No. 101585-2

SUPREME
OF THE STATE OF WASHINGTON

T-MOBILE USA, INC.,

Respondent,

v.

STEADFAST INSURANCE COMPANY and ZURICH AMERICAN INSURANCE COMPANY,

Petitioners.

ANSWER TO PETITION FOR REVIEW

Michael B. King
WSBA No. 14405
Carney Badley Spellman, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104
Phone: (206) 622-8020

Michael A. Moore
WSBA No. 27047
CORR CRONIN LLP
1015 Second Avenue
Floor 10
Seattle, WA 98154
Phone: (206) 625-8600

Attorneys for Respondent

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I. INTRODUCTION

Respondent T-Mobile USA, Inc. ("T-Mobile") opposes Petitioners' Petition for Discretionary Review ("Petition"). This case involves the interpretation of the insurance policy issued by Petitioner Steadfast Insurance Company ("Steadfast")[1] to T-Mobile ("Policy"). There is no reason for this Court to expend judicial resources on review of an unpublished Court of Appeals decision, a decision based on established precedent and undisputed facts.

Division One correctly determined that: (1) T-Mobile incurred a covered "loss" that exceeded the policy's $10 million self-insured retention provision ("SIR") in the form of defense costs well in excess of that amount, a fact not disputed below;[2] (2) T-Mobile's subsequent settlement with third-party Experian

[1] Zurich American Insurance Company and Steadfast Insurance Company are collectively referred to as "Steadfast."

[2] While T-Mobile initially calculated it losses as $17.3 million, Steadfast conceded below that T-Mobile's loss was at least $16 million. CP 168 at fn. 1.

did not "absolve" T-Mobile from paying that insured loss because it was undisputed that T-Mobile *actually paid* the underlying attorney's fees and related defense costs at issue;[3] (3) based on clear precedent from this Court, an insurer may not reduce its liability to account for such third-party payments "unless the policy authorizes it" to do so;[4] and (4) the Policy contained no such language here.[5] Unpublished Opinion ("Opinion") at 6-7.

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[3] "[T]he Experian recovery did not "absolve" T-Mobile from payment because it did not set free or release T-Mobile from its obligation to pay the costs and expenses it incurred from the data breach. T-Mobile remained directly liable for those obligations and paid them in full."

[4] "[A]n insurer may not set off any third-party payment to the insured unless '(1) the [policy] itself authorizes it and (2) the insured is fully compensated by the relevant 'applicable measure of damages.' *Sherry v. Fin. Indem. Co*., 160 Wn.2d 611, 618-19, 160 P.3d 31 (2007) (quoting B*arney v. Safeco Ins. Co. of Am*., 73 Wn. App. 426, 429, 869 P.2d 1093 (1994), *abrogated on other grounds by Price v. Farmers Ins. Co. of Wash*., 133 Wn.2d 490, 946 P.2d 388 (1997)); *Grp. Health Coop. v. Coon*, 193 Wn.2d 841, 852, 447 P.3d 139 (2019)."

[5] "Nothing in T-Mobile's policy authorized Steadfast to set off the $10.75 million Experian recovery."

Given the absence of any such authorizing language, the Court of Appeals ended its analysis at that point and did not reach the secondary issue of the made whole doctrine – the separate question of whether the Experian settlement fully compensated T-Mobile for all of its losses. Like the Court of Appeals, this Court need not reach that issue.

The Court of Appeals' decision does not conflict with any precedent established by this Court or by published decisions from the Court of Appeals. RAP 13.4(b)(1), (2). Similarly, the Petition to review an unpublished decision reflecting settled law does not raise any unresolved issues of substantial public interest. RAP 13.4(b)(4). As such, this Court should deny Steadfast's Petition.

II. RESTATEMENT OF THE CASE

A. The Policy, Data Breach, and the Resulting Defense Costs.

Steadfast does not dispute that the Policy generally provides coverage for costs and expenses flowing from a data breach, including the defense costs at issue. Just by way of one

example, insuring agreement A ("Information Technology and Internet Liability Coverage") confirms Steadfast's liability for all losses (including defense costs) "for which the Insureds become legally obligated to pay on account of any Claim for a Technology Wrongful Act or Media Wrongful Act . . . ." CP 224, 228 (*see* Insuring Agreement A and the Policy's definition of "Loss" which explicitly includes defense costs).

