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SUPREME COURT  
STATE OF WASHINGTON

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CERTIFICATION FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
IN

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,  
Plaintiff,  
vs.

ONVIA, INC., ONVIA.COM, and RESPONSIVE MANAGEMENT  
SYSTEMS, in its individual capacity and as class representative of a  
purported settlement class,  
Defendants.

**BRIEF OF AMICI CURIAE  
AMERICAN INSURANCE ASSOCIATION; COMPLEX  
INSURANCE CLAIMS LITIGATION ASSOCIATION; NATIONAL  
ASSOCIATION OF MUTUAL INSURANCE COMPANIES; AND  
PROPERTY CASUALTY INSURERS ASSOCIATION OF  
AMERICA, IN SUPPORT OF PLAINTIFF**

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## INTEREST OF AMICI CURIAE

This brief is presented by the American Insurance Association (“AIA”), the Complex Insurance Claims Litigation Association (“CICLA”) the National Association of Mutual Insurance Companies (“NAMIC”), and the Property Casualty Insurers Association of America (“PCI”) (jointly, the “*amici*”).<sup>1</sup> *Amici* are the leading associations of insurers and reinsurers in the United States. Members of *amici* range in size from small companies to the largest insurers with global operations. On issues of importance to the insurance industry and marketplace, *amici* advocate sound public policies on behalf of their members in legislative and regulatory forums at the state and federal levels and file *amicus curiae* briefs in significant cases before federal and state courts.

*Amici* members write a substantial amount of insurance in Washington and nationwide and thus are vitally interested in the resolution of the issues certified to this Court. *Amici* will demonstrate that, where an insurer owes no contractual obligation to its policyholder, no bad faith cause of action should exist. If such a cause of action is recognized, *amici* will explain why there is no reason to abandon traditional tort principles

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<sup>1</sup> This brief is not submitted on behalf of *amici* member The Travelers Indemnity Company, whose affiliate, St. Paul Fire and Marine Insurance Company, is a party in this case.

regarding proof of harm and measuring damages. *Amici* submit that their perspective may assist this Court in resolving these important questions.

### **STATEMENT OF THE CASE**

*Amici* adopt appellant St. Paul Fire and Marine Insurance Company's Statement of the Case in full. Appellant's Br. at 2-5.

### **ARGUMENT**

#### **I. THERE SHOULD BE NO CAUSE OF ACTION FOR BAD FAITH IF THE INSURER OWES NO DUTIES TO ITS POLICYHOLDER.**

In this case, the policyholder's assignee seeks to advance a cause of action based solely on a third-party insurer's alleged delay in responding to a policyholder, even though that insurer owed no contractual duties to that policyholder. If this Court permits a cause of action in the circumstances presented here, a policyholder would have a perverse incentive to tender any potential claim to an insurer – regardless of how frivolous and how far afield of the actual policy coverage – in the hope that an insurer will innocently fail to respond in a manner satisfactory to the policyholder. By allowing bad faith claims on facts such as these, this Court potentially opens the door to a flood of lawsuits charging insurers with a myriad of “procedural” irregularities that have no relevance whatsoever to the coverage provided under the policy.

**A. Where A Liability Insurer Owes No Contractual Obligation To Its Policyholder, No Bad Faith Cause Of Action Should Exist.**

Fundamentally, the relationship between an insurer and its policyholder is premised on the contract entered into between them. That contract sets forth the mutual obligations and benefits that each party receives from the other. The principal object of that contract, of course, is for the insurer to pay for any covered losses. For third-party liability insurers, the other significant contractual undertaking is for the defense of potentially covered claims.

In setting forth the standard for bad faith, this Court recently has emphasized that “a policyholder must show the insurer’s breach of the insurance contract was unreasonable, frivolous, or unfounded.” Smith v. Safeco Ins. Co., 150 Wn.2d 478, 485, 78 P.3d 1274, 1277 (2003) (emphasis added); accord Overton v. Consol. Ins. Co., 145 Wn.2d 417, 433, 38 P.3d 322, 329 (2002). Thus, this Court has recognized that bad faith actions – at least typically – are premised on some breach of the contractual relationship between the insurer and its policyholder. Where the insurer has no duty to defend or indemnify a claim, an insurer’s alleged failure to respond to a policyholder promptly – without more – should not support a bad faith cause of action. The bad faith doctrine was intended to address unreasonable and frivolous actions by insurers, and it

should not be applied where, as here, an insurer owes no contractual obligations to its policyholder.

