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SCRQ-24-0000602

IN THE SUPREME COURT OF THE STATE OF HAWAII

IN THE MATTER OF THE PETITION FOR
COORDINATION OF MAUI FIRE CASES

S. P. No. 2CSP-23-000057

RESERVED QUESTIONS FROM THE
CIRCUIT COURT OF THE SECOND
CIRCUIT

Honorable Peter T. Cahill
Judge, Second Circuit Court

**MOTION OF *AMICUS CURIAE* UNITED POLICYHOLDERS FOR LEAVE TO
APPEAR AND TO FILE BRIEF IN RESPONSE TO *AMICUS CURIAE* BRIEFS FILED
IN SUPPORT OF SUBROGATING INSURERS REGARDING RESERVED QUESTIONS**

MEMORANDUM IN SUPPORT OF MOTION

APPENDIX A [PROPOSED *AMICUS* BRIEF]

CERTIFICATE OF SERVICE

WRIGHT & KIRSCHBRAUN
A Limited Liability Law Company

DOUGLAS R. WRIGHT 9643
1885 Main Street, Suite 106
Wailuku, HI 96793
Telephone: 808-244-6644
Facsimile: 808-244-1013
Email: doug@wkmaui.com

Attorney for Amicus Curiae
United Policyholders



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United Policyholders respectfully moves this Court pursuant to Hawai'i Rules of Appellate Procedure 27 and 28(g) for leave to appear as *amicus curiae* and to file a [9]-page brief responding solely to the *amicus curiae* briefs filed by Insurance Industry trade associations in support of Subrogating Insurers.

In the Court's Orders dated November 12, 2024 (Docket 64) and November 21, 2024 (Docket 85), leave to file *amicus curiae* briefs was granted to, among other entities, (1) American Property Casualty Insurance Association, National Association of Mutual Insurance Companies, and Reinsurance Association of America and (2) Hawaii Insurance Council. In the same orders, and again reiterated in the Court's Order dated November 27, 2024 (Docket 103), the Court granted leave to "any party" to this proceeding to file a brief by December 6, 2024 responding to the Insurance Industry *amicus curiae* briefs, not to exceed 10 pages. By way of this motion, United Policyholders, which is a national non-profit organization that advocates for policyholder interests—just like the Insurance Industry *amici* represent the interest of the insurance industry—

seeks permission to appear and to respond to the Insurance Industry *amicus curiae* briefs and to serve as *amicus curiae*.

Respectfully submitted.

DATED: Wailuku, Maui, Hawaii; December 6, 2024.

/s/ Douglas R. Wright

DOUGLAS R. WRIGHT

Attorney for Amicus Curiae
United Policy Holders

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MEMORANDUM IN SUPPORT OF MOTION

I. INTEREST AND IDENTIFY OF *AMICUS CURIAE*

United Policyholders (or “UP”) is a highly respected national non-profit 501(c)(3) organization that has served as a reliable information and problem-solving resource and a dedicated advocate for individual and business insurance consumers throughout the United States for over three decades. United Policyholders educates and assists people who have sustained a loss, are navigating an insurance claim, and need plain language guidance and problem-solving support. United Policyholders routinely coordinates with public officials, agencies and other non-profits to help people and communities impacted by disasters including fires, floods, windstorms, volcanic eruptions and hurricanes.

In addition to hosting workshops and clinics and helping individual policyholders resolve coverage questions and claim disputes, United Policyholders routinely engages in advocacy activities aimed at upholding and strengthening consumer protection laws, and regulations and improving insurer business practices. Grants, donations, and volunteers support United Policyholders’ work. Through the post-disaster surveys United Policyholders regularly conducts—including a currently open Maui wildfire survey—United Policyholders knows that significant

underinsurance is a major obstacle to recovery. It is therefore critical that impacted households have access to non-insurance funding sources to finance restoration and rebuilding.

