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No. 87644-4

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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.*

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RESPONDENT WSDOT'S BRIEF IN RESPONSE TO  
BRIEF OF *AMICI CURIAE*

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 ORIGINAL

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**I. Argument in Response to Amici**<sup>1</sup>

The brief filed by Amici American Insurance Association, et al. adds nothing of substance to the arguments before this Court. In fact, Amici candidly admit that the legal arguments they support are “developed more fully in Appellant’s submissions.” Amici at 11. Nonetheless, WSDOT submits this response because Amici do more than simply parrot the arguments already submitted by James River (and rejected by the superior court). Amici also make incorrect statements about the manner in which those arguments, if adopted, would affect the public interest. And Amici also demonstrate ignorance of the evidence showing that the arbitration endorsements in this case were never made part of the policies in question. This Court should reject Amici’s unhelpful arguments.

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<sup>1</sup> The amici in this case are the American Insurance Association, the Complex Insurance Claims Litigation Association, National Union Fire Insurance Company of Pittsburgh, Pa., and American Home Assurance Company.

A. Amici incorrectly assume that arbitration would have resolved any issues cheaper or faster than litigation.

Amici assert in their brief that forcing arbitration would have somehow given WSDOT and James River clarity as to what funds would have been available to settle the underlying tort case:

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.

Amici at 8. This argument is irrelevant to the purely legal issues before this Court.<sup>2</sup>

This argument also ignores the realities of the coverage dispute in this case and in the majority of third party liability coverage disputes in which the insurer denies the duty to indemnify the insured, but not the duty to defend. In these kinds of liability coverage disputes, the insured is often faced with a multiplicity of allegations, some of which, if proven, will be covered and some of which will not. *See Yakima Cement Products Co. v. Great Am. Ins. Co.*, 14 Wn. App. 557, 563, 544 P.2d 763, 766 (1975) (“Although an insurer's duty to defend ‘arises when the complaint is filed and is to be determined from the allegations of the complaint’, its

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<sup>2</sup>The legal issues for this Court concern the meaning of the phrase “jurisdiction of action” in RCW 48.18.200(1)(b), the meaning of the phrase “shall be sued” in RCW 48.15.150, and the meaning of the phrase “business of insurance” in the McCarran-Ferguson Act.

duty to pay depends upon the actual determination of factual issues relating to coverage, whether presented by the pleadings, or during trial.”). Such a dispute cannot be finally resolved until the underlying lawsuit against the insured is finally resolved. No arbitrator can see into the future to discern how and on what basis a civil jury will resolve the various claims made against an insured. Arbitration could not have “resolved the coverage issue earlier” in this case in a way that “clarifie[d] what funds [would be] available to settle that case.”

Regardless, even when the issues in a given case *are* issues that are ripe for resolution before the underlying tort suit, arbitration is hardly a faster remedy than the court system. In fact, our rules provide for speedy *judicial* resolution in these circumstances: “The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.” CR 57. There is no such guarantee in an arbitration.

This Court should reject the assertion by Amici that forcing arbitration of this matter would have aided the settlement of the underlying tort case.

**B. Amici incorrectly assert that there is no issue as to whether these arbitration provisions are part of the policies.**

Amici assert, without citation to the record, that: “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.” Amici at 5. Amici then go further and assert that the endorsements became part of the policies as “a result of a mutually-informed, arms’ -length procurement process.” Amici at 7.

Again, this issue is largely irrelevant to the underlying question of the meaning of RCW 48.18.200 and RCW 48.15.150, both of which *assume* that the policy provisions they render void have been the “result of a mutually-informed, arms’-length procurement process.” But even so, Amici’s argument is deficient in that it fails to address the fact that WSDOT *did* bargain for an insurance contract that retained its full panoply of due process rights. *See* Brief of Respondent § IV(B). Because Amici do not even *address* that issue, their assertions about the alleged arms-length negotiation of an arbitration clause are unhelpful.

C. **A provision in an insurance contract that violates Washington insurance statutes is void, even if not ambiguous.**

Amici argue at pages 4-5 that under the rules of insurance contract interpretation, the “Binding Arbitration” clauses are clear and unambiguous. That, of course, is not the issue presented: even if they are unambiguous, they are not enforceable. RCW 48.18.200(2) specifically declares insurance policy provisions that violate 48.18.200(1) are “void,

but such voiding shall not affect the validity of the other provisions of the contract.” The issue in this appeal is not the interpretation of the policy, but rather the interpretation of Washington Insurance Code statutes.

**D. Washington will not always enforce arbitration clauses.**

At pages 6-8, Amici argue that Washington has a strong public policy supporting the enforcement of arbitration clauses. However, in making this argument Amici fail to mention, let alone distinguish *Kruger Clinic Orthopaedics, LLC v Regence Blue Shield*, 157 Wn.2d 290, 138 P.3d 936 (2005), in which this Court did refuse to enforce an arbitration provision because it conflicted with Washington insurance law. As set forth in Respondent’s brief at 23-25, the instant case is controlled by the analysis in *Kruger*.