In September of 2015, Experian notified T-Mobile that it had suffered a security breach ("Data Breach"). CP 81-83.[6] T-Mobile subsequently incurred significant costs defending multiple lawsuits and government investigations. By Steadfast's own calculation, T-Mobile incurred more than $16 million in expenses flowing out of the Data Breach. CP 168 at fn. 1.

B. T-Mobile's Tender to Steadfast.

On or about October 7, 2015, T-Mobile notified Steadfast of the Data Breach and tendered its claim for coverage. CP 269.

[6] CP 83 refers to a September 2015 letter from T-Mobile to Experian regarding the breach.

A year later, T-Mobile received a letter from Steadfast's claims counsel, John Haschak, expressly acknowledging that the Policy covered "reasonable and necessary Privacy Breach Costs" like the defense costs at issue. CP 275-76.

C. The Experian Settlement.

T-Mobile attempted to pursue its indemnity rights against Experian in 2016. Petitioners' Br. at 6. Experian responded by asserting a counterclaim against T-Mobile for $23.1 million, alleging that T-Mobile was responsible for the Data Breach. CP 119,[7] 212 at ¶ 5. Experian and T-Mobile engaged in contentious litigation from May of 2016 through August of 2017. CP 212-13 at ¶¶ 5, 8.

Once T-Mobile and Experian began discussing the possibility of settlement in the spring of 2017, T-Mobile updated Steadfast and Mr. Haschak on those efforts. CP 123, 212-13 at ¶ 7. It is undisputed that Mr. Haschak did not respond or request

[7] CP 119 refers to the Experian and T-Mobile Settlement and Release, which was filed under seal by Petitioners.

any additional information about the settlement, much less indicate that it potentially impacted T-Mobile's claim for coverage. *Id*. The settlement was finalized on August 22, 2017, with Experian agreeing to pay $10.75 million to T-Mobile ("Experian Settlement").[8] CP 119, 213 at ¶ 8.

D. T-Mobile's Attempts to Secure Payment from Steadfast.

T-Mobile next began the process of attempting to recover

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[8] Given that T-Mobile informed Steadfast of the Experian Settlement in 2017, there is no merit to Steadfast's attempt to imply that T-Mobile concealed the settlement. *See* Petitioners' Brief at 7 (indicating that T-Mobile "did not disclose the settlement agreement with Experian . . . until almost 18 months later"). Again, it undisputed that Mr. Haschak: (1) did not respond to T-Mobile's 2017 communications about the Experian Settlement; (2) did not request a copy of the settlement at that time; and (3) did not request any information about Experian Settlement until *after* T-Mobile served its IFCA notice advising Steadfast of its intent to sue. T-Mobile immediately provided him with a copy of the settlement, confirmed it was the first time he had raised the issue, and noted its frustration with his failure to timely raise the issue back in 2017. CP 123. In sum, while the issue is irrelevant to the legal question before the Court, the only reason Steadfast did not receive a copy of the Experian Settlement in 2017 is because it failed to respond to T-Mobile's communications about the settlement and ask for a copy of that document.

its losses from Steadfast in 2018 by providing a hard copy set of the underlying invoices to Mr. Haschak in July of 2018. CP 213 at ¶ 9. Notably, T-Mobile's submission consisted of just two binders of invoices. CP 213 at ¶ 9.

T-Mobile repeatedly followed up with Mr. Haschak in August and September of 2018 after not receiving a response to its request for reimbursement. CP 213, 283-86. Mr. Haschak responded in October of 2018 by indicating that he would provide that substantive response "shortly." CP 288.

