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EXPEDIA, INC., a Washington Corporation; EXPEDIA, INC., a Delaware Corporation; HOTELS.COM, L.P., a Texas Limited Liability Partnership; HOTELS.COM, GP, LLC, a Texas Limited Liability Company; HOTWIRE, INC., a Delaware Corporation; TRAVELSCAPE, a Nevada Limited Liability Company,

Plaintiffs/Petitioners,

v.

STEADFAST INSURANCE COMPANY, a Delaware Corporation;
ZURICH AMERICAN INSURANCE COMPANY, a New York Corporation;
ROYAL & SUN ALLIANCE, a Foreign Corporation;
ARROWPOINT CAPITAL CORP., a Delaware Corporation;
ARROWOOD SURPLUS LINES INSURANCE COMPANY, a Delaware Corporation;
ARROWOOD INDEMNITY COMPANY, a Delaware Corporation,

Defendants/Respondents.

BRIEF OF *AMICUS CURIAE* ASSOCIATED GENERAL CONTRACTORS OF WASHINGTON, AVISTA CORPORATION, BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, MAINSTREET PROPERTY GROUP LLC, PACIFIC SEAFOOD GROUP, PORT OF SEATTLE, PUGET SOUND ENERGY, AND WEYERHAEUSER COMPANY
IN SUPPORT OF PETITION FOR REVIEW

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STATE OF WASHINGTON

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

Amici Curiae are a diverse coalition of Washington public entities, utilities, businesses, and trade associations: Associated General Contractors of Washington, Avista Corporation, Building Industry Association of Washington, MainStreet Property Group LLC, Pacific Seafood Group, Port of Seattle, Puget Sound Energy, and Weyerhaeuser Company. A detailed statement of the individual interests of each *amicus* is set forth in the accompanying Motion of Amici Curiae Associated General Contractors of Washington, Avista Corporation, Building Industry Association of Washington, MainStreet Property Group LLC, Pacific Seafood Group, Port of Seattle, Puget Sound Energy, and Weyerhaeuser Company for Leave to File Memorandum in Support of Petition for Review.

Together, *amici* represent the wide range of entities and organizations that obtain liability insurance policies in Washington. For many of these organizations, state law requires that liability insurance be maintained in connection with the services *amici* provide. Therefore, *amici* are directly impacted by any decision or policy change that has the potential to affect their relationships with their insurers, especially with respect to the duty to defend, one of the primary benefits offered by liability insurance. *Amici* are concerned that the rulings by the courts

below will harm those relationships and encourage those insurers to refuse to defend *amici* when they are faced with potential liability, in contravention of Washington law. *Amici* offer a unique perspective as a coalition of organizations whose diverse constituents and services may suffer the adverse effects of the lower court's decision.

II. INTRODUCTION AND STATEMENT OF THE CASE

Both the Washington legislature and this Court treat liability insurance as a matter of substantial public interest. The body of law interpreting insurers' duties under the policies they issue approaches those duties from a public policy favoring insurance and encouraging liability insurers, in particular, to defend their policyholders against potential liability. Decisions limiting the duty to defend—or encouraging insurers not to defend but rather to deny and delay, as the Court of Appeals did here—have a significant impact on all Washington policyholders

The duty to defend is one of the central promises of a liability insurance policy. It protects policyholders against the crippling costs that litigation can impose. For that reason, it arises at the time a potentially covered complaint is filed and remains in effect until all possibility of coverage has been extinguished. Factual disputes regarding coverage do not defeat the duty to defend; to the contrary, they confirm its existence. The Court of Appeals, however, like the Superior Court below, has

excused Zurich from defending Expedia while it pursues discovery into its many claimed defenses to coverage, including defenses that overlap with issues in the underlying lawsuits. In so doing, it has acted contrary to decades of this Court's jurisprudence.

