

Colorado Court of Appeals 2 East 4th Avenue Denver, CO 80203	DATE FILED: July 12, 2024 11:39 AM FILING ID: E495B8E1E101C CASE NUMBER: 2024CA34		
Denver District Court 2021CV30695			
<p><b>Plaintiffs-Appellants:</b>          SPECTRUM RETIREMENT COMMUNITIES, LLC, et al.,</p> <p>v.</p> <p><b>Defendant-Appellee:</b>          CONTINENTAL CASUALTY COMPANY</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> <p>Case Number: 2024CA34</p>		
<p><b>ATTORNEYS FOR <i>AMICUS CURIAE</i></b>  <b>UNITED POLICYHOLDER</b></p> <table border="0" style="width: 100%;"> <tr> <td style="width: 50%; vertical-align: top;">           Allan B. Moore (<i>Of Counsel</i>)            Jad H. Khazem (<i>Of Counsel</i>)            Justin T. Howell (<i>Of Counsel</i>)            COVINGTON &amp; BURLING,            LLP            One CityCenter            850 Tenth Street, NW            Washington, DC 20001-4956            Telephone: (202) 662-5458  <a href="mailto:abmoore@cov.com">abmoore@cov.com</a>  <a href="mailto:jkhazem@cov.com">jkhazem@cov.com</a>  <a href="mailto:jhowell@cov.com">jhowell@cov.com</a> </td> <td style="width: 50%; vertical-align: top;">           Stephen B. Shapiro, No. 13464            Garth A. Gersten, No. 51855            OTTESON SHAPIRO LLP            7979 E. Tufts Avenue, Suite            1600            Denver, Colorado 80237            Telephone: (720) 488-0220            Facsimile: (720) 488-7711  <a href="mailto:sbs@os.law">sbs@os.law</a>  <a href="mailto:garth@os.law">garth@os.law</a> </td> </tr> </table>		Allan B. Moore ( <i>Of Counsel</i> ) Jad H. Khazem ( <i>Of Counsel</i> ) Justin T. Howell ( <i>Of Counsel</i> ) COVINGTON & BURLING, LLP One CityCenter 850 Tenth Street, NW Washington, DC 20001-4956 Telephone: (202) 662-5458 <a href="mailto:abmoore@cov.com">abmoore@cov.com</a> <a href="mailto:jkhazem@cov.com">jkhazem@cov.com</a> <a href="mailto:jhowell@cov.com">jhowell@cov.com</a>	Stephen B. Shapiro, No. 13464 Garth A. Gersten, No. 51855 OTTESON SHAPIRO LLP 7979 E. Tufts Avenue, Suite 1600 Denver, Colorado 80237 Telephone: (720) 488-0220 Facsimile: (720) 488-7711 <a href="mailto:sbs@os.law">sbs@os.law</a> <a href="mailto:garth@os.law">garth@os.law</a>
Allan B. Moore ( <i>Of Counsel</i> ) Jad H. Khazem ( <i>Of Counsel</i> ) Justin T. Howell ( <i>Of Counsel</i> ) COVINGTON & BURLING, LLP One CityCenter 850 Tenth Street, NW Washington, DC 20001-4956 Telephone: (202) 662-5458 <a href="mailto:abmoore@cov.com">abmoore@cov.com</a> <a href="mailto:jkhazem@cov.com">jkhazem@cov.com</a> <a href="mailto:jhowell@cov.com">jhowell@cov.com</a>	Stephen B. Shapiro, No. 13464 Garth A. Gersten, No. 51855 OTTESON SHAPIRO LLP 7979 E. Tufts Avenue, Suite 1600 Denver, Colorado 80237 Telephone: (720) 488-0220 Facsimile: (720) 488-7711 <a href="mailto:sbs@os.law">sbs@os.law</a> <a href="mailto:garth@os.law">garth@os.law</a>		
<p style="text-align: center;"><b>UNITED POLICYHOLDERS' MOTION FOR PANEL RECONSIDERATION          OF THE SINGLE-JUDGE ORDER DENYING MOTION FOR LEAVE          TO SUBMIT BRIEF OF <i>AMICUS CURIAE</i></b></p>			

## CERTIFICATE OF COMPLIANCE

I certify that this motion, including the brief, complies with all requirements of C.A.R. 27, 28(a)(2) and (a)(3), C.A.R. 29 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

There is no applicable word limit on a motion, but this motion and brief complies with the applicable word limits set forth in C.A.R. 29(d). It contains 2775 words.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

