Docket No. 23-3109

In the

United States Court of Appeals

For the

Ninth Circuit

OLYMPIC VISTA HOMEOWNERS ASSOCIATION,
a Washington non-profit corporation,

Plaintiffs-Appellants,

v.

ALLSTATE INSURANCE COMPANY, an Illinois company and STATE FARM FIRE & CASUALTY COMPANY, an Illinois company,

Defendants-Appellees.

Appeal from a Decision of the United States District Court for the Western District of Washington, Seattle, No. 2:22-cv-00683-TSZ· Honorable Thomas S. Zilly

BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS SUPPORTING THE APPELLANT AND IN SUPPORT OF REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, United Policyholders ("UP") is a non-profit section 501(c)(3) organization. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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A. INTEREST OF *AMICUS CURIAE*[1]

As set forth in its motion for leave, UP is a non-profit organization whose mission is to serve as an effective voice and a source of information and guidance for insurance consumers around the country. UP is funded by donations and grants. It does not sell insurance or accept money from insurance companies.

Individual policyholders rely heavily on insurers to deliver on their promises; they do not draft insurance contracts, nor are they insurance law or coverage experts or repeat users of the litigation system. UP works to provide an intellectual counterweight to the claims of the insurance industry in order to help facilitate the evenhanded development of insurance law. With the Court's leave, UP seeks to assist the Court on an issue of public importance by identifying arguments and authorities that may have escaped the Court's attention to date.

B. INTRODUCTION

The district court here misinterpreted longstanding Washington precedent, applied consistently by other federal courts in Washington, regarding an "after loss occurred" suit limitation clause in the all-risk policy sold by State Farm Fire & Casualty Company ("State Farm") to Olympic Vista Homeowners Association

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), UP affirms that no counsel for a party authored this brief in whole or in part and that no person other than UP or its counsel made any monetary contributions intended to fund the preparation of submission of this brief.

("Olympic Vista"). *Olympic Vista Homeowners Ass'n v. State Farm Fire & Cas. Co.*, 2023 WL 5509303 (W.D. Wash. 2023). The Washington Supreme Court has already determined that such a contractual limitation should not apply to bar insurance claims for hidden, progressive loss, a type of harm often encountered by homeowner associations in condominia. Any limitation period does not commence until the harm is actually exposed to view by the homeowner association.

Because Washington mandates that homeowners associations purchase property insurance, disfavors limitations on lawsuits particularly where the claimant's loss is incapable of being appreciated, and an average purchaser of insurance would not expect that it would be denied coverage for hidden progressive property loss of which it could not be aware, UP believes that the district court's outlier analysis was error and should be reversed.

C. STATEMENT OF THE CASE

UP adopts the Statement of the Case in Olympic Vista's brief and the recitation of the facts in the district court's opinion.

D. SUMMARY OF ARGUMENT

Olympic Vista sought coverage under an all-risk State Farm policy last in effect in 2003 for incremental and progressive hidden damage from rainwater intrusion in the exterior walls of its condominium complex.

State Farm's policy contains a suit limitation clause which requires the insured to file suit 2 years after the "accidental direct physical loss occurred."[2] With respect to progressive hidden damage, the Washington Supreme Court has interpreted such a suit limitation clause to mean that the homeowners association must file suit only *after* the hidden damage is exposed to view. In reaching its decision, that court explained that the insurer wrote the policy, knew how to protect itself, and could eliminate risk from a progressive loss by not including such a suit limitation clause in its policy.[3] Here, Olympic Vista could only discern the damage to its condominium building after an *intrusive* investigation broke into the building's walls.

Because condominium associations are required by the Washington Legislature to purchase all-risk insurance policies which cover all risks of direct physical loss to the condominium building, RCW 64.34.352(1), and the State Farm

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[2] The policy states: "Legal Action Against Us. No one may bring legal action against us under this insurance unless… the action is brought within two years after the date on which the accidental direct physical loss occurred."

[3] State Farm knows how to avoid liability for a hidden, progressive loss; other Washington policy forms State Farm uses require its insureds to file suit "after the occurrence causing the loss or damage." This Court in a recent unpublished decision to be discussed *infra* recognized that an "after the occurrence causing the loss or damage" suit limitations language is *distinct* from an "after loss occurred" clause like the clause at issue here, in that it requires the insured to file suit *one year from when the policy terminated*, as opposed to *after the hidden damage is exposed*. State Farm chose not to use such language in the Olympic Vista policy.

all-risk policy did not expressly exclude hidden progressive rainwater damage to a condominium building, an average purchaser of insurance would expect that the suit limitation clause language in State Farm's policy would not bar an insured's claim until such a hidden loss is exposed to view. Such a purchaser would not expect that such provisions would effectively prevent coverage for hidden covered damage that cannot be discerned until after the policy terminates. Under State Farm's suit limitation provision, Olympic Vista timely filed suit within 2 years after the loss was exposed by an intrusive investigation.

The district court erred by disregarding the coverage for wind-driven rain sought by Olympic Vista under State Farm's all-risk policy, and instead only analyzed coverage under an endorsement for collapse, when such collapse coverage was not even sought by Olympic Vista. Because it ignored coverage for hidden damage from wind-driven rain and treated the insured's claim as a non-progressive collapse loss, the district court wrongly determined that Olympic Vista could not identify covered hidden damage that continued to exist until it was exposed within the two year period prior to filing suit. In so ruling, the court failed to apply Washington precedent and numerous concurring federal district court opinions.

The district court's decision to bar coverage for progressive hidden covered damage in such a dramatic fashion is against both the plain language of the policy and the Washington Legislature's intent. The district court should be reversed.