The order of the Court of Appeals will embolden insurers to disregard their defense obligations, creating substantial risk to all Washington policyholders. Denying defense and delaying adjudication of motions like Expedia's will force policyholders to direct their resources away from their corporate, charitable, or other designated uses and toward expensive litigation, both in the underlying action and in a coverage action against the insurer. The policyholder will be required to engage in prolonged discovery that this Court has consistently held is not relevant to the issue of whether the duty to defend has arisen. And in situations where that discovery overlaps with or potentially is prejudicial to the underlying litigation—as is the case for Expedia and in nearly any other scenario where questions of policyholder negligence or policyholder knowledge are at issue—the policyholder will be forced to risk harming its interests in the underlying lawsuit to pursue the coverage to which it is entitled.

This Court should accept review and make clear that these results are not permitted under Washington law. This Court should also take this opportunity to formally adopt the policies and procedures articulated by the California Court of Appeals in *Haskel, Inc. v. Superior Court*, 33 Cal. App. 4th 963, 39 Cal. Rptr. 2d 520 (1995).

The facts of this case illustrate the burdens that policyholders can wrongly be forced to bear if the duty to defend is wrongly denied.¹ Expedia, an online travel company, facilitates customers' hotel reservations through its merchant model. Expedia negotiates with hotels for discounted room rates, which consumers can reserve through Expedia's website. When the reservation is made, Expedia charges the consumer a total price that includes: (1) the rate charged by the hotel for occupancy of the room (the rent); (2) an amount retained by Expedia for the online services it provides to the customer (the facilitation fee); and (3) an amount for "tax recovery charges and service fees," which consists of an amount equal to any applicable local occupancy tax on the rent and an additional fee for Expedia's services.

¹ *Amici* adopt and incorporate the statement of facts as set forth in Plaintiffs/Petitioners' Motion for Discretionary Review and recites herein only those facts relevant to this amicus brief. These facts are taken from the Appendix to Plaintiffs/Petitioners' Motion for Discretionary Review filed April 9, 2013.

In the underlying litigation, municipalities claim to have suffered damages from an alleged shortfall in revenue received for hotel stays booked through Expedia, whatever the reason for the shortfall. Expedia promptly tendered the first such complaint to its liability insurers, who responded by denying defense and indemnity coverage. Over the next several years, Expedia was sued in dozens of similar lawsuits brought by other municipalities across the country.

In November 2010, Expedia tendered fifty-six additional lawsuits to its liability insurers, who again denied both defense and indemnity coverage.² Expedia also brought this coverage action in King County Superior Court. In January 2012, the Superior Court denied Zurich's motion for summary judgment as to the duty to indemnify and duty to defend, finding that Zurich had not met its burden to prove that there was no possibility for coverage under two of its policies.

Expedia then brought a motion for summary judgment that Zurich had a duty to defend Expedia under those two policies. Expedia argued that the Superior Court's prior ruling that the allegations of the complaints gave rise to a possibility of coverage under the policies, established Zurich's duty as a matter of law. Zurich moved for a CR 56(f)

² A third tender, in September 2011, of lawsuits filed between November 2010 and May 2011, produced the same result.

continuance, arguing that certain discovery into, among other things, Expedia's knowledge and intent was necessary to create issues of fact as to coverage. Expedia responded that questions of fact extrinsic to the complaint could only confirm, and not defeat, the existence of the duty to defend. Nonetheless, the Superior Court granted Zurich's request for continuance.

Much of Zurich's requested discovery overlapped with matters at issue in the underlying cases. Following Washington law that protects policyholders from such overlapping and potentially prejudicial discovery, Expedia completed as much discovery as it believed it could without exposing it to potential prejudice in the underlying cases. It then asked the Superior Court to resolve its motion for summary judgment as to the duty to defend and to protect it from overlapping and potentially prejudicial discovery. The Superior Court denied that motion, refusing to even consider Expedia's duty to defend motion. The Court of Appeals denied discretionary review.

III. ISSUE PRESENTED FOR REVIEW

May a liability insurer delay summary adjudication of the duty to defend issue until discovery has been completed on disputed coverage questions, particularly when the discovery pursued overlaps with or has the potential to prejudice the policyholder in the underlying litigation?