It is undisputed that Mr. Haschak *never* did so. CP 213 at ¶ 12. Indeed, Steadfast did not respond to T-Mobile's claim until T-Mobile served a notice on Mr. Haschak in late February of 2019 indicating that it intended to file suit under Washington's Insurance Fair Conduct Act ("IFCA"). CP 123, 213 at ¶ 12, 290-92. Mr. Haschak responded to the IFCA notice by asking (for the first time) for a copy of the Experian Settlement. T-Mobile immediately provided it to him. CP 123.

E. Steadfast Raises the Setoff Defense After T-Mobile Files Suit.

In an apparent attempt to sidestep Steadfast's failure to substantively address T-Mobile's claim, Steadfast subsequently raised the legal question addressed by this appeal – Steadfast's assertion that it had the right to unilaterally setoff the Experian Settlement to retroactively reduce T-Mobile's claim. The parties subsequently cross moved for summary judgment on the issue before the trial court. CP 19-18, 189-210, 383-85.

T-Mobile argued that: (1) the Policy did not contain any language indicating that Steadfast had the right to reduce T-Mobile's otherwise covered losses to reflect subsequent recoveries from third parties like Experian; (2) other insurers had adopted provisions into their policies expressly allowing setoff of third-party recoveries; (3) the interpretations of the Policy put forth by Steadfast were facially unreasonable; but (4) even if Steadfast's interpretations were reasonable, that only resulted in conflicting interpretations of the Policy, a conflict that had to be construed in favor of coverage under well-settled Washington

law. CP 1820 ("the *only* question the Court needs to determine to resolve the parties' motions in T-Mobile's favor is whether both parties have presented conflicting reasonable interpretations of the Policy," as Washington law is clear that "T-Mobile's interpretation prevails as a matter of law" in that circumstance), RP at 7-12; 24-28; 31-32; 35-38. Thus, T-Mobile argued that the trial court did not even need to reach the issue of the "made whole" doctrine. CP 1821, RP at 7-12; 24-28; 31-32; 35-38.

The trial court subsequently granted summary judgment in T-Mobile's favor via a brief written order that did not contain any reference to the made whole doctrine. CP 383-385.

Steadfast appealed and the parties briefed the issue to the Court of Appeals, with Steadfast primarily arguing that: (1) the language of the Policy's SIR provision allowed it to setoff the Experian Settlement against T-Mobile's otherwise covered losses; and (2) the Experian Settlement "absolved" T-Mobile's obligation to pay the defense costs.

As noted above, the Court of Appeals rejected those arguments, applying the relevant rules of policy construction and determining that: (1) the Policy did not contain any language actually authorizing Steadfast to account for third-party payments like the Experian Settlement; and (2) the settlement did not "absolve" T-Mobile from its obligation to pay the defense costs at issue because it was undisputed that T-Mobile actually paid those costs. Opinion at 7 (noting that the Experian Settlement "did not 'absolve' T-Mobile from payment" because "T-Mobile remained directly liable for those obligations and paid them in full").

III. RESTATEMENT OF THE ISSUES

1. Does the Court of Appeals' decision determining that T-Mobile incurred a covered loss under the Policy and that nothing in the Policy authorized reduction of coverage due to later recoveries from a third-party, conflict with any precedents from this Court or from the Court of Appeals?

2. Even if the Court of Appeals erred in its determination, does the outcome remain the same as a matter of law when any ambiguity in the Policy should be interpreted in favor of the insured, T-Mobile, and when the made whole doctrine disallows recovery by Steadfast because T-Mobile has not been fully compensated for its loss?

3. Does the Court of Appeals' decision present any issue of public policy or conflict with any precedent from this Court or from the Court of Appeals, such that review is warranted?

IV. ANSWERING ARGUMENT

A. T-Mobile Suffered a "Loss" in Excess of the SIR and Steadfast Cannot Reduce That Loss by Amounts Recovered from a Third Party.

It is undisputed that T-Mobile suffered an insurable "loss" under the Policy. As noted above and by Division One, the language of the Policy includes defense costs as part of the loss that is covered and T-Mobile tendered invoices for such costs to Steadfast. Opinion at 6. It is also undisputed that T-Mobile's total

costs greatly exceeded the Policy's SIR of $10 million, as T-Mobile calculated those losses at approximately $17 million and Steadfast itself conceded below that the defense costs totaled at least $16 million. CP 168 at fn. 1. Finally, as specifically noted by Division One, it is also undisputed that T-Mobile actually incurred and paid the defense costs at issues. Opinion at 6.

