Supreme Court No. 95604-9
(Court of Appeals No. 75674-5-I)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

NATIONAL SURETY CORPORATION,

Plaintiff/Respondent,

v.

IMMUNEX CORPORATION

Defendant/Appellant.

BRIEF OF *AMICI CURIAE* ASSOCIATED GENERAL CONTRACTORS OF WASHINGTON, BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, GEORGIA-PACIFIC LLC, AND NATIONAL UTILITY CONTRACTORS ASSOCIATION IN SUPPORT OF PETITION FOR REVIEW

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INTRODUCTION

Amici Curiae ("*Amici*") are Washington trade associations and businesses[1] that depend on liability insurance to protect against the risks they and their members face in their day-to-day operations. They are concerned that the Court of Appeals' ruling in this case severely undermines the work this Court has done to encourage insurers to faithfully and promptly discharge their duty to defend under liability policies. If this ruling permitted to stand, Washington will become the first and only State to permit liability insurers to discharge their duty to defend merely by "promising" to reimburse defense costs, years after the fact, once all disputed coverage questions have been litigated to judgment. This Court should not countenance that unfair and unfounded result.

This Court has consistently enforced the duty to defend as one of the primary benefits—if not *the* primary benefit—policyholders receive when they buy liability insurance. It has recognized that the value of that duty to policyholders is the benefit of receiving a defense against the liability claim *in real time*. To honor the duty, the insurer must defend immediately and on an ongoing basis, not leave the insured to fend for itself and reimburse defense costs at some later date, if at all. If the

[1] *Amici* are Associated General Contractors of Washington, Building Industry Association of Washington, Georgia-Pacific LLC, and National Utility Contractors Association.

insurer does not actually defend, but only makes a vague agreement to reimburse defense costs at an undetermined later date after disputed coverage issues are litigated, individuals and organizations will be left to defend lawsuits with their own resources and subject to market and other risks that come with the passage of time. This is the precise outcome they intended to *avoid* by purchasing liability insurance. And the practical reality is that most Washington policyholders simply lack the financial resources to defend against even baseless third party claims without the insurer bearing the cost of the defense.

To encourage insurers to discharge this important duty, this Court subjects them to *extra*-contractual remedies when they unreasoanbly deny a defense to their insured. This Court also provides an alternative for insurers who dispute their duty to defend but wish to immunize theselves from such potentially severe liability. Insurers who wish to do both may (1) promptly mount a defense on behalf of their insured under a "reservation of rights"; *and* (2) pursue a judicial declaration of no-coverage, *while continuing to defend* until they secure that ruling.

That was the state of the law prior to the Court of Appeals' ruling. But that ruling disturbed the incentives this Court has crafted over the past several decades. It allows insurers to secure the immunity that comes from providing an immediate and ongoing defense under reservation of

rights, without ever actually providing any defense at all. Instead, insurers are immunized merely by *promising* to reimburse defense costs, regardless of when or even whether any such reimbursements are ever made.

In 2013, in this very case, this Court rejected the proposition that insurers can "have it both ways" under a reservation of rights defense by claiming the benefits of that defense without ever paying the corresponding costs. *Amici* urge this Court to grant review again to secure the integrity of that prior ruling and protect the duty to defend. It is critically important to policyholders across the state that the incentives this Court has crafted over the past decades remain intact and robust.

STATEMENT OF THE CASE

Beginning in 2001 Immunex began facing a number of lawsuits alleging it used misleading numbers when it published the "Average Wholesale Price" for certain of the prescription drugs it manufactured. The parties refer to this as the "AWP Litigation." Immunex tendered the AWP Litigation claim to its excess and umbrella liability insurer, National Surety Corporation ("NSC"), no later than October 2006.

At the time of the undisputed tender in 2006, Immunex was in the midst of defending itself in the AWP Litigation and incurred millions of dollars in defense costs from that date through the end of the trial in the AWP Litigation. Trial Ex. 302, 304A, 304B, 305. Nevertheless, NSC did

not provide Immunex with a coverage decision for nearly 18 months after that tender. On March 28, 2008, it filed a declaratory relief action in King County Superior Court, seeking a declaration that the AWP Litigation was not covered. CP 1. Three days later, on March 31, 2008, NSC sent a letter to Immunex agreeing to defend under reservation of rights, explaining it was providing that defense because it "wanted to be sure it protected Immunex's interests while it pursues [its] investigation" regarding coverage. *Id.* p. 9. NSC did not receive a ruling that it had no duty to defend until April 14, 2009. CP 1124-26. Despite its reservation of rights, NSC did not pay any of Immunex's defense costs incurred prior to that date. Nor did it ever appoint defense counsel, offer to appoint defense counsel, or otherwise do anything to defend Immunex at any time during or after the trial in the AWP Litigation.

