United States Court of Appeals
for the First Circuit
Docket No. 21-1698

LIONBRIDGE TECHNOLOGIES, LLC,

Plaintiff/Appellant

v.

VALLEY FORGE INSURANCE CO.,
Defendants/Appellants

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS CASE NO. 1:20-CV-10014-PBS (PATTI B. SARIS, J.)

UNITED POLICYHOLDERS' BRIEF OF AMICUS CURIAE IN SUPPORT OF THE PLAINTIFF-APPELLANT AND REVERSAL OF THE DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

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CORPORATE DISCLOSURE STATEMENT

United Policyholders ("UP") is a federal 501(c) (3) tax-exempt non-profit organization founded in 1991. UP is not publicly held and does not have any public company affiliates.

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STATEMENT OF INTEREST OF THE AMICUS

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In furtherance of its mission, UP cautiously chooses cases and regularly appears as *amicus curiae* in courts nationwide to advance the policyholder's perspective on insurance cases likely to have widespread impact. UP has been

advocating for policyholders' rights in the courts for decades and has submitted *amicus* briefs in more than 500 cases. For instance, UP's *amicus* brief was cited in the U.S. Supreme Court's opinion in *Humana Inc. v. Forsyth*, 525 U.S. 299 (1999). UP seeks to fulfill the classic role of *amicus curiae* by supplementing the efforts of counsel and drawing the Court's attention to law that may have escaped consideration. As commentators have stressed, an *amicus* is often in a superior position to "focus the court's attention on the broad implications of various possible rulings." R. Stern, E. Greggman & S. Shapiro, *Supreme Court Practice*, 570-71 (1986) (*quoting* Ennis, *Effective Amicus Briefs*, 33 Cath. U.L. Rev. 603, 608 (1984)).

FRAP RULE 29 STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 29(a)(2), undersigned counsel for *amicus curiae* states that it is concurrently moving for leave to file this *amicus* brief pursuant to Federal Rule of Appellate Procedure 29(a)(3).

Pursuant to FRAP 29(a)(4)(E), undersigned counsel for *amicus curiae* states that no counsel for the parties authored this brief in whole or in part, and no party, party's counsel, or person or entity other than Amicus and their counsel contributed money that was intended to fund the preparing or submitting of this brief.

SUMMARY OF THE ARGUMENT

UP respectfully submits that the district court's order overlooks multiple longstanding paradigms in the insurer-insured relationship and the duty to defend, and could result in deleterious consequences to insureds for the foreseeable future.

First, an insurer should not be permitted to obtain the privileged information of its insured under the guise of the common interest doctrine when the insurer offers only a limited defense of the insured, subject to its reservation of rights, later withdraws that defense, and is involved in active litigation with the insured. The common interest doctrine is premised on the concept that the parties not only share a common legal, factual, or strategic interest, but that continued cooperation furthers that shared interest. No such shared interests exist between Lionbridge

Technologies, LLC, and Valley Forge Insurance Company here. On the contrary, the interests of Lionbridge and Valley Forge diverged the moment the claim was tendered, as Valley Forge did not provide a reasonable defense. When, as here, an insurer attempts to use the common interest doctrine to obtain privileged information from an underlying litigation for the express purpose of contesting its duty to indemnify or defend the insured in a coverage litigation over that precise issue, there is no common interest sufficient to justify access to privileged information. A holding to the contrary would allow an insurer to offer to pay a fraction of its insured's defense while reserving its rights to later deny any obligation to pay defense costs or indemnify its insured, and the insurer would be able to access all of its insured's privileged information and obtain insight into strategies specifically related to coverage. Such an intrusion into the privilege should not be permitted.

Second, an insurance contract is premised on a mutual understanding that an insurer will take up the mantle of an insured's defense when a complaint seeks damages that are potentially covered by an insurance policy. Subsumed within that standard is the understanding that when an insurer does defend its insured—even pursuant to a reservation of rights—that defense will be reasonable. The district court's order leads to an untenable situation for insureds:

- Insureds must either run the risk of prejudice when an insurer provides a less-than-fulsome defense or supplement at their own expense;
- Insureds are forced to litigate on two fronts, one of which is against the insurer, their supposed ally; and
- Insureds can be forced to produce privileged information to their insurer, with whom they are litigating, while the insurer undercuts the common interest doctrine by its conflict-creating reservations of rights.