Steadfast argues that it may unilaterally reduce its insured's loss so that the SIR has not been met, leaving T-Mobile entirely responsible for its otherwise-covered costs. As the Superior Court and Court of Appeals agreed, however, decisions from this Court have held that an insurer may not reduce its coverage based on third-party payments unless two conditions are satisfied: (1) the policy contains clear and unequivocal language allowing such a reduction by the insurer; and (2) the insured has been fully compensated for all losses prior to the reduction. *See Sherry Fin. Indem. Co.*, 160 Wn.2d 611, 618-19, 160 P.3d 31 (2008); *Grp. Health Coop. v. Coon*, 193 Wn.2d 841, 852, 447 P.3d 139 (2019).

The Court of Appeals' decision hinges on the first requirement, as there is no language in the definition of "loss," the SIR, or, indeed, anywhere in the Policy that clearly and explicitly authorizes a reduction of an insured's loss for amounts recovered from a third party. CP at 28-78. The absence of any express language in the Policy is dispositive of all of Steadfast's arguments as a matter of law under this Court's well-established rules of policy construction, the same rules relied upon by Division One below.

Specifically, insurance contracts are interpreted in the manner understood by the average lay purchaser of insurance. *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 877, 881, 784 P.2d 507 (1990); *State Farm Gen. Ins. Co. v. Emerson*, 102 Wn.2d 477, 480, 687 P.2d 1139 (1984). Policy provisions are construed broadly and in favor of coverage. *Ross v. State Farm Mut. Auto. Ins. Co.*, 82 Wn. App. 787, 792, 919 P.2d 1268 (1996) ("The purpose of insurance is to insure; therefore, inclusionary

clauses are construed liberally in favor of coverage and exclusionary clauses are construed narrowly").

Insurers like Steadfast carry the burden, therefore, of clearly and unequivocally setting forth any alleged limitations on coverage in their policies and doing so in a way that would place the average purchaser of insurance on notice of such limitations. *Panorama Village Condominium Owners Assoc. Bd. of Dir. v. Allstate Insur. Co.*, 144 Wn.2d 130, 141, 26 P.3d 910 (2001); *see also* ("the burden was on [the insurer] to clearly describe any limitations on its broad grant of coverage"). That burden is merely recognition of the fact that insurers know how to protect their own interests by drafting policies in the manner they intend. *Panorama*, 144 Wn.2d at 141 (internal citation omitted) (as the insurance "industry knows how to protect itself and it knows how to write exclusions and conditions," if the insurer intended "'hidden' to mean 'unknown,' it must say so"); *see also Pension Trust Fund*, 307 F.3d at 950 (the insurer could "have easily

drafted the provision to plainly limit coverage" in the manner later argued).

It is also clear that insurers understand how to draft provisions that actually allow them to reduce coverage to account for third-party payments like the Experian Settlement. Indeed, precedent is replete with examples of insurers including express setoff or offset provisions in their policies, including cases from Washington. *See e.g., Safeco Ins. Co. v. Woodley*, 102 Wn. App. 384, 388, 8 P.3d 304, 306 (2000), *review granted in part, cause remanded*, 145 Wn.2d 1032, 42 P.3d 1278 (2002) (insurer entitled to reduce the amount of UIM benefits it owed under personal injury protection ("PIP") coverage because the "offsets [were] authorized . . . in the medical and PIP sessions, which state that benefits received under those sections 'shall be applied toward' her UIM recovery"); *Britton v. Safeco Ins. Co. of Am.*, 104 Wn.2d 518, 520, 707 P.2d 125, 127 (1985) (setoff of disability payments allowed where the policy language indicates that insurer may reduce amounts payable by "[a]ll sums paid or

payable under any workers' compensation, disability benefits or similar law").