United Policyholders served Hawai`i residents after Hurricane Iniki in 1992, Hurricane Iselle in 2014, and after the 2018 Kilauea volcano eruption. United Policyholders routinely coordinates with Hawai`i Insurance Commissioner Ito and his team. Within days of the August 8, 2023 Lahaina fire, United Policyholders deployed volunteers and staff members to provide first steps guidance and empathy to impacted residents. Soon thereafter, United Policyholders brought our “Roadmap to Recovery” program to the region. This program consists of live and online educational and problem-solving programming. United Policyholders has a full-time employee based on Maui who is assisting wildfire-impacted households on a daily basis in collaboration with local organizations and aid workers.

Public officials, state insurance regulators, academics, and journalists throughout the U.S. routinely seek United Policyholders’ input on insurance matters. United Policyholders serves on the Federal Advisory Committee on Insurance, which briefs the Federal Insurance Office and, in turn, the U.S. Treasury Department. United Policyholders’ Executive Director has been an official consumer representative to the National Association of Insurance Commissioners since 2009. In that role, United Policyholders assists regulators in monitoring policy language and claim practices through presentations and collaboration and the development of model laws and regulations.

Since 1991 United Policyholders has filed *amicus curiae* briefs in federal and state appellate courts across 42 states and in over 500 cases. *Amicus* briefs filed by United Policyholders have been expressly cited in the opinions of state supreme courts as well as the U.S. Supreme Court. *See Humana Inc. v. Forsyth*, 525 U.S. 299, 314 (1999); *Pitzer Coll. v. Indian Harbor Ins. Co.*, 8 Cal.5th 93, 104 (Cal. 2019); *Julian v. Hartford Underwriters Ins. Co.*, 110 P.3d 903, 911

(Cal. 2005); *Cont'l Ins. Co. v. Honeywell Int'l, Inc.*, 188 A.3d 297, 322 (N.J. 2018); *Allstate Prop. & Cas. Ins. Co. v. Wolfe*, 105 A.3d 1181, 1185-6 (Pa. 2014).

In addition to numerous cases before the U.S. Court of Appeals for the Ninth Circuit, United Policyholders has appeared as *amicus curiae* in the multiple cases before this Court including:

- *Aloha Petroleum, Ltd. v. National Union Fire Insurance Co. of Pittsburgh*, No. SCCQ-23-0000515 (Hawai`i 2024);
- *Travelers Insurance Co. v. Bodell Construction Co.*, No. SCCQ-22-0000658 (Hawai`i 2023);
- *Charles Mitchell Hart and Lisa Marie Hart v. TICOR Title Ins. Co.*, No. SCWC-29467 (Hawai`i 2011); and
- *Miller v. Hartford Life Ins. Co.*, No. SCCQ-11-0000329 (Hawai`i 2010).¹

II. ARGUMENT

The Court has broad discretion to grant leave to an *amicus curiae* to file a brief. *See* Haw. R. App. P. 28(g). Indeed, in this Court's Orders dated November 12 and 21, 2024, leave was granted to various Insurance Industry trade associations to file *amicus* briefs totaling 34 pages. United Policyholders respectfully requests leave to file a concise *amicus* brief (attached as Appendix A), responding to those submissions.

The classic role of an *amicus curiae* is to assist the Court "in a case of general public interest." *Miller-Wohl Co., Inc. v. Comm V of Labor and Indus.*, 694 F.2d 203 204 (9th Cir. 1982). With the availability of billions of dollars of settlement funds at stake, the issues presented in this special appeal are clearly of great public importance. The Court's decision here will directly impact thousands of wildfire survivors—many of whom are still struggling to rebuild their lives as they

¹ A complete listing of all cases in which United Policyholders has appeared as *amicus curiae* can be found online at UP's *Amicus* Project library at the following website: <https://www.uphelp.org/resources/amicus-briefs>.

wait for desperately needed recovery funds—as well as the greater communities of Lahaina, Maui, and all of Hawai‘i. In this context, granting *amicus curiae* status to a diverse array of entities is important, and United Policyholders respectfully submits that its perspective and involvement is all the more important to counterbalance and respond to the arguments made by multiple Insurance Industry trade associations.

