent, deterrent to misbehavior or litigation: the threat of attorney fee exposure under Or. Rev. Stat. § 742.061. Knowing that the risk of attorney fees is always present, an insurer's first question is whether or not the claim is covered – knowing that if it is later deemed by a court to have denied the claim inappropriately, it will have to pay more. Moreover, the risk of an attorney fee award to the policyholder discourages pre-emptive litigation (such as a declaratory judgment action that may bring a breach of contract counterclaim) and it encourages, if not prompt and full claim payment, at least negotiation of coverage disputes before litigation.

Appellants' interpretation of Or. Rev. Stat. § 742.061 would reverse the incentives regarding litigation of claims. The first question for insurers will no longer be whether the claim is covered under Oregon law; it will be whether there is diversity jurisdiction, such that the insurer could avoid attorney fees by filing suit first, in federal court. If the attorney fee exposure can thus be eliminated, insurers will be left with absolutely no "downside risk" for an incorrect claims decision, in light of the current state of Oregon law on "bad faith" explained above. Insurers will no longer have an incentive to give the benefit of the doubt to the insured, or to move quickly in making claim determinations. Once the insured dares to challenge the claim denial the insurer will immediately file a declaratory judgment action in federal court, rather than engage in dialogue or negotiation and risk the insured filing first in state court in order to invoke the attorney fee statute.

At the same time, under Appellants' interpretation of the statute, policyholders will be incentivized to race to the *state* courthouse with a breach of contract claim in order to secure "first-to-file" status and to have attorney-fee exposure under Or. Rev. Stat. § 742.061 attach, even if the policyholder knows that the claim will be removed by the insurer to federal court.

Encouraging insurers to file early declaratory judgment actions in federal court, and *requiring* policyholders to file early lawsuits in state court in order to obtain any leverage whatsoever, would be an anomalous result totally at odds

with the purpose of the attorney fee statute. That result would be the *opposite* of "protect[ing] [the] insured who has suffered a loss from annoying and expensive litigation" and from "unnecessary and wrongful delay" in coverage payments, *Murray*, 121 Or. at 172, and would undermine the statue's purpose to "encourage the settlement of claims without litigation…"*Chalmers*, 263 Or. at 452. If an insurer, generally possessed of superior resources and sophistication, is allowed to avoid the risk of attorney fee liability simply by being the first to file suit in the court of its choice, the insurer will have no meaningful incentive to negotiate with the policyholder.

Nor would Appellants' approach be good public policy even if the interests of policyholders were set aside. Additional and duplicative state- and federal-court litigation will increase the burden on public systems and the costs to society. The delay in claim payments would also disadvantage claimants who are looking to insurance proceeds for redress.

IV. CONCLUSION

Appellants' proposed interpretation of Or. Rev. Stat. § 742.061 would create an anomalous result totally at odds with the purposes of the statute and sound public policy. Therefore, *Amici* respectfully encourage this Court to affirm the supplemental judgment of the District Court regarding Appellees' entitlement to attorney fees under Or. Rev. Stat. § 742.061.

Respectfully submitted this 15th day of July, 2015.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) because this brief contains 3866 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Windows software in 14 pt. Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing BRIEF OF AMICI CURIAE 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 this15th day of July, 2015.

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