The duty to defend demands more of an insurer than the district court's order would provide. A defense taken up by an insurer, even if assumed voluntarily, and even if it is later determined that the insurer has no defense duty, must be reasonable.

For these reasons, UP respectfully requests that the district court's rulings be reversed with respect to (1) the applicability of the common interest doctrine to Lionbridge's privileged communications with its underlying counsel and (2) Lionbridge's request to obtain the reasonable defense costs while Valley Forge purportedly was defending it under a reservation of rights.

ARGUMENT

I. THE COMMON INTEREST DOCTRINE SHOULD NOT BE EXTENDED TO ALLOW VALLEY FORGE TO ACCESS PRIVILEGED COMMUNICATIONS

A. The Common Interest Doctrine Developed to Protect Communications of Cooperating Parties

"It is generally accepted that the common interest rule first appeared in *Chahoon v. Commonwealth*, a late nineteenth century criminal case in Virginia involving two defendants." Nicole Garsombke, *A Tragedy of the Common: The Common Interest Rule, Its Common Misuses, and an Uncommon Solution*, 40 Ga. L. Rev. 615, 624 (2006). In *Chahoon*, three defendants were under indictment for joint conspiracy to defraud. Each of the three defendants was represented by different attorneys. The three defendants met and consulted with two of the three attorneys. Communications made during that conference were later introduced as evidence, and the attorney for one of the defendants claims that those communications were privileged. *Chahoon v. Commonwealth*, 62 Va. 822, 83940 (1871). The Supreme Court of Appeals of Virginia held that the communications were privileged. The court reasoned that under the circumstances of the case, "it was natural and reasonable, if not necessary, that these parties, thus charged with the same crimes, should meet together in consultation with their counsel, communicate to the latter all that might be deemed proper for them to know, and to

make all necessary arrangements for the defense." *Id.* at 839. Accordingly, all the conversation among the parties was privileged.

The court noted that this application of the privilege was an extension of the current bounds of the attorney-client privilege. However, it concluded that such an extension was appropriate:

> The parties were jointly indicted for a conspiracy to commit a particular crime, and severally indicted for forging and uttering the same paper. They might have employed the same counsel, or they might have employed different counsel as they did. But whether they did the one thing or the other, the effect is the same, as to their right of communication to each and all of the counsel, and as to the privilege of such communication. *They had the same defence to make, the act of one in furtherance of the conspiracy, being the act of all, and the counsel of each was in effect the counsel of all, though, for purposes of convenience, he was employed and paid by his respective client. They had a right, all the accused and their counsel, to consult together about the case and the defence*, and it follows as a necessary consequence, that all the information, derived by any of the counsel from such consultation, is privileged, and the privilege belongs to each and all of the clients, and cannot be released without the consent of all of them.

*Id.*at 841-42 (emphasis added).

The Supreme Judicial Court of Massachusetts has likewise recognized that the common interest doctrine "traces its origins to *Chahoon v. Commonwealth*." *Hanover Ins. Co. v. Rapo & Jensen Ins. Services, Inc.*, 449 Mass. 609, 612, 870 N.E.2d 1105, 1109 (Mass. 2007). As that court also recognized, the common

interest doctrine first illustrated in *Chahoon* has since been extended further to include:

- Communications shared between counsel for co-defendants asserting common claims in defense of civil actions, 449 Mass. at 613, 870 N.E.2d at 1110;
- Communications shared by counsel for co-plaintiffs, *id.*;
- Communications shared between a party and a jointly interested nonparty to pending litigation, *id.*; and
- Documents shared between a plaintiff's counsel and a defendant's counsel in the same case when the parties previously agreed to share information, *id*.

B. The Purpose of the Common Interest Doctrine Is to Promote the Free Flow of Information Between Similarly Aligned Parties

Although the precise contours of the common interest doctrine have shifted since its initial appearance in *Chahoon*, the underlying purpose of the rule has remained consistent. In *Chahoon*, the court explained that privilege applied because the defendants had the "same defence to make" and that, because they were indicted for the same offense, they "had a right, all the accused and their counsel, to consult together about the case and the defence." 62 Va. at 840-41. Similar justifications have been given to applications since. *See Schmitt v. Emery*, 211 Minn. 547, 554, 2 N.W.2d 413, 417 (1941) (finding the existence of privilege