E. ARGUMENT[4]

(1) Washington's Condominium Act Mandates That Homeowners Associations Purchase Property Insurance

An important backdrop to the analysis of State Farm's suit limitation provision is the Washington Legislature's mandate that homeowners associations must purchase and maintain all-risk insurance for the units in their complexes. Pursuant to RCW 64.34.352, Washington homeowners associations are required to maintain all-risk property insurance for the benefit of the unit owners in the event that there is damage to the condominium complex. As noted in William B. Stoebuck, John W. Weaver, 18 *Wash. Practice Real Estate* § 12.10 (2d ed.) regarding RCW 64.34.352:

> As soon as the first unit is conveyed, the condominium association is required to obtain blanket casualty coverage on the entire "condominium," which insures owners of the individual units. This insurance may, but need not, cover equipment and improvements unit owners have added to their own units. Also, the association is required to obtain personal injury and property damage liability insurance, but only as to liability arising out of the use, ownership, or maintenance of the common elements, not of individual units. These are the statutorily required forms of insurance; the declaration may require the association to obtain other insurance, and, even if it does not, the association may voluntarily obtain other insurance. Each unit owner is an insured under the association's policies.

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[4] In this diversity action, this Court must apply Washington law as established by Washington's highest court and, failing such authority, predict what its highest court would rule. *Ticknor v. Choice Hotels, Int'l, Inc.*, 265 F.3d 931, 939 (9th Cir. 2001), *cert. denied*, 534 U.S. 1133 (2002).

This legislative mandate is important because the community association model is so prevalent in Washington. Presently, 2.4 million Washington residents live in the nearly 10,700 communities subject to that mandate.

State Farm's restrictive analysis of its policy's suit limitation provision is contrary to Washington law. A policy provision that is country to public policy[5] is unenforceable. *Preferred Contractor's Ins. Co., Risk Retention Group, LLC v. Baker & Sons Constr., Inc.*, 200 Wn.2d 128, 514 P.3d 1230 (2022) ("*PCIC*") (policy provision in CGL policy violated public policy of RCW 18.27, the Contractor Registration Act, that required purchase of insurance by contractors). It is positively prejudicial to homeowners associations required by RCW 64.34.352 to carry property insurance. State Farm's interpretation *dramatically* narrows the coverage homeowner association members must buy and maintain, foreclosing coverage for homeowners associations for hidden progressive damage to association buildings such as rain-driven losses; the insureds are deprived of coverage because they have not presented claims that by their hidden nature they cannot discern without tearing apart their building. An average purchaser of insurance would not understand that it would be required to sue its insurance company before it learned of hidden damage,

[5] There is no doubt that public policy plays a clear role in the interpretation of insurance contracts in Washington. *P.E.L. v. Premera Blue Cross*, __ Wn.3d __, 540 P.3d 105 (2023) at 113-14; *PCIC*, *supra* at 138-39; *Durant v. State Farm Mut. Auto Ins. Co.*, 191 Wn.2d 1, 11, 419 P.3d 400 (2018); RCW 48.18.510.

and such a result simply does not follow from the plain language of State Farm's suit limitation clause which, as explained below, does not require an insured to file suit until after a hidden progressive loss is exposed.

Rather than protect homeowner associations, as the Washington Legislature envisioned, adopting State Farm's interpretation eviscerates coverage, shifting the burden of losses to homeowner associations, which ultimately will require individual homeowners to fund costly repairs. This will result in many homeowners who cannot afford a special assessment having to sell or lose their homes, frustrating legislative policy. This Court should not allow State Farm such a judicially-imposed narrowing of a policy it marketed as covering *all* risks. Other insurers will follow that bad example.

(2) Interpretation of Insurance Policies under Washington Law

Washington law favors coverage, not limitations on coverage. Ultimately, Washington courts liberally interpret insuring clauses because the purpose of insurance is to insure. *Phil Schroeder, Inc. v. Royal Globe Ins. Co.*, 99 Wn.2d 65, 68, 659 P.2d 509 (1983). Washington law has long required that insurance policies be given a "fair, reasonable and sensible construction which fulfills the apparent object of the contract, rather than a construction which leads to an absurd conclusion or renders a policy nonsensical or ineffective." *McDonald Indus. Inc. v. Rollins Leasing Corp*., 95 Wn.2d 909, 913, 631 P.2d 947 (1981).

Moreover, the policy language is interpreted in accordance with the way it would be understood by the average person purchasing insurance. *Am. Star Ins. Co. v. Grice*, 121 Wn.2d 869, 875, 854 P.2d 622 (1993). However, the commercial context in which the insurance coverage is obtained is also important, and extrinsic evidence is admissible to establish such context. *Intl Marine Underwriters v. ABCD Marine, LLC*, 179 Wn.2d 274, 282, 313 P.3d 395 (2013). Similarly, the structure of the policy itself is an important objective source of its meaning and intent. *Id.* Thus, this Court should be mindful of the circumstances that led Olympic Vista to purchase State Farm's "all-risk" policy. *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 15 P.3d 115, 124-25 (2001). Here, that includes the mandate of RCW 64.34.352 to purchase broad insurance coverage "insuring against all risks of direct physical loss."

As the drafter of the suit limitation provision, State Farm had the ability, and duty, to clearly express any policy coverage limitations. *Smith & Chambers Salvage v. Ins. Mgmt. Corp.*, 808 F. Supp. 1492, 1503 (E.D. Wash. 1992). Any ambiguity resulting from that drafting is strictly applied as to insurance contracts and a court must resolve any ambiguity in Olympic Vista's favor. *Allstate Ins. Co. v. Peasley*, 131 Wn.2d 420, 424, 932 P.2d 1244 (1997); *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 733, 837 P.2d 1000 (1992) (explaining that as with any contract, ambiguous policies should be construed against the drafter). "Where

exceptions to, or limitations upon coverage are concerned, this principle applies with added force." *Queen City Farms, Inc. v. Centennial Nat'l Ins. Co.*, 126 Wn.2d 50, 83, 882 P.2d 703 (1994) (citation omitted).