The parties cross-moved for summary judgment on NSC's obligation to reimburse defense costs Immunex had incurred prior to April 14, 2009. The trial court held NSC was required to pay "all reasonable defense fees and costs incurred by Immunex in the AWP Litigation through April 14, 2009 . . . unless [NSC] prevails on its late notice claim at trial." CP 1408-10. The Court of Appeals affirmed both rulings. *Nat'l Sur. Corp. v. Immunex Corp.*, 162 Wn. App. 762, 256 P.3d 439 (2011).

NSC petitioned for, and this Court granted, review. NSC

contended that it was not required to reimburse any defense costs, notwithstanding its explicit promise to do so, in light of the ultimate ruling of no coverage. In *National Sur. Corp. v. Immunex Corp.*, 176 Wn.2d 872, 297 P.3d 688 (2013) ("*Immunex I*"), this Court affirmed. It held that NSC was obligated to pay reasonable defense costs incurred prior to April 14, 2009, except to the extent it prevailed on its argument that it suffered actual and substantial prejudice as a result of the timing of Immunex's tender. *Id.* at 890-91. NSC was required to make these payments because "a reservation of rights defense must be a *real* defense" in that "the insurer must bear the expense of defending the insured" pending a ruling on the coverage issues. *Id.* at 884 (emphasis added and citations omitted).

On remand, NSC argued it was actually and substantially prejudiced by the timing of Immunex's notice and that the defense costs for which Immunex was seeking reimbursement were unreasonably high. Immunex disputed both assertions.

NSC moved for partial summary judgment on Immunex's counterclaims for breach of contract and extra-contractual claims for bad faith and violations of IFCA and the Washington CPA. NSC argued that merely agreeing to defend under a reservation of rights immunized it from extra-contractual liability, even though it had not done anything to provide a defense. CP 2071-73, 2076-77. Under this Court's precedents an

insurer may shield itself from extra-contractual liability by *defending* under a reservation of rights while it pursues a ruling on its coverage defenses. *See Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 164 P.3d 454 (2007). But no court had ever held that an insurer could secure the same immunity by doing what NSC admits it did here: merely promising to defend but never actually doing anything to fulfill that promise. The trial court, however, granted NSC's motion and dismissed Immunex's counterclaims, meaning that the *most* Immunex could recover at trial was the defense costs NSC should have paid in the first place. CP 3521-22. The Court of Appeals, Division I, affirmed, effectively holding that an insurer may enjoy the benefit that comes with defending under reservation of rights without actually providing an ongoing defense to its insured. *See* App'x A to Petition for Review ("Order").

ISSUE PRESENTED FOR REVIEW

Whether this Court, consistent with its precedents, should require an insurer to actually undertake an immediate, ongoing defense under a reservation of rights in order to obtain the substantial benefit of immunity from potential extra-contractual liability, rather than permit the insurer to obtain the same benefit by merely agreeing to defend, without ever doing anything to provide that defense until after coverage issues are decided.

ARGUMENT

A. The Court of Appeals' Ruling Transforms the Duty To Promptly Defend Into a Mere Duty To Reimburse Years Later.

The Court of Appeals held that NSC discharged its duty to provide a reservation-of-rights defense to Immunex solely because it issued a reservation-of-rights letter in which it "assumed as a matter of law the obligation to pay reasonable defense costs" *after* the court resolved all disputes about what amounts were "reasonable" and to what extent NSC was prejudiced by the timing of Immunex's tender. Order at 6. That reasoning fundamentally misunderstands, and threatens to transform, the duty to defend.