when a document was shared "solely to accommodate [counsel] and thereby to enable them to make their effort and aid more effective in [their] common cause"); *In re Grand Jury Subpoenas*, 902 F.2d 244, 249 (4th Cir.1990) ("the rationale for the joint defense rule remains unchanged: persons who share a common interest in litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims"); *Sedlacek v. Morgan Whitney Trading Grp., Inc.*, 795 F.Supp. 329, 331 (C.D.Cal.1992) (adopting the reasoning of *In re Grand Jury Subpoenas*); *Visual Scene, Inc. v. Pilkington Bros., plc*, 508 So.2d 437, 440–442 (Fla.Dist.Ct.App.1987) (applying the common interest doctrine when the intent to maintain confidentiality was "evidenced by an affidavit attesting to a before-the-exchange agreement stating their intention to maintain confidentiality and to use the information only in preparation for trial on those issues common to both"). Indeed, as explained by the *Hanover* court, "[t]here is no reason to treat confidential client communications differently when shared with an attorney representing a client having a common interest where the purpose for sharing is to provide a free flow of information essential to providing the best available legal services to the client." 449 Mass. at 616, 870 N.E.2d at 1111.

A similar purpose behind the common interest doctrine was outlined in the *Restatement (Third) of the Law Governing Lawyers*:

> The rule in this Section permits persons who have common interests to coordinate their positions without destroying the privileged status of their communications with their lawyers. For example, where conflict of interest disqualifies a lawyer from representing two co-defendants in a criminal case (see § 129), the separate lawyers representing them may exchange confidential communications to prepare their defense without loss of the privilege. Clients thus can elect separate representation while maintaining the privilege in cooperating on common elements of interest.

Restatement (Third) of the Law Governing Lawyers § 76 (2000).

These stated purposes have several common themes. *First*, the purpose behind the common interest rule requires that there, in fact, be a common interest between the two parties. The *Restatement* suggests that the common interest "may be either legal, factual, or strategic in character." *Id.* *Second*, the common interest doctrine or exception was initially developed, and later crystallized, around the concept of cooperation between two parties. *Third*, and finally, the cooperation of parties with common interest is for the specific purpose of allowing communications to further both parties' interests in their case.

C. Applicability of the Common Interest Doctrine in Insurance Coverage Litigation Turns on the Relationship Between the Insurer and Insured

Courts throughout the country have addressed the question of whether the common interest doctrine permits an insurer to access privileged and work product protected communications between an insured and its litigation counsel in an underlying matter. In each case, the answer to that question in depends upon the

extent of the shared interest before the court. When determining what information an insured must share with an insurer, four outcomes are available. First, the insured may not be required to disclose any additional information to the insurer. Second, the insured may be required to share only non-privileged information with the insurer. Third, the insured may be required to share privileged information with the insurer, subject to the limitation that the insured is only required to produce privileged information that does not relate to disputed coverage issues. Fourth, the insured may be required to share all communications and the work product of the underlying counsel, regardless of its privileged nature.

When an insurer has recognized coverage and is fully defending and indemnifying its insured, the applicability of the common interest doctrine is clearer. In that scenario, there is a clear common interest between the parties: the insurer and insured are both served by having the total defense and indemnity costs be as low as possible. Accordingly, the parties are best served by cooperating during the course of the underlying litigation, and the parties are best served by maintaining an open line of communication.

However, when the insurer and the insured are not aligned with respect to the underlying litigation, such as when an insurer and insured are in active litigation against one another, the interests of an insurer and insured are misaligned. That is particularly the case when, as here, the insurer is attempting to

use the common interest doctrine to obtain privileged information from an underlying litigation *for the express purpose of contesting its duty to indemnify or defend the insured in a coverage litigation over that precise issue*. There can be no common interest in sharing information with respect to an insurer's coverage obligations when the insurer and insured are engaged in litigation over those same obligations.

An examination of the monetary interests of the insurer and insured in such a scenario further demonstrate that adversity. On the one hand, a reasonable insured in such a situation would seek to drive its own costs down as much as possible. Accordingly, an insured would seek the outcome that would result in the lowest combined total expense between defense costs, settlement, judgment, and other fees. On the other hand, an insurer in a situation such as that here that has largely denied indemnity coverage outright and has refused to offer a reasonable defense to its insured has significantly different monetary goals. An insurer who refuses to indemnify has no interest in the end result of the underlying litigation—it is simply refusing to pay anything whether there is any settlement or judgment. Its expense for the end result of the underlying litigation is zero. An insurer who offers to indemnify, or reserves its rights with respect to indemnification for, a minimal portion of the claim similarly has little to no interest in the end result of the underlying litigation and may instead have interest in affirmatively minimizing its

defense costs spent. Likewise, when the insurer refuses to reasonably defend, the insurer either has (1) no interest in the outcome of the defense, or, at best, (2) only has an interest in minimizing the defense costs it spends, regardless of the impact on the insured's net expenditures. Its shared interest with the insured in the defense costs expended is effectively none. Instead, their interests are diametrically opposed—the insurer wants to spend as little as possible on the insured's defense while the insured wants the most reasonable defense.