As to all-risk policies generally, such policies involve "a promise to pay upon the fortuitous and extraneous happening of loss or damage . . . *from any cause whatsoever*, . . . except when occasioned by the willful or fraudulent act or acts of the insured." *McDonald*, 119 Wn.2d at 731 n.5 (citation and quotation marks omitted, emphasis added); *Vision One, LLC v. Phila. Indem. Ins. Co.*, 174 Wn.2d 501, 513-14, 276 P.3d 300 (2012) (explaining that "[a]ll-risk policies . . . provide coverage for all risks *unless the specific risk is excluded*," and that "[u]nder an 'all-risk' policy, the insurer bears the risk that a catastrophe *not mentioned in the policy* will occur.") (citations omitted, emphasis added).

Washington courts have opined that when insurers market policies as "comprehensive" or "all-risk," courts must strictly construe such policies when an insurer attempts to subtract from the comprehensive scope of its undertaking. *Olds-Olympic, Inc. v. Commercial Union Ins. Co.*, 129 Wn.2d 464, 472, 918 P.2d 923 (1996) ("CGL policies are marketed by insurers as comprehensive in their scope and should be strictly construed when the insurer attempts to subtract from the comprehensive scope of its undertaking."); *Findlay v. United Pac. Ins. Co.*, 129 Wn.2d 368, 381 n.2, 917 P.2d 116 (1996) (Talmadge, J. dissenting) (insurers should

not market policies as "all risk" when expansive exclusions of coverage are present). Exclusions are contrary to the basic intent of protecting the insured, and thus should not extend "beyond their clear and unequivocal meaning. *Id*. at 915.

(3) Washington Public Policy Does Not Favor Suit Limitation Clauses in Contracts

Although Washington law permits suit limitation provisions in insurance contracts, RCW 48.18.200(1)(c),[6] decisions of the Washington Supreme Court demonstrate that Washington public policy disfavors contractual or statutory limitation provisions that bar actions for losses of which the claimant could not be aware.

Suit limitation provisions imposed by insurers on largely unsuspecting insureds already dramatically reduce the statutory limitations periods for the commencement of litigation. In Washington, absent a suit limitation provision

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[6] … no insurance contract delivered or issued for delivery in this state and covering subjects located, resident, or to be performed in this state, shall contain any condition, stipulation, or agreement

…….

(c) limiting right of action against the insurer to a period of less than one year from the time when the cause of action accrues in connection with all insurances other than property and marine and transportation insurances. In contracts of property insurance, or of marine and transportation insurance, such limitation shall not be to a period of less than one year from the date of the loss.

buried in a policy, an insured could bring a property loss claim against an insurer like State Farm within six years of the insurer's breach of contract.[7] *Schwindt v. Commonwealth Ins. Co.*, 140 Wn.2d 348, 997 P.2d 353 (2000).[8]

In *Tadych v. Noble Ridge Constr., Inc.*, 200 Wn.2d 635, 519 P.3d 199 (2022), the Washington Supreme Court determined that a suit limitation clause buried in a consumer construction contract drafted by the builder was unconscionable where the plaintiffs were lay people, the provision, drafted by the builder, favored the builder when compared to the normal statute of limitations, the provision was not negotiated and was not prominently set out in the parties' agreement, and it offered no benefit to the plaintiffs. *Id*. at 645-46.

In *PCIC*, *supra*, the Washington Supreme Court invalidated a provision in a CGL policy that combined occurrence and claims-made features, specifically barring retroactive claims-made coverage. The Court stated:

> The insurance policies PCIC issued to Baker fail to provide prospective or retroactive coverage and create limited one-year windows for claims

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[7] The discovery rule applies to breach of contract claims in Washington. *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 579-81, 146 P.3d 423 (2006).

[8] Suit limitation provisions constrain an insured's right to seek judicial relief for breach of contract, but they do not extinguish coverage generally. An insured can still seek extracontractual remedies against the insurer afforded insureds under Washington common law and statutes. *Ashburn v. Safeco Ins. Co. of Am.*, 42 Wn. App. 692, 713 P.2d 742, *review denied*, 105 Wn.2d 1016 (1986); *West Beach Condo. v. Commonwealth Ins. Co.*, 11 Wn. App. 2d 791, 455 P.3d 1193, *review denied*, 195 Wn.2d 1026 (2020).

> to occur and be reported to qualify for coverage. Such restrictive coverage violates Washington's public policy.

200 Wn.2d at 143.

In *Bennett v. United States*, __ Wn.3d __, 539 P.3d 361 (2023), a certified federal question case, the Washington court found the medical malpractice statute of repose to be unconstitutional on state constitutional grounds because the claimant could never appreciate the existence of a claim within the repose period. Relevant to the analysis of State Farm's suit limitation provision, the court observed that statutory repose periods are typically measured from the defendant's last culpable act or omission, rather than the accrual of the claim. *Id*. at 367. Moreover, the court concluded that the repose statute was unreasonable by disadvantaging certain claimants' rights to maintain common law malpractice actions so dramatically. *Id*. at 369-70. That type of analysis applies with equal vigor to a statute authorizing suit limitation provisions in insurance contracts barring claims by insureds who could not know of the progressive hidden loss to their property.

The clear implication of these decisions is that a claimant must have a legitimate opportunity to become aware of his/her claim before such claim can be barred on limitations grounds. As discussed further below this is the exact result mandated not just by public policy but by State Farm's "after loss occurred" policy language.

