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(Court of Appeals No. 56761-6-I)

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SUPREME COURT  
OF THE STATE OF WASHINGTON

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NCF FINANCIAL, INC.,  
a Washington corporation,

Plaintiff/Petitioner,

vs.

ST. PAUL FIRE & MARINE INSURANCE COMPANY,  
a Minnesota corporation,

Defendant/Respondent.

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**ANSWER TO PETITION FOR REVIEW**

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## I. IDENTITY OF RESPONDENT

Respondent St. Paul Fire & Marine Insurance Company (“SPF&M”) herein answers Northwest Computer Financial Inc.’s, (“NCF”) petition for review.

## II. RESPONSE TO NCF’S ISSUE PRESENTED FOR REVIEW

1. This Court should not grant review under RAP 13.4(b)(4) to consider whether the Court of Appeals erroneously decided that the “Disappearance-Inventory loss” exclusion in SPF&M’s property insurance contract bars coverage under the unique facts of this case for the following reasons:

- The decision is in an unpublished opinion that has no precedential value. *See* RCWA § 2.06.040.
- The purpose of the “Disappearance-Inventory loss” exclusion is to bar coverage for unexplained losses of property. The application of the exclusion is based solely on whether or not there is any physical evidence to show what happened to the missing property. It would defeat the mutual intentions of the contracting parties for the Court to find that the exclusion somehow does not bar coverage for unexplained losses of property merely because an additional insured makes a claim for coverage.<sup>1</sup> It is also

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<sup>1</sup> Assuming NCF has standing to make such an argument, since the Court of Appeals found that there are material issues of fact as to whether NCF is an additional insured. (Unpublished Opinion at p. 10).

unclear how such a ruling would advance the interests of the leasing industry, since it should be assumed that most lessors of property are already aware that some risks of loss, like unexplained losses of property, are not insurable risks.

- The Court of Appeals found that the “Disappearance-Inventory loss” exclusion is not ambiguous, as NCF did not argue otherwise. (Unpublished Opinion at p. 13.) Under established law, “a court may not modify an insurance contract if the policy language is clear and unambiguous.” (Unpublished Opinion at p. 11, citing to *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 947 P.2d 1173 (1998).) The Court of Appeals held, therefore, that because NCF admitted there is no physical evidence to show what, if anything, happened to the leased equipment, the exclusion bars recovery for the missing equipment that was not returned to NCF. (Unpublished Opinion at p. 13.) The public has no interest in this Court overturning well-established law regarding the application of unambiguous insurance contract language to undisputed facts.
- The “Disappearance-Inventory loss” exclusion does not contravene Washington public policy.<sup>2</sup> Under established

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<sup>2</sup> NCF asserts that there are “public policy ramifications” of the Court of Appeals decision. (Petition at p. 11).

law, a provision in an insurance contract does not violate public policy unless a statute prohibits it, a judicial decision condemns it, or it is contrary to the public morals. *See Mendoza v. Rivera-Chavez*, 140 Wn.2d 659, 663, 999 P.2d 29 (2000). There is no statute, judicial decision, or public morals issue dictating that a leasing company, like NCF, is somehow entitled to any property insurance coverage - let alone coverage for an unexplained loss of property. Thus, there are no public policy concerns implicated by the Court of Appeals' decision regarding the "Disappearance-Inventory loss" exclusion.

- The Court of Appeals found that NCF admitted the loss was discovered when taking inventory and that it does not know what happened to the missing equipment. The Court also rejected NCF's attempt to rely on speculation or argumentative assertions that unresolved factual issues remain. (Unpublished Opinion at p. 14-15.) NCF's argument, under the subheading "iii Theft coverage" is simply a rehashing of the same speculation and argumentative assertions that the Trial Court and Court of Appeals rejected.

### III. STATEMENT OF THE CASE

For purposes of this Answer only, SPF&M adopts and incorporates by reference the facts set forth in the Court of Appeals Unpublished Opinion of February 20, 2007.

### IV. ARGUMENT

This Court should not grant review pursuant to RAP 13(b)(4) because no issue of substantial public interest is presented. The decision to bar coverage for the unexplained loss of leased computer equipment is part of an unpublished opinion that has no precedential value. *See* RCWA § 2.06.040. As a result, NCF's trepidation regarding the possible effect of this decision on the entire lending industry is based on an implausible premise. This decision will not have an impact on anyone other than the parties in this lawsuit.

But even if that were not the case, the decision only involves the application of established Washington law to undisputed facts in a situation that does not involve competing public interests. The Court of Appeals appropriately determined that the "Disappearance – Inventory loss" exclusion would apply as written, as NCF never argued that the exclusion was ambiguous. The court also recognized that under long-standing Washington law, a court may not modify an insurance contract if the language is clear and unambiguous. (Unpublished Opinion at p. 11 citing to *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 947 P.2d 1173 (1998).) Applying this analysis, the Court of Appeals concluded that the

SPF&M policies exclude coverage for missing property when there is “no physical evidence to show what happened to the property.”