Courts often grant leave to nonprofit organizations like United Policyholders with knowledge and perspective that may assist in the resolution of the case. *See Bryant v. Better Bus. Bureau*, 923 F. Supp. 720,728 (D. Md. 1996); *see also Perry-Bey v. City of Norfolk, Va.*, 678 F. Supp. 2d 348, 357 (E.D. Va. 2009). Given its decades of experience in disaster recovery and its extensive and ongoing work specifically relating to the Lahaina fires, United Policyholders is uniquely suited to provide context for the Court regarding how the position argued by the Insurance Industry *amicus* allies of Subrogating Insurers will negatively impact disaster. In the proposed *amicus* brief, United Policyholders focuses on responding to specific arguments developed in the Insurance Industry *amicus* briefs. In short, United Policyholders seeks to ensure this Court has that full context before it when addressing the Reserved Questions.

III. CONCLUSION

For the foregoing reasons, United Policyholders respectfully requests that the Court permit it to file an *amicus* brief in response to the Insurance Industry *amicus* briefs regarding the Reserved Questions in the form attached as Appendix A.

Respectfully submitted.

DATED: Wailuku, Maui, Hawaii; December 6, 2024.

/s/ Douglas R. Wright

DOUGLAS R. WRIGHT

Attorney for Amicus Curiae
United Policy Holders

APPENDIX A

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Email: doug@wkmaui.com

Attorney for Amicus Curiae
United Policyholders

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**BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS
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SUBROGATING INSURERS REGARDING RESERVED QUESTIONS**

I. INTRODUCTION AND STATEMENT OF INTEREST OF *AMICI CURIAE*

United Policyholders (“UP”) submits this brief as *amicus curiae* in response to the *amicus* briefs filed by (1) American Property Casualty Insurance Association, National Association of Mutual Insurance Companies, and Reinsurance Association of America and (2) Hawaii Insurance Council. United Policyholders is a highly respected national non-profit 501(c)(3) organization that for over 30 years has operated as a dedicated advocate and information resource for individual and commercial insurance consumers throughout the United States.

Before United Policyholders brought their Roadmap to Recovery services to assist in the Maui wildfire recovery, they put in years of work assisting households that were impacted by 2017 and 2018 California wildfires whose origins were attributed to a utility company’s equipment. When that utility, PG&E, declared bankruptcy, United Policyholders saw firsthand how the victims were grievously harmed when insurers took \$11 billion in cash from PG&E leaving individual consumers with (devalued) stock IOUs. The fact that insurers took cash meant that victims waited years for compensation, and many are still waiting. United Policyholders’ firsthand knowledge stems from the fact that UP’s Executive Director serves on the Fire Victims Trust Oversight Committee that is monitoring settlements from the stock sales. United Policyholders respectfully urges this court to benefit from lessons learned from that scenario.

As discussed below, the Insurance Industry *amicus* briefs present an erroneous and incomplete picture of subrogation rights. As the insurance industry sees it, an insurance company’s subrogation right to recoup the payouts it made in the aftermath of the Lahaina fires gives them a

trump card over the interests of everyone else, from policyholders to uninsured third parties and even to the utilities and other actors held responsible for the fires, all of whom want the proposed Global Settlement Agreement to go forward.² This is the opposite of the way it should be. Insurance companies are in the business of underwriting risk. They collect premiums and profit during good years, but when disaster strikes, they must be held accountable for the promises they made. In the aftermath of a natural disaster, when recovery funds are limited and insufficient to fully compensate every victim (as they always are in the wake of a disaster that is the magnitude of the Lahaina Fires), insurance companies must take their place at the back of the line.