The "penetrating use" of the common interest doctrine as a "sword" to compel disclosure of privileged information is "contrary to the idea of cooperative action that permeates the rule." Garsombke, 40 Ga. L. Rev. at 631. Indeed, "[e]fforts to use the common interest arrangement as a sword compelling disclosure, rather than as a shield against disclosure, have been consistently and properly rejected because compelled disclosure is the antithesis of the cooperation that underlies the arrangement." James M. Fischer, *The Attorney-Client Privilege Meets the Common Interest Arrangement: Protecting Confidences While Exchanging Information for Mutual Gain*, 16 Rev. Litig. 631, 643 (1997).

D. Lionbridge and Valley Forge Do Not Share a Common Interest

As Lionbridge noted in its principal brief, Valley Forge "largely denied indemnity coverage outright, refused to reasonably defend Lionbridge, and then disputed its obligation to defend Lionbridge at all." Opening Br. for Pl.-Appellant

Lionbridge Techs., LLC ("Opening Br.") at 48. The common interest doctrine was developed in response to the need of parties with aligned interests to strategize and cooperated with respect to those interests. Here, however, there was never any such strategy or cooperation between Valley Forge and Lionbridge. The two parties were not aligned with respect to the defense of the underlying case. The cooperative underpinnings of the rule—the "free flow of information essential to providing the best available legal services to the client"—does not exist in here. Simply put, the common interest doctrine should not apply in a scenario where there was (1) a lack of cooperation by the insurer with the insured, (2) a denial of any indemnification, (3) an unreasonable initial defense, and (4) a later withdrawal of any defense.

Moreover, when the insurer takes the position that it has no indemnity obligation, there can be no common interest between insurer and insured.[1] The district court's holding that a payment of "some of the defense costs" demonstrates a common interest is a gross oversimplification of the common interest doctrine with potentially chilling consequences. Under the district court's reasoning, an insurer would merely have to pay "some" fraction of its insured's defense, while reserving the future option to deny any obligation to pay any defense costs or

[1] Indeed, once Valley Forge argued that it had no duty to defend, there was no common interest between the parties whatsoever.

indemnify its insured, and it would have free reign to dig through the privileged information of its insured for the express purpose of fighting any claim to coverage. There is not even the pretense of a common interest in this situation.

The only outcome that maintains the contours of the common interest doctrine and protects any remaining vestiges of the insured's privileged information is a determination that an insurer such as Valley Forge may not use the common interest doctrine as a sword to access privileged information when it was never aligned with the interests of an insured such as Lionbridge.

And that determination passes muster under *Vicor Corp v. Vigiland Insurance, Co.*, 674 F.3d 1 (1st Cir. 2012). In *Vicor*, unlike in the present case,

> the record reflect[ed] multiple letters, reports and other communications between underlying defense counsel and the insurers regarding such matters as liability assessment, strategic litigation planning and calculations of potential damage outcomes. All were marked as "privileged and confidential," and the parties agree[d]they were privileged as to third-parties.

Id. at 19. As this Court noted, "the primary insurers paid defense counsel and partially funded the settlement." *Id.* Accordingly, this Court determined that the common interest exception applied, as the insureds "cannot make use of the benefit of the common interest exception to avoid waiver of the attorney-client privilege as to third parties and simultaneously assert the privilege against the parties with whom they share a common interest." *Id.* (quoting *RPM, Inc. v. Hartford Accident & Indemnity Co.*, No. 1:03CV1322, slip op. at 12-13 (N.D. Ohio Apr. 11, 2006)).