**B. Relying On Two Cases, RMS Seeks To Impose Bad Faith Liability Even In The Absence Of Any Insurer-Policyholder Contractual Obligation.**

Relying on selective quotations, RMS seeks to advance a procedural bad faith claim in the absence of a contractual duty owed by an insurer. Although the insurer owes an independent duty of good faith, a bad faith cause of action should not exist completely independent of the insurer's contractual obligations. Contrary to RMS' contentions, Coventry Associates v. American States Insurance Co., 136 Wn.2d 269, 961 P.2d 933 (1998), and Safeco Insurance Co. v. Butler, 118 Wn.2d 383, 823 P.2d 499 (1992), should not be read to support such a right.

In Butler, the Court addressed the extent to which a policyholder must prove harm arising out of a liability insurer's bad faith conduct. In that case, the policyholder chased two people in his car at high speed, subsequently shooting and severely injuring one of them. The insurer had agreed to defend the policyholder, but reserved its right to deny coverage in part based on the lack of an "accident" and an intentional acts exclusion. Butler, 118 Wn.2d at 386-87, 823 P.2d at 501-02. The policyholder alleged bad faith because, among other things, the insurer: delayed its investigation of the underlying lawsuit in part for the purpose

of enhancing its position on the coverage issue; caused the loss of evidence that would have been useful to the policyholder in the coverage suit; used the defense counsel that it had assigned for the underlying case to obtain statements for use in the coverage action; and commingled information from the tort defense and coverage action files. Id. at 395, 823 P.2d at 506. In a subsequent declaratory judgment action, the trial court determined that the insurer owed no indemnity obligation, but refused to dismiss the bad faith claim. Id. at 388; 823 P.2d at 502.

In affirming, this Court premised its decision on the fact that “[t]he insurer’s duty to defend the insured is one of the main benefits of the insurance contract.” Id. at 392, 823 P.2d at 504. “The insurer who accepts that duty under a reservation of rights, but then performs the duty in bad faith, is no less liable than the insurer who accepts but later rejects the duty.” Id., 823 P.2d at 504-05. Butler thus presented a situation where the insurer breached an important contractual obligation – namely, its obligation to defend its policyholder properly in the underlying action.

Moreover, this Court in Butler made clear that the bad faith cause of action, while separate and independent from any indemnity obligation, still arose out of the contractual obligations between the insurer and the policyholder. The Court stated the cause of action “arises from the contract and the fiduciary relationship, and which sounds in tort. Any

remedy must take into account all of the aspects of the insurer/insured relationship.” Id. at 393-94, 823 P.2d at 505 (emphasis added).

RMS mischaracterizes and overstates Butler in suggesting that it supports a bad faith cause of action even in the absence of any contractual obligation owed by the insurer. In Butler, the insurer was contractually obligated to defend the policyholder – including investigating the underlying liabilities in a manner consistent with providing that defense. In contrast, as recognized by the federal district court, the insurer in this case did not even owe a defense to the policyholder.

RMS also cites Coventry to urge the imposition of bad faith liability in the absence of any defense or indemnity obligation by an insurer. Coventry, however, involved a first-party insurer’s failure to investigate that allegedly resulted in costs incurred by the policyholder that should have been borne by the insurer. In Coventry, the policyholder incurred damage and losses at a construction site as a result of a weather-related mudslide. Coventry, 136 Wn.2d at 274, 961 P.2d at 934. That event caused the collapse of a retaining wall, leading to other damage to the site as well as business losses. Id. The insurer’s adjuster determined that the damage to the retaining wall was not covered because of an exclusion, but failed to investigate other damage or business losses incurred. Id. The policyholder then incurred expenses in conducting that

investigation, and filed suit against the insurer. Id. at 274, 285, 961 P.2d at 934-35, 940. The insurer subsequently denied coverage for the other damages and business loss because the policy contained a “weather conditions” exclusion. The trial court agreed with the insurer and ruled that the exclusion was applicable. Id. at 274-75, 961 P.2d at 935.