Most importantly, insurers attempting to preserve the right to reduce an insured's "loss" like Steadfast do so by modifying the policy's definition of "loss" to expressly indicate that "loss" will be reduced to reflect such recoveries. *See, e.g.*, *SR Int'l Bus. Ins. Co. v. Allianz Ins. Co.*, 343 F. App'x 629, 632 (2d Cir. 2009) (Allianz policy defining loss as "the actual loss sustained by the Insured . . . *after making deductions for . . . all recoveries*") (emphasis added); *Gen. Refractories Co. v. First State Ins. Co.*, 94 F. Supp. 3d 649, 654 (E.D. Pa. 2015) (Travelers policy defining loss as "the total of all sums which the insured becomes legally obligated to pay . . . *less realized recoveries*") (emphasis added).

As noted by the Court of Appeals, the Policy does not contain any language clearly and unequivocally granting Steadfast the right to account for third-party payments like the

Experian Settlement. The absence of that language is fatal to all of Steadfast's arguments to this Court, just as it was below.

Steadfast nevertheless attempts to shoehorn its arguments into two sections of the Policy – the definition of "loss" and the SIR provision.[9] Steadfast primarily relies on the argument that "loss" does not includes amounts from which T-Mobile was "absolved from payment," asserting that the definition of absolved employed by the Court of Appeals ("to set free or release from some obligation, debt, or responsibility") was too narrow. That argument fails for three reasons.

First, the Court of Appeals' usage of the term comports with the "plain, ordinary meaning" of "absolve," a usage consistent with this Court's precedent. *Boeing*, 113 Wn.2d at 877. To define "absolve" as broadly as Steadfast requests

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[9] Steadfast's additional argument that Experian could have indemnified T-Mobile for its loss is meritless. Petition at 14-15. While Experian ***could have*** indemnified T-Mobile and relieved it of the burden to pay the relevant defense costs, it is undisputed that ***Experian did not do so***.

conflicts with that plain meaning of the Policy and would require the Policy to be read through the eyes of "a learned judge or scholar" to "with study, comprehend the meaning of an insurance contract" instead of "the average person." *Allstate Ins. Co. v. Raynor*, 143 Wn.2d 469, 477, 21 P.3d 707 (2001) (quoting *Boeing*, 113 Wn.2d at 881).

Second, regardless of which definition applies, it is undisputed that the Experian Settlement did ***not*** absolve T-Mobile "*from payment*" as required by the actual language of the Policy. To the contrary, T-Mobile received, was obligated to pay, and *actually did pay* all of the bills at issue – the undisputed fact relied upon Division One below. Opinion at 7 (noting that the Experian Settlement "did not 'absolve' T-Mobile from payment" because "T-Mobile remained directly liable for those obligations and paid them in full"). It was not "absolved from payment" of those bills by the later settlement with Experian as a result.

Third, even if Steadfast were correct and the Experian Settlement fell within the meaning of the "absolve" language, it has not demonstrated that Experian's payment to T-Mobile compensated T-Mobile for the ***exact same*** attorney fees and expenses (and ***only*** those fees and expenses) that T-Mobile sought to recover under from Steadfast. *See Puget Sound Energy v. Certain Underwriters at Lloyd's, London*, 134 Wn. App. 228, 138 P.3d 1068 (2006) (holding that a party seeking to show double recovery must "assign a price tag" to each aspect of a settlement). Here, the Experian Settlement included the resolution of all of the disputed issues between Experian and T-Mobile, including issues outside the defense costs tendered to Steadfast. Those additional issues included consequential damages (reputational harm to T-Mobile due to the data breach), potential future losses and expenses related to the breach, and other out-of-pocket losses and expenses. Indeed, T-Mobile advised Steadfast of this very fact as early as February 2019. CP 123.

In sum, the Policy does not contain any language clearly and explicitly indicating that Steadfast had the right to account for third-party recoveries like the Experian Settlement. As the Court of Appeals correctly determined below, Steadfast's current attempts to distort the language in the Policy's definition of "loss" and the SIR Provision are unreasonable as a matter of law under the relevant rule of policy construction established by this Court.

B. Even If Steadfast's Interpretation of the Policy was Reasonable, That Merely Creates Ambiguity in the Policy That Must Be Construed in Favor of T-Mobile.