There was no such funding of the settlement here. Moreover, unlike the insured and insurer in *Vicor*, Lionbridge and Valley Forge were diametrically opposed on the extent of the duty to defend. As this Court observed in *Vicor*, an in-depth examination of the relationship between the parties is required:

> Resolution of both the attorney-client and work product claims require a more precise examination of the course of the relationship between the parties as it relates to the [underlying] litigation and the juncture at which various communications were made. We acknowledge the difficulty entailed in the three-way relationship recognized by Massachusetts law. The fact that both the insured and insurer are deemed to be clients does not mean that all communications are excepted from the applicable privileges, or that the insurers are necessarily entitled to the entire defense file, as they claim.

Id. at 20.

An examination of that relationship here is revealing. Valley Forge (1) denied any responsibility to indemnify Lionbridge, (2) imposed unreasonable constraints on the defense it provided to Lionbridge, (3) later claimed it had no duty to defend Lionbridge, and (4) never participated in the strategy relating to the underlying litigation. There is no alignment of interests sufficient to justify application of the common interest doctrine. In such a case, an insured's

privileged communications relating to the case, and particularly, those relating to coverage, should be protected from discovery by an insurer.[2]

II. VALLEY FORGE MUST PROVIDE A REASONABLE DEFENSE

In its order, the district court denied Lionbridge's request for the reasonable costs of defense accrued during the period in which Valley Forge defended the case. The district court's holding permits an insurer to provide an unreasonable

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[2] While the law is not uniform nationally, many courts have held that there is no common interest between an insurer that reserves rights and its insured. *See, e.g.*, *Rockwell Int'l Corp. v. Superior Court,* 26 Cal. App. 4th 1255, 1266, 32 Cal. Rptr. 2d 153 (1994) ("In California, the 'joint client' or 'common interest' exception applies only where 'two or more clients have retained or consulted a lawyer upon a matter of common interest,' in which event neither may claim the privilege in an action by one against the other. Assuming the attorneys representing Rockwell in one or more of the underlying actions were selected by the carriers, those attorneys were not 'retained or consulted' by the carriers . . . . To the contrary, the attorneys were retained to represent Rockwell and only Rockwell." (citations omitted)); *Metropolitan Life Ins. Co. v. Aetna Cas. & Sur. Co.,* 249 Conn. 36, 52-62, 730 A.2d 51, 60-65 (1999) (insured did not put attorney-client communications at issue merely by suing to recover monies and "common interest doctrine" and cooperation clause did not entitle insurer to access); *Dixie Mfg. Co. v. Ricks*, 153 Ga. 364, 112 S.E. 370, 373 (Ga. 1922) (privilege does not apply to communication between insured and insurer's counsel when insured had been informed that insurer was disputing coverage); *State v. Hydrite Chem. Co*., 220 Wis. 2d 51, 70-77, 582 N.W.2d 411 (Wis. App. 1998) (insurers could not rely upon the cooperation clause or the "at issue" or "common interest" doctrines to compel their insured to disclose privileged communications with its defense counsel); *Vt. Gas Sys., Inc. v. U.S. Fid. & Guar. Co*., 151 F.R.D. 268, 277 (D. Vt. 1993) (The "common interest" doctrine does not apply "where there is an adversarial relationship between an insured and insurer as to whether coverage exists, the parties have never shared the same counsel or litigation strategy and the documents at issue were prepared in an atmosphere of uncertainty as to the scope of any identity of interest shared by the parties.").

defense of its own choosing, squarely placing the burden on the insured to provide its own reasonable defense and predict whether it should need to file a suit against its own insurer to protect its rights under the policy. If upheld, this order would flip the well-established paradigm for the duty to defend on its head, forcing insureds to make initial coverage determinations and take up the mantle of their own defense. As courts and commentators throughout the country have observed, a reasonable defense is a keystone to an insurer's duty to defend, even when that defense is taken voluntarily.

A. The Duty to Defend Is of Paramount Important in an Insurance Contract

The paradigm for an insurer's duty to defend its insured is clearly and concisely explained in the *Restatement of Law, Liability Insurance*[3]:

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[3] *The Restatement of Law, Liability Insurance* was published by the American Law Institute ("ALI"). The ALI was founded in 1923. *The Story of ALI*, American Law Institute, https://www.ali.org/about-ali/story-line/ (last visited Nov. 21, 2021). The ALI's membership "consists of eminent judges, lawyers, and law professors from all areas of the United States and from many foreign countries, selected on the basis of professional achievement and demonstrated interest in improving the law." *Membership*, American Law Institute, https://www.ali.org/members (last visited Nov. 21, 2021). According to the ALI, "Restatements are primarily addressed to courts. They aim at clear formulations of common law and its statutory elements or variations and reflect the law as it presently stands or might appropriately be stated by a court." American Law Institute, *A Handbook for ALI Reporters And Those Who Review Their Work* (rev'd 2015), available at https://www.ali.org/media/filer_public/2b/f8/2bf8b6aa-10b9-4be5-bb28-965451c40e2d/ali-style-manual.pdf. The Restatements "will operate to produce agreement on the fundamental principles of the common law, give precision to use

