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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON  
DEPARTMENT OF TRANSPORTATION,

*Respondent,*

v.

JAMES RIVER INSURANCE COMPANY,

*Appellant.*

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
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**BRIEF OF *AMICI CURIAE* AMERICAN INSURANCE  
ASSOCIATION, COMPLEX INSURANCE CLAIMS LITIGATION  
ASSOCIATION, NATIONAL UNION FIRE INSURANCE  
COMPANY OF PITTSBURGH, PA., AND AMERICAN HOME  
ASSURANCE COMPANY IN SUPPORT OF APPELLANT**

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## INTEREST OF THE AMICI CURIAE

This brief is presented by the American Insurance Association (“AIA”), the Complex Insurance Claims Litigation Association (“CICLA”), National Union Fire Insurance Company of Pittsburgh, Pa. (“National Union”) and American Home Assurance Company (“American Home”) (jointly, the “*amici*”).<sup>1</sup> AIA and CICLA are leading trade associations of major property and casualty insurers. National Union and American Home provide casualty insurance coverage for varying risks on a global basis, including significant interests in Washington.

Together, *amici* write a substantial amount of insurance in Washington and nationwide, and have entered into insurance contracts containing provisions similar to those at issue in this case. *Amici* seek to assist courts in understanding and resolving important insurance coverage issues, and have participated in numerous cases throughout the country, including cases before this Court.<sup>2</sup> *Amici* are vitally interested in the

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<sup>1</sup> This brief is submitted by and on behalf of AIA and CICLA, which are incorporated associations of major insurance companies. The brief is also submitted by and on behalf of National Union and American Home.

<sup>2</sup> *Amici* participant CICLA, for example, has participated as *amicus curiae* before this Court numerous times. See, e.g., *St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 196 P.3d 664 (2008) (en banc); *Quadrant Corp. v. Am. States Ins. Co.*, 151 Wn.2d 1031, 94 P.3d 960 (2004); *Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 998 P.2d 856 (2000); *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 15 P.3d 115 (2001); *Am. Nat’l Fire Ins. Co. v. B & L*

interpretation and enforcement of clearly-worded policy provisions establishing arbitration as the mandatory mechanism for resolution of coverage disputes, and believe that the vindication of such provisions, consistent with the mutual intent of the contracting parties, is clearly in the public interest.

### **STATEMENT OF THE CASE**

The *amici* adopt, and incorporate by reference herein, the Assignment of Error, Issues Pertaining to Assignment of Error and Statement of the Case sections of the Brief of Appellant James River Insurance Co. (“Appellant’s Br.”) dated October 28, 2011. *See* Appellant’s Br. at 2-7.

### **ARGUMENT**

#### **I. SETTLED PRINCIPLES OF WASHINGTON LAW DICTATE THE ENFORCEMENT OF INSURANCE POLICIES IN ACCORDANCE WITH THE PLAIN LANGUAGE OF THEIR PROVISIONS AND THE MUTUAL INTENT OF THE CONTRACTING PARTIES**

Appellant issued two liability insurance policies to Scarsella Brothers, Inc. (“Scarsella”) – one primary and one excess – for the period April 4, 2008 to April 4, 2011, in connection with a highway construction

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*Trucking & Constr. Co.*, 134 Wn.2d 413, 951 P.2d 250 (1998); *Kitsap Cnty. v. Allstate Ins. Co.*, 136 Wn.2d 567, 964 P.2d 1173 (1998); *Hillhaven Props., Ltd. v. Sellen Constr. Co.*, 133 Wn.2d 751, 948 P.2d 796 (1997).

project Scarsella agreed to perform for respondent the State of Washington Department of Transportation (“WSDOT”). Per the terms of the agreement between Scarsella and WSDOT, WSDOT was designated as an Insured under Appellant’s policies for certain liabilities that might arise in the course of work on the highway project. *See generally* Appellant’s Br. at 3.

With respect to dispute resolution, each of the policies at issue incorporated the following provision:

#### **BINDING ARBITRATION**

Should we and the insured disagree as to the rights and obligations owed by us under the policy, including the effect of any applicable statutes or common law upon the contractual obligation otherwise owed, either party may make a written demand that the dispute be subjected to binding arbitration.

