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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 *AMICI CURIAE* SWINOMISH INDIAN TRIBAL
COMMUNITY, ASSOCIATED GENERAL CONTRACTORS OF
WASHINGTON, AVISTA CORPORATION, THE BOEING
COMPANY, BUILDING INDUSTRY ASSOCIATION OF
WASHINGTON, GEORGIA-PACIFIC LLC, MAINSTREET
PROPERTY GROUP LLC, PACIFIC SEAFOOD GROUP,
PORT OF SEATTLE, PUGET SOUND ENERGY, AND
WEYERHAEUSER COMPANY

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

Amici Curiae are a diverse coalition of Washington tribal and public entities, utilities, businesses, and trade associations: Swinomish Tribal Indian Community, Associated General Contractors of Washington, Avista Corporation, The Boeing Company, Building Industry Association of Washington, Georgia-Pacific LLC, MainStreet Property Group LLC, Pacific Seafood Group, Port of Seattle, Puget Sound Energy, and Weyerhaeuser Company.¹

Together, *amici* represent the wide range of organizations and entities that obtain liability insurance policies in Washington. For many of these organizations, state law or contractual relationships require liability insurance to be maintained in connection with the services *amici* provide. Therefore, *amici* are 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 below will harm those relationships and encourage their insurers to refuse to defend *amici* when they are faced with potential liability. *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 orders.

¹ A detailed statement of the individual interests of each *amicus* is set forth in the accompanying motion.

II. INTRODUCTION

The Washington legislature has declared that “[t]he business of insurance is one affected by the public interest.” RCW 48.01.030. This Court has interpreted that statutory mandate to impose a public policy that encourages liability insurers 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 trial court 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. An insurer’s duty is to defend until it can conclusively prove there is no obligation to do so. Insurers are, of course, no more eager to spend money defending litigation than their policyholders are. Therefore, this Court has crafted—through several decades of consistent jurisprudence—rules that are designed to ensure that insurers have the proper incentives to honor the duty to defend.

The trial court committed a series of interrelated errors in orders that are contrary to the longstanding principles of Washington insurance law pronounced by this Court and threaten to upset the incentives that this Court has created. The trial court refused to order Zurich to honor its duty to defend, even after finding that Zurich could not meet its burden to prove that there was no potential for coverage. The trial court then refused to

further adjudicate Expedia's right to an ongoing defense until Zurich completed discovery, extrinsic to the policies and the complaints, into all of its coverage defenses. And the trial court reaffirmed its decision to hold Expedia's right to an ongoing defense hostage to the completion of all discovery even after finding that the discovery Zurich sought was "dangerous" and potentially "injurious" to Expedia's interests in the underlying cases. June 15, 2012 RP 31:10-20.

If left undisturbed, the orders on appeal will embolden insurers to disregard their defense obligations, creating substantial risk to all Washington policyholders. Insurers can refuse to defend for years and, when policyholders are forced to litigate to enforce the insurers' obligations, erect a barricade of defenses and discovery to further delay the policyholder's right to defense coverage. A court's refusal to promptly adjudicate and enforce an insurer's duty to defend will force policyholders to direct their resources away from their community, business, charitable, or public purposes 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 consistently has held is not relevant to the issue of whether a 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 in nearly any

scenario where questions of policyholder negligence or 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 reverse and make clear that the duty to defend may not be so compromised under Washington law. This Court should also take the opportunity to solidify and clarify two simple principles that this Court’s jurisprudence already support: 1) an insurer’s failure to prove that coverage is not possible establishes that coverage is possible, thereby triggering the duty to defend, and 2) adjudication of the duty to defend cannot be delayed by any discovery, let alone overlapping and prejudicial discovery. This Court should confirm that the articulation of those principles in *American Cyanamid Co. v. American Home Assurance Co.*, 30 Cal. App. 4th 969, 35 Cal. Rptr. 2d 920 (1994) and *Haskel, Inc. v. Superior Court*, 33 Cal. App. 4th 963, 39 Cal. Rptr. 2d 520 (1995), among others, is precisely what Washington law already requires.