IV. ARGUMENT

A. Overview of the Law Regarding Liability Insurers' Duty to Defend.

This Court has been called upon on several occasions over the past three decades to define and clarify the scope of a liability insurer's duty to defend and how that duty differs from the separate obligation to indemnify the policyholder. *See Nat'l Sur. Co. v. Immunex Corp.*, — P.3d —, 2013 WL 865459 (Wn. 2013); *Am. Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 229 P.3d 693 (2010); *Mut. of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc.*, 161 Wn.2d 903, 169 P.3d 1 (2007); *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 164 P.3d 454 (2007); *Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wn.2d 751, 58 P.3d 276 (2002); *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 951 P.2d 1124 (1998); *Safeco Ins. Co. v. Butler*, 118 Wn.2d 283, 823 P.2d 499 (1992); *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 715 P.2d 1133 (1986). These decades of jurisprudence confirm the following key principles.

First, the duty to defend is based on the *potential* for coverage. It arises when “a complaint against the insured, construed liberally, alleges facts which could, if proven, impose liability upon the insured within the policy's coverage.” *Woo*, 161 Wn.2d at 52-53 (quoting *VanPort Homes*, 147 Wn.2d at 760). As long as coverage is possible, the duty to defend

exists. The duty to indemnify, in contrast, hinges on actual liability to the underlying claimant and actual coverage under the policies. *Id.* at 53. The duty to indemnify does not arise, if at all, until the policyholder is found liable. As a result, the duty to defend often arises in situations where the duty to indemnify ultimately is found not to attach.

Second, the duty to defend arises at the moment a potentially covered claim is filed. *Id.* at 52; *see also Griffin v. Allstate Ins. Co.*, 108 Wn. App. 133, 138, 29 P.3d 777 (2001). From the time it arises, it is not extinguished until the insurer can prove that there is no possibility for coverage. The insurer “must defend until it is clear that the claim is not covered.” *Am. Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 405, 229 P.3d 693 (2010).

Third, whether the duty to defend exists is to be determined exclusively from the eight corners of the relevant policy and the relevant underlying complaint. *Woo*, 161 Wn.2d at 53-54; *VanPort Homes*, 147 Wn.2d at 760; *see also Or. Mut. Ins. Co. v. Hartford Fire Ins. Co.*, 170 Wn. App. 666, 675, 285 P.3d 892 (2012) (“[T]he duty to defend must be determined from the complaint.”). While there are two exceptions to this rule that allow a policyholder to present information beyond the policy and complaint to trigger the duty, an “insurer *may not* rely on facts

extrinsic to the complaint to deny the duty to defend.” *Woo*, 161 Wn.2d at 54 (emphasis added).

Fourth, any ambiguities or questions of fact or law as to the existence of coverage must be construed “liberally in favor of ‘triggering the insurer’s duty to defend.’” *Id.* at 53 (quoting *VanPort Homes*, 147 Wn.2d at 760). For example, if the insurer asserts a late notice defense, the insurer must continue to defend its policyholder until all questions of fact surrounding late notice, and any accompanying actual and substantial prejudice to the insurer, are resolved. *Immunex*, — P.3d —, 2013 WL 865459, at *9-10 (“[T]he insurer must show that late notice actually and substantially prejudiced its interests before performance of its duties will be excused.”); *Time Oil Co. v. Cigna Prop. & Cas. Ins. Co.*, 743 F. Supp. 1400, 1415-16 (W.D. Wa. 1990).³ If there is “any reasonable interpretation of the facts or the law that could result in coverage, the insurer must defend.” *Am. Best*, 168 Wn.2d at 405.

³ *Time Oil*, which applied Washington law, illustrates the proper sequencing for courts to follow when a late notice defense is asserted. One of Time Oil’s insurers asserted a late notice defense that could not be resolved at the summary judgment stage due to factual disputes relating to whether the insurer suffered actual and substantial prejudice. 743 F. Supp. at 1416. Notwithstanding that unresolved defense, the court found that Time Oil “has established the existence of a duty [to defend]” because the allegations of the underlying complaint raised a claim potentially covered by the policies and thus granted Time Oil’s motion for summary judgment as to the duty to defend. *Id.* at 1420, 1422.