When such a request is made, The American Arbitration Association shall be used, with each party selecting an arbitrator from the list of qualified arbitrators for insurance coverage disputes provided by that Association. The two chosen arbitrators shall select a third arbitrator from the same list, if they cannot agree to a selection, the American Arbitration Association shall make the selection for them. Each party shall bear the costs of its arbitrator and shall share equally the costs of the third arbitrator and of the arbitration process. A decision agreed to by two of the arbitrators will be binding.

In the event you prevail in the arbitration and we promptly offer to you costs and reasonable attorney fees incurred in connection therewith, in addition to the disputed contract benefit, you shall have no right to sue us for breach of

implied covenants or unreasonable withholding of contract benefits.

To the extent that we prevail in the arbitration, the arbitrators may award us any expenses and/or damages incurred or paid under a reservation of rights in excess of our contract obligations as determined by the arbitrators.

*Id.* at 4-5, and record citations therein.

The policies' arbitration provisions are clear and unambiguous; neither the parties to this proceeding nor the trial court appear to have suggested otherwise. Accordingly, under long-settled principles of contract construction reflected in this Court's decisions, the policies in general and the arbitration provisions in particular are presumptively enforceable in accordance with their plain language as a manifestation of the mutual intent of the contracting parties.

**A. Contracts, Including Insurance Policies, Must Be Interpreted And Enforced In Accordance With Their Unambiguous Terms**

This Court's precedents articulate clear principles regarding the interpretation of contracts that *amici* submit should govern the resolution of this action. Thus, Washington courts are instructed to "construe insurance policies as contracts." *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wn.2d 165, 171, 110 P.3d 733 (2005), *citing Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 665, 15 P.3d 115 (2001); *see also Findlay v. United Pac. Ins. Co.*, 129 Wn.2d 368, 378, 917 P.2d 116

(1996) (“[I]nsurance policies are to be construed as contracts.” (Citation omitted.)).

We consider the policy as a whole, and give it a ““fair, reasonable and sensible construction as would be given to the contract by the average person purchasing insurance.”” *Weyerhaeuser*, [142 Wn.2d] at 666 (quoting *Am. Nat’l Fire Ins. Co. v. B & L Trucking & Constr. Co.*, 134 Wn.2d 413, 427-28, 951 P.2d 250 (1998) (quoting *Key Tronic Corp. v. Aetna (CIGNA) Fire Underwriters Ins. Co.*, 124 Wn.2d 618, 627, 881 P.2d 201 (1994))). *Most importantly, if the policy language is clear and unambiguous, we must enforce it as written; we may not modify it or create ambiguity where none exists. See id.*

*Quadrant Corp.*, 154 Wn.2d at 171 (emphasis added).

Here, the provisions incorporated into the policies mandating binding arbitration are apparent on the face of the contracts to which Appellant and Scarsella agreed. Without question, the mutual intent of the contracting parties was that arbitration would be the means by which any disputes concerning their respective rights and obligations under the policies would be resolved. This Court’s objective, indeed its mandate, is “to give effect to the apparent clear intention of the parties.” *Rones v. Safeco Ins. Co. of Am.*, 119 Wn.2d 650, 654, 835 P.2d 1036 (1992), quoting *Eurick v. Pemco Ins. Co.*, 108 Wn.2d 338, 341, 738 P.2d 251 (1987).

**B. Washington Law And Public Policy Strongly Favor The Enforcement Of Contractual Arbitration Provisions**

The settled rules of contract construction dictating that insurance policies are to be enforced in accordance with the plain language of their provisions and the mutual intent of the contracting parties are due especially compelling force where the matter in question concerns arbitration, in light of this State's well-articulated strong public policy favoring arbitration as a preferred mechanism for resolving disputes.