(4) The District Court's Analysis of State Farm's Suit Limitation Clause Is Contrary to Washington Law

Turning to suit limitations clauses in insurance contracts specifically, and in light of the foregoing principles, the district court erred in its analysis of State Farm's suit limitation provision.

(a) Washington Courts' Treatment of Suit Limitations Provisions in Policies

In general terms, Washington courts have determined that suit limitations clauses' limitation periods commence from the date the loss occurred. *Simms v. Allstate Ins. Co.*, 27 Wn. App. 872, 621 P.2d 1555 (1980). Where, as in *Simms*, the date of the loss is readily identifiable (the loss there involved thefts of the insureds' property) for purposes of RCW 48.18.200(1)(c)'s reference to one year from the date the loss "accrues," *id*. at 875, the issue is straightforward. *See also*, *Cope Constr. Co. v. Am. Home Assur. Co.*, 28 Wn. App. 38, 622 P.2d 395, *review denied*, 95 Wn.2d 1023 (1981). But the issue is more complex where the loss is progressive in nature and the loss is hidden, i.e., it cannot be determined from observation or without an "intrusive" investigation, i.e. one involving tearing into the building structure.

(b) Claims Involving Rain-Driven Damage to Property

State Farm's all-risk policy did not expressly exclude a wind-driven rain loss. An all-risk policy that does not expressly exclude such damage caused by wind-

driven rain covers damage caused by wind-driven rain, even when the policy otherwise contains exclusions for hidden or latent defect, deterioration, and decay. *Sunbreaker Condo. Ass'n v. Travelers Ins. Co.*, 79 Wn. App. 368, 376-78, 382, 901 P.2d 1079 (1995), *review denied*, 129 Wn.2d 1020 (1996).

In *Sunbreaker*, the condominium association argued that damage caused by wind-driven rain was covered by an all-risk insurance policy. Rainwater began penetrating the condominium stucco within thirty days of construction completion, and decay started, at least in localized areas, within two or three years of original construction in the early 1980s. In 1991, Sunbreaker discovered extensive decay in its building's south facing wall and sought coverage from its property insurer, Travelers. The policy contained exclusions for "dry rot," decay, hidden or latent defect, deterioration, and "repeated seepage of water." Pointing to the policy's exclusions, Travelers argued that damage from wind-driven rain was not a distinct, covered peril under the policy. Sunbreaker countered that because the policy mentioned "weather conditions," but only excluded "weather conditions" when weather conditions combined with certain other causes of loss, "weather conditions" was a distinct and covered peril.[9]

[9] Before the district court, State Farm argued that *Sunbreaker* only applied to damage from "unusual" weather events. This does not follow from *Sunbreaker* where the court found the insurer liable "for numerous weather events" based on the policies coverage for damage from weather conditions. 79 Wn. App. at 778. Courts have consistently rejected the argument that *Sunbreaker* only applied to damage

The Washington Court of Appeals agreed with Sunbreaker, holding that the weather conditions clause evinced the insurer's intent to accept liability for loss or damage caused by wind-driven rain, and that under the all-risk policy the insurer was liable for damage from "numerous weather events." *Id.* at 377-78. The court determined that wind-driven rain was covered under the policy, and that there were four distinct causes that may have contributed to Sunbreaker's loss: "defective construction, wind-driven rain, repeated seepage [or leakage of water], and fungus" and that it was an issue of fact for the jury as to which peril was the efficient proximate cause of the loss. *Id*. at 378.

Here, just as in *Sunbreaker*, State Farm's policy excludes "rain" in certain inapplicable circumstances such as when "rain" damages personal property[10] in the open, or the interior of the building, but *not* when rain causes hidden damage to exterior wall sheathing and framing, thus demonstrating State Farm's intent to cover such damage here. *See Greenlake Condo. Ass'n v. Allstate Ins. Co.*, 2015 WL

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from "unusual" weather events. *See Eagle Harbour Condo. Ass'n v. Allstate Ins. Co.*, 2017 WL 1316936, at *4 (W.D. Wash. 2017) (*Sunbreaker* court stated clearly that it was not relying on the evidence of specific storm events, but rather on its conclusion that certain policy provisions evinced an intention on the part of the insurer to treat wind-driven rain as a distinct peril.). *See also*, *Dally Props., LLC v. Truck Ins. Exch.*, 2006 WL 1041932, *4 (W.D. Wash. 2006) (same).

[10] Damage to sheathing and framing is real property, not personal property, nor is it property in the open.

11988945, at *9 (W.D. Wash. 2015) (Allstate's similar rain exclusion did not bar coverage because damage to sheathing and framing of the exterior walls of the condominium was hidden; it was not "property in the open, i.e. completely uncovered property"); *see also*, *Canyon Estates Condo. Ass'n v. Atain Specialty Ins. Co.*, 2021 WL 1208581, at *3-4 (W.D. Wash. 2021) (interior rain exclusion evinces intent to treat rain damage to exterior of the building as a distinct covered peril).[11]

Washington courts routinely recognize that wind-driven rain is a separate and distinct peril that is covered unless explicitly excluded. *See Findlay v. United Pac. Ins.*, 129 Wn.2d 368, 379, 917 P.2d 116 (1996) ("It violates no public policy for an insurer to write an insurance policy to exclude coverage for loss caused by adverse weather"); *see also, Eagle Harbour*, 2017 WL 1316936, at *5 (many insurance

[11] State Farm may attempt to claim there is no coverage under *Mercer Place Condo. Ass'n v. State Farm Fire & Cas. Co.*, 104 Wn. App. 597, 17 P.3d 626 (2000), *review denied*, 143 Wn.2d 1023 (2001). However, *Mercer Place* was not a wind-driven rain case, but instead addressed whether coverage for a collapse from excluded dry rot that occurred during the policy period "also extend[ed] to . . . damage not yet in a state of collapse during the policy period that will eventually reach a point of collapse." *Id*. at 599. *Mercer Place* held it did not because collapse—not "precursors of collapse such as dry rot"—was "the predicate for coverage" and a "structure is either in a 'collapse' condition or it is not." *Id*. at 605. *See also*, *Franssen Condo. Ass'n of Apartment Owners v. Country Mut. Ins. Co.*, 2022 WL 10419015, at *11 n.12 (W.D. Wash. 2022) (*Mercer* does not apply here, where plaintiff claims that covered damage – *i.e.*, from weather conditions – occurred *during* the policy periods at issue).

policies exclude coverage for weather, including storm events, evidencing its characterization as a peril that must be explicitly excluded).