By: /s/ Garth A. Gersten

Pursuant to Rule 27 of the Colorado Rules of Appellate Procedure and this Court’s inherent authority to reconsider prior non-final orders, United Policyholders (“UP”) hereby moves for panel reconsideration of the single-judge order denying UP leave to submit an *amicus curiae* brief in support of Plaintiffs-Appellants in this matter. In support, UP states as follows:

### **INTRODUCTION**

On June 20, 2024, UP filed an amicus brief and an accompanying motion for leave in an effort to assist this Court on an issue of immense public importance to Colorado businesses that is presented by this appeal—namely, the availability of insurance coverage for COVID-19-related business income losses under standard insurance-industry language in commercial property insurance policies and governing Colorado law. This appeal is the first case ever to reach this Court presenting this highly significant question, and UP’s brief draws upon UP’s extensive insurance law expertise and knowledge of insurance doctrine and case law, both in Colorado and nationwide.

As UP’s motion showed, UP is a nationally recognized expert and nonprofit advocate for policyholder rights, and its amicus briefs are frequently considered and have been cited by appellate courts across the country, including the United States Supreme Court. *See* UP Motion for Leave at 1-3 (June 20, 2024) (Filing ID:

11805B2FFBB40). UP’s input can be particularly important on an issue of first impression and in cases like this one, where a small- or medium-sized business is pitted, on an issue of broader implication, against a member of the heavily funded insurance industry. Indeed, in this case, UP reached out to Plaintiffs-Appellants, not vice versa, and volunteered to offer *amicus* support, in light of the manifest importance of this appeal and UP’s wholly independent assessment that the court below (and federal courts in Colorado) have either ignored or misunderstood the controlling insurance policy language and Colorado insurance law at issue.

On June 28, 2024, without any opposition having been filed to UP’s motion, a judge in the Court’s motions division summarily denied UP’s motion for leave, stating that it “appear[ed]” that UP’s *amicus* brief would not be “helpful” to the merits panel. *See* Order of Court (June 28, 2024). UP respectfully requests panel reconsideration, and the acceptance of its *amicus* brief, for four reasons.

*First*, the single-judge order denying UP’s motion for leave is inconsistent with the Colorado Supreme Court’s liberal standard for, and longstanding encouragement of, *amicus* participation in cases of significant public interest like this one. *Second*, as a nationally recognized policyholder advocacy organization that has been granted leave to file more than 500 *amicus* briefs before various appellate courts over the years—including, on at least ten prior occasions, this Court or the

Colorado Supreme Court—UP is well-positioned to offer the Court expertise in insurance law to help “even the playing field” in the resolution of this critically important appeal. *Third*, UP’s brief addresses the issues that this appeal presents from a broader perspective than Plaintiffs-Appellants’ brief is able to do and shows how courts and commentators nationwide have analyzed and understood the relevant precedents—including how *even courts outside Colorado* have correctly understood the key Colorado Supreme Court precedent at issue here. *Finally*, particularly in an appeal of this importance, the equities support granting courtesy of leave to file to a recognized nonprofit organization, like UP, that seeks to assist the Court *pro bono* by donating its time and subject-matter expertise. After leave is granted, each member of the merits panel can decide for herself or himself, after reviewing all the briefing and arguments, if UP’s analysis offers valuable insights and perspectives that should bear on the Court’s decision.

Notably, just last year, a three-judge panel of this Court granted reconsideration of a single-judge order that, as here, summarily denied an organization leave to submit *pro bono* an *amicus* brief in support of an insurance policyholder—and thus, allowed the brief to be filed and considered. *Weatherill v. State Farm Mut. Ins. Co.*, Case No. 2023CA1172, Order (Dec. 1, 2023), *granting reconsideration of Order* (Nov. 3, 2023). That same relief is warranted here.

## ARGUMENT

### **I. The Court Has Broad Discretion to Reconsider the Single Judge’s Order and Should Enforce Colorado’s Liberal Standard for *Amicus* Participation.**

Under Rule 27(c), “a single justice or judge may act alone on non-dispositive motions,” but “[t]he court or a division of the court may review the action of a single justice or judge.” C.A.R. 27(c). This rule comports with the broader principle that “a court always retains the inherent power to reconsider a prior ruling” upon timely motion. *Ranger Ins. Co. v. District Court In & For City & Cty. of Denver*, 647 P.2d 1229, 1231 (Colo. 1982).