Fifth, the duty to defend is one of the main benefits of the policy and must be provided promptly. Delay in providing policyholders with a defense deprives them of that benefit. For that reason, this Court repeatedly has ruled that “insurers may not desert policyholders and allow them to incur substantial legal costs while waiting for an indemnity determination.” *Id.* (quoting *VanPort Homes*, 147 Wn.2d at 761). If an insurer initially refuses to defend and forces its policyholder to pursue litigation, the insurer cannot delay adjudication of the duty to defend. *See Haskell*, 33 Cal. App. 4th at 977 (insurers may not “delay an adjudication of their defense obligation until they develop sufficient evidence to retroactively justify their refusal to provide that defense”). The insurer also may not engage in discovery that is prejudicial to its policyholder’s interests in the underlying litigation in an attempt to avoid its defense obligations. *Dan Paulson*, 161 Wn.2d at 918 (an insurer “acts in bad faith if it pursues a declaratory judgment that it has no duty to defend and that ‘action might prejudice its insured’s tort defense’” (quoting *Thomas V. Harris*, *Washington Insurance Law*, § 14.2 at 14-4 (2d ed. 2006))).

B. The Court of Appeals, Like the Superior Court Before It, Failed to Correctly Apply the Law Governing the Duty to Defend as Articulated by This Court.

The Court of Appeals erred in two related ways. First, it created an exception to the longstanding principles governing the duty to defend

in circumstances where an insurer claims there has been a late tender. This exception is contrary to Washington law and unsupported by the facts of this case. Moreover, it would give insurers license to use any alleged delay in tender—a defense commonly raised by insurers—as a shield to excuse themselves from providing defense coverage until a policyholder sues and fully litigates the issue in a separate coverage action, all the while funding its own defense of the underlying lawsuit. Second, in focusing on the details of the protection against overlapping and potentially prejudicial discovery, the Court of Appeals failed to acknowledge that mandating *any* discovery prior to adjudication of the duty to defend is contrary to Washington law.

1. **An Insurer May Not Avoid Its Defense Obligation, or the Adjudication of the Duty to Defend, Based on Disputed Facts Related to a Late Notice Defense.**

The Court of Appeals gave lip service to the correct principles governing the duty to defend. It recognized that the duty is broad, arises when a complaint is first filed, and is to be “resolved on the allegations in the underlying complaint and the terms of the insurance policy.” Order at A.5. It also recognized that information outside the policy and the complaint may only be used in the favor of the insured. A.5-6.

Yet, the Court of Appeals found that these principles ceased to apply under the “unique circumstances” of Expedia’s case, in particular

“Expedia’s long-delayed tender.” A.6. This holding is wrong.

Washington law is clear: “The insurer *may not rely* on facts extrinsic to the complaint to deny the duty to defend—it may do so *only* to trigger the duty.” *Woo*, 161 Wn.2d at 54 (emphasis added). No previous decision in Washington had ever held that an insurer must be allowed to develop evidence related to late notice (or any other defense the insurer chooses to assert) before a policyholder’s motion for summary judgment that the duty to defend is triggered may be ruled upon.

Relying on a “late tender” defense to delay adjudication of Expedia’s summary judgment motion is particularly inappropriate given the heavy burden Washington law places on an insurer seeking to benefit from that defense. As the very case cited by the Court of Appeals makes clear, when there has been a late tender, “the insurer must demonstrate actual prejudice before it will be relieved from its duties to its insured.” *Mut. of Enumclaw Ins. Co. v. USF Ins. Co.*, 137 Wn. App. 352, 360-61, 153 P.3d 877 (2007).⁴ The “duty to defend remains unless [the insurer] proves actual and substantial prejudice.” *Id.* Contrary to the holding in *USF*, the Court of Appeals excused Zurich from its duty to defend while it gathers evidence necessary to attempt to meet its burden to prove

⁴ Neither *USF* nor any other Washington case of which *amici* are aware delayed adjudication of a duty to defend motion to permit the insurer to uncover extrinsic evidence in support of its defenses.

prejudice and other evidence that it will attempt to use to retroactively justify its wrongful refusal to defend Expedia.

The Court of Appeals was also wrong to describe the late notice defense as a “unique” circumstance. Notice provisions are common features of liability policies and thus, in *amici*’s experience, late notice is one of the most commonly asserted defenses by insurers.

2. Delaying Adjudication of Whether the Duty to Defend Has Arisen to Permit an Insurer to Conduct Discovery Violates Longstanding Duty to Defend Principles.