III. STATEMENT OF THE CASE

The facts of this case illustrate the burdens that policyholders can wrongly be forced to bear if the duty to defend is wrongly denied.² Expedia, an online travel company, has been sued by a number of municipalities that claim to have suffered damages from an alleged

² *Amici* recite only those facts relevant to this amicus brief. These facts are taken from the Clerk’s Papers and Report of Proceedings designated by the parties.

shortfall in revenue received for hotel stays booked through Expedia, whatever the reason for the shortfall. CP 2; CP 1923. In 2005, Expedia tendered the first such complaint to its liability insurers, who responded by denying defense and indemnity coverage. CP 2147-48. In 2010 and 2011, Expedia tendered sixty-two additional lawsuits to its liability insurers, who again denied both defense and indemnity coverage. CP 2170-84; CP 2186-93. Expedia also brought this coverage action in King County Superior Court. CP 1-17.

The trial court denied Zurich's motion for summary judgment as to the duty to indemnify and duty to defend, holding that Zurich did not meet its burden to prove that coverage in the underlying cases was not possible. In delivering its ruling from the bench, the trial court stated that "one of those theories [of liability in the underlying cases], at least, would put this more in the category of damages" and that the underlying cases raise "a situation where Expedia could be found to be liable under the underlying complaints" for potentially covered conduct, confirming the potential for coverage. Jan. 13, 2012 RP 81:22-24, 82:25-83:2. Following this ruling, Expedia requested that the trial court enter an order confirming that Zurich had a duty to defend. CP 1704-24. The trial court declined to enter such an order and instead entered an order simply denying Zurich's motion. CP 1883-87.

Expedia then brought a motion for summary judgment that Zurich had a duty to defend Expedia under those two policies. CP 1895-1921. Expedia argued that the trial 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. *Id.* Zurich moved for a CR 56(f) continuance, arguing that certain discovery into, among other things, Expedia's knowledge and intent was necessary to "raise genuine issues of material fact" as to coverage. CP 3830. Expedia responded that questions of fact extrinsic to the complaint could only confirm, and not defeat, the existence of the duty to defend. CP 4520-32. Nonetheless, the trial court granted Zurich's request for continuance. CP 4540-42.

Expedia completed certain discovery. Arguing that much of the requested discovery overlapped with matters at issue in the underlying cases, Expedia then asked the trial court to resolve its motion for summary judgment as to the duty to defend and to protect it from overlapping and potentially prejudicial discovery. CP 4557-80. The trial court denied that motion, refusing to even consider Expedia's duty to defend motion. CP 4907-09; *see also* June 15, 2012 RP 30:17-37:15. This appeal followed. Expedia's motion for summary judgment to establish Zurich's duty to defend, filed almost two years ago, remains unheard.

IV. ARGUMENT

A. **This Court Has Repeatedly and Steadfastly Protected a Policyholder’s Right to a Defense Under Liability Insurance Policies.**

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 a policyholder. *See Nat’l Sur. Co. v. Immunex Corp.*, 176 Wn.2d 872, 297 P.3d 688 (2013); *Am. Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 229 P.3d 693 (2010); *Mut. of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d 411, 191 P.3d 866 (2008); *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. of Am. v. Butler*, 118 Wn.2d 383, 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—a separate and independent obligation from the duty to indemnify—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 of the policyholder and actual coverage under the policies. *Id.* at 53. As a result, the duty to defend often arises in situations where the duty to indemnify ultimately is found not to exist. While insurers are free to, and often do, issue non-defense liability policies, such policies are sold and priced according to that limited scope of coverage. Conflating the duty to defend with the duty to indemnify risks improperly rewriting or unilaterally modifying the ongoing defense coverage that the insurer agreed to provide.