> Liability insurance not only provides financial protection against judgments; it also protects insureds against the liability action itself. Some liability insurance policies highlight this protection by stating that the insurer will defend a suit even if it is "groundless, false or fraudulent." The insurer's promise to defend a legal action provides litigation insurance that is at least as important as the insurer's promise to pay a judgment or settlement.

Restatement of Law, Liability Insurance § 14 (2019); *see* Steven Plitt, et al., 14 *Couch on Insurance* § 200:1 (3d ed. 2021) ("Generally, liability insurance policies allow the insurer exclusive control over litigation against the insured. This right is accompanied by the insurer's responsibility to defend the insured from all actions brought against the insured based on alleged facts or circumstances falling within

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of legal terms, and make the law more uniform throughout the country. Such a restatement will also effect changes in the law, which it is proper for an organization of lawyers to promote and which make the law better adapted to the needs of life." *Id.*

Courts have looked to the *Restatement* to provide guidance on several coverage issues. *See, e.g., In re Farmers Texas Cty. Mut. Ins. Co.*, 64 Tex. Sup. Ct. J. 782, 621 S.W.3d 261, 268 (Tex. 2021) (relying on the *Restatement* for the proposition that "the contract between the insured and insurer sets out the carrier's obligations and protects the insured); *GEICO Indem. Co. v. Whiteside*, 311 Ga. 346, 354, 857 S.E.2d 654, 663 (Ga. 2021) (relying on the *Restatement* to demonstrate the principle that "[i]f the insurer's breach of the duty to make a reasonable settlement decision causes an excess judgment against the insured, the insured is entitled to recover from the insurer, in addition to the policy limit, the difference between the policy limit and the underlying judgment"); *Guastello v. AIG Spec. Ins. Co.*, 61 Cal. App. 5th 97, 100, 275 Cal. Rptr. 3d 370, 371 (2021) (citing the *Restatement* to establish that "the determination of when the occurrence took place may itself be a question of fact").

the purview of coverage under the policy regardless of the suit's validity or invalidity.").

This protection purchased by insured requires that an insurer make "reasonable" efforts to defend its insured:

> The insurers duty to defend includes the obligation to provide a defense of the legal action that makes reasonable efforts to defend the insured from all of the judgment risks, whether they are insured or not, as long as there is one actual or potential cause of action that obligates the insurer to provide a defense . . . .

Restatement, Insurance § 14 (2019); *see Woo v. Fireman's Fund Ins. Co.*, 161 Wash. 2d 43, 54, 164 P.3d 454, 459-60 (Wash. 2007) (the duty to defend "is a valuable service paid for by the insured and one of the principal benefits of the liability insurance policy"). This "reasonable efforts" requirement provides benefits to both insurers and insureds.

An insurer, on the one hand, gets to scale based on what is reasonable in a given case:

> The reasonable-effort requirement benefits insurers by allowing them to scale the defense effort to the judgment risk at stake in a legal action: what is reasonable will generally depend on the expected value of the potential damages or other remedies, taking into account the probability of the plaintiff's success.

Restatement, Insurance § 14. The insured, on the other hand, gets the benefit of being fully protected from paying defense costs in the event of a legal action:

> The requirement that the defense protect the insured against all of the causes of action and remedies sought in the legal action benefits insureds by reducing the insurer's incentive to underinvest in the defense of a legal action that poses a mix of insured and uninsured causes of action or remedies.

Id.

In sum, the duty that an insurer assumes under its policy is to make a "reasonable effort" to provide a full defense moving forward in the case. Certainly, a "reasonable effort" includes providing a "reasonable defense" from the first instance.