Insurance is woven into the fabric of the U.S. economy through mandatory purchase requirements, personal and business risk management, and pricing of goods and services. Although insurance companies are in business to make a profit for their shareholders, it is most crucial that insurance fulfil its dominant purpose “to indemnify the insured in case of loss.” *Ins. Co. of N. Am. v. Elec. Purification Co.*, 67 Cal.2d 679, 689 (1967); *see also* American Law Institute, Restatement of the Law, Liability Insurance § 2, cmt. c (2019) (insurance-policy interpretation helps “effect[] the dominant protective purpose of insurance”).

Insurance is a crucial engine of the economy and, given its protective purpose and stability to policyholders, is imbued with a public purpose. Because insurers occupy a unique position, jurists, regulators, and legislators have promulgated a specialized field of law with numerous

² Lest anyone be concerned that the Global Settlement Agreement is a result of collusion between the other stakeholders to take advantage of the insurance companies, note that the briefs of Subrogating Insurers as well as the Insurance Industry amici are notably empty of any such insinuations. To the contrary, insured survivors, uninsured survivors, the responsible tortfeasors, and the communities they are part of, have to all accounts engaged in a series of tough and ultimately exceedingly productive mediations. The resulting proposed Global Settlement is fair and was reached in a remarkably short time given the scale of disaster that it addresses.

safeguards, rules, statutes and regulations, such as HRS § 663-10, that protect the interest of insureds and the public at large against the potential overreach of typically large and repeat-player insurance companies. “Insurance contracts cover fortuitous events, are contracts of adhesion and indemnity, must have the public interest in mind, require the utmost good faith, are executory and conditional, and must honor reasonable expectations. . . . Insurance contracts are different from other commercial contracts because insurance is more a necessity than a matter of choice. Therefore, insurance is a business affected with a public interest, as reflected in legislative and judicial decisions.” James J. Lorimar, *The Legal Environment of Insurance* 179, 180 (American Institute for Chartered Property Casualty Underwriters, 4th ed. 1993).

Bearing this important public trust in mind, United Policyholders respectfully urges the Court to resolve the Reserved Questions in favor of the position urged by both Plaintiffs and Defendants in the underlying mass litigations and hold that the Subrogating Insurers’ right to subrogation does not in this case allow them to torpedo an otherwise hard-won Global Settlement agreement.

II. CONCISE STATEMENT OF FACTS,

United Policyholders adopts the Statement of Facts in Plaintiffs’ *Amended* Opening Brief (Docket 89) and Defendants’ Corrected Opening Brief (Docket 93).

Notably, both Plaintiffs and Defendants agree on and underscore two important points. First, the mediation that gave rise to the proposed Global Settlement was court-supervised and conducted by three exceedingly well-regarded and capable mediators. Together, the mediators conducted numerous sessions attended by all stakeholders, including Subrogating Insurers, and the ultimate settlement amount is considered to be near or at the maximum amount Defendants can

afford. Second, Subrogating Insurers have engaged in litigation behavior that appears designed to delay resolution of the Global Settlement for the purpose of gathering to themselves a larger share of limited funds.

III. RESERVED QUESTIONS AND STANDARD OF REVIEW

The Court issued an Order dated September 25, 2024 (Docket 16) accepting the following three Reserved Questions.

Question 1. Does the holding of *Yukumoto v. Tawarahara*, 140 Hawai‘i 285, 400 P.3d 486 (2017) that limited the subrogation remedies available to health insurers to reimbursement from their insureds under HRS § 663-10 and barred independent actions against tortfeasors who settled with the insureds extend to property and casualty insurance carriers?

Question 2. Is a property and casualty insurer’s subrogation right of reimbursement prejudiced by its insured’s release of any tortfeasor when the settlement documents and release preserve those same rights under HRS § 663-10?

Question 3. Under the circumstances of the Maui Fire Cases and the terms of the “Global Settlement,” does the law of the State of Hawai‘i require that insureds be made whole for all claimed injuries or damages before their insurers can pursue a subrogation right of recovery or reimbursement against a third-party tortfeasor?