On appeal to this Court, the parties did not dispute that the losses were not covered, but the policyholder argued that the insurer acted in bad faith by failing to investigate the losses thoroughly and forcing the policyholder to incur its own costs for that investigation. Id. at 275, 961 P.2d at 935. The Court found that the property policy imposed contractual obligations on an insurer to investigate any loss thoroughly to determine whether coverage exists. See id. at 281, 961 P.2d at 938. The insurer’s failure to investigate damages unrelated to the retaining wall forced the policyholder to incur expenses to investigate those losses on its own. As this Court explained, the policyholder was therefore allowed to pursue a bad faith action to recover those costs:

The record before us establishes that [the policyholder] was required to go through some financial expense as a result of the bad faith investigation conducted by [the insurer]. These expenses include the cost of hiring their own experts and investigators to determine if [the insurer] should have covered the claim. To that extent, [the policyholder] is entitled to make a claim for those amounts and damages normally associated with bad faith and CPA violations.

Id. at 285, 961 P.2d at 940.

Coventry did not impose bad faith liability without regard to an insurer's contractual obligations to its policyholder. Indeed, Chief Justice Durham concurred with the judgment, specifically emphasizing the causal connection between the insurer's duties and any bad faith cause of action:

[T]he Court of Appeals decision below recognizes that a first-party insured may maintain a bad faith or CPA claim in the absence of coverage where the bad faith investigation actually harms the insured. The majority, in resolving this nonissue, states that when an insurer breaches its duty to act in good faith, "a cause of action exists." At first blush, it might appear that the majority is suggesting that insurer bad faith alone is actionable.

Yet, the majority correctly observes that harm is an essential element of both bad faith and CPA causes of action and that the Plaintiff is entitled to recover only to the extent that it incurred expenses as a direct result of any bad faith. Therefore, when an insurer breaches its duty to act in good faith, a cause of action exists only if such bad faith causes resulting harm to the insured.

Id. at 286, 961 P.2d at 940 (Durham, C.J., concurring) (citations omitted) (emphasis added).

As this Court has recognized, there are important differences between third-party and first-party claims, particularly with respect to alleged duties to investigate a claim. In Overton, this Court rejected a policyholder's bad faith claim against a third-party insurer based in part on

the insurer's allegedly defective investigation. In so doing, the Court recognized the different obligations of the insurer:

[I]nvestigation of a third party liability claim differs greatly from a fact-intensive first party claim in which the insurer itself must determine the validity of the claim. In a third party liability claim, however, the universe of relevant facts is largely contained in the complaint against the insured. Any additional facts within the insured's knowledge can be easily submitted to the insurer.

Overton, 145 Wn.2d at 434, 38 P.3d at 330.

In this case, the insurer had no duty under the insurance contract to cover this claim. Unlike in Coventry, RMS has not alleged that the insurer's delay caused the policyholder to incur costs that should have been borne by the insurer. Unlike in Butler, the insurer never had a duty to defend and therefore RMS cannot allege that the insurer delayed the investigation of the underlying lawsuit in order to further the insurer's coverage position. Quite simply, as the federal district court determined, the insurer had no contractual obligations to defend or indemnify under the policy. Accordingly, the insurer lived up to its obligations to the policyholder, which turned out to be non-existent. In the absence of any such obligations, this Court should not allow a bad faith cause of action that is untethered and standardless, as RMS urges here.

**C. This Court Should Limit A Policyholder's Ability To Bring Bad Faith Claims In The Absence Of Coverage.**

This Court has recognized that not all wrongful actions by insurers should give rise to bad faith actions. Rather, the insurer's actions must be unreasonable and harmful to the policyholder, and any bad faith action requires a showing that the insurer failed to give proper consideration to the interests of its policyholder.

As even policyholder-oriented commentators have recognized, although Washington is considered to provide expansive bad faith protection to policyholders, “[t]hat does not mean insureds will be allowed to manufacture bad-faith claims against insurers.” Thomas V. Harris, Wash. Ins. Law § 7.4, at 7-8 (2d ed. 2006). For example, in Stouffer & Knight v. Continental Casualty Co., 96 Wn. App. 741, 982 P.2d 105 (1999), the Washington Court of Appeals rejected a policyholder's claim that its third-party liability insurer engaged in a bad faith investigation of the underlying claim. In that case, the insurer agreed to defend under a reservation of rights. The policyholder argued that the defense was inadequate because the insurer had allegedly failed to conduct an independent and thorough investigation of his claims and coverage. Id. at 755-56, 982 P.2d at 113-14. The court disagreed, noting that the policyholder had cited no authority for this expansive view of bad faith liability. Id. The court further noted that the policyholder had failed to

allege any harm caused by the insurer's conduct. In the absence of such allegations, the bad faith claim properly was dismissed. Id.