This Court has repeatedly recognized that the duty to defend is a valuable and important benefit that policyholders bargain for when they purchase liability insurance. *See Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wn.2d 751, 760, 58 P.3d 276 (2002) ("The duty [to defend] is one of the main benefits of the insurance contract."); *Safeco Ins. Co. v. Butler*, 118 Wn.2d 383, 392, 823 P.2d 499 (1992) ("The insurer's duty to defend the insured is one of the main benefits of the insurance contract."). Policyholders pay for this benefit so that they may call upon the superior resources of the insurer to provide a "valuable *service*," that is, the mounting and funding of a defense on their behalf. *Woo*, 161 Wn.2d at 54 (emphasis added). This reliance on the insurer's resources to mount a

defense is particularly important for individuals and small organizations who lack the means to pay legal bills out of their own funds.

Because of the nature and purpose of the duty to defend, this Court has also held that it "arises at the time the action is first brought" against the policyholder; that is, the same point in time at which the policyholder is required to begin mounting a defense against the third-party claim. *Woo*, 161 Wn.2d at 52. And once the duty is triggered a policyholder is entitled to a "*prompt* and proper defense" from its insurer. *N.H. Indem. Co. v. Budget Rent-A-Car Sys., Inc.*, 148 Wn.2d 929, 938, 64 P.3d 1239 (2003) (emphasis added); *see Rushforth Constr. Co. v. Wesco Ins. Co.*, 2018 WL 1610222 at *3 (W.D. Wash. April 3, 2018) ("A prompt litigation defense is one of the main benefits of an insurance contract.") (*citing* Allan Windt, *Insurance Claims and Disputes*, § 2:21 (6th ed. 2018) ("a substantial part of the protection purchased by an insured is the right to receive policy benefits promptly") *and N.H. Indem. Co., supra*); *VanPort Homes*, 147 Wn.2d at 761 ("Once the duty to defend attaches, insurers may not desert policyholders and allow them to incur substantial legal costs while waiting for an indemnity determination."). That is because "[i]mposition of an immediate duty to defend is necessary to afford the insured what it is entitled to: the full protection of a defense on its behalf." *Montrose Chem. Corp. v. Super. Ct.*, 6 Cal. 4th 287, 295, 861 P.2d 1153

(1993). The highest courts of several other states have likewise held that the duty to defend requires insurers to take "immediate" action to defend their insured. *See, e.g.*, *Shoshone First Bank v. Pac. Employers Ins. Co.*, 2 P.3d 510, 515 (Wyo. 2000) ("To defend meaningfully, the insurer must defend *immediately*.") (emphasis added, quotations omitted); *State Farm Fire & Cas. Co. v. Schwan*, 371 Mont. 192, 197 n.2, 308 P.3d 48 (2013). *Amici* are aware of no authority to the contrary.[2]

By holding that NSC's agreement to *eventually* reimburse *some* defense costs was tantamount to the immediate and ongoing mounting of a defense on Immunex's behalf, the Court of Appeals effectively allowed NSC to re-write the Policy, transforming its duty to promptly defend into a duty to reimburse many years after the fact. This Court has rejected insurers' attempts to unilaterally delay, and thus narrow, their defense duty, including NSC's earlier attempt to do so in this case. *See Immunex I*, 176 Wn.2d at 891 (rejecting NSC's attempt to "unilaterally" relieve itself of obligation to pay defense costs while awaiting ruling on duty to defend). It should reject this latest attempt as well.

[2] In its March 31, 2008 reservation of rights letter, NSC itself acknowledged it owed a duty"to defend Immunex *until such time* as it can obtain a court determination confirming its coverage decision." TE 95 at 9 (emphasis added).

B. The Court of Appeals' Ruling Eliminates the Incentives This Court Has Put In Place To Encourage Insurers To Defend Even Where They Dispute Their Duty To Do So.

1. To Correct Skewed Financial Incentives, This Court's Precedents Subject Insurers To *Extra*-Contractual Liability For Bad Faith Failures To Defend.

This Court has recognized that insurers have a financial incentive to wrongfully deny defense coverage if the "worst case scenario" for them is nothing worse than being compelled, years later, to meet their contractual obligation to pay defense costs that were due under the policy. *See Butler*, 118 Wn.2d at 394 (*citing Bad Faith Refusal to Pay First-Party Insurance Claims: A Growing Recognition of Extra–Contract Damages*, 64 N.C.L.Rev. 1421, 1422 (1986) (observing that insurers who face only contractual remedies have economic incentive to wrongfully deny coverage)). To correct these skewed incentives, this Court has repeatedly held that insurers who refuse to provide a defense in bad faith (that is, without good reason) thereby expose themselves to penalties such as coverage by estoppel, treble damages and attorney's fees. *Id.* (extra-contractual remedies like coverage by estoppel required as a "strong disincentive to act in bad faith"); *see also id.* at 392 (rules governing duty to defend should vindicate public policy goal of providing "a meaningful disincentive to insurers' bad faith conduct"); *Immunex*, 162 Wn. App. at 777 (Washington law promotes a "policy goal of defending the insured"

and uses the "risk of a bad faith claim and coverage by estoppel" to "prevent [insurers'] resistance to provision of a defense").

