SUPREME COURT

OF THE

STATE OF CONNECTICUT

S.C. 20149

STEVEN KARAS AND,
GAIL KARAS
PLAINTIFFS-APPELLANTS

V.

LIBERTY INSURANCE CORPORATION
DEFENDANT-APPELLEE

BRIEF OF *AMICUS CURIAE* 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 N.Y. 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 26 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 plaintiffs, Steven and Gail Karas, are two 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, Liberty Insurance Corporation, has been collecting premiums from the plaintiffs and insuring their home since 2010. Pl's App. 285. Liberty's homeowner's policies expressly provided coverage for "collapse." Pl's App. 210, 228, 344. This lawsuit alleges that Liberty breached its obligation to provide coverage for collapse when it denied the Karases' claim. Pl's App. 9-18.

Liberty's policies did not define the term "collapse." Thirty years ago, in Beach v. Middlesex Mutual Assurance Co., 205 Conn. 246 (1987), this Court broadly construed the undefined 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 undefined 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 structural 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, 181 Ga. App. 413, 416 (1986)).

In this case, Liberty moved for summary judgment on, *inter alia*, the issue of whether plaintiffs could establish that their basement walls had suffered a collapse, and specifically challenged whether "substantial impairment of structural integrity" was the applicable standard. On December 14, 2017, the trial court (*Underhill, J.*) denied summary judgment on plaintiffs' breach of contract count, incorporating by reference its ruling in a substantially similar case, Roberts v. Liberty Mutual Fire Insurance Co., 264 F. Supp. 3d 394 (D. Conn. 2017). The trial court specifically rejected Liberty's argument that "substantial impairment of structural integrity" was not the applicable standard for "collapse" coverage, and further rejected the insurer's attempts to import an "imminence" requirement. Id. at 407-408. It determined, properly, that the Karases had raised a genuine issue of material fact of

whether the damage to their home constituted a "collapse," given the testimony of the Karases' expert.

Days after its motion was denied, Liberty moved to certify questions of law to this Court. On July 5, 2018, this Court issued notice that it would certify three questions:

> (1) Is "substantial impairment of structural integrity" the applicable standard for "collapse" under the provision at issue?
>
> (2) If the answer to question one is yes, then what constitutes "substantial impairment of structural integrity" for purposes of applying the "collapse" provision of this homeowners' insurance policy?
>
> (3) Under Connecticut law, do the terms "foundation" and/or "retaining wall" in a homeowners' insurance policy unambiguously include basement walls? If not, and if those terms are ambiguous, should extrinsic evidence as to the meaning of "foundation" and/or "retaining wall" be considered?

On September 24, 2018, UP's application to appear as an *amicus curiae* party was granted.

ARGUMENT

I. "SUBSTANTIAL IMPAIRMENT OF STRUCTURAL INTEGRITY" IS THE APPLICABLE STANDARD AND DOES NOT REQUIRE AN IMMINENT DANGER OF FALLING DOWN.

Liberty's efforts to define "substantial impairment of structural integrity" so as to require that a structure be in imminent danger of falling down and unsafe to occupy is a bold attempt to reverse this Court's holdings in Beach, and should be rejected.[2] Beach specifically held that the structural impairment it had in mind could be satisfied "even though no actual caving-in occurred and the structure was not rendered completely

[2] Connecticut state and federal courts have consistently declined to indulge Liberty's efforts, noting that such attempts are directly contrary to the holding in Beach. E.g., Roberts v. Liberty Mut. Fire Ins. Co., 264 F. Supp. 3d 394, 406-407 (D. Conn. 2017) (collecting authorities). This Court should do the same because Beach is soundly reasoned, and because neither the policy language at issue nor the facts in this case require a departure from Beach.

uninhabitable." 205 Conn. at 252-53. The Karases correctly argue that Beach supplies the relevant standard, and that a determination of whether there has been a substantial impairment of structural integrity is a question of fact which requires no further clarification.

If the Court is inclined to offer further guidance on the relevant standard for the many cases addressing claims under similar policies for coverage of crumbling basement walls which contain iron sulfide minerals, it should conclude that where the impairment at issue, if not remedied, will lead inevitably to a caving in, a falling down, and/or a structure's being unsafe to occupy, the standard of substantial impairment of structural integrity has been met. Such a standard is well supported by the decision in Beach which eschewed any notion that a caving in had to be imminent or the building be unsafe to inhabit. Beach's standard for collapse, and that standard as clarified here, is also the only one which is consistent with the reasonable expectations of the policyholder.