Even if delay in notifying the policyholder of the lack of any contractual obligation – standing alone – could constitute a basis for bad faith, long-standing elements of a bad faith cause of action apply to limit the ability of claimants to bring “procedural bad faith” claims. The policyholder must allege that the delay was “frivolous and unfounded,” and that it caused harm. See, e.g., Rizzuti v. Basin Travel Serv. Of Othello, Inc., 125 Wn. App. 602, 620-21, 105 P.3d 1012, 1021-22 (2005); see also Shields v. Enter. Leasing Co., 139 Wn. App. 664, 675-76, 161 P.3d 1068, 1074 (2007). In the absence of such allegations, the policyholder's claim must be dismissed.

Here, RMS seeks to create a cause of action based solely on the alleged delay between the time the policyholder notified the insurer of the claim and the time that the insurer notified the policyholder that no contractual obligations were owed. RMS has provided no allegation of harm or prejudice caused by the insurer's actions. Rather, RMS is simply alleging that the insurer's alleged delay – standing alone – should allow it to present a bad faith cause of action to the jury.

Allowing such a cause of action effectively would create a strict liability standard for the insurer. Under that theory, any violation of the

procedural or timing requirements of the claims-handling regulations could be considered bad faith. Under RMS' theory, a policyholder would have an incentive to submit claims to any insurer – regardless of how frivolous its claims are – in the hope that the insurer failed to meet one of its procedural or statutory obligations. As long as the policyholder could claim that the insurer failed to meet a procedural obligation, the actual contractual obligations between the parties would be irrelevant. This Court should reject such an approach.

**II. IF THIS COURT DOES FIND A CAUSE OF ACTION, THERE IS NO REASON TO DEPART FROM TRADITIONAL WASHINGTON TORT LAW REGARDING A PLAINTIFF'S BURDEN OF PROVING DAMAGES.**

If this Court allows a bad faith cause of action to proceed even in the absence of any contractual duties owed to the insured, it should impose neither a presumption of harm nor coverage by estoppel as a remedy for such harm. This Court has applied a presumption of harm or coverage by estoppel only in the limited context of an insurer's bad faith failure to defend its policyholder or its bad faith misconduct in that defense, and has rejected extending them to other contexts. This Court should follow its prior precedent. Neither a presumption of harm nor coverage by estoppel should be imposed where, as here, an insured tenders a claim outside the scope of its liability policy. Where no coverage obligation is owed, a

policyholder must be required to prove actual harm to recover. To hold otherwise would so severely alter the insurance arrangement that it would harm insurance affordability and availability in Washington.

**A. The Limited Exception Allowing A Presumption Of Harm Should Not Be Extended To Situations Where An Insurer Owes No Contractual Duties.**

Just last year, this Court recognized well-settled Washington precedent that analyzes insurer bad faith claims by “applying the same principles as any other tort: duty, breach of that duty, and damages proximately caused by any breach of duty.” Mut. of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc., 161 Wn.2d 903, 916, 169 P.3d 1, 8 (quoting Smith, 150 Wn.2d at 485, 78 P.3d at 1277). As with any tort, “a showing of harm is an essential element” of an action for bad faith handling of an insurance claim. Butler, 118 Wn.2d at 389, 823 P.2d at 503; Kirk v. Mt. Airy Ins. Co., 134 Wn.2d 558, 562, 951 P.2d 1124, 1127 (1998). The burden of demonstrating harm typically lies with the tort plaintiff. See Coventry, 136 Wn.2d at 276, 961 P.2d at 395.

This Court has allowed only limited exceptions with respect to the plaintiff’s burden of proof. In Butler, this Court determined that in the context of an insurer’s bad faith breach of its duty to defend performed under a reservation of rights, the burden would be reversed. It held that if the policyholder meets its burden of demonstrating bad faith, it would

impose a rebuttable presumption of harm “requiring the insurer to prove its acts did not prejudice the insured.” Butler, 118 Wn.2d at 391-92, 823 P.2d at 504-05. In Butler, the policyholder alleged that the insurer acted in bad faith by conducting the defense in a manner that would enhance its position on the coverage issue.<sup>2</sup>