2. An Insurer Disputing Its Duty To Defend May Avoid Exposure To Extra-Contractual Liability Only By Promptly Mounting a Defense and Continuing To Defend Until It Obtains a Ruling of No-Coverage.

This Court has carefully fashioned rules to guide insurers' conduct where the duty to defend is disputed. An insurer can always simply stand on its coverage position and refuse outright to defend. If it does so, however, it may face extra-contractual liability if it is later determined that the refusal to defend was unreasonable. *See Woo v. Fireman's Fund Ins. Co.*, 150 Wn. App. 158, 170-72, 208 P.3d 557 (2009). Under this approach the cost the insurer pays for the benefit of *not* providing an ongoing defense to the insured is potential exposure to bad faith liability.

Alternatively, the insurer may elect to promptly defend its insured in the same manner as it would where the duty to defend is undisputed, while it seeks a judicial determination that there is no defense coverage under the policy (the so-called "reservation of rights defense"). *Immunex I*, 176 Wn.2d at 880, *citing Woo*, 161 Wn.2d at 54. If it secures such a ruling its defense obligation will be cut off from that point forward. *Id.* Under this approach the insurer pays the cost of providing an ongoing defense, in exchange for the benefit that its liability will not be any greater

than its contractual coverage obligations under the insurance policy.

3. The Court of Appeals' Ruling Permits Insurers To Do What This Court Forbade Them To Do In *Immunex I*: Claim the Benefits of the Reservation of Rights Defense Without Paying the Corresponding Costs.

In *Immunex I,* NSC argued it was not required to abide by its March 31, 2008 promise to pay defense costs because of the superior court's subsequent ruling that the claim was not potentially covered under the policies. 176 Wn.2d at 881. NSC based its argument on a purported right to "recoup" defense costs from Immunex, even though no such right existed in the policies and no costs had actually been paid. *Id.*

This Court rejected that argument. It held that NSC was wrong to argue that it could obtain the benefit of the reservation of rights defense without paying the corresponding cost or giving its insured the corresponding advantage:

> We reject National Surety's view that an insurer can have the best of both options: protection from claims of bad faith or breach without any responsibility for the costs of defense if a court later determines there is no duty to defend. *This "all reward, no risk" proposition renders the defense portion of a reservation of rights defense illusory*.

Id. at 884 (emphasis added). This Court correctly observed that, under NSC's proposed "application" of the reservation-of-rights defense doctrine, "[t]he insured receives no greater benefit than if its insurer had refused to defend outright." *Id.* It reiterated that "a reservation of rights

defense *must be a real defense*" in that "the insurer *must bear the expense* of defending the insured" pending the judicial determination on the coverage issue. *Id.* (emphasis added). It criticized an illusory "'offer' to defend" because it "would serve solely to protect [the insurer] from claims of breach while placing the full risk of a determination of noncoverage on its insured. This provides no security to the insured." *Id*. at 886.

The Court of Appeals' ruling allows NSC to do exactly what this Court prohibited in *Immunex I*—benefit from the immunity from extra-contractual liability that comes with a reservation of rights defense, without having provided the "real defense" that *Immunex I* requires. This Court should reject NSC's second attempt to achieve that unfair result.

4. The Court of Appeals' Ruling Improperly Allows Insurers To Escape Extra-Contractual Liability "Simply by Reserving Their Rights."

This Court has recognized that "[t]he requirement of acting in good faith is meaningless if the insurer can protect itself from liability for bad faith simply by reserving its rights." *Butler*, 118 Wn.2d at 392. Indeed, this Court fashioned the reservation of rights defense as a way of encouraging insurers to defend their policyholders even where they disputed their duty to do so. *See Immunex I*, 176 Wn.2d at 886 (referring to the two-alternative approach as "the legal principles *that induce an insurer's offer to defend under reservation of rights*" (emphasis added)

(*quoting Terra Nova Ins. Co. v. 900 Bar, Inc.*, 887 F.2d 1213, 1219–20 (3d Cir. 1989))). It would be perverse to allow insurers to invoke a doctrine intended to encourage the faithful discharge of the duty to defend, as a means of *escaping* that very duty.