As stated by this Court in *Boyd v. Davis*, 127 Wn.2d 256, 897 P.2d 1239 (1995), "[e]ncouraging parties voluntarily to submit their disputes to arbitration is an increasingly important objective in our ever more litigious society. . . . Arbitration is attractive because it is a more expeditious and final alternative to litigation." *Id.* at 262. Consistent with this express recognition of the positive attributes characterizing arbitration as an alternative dispute resolution medium, "[t]here is a strong public policy in Washington state favoring arbitration of disputes." *Perez v. Mid-Century Ins. Co.*, 85 Wn. App. 760, 765, 934 P.2d 731 (1997) (citation omitted); *see also Munsey v. Walla Walla College*, 80 Wn. App. 92, 94-95, 906 P.2d 988 (1995) ("We begin our analysis by noting the strong public policy in this state favoring arbitration of disputes. Among other things, arbitration eases court congestion, provides an expeditious method of resolving

disputes and is generally less expensive than litigation. We construe the agreement then to enforce arbitration, if possible.” (Citations omitted.); accord *Verbeek Props., L.L.C. v. GreenCo Env'tl., Inc.*, 159 Wn. App. 82, 87, 246 P.3d 205 (2010) (“Washington courts apply a strong presumption in favor of arbitration. Courts must indulge every presumption in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” (Citations omitted.)).

Here, as a result of a mutually-informed, arms'-length procurement process, Appellant issued liability insurance policies to Scarsella (and thus, to WSDOT) providing that any ensuing coverage disputes would be the subject of resolution by binding arbitration. *See generally* Reply Brief of Appellant James River Insurance Co., dated February 16, 2012, at 21-24. Thus, it is apparent that, as a matter of the mutual intent of the contracting parties, a dispute resolution methodology expressly favored by the strong public policy of this State was chosen. The policies' arbitration provisions are therefore presumptively enforceable by their terms. *See generally Sales Creators, Inc. v. Little Loan Shoppe, L.L.C.*, 150 Wn. App. 527, 531, 208 P.3d 1133 (2009) (“In interpreting an arbitration clause, the intentions of the parties as expressed in the contract control.” (*citing* *W.A.*

*Botting Plumbing & Heating Co. v. Constructors-Pamco*, 47 Wn. App. 681, 684, 736 P.2d 1100 (1987)).

Finally, *amici* note that many commentators believe arbitration possesses virtues of expedition, economy and finality. It is therefore possible that Appellant and WSDOT could have resolved the coverage issue earlier via arbitration than through litigation, and at less cost. Such a scenario could have been beneficial for the parties in the underlying tort suit, because a prompt resolution of the coverage issue clarifies what funds are available to settle that case. Moreover, prompt resolution of the tort suit and non-judicial resolution of the coverage issue would ease the burden on the courts, as well as the burden on the taxpayers to fund their operations.

**II. RCW 48.18.200 AND RCW 48.15.150(1), BY THEIR RESPECTIVE PLAIN TERMS AND MEANINGS, ADDRESS MATTERS OF FORUM SELECTION AND VENUE, AND NEITHER PROVISION POSES AN IMPEDIMENT TO THE ARBITRATION OF INSURANCE COVERAGE DISPUTES**

In derogation of the foregoing principles confirming that insurance policies, as contracts generally, are enforceable in accordance with their plain terms and that the use of arbitration as a favored mechanism for the resolution of contract disputes is supported by the strong public policy of this State, WSDOT argued below (and the court below held) that arbitration of the pending coverage dispute between Appellant and

WSDOT is expressly precluded by two statutory provisions – RCW 48.18.200 and RCW 48.15(150)(1) – individually and collectively. The lower court’s analysis and conclusions in this regard, however, are not warranted, much less compelled, by the statutes in question.

RCW 48.18.200 provides, in pertinent part, that “[n]o insurance contract delivered or issued for delivery in this state and covering subjects located, resident, or to be performed in this state shall contain any condition, stipulation or agreement . . . depriving the courts of this state of jurisdiction of action against the insurer.” *See* RCW 48.18.200(1)(b). Any such policy “condition, stipulation or agreement” is deemed void. RCW 48.18.200(2). RCW 48.15.150(1), in turn, provides, in pertinent part, that “[f]or any cause of action arising in this state under any contract issued as a surplus lines contract under this chapter, an unauthorized [*i.e.*, non-admitted] insurer must be sued in the superior court of the county in which the cause of action arose. . . .” Notwithstanding the fact that neither of these statutes even mentions “arbitration,” to say nothing of expressly foreclosing the enforcement of insurance policy provisions establishing arbitration as the agreed-upon medium for resolution of coverage disputes, WSDOT has characterized each of them as an “anti-arbitration statutes.” *See, e.g.*, Brief of Respondent WSDOT, dated January 17, 2012, at 45. *Amici* submit that the labeling of RCW 48.18.200(1)(b) and RCW

48.15.150(1), respectively, as “anti-arbitration statutes” is demonstrably groundless.

