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SUPREME COURT NO. 101576-3  
COURT OF APPEALS NO. 82554-2-I

IN THE WASHINGTON SUPREME COURT

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STAN SCHIFF, M.D., PH.D,  
on behalf of himself and a class of similarly situated providers,

Plaintiff-Respondent,

v.

LIBERTY MUTUAL FIRE INSURANCE CO. and LIBERTY  
MUTUAL INSURANCE COMPANY, foreign insurance  
companies,

Defendants-Petitioners.

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**DR. STAN SCHIFF'S RESPONSE TO AMICUS CURIAE  
MEMORANDA OF AMERICAN PROPERTY CASUALTY  
INSURANCE ASSOCIATION AND MITCHELL  
INTERNATIONAL**

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Plaintiff-Respondent Dr. Stan Schiff submits this response to the amicus curiae memoranda (“ACM”) of American Property Casualty Insurance Association (“APCIA”) and Mitchell International in support of Liberty Mutual’s petition for review in this case. The amici do not point to any conflicting appellate decisions or unresolved issues of public interest, nor do they submit helpful legal analysis on any issue presented in Liberty Mutual’s Petition for Review. RAP 13.4.

Rather, the interest of both amici is solely pecuniary: APCIA is an association of PIP insurers who are looking to continue to save millions of dollars in PIP claims per year by paying less than “all reasonable” medical expenses incurred by insureds, as required by RCW 48.22.005(7). Mitchell is a third-party provider of bill-review software with a financial interest in the continued use of its software by auto insurers like Liberty Mutual in processing and reducing PIP claims. These private pecuniary interests stand in direct opposition to the important public interest—expressly codified in the insurance code—in

full payment of PIP benefits on behalf of injured insureds.

**A. The ACMs point to no conflicting appellate decisions or unresolved issues of substantial public interest.**

The ACMs by APCIA and Mitchell, like Liberty Mutual's Petition for Review, do not present a conflict among appellate decisions or any unresolved issues of substantial public interest. RAP 13.4(b).

Five years ago, the Court of Appeals held that when a PIP insurer denies full payment of a medical expense under PIP insurance based on an automatically-applied percentile of a broad geographic database of paid charges, rather than conducting individualized inquiry into the reasonableness of the bill, the insurer has committed an unfair trade practice under the Washington Consumer Protection Act (CPA). *Folweiler v. American Family*, 5 Wn. App. 829, 837, 429 P.3d 813 (2018), *review denied*, 193 Wn.2d 1001, 443 P.3d 800 (2019).<sup>1</sup>

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<sup>1</sup> American Family thereafter ceased its use of database reductions. *See Folweiler v. American Family*, No. 16-2-16112-0 SEA, dkt. 47 at 5 (motion for preliminary approval of class

Two years later, the Court of Appeals again reached an identical decision in *Eastside v United Servs. Auto. Assn.*, 10 Wn. App. 2d 1031, \*6-7 (2019) (unpublished).<sup>2</sup>

The Court of Appeals' decision in this case simply applies *Folweiler* and *Eastside* to Liberty Mutual:

The undisputed and pertinent facts indicate that Liberty Mutual's 80th percentile practice is indistinguishable from the practice we held unlawful in the *Folweiler* decision.

*Schiff v. Liberty Mut. Fire Ins. Co.*, 520 P.3d 1085, 1092 (2022).

Like Liberty Mutual, the amici do not cite to any Court of Appeals or Supreme Court decisions with which the Court of

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action settlement). American Family is the 12th largest PIP insurer in Washington (Liberty Mutual is 38th), and is fully able to process claims without relying solely on a geographic database. See OIC Market Share Report at 13, <https://www.insurance.wa.gov/sites/default/files/documents/2021-appendix-e-market-information.pdf> (last accessed March 19, 2023).