Even if Steadfast's interpretation of the Policy was reasonable (and it is not), the Court of Appeals was still correct in affirming the trial court's decision below under the final rule of policy construction relevant to Steadfast's Petition.

Specifically, this Court has made it clear that any potential ambiguity within a policy is *always* "resolved against the insurer and in favor of the insured." *Quadrant Corp. v. Am. State Ins. Co*., 154 Wn.2d 165, 172, 110 P.3d 733 (2005)*; see also, Am.*

Nat. Fire Ins. Co. v. B&L Trucking Const. Co. Ins., 134 Wn.2d 413, 428, 951 P.2d 250 (1998) (citing *Queen City Farms*, 126 Wn.2d 50, 68, 882 P.2d 702 (1994); *Am. Best Foods v. Alea London, Ltd*., 168 Wn.2d 398, 411, 229 P.3d 692 (2010) (finding coverage where policy ambiguity present "[b]ecause such ambiguity is to be resolved in favor of the insured"). That includes interpreting policies in favor of full compensation and against an insurer's right to setoff or offset, a fact confirmed by this Court just three years ago. *Daniels v. State Farm Mut. Auto. Ins. Co*., 193 Wn.2d 563, 580, 444 P.3d 582, 590 (2019) (rejecting insurer's interpretation of policy language as unreasonable because it did not align with the principle of ensuring full compensation to insureds under "the common law made whole doctrine").

Steadfast's interpretation of the Policy is not reasonable or supported by the actual language of the Policy for all of the reasons noted above. Even if that interpretation were facially reasonable, however, *the only question the Court needs to*

determine to resolve this appeal in T-Mobile's favor is whether both parties have presented conflicting reasonable interpretations of the Policy. If they have, Washington law is clear that the Policy is ambiguous and T-Mobile's interpretation prevails as a matter of law. *Kaplan v. Nw. Mut. Life Ins. Co.*, 115 Wn. App. 791, 811–12, 65 P.3d 16, 27 (2003) (reversing trial court's failure to grant summary judgment in favor of insured where the insurer and insured presented reasonable conflicting interpretations of the policy because the insured was "entitled as a matter of law to have" the language "interpreted in his favor").

In short, the Court need not determine which of the parties' respective interpretations is correct. It instead need only determine: (a) whether both parties have presented reasonable interpretations of the Policy; (b) whether those positions conflict (they clearly do); and (c) if so, whether the Policy is ambiguous as a matter of law and construed in favor of coverage, meaning that T-Mobile's interpretation controls.

Only if the Court were to accept Steadfast's interpretation of the Policy after applying each of the steps noted above does it need to address the next issue – the potential application of the "made whole" doctrine.

C. Steadfast Has Not Carried Its Burden Under the Made Whole Doctrine.

Even if Steadfast had established a right to setoff under the Policy, the made whole doctrine still supports the Court of Appeals' decision and bars Steadfast's reduction of T-Mobile's loss.

Despite Steadfast's assertion otherwise, Washington's made whole doctrine says that proceeds from a third party—in any insurance action (not just subrogation)—must be allocated to first make the insured party whole. This Court's precedent holds that there is an "established priority for the interests of the insureds through the made whole doctrine." *Daniels*, 193 Wn.2d at 571. That doctrine requires that an insurer can "recover only the excess which the insured has received from the wrongdoer, remaining after the insured is fully compensated for his loss."

Thiringer v. Am. Motors Ins. Co., 91 Wn.2d 215, 219, 588 P.2d 191 (1978). It is only when the insured has made an actual "[d]ouble recovery" that the insurer can seek additional compensation. *Sherry*, 160 Wn.2d at 621.[10]

An insurer bears the burden of proof on the issue. *Puget Sound Energy*, 134 Wn. App. at 231 (insurer had the "burden of proving [the insured] has been made whole by prior settlements"); *see also*, *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 673, 15 P.3d 115 (2000) (holding the insurer "carries the burden of double recovery"); *Alba*, 149 Wn.2d at 141 (an insurer seeking to reduce its liability by a settlement recovery "has the burden of establishing what part of the settlement was attributable to the claim it seeks to offset").