Each of the three reserved questions is a question of law. Questions of law including questions of statutory interpretation are reviewed *de novo*. *Yukumoto v. Tawarahara*, 140 Hawai‘i 285, 291, 400 P.3d 486, 492 (2017); *State Farm Fire & Cas. Co. v. Pac Rent-All, Inc.*, 90 Haw. 315, 322, 978 P.2d 753, 760 (1999).

The answers to the First and Third Reserved Questions are yes. The answer to the Second Reserved Question is no.

IV. ARGUMENT

A. Wildfire Survivors Urgently Need Access to Settlement Funds.

The survivors of the Lahaina wildfires need stability and face the monumental task of rebuilding their homes, lives, and livelihoods. Individuals and communities need timely access to settlement funds, which as of now represent one of the few new sources of financial relief available. Delaying or diverting these funds through protracted subrogation disputes jeopardizes the ongoing and difficult recovery process.

The Insurance Industry *amicus* briefs argue that enforcing subrogation rights is important for their future underwriting processes and the stability of the insurance marketplace. But while they focus on vague future considerations, they ignore the reality of the present. Ultimately there is no justifiable basis for asserting that the responsible third-party tortfeasors have enough money to wholly fund the support necessary for the physical recovery and rebuilding of Lahaina and surrounding communities as well as adequately compensate each survivor for the health and emotional pain and suffering endured.

The current situation is a far cry from a classic subrogation case—for example, one in which a single house burned down, the insurance company immediately and fully indemnified its insured, and then seeks to recover funds from the responsible third party who possesses the liquidity or liability insurance to pay for the damage that occurred. Here, critically, it is not just one home, but an entire community of homes, business owners, and surrounding areas who are uninsured or underinsured.

Underinsurance is a chronic problem that policyholders experience after their property is damaged or destroyed in a fire or other catastrophe. Results from United Policyholders post disaster surveys consistently find more than half of homeowners do not have adequate coverage to replace or rebuild their homes. The underinsurance problem is often exacerbated in the wake of a large-scale natural disaster when materials and labor costs spike in response to dramatically increased demand. This tragic pattern holds true on Maui where it is anticipated that an *average* insured home is likely underinsured anywhere from \$50,000 to \$300,000.

In this context, insurance companies' *equitable* rights of subrogation should not be accorded priority over the rights and interests of numerous other stakeholders. The subrogation scheme proposed by Insurance Industry *amici* will result in a flurry of unnecessary and wasteful litigation, delay the availability of urgently needed recovery funds, and ultimately move a relatively fixed amount of tort judgment funds into the pockets of insurance companies at the expense of wildfire survivors and their communities. This is the antithesis of a settlement achieved in the interests of justice.

Settlement funds are not just about personal recovery and planned stability, they are also a critical resource for revitalizing local businesses, repairing infrastructure, and restoring a sense of normalcy to a devastated community. Every delay in survivors receiving these funds slows the broader recovery process and compounds the economic and emotional toll on the entire community.

B. *Yukumoto*, HRS § 663-10, and the Made Whole Doctrine

In an effort to avoid unnecessarily duplicative arguments, United Policyholders provides only the following short statement addressing the relevance of *Yukumoto v. Tawarahara*, 140 Haw.

285, 400 P.3d 486 (2017), HRS § 663-10, and the “Made Whole” Doctrine, all of which are the subject of extensive argument by the parties and other amicus entities.