Here, UP respectfully asks that this Court exercise its power to reconsider the single-judge order denying its request for leave to file an *amicus* brief in this appeal. In particular, UP respectfully asks for review by the merits panel, as the merits panel will decide this appeal and is best positioned to assess the “helpful[ness]” of UP’s *amicus* brief. C.A.R. 29(b). Alternatively, UP asks that a three-judge motions panel review the single-judge order. In all events, the Court should bear in mind that, because motions judges assess “not whether the proposed *amicus* brief would be helpful to them, but whether it might be helpful to others who may view the case differently,” it is “preferable to err on the side of granting leave.” *Neonatology Assocs., P.A. v. C.I.R.*, 293 F.3d 128, 133 (3d Cir. 2002).

Reconsideration is especially warranted here, given that the single-judge order does not comport with Colorado’s well-established embrace of *amicus* participation. The Colorado Supreme Court has long “welcomed the appearance and argument of amici curiae,” especially on a *pro bono* basis, recognizing that “[i]t speaks well for the profession when learned and distinguished members of it ... are willing, without fee or reward,” to contribute their insights “in cases of grave consequences.” *Mitchell v. People*, 232 P. 685, 687 (Colo. 1924); *see also People v. Max*, 198 P. 150, 151 (Colo. 1921) (“We desire here to express our very great appreciation of the aid given us by the able and exhaustive briefs filed in these cases by amici curiae.”). Consistent with this welcoming standard, practitioners have recognized that Colorado appellate courts, like appellate courts generally, “liberally allow the filing of amicus briefs.” Stephen G. Massiocchi, *What Amici Curiae Can and Cannot Do With Amicus Briefs*, 46 COLORADO LAWYER 23, 24 (Apr. 2017). Accordingly, this Court has not hesitated to reconsider single-judge orders that, as here, depart from Colorado’s liberal leave policy. *Weatherill*, Case No. 2023CA1172 (Dec. 1, 2023 Order).

## **II. United Policyholders Is a Nationally Recognized Leader In the Protection of Policyholder Rights.**

With this legal framework in mind, UP’s *amicus* participation is appropriate here. As a seasoned advocate for policyholder rights with longstanding experience

in judicial advocacy and detailed knowledge of the specific issues presented in this appeal, UP has a strong interest in, and is well-equipped to, assist this Court in resolving this important insurance coverage appeal.

As UP explained in its motion for leave, UP has served as a dedicated information resource for insurance consumers throughout the United States for more than 30 years. *See* UP Motion for Leave at 1-3 (June 20, 2024) (Filing ID: 11805B2FFBB40). Public officials, state regulators, academics, and journalists routinely seek UP’s input on insurance and related legal matters. A representative of UP serves on the Federal Advisory Committee on Insurance, which briefs the Federal Insurance Office and, in turn, the U.S. Treasury Department, and UP’s Executive Director has been an official consumer representative to the National Association of Insurance Commissioners for the past 15 years. In these roles, UP assists regulators in monitoring policy language and claim practices and in the development of model laws and regulations.

In addition, UP has filed more than 500 *amicus curiae* briefs in federal and state courts in cases, like this one, of vital importance to insurance consumers.<sup>1</sup> On at least ten prior occasions, UP has participated as an *amicus* before the Colorado

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<sup>1</sup> *See* United Policyholders Amicus Library, <https://uphelp.org/amicus-briefs/> (accessed July 10, 2024).

Supreme Court or this Court—with the Colorado Supreme Court having granted UP leave to participate as *amicus* as recently as last month. *See Hill Hotel Owner, LLC v. Hanover Ins. Co.*, Case No. 2024SA113 (June 18, 2024 Order).<sup>2</sup> Various appellate courts, including the U.S. Supreme Court, also have cited favorably UP’s *amicus* briefs, as have Colorado Supreme Court justices. *See, e.g., Humana Inc. v. Forsyth*, 525 U.S. 299, 314 (1999); *Allstate Prop. & Cas. Ins. Co. v. Wolfe*, 105 A.3d 1181, 1185-86 (Pa. 2014); *Rumnock v. Anschutz*, 384 P.3d 1262, 1265-66 (Colo. 2016) (Coats, J., dissenting, joined by Eid, J.). Of particular relevance here, UP has been admitted as an *amicus* in multiple COVID-19-related insurance coverage appeals resolved in favor of the policyholder. *See, e.g., Huntington Ingalls Indus., Inc. v. ACE Am. Ins. Co.*, 287 A.3d 515, 518 (Vt. 2022); *Ungarean v. CNA*, 286 A.3d 353 (Pa. Super. Ct. 2022) and 490 WDA 2021, Order (Pa. Super. Ct. Feb. 2, 2022).