The Court of Appeals also observed that NCF had repeatedly conceded that there was no physical evidence to show what, if anything, happened to its missing leased equipment. (Unpublished Opinion at p. 13.) Accordingly, the Court of Appeals held that even if NCF is an additional insured, the unambiguous terms of the “Disappearance-Inventory loss” exclusion bars recovery for the missing equipment that was not returned to NCF. (Unpublished Opinion at p. 13.)

According to NCF, however, this Court should overturn the decision for the conclusory reason that the “implications for the lending industry are staggering.” NCF’s concern, however, is unfounded given that under the familiar principle of *stare decisis* only published decisions are of precedential value. In addition, there is no public policy basis for this Court to ignore well-established law regarding the application of unambiguous insurance contract language to undisputed facts to carve out an exception for lessors of property. To be sure, there is no case law, statute, or public moral issue dictating that any insurance coverage must be available for lessors, let alone lessors whose property is missing for unknown reasons.

Indeed, the implications of such a ruling would be problematic. If lessors were exempt from having insurance coverage barred for unexplained losses of property, there would be no incentive for a lessee who simply misplaced, or intentionally destroyed or gave away leased

property to be accountable for what happened to the missing property. Instead, the lessee could simply ask the company that leased the property to make an insurance claim. Under NCF's theory, while the policyholder's claim would be barred by the exclusion, the lessor's claim would not, based on NCF's position that the exclusion cannot apply to the additional insured/lessor, because that party does not have control over the property. Such a result-oriented approach does not account for the fact that a lack of evidence to show what happened to the missing property means that there is no way to establish whether the loss even involves a fortuitous risk of loss. Requiring some physical evidence to show what, if anything, happened to the missing property is essentially an important way to avoid insurance fraud. *See* RCWA Chapter 48.30A Insurance Fraud.

That, among other reasons, is why NCF's claim is not covered. There is simply no physical evidence to show what happened to the 1068 pieces of missing leased computer property Emerald failed to return to NCF. Absent any such evidence, SPF&M could not determine what happened, when it happened, where it happened, how it happened, whether it happened all at once or in 1068 separate events, or even whether any loss took place during an applicable policy period. (Unpublished Opinion at p. 13.) Emerald, the lessee, provided no physical evidence to show what happened to the missing property and neither did NCF. In the absence of an such evidence, NCF simply proposed that the exclusion was not meant to apply to it as an additional insured, and that

the loss should be deemed to have occurred when the property was not returned to NCF. (Unpublished Opinion at p. 14.)

For insurance coverage purposes, however, you have to look at the policy language to determine what is covered. There is no language in the policy even suggesting that the “Disappearance-Inventory loss” exclusion is only applicable to the named insured. The policy also does not provide coverage for the mere failure of an insured to return property to an additional insured. NCF’s self-serving position fails to account for the fact that the missing property may have been misplaced, intentionally thrown out, is still sitting intact somewhere, or was given away years before the date of return. Quite simply, NCF wants this Court to rewrite an unambiguous policy exclusion to provide some sort of a judicial exception for a select class of claimants (in this case lessors of property)<sup>3</sup> merely because one lessor (in this case NCF) apparently failed to account for the fact that the insurance policy its lessee obtained contained exclusions for certain uninsurable risks of loss. The plain language of the policy, however, demonstrates the mutual intentions of the contracting parties; that is, no coverage is afforded for unexplained losses of property when there is “no physical evidence to show what happened to the property” regardless of who makes the claim. (Unpublished Opinion, p. 14.)

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<sup>3</sup> Unfortunately, NCF fails to make clear whether NCF is advocating for an exception for lessors, or for lessors, lenders, and bankers.

Finally, to the extent that NCF's Petition repeats the same failed arguments that the Trial Court and Court of Appeals have already rejected, SPF&M adopts and incorporates by reference the analysis set forth in the Court of Appeals Unpublished Opinion of February 20, 2007, with respect to why those arguments have no merit.

DATED this 1st day of August, 2007.

BETTS, PATTERSON & MINES, P.S.

By   
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PROOF OF SERVICE

TO: Clerk of the Court of the Supreme Court

AND TO: Plaintiff/Appellant

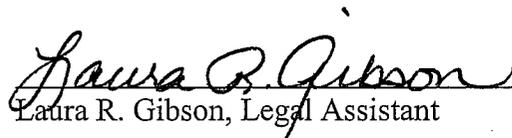
I certify that on the 1st day of August, 2007, I caused a true and correct copy of this *Answer to Petition for Review* and *Certificate of Service* to be filed with the Supreme Court and served via Washington Legal Messenger on the following:

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Dated this 1st day of August, 2007

  
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