The Court of Appeals determined that discovery related to prejudice from late notice “can be appropriate to the duty defend.” A.6. This observation is itself obvious error because an insurer’s contractual late notice defense cannot negate the triggering of the duty to defend, which as this Court has repeatedly recognized, including most recently in *Immunex*, arises the moment an insured is sued. This rule was also followed by the California Court of Appeals in *Haskel*. Insurers “have a duty to provide a defense to [the policyholder] upon tender of those claims unless and until they produced in court *undisputed* extrinsic evidence which *conclusively* establishes that there is no potential for coverage.” 33 Cal. App. 4th at 976-77. If, at the time the policyholder moves to establish the duty to defend, the insurer lacks such evidence, the insurer cannot oppose, or delay, “an immediate judicial recognition of the fact that a

defense obligation *then* existed.” *Id.* Thus, while discovery into whether tender was, in fact, late and whether Zurich suffered actual and substantial prejudice may ultimately provide Zurich with sufficient evidence to *extinguish* Zurich’s coverage obligations (both defense and indemnity) prospectively, such discovery may not be used to avoid Zurich’s defense obligation while the issue remains unresolved.

California and Washington law are consistent with regard to the duty to defend principles underlying the *Haskel* decision.⁵ Thus, the result in *Haskel*—adjudicate the duty to defend first, then deal with discovery, with no overlapping discovery allowed while the underlying action is ongoing—applies with full force in Washington as well. The sequencing described in *Haskel* and followed in Washington provides clear guidance for policyholders and insurers alike, facilitating the orderly administration of coverage cases and providing all parties with clarity that the duty to defend must be decided first. The courts below committed obvious, or at least probable, error by failing to adhere to this sequence.

⁵ The only difference is that Washington law is even more restrictive than California as to what evidence an insurer may use to defeat a showing that the duty to defend was triggered by the filing of an underlying lawsuit. Unlike Washington law, California permits an insurer to rely on facts extrinsic to the complaint to defeat a defense duty. *Id.* at 975. However, even in California, the insurer must defend until those facts are developed, and may not deny the duty to defend or delay adjudication of the duty to defend in order to take discovery to develop those facts. *Id.* at 976-77.

3. **The “Alternatives” Described by the Courts Below Do Not Cure the Harm Resulting From Delayed Adjudication of the Duty to Defend.**

The Court of Appeals also declined review because it believed that Expedia had alternatives to a complete stay of the coverage action that it had not adequately explored. A.6-7. However, in urging the parties to “try again to define what discovery should be allowed in this pending litigation,” A.7-8, the Court of Appeals ignored the rule in *Haskel*, which is echoed in the holdings of *Woo* and *VanPort* barring the use of extrinsic evidence to deny a defense obligation, that *no* discovery should be allowed to delay a summary adjudication as to whether the duty to defend has arisen. *See also, e.g., SmartReply, Inc. v. Hartford Cas. Ins. Co.*, No. 10-1606, 2011 WL 338797, at *2 (W.D. Wa. Feb. 3, 2011) (noting that case law in Washington and California “clearly holds that extrinsic evidence is not discoverable to defeat [policyholders’] summary judgment motions in ‘duty to defend’ cases”).

The Court of Appeals ignored the clear import of the Superior Court’s order. The Superior Court refused to consider Expedia’s summary judgment motion until further discovery had been completed. That ruling is not only probable, but obvious, error. The error certainly was compounded by the fact that much of the discovery at issue overlapped with the underlying litigation, but even had that not been the case, refusing

to consider Expedia's summary judgment motion was improper under Washington law. By ordering the parties to go back to the Superior Court to determine what additional discovery must be done before any ruling on whether the duty to defend has arisen, the Court of Appeals denied Expedia the benefits of its policies.

C. **The Ruling of the Court of Appeals Has a Significant Adverse Effect on All Washington Policyholders.**

Public entities, utilities, businesses, and trade associations such as *amici* obtain liability insurance to protect themselves both against the costs of ultimate liability *and* the sometimes prohibitive costs of litigation.