However, this Court has never reversed this burden and imposed a presumption of harm where the insurer had no contractual duty to defend, settle, or indemnify the policyholder. In Kirk, a certified question before this Court asked whether Butler’s rebuttable presumption of harm would apply if an insurer refused to defend in bad faith. Kirk, 134 Wn.2d at 560, 951 P.2d at 1125. This Court noted that the question required it “to assume the claim against the insured alleges facts giving rise to the insurer’s duty to defend, and the duty was breached [in bad faith].” Id. at 561, 951 P.2d at 1126-27. The presumption applied “because a bad faith breach of the duty to defend wrongfully deprives the insured of a valuable benefit of the insurance contract, and leaves the insured with the

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<sup>2</sup> In those unique circumstances, the Court found, the policyholder “should not have the almost impossible burden of proving that he or she is demonstrably worse off because of [the insurer’s actions]” in defending a claim. Id. at 390, 823 P.2d at 504 (quoting A. Windt, Insurance Claims and Disputes: Representation of Insurance Companies and Insureds § 2.09, at 40-41 (2d ed. 1988)). Indeed, “[t]he course cannot be rerun, no amount of evidence will prove what might have occurred if a different route had been taken.” Id. at 391, 823 P.2d at 504 (quoting Transamerica Ins. Group v. Chubb & Son, Inc., 16 Wn. App. 247, 252, 554 P.2d 1080, 1083 (1977)).

difficult problem of proving harm.” Id. at 563, 951 P.2d at 1127.<sup>3</sup> This Court has also imposed a presumption of harm where an insurer violated in bad faith its duty to settle a claim against its policyholder following an automobile accident. Besel v. Viking Ins. Co. of Wis., 146 Wn.2d 730, 733-35, 738; 49 P.3d 887, 889-90, 891 (2002).

In Coventry, this Court declined to extend the presumption of harm to the first-party context because there is no similar “heightened duty of good faith” as there is where the insurer controls the defense and resolution of a third-party claim against its policyholder. Coventry, 136 Wn.2d at 281, 961 P.2d at 938. In the third-party context, “the potential conflicts of interest between insurer and insured inherent in [a reservation of rights] defense mandate an even higher standard: an insurance company must fulfill an enhanced obligation to its insured as part of its duty of good faith.” Id. (quoting Tank v. State Farm Fire & Cas. Co., 105 Wn.2d 381, 387, 715 P.2d 1133, 1137 (1986)). Where the inherent conflicts of interest that arise in a defense situation do not exist, such as in first-party cases, imposing a rebuttable presumption of harm is unwarranted. See id.

Just last year, this Court unambiguously confirmed that the presumption of harm applies only in those cases in which an insurer’s bad

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<sup>3</sup> See also id. (“The rebuttable presumption of harm must be applied because an insured should not be required to prove what might have happened had the insurer not breached its duty to defend in bad faith.”).

faith conduct is coupled with a contractual duty to defend. See Paulson, 161 Wn.2d at 924, 169 P.3d at 13. In Paulson, an insurer agreed to defend its policyholder, a home builder, for construction defects, but reserved its right to disclaim certain aspects of the claim. Id. at 909, 169 P.3d at 5. The Court found that the insurer's defense was defective. Specifically, the insurer issued a subpoena to the arbitrator just before the start of the hearing, seeking all evidentiary documents, all correspondence between the arbitrator and the parties, and even the arbitrator's thought processes regarding witness credibility and his analysis of which work had been performed by subcontractors. Id. at 916, 169 P.3d at 8. It also sent two ex parte letters to the arbitrator explaining its coverage dispute with the policyholder and seeking information about the basis of any award. Id. at 916-17, 169 P.3d at 9. This Court held that the insurer's actions, displaying a great concern for its own monetary interest while showing little regard for its policyholder's financial risk, amounted to bad faith. Id. at 918, 169 P.3d at 9. Although this Court "reaffirm[ed] the Butler presumption of harm framework," id. at 922, 169 P.3d at 11, it carefully delineated its limits:

Finally, we emphasize that while we are not retreating from Butler, neither are we extending it. The presumption of harm has previously been applied where the insurer's bad faith was associated with its underlying defense of the insured. That limitation is unchanged by our decision

today. [The insurer's] bad faith conduct ... was intrinsically associated with its underlying defense of [the insured]. The conduct cannot reasonably be segregated from the defense.

Paulson, 161 Wn.2d at 924, 169 P.3d at 13 (citations omitted).