The present order denying UP leave to file its *amicus* brief thus marks a sharp

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<sup>2</sup> *See also Auto-Owners Ins. Co. v. Bolt Factory Lofts Owners Ass’n Inc.*, 487 P.3d 276, 278 (Colo. 2021); *Owners Ins. Co. v. Dakota Station II Condo. Ass’n, Inc.*, 443 P.3d 47, 47 (Colo. 2019); *Thompson v. Catlin Ins. Co. (UK) Ltd.*, 431 P.3d 224, 226 (Colo. 2018); *Rooftop Restoration, Inc. v. American Family Mut. Ins. Co.*, 418 P.3d 1173, 1174 (Colo. 2018); *Rumnock v. Anschutz*, 384 P.3d 1262, 1263 (Colo. 2016); *Craft v. Philadelphia Indem. Ins. Co.*, 343 P.3d 951, 952 (Colo. 2015); *Mountain States Mut. Cas. Co. v. Roinestad*, 296 P.3d 1020, 1021 (Colo. 2013); *Board of Directors, Metro Wastewater Reclamation Dist. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 105 P.3d 653, 655 (Colo. 2005); *MarkWest Energy Partners, L.P. v. Zurich Am. Ins. Co.*, 411 P.3d 1080, 1080 (Colo. App. 2016).

and unjustified break from the longstanding judicial receptivity to UP's services, both in Colorado and nationwide.

### **III. United Policyholders' Brief Provides a Broad and Experienced Perspective on the Important Issues to be Decided in this Appeal.**

As a nationally recognized policyholder advocate, UP is well-positioned to assist this Court by providing a broader perspective on the questions presented than Plaintiffs-Appellants are able to do. In particular, UP's brief will help to inform the Court by shedding light on how courts, commentators, and insurance professionals nationwide have long understood (and occasionally relied upon) Colorado's leading precedent on what "physical loss" means in standard commercial property insurance policies in cases like this one involving noxious airborne substances. *Cf. Logan Irr. Dist. v. Holt*, 133 P.2d 530, 534 (Colo. 1943) ("Amici curiae, in the briefs presented, have called attention to authorities from other jurisdictions, which have been helpful in shedding light upon this subject.").

More than 50 years ago, the Colorado Supreme Court established that the presence of harmful substances in the air of insured premises—which impairs the use or habitability thereof—may cause "physical loss" under a so-called "all-risk" commercial property insurance policy. *Western Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 54-56 (Colo. 1968). Both Plaintiffs-Appellants and UP agree that *Western Fire* should control the outcome of this case—inasmuch as Plaintiffs-

Appellants plausibly alleged “physical loss” by pleading that the coronavirus and COVID-19 were physically present at their insured properties (i.e., retirement homes with elderly residents and medical staff) and impaired the safe use and habitability thereof. *See UP Amicus Curiae* Brief at 1-3 (June 20, 2024) (Filing ID: 11805B2FFBB40). UP’s brief helps to demonstrate the meaning and import of *Western Fire* in a COVID-19 context and against the broader context of settled industry and consumer understandings of what standard-form “all-risk” commercial property insurance policies cover. *See id.* at 7-11.

In particular, UP’s brief provides this broader perspective by surveying cases nationwide that have cited and discussed *Western Fire*’s expansive construction of “physical loss” in “all-risk” commercial property policies in the COVID-19 context. Such cases have either sustained COVID-19 coverage claims at the pleading stage, or dismissed such claims under applicable state law, while suggesting that the outcome might have been different if Colorado’s *Western Fire*—which is widely known in insurance circles and has been accurately described in a leading insurance law treatise—were controlling or followed. *Id.* at 7-10; *see also* Steven Plitt et al., 10A COUCH ON INSURANCE § 148:46 & n.7 (noting that, while some courts construe the “physical loss or damage” requirement to require a “physical alteration of the property,” *Western Fire* reached the “opposite result” in allowing coverage for

impaired habitability “despite the lack of physical alteration of the property”). UP’s brief (at 10-11) also analyzes industry literature documenting how *Western Fire* and its progeny have permitted claims for commercial property coverage for loss of use of property owing to all sorts of noxious airborne substances—an especially useful insight in an appeal concerning loss of use due the airborne coronavirus.