<sup>2</sup> USAA also thereafter ceased using database reductions. See *Eastside v. USAA*, no. 17-2-26885-2 SEA, dkt. 104 at 26 (stipulation of class action settlement). USAA is the 10th largest PIP insurer in Washington, and is fully able to process claims without solely relying on a geographic database. See OIC Market Share Report at 13, *supra* at n. 1.

Appeals' decision in this case conflicts. In fact, between them only one (APCIA) cites to any case even nominally at variance with these cases, and it is a Delaware case interpreting Delaware's PIP statute. *GEICO Gen. Ins. Co. v. Green*, 2022 WL 1052195 at \*11 (Supreme Ct. Del. April 8, 2022).

Instead, the amici rely solely on arguments about the public policy implications of the Court of Appeals' decision. But this Court already rejected those arguments in denying American Family's Petition for Review in 2019.<sup>3</sup>

This Court has spoken extensively about the public interest in the fair handling of PIP insurance claims. *Durant v. State Farm Mut. Auto. Ins. Co.*, 191 Wn.2d 1, 11, 419 P.3d 400 (2018). In *Durant*, the Court observed that the PIP statute and regulations "reflect Washington's strong public policy in favor of the full compensation of medical benefits for victims of road

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<sup>3</sup> See American Family Petition for Review at 15-17, <https://www.courts.wa.gov/content/petitions/96561-7%20Petition%20for%20Review.pdf> (last accessed May 20, 2023) (making identical public policy arguments).

accidents.” *Id.* at 13-14. There, the Court struck down State Farm’s “maximum medical improvement” requirement, ruling that PIP insurers cannot lawfully erect arbitrary limitations on their payment of PIP bills or unilaterally define “reasonable” in order to save themselves money. *Id.*

The amici, like Liberty Mutual, argue the opposite here. They claim they should be able to unilaterally define “reasonable” to mean an arbitrary percentile of a database of charges from a broad geographic region.<sup>4</sup> This Court and the Court of Appeals have already held that such unilateral limitations on PIP reimbursement are unlawful.

**B. Amici have a pecuniary interest in PIP insurers’ continued use of the FAIR Health database.**

APCIA is a nationwide trade association representing property and casualty insurers writing insurance policies in Washington, nationwide, and globally. Its interests are not

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<sup>4</sup> For Liberty to deem the 80<sup>th</sup> percentile “reasonable” and everything above it “unreasonable” is indeed arbitrary. Many reductions are for less than a few dollars.

grounded in Washington public policy or in the proper application of Washington's unique PIP laws and regulations.

Amicus APCIA asserts that the FAIR Health database is used "nationwide" and "industry-wide" and that this case threatens that use. APCIA ACM at 3. That is irrelevant. Other states have entirely different PIP laws and requirements for reimbursement (for example, some states, like Oregon, have a defined fee schedule, *see* ORS 742.525). The Washington legislature has decided that PIP insurers must pay "all reasonable" medical expenses incurred by an insured in a covered accident. RCW 48.22.005(7) (emphasis added). The Court of Appeals' holding that this statute does not allow PIP insurers to deny full payment of such medical expenses based solely on automatic application of an arbitrary percentile of charges in a geographic database is beyond controversy. It is established law in Washington. This does not affect or implicate other states' laws or PIP insurers' use of a database in other states, nor does it affect insurers' use of a geographic

database in non-PIP contexts in Washington, which are governed by different laws and regulations than PIP.

Amicus Mitchell International is a third-party provider of bill-review software and processor of PIP bills; it sells access to the medical charge database, FAIR Health, used in this case by Liberty Mutual. CP 4914. Thus, it has an obvious financial interest in continued use of charge database software in processing and reducing PIP claims. Indeed, use of Mitchell International's own software and processing to reduce PIP insurance coverage has been found illegal in Washington; it provided the bill-review software used by Progressive Insurance, which a jury in King County found violated the CPA over a decade ago, in 2012. CP 5704; 6505.<sup>5</sup>

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<sup>5</sup> Progressive stopped using Mitchell's database for Washington PIP claims in 2011. *See Kerbs v. Progressive*, case no. 10-2-30608-1 SEA, dkt. 439 at 3 (motion for final settlement approval). Progressive is the 6th largest PIP insurer in Washington, and is fully able to process claims without solely relying on a geographic database. *See* OIC Market Share Report at 13, *supra* at n. 1.