Where, as here, there is no contractual duty to defend, the potential conflicts of interest between insurer and policyholder in the conduct of the defense alluded to in such cases as Coventry, Tank, and Paulson do not arise. Where there is no defense, an insurer has no opportunity to affect the underlying claim to the policyholder's disadvantage and to its own advantage. Here, unlike in the cases imposing a rebuttable presumption of harm, the insurer's actions – whether performed in good faith or bad faith – could have no impact on the outcome of the underlying claim. The insurer correctly determined that the policy did not cover the underlying claim against the policyholder but allegedly failed to issue its denial for eight months. If the insurer had responded promptly, the result would be no different: the policyholder, not entitled to coverage, would be responsible for its own defense and any liabilities. No guesswork is required to determine how events might have played out differently in the underlying case because the insurer's alleged bad faith conduct could not have affected the outcome of the underlying claim. Thus, no presumption of harm is warranted here.

**B. Applying Estoppel And Measuring Damages As The Amount Of A Stipulated Judgment Where The Insured Is Not Entitled To Any Contractual Benefits Is Unfairly Punitive To The Insurer And Would Create A Windfall To The Policyholder.**

In the final certified question, in an ultimate attempt to stack the deck against insurers, the policyholder's assignee seeks to estop the insurer from litigating the measure of damages, notwithstanding the absence of any breach of the its insurance contract. This Court should reject such a fundamental distortion of the parties' insurance relationship.

This Court has imposed coverage by estoppel only in cases where the Court has concluded that an insurer's bad faith conduct inextricably was tied to the harm caused to the policyholder. See, e.g., Paulson, 161 Wn.2d at 924, 169 P.3d at 13; Butler, 118 Wn.2d at 391, 823 P.2d at 504. As the Court has stated, "coverage by estoppel is an appropriate remedy because the insurer contributes to the insured's loss by failing to fulfill its obligation in some way." Coventry, 136 Wn.2d at 284, 961 P.2d at 939. Here, even if the insurer could be liable for its allegedly negligent failure to investigate the claim promptly and thoroughly, that conduct did not lead to further indemnity losses by the policyholder. Accordingly, this Court should find that estoppel has no applicability in this case.

Moreover, estoppel is an equitable remedy. Toward that end, the principle should not be applied to confer a windfall to any party. See

Mendez v. Palm Harbor Homes, Inc., 111 Wn. App. 446, 460, 45 P.3d 594, 602 (2002) (“The goal of equity is to do substantial justice to the contracting parties.”). Here, the policyholder plainly is not entitled to indemnity (or even a defense) under the liability policy. Awarding the RMS the equivalent of full coverage or more, while completely estopping the insurer from presenting any evidence of the lack of actual harm from its conduct, would create an inappropriate, dramatic windfall based on what RMS agrees is a “procedural” violation. Quite simply, such an award would be inconsistent with the insurer’s alleged failing.<sup>1</sup>

Extracontractual awards are likely to have negative effects beyond those felt by individual insurers. Imposing awards outside the scope of insurance contracts would disrupt the actuarial assessment of risk insurers rely on to provide coverage. In the long run, the costs of such awards are borne by other insureds through increased premiums, see Garvey v. State Farm Fire & Cas. Co., 48 Cal. 3d 395, 408, 770 P.2d 704, 711 (1989), or by the market through decreased availability of coverage. Consequently,

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<sup>1</sup> This inequity is illustrated by reference to how Washington courts have treated the explicit contractual obligation of policyholders to notify insurers of claims. When a policyholder fails to give its insurer timely notice of a claim, Washington courts still require the insurers to provide coverage unless the insurer can demonstrate prejudice from the late notice. See, e.g., Key Tronic Corp. v. St. Paul Fire & Marine Ins. Co., 134 Wn. App. 303, 307, 139 P.3d 383, 385 (2006); Canron, Inc. v. Fed. Ins. Co., 82 Wn. App. 480, 485, 918 P.2d 937, 941 (1996). In contrast, here RMS seeks a lopsided rule. A policyholder would have no obligation to prove harm based on an insurer’s allegedly untimely failure to notify a policyholder of the absence of coverage.

the award of undeserved coverage because an insurer allegedly provided late notice of no coverage could have very substantial implications beyond this case.

### CONCLUSION

For all of the foregoing reasons, *amici* respectfully request that this Court hold that, under Washington law, an insured has no bad faith cause of action against a liability insurer that has no contractual duty to defend, settle, or indemnify the insured. If this Court allows such a cause of action, *amici* request this Court to require the insured to prove actual harm and that damages be measured according to whatever harm was proximately caused.

Respectfully submitted this 29th day of January, 2008,

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