With this in mind, this Court has refused to extend immunity from bad faith liability to insurers who *promise* a defense under a reservation of rights, but then do not keep that promise, such as by withdrawing from the defense or performing the defense in bad faith, because "[e]ach has equally breached its duty to the insured." *Butler*, 118 Wn.2d at 392. But insurers, like NSC here, who promise a defense under a reservation of rights and then do *nothing* to provide it should not be treated any better than those who withdraw a promised defense or those who perform it in bad faith. In all of those cases the insurer improperly attempts to exploit the reservation of rights defense to *reduce* its obligations to defend its insured. *See Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 387, 715 P.2d 1133 (1986) ("A reservation of rights agreement is not a license for an insurer to conduct the defense of an action in a manner other than the manner in which it would normally be required to defend.") (quotations and alterations omitted).

By treating NSC as if it had fulfilled its express promise to provide a defense under reservation, the Court of Appeals' ruling defeats "the

purpose of creating a bad faith cause of action" in the first place, that is, to distinguish "between an action for an insurer's wrongful but good faith conduct, and an action for its bad faith conduct." *Butler*, 118 Wn.2d at 393. If this ruling is left undisturbed, "[a]n insurer could act in bad faith without risking any additional loss" merely by promising to defend, whether or not that promise was sincere or ever fulfilled, thus rendering the reservation of rights defense doctrine "meaningless." *Id.*[3]

5. The Court of Appeals' Ruling Cannot Be Squared With the Enhanced Good Faith Duty Insurers Owe When Defending Under Reservation of Rights.

"Because security and peace of mind are principal benefits of insurance, insurers must fulfill their contractual obligations in good faith, 'giving equal consideration *in all matters* to the insured's interests.'" *Immunex I*, 176 Wn.2d at 878 (*quoting Tank*, 105 Wn.2d at 387); *see also Tank*, 105 Wn.2d at 385 (insurers owe a duty of good faith "because of the high stakes involved for both parties to an insurance contract and the elevated level of trust underlying insureds' dependence on their insurers"). Moreover, this Court has repeatedly held that an insurer who opts to defend under reservation of rights owes an even higher, "enhanced duty of

[3] Moreover, even the garden-variety duty of good faith (that imposed on arm's-length business transactions) requires parties to deal with one another with honesty. *Tank*, 105 Wn.2d at 385. *A fortiori*, courts send precisely the wrong message when they reward and encourage the breaking of promises—or the making of false ones—in the reservation-of-rights context, where *much more* than mere honesty is required.

good faith toward the insured." *Immunex I*, 176 Wn.2d at 879 (*citing Tank*, 105 Wn.2d at 383).

When an insurer promises an immediate defense but then abandons its insured to fend for itself while a court resolves a coverage dispute, it has not given "equal consideration" to the insured's interests with respect to that dispute, nor has it vindicated "the elevated level of trust" insureds place in their insurers. *Immunex I*, 176 Wn.2d at 878; *Tank*, 105 Wn.2d at 385. Instead, that approach—the one NSC took here—serves the insurer's interests *exclusively*, at the cost of denying the insured one of the core benefits it purchases when it buys liability insurance—a "prompt and proper defense." *Budget Rent-A-Car Sys.*, 148 Wn.2d at 938; *see Tank*, 105 Wn.2d at 388 ("Finally, an insurance company must refrain from engaging in any action which would demonstrate a greater concern for the insurer's monetary interest than for the insured's financial risk.").

C. The Practical Consequences of the Court of Appeals' Ruling Will Be Widespread But Especially Severe For the Great Majority of Washington Policyholders Who Lack the Means To Mount and Fund Their Own Defense.

All Washington policyholders—public entities, individuals, small businesses, and large corporations—are harmed when insurers withhold their defense obligation for years. Most significantly, they are forced to bear the expense of a defense that they purchased insurance to provide.

Policyholders are also subject to market and other systemic economic risks that cause harm when insurers delay their defense. Companies lose funds they could otherwise use for innovation or investment in jobs and local development. Public entities lose money they could otherwise use for public services and community resources. And all policyholders face risks that insurers will go bankrupt or otherwise lose the funds they would have provided in defense. Reimbursement years later cannot cure these risks.