Judge Underhill has suggested that a "middle ground" could be reached by adopting a standard that would require the structure to be so impaired that it "would have caved in had the [homeowners] not acted to repair the damage." Karas v. Liberty Ins. Corp., 2018 WL 2002480, at *5 (quoting Roberts, 264 F. Supp. 3d at 407). To the extent this "middle ground" suggests that policyholders are required to pay for repairs before they can get coverage, such a standard would be unfair to policyholders and likely unworkable in the context of these crumbling cement cases. See Northrop v. Allstate Ins. Co., 247 Conn. 242, 251 (1998).[3] In the context of these crumbling cement claims, homeowners have been

[3] In Northrop, a case concerning whether an insured needed to pay for repairs out-of-pocket before immediately being reimbursed by a homeowners insurer for an otherwise covered repair claim, the Court held 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.

advised that the only way to solve the problem is to remove the basement walls and replace them,[4] at a cost that is estimated to be $100,000 to $200,000 for most homeowners. Where a homeowner does not have the resources[5] to make those repairs, requiring the homeowner to wait until the home actually caved in would be an absurd result, and would violate the reasonable expectations of the homeowner.

This Court has recently considered the reasonable expectations of the policyholder in Nationwide Mut. Ins. Co. v. Pasiak, 327 Conn. 225, 258-59 (2017). 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. See Brief of United Policyholders as *Amicus Curiae* in Jemiola v. Hartford Cas. Ins. Co., S.C. 19978. Impacted homeowners, like the Karases, reasonably expected that they would not have to wait until their homes inevitably fall to the ground, or are in imminent danger of falling down or unsafe to occupy, before they would be entitled to coverage under their policies – policies that expressly cover collapse.

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." Northrop v. Allstate Ins. Co., 247 Conn. 242, 251 (1998).

[4] See Belz v. Peerless Ins. Co., 204 F. Supp. 3d 457, 466-67 (D. Conn. 2016) (citing expert evidence suggesting that there are no interim measures that can be taken to arrest the process of crumbling and "that '[t]he concrete is essentially doomed from the day of conception'").

[5] Once the problem of crumbling cement is discovered, the value of the home is greatly reduced and the homeowner typically is unable to use the home as collateral for financing repairs.

For these reasons, the Court should reaffirm that Beach's standard for "collapse" is applicable, and that a determination of "substantial impairment of structural integrity" is a factual issue that requires no further definition. If necessary, the Court should further clarify that "substantial impairment of structural integrity" in the context of these cases includes an impairment which, if not remedied, will lead inevitably to a caving in, a falling down, and/or a structure's being unsafe to occupy.

II. NO EXTRINSIC EVIDENCE SHOULD BE PERMITTED TO CONSTRUE AMBIGUOUS TERMS IN INSURANCE POLICIES.

Connecticut insurance law has a well-established framework for interpreting insurance policies. This framework is premised on the tension between laws that require consumers to purchase insurance if they wish to own a home, the value to the insured (and society, generally) of protection against fortuitous loss, and yet the business of insurance, which increases profits by avoiding and reducing claim payments.

The bedrock principle in Connecticut insurance law is therefore that insurance policies are construed in favor of coverage. When an insurance policy contains "ambiguous" terms, those terms must be construed in accord with the policyholder's expectations, provided that the interpretation is a reasonable one. There is no reason for this Court to change that framework, much less to adopt a new rule that would permit an insurer to present extrinsic evidence and effectively rewrite the meaning of the policy's terms once an ambiguity has been presented. To do so would upset Connecticut law and public policy.

It is hornbook Connecticut insurance law that construction of policy language is determined by "what coverage the ... [insured] expected to receive and what the [insurer] was to provide, as disclosed by the provisions of the policy.... If the terms of the policy are clear and unambiguous, then the language, from which the intention of the parties is to be

deduced, must be accorded its natural and ordinary meaning.... However, [w]hen the words of an insurance contract are, without violence, susceptible of two [equally reasonable] interpretations, that which will sustain the claim and cover the loss **must**, in preference, be adopted." R.T. Vanderbilt Co. v. Cont'l Cas. Co., 273 Conn. 448, 462 (2005) (emphasis added) (quoting Allstate Ins. Co. v. Barron, 269 Conn. 394, 406 (2004)).[6] Indeed this principle has been among the most fundamental rules of insurance policy construction in Connecticut for more than 100 years. E.g., Raffel v. Travelers Indem. Co., 141 Conn. 389, 392 (1954); Dickinson v. Maryland Cas. Co., 101 Conn. 369, 125 A. 866, 869 (1924); Dresser v. Hartford Life Ins. Co., 80 Conn. 681, 710 (1908).