UP expects that State Farm will attempt to avoid its failure to exclude damage from rainwater intrusion by arguing that its policy covers "accidental direct physical loss,"[12] and rain is not "accidental" in the Pacific Northwest. However, accidental means subjectively "unexpected and unintended." *Queen City Farms*, 126 Wn.2d at 83. Washington courts have routinely determined that a hidden loss from rainwater intrusion is unexpected and thus accidental. *Gruol Constr. Co. v. Ins. Co. of N. Am.*, 11 Wn. App. 632, 635, 524 P.2d 427, *review denied*, 84 Wn.2d 1014 (1974) ("We recognize that dry rot is the expected result when moisture is introduced to dirt which is too close to wood but the fact that the condition [defective backfilling] was not detected during construction supports the finding that the dry rot which resulted from the unknown condition was unexpected" and thus accidental); *see Babai v. Allstate Ins. Co.*, 2013 WL 656353, at *4 (W.D. Wash. 2013) (court rejected insurer's argument that rain should not be covered because rain is expected in the Puget Sound area, noting that if this were true there would be no reason for insurance policies ever to exclude normal weather conditions or any expected conditions at all from

[12] State Farm's policy also requires the insured to file suit after the "*accidental direct physical loss* occurred." (emphasis added). Both the coverage grant, and suit limitation clause make clear it is the loss, the hidden damage, that must be accidental, i.e. unexpected.

coverage, but policies do exclude weather conditions); *See Sunwood Condo. Ass'n v. Travelers Cas. Ins. Co. of Am.*, 2017 WL 5499809, at *3 (W.D. Wash. 2017) ("NSC's policy contains no exclusion for rain, and NSC cannot create one with a fortuitousness argument.").

As explained *supra*, the district court erred by ignoring the coverage for hidden damage from wind-driven rain under State Farm's all-risk policy, and by only applying the suit limitation provision to an endorsement for non-progressive collapse coverage, coverage which was never actually sought by Olympic Vista.

(c) Washington Law Required that Olympic Vista File Suit under State Farm's Suit Limitation Clause Within Two Years of the Exposure of the Hidden Rain-Driven Progressive Loss

State Farm's policy contains a 2-year "after a loss occurred" suit limitation clause. The controlling case on such a suit limitation clause in Washington is *Panorama Village Condo. Owners Ass'n Bd. of Dirs. v. Allstate Ins. Co.*, 144 Wn.2d 130, 26 P.3d 910 (2001) where the court in a progressive hidden damage case held that the time for bringing suit under a suit limitation provision did not begin to run until the progressive damage ends, i.e., when the damage is exposed to view. *Id.* at 130, 133-34. In *Panorama*, the insured condominium association sued after an intrusive investigation exposed progressive dry rot that posed a risk of building collapse. *Id.* The *Panorama* court held that the policy's suit provision clause, which required the insured to bring suit within one year "after a loss occurs," could not be

interpreted to mean that an insured must bring suit "'during a loss' or 'after the beginning of a loss.'" *Id*. at 138. The court also distinguished the policy's suit limitation provision from "[a]n 'after inception' suit limitation provision," which "requires the policyholder to bring an action for coverage within a time certain subsequent to the beginning of the loss." *Id.* at 139. The court further explained that "[o]f the two types of suit limitation provisions the latter [an inception provision] clearly provides greater protection to the insurance company where a progressive loss is concerned." *Id.*[13]

The courts following *Panorama* have consistently ruled that in cases involving progressive hidden damage from water intrusion, an insured's suit is timely under an after loss occurred suit limitation provision if filed after the loss occurred, *i.e.*, when the hidden damage is exposed to view. *See Sunwood*, 2017 WL

[13] In *Gold Creek Condo.-Phase I Ass'n of Apartment Owners v. State Farm Fire & Cas. Co.*, 2023 WL 8711820 (9th Cir. 2023), in an unpublished memorandum opinion, this Court explained that the *Panorama* court interpreted an after a loss occurs suit limitations clause like the clause at issue here "to require suit be brought within one year after the completion of hidden loss, i.e. when the loss was discovered." *Id.* at *1. But State Farm's policy was different, requiring the insured to file suit "after the occurrence causing loss or damage." *Id.* This difference in policy language was important because an "after occurrence causing loss or damage" suit limitation provision focused on the cause of the loss, i.e. the rainstorms which were not hidden, and thus required the insured to file suit one year after the policy period. *Id.* In contrast, an "after loss occurs" suit limitations clause as here focuses on the coverage triggering event of the loss, and thus requires the insured to file suit only after a hidden loss is exposed. *Id.*

5499809, at *6 ("the damage to the buildings at issue here was exposed in December 2014 and was sued on in June 2016" and thus "suit was [timely] brought within the two-year period"); *Sixty-01 Ass'n of Apartment Owners v. Pub. Serv. Ins. Co.*, 2022 WL 2079215, at *2 (W.D. Wash. 2022) ("The damage at issue was hidden. And under Washington law, until such damage was exposed, the time period did not begin to run") (record citations deleted).