RCW 48.18.200(1)(b), on its face, precludes the issuance of an insurance policy, to a Washington policyholder or addressing Washington subject-matter, that by its terms would purport to designate any forum outside the State of Washington as the sole and exclusive location for court actions against the insurer (thereby ostensibly “depriving the courts of this state of the jurisdiction of action against the insurer”). Notably, the statute, by its plain language, does not purport to require the insurance policies to which it applies to designate Washington courts as the *sole* forum for the resolution of coverage disputes; rather, it merely *prevents* Washington’s court from being *expressly excluded* from the potential array of tribunals within which actions against the insurer can be brought. Accordingly, RCW 48.18.200(1)(b) is essentially a forum selection (or, more precisely, an anti-forum preclusion) statute – one which is completely silent on the matter of arbitration versus litigation as the operative medium for dispute resolution.

Moreover, even if RCW 48.18.200(1)(b) did constitute an affirmative mandate requiring insurance policies issued in order to cover Washington risks to include a provision designating the Washington courts as the sole forum for actions against the insurer to resolve

contractual disputes, which it does not as shown above, the statute still would not constitute an “anti-arbitration” provision. This is because, as developed more fully in Appellant’s submissions, the enforcement of a contractual arbitration provision simply does not have the effect of divesting a court of its jurisdiction over the action subject to arbitration. As Appellant has demonstrated, Washington’s Uniform Arbitration Act, RCW 7.04A, which contains no exception for insurance policies, is replete with references evidencing that the State’s courts are fully vested with jurisdiction over actions in which arbitration is the applicable dispute resolution mechanism. *See generally* Appellant’s Br. at 13-18 & n.27. Thus, as was cogently observed by the United States Court of Appeals for the First Circuit in a closely-analogous case in which an argument parallel to WSDOT’s contentions here was rejected: “It is neither illogical nor meaningless for a court’s jurisdiction to remain intact and crucial to the overall arbitration scheme even while it honors the parties’ voluntary agreement to deal with the merits outside the courtroom.” *DiMercurio v. Sphere Drake Ins., PLC*, 202 F.3d 71, 77 (1st Cir. 2000); *accord Boeing Co. v. Agric. Ins. Co.*, No. C05-921C, 2005 WL 2276770, at \*5 (W.D. Wash. Sept. 19, 2005) (“[N]either section 48.18.200 nor Washington case law interpreting and applying that section (or Washington’s insurance

statutes generally) bars the enforcement of express agreements to arbitrate coverage disputes[.]”).

As for RCW 48.15.150(1), that provision, to the extent possible, supplies even less support for WSDOT’s “anti-arbitration” characterization than does RCW 48.18.200(1)(b). RCW 48.15.150(1) clearly does nothing more than state that *if* a judicial proceeding against an out-of-state (*i.e.*, “unauthorized”) insurer arising out of a surplus lines policy is to be brought in the Washington courts, it must be initiated in the superior court for the county in which the claim for coverage arose. This is, simply stated, a *venue* provision; it neither says nor purports to say anything about the right of an insurer, in the context of an action filed in full compliance with the letter and spirit of RCW 48.15.150(1), to interpose a contractual arbitration provision once the case has been brought. The court, in those circumstances, would plainly maintain jurisdiction to rule on whether or not the arbitration provision should be enforced per its terms. In doing so, no violation of the provisions of RCW 48.15.150(1) would be implicated. Indeed, taken to its logical extreme, the reading of RCW 48.15.150(1) advocated by WSDOT and embraced by the trial court would prevent an insurer from seeking dismissal or a stay of an action filed pursuant to the statute, even if a competing action involving the same parties and the same coverage issue were already pending in a

different court located elsewhere. The statute simply cannot be read so expansively, and there is no coherent or compelling policy rationale suggesting that this Court should take such a drastic step.<sup>3</sup>

In sum, neither of the statutory provisions invoked by WSDOT, whether given a facial interpretation or construed in the specific context of a case such as the one here, require nor counsel in favor of a reading that precludes arbitration of coverage disputes where the contracting parties have so agreed by express and unambiguous terms.