B. An Insurer Has a Duty to Provide an Adequate Defense

Courts and commentators have likewise recognized that a cause of action exists for a negligently or inadequately handled defense proffered by an insurer pursuant to the duty to defend. *Restatement, Insurance* § 14 (2019) (citing *Lloyd v. State Farm Mut. Auto. Ins. Co.,* 176 Ariz. 247, 248, 860 P.2d 1300, 1301 (Ariz. Ct. App. 1992) ("an insurer's voluntary assumption of the duty to defend may give rise to a cause of action for derelictions in that defense even when there is no actual coverage")); *BellSouth Telecomms., Inc. v. Church & Tower, Inc.*, 930 So. 2d 668, 673 (Fla. Dist. Ct. App. 2006) (labeling as "meritless" an insurer's attempted distinction that a case relied on by the insured "involved a failure to provide an adequate defense, rather than a refusal to provide a defense at all"); *Aaron v. Allstate Ins. Co.*, 559 So. 2d 275, 277 (Fla. Dist. Ct. App. 1990) (an insured has "a

cause of action for inadequate defense" stemming from the insurer's "duty to adequately defend"); *Carrousel Concessions, Inc. v. Florida Ins. Guar. Ass'n*, 483 So. 2d 513, 518 (Fla. Dist. Ct. App. 1986) ("principles" surrounding a breach of the duty to defend "are equally applicable here where it is alleged that the insurer breached its duty to defend because it provided an inadequate defense"); *O'Keefe v. Safeco Ins. Co. of Am.*, 55 Or. App. 811, 639 P.2d 1312 (Or. Ct. App. 1982) (question as to whether insurer breached the duty to defend by defending a $2,000,000 action as if it were a $20,000 action is for jury to answer).

Accordingly, "[i]f the insurer is negligent in performing its duty, the insurer is liable for damages resulting to the insured, even if such damages exceed policy limits." 14A *Couch on Ins*. § 202:18. Notably, "[t]he same rules apply where an insurer undertakes a defense voluntarily. An insurer's voluntary assumption of the duty to defend may give rise to a cause of action for derelictions in that defense even when there is no actual coverage." *Id.; see Lloyd,* 176 Ariz. at 248, 860 P.2d at 1302 ("an insurer's voluntary assumption of the duty to defend may give rise to a cause of action for derelictions in that defense even when there is no actual coverage"). The principle that an insurer must provide a reasonable defense, even if there is no prospective duty to defend, is a longstanding principle recognized by this Court and throughout the country:

> It is also a well-recognized rule that, where the only relation between the parties is contractual, the liability of one to the

> other, in an action of tort for negligence, must arise out of some positive duty which the law imposes because of the relationship or because of the negligent manner in which some act which the contract provides for is done, and that the mere breach of an executory contract, where there is no general duty, is not the basis of such an action. It is not claimed in this case that the defendant was under a general duty to the plaintiff to defend or settle the suit. *The claim is that, having actively intervened in the defense of the suit and in the settlement thereof, it was under a duty imposed by law to exercise due care not to injure the plaintiff's rights in what it did; and we so hold.*

Attleboro Mfg. Co. v. Frankfort Marine, Acc. & Plate Glass Ins. Co., 240 F. 573, 579–80 (1st Cir. 1917) (emphasis added; citations omitted).

C. The District Court's Order Improperly Placed the Burden on Lionbridge to Provide Its Own Reasonable Defense

The district court's order flips that burden on its head. The burden on the insurer "includes the obligation to provide a defense of the legal action that makes reasonable efforts to defend the insured." *Restatement, Insurance* § 14. An unreasonable defense, by its own terms, is less than a "reasonable effort" to defend the insured. On the contrary, it forces the insured to undertake a reasonable effort to defend itself (or to pay for its own defense). As observed by Lionbridge in its principal brief, an insurer has three options under Massachusetts law with respect to its duty to defend: (1) defend without reservation; (2) defend under a reservation of rights; or (3) refuse to defend (at risk of being liable for breach of its duty to defend). Opening Br. at 30-31.

When an insurer defends under a reservation of rights (the second category), it must then pay the reasonable costs of defense. However, if an insurer elects not to offer a reasonable defense, the insured is faced with a dilemma: accept the unreasonable defense offered by the insurer, or fight a two-front battle in the underlying litigation and the coverage litigation. The resulting monetary burden required to engage in not one, but two litigations may be crippling to insureds who expected to receive (and relied upon) the defense for which they paid. Indeed, were an insured faced with a "bet the company" litigation, and an insurer offered only an unreasonable defense, an application of the district court's rule may be catastrophic to (or even fatal for) that insured's continued existence. Even absent that worst case scenario, this rule forces insureds into making the decision that their insurers are contractually obligated to make: the determination as to whether it has a duty to defend at all. Finally, such a rule would allow an insurer to "offer" a negligent or derelict defense without recourse.