Under a simple, plain-language reading of the statute, HRS § 663-10 applies to property and casualty insurers. The use of the word “any” in relation to “claim” and “person” and “party” means what it says. A. Scalia & B. Garner, *Reading Law: the Interpretation of Legal Texts* 56 (2012) (“[t]he words of a governing text are of paramount concern, and what they convey, in their particular context, is what the text means.”). An entity that is a property and casualty insurer falls within the meaning of “any person” and “any entity.” The statute’s reference to “including health insurance” does not mean that it is limited to *only* health insurance. *See Fed. Land Bank v. Bismark Lumber Co.*, 314 U.S. 95, 100 (1941) (“the term ‘including’ is not one of all-embracing definition, but connotes simply an illustrative application of the general principle”). *Yukumoto*’s limitation of subrogation remedies therefore applies to all insurers. The “Made Whole” doctrine is consonant with these principles, the law of Hawai‘i, and the overarching purpose of insurance which is to indemnify and make whole those who suffer losses. An insurer is not entitled to subrogation benefits unless and until the insured is fully compensated for their loss. American Law Institute, Restatement of the Law, Liability Insurance § 23.02[2], at 23.8-13.

C. Under *State Farm v. Pac. Rent-All*, Insurers Should Not Be Permitted To Abuse The Equitable Right of Subrogation to Undermine A Valid and Fair Settlement Agreement.

Insurance Industry *amici* mischaracterize *State Farm Fire & Cas. Co. v. Pac. Rent-All, Inc.*, 90 Haw. 315, 978 P.2d 753 (1999) and seek to contrive an overly legalistic “prejudice” to support their right of subrogation when there is in fact no actual prejudice under the terms of the proposed Global Settlement.

Subrogation is an equitable remedy and, as a consequence, the prejudice faced by insurance companies under the reasoning of *State Farm* must be in some practical sense real. Moreover, as this Court explained in *State Farm*, unjust enrichment is an important factor in the rationale that underpins subrogation: “Equity simply does not support the conclusion that the insurer, which has performed its contractual obligations under the policy in good faith, should be forced to unjustly enrich a tortfeasor.” *State Farm* at 333. Additionally in *State Farm*, this Court went out of its way to hint that the circumstances surrounding the settlement between the insured and tortfeasor were suspect (“Although we do not decide conclusively at this time whether the instant case involved collusion or fraud, it is worthy of note that...”). *Id* at 333, n. 15. But here, there is absolutely no evidence that the proposed Global Settlement collusive rather than being what it is, a hard-won compromise that provides substantial and urgently needed compensation to survivors and communities while avoiding bankruptcy of the responsible entities. Moreover, there is no good basis for believing that Defendants are being unjustly enriched by avoiding paying for losses that Subrogating Insurers covered. This is true for multiple reasons.

First, under the proposed Global Settlement, Defendants are contributing as much as they practically can be expected to contribute. Subrogating Insurers will not be able to extract appreciably more money from Defendants if they are given the right to bring lawsuits. To the contrary, delaying the Global Settlement and allowing subrogation lawsuits will only decrease the amount of funds ultimately available for beneficial uses and will ensure that such funds arrive late. Second, even if Defendants had substantially more funds available, such dollars should first go towards uninsured and underinsured Maui residents, businesses, and government entities. Third, Subrogating Insurers are adequately protected by the remedy of being able to seek recovery from

any insureds who have received a double recovery windfall through payment of insurance funds plus additional settlement amounts that exceed their actual loss.

V. CONCLUSION

For the foregoing reasons, United Policyholders submits that Subrogating Insurers do not have an absolute right to disregard the wishes and best interests of their insureds by bringing independent tort actions against the parties responsible for causing the Lahaina Fires and thereby doom the hard-reached Global Settlement. United Policyholders respectfully requests the Court to answer the First and Third Reserved Questions in the affirmative and the Second Reserved Question in the negative.

Respectfully submitted.

DATED: Wailuku, Maui, Hawaii; December 6, 2024.

/s/ Douglas R. Wright

DOUGLAS R. WRIGHT

Attorney for Amicus Curiae
United Policy Holders

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was duly served upon all parties to this Reserved Questions proceeding, through their respective counsel of record, via electronic transmission through the Hawai'i Judiciary Electronic Filing System (JEFS), on December 6, 2024.

DATED: Wailuku, Maui, Hawaii; December 6, 2024.

/s/ Douglas R. Wright

DOUGLAS R. WRIGHT

Attorney for Amicus Curiae
United Policy Holders