### CONCLUSION

*Amici* concur with the State of Washington's well-articulated position that as a matter of sound public policy, arbitration constitutes a valuable medium of alternative dispute resolution, and that where contract parties, freely and of their own volition, have mutually elected arbitration as the vehicle by which their contractual disputes shall be resolved, the parties' choice should be vindicated absent clear and compelling grounds for an alternative outcome. Because the arguments advanced by WSDOT and accepted by the Court below rest upon contrived and wholly

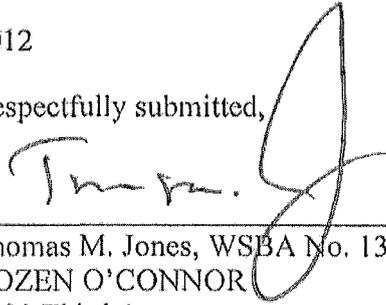
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<sup>3</sup> For the reasons stated, *amici* agree with Appellant's conclusion that because neither RCW 48.18.200(1)(b) nor RCW 48.15.150(1) are "anti-arbitration" provisions, analysis of the extent to which those provisions clash with the Federal Arbitration Act and thus implicate the McCarron-Ferguson Act is unnecessary. See Appellant's Br. at 28-34; Appellant's Reply Br. at 12-17; see generally *Boeing*, 2005 WL 2276770, at \*5.

unwarranted statutory interpretations which do not even address, much less preclude, arbitration and contravene the strong public policy of the State, the judgment below should be reversed.

DATED: September 25, 2012

Respectfully submitted,



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## DECLARATION OF SERVICE

The undersigned states:

I am a citizen of the United States of America and a resident of the State of Washington, I am over the age of 18 years, I am not a party to this action, and I am competent to be a witness herein.

On this 25th day of September, 2012, I caused to be filed via electronic filing with the Supreme Court of the State of Washington, the foregoing BRIEF OF AMICI CURIAE AMERICAN INSURANCE ASSOCIATION, COMPLEX INSURANCE CLAIMS LITIGATION ASSOCIATION, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., AND AMERICAN HOME ASSURANCE COMPANY IN SUPPORT OF APPELLANT. I also served a copy of said document on the following parties as indicated below:

<b>Parties Served</b>	<b>Manner of Service</b>
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A. Richard Dykstra Friedman Rubin 601 Union Street, Suite 3100 Seattle, WA 98101	(X) Via Legal Messenger ( ) Via Overnight Courier ( ) Via U.S. Mail ( ) Via Email

Parties Served	Manner of Service
Robert A. Hyde Richard A. Fraser, III Office of the Attorney General 800 Fifth Avenue, Suite 2000 Seattle, WA 98104	<input checked="" type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Via Overnight Courier <input type="checkbox"/> Via U.S. Mail <input type="checkbox"/> Via Email
Kara R. Masters Skellenger Bender PS 1301 Fifth Avenue, Suite 3401 Seattle, WA 98101	<input checked="" type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Via Overnight Courier <input type="checkbox"/> Via U.S. Mail <input type="checkbox"/> Via Email

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

Executed at Seattle, Washington, this 25th day of September, 2012.

  
 \_\_\_\_\_  
 Dava Bowzer

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Please find attached in PDF format 1) Motion of Amici Curiae for Leave to Appear to File an Amicus Brief in Support of Appellant, and 2) Brief of Amici Curiae in Support of Appellant, which we would request be filed among the papers of Supreme Court Case No. 87644-4; *State of Washington Department of Transportation v. James River Ins. Co.* These documents are submitted by Thomas M. Jones, WSBA No. 13141, phone: (206) 340-1000, email: [tjones@cozen.com](mailto:tjones@cozen.com).

Thank you for your attention to this matter.

Dava Z. Bowzer | Cozen O'Connor  
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