In *Housing Nw. Inc. v. Am. Ins. Co.*, 2019 WL 7040922 (D. Or. 2019), an Oregon court looked to *Panorama* to interpret an "after the loss occurred" suit limitations clause in a claim involving progressive hidden damage from rainwater intrusion. Consistent with Washington law the court concluded that it is reasonable to interpret "occurred" to mean "to present itself," to "appear," or to "exist," so that the limitations period is not triggered until after the loss or damage presents itself or appears or ceases to exist. *Id.* at *3.

Panorama does not apply only to losses involving hidden decay that causes collapse, nor does *Panorama* hold that the suit limitation period must run upon termination of the policy for claims involving progressive hidden damage. The *Sunwood* court stated:

> A suit limitation clause that hinges on when a loss "occurs" begins to run when hidden damage is "concluded or exposed," not upon termination of an insurance policy. *Panorama Vill. Condo. Owners Ass'n Bd. Of Directors v. Allstate Ins. Co.*, 144 Wn.2d 130, 26 P.3d 910, 915 (Wash. 2001). NSC argues *Panorama Village* applies only to

> policies that cover collapse caused by hidden decay. *Id.*; (Dkt. No. 88 at 11.) The Court disagrees…

Sunwood, 2017 WL 5499809, at *6 (also rejecting the argument that each drop of rain triggers the running of the suit limitations clause under the insured's "after the loss occurred" suit limitations provision).

Here, the district court disregarded that the Association's claim was for hidden progressive damage from rainwater intrusion, and instead treated Olympic Vista's claim as if it was for collapse that occurred *at a single point in time*. Thus, the district court erred in determining that Olympic Vista "cannot identify the requisite covered peril…that continued to exist until it was revealed within the two-year period prior to filing suit," and erroneously ruled that *Panorama* did not apply and that Olympic Vista must file suit within 2 years of when the policy terminated, as opposed to when damage was exposed.

In so ruling, the court incorrectly treated State Farm's "after the loss occurred" suit limitations provision as if it were an "after the occurrence causing the loss or damage" suit limitations clause like the State Farm policy issued in *Gold Creek*. The fact that State Farm had access to a standard policy form with a suit limitations provision which clearly barred the progressive loss at issue, but did not use such policy language here, demonstrates State Farm's intent to cover the hidden damage at issue. *Lynott v. Nat'l Union Fire Ins. Co.*, 123 Wn.2d 678, 688, 871 P.2d 146 (1994) (highly significant that insurer form endorsement was available to insurer

specifically excluding claims arising out of a merger or acquisition involving a particular entity and did not use it).

The district court also incorrectly attempted to distinguish the Washington district court decisions discussed above, as applying *Panorama* to policies only with explicit coverage for hidden decay that caused *collapse*. That is wrong. For example, in *Eagle Harbour*, the court explained that it was applying *Panorama* to "this claimed progressive loss, which does not fall under the policy's collapse provision" because under *Panorama*:

> If Allstate and the Association had intended to sever Allstate's liability for progressive losses within one year of the policy's effective dates, they could have. They also could have limited Allstate's liability by agreeing to an inception clause. They agreed to neither, and the Court will not rewrite their "after a loss occurs" limitations language under the guise of interpretation.

Eagle Harbour Condo. Ass'n v. Allstate Ins. Co., 2016 WL 499301, at *2 (W.D. Wash. 2016).

Further, in *Holden Manor Homeowners Ass'n v. Safeco Ins. Co. of Am.*, 2016 WL 3349339 (W.D. Wash. 2016), the homeowners association filed suit in 2015 to obtain coverage for hidden damage from wind-driven rain against a Safeco property policy in effect from 1980 to 1982. The Safeco policy stated it "applies only to loss to property during the policy period" and contained a one year after loss occurs suit limitation clause. *Id.* at *1. Like State Farm, Safeco argued that under the suit limitations clause its insured was required to file suit by 1983, one year after the

expiration of the policy period. *Id.* at *2. The court rejected Safeco's argument, explaining that as in *Panorama* the Safeco policy's suit limitation clause hinged on the date a loss occurred so that the plaintiff was required to sue within one year of the date the loss for hidden damage from wind-driven rain was exposed. *Id.* at *3. The court further determined that the application of *Panorama* was not limited to collapse claims and instead applied with equal force to claims for progressive hidden damage when such damage was not "expressly excluded" under an all-risk policy. *Id.* at *2-3. The district court here agreed with the reasoning in *Holden Manor*, but then claimed *Holden Manor* was distinguishable on the basis that State Farm's policies contained irrelevant exclusions for decay, deterioration, and hidden or latent defect.

However, as noted in *Sunbreaker* (discussed above *supra*) in which the insurer's policy had the exact same exclusions for decay, deterioration, and hidden or latent defect, such exclusions do not as a matter of law exclude progressive hidden damage in the exterior walls of a condominium complex from wind-driven rain. *Sunbreaker*, 79 Wn. App. 368, 377-82 (finding wind-driven rain a distinct covered peril from the above listed exclusions, and there is coverage if wind-driven rain is the efficient proximate cause "even though, other excluded perils contributed to the loss"). Thus, *Panorama* should apply with equal force to Olympic Vista's claims for progressive hidden damage from wind-driven rain because such damage is not

expressly excluded under State Farm's all-risk policy. *See Holden Manor*, 2016 WL 3349339, at *3; *Sunwood*, 2017 WL 5499809, at *6 (finding hidden damage from wind-driven rain covered and *Panorama* applies even though policy contained irrelevant exclusions for "wear and tear, gradual deterioration, inherent vice, latent defect . . . mold, [or] wet or dry rot");[14] *Eagle Harbour*, 2017 WL 1316936, at *5 (finding hidden damage from wind-driven rain covered despite irrelevant policy exclusions for "wear and tear, rot or deterioration, or repeated seepage of water" and that *Panorama* applied to these same policies).

