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Case No. 100168-1

SUPREME COURT OF THE STATE OF WASHINGTON

SEATTLE TUNNEL PARTNERS,

Plaintiff-Petitioner,

WASHINGTON STATE
DEPARTMENT OF TRANSPORTATION,

Plaintiff-Petitioner,

HITACHI ZOSEN U.S.A. LTD.,

Intervenor-Plaintiff,

vs.

GREAT LAKES REINSURANCE (UK) PLC, et al.,

Defendants-Respondents.

BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Founded in 1991, amicus curiae United Policyholders (“UP”) is a non-profit organization that serves as a voice and information resource for insurance consumers in all 50 states. UP is a tax-exempt § 501(c)(3) entity sustained by individual and corporate donations and grants from foundations. Volunteers across the country donate thousands of hours each year to support the organization’s work. Through its *Roadmap to Recovery*TM program, UP promotes insurance and financial literacy, and helps individuals navigate the insurance claim process and recover fair and timely settlements. For example, in 2014, UP provided claim assistance to many victims of the Carlton Complex Fire in Pateros, Washington.

Additionally, through its *Advocacy and Action* program, UP solves claims and related coverage problems by working with public officials, other non-profit and faith-based organizations, and a diverse range of other entities, including insurers and producers.

UP seeks to assist courts as *amicus curiae* in appellate proceedings throughout the United States, including the Washington Supreme Court, particularly in cases involving insurance principles that are likely to affect large segments of the public. UP has appeared as *amicus curiae* recently in the Washington Supreme Court cases of *Preferred Contractors Ins. Co. v. Baker and Son Construction, et al.* (Case No. 1000466-4), *McLaughlin v. Travelers Commercial Ins. Co.* (Case No. 97652-0), and *Alpert v. Nationstar Mortgage LLC* (Case No. 99377-7). A complete listing of all cases in which UP has appeared as *amicus curiae* can be found in UP's online *Amicus* Project library at www.uphelp.org.

ARGUMENT

UP submits this brief to provide the Court perspective on the genesis and historical interpretation of the key coverage “trigger” language—“direct physical loss” or “damage” happening to insured property—at issue in this case, which is similar to the trigger language at issue in many other insurance coverage cases pending in Washington state courts.

First, decades ago the insurance industry adopted the coverage trigger language used in policies like that of Plaintiffs-Petitioners Seattle Tunnel Partners and Washington State Department of Transportation (“Plaintiffs-Petitioners”) to clarify that coverage applies to events that do not physically alter property. Specifically, the industry changed the trigger language from requiring that property be “damaged” or “destroyed” to broader language including “physical loss” when it expanded coverage from “named perils” (such as fire, which did physically destroy property) to “all-risk” policies that covered loss from any risk unless otherwise expressly excluded

(including theft, for example, where the insured lost the use of property).

Second, over the past 60 years, courts that have been called upon to interpret the phrase “physical loss” have recognized that it includes property rendered unusable for its intended purpose (*i.e.*, “lost”), even where the property itself was not physically altered in any way.

Third, the insurance industry has itself recognized, and even argued, that “direct physical loss” of property can be read to encompass the loss of use of property without any physical alteration to the property.

Taken together, this background contradicts the conclusion of the Court of Appeals that “direct physical loss” does not cover loss of use. *See Seattle Tunnel Partners v. Great Lakes Reinsurance (UK) PLC*, 18 Wn. App. 2d 600, 622, 492 P.3d 843 (2021). It also refutes the assertion of the insurer Defendants-Respondents that “direct physical loss” requires “physical alteration to property.” *See Resp’ts Supp. Br.* at 22.

Plaintiffs-Petitioners’ reading of “direct physical loss” as encompassing loss of use has long been the favored reading of courts that have addressed the issue, including the recent decisions of Washington courts in *Perry St. Brewing Co. v. Mut. of Enumclaw Ins. Co.*, No. 20-2-02212-32, 2020 WL 7258116, at *3 (Wash. Super. Ct. Nov. 23, 2020), which concluded that “physical loss” should be given a different meaning than “damage” and finding that the brewery had suffered a direct physical loss of its property because that property “could not physically be used for its intended purpose,” and *Snoqualmie Ent. Auth. v. Affiliated FM Ins. Co.*, No. 21-2-03194-0 SEA, 2021 WL 4098938, at *5 (Wash. Super. Ct. Sept. 3, 2021), which concluded that the policy’s “physical loss” requirement was triggered when the policyholder was “deprived of the ability to physically use, operate, or manipulate its property.” At a minimum, this background establishes that “direct physical loss” can be reasonably interpreted as encompassing loss of use without any

physical change or alteration of property, and under Washington law any ambiguity must be resolved in favor of the insured. *McLaughlin v. Travelers Com. Ins. Co.*, 196 Wn.2d 631, 642, 476 P.3d 1032 (2020).

UP refers the Court to its amicus brief being submitted simultaneously in *Hill and Stout PLLC v. Mutual of Enumclaw Ins. Co.*, Case No 100211-4, scheduled to be heard by the Court on the same day as the present case, which sets forth the above points in greater detail. To avoid burdening the Court with overlapping amicus briefs on the same issue, UP incorporates by reference all of the arguments set out in its amicus brief in *Hill and Stout*.

CONCLUSION

For the foregoing reasons, UP respectfully urges this Court to hold that loss of use or functionality of insured property constitutes “physical loss” or “damage” that triggers insurance coverage, reverse the award of summary judgment to Defendants-Respondents, and remand for further proceedings.

RESPECTFULLY SUBMITTED this 13th day of May,
2022.

I hereby certify that this document contains 875 words in
accordance with RAP 18.17.

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