Connecticut law therefore requires that, in every scenario in which an insured proffers a reasonable interpretation of ambiguous policy language that provides for coverage, coverage will be had notwithstanding a proffered reasonable interpretation of policy language that could potentially preclude coverage. This result should remain unchanged regardless of whether extrinsic evidence exists that supports the insurer's interpretation.

This Court has for years steadfastly applied this principle without permitting an insurer a "second chance" to attempt to explain away an ambiguity. But Liberty seeks to overturn this embedded principle of Connecticut insurance law in favor of a new rule that would treat insurance policies – the exemplar of contracts of adhesion – the same[7] as

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[6] None of the cases cited by Liberty support a different statement of *Connecticut* law, nor one which suggests that this Court has approved of extrinsic evidence when construing language between an ordinary policyholder and an insurer.

[7] In actuality, Liberty seeks to provide insurers with more power to wield extrinsic evidence than ordinary contract principles permit because, here, it seeks a rule in which consideration can be had of extrinsic evidence that comes into existence *after the contract has been drafted*, which sheds no light on the intent of the sole drafter. Cf., e.g., Buell

ordinary contracts produced through arms-length negotiation. The Court should reject this attempt. Permitting consideration of extrinsic evidence to resolve an ambiguity provides the insurer a revisionist opportunity to present evidence as to what it actually intended, even though it was the insurer which chose language susceptible of a reasonable interpretation supporting coverage, and that interpretation was within the reasonable expectations of the insured.

Changing settled insurance jurisprudence would be bad policy for at least four reasons. First, given the extremely uneven bargaining power of the parties to the contract, insurers should not be afforded a "second chance" to clarify language they drafted so as to further avoid paying out on claims. Policyholders, who generally have no opportunity to negotiate the terms of their coverage, ought to be able to rely on a reasonable construction of the policy terms they are given and thus require continued operation of the rule that an ambiguous insurance contract must be construed in favor of coverage without consideration of extrinsic evidence. See Gaunt v. John Hancock Mut. Life Ins. Co., 160 F.2d 599, 602 (2d Cir. 1947) (*Hand, J.*) ("A man must indeed read what he signs, and he is charged, if he does not; but 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.").

Second, Connecticut's rule of construing ambiguous terms in favor of coverage serves the important public policy purpose of encouraging insurers to draft and revise policies to make their terms clear. If an insurer can change the meaning of a term through extrinsic evidence, it has less incentive to clarify otherwise ambiguous terms.

Indus., Inc. v. Greater N.Y. Mut. Ins. Co., 259 Conn. 527, 539 (2002) (looking to dictionary definitions of terms in existence *when the provision was adopted*).

Third, permitting extrinsic evidence would allow different constructions to be applied to identical policy language. Many insurers adopt similar or identical policy language, in part as a result of their memberships in associations such as the Insurance Services Office that provides form policy language. Insurers often use the same policy language over many years. The ability to depend on a consistent judicial construction of identical terms would simply evaporate if each insurer could prove its own distinct meaning of the terms with extrinsic evidence or change its intended meaning over time.

Fourth, changing this jurisprudence is wasteful of the courts' judicial resources. Examination of extrinsic evidence would significantly multiply proceedings in insurance coverage disputes. Trial courts confronted with ambiguous policy language would be required to hear additional evidence, and appellate courts reversing on a finding of ambiguity would need to remand for further proceedings rather than entry of judgment.

The Court should reject Liberty's attempt to alter long-standing law on insurance policy construction.

CONCLUSION

The United Policyholders urge this Court to answer the certified questions as follows:

Question One: Yes.

Question Two: "Substantial impairment of structural integrity" is the applicable standard for "collapse" and need not be clarified. If the Court is inclined to offer further guidance on the standard in the context of these cases, it includes an impairment which, if not remedied, will lead inevitably to a caving in, a falling down, and/or a structure's being unsafe to occupy.

Question Three: "Foundation" and "Retaining Wall" are ambiguous and reasonably include basement walls. No extrinsic evidence as to the meaning of ambiguous terms is permitted, and those terms must be construed in favor of coverage.

Respectfully Submitted,

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CERTIFICATION

The undersigned attorney hereby certifies, pursuant to Connecticut Rule of Appellate Procedure § 67-2, that on October 5, 2018:

(1) the electronically submitted brief 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 the filed paper brief 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 has been sent to each counsel of record in compliance with Section 62-7; and

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

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

Proloy K. Das, Esq.

CERTIFICATE OF SERVICE

Pursuant to Practice Book § 62-7 the undersigned certifies that a copy of the foregoing was mailed this 5th day of October, 2018 to:

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