"The duty to defend is one of the main benefits of the insurance contract." *VanPort Homes*, 147 Wn.2d at 760 (citing *Butler*, 118 Wn.2d at 392). It protects the insured from the outset of a lawsuit, both when the claims asserted against the insured have merit and when they do not. When an insurer refuses its obligation to defend, it leaves the policyholder to bear the costs of the underlying lawsuit and the expense of separate litigation to force the insurer to provide the coverage it agreed to in the policy.

For this reason, the Washington Legislature and Washington Supreme Court have put in place rules requiring insurers to act promptly and to defend where there is any doubt as to whether coverage exists. Insurers must respond within thirty days after a policyholder tenders a

claim. WAC 284-30-370. The determination of whether the duty to defend is triggered is based on the complaint and policy—not extrinsic discovery. Insurers must give policyholders the benefit of the doubt and defend for so long as there is any possibility that coverage might exist. *Woo*, 161 Wn.2d at 53. Indeed, it is bad faith for an insurer to rely on an equivocal interpretation of the case law, or the underlying facts, in its favor to deny coverage. *Am. Best*, 168 Wn.2d at 413; *see also* RCW 48.30.015. Washington courts have encouraged insurers to defend under a reservation of rights if there is any uncertainty as to coverage, so that the insurer may preserve all its defenses to coverage should it ultimately be able to prove them but the policyholder will receive the benefit of the promised defense so long as the situation remains in doubt.

By allowing Zurich to delay adjudication of the duty to defend until discovery beyond the complaints and policies—including potentially prejudicial discovery—is complete, the Court of Appeals upset these carefully crafted rules and policies and encourages insurers to refuse to defend and force policyholders to chase coverage through costly litigation. Insurers who assert late notice as a defense to coverage now may be able to avoid providing a defense based on the mere possibility that they might develop evidence of prejudice.

Amici and their various constituents face litigation arising out of their services and operations. They maintain liability insurance to ensure that the costs of that litigation do not prevent *amici* and their constituents from devoting their resources to the services they are organized to perform: overseeing commerce entering Washington state; providing gas and electricity to millions of Washington citizens; building homes; improving infrastructure; harvesting timber; gathering food; and performing services within the community. If their insurers wrongly refuse to provide a defense, as Zurich has done here, these entities will be forced to divert resources away from their intended purposes to shoulder the burden of defending the underlying litigation. Indeed, with respect to *amici* like Avista and Puget Sound Energy, the costs of funding litigation when insurers refuse to defend ultimately will be borne by Washington residents through rate-making or other procedures. Lack of a defense will necessarily affect a policyholder's case and settlement strategy in the underlying litigation. These problems are compounded if these entities are then forced to bring a separate lawsuit to establish their right to a defense and are denied the right a prompt determination that the right exists by costly—and potentially prejudicial—discovery into any number of defenses the insurer might assert. The promised security of the duty to defend is meaningless if an insurer is allowed to convert a prompt defense

obligation into a delayed reimbursement obligation by refusing to provide a defense for so long as disputed issues as to coverage exist, as the Superior Court and Court of Appeals have permitted Zurich to do here.

The harm resulting from the orders of the courts below is felt by large and small policyholders alike. The Superior Court observed that—presumably because Expedia is a large corporation—Expedia had “adequate funds” to support the underlying litigation and, therefore, that Expedia was not entitled to a prompt determination of the duty to defend. Washington law does not treat policyholders with “adequate funds” different from those without. As this Court has recognized, insurers issue the same form policies to both large and small insureds and rulings under those policies “will bind policyholders throughout the state regardless of the size of their business.” *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 883, 784 P.2d 507 (1990). Courts should not require policyholders to present evidence of indigence before they are afforded the rights provided to them by their insurance policies.⁶ The duty to defend does not exist only for those policyholders who will face certain

⁶ Indeed, this would lead to an absurd procedure where the policyholder would need to demonstrate some unspecified level of financial duress in order to have its duty to defend motion heard. This is contrary to Washington law and would wreak havoc on the proper sequencing and orderly administration of insurance coverage cases.

bankruptcy from the litigation costs they face—it exists equally and under equal terms for all policyholders in this state.