Accordingly, UP fulfills 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”—in Colorado and on a national level— “that might otherwise escape consideration.” *Funbus Systems, Inc. v. CPUC*, 801 F.2d 1120, 1125 (9th Cir. 1986) (citation omitted). In this connection, it bears emphasis that, while insurance companies like Defendant-Appellee here are “repeat players” in coverage disputes who can harness massive resources to support their positions, most policyholders, like Plaintiffs-Appellees, are not and may have little experience with the insurance policy language, precedents, and principles at issue. *Cf. Owners Ins. Co. v. Dakota Station II Condo. Ass’n, Inc.*, 443 P.3d 47, 56 (Colo. 2019) (Samour, J., concurring in part and dissenting in part) (discussing the “imbalance of power” between policyholders and insurers).<sup>3</sup> Allowing UP to submit its *amicus*

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<sup>3</sup> Highlighting this point, Defendant-Appellee has been named a party in at least 38 COVID-19 coverage cases nationwide, according to one leading tracker. *See*

brief, as a policyholder advocate steeped in insurance law with capacity to offer a nationwide perspective, would be a step toward providing some modicum of balance in this regard.

**IV. Equitable Considerations Also Support Granting Leave to United Policyholders, a *Pro Bono* Advocate, to File Its *Amicus* Brief.**

UP's brief is not only highly likely to assist this Court in its deliberations; basic equities and sound public policy also support granting UP the courtesy of filing its *amicus* brief.

No value is served by denying the merits panel in this appeal the opportunity to consider insights and arguments presented by an experienced policyholder advocacy group—in this first-ever Colorado state court appeal on an issue of exceptional importance to Colorado insurance consumers. Nor is there any value in conveying the message to organizations and counsel who donate their time and resources as *amici* that their efforts are not welcomed and should be discouraged in Colorado.

UP and its counsel devoted considerable time and expense to preparing UP's *amicus* brief in this appeal, all donated *pro bono*. Understandably, Colorado courts

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Covid Coverage Litigation Tracker, PENN CAREY LAW SCHOOL AT THE UNIVERSITY OF PENNSYLVANIA, <https://cclt.law.upenn.edu/cclt-case-list/> (accessed July 10, 2024). Plaintiffs-Appellants, by contrast, have participated in just one—this case.

have traditionally “welcomed” such thoughtful contributions, made “without fee or reward” in “cases of grave consequences.” *Mitchell*, 232 P. at 687. The order summarily denying UP leave to file its brief undermines this welcoming policy and threatens to diminish future *pro bono amicus* contributions. Among other things, such a denial may chill the ability of UP and similar organizations to secure volunteer *amicus* brief writers in the future in Colorado cases for fear that their briefs too may be summarily rejected. *See Weatherill*, Case No. 2023CA1172 (Dec. 1, 2023 Order) (granting motion for reconsideration that centered on similar concerns over chilling *pro bono amicus* contributions).

Finally, even if Judge Tow’s assessment were correct, “[i]f an amicus brief that turns out to be unhelpful is filed, the merits panel, after studying the case, will often be able to make that determination without much trouble and can then simply disregard the amicus brief.” *Neonatology*, 293 F.3d at 133. “On the other hand, if a good brief is rejected, the merits panel will be deprived of a resource that might have been of assistance.” *Id.* The Court should not deprive itself of the potentially valuable resource of UP’s *amicus* brief here.

## **CONCLUSION**

For these reasons, UP respectfully requests that the Court reconsider the single judge's order denying its motion for leave to file its *amicus* brief and that the Court accept and consider UP's brief.

Dated: July 12, 2024

Respectfully submitted,

By: /s/ Garth A. Gersten

Allan B. Moore (*Of Counsel*)  
Jad H. Khazem (*Of Counsel*)  
Justin T. Howell (*Of Counsel*)  
COVINGTON & BURLING, LLP  
One CityCenter  
850 Tenth Street, NW  
Washington, DC 20001-4956  
Telephone: (202) 662-5458  
[abmoore@cov.com](mailto:abmoore@cov.com)  
[jkhazem@cov.com](mailto:jkhazem@cov.com)  
[jhowell@cov.com](mailto:jhowell@cov.com)

Stephen B. Shapiro, Esq.  
Garth A. Gersten, Esq.  
OTTESON SHAPIRO LLP  
7979 E. Tufts Avenue, Suite 1600  
Denver, Colorado 80237  
Telephone: (720) 488-0220  
[sbs@os.law](mailto:sbs@os.law)  
[garth@os.law](mailto:garth@os.law)

**Attorneys for *Amicus Curiae*  
United Policyholders**

## **CERTIFICATE OF SERVICE**

I certify that, on July 12, 2024, a true and correct copy of the foregoing was filed and served via the Colorado Courts E-Filing system on all counsel of record.

/s/ Shannon Salcedo

Paralegal