Finally, under Washington rules of policy construction, the more specific policy provision must govern. *Foote v. Viking Ins. Co.*, 57 Wn. App. 831, 834, 790 P.2d 659 (1990) ("In contracts, the specific provisions control over the general provisions"). Here, it is clear that the specific provision that dictates when Olympic Vista must file suit is State Farm's "after the loss occurred" suit limitation provision. However, the district court reasoned that because State Farm's policy states it covers loss commencing during the policy period, it is somehow the unrelated commencing provision that governs when the Association must file suit, and not the suit limitations provision. The court came to this conclusion by again erroneously treating Olympic Vista's claim as if it were a non-progressive collapse loss.

[14] Given that Judge Coughenour authored both *Sunwood* and *Holden Manor*, and both decisions applied *Panorama* to claims involving hidden damage from rainwater intrusion, the district court simply misread *Holden Manor*.

With respect to progressive damage claims, courts have recognized that provisions which state loss must commence or occur during the policy period go to whether a policy is triggered by new damage, and do not cut off liability for a progressive loss. For example, in *Am. Nat'l Fire v. B&L Trucking*, 134 Wn.2d 413, 425, 951 P.2d 250 (1998), the Washington Supreme Court rejected as "misguided" the insurer's arguments that a provision requiring damage to occur during the policy limits an insurer's liability for progressive loss and found that such a provision "only addresses which policies are triggered."

Further, in *Ellis Court Apartments Ltd. P'ship ex rel. Woodside Corp. v. State Farm Fire & Cas. Co.*, 117 Wn. App. 807, 816, 72 P.3d 1086 (2003), the court recognized that the term "commencing" is ambiguous and means when damage begins. Applying this definition, Washington district courts have recognized that in the context of a progressive loss the commencing condition is satisfied, and the insurance policy is triggered as long as there is new damage from rainwater intrusion during the policy period. *Franssen Condo. Ass'n*, 2022 WL 10419015, at *6 ("in the absence of any language in the policy documents defining the terms 'commencing' or 'occurring,' plaintiff need only demonstrate that water intrusion caused new damage to the Condominium's exterior during those periods"); *See Ridge at Riverview Homeowners Ass'n v. Country Cas. Ins. Co.*, 2023 WL 22678, at *13 (W.D. Wash. 2023) (same). The requirement of new damage commencing to trigger

the policy, simply has no bearing on when a homeowners association like Olympic Vista must file suit.

The effect of the district court's incorrect analysis is to rewrite the suit limitation clause to say that Olympic Vista must file suit when damage "commenced," instead of after the loss occurred.[15] Such an approach violates Washington's rules of policy interpretation and does not comport with the ruling in *Panorama*.[16]

In sum, construing State Farm's suit limitation clause against it as its drafter, the express language requires that an action for progressive rain-driven damage that is hidden from the insured must be filed within two years of the exposure of the

[15] *Panorama* determined that the insured would not be required to file suit after each instance of hidden decay that occurred during the policy period, but rather only when such damage was exposed to view. The district court's reasoning is simply wrong and does not comport with *Panorama*.

[16] *See Ellis Court Apartments*, 117 Wn. App. at 818 (finding *Panorama* applies despite commencing condition in policy); *Sunwood*, 2017 WL 5499809, at *5-6 (finding suit limitation clause governs when suit must be filed, and not the commencing condition which goes to whether coverage is triggered by new damage); *Eagle Harbour*, 2017 WL 1316936, at *6 (finding new damage triggers the policy and satisfies the commencing condition); *Eagle Harbour Condo. Ass'n v. Allstate Ins. Co.*, 2017 WL 1395457 (W.D. Wash. 2017), at *4 (finding separate suit limitation provision governs when suit must be filed); *see also*, *Holden Manor*, 2016 WL 3349339, at *1, 2 (finding after loss occurs suit limitation clause governs when suit must be filed and not separate provision stating the policy covers damage that occurs during the policy period).

damage to the insured's property. This is consistent with *Panorama* and numerous federal court decisions and comports with Washington public policy.

E. CONCLUSION

The district court's decision would essentially eradicate coverage for progressive hidden covered damage in violation of Washington precedent and the plain meaning of State Farm's policy language. The district court should be reversed.

DATED this 19th day of January, 2024.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume of limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,690 words as counted by Microsoft Word 2016, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 36(a)(6) because it has been prepared in a proportionally spaced serif typeface using Microsoft Word 2016 in 14-point Times New Roman.

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I hereby certify that on January 19th, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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.

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Docket No. 23-3109

In the

United States Court of Appeals

For the

Ninth Circuit

OLYMPIC VISTA HOMEOWNERS ASSOCIATION,
a Washington non-profit corporation,

Plaintiffs-Appellants,

v.

ALLSTATE INSURANCE COMPANY, an Illinois company and STATE FARM FIRE & CASUALTY COMPANY, an Illinois company,

Defendants-Appellees.

Appeal from a Decision of the United States District Court for the Western District of Washington, Seattle, No. 2:22-cv-00683-TSZ· Honorable Thomas S. Zilly

MOTION FOR LEAVE TO FILE AMICUS BRIEF

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A. INTRODUCTION

United Policyholders ("UP") moves the Court for an order permitting it to file the attached *amicus curiae* brief in support of the appellant, Olympic Vista Homeowners Association. The brief brings to the Court's attention Washington and nationwide precedents and maxims of insurance law that bear directly on the issues on appeal. *Amicus* support is especially vital here because the issues implicated by this case are far-reaching and of critical importance, as they may affect insurance recoveries for homeowners associations throughout Washington.