**E. RCW 48.18.200 is not merely a forum selection clause.**

Amici’s principal argument is that RCW 48.18.200(1)(b) and RCW 48.15.150 are “*anti-forum preclusion*” provisions that simply prevent an insurer from issuing an insurance policy “expressly excluding” Washington courts from being a forum for resolving disputes. However, this double-negative “distinction” ignores the fact that a clause allowing each party to demand arbitration in effect allows an insurer to prevent any Washington cause of action from being heard in Washington courts.

If the clause only gave the insured an option to demand arbitration of disputes, the argument might be more persuasive. See *Mutual of Enumclaw v. Huddleston*, 119 Wn. App. 122, 77 P.3d 360 (2003) (“Under the insurance policy, resolving future disputes through arbitration is an option, along with trial, but it is not the only method of dispute resolution.”). And the statute does not prohibit post-hoc agreements to arbitrate. For example, the *Kruger* decision took pains to note that “non-binding” arbitration clauses were enforceable, but that the insurance regulation prohibited a policy requiring *binding* arbitration to the exclusion of judicial remedies. *Kruger*, 157 Wn.2d at 303; see also *Rimov v. Schultz*, 162 Wn. App. 274, 288, 253 P.3d 462, 469, review denied, 172 Wash. 2d 1026, 268 P.3d 225 (2011) (approving parties’ post-dispute agreement to “nonbinding arbitration” in non-insurance context). But where an insurer attempts to compel an insured to arbitrate any disagreement “as to the rights and obligations owed by us under this policy, including the effect of any applicable statutes or common law upon the contractual obligations otherwise owed,” as the binding arbitration clause does in this case, it is in violation of the statute. Such a provision would give James River the option of compelling any dispute with its insured to be resolved outside of the Courts of the State of Washington.

Amici's remaining arguments simply incorporate by reference the arguments in Appellant's Opening Brief and Reply Brief. The only authorities substantively discussed are the unpublished, pre-*Kruger* decision of *Boeing v. Agricultural Ins. Co.*, 2005 WL 2276770 (W.D. Wash.), and *DiMercurio v. Sphere Drake Insurance PLC*, 202 F.3d 71 (1st Cir. 2000), both dealing with implied repeal analyses. What Amici neglect to acknowledge is that Appellant James River has conceded that an implied repeal argument does not apply to the Washington insurance statute, because the relevant Insurance Code provisions were adopted *after* the adoption of the Uniform Arbitration Act. See James River Reply Brief at 11 ("Washington amended RCW 48.18.200 four years after it adopted the Uniform Arbitration Act. James River does not dispute this, and does not attempt to argue implied repeal.").

**F. RCW 48.15.150 is not merely a venue clause.**

With respect to RCW 48.15.150, Amici restates the Appellant's argument that the provision "is, simply stated, a *venue* provision[.]" Amici at 12 (emphasis in original). Amici does not analyze the legislative development of the statute, nor does Amici address the other statutes that *already* address venue for claims against insurers (RCW 48.05.220) and foreign corporations (RCW 4.12.025(3)). Because the interpretation

Amici supports would render RCW 48.15.150 superfluous, this Court should reject it. *See American Cont'l Ins. Co. v. Steen*, 151 Wn.2d 512, 521, 91 P.3d 864 (2000) (all of the words in the 1947 insurance code “have meaning” and “are not superfluous.”).

## II. Conclusion

When it discusses relevant legal issues, the brief of Amici simply regurgitates, in less “developed” form, the arguments of the Appellant. The remaining portions of Amici’s brief inaccurately represent the litigation realities in Washington insurance coverage cases and the factual record in this particular case. The brief is unhelpful, and this Court should disregard it.

Dated this 15th day of October, 2012



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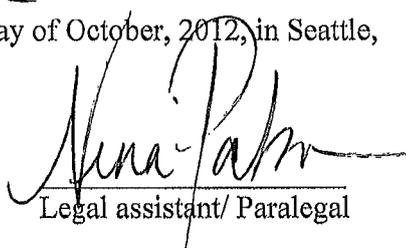
**CERTIFICATE OF SERVICE**

I certify, under penalty of perjury under the laws of the State of Washington, that on this date I served the foregoing Reply to Brief of Amicus Curiae, via electronic mail and U.S. Postal Service upon the following:

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Attached for filing in the above referenced matter is the State's Brief in Response to Amici Curiae in PDF format. We request this document to be filed in Supreme Court Case No. 87644-4 *State of Washington, Department of Transportation v. James River Ins. Co.* This document is submitted by Richard A. Dykstra, WSBA No. 5114, phone number (206) 388-3475, email: [rdykstra@friedmanrubin.com](mailto:rdykstra@friedmanrubin.com).

Thank you for your attention to this matter.

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