The most immediate and severe harm will be suffered by those individual and small corporate policyholders who have no hope of self-funding a defense against liability claims. The Court of Appeals did not address, and perhaps did not consider, how its ruling would affect this "silent majority" of policyholders.

In the run-of-the-mill insurance claim, for example a car crash or a slip-and-fall, the liability insurer retains defense counsel, funds the defense, and handles any disputes regarding billing as they arise. But under the Court of Appeals' ruling, a policyholder will be required, on their own, to: (1) retain a qualified attorney (though they know none); (2) pay the attorney's fees and other defense costs out of their own pocket (though they don't have the money to do so); and (3) wrangle with their defense counsel over what a "reasonable" defense should cost (though this is well beyond their expertise). Bereft of the prompt assistance of their

insurers, many policyholders will be left effectively defenseless and vulnerable to coerced settlements or financial ruin as a result of third-party claims (even meritless ones).

For those policyholders who *are* able to mount a defense on their own, their best hope will be to have the opportunity someday to present their reimbursement claim to the insurer, perhaps years later. And that may well launch a *second* expensive and protracted dispute, this time with the insurer, over what in retrospect was "reasonably" incurred in their defense and what was not. In that case the policyholder may require the assistance of a different attorney to do battle with their insurer.

Nothing in logic, experience, common sense, precedent or the language of the insurance contract permits this radical transformation of a robust and meaningful duty to promptly defend into a diluted and in most cases practically meaningless duty to eventually and partially reimburse.

D. The Court of Appeals' Ruling Makes Washington the First and Only U.S. Jurisdiction To Permit Insurers To Willfully Disregard Their Duty To Defend In This Manner.

Amici are unaware of any court permitting an insurer to discharge its duty to defend by promising a prompt defense but then doing *nothing* to actually defend for years while awaiting a judicial ruling on coverage defenses. Unless this Court intervenes to correct the error, Washington will stand alone in this radical transformation of the duty to defend.

E. This Court's Precedents Apply Regardless of the Specific Nature of the Insurer's Coverage Defenses.

On its face, the Court of Appeals' holding applies only to two coverage defenses: alleged late tender (and prejudice stemming therefrom) and reasonableness of defense costs. Order at 7. But there is no basis for allowing an insurer to delay its defense duty on the basis of these coverage arguments any more than other arguments insurers make to defeat or limit a defense duty. Indeed, in *Expedia* this Court held that an insurer's duty to defend is *not* delayed pending the adjudication of its late tender defense. *Expedia, Inc. v. Steadfast Ins. Co.*, 180 Wn.2d 793, 805, 329 P.3d 59 (2014).

More importantly, there is no principled way to confine the Court of Appeals' rule—that the insurer may issue a reservation of rights letter, refuse to defend, and yet be protected as a matter of law from extra-contractual liability—only to the coverage defenses of late tender and resulting prejudice and challenges to the reasonableness of the costs of the defense. To the contrary, if the Court of Appeals' decision stands, insurers will be able to stand on *any* colorable defense to coverage, and still enjoy blanket immunity from extra-contractual claims. The inability to confine this new rule is what makes it a grave threat to the continued viability of the duty to defend—in *all* contexts—in Washington.

CONCLUSION

The Court of Appeals held that to expose NSC to liability for bad faith after it promised to defend under reservation of rights, simply because it failed to fulfill that promise, "would require us to graft an exception onto the rule" governing such defenses. Order at 7. However, as explained above, the precise opposite is true. The requirement that an insurer *actually and promptly defend* under its reservation of rights defense, if it wishes to enjoy immunity from bad faith liability, is already part of the doctrine this Court has spent decades crafting. It is the Court of Appeals' ruling that grafted an unsupported exception onto the rules established by this Court. It is an exception that, if allowed to stand, will eviscerate the rule.

Amici respectfully request that the Court grant review of the Court of Appeals' ruling. Review and reversal are necessary to restore the balance this Court has crafted over the years between the important and time-sensitive duty to defend, and insurers' interest in being free from covering frivolous claims.

Dated: April 30, 2018

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing document to be electronically filed with the Clerk of the Court and served on counsel of record via the court's ECF system.

Executed at Seattle, Washington this 30th day of April 2018.

s/Paul F. Rugani
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