No. 861158

IN THE COURT OF APPEALS FOR THE
STATE OF WASHINGTON, DIVISION I

TULALIP TRIBES OF WASHINGTON, federally recognized Indian Tribes, and TULALIP GAMING ORGANIZATION, an instrumentality and enterprise of Tulalip Tribes of Washington,
Appellants,
v.
LEXINGTON INSURANCE COMPANY; et al.
Respondent.

UNITED POLICYHOLDERS' MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

RULES

OTHER AUTHORITIES

United Policyholders ("UP"), by and through undersigned counsel, respectfully moves this Court for an order permitting it to file *instanter* the enclosed *amicus curiae* brief in support of Appellants The Tulalip Tribes of Washington State and the Tulalip Gaming Organization (the "Tribes"). The brief, a copy of which is attached, brings to the Court's attention Washington and nationwide current and historic precedents and principles of insurance law that bear directly on whether coronavirus-related losses meet the "direct physical loss or damage" coverage trigger for "all risk" commercial property policies like that which Respondents issued to the Tribes.

Amicus support is especially vital here because the issues implicated by this case are far-reaching and of critical importance, as they will impact businesses and non-profit organizations throughout

Washington, thousands of whom were insured under similar policies during the relevant timeframe.

The undersigned counsel are authorized to file an *Amicus Curiae* brief on behalf of UP. UP, through counsel, sought consent from the parties before filing this Motion. The Tribes have consented, but counsel for the various Respondents did not respond to UP's request.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Policyholders across the country purchase property insurance policies to protect against losses and costs arising from unexpected disasters. Although insurers are in business to make a profit, it is most crucial that insurance fulfill its dominant purpose to indemnify the insured in case of loss. Restatement of the L., Liab. Ins. § 2, cmt. c. (Am. L. Inst. 2019) (insurance-policy interpretation helps "effect[] the

dominant protective purpose of insurance").

Since the COVID-19 pandemic began in 2020, UP has played an important role in assisting business owners whose operations have been significantly impacted by SARS-CoV-2 and COVID-19 with their claims for insurance coverage. In furtherance of its mission, UP cautiously chooses cases and regularly appears as *amicus curiae* in courts nationwide.

UP *amicus* briefs help provide an intellectual counterweight to the claims of the insurance industry and facilitate the evenhanded development of the law. While insurers are repeat players in coverage litigation, most policyholders are not. *Travelers Ins. Co. v. Budget Rent-A-Car Sys., Inc.*, 901 F.2d 765, 771 (9th Cir. 1990) (describing insurance companies as "institutional litigants"). Since its founding in 1991, UP has filed *amicus curiae* briefs in numerous federal and state

appellate courts across the country. *Amicus* briefs filed by UP have been expressly cited in the opinions of multiple state supreme courts as well as the U.S. Supreme Court. *See Humana Inc. v. Forsyth*, 525 U.S. 299, 314 (1999); *Sproull v. State Farm Fire & Cas. Co.*, 2021 IL 126446 ¶ 17; *Julian v. Hartford Underwriters Ins. Co.*, 35 Cal. 4th 747, 760 (2005), *as modified* (May 5, 2005); *Cont'l Ins. Co. v. Honeywell Int'l, Inc.*, 188 A.3d 297, 322 (N.J.2018); *Allstate Prop. & Cas. Ins. v. Wolfe*, 105 A.3d 1181, 1185-86 (Pa. 2014).

The application and interpretation of insurance policies requires special judicial handling. Insurance policies, unlike standard commercial contracts, are adhesive in nature, which compels judicial balancing and places the burden squarely on the insurer as the drafters of the policy show that their interpretation of the terms is the only reasonable one. *See Miller v.*

Republic Nat'l Life Ins. Co., 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."). In other words, a policyholder's interpretation of the policy's terms need not be the only interpretation of those terms, or even the best interpretation. Unless the insurer can show that the policyholder's interpretation is implausible *(i.e.*, unreasonable), courts must find in favor of the policyholder.

The public at large has a significant interest in this matter, which like cases being actively litigated across the country, and this Court's disposition of this matter has the potential to affect thousands of policyholders, not only Washington State, but nationwide. This is particularly so with respect to the Court's treatment of the Washington Supreme Court's

"loss of functionality" pathway to coverage under policies requiring "direct physical loss or damage" outlined in *Hill & Stout, PLLC v. Mutual of Enumclaw Insurance Company*, 200 Wn.2d 208 (2022), and further discussed in *Seattle Tunnel Partners v. Great Lakes Reinsurance (UK) PLC*, 200 Wn.2d 315 (2022).

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 the perspective of UP, who has considerable experience in briefing courts on insurance coverage issues and an interest in ensuring a proper ruling under established principles of policy interpretation.

The Tribes' case is especially significant as

numerous COVID-19 coverage claims based on the actual presence of COVID-19 and its impact on property (as supported by pleaded scientific information) have been in progress in Washington state courts for nearly three and a half years without firm guidance from Washington courts. This has led to inconsistent outcomes in the Superior Courts, denied claims in the federal courts, and uncertainty amongst Washington policyholders.

Moreover, because nearly every major property insurer is domiciled outside Washington, making many property insurance disputes subject to federal diversity jurisdiction, numerous policyholders are proceeding towards final decisions in the Ninth Circuit Court of Appeals after stays were previously lifted; yet that court has not acknowledged the significance of *Hill & Stout* and *Seattle Tunnel*'s "loss

of functionality" analysis to COVID-19 claims.

Finally, time is running on policyholder claims as they are facing contractual and/or statutory limitations periods. For the foregoing reasons and pursuant RAP 10.6, UP respectfully requests leave to file the attached *amicus curiae* brief supporting the Tribes *instanter*.

RESPECTFULLY SUBMITTED this 17th day of June, 2024

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Certificate of Compliance: I certify this motion contains 959 words in compliance with Rule of Appellate Procedure 18.17.

CERTIFICATE OF SERVICE

On June 17, 2024, a copy of the foregoing Motion was electronically filed with the Clerk for the Washington State Appeals Court of Appeals, Division One, by using the Court's appellate CM/ECF system, and that service will be accomplished by the appellate CM/ECF system.

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Comments:

Motion for Leave to File an Amicus Curiae Brief in Support of Appellants

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