B. INTEREST OF *AMICUS CURIAE*

UP is familiar with, and maintains, a strong interest in, the issues in this case. Founded in 1991, 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*™ program, UP promotes insurance and financial literacy, and helps individuals navigate the insurance claim process and recover fair and timely settlements. UP provided long term recovery and insurance problem-solving assistance to victims of the Carlton Complex Fire in Pateros, Washington, and is currently providing similar assistance to households impacted by the 2020 Labor Day Complex fires in Okanogan and

Douglas Counties. Additionally, through its Advocacy and Action program, UP helps solve claim and 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's Counsel and Executive Director Amy Bach has served as an official, appointed consumer representative to the National Association of lnsurance Commissioners ("NAIC") since 2009 and works closely with Insurance Commissioner Mike Kriedler and his office on a variety of issues affecting Washington residents. The late former Washington Insurance Commissioner Deborah Senn completed a term of service on the United Policyholders' board of directors.

UP regularly submits *amicus curiae* briefs in cases involving insurance principles that are likely to impact large segments of the public and business community. UP has filed *amicus curiae* briefs in over 500 cases nationwide and its arguments have been adopted by numerous state and federal appellate courts. UP's *amicus curiae* brief was cited in the U.S. Supreme Court's opinion in *Humana Inc. v. Forsyth*, 525 U.S. 299, 314 (1999). UP has frequently appeared in this Court as an *amicus curiae*. *E.g., Oregon Clinic, PC v. Fireman's Fund Ins. Co.,* 75 F.4th 1064 (9th Cir. 2023); *Mudpie, Inc. v. Traveler Cas. Ins. Co. of Am.,* 15 F.4th 885 (9th Cir. 2021); *HotChalk Inc. v. Scottsdale Ins. Co.,* 736 Fed.Appx. 646 (9th Cir. 2018).

In Washington, UP submitted *amicus briefs* in important insurance-related cases before the Washington Supreme Court such as *Seattle Tunnel Partners v. Great Lakes Reins. (UK) PLC*, 200 Wn.2d 315, 516 P.3d 796 (2022); *Hill & Stout, PLLC v. Mut. of Enumclaw Ins. Co.*, 200 Wn.2d 208, 515 P.3d 525 (2022); *Preferred Contractors Ins. Co. v. Baker & Son Constr. Inc*., 200 Wn.2d 128, 514 P.3d 1230 (2022); *Alpert v. Nationstar Mortgage, LLC*, 198 Wn.2d 228, 494 P.3d 419 (2021); *McLaughlin v. Travelers Commercial Ins. Co.*, 196 Wn.2d 631, 476 P.3d 1032 (2020); *Thornell v. Seattle Serv. Bureau, Inc.*, 184 Wn.2d 793, 363 P.3d 587 (2015).

The application and interpretation of insurance contracts requires special judicial handling. Insurance contracts are adhesive in nature, which compels judicial balancing and places the burden squarely on the insurer—as the drafters of the contract—to show that their interpretation of the contract terms is the only reasonable interpretation. *See Miller v. Republic Nat'l Life Ins.*, 714 F.2d 958, 961 (9th Cir. 1983) ("[I]nsurance policies are 'contracts of adhesion,' i.e., standardized contracts prepared entirely by one party to the transaction for acceptance by the other.").

Because Washington homeowners associations must purchase and maintain insurance for their properties, RCW 64.34.352(1), the public has a significant interest in this matter. This Court's disposition of the suit limitation issue here has the potential to affect thousands of policyholders. Due to the public interest and the

importance of this Court's decision, UP has a special interest in fulfilling the traditional role of *amicus curiae* by supplementing the efforts of counsel and drawing the Court's attention to law that may have escaped consideration. The Court will benefit by reviewing UP's perspective, an *amicus* with considerable experience in briefing courts on Washington insurance coverage issues and an interest in ensuring a proper ruling under the well-established principles of policy interpretation.

C. LEGAL STANDARD FOR APPOINTING *AMICUS CURIAE*

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." *Id.* The purpose of an *amicus curiae* is "to call the court's attention to law or facts or circumstances in a matter then before it that may otherwise escape its consideration." 4 Am. Jur. 2d *Amicus Curiae* § 6 (2004). An *amicus curiae* "assist[s] in a case of general public interest, supplement[s] the efforts of counsel, and draw[s] the court's attention to law that escaped consideration." *Miller-Wohl Co. v. Comm'r of Lab. & Indus. Mont.*, 694 F.2d 203, 204 (9th Cir. 1982) (citations omitted).

This Court frequently grants leave to nonprofit organizations like UP with industry familiarity and perspective to submit briefing that may assist in the resolution of a case. *See Office Depot, Inc. v. AIG Specialty Ins.*, No. 17-55125, 2018

U.S. App. LEXIS 12191 (9th Cir. 2018) (granting UP's motion for leave to file *amicus curiae* brief); *Probuilders Specialty Ins. v. Phx. Contracting, Inc.*, 743 F. App'x 876, 877 n.1 (9th Cir. 2018) (same); *HotChalk, Inc. v. Scottsdale Ins.*, 736 F. App'x 646, 649 n.4 (9th Cir. 2018) (same).

The undersigned counsel are representing UP in this matter on a *pro bono publico* basis. Pursuant to Circuit Rule 29-3, UP has sought consent from the parties before filing this motion. Appellee Allstate Insurance Company has not yet responded to that request. Appellant Olympic Vista Homeowners Association provided consent.

For the foregoing reasons, UP respectfully requests leave to file the attached *amicus curiae* brief.

DATED this 19th day of January, 2024.

Respectfully submitted,

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