Policyholders should be given certainty that when they face litigation that their insurer refuses to defend, a prompt adjudication of the insurer’s duty without any extrinsic and costly discovery will be available to them in a coverage lawsuit. This is what Washington law requires and this is the only way to ensure that organizations like *amici* have adequate resources to devote to their intended functions and purposes (an even more daunting task in this economic climate). This Court should correct the errors made by the Superior Court and the Court of Appeals and ensure that the duty to defend retains its unique function under Washington law.

V. CONCLUSION

This Court should grant Plaintiffs/Petitioners’ Motion for Discretionary Review so as to protect Washington’s longstanding duty to defend principles and make clear that insurers may not avoid their obligations to defend while coverage disputes are ongoing.

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DATED this 10th day of April, 2013.

Respectfully submitted,

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DECLARATION OF SERVICE

I, Jacqueline Lucien, declare under penalty of perjury that I am over the age of 18 and competent to testify and that the parties listed below were served in the manner listed below:

On April 10, 2013, I caused a copy of (1) Motion of *Amici Curiae* Associated General Contractors of Washington, Avista Corporation, Building Industry Association of Washington, Mainstreet Property Group LLC, Pacific Seafood Group, Port of Seattle, Puget Sound Energy, and Weyerhaeuser Co. for Leave to File Memorandum in Support of Petition for Review; (2) Brief of *Amici Curiae* Associated General Contractors of Washington, Avista Corporation, Building Industry Association of Washington, Mainstreet Property Group LLC, Pacific Seafood Group, Port of Seattle, Puget Sound Energy, and Weyerhaeuser Co. for Leave to File Memorandum in Support of Petition for Review; and (3) this Declaration of Service to be delivered on this date via Legal Messenger to:

Michael Hooks
Matthew Adams
FORSBERG UMLAUF, P.S.
901 Fifth Avenue, Suite 1400
Seattle, WA 98164-2047

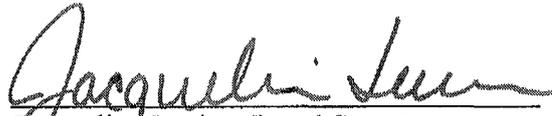
Mark S. Parris
Paul F. Rugani
ORRICK HERRINGTON & SUTCLIFFE LLP
701 Fifth Avenue, Suite 5600
Seattle, WA 98104-7097

On April 10, 2013, I further served via FedEx copies of the above-referenced documents to:

J. Randy Evans
Joanne L. Zimolzak
McKENNA LONG & ALDRIDGE LLP
1900 K Street NW
Washington, D.C. 20006

I hereby declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 10th day of April, 2013, at Seattle, Washington.


Jacqueline Lucien, Legal Secretary
Gordon Tilden Thomas & Cordell LLP

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Wednesday, April 10, 2013 2:32 PM
To: 'Jaci Lucien'
Subject: RE: Expedia, Inc., et al v. Steadfast Insurance Company, et al.; Washington Supreme Court Cause No. Unassigned

Rec'd 4-10-13

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Jaci Lucien [<mailto:jlucien@gordontilden.com>]
Sent: Wednesday, April 10, 2013 2:27 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: Expedia, Inc., et al v. Steadfast Insurance Company, et al.; Washington Supreme Court Cause No. Unassigned

Dear Clerk:

Attached for filing is a Motion of *Amici Curiae* Associated General Contractors of Washington, Avista Corporation, Building Industry Association of Washington, MainStreet Property Group LLC, Pacific Seafood Group, Port of Seattle, Puget Sound Energy, and Weyerhaeuser Company for Leave to File Memorandum in Support of Petition for Review; and Brief of *Amicus Curiae* Associated General Contractors of Washington, Avista Corporation, Building Industry Association of Washington, MainStreet Property Group LLC, Pacific Seafood Group, Port of Seattle, Puget Sound Energy, and Weyerhaeuser Company, in Expedia, Inc., et al. v. Steadfast Insurance Company, et al.; No. Unassigned.

This email is being sent on behalf of Franklin D. Cordell, WSBA #26392
206-467-6477
fcordell@gordontilden.com

GORDON TILDEN THOMAS & CORDELL LLP

Jacqueline Lucien
Legal Secretary to
Franklin D. Cordell
Mark Wilner
David M. Simmonds

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