Mitchell argues that its software, which uses the FAIR Health database, is the most objective and reliable way to determine what a “reasonable” or “usual and customary” fee for a certain procedure is. Mitchell ACM at 6-7. But Mitchell omits that its Master Services Agreement with FAIR Health states that the FAIR Health products “do not set forth a stated or an implied 'reasonable and customary' charge or allowed amount.” CP 3793.<sup>6</sup> Mitchell has a clear financial self-interest in this dispute, and its ACM should be disregarded.<sup>7</sup>

**C. The majority of Washington PIP insurers do not use a geographic database.**

Both amici argue that the sky will fall if PIP insurers are not allowed to use a geographic database to set the amount paid on PIP claims. APCIA argues that individualized bill review is

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<sup>6</sup> The FAIR Health licensing agreement and User Guide state the same. CP 2047, 6471.

<sup>7</sup> Mitchell’s argument that automatic reductions benefit insureds should be dismissed as self-serving. Liberty admits that only 50% of the cost savings from its reductions are passed onto the consumer – it pockets the rest, CP 6428, to the direct detriment of insureds and its competitors who do not illegally reduce bills.

impossible and that “review of these claims for payment would drastically increase administrative costs and delay payment to the medical providers thereby placing significant upward pressure on premium costs for consumers.” APCIA ACM at 7. Mitchell similarly argues that individualized bill review is impossible. Mitchell ACM at 4.

These assertions are false. Most Washington PIP insurance providers do not use a geographic database to set reimbursement rates. CP 5872, 5874, 5882. There is no evidence premium costs have increased, processing has been rendered impossible, or payments to providers have been delayed. There is no evidence that these insurers are unable to engage in the individualized review required by Washington law.<sup>8</sup>

**D. Amici do not provide any helpful legal analysis about the “safe harbor” determination, which is a legal question.**

APCIA’s ACM also addresses the Court of Appeals’

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<sup>8</sup> Perhaps because their interests are national, amici neglect to identify a single Washington auto insurer other than the Liberty Mutual companies that uses a geo-database limitation.

ruling on the “safe harbor” provision of RCW 19.86.170.

APCIA argues that OIC’s “approval” of Liberty’s use of FAIR Health in 2016 was “logical in the context of PIP and MedPay claims.” ACM at 7. This assertion is irrelevant and impertinent.

First, OIC’s 2016 approval of Liberty’s policy language is not at issue in this case. The payment reductions here were in 2015-2016 and took place under the terms of its 2006 policy – the 2016 policy did not go into effect until after the reductions.<sup>9</sup>

Second, the “safe harbor” does not ask whether agency approval was “logical.” Rather, it asks whether the action OIC took – here, routine administrative approval of policy language that did not delineate the practice at issue – constitutes the type of affirmative and specific permission of a specific practice that warrants “safe harbor” protection. Amici’s arguments do not address this question, and therefore should be disregarded.

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<sup>9</sup> OIC’s thoughts in 2020 about the legality of the practice are also irrelevant to whether it granted Liberty affirmative and specific permission for its specific practice prior to 2015.

I certify that this brief contains 1746 words.

DATED: March 23, 2023

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## **CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this date I electronically filed the attached document with the Clerk of the Court via the Washington State Appellate Courts' Portal which caused service of same on all counsel of record.

DATED this March 23, 2023, at Seattle, Washington.

*s/ Cynthia Heidelberg*  
Cynthia Heidelberg

# BRESKIN, JOHNSON & TOWNSEND

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## Transmittal Information

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**Appellate Court Case Title:** Stan Schiff, M.D., Ph.D. v. Liberty Mutual Fire Insurance Co. et ano.

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