[10] As discussed elsewhere, Steadfast has not and cannot establish that the Experian settlement represents a double recovery for T-Mobile, as that settlement represented a "release from an unquantifiable basket of risks and considerations." *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 673, 15 P.3d 115 (2000).

Steadfast's primary argument against application of the made whole doctrine is that the doctrine can apply only in the context of subrogation. However, Steadfast fails to cite to *any* case law supporting this position and no such rule exists. On the contrary, this Court has explicitly expanded the applicability of the made whole doctrine:

> [T]o the extent the Court of Appeals held the made whole doctrine is confined to reimbursement claims, we overrule it. Under *Thiringer* and *Sherry*, no distinction exists based on who brings a claim against a responsible third party . . . . [T]he proceeds of any recovery from a third-party tortfeasor, ***whether in a subrogation or otherwise***, must be allocated in such a way as to first make the insured whole.

Daniels, 193 Wn.2d at 576 (emphasis added).

This Court has already applied the made whole doctrine to a non-subrogation case in *Puget Sound Energy v. Alba*, 149 Wn.2d 135, 68 P.3d 1061 (2003). In that case, an insurer could not avoid payment to its insured – even though several other insurers had settled related claims with the insured party – because the insured had not yet been made whole. *Id.* at 142-43.

Washington courts have also applied the made whole doctrine to a case that involved a SIR, a case to which Steadfast was a party. In *Bordeaux v. Am. Safety Ins. Co.*, 145 Wn. App. 687, 186 P.3d 1188 (2008), the insured party satisfied its SIR by paying defense costs directly. *Id.* at 692. That insured party also, subsequent to making such defense payments, settled its claims with multiple third parties to the dispute. *Id.* at 692-93. Although Steadfast argued on appeal that the made whole doctrine did not apply, the Court of Appeals rejected that argument and ruled instead that an insured's recovery of an SIR amount has priority over the insurer when proceeds are recovered from a third-party tortfeasor. *Id.* at 696-97. The insured was therefore "entitled to be made whole before any third-party recovery funds [were] paid to the insurers." *Id.* at 697.

In sum, Steadfast cannot reduce the amount of T-Mobile's losses until Steadfast carries its burden of proving that T-Mobile has been made whole. Steadfast cannot make that showing here given the global nature of the Experian Settlement.

While the Court of Appeals did not address the made whole doctrine, application of that doctrine does not alter the outcome of this appeal. That doctrine supports the Court of Appeals' decision because Steadfast cannot show that the Experian settlement made T-Mobile whole. Thus, the application of the made whole doctrine does not provide grounds for review or reversal of Division One's opinion in this case.

V. CONCLUSION

Steadfast cannot show that the Court of Appeals' opinion conflicts with any prior decision by the Court of Appeals or this Court. To the contrary, the Opinion follows longstanding rules of contract interpretation and established Washington precedent. The Petition also raises no issues of substantial public interest. This Court should deny review and remand the case.[11]

[11] Although T-Mobile seeks appellate attorney fees, this Court need not make any determination of appropriate fees. This is an appeal of an interlocutory decision, and T-Mobile respects the Court of Appeals' determination that the issue of attorney fees should be reserved for the trial court after the final disposition of the case. *See* RAP 18.1(i).

This document contains 4672 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 27th day of January, 2023.

CARNEY BADLEY SPELLMAN, P.S.

By */s/ Michael B. King*
Michael B. King,
WSBA # 14405

CORR CRONIN LLP

By */s/ Michael Moore*
Michael Moore,
WSBA #27047

Counsel for Respondent

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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Howard M. Goodfriend Catherine W. Smith 1619 8th Avenue North Seattle, WA 98109	Andrew L. Margulis Ropers Majeski Kohn & Bentley, P.C. 750 Third Avenue, 25th Floor New York, NY 10017

DATED this 27th day of January, 2023.

S: / Patti Saiden
Patti Saiden, Legal Assistant

CARNEY BADLEY SPELLMAN

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