An affirmation would likewise be contrary to the decisions of courts across the country holding that a defense provided under a reservation of rights must be reasonable. *See, e.g., Northern Sec. Ins. Co., Inc. v. R.H. Realty Trust*, 78 Mass. App. Ct. 691, 695, 941 N.E.2d 688, 691 (Mass. App. Ct. 2011) (an insurer that reserves its rights and pays for an insured's defense costs "must pay the reasonable charges of the insured's retained counsel"); *ACP Servs. Corp. v. St. Paul Fire &*

Marine Ins. Co., 637 N.Y.S.2d 566, 224 A.D.2d 961, 962 (N.Y. App. Div. 1996) ("we conclude that plaintiffs are entitled to reimbursement for litigation expenses, including reasonable attorney's fees, incurred in defending the underlying action only"); *Xtreme Prot. Servs., LLC v. Steadfast Ins. Co.*, 2019 IL App (1st) 181501, ¶ 20, 143 N.E.3d 128, 135, *appeal denied,* 132 N.E.3d 357 (Ill. 2019) ("In this situation, the insured is entitled to control the defense and by reason of its contractual obligation to furnish a defense, the insurer must underwrite the reasonable costs incurred by the insured in defending the action with counsel of his own choosing." (internal quotations omitted)); *EmbroidMe.com, Inc. v. Travelers Prop. Cas. Co. of Am.*, 845 F.3d 1099, 1108 (11th Cir. 2017) ("if an insurer provides a defense so inadequate that the insurer can be said to have 'forced' the insured to obtain its own counsel, then the insured will be entitled to recover all reasonable costs and attorney's fees incurred at the trial level"); *Fireman's Fund Ins. Co. v. Waste Mgmt., Inc.*, 777 F.2d 366, 370 (7th Cir. 1985) (the insurer "has the continuing duty to finance the independent counsel selected . . . and now accepted by it, and to pay . . . its reasonable fees for services performed"); *San Diego Navy Fed. Credit Union v. Cumis Ins. Soc'y, Inc.*, 162 Cal. App. 3d 358, 375, 208 Cal. Rptr. 494, 506 (Ct. App. 1984) ("the insurer must pay the reasonable cost for hiring independent counsel by the insured"); *Rass Corp. v. Travelers Cos.*, 90 Mass. App. Ct. 643, 657, 63 N.E.3d 40, 52 (2016) ("by surrendering control of

the defense to the insured under a reservation of rights, yet at the same time refusing to pay [the attorney's] hourly rate, which was reasonable, [the insurer] unfairly compelled [the insured] to seek the unpaid fees through litigation").

UP is unaware of any case holding that an insurer may provide an inadequate defense to its insured in such circumstances. Providing insurers with an avenue to avoid acting reasonably towards their insureds upsets the calculated balance of responsibilities between insureds and insurers as to an insurer's duty—and right—to defend their insureds. That balance exists for a reason. As noted in the *Restatement, Insurance*, "[t]he insurer's promise to defend a legal action provides litigation insurance that is at least as important as the insurer's promise to pay a judgment or settlement." That promise should not be broken here.

CONCLUSION

Accordingly, UP respectfully requests that the district court's orders that (1) the common interest exception to the attorney-client privilege applies to information and work product prepared by Lionbridge's underlying counsel and (2) that Valley Forge was not required to pay the reasonable costs of defense accrued while it agreed to defend Lionbridge be reversed.

Dated: November 22, 2021

Respectfully submitted,

PASICH LLP

By: */s/ Christopher Pasich*
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United Policyholders

CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by the Fed. R. App. P. 32(f), this document contains 6,436 words.

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Dated: November 22, 2021

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CERTIFICATE OF SERVICE

I, Christopher Pasich, hereby certify that on November 22, 2021, I electronically filed the foregoing document, **UNITED POLICYHOLDERS' BRIEF OF AMICUS CURIAE IN SUPPORT OF THE PLAINTIFF-APPELLANT AND REVERSAL OF THE DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS**, with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that I served all parties or their counsel by the CM/ECF system on this 22nd day of November 2021.

Dated: November 22, 2021 PASICH LLP

/s/ *Christopher Pasich*
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