Second, the duty to defend arises at the moment a potentially covered claim is filed and is discharged when the underlying litigation concludes. *Id.* at 52; *see also Griffin v. Allstate Ins. Co.*, 108 Wn. App. 133, 138, 29 P.3d 777 (2001). An insurer may be relieved of its continuing obligation to defend, but only if it 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*, 168 Wn.2d at 405.

Third, whether the duty to defend has arisen is to be determined exclusively from the eight corners of the policy and the 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.

Fourth, any ambiguities or questions of fact as to the existence of coverage must be construed “liberally in favor of ‘triggering the insurer’s duty to defend.’” *Woo*, 161 Wn.2d 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*, 176 Wn. 2d at 890 (“[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. Wash. 1990).³ If there is “any reasonable interpretation of the facts

³ *Time Oil* 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.

or the law that could result in coverage, the insurer must defend.” *Am. Best*, 168 Wn.2d at 405.

Fifth, a ruling in the policyholder’s favor on the duty to defend is “required” unless the insurer “could conclusively negate coverage as a matter of law.” *Amazon.com Inc. v. Atl. Mut. Ins. Co.*, No. 05-719, 2005 WL 1711966, at *4 (W.D. Wash. July 21, 2005) (applying Washington law). Thus, when an insurer moves for summary judgment on the duty to defend and loses because it is unable to negate the possibility of coverage, “the duty to defend is then *established*” and the insurer must defend unless and until it can conclusively prove otherwise. *Am. Cyanamid Co. v. Am. Home Assurance Co.*, 30 Cal. App. 4th 969, 975, 35 Cal. Rptr. 2d 920 (1994); accord *Horace Mann Ins. Co. v. Barbara B.*, 4 Cal. 4th 1076, 1084-85, 17 Cal. Rptr. 2d 210, 846 P.2d 792 (1993).

Sixth, 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.” *Am. Best*, 168 Wn.2d at 405 (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 Haskel, Inc. v. Super. Ct.*, 33 Cal. App. 4th 963, 977, 39 Cal. Rptr. 2d 520 (1995) (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. *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 Trial Court’s Rulings Effectively Deny Policyholders the Right to an Ongoing Defense, Contrary to the Duty to Defend Principles Articulated by This Court.

Washington law on the duty to defend reduces to a single maxim: while coverage is possible, the insurer must defend. All of the related rules—when the duty should be adjudicated, what evidence may be considered, what burden the insurer bears to negate its duty, etc.—flow from that single maxim. Yet after concluding, in connection with Zurich’s summary judgment motion, that the underlying complaints asserted potentially covered claims seeking damages as a result of alleged negligence, the trial court did exactly the opposite of what that maxim

dictates. It refused to order Zurich to defend and then compounded that error by refusing even to adjudicate Zurich's ongoing duty.

The trial court's ruling effectively denies a policyholder its right to an ongoing defense. The promise of the duty to defend is not simply that, at some later date, and only after all of the insurer's potential defenses to coverage are defeated, the insurer will pay the policyholder a sum of money to reimburse it for defense costs that the policyholder has borne in the first instance. It is instead a promise of action. The insurer will undertake, or at the very least fund, the defense, protecting the policyholder from that often prohibitive expense and leaving the policyholder free to devote its resources to their intended purposes.

The unbroken line of Washington authority set forth above makes clear that the trial court's decision was wrong. *Amici* are not aware of any prior Washington decision refusing to order an insurer to defend after finding that the insurer had failed to meet its burden to negate the potential for coverage. Instead, Washington law embraces the same principles as those animating the California appellate decisions in *American Cyanamid* and *Horace Mann*, which hold that an insurer's failure to negate the duty to defend necessarily establishes that a duty to defend exists. *Am. Cyanamid*, 30 Cal. App. 4th at 975; *Horace Mann*, 4 Cal. 4th at 1084-85. If the insurer cannot conclusively "eliminate" the possibility of coverage,

the duty to defend remains in place and the insurer must defend. *Horace Mann*, 4 Cal. 4th at 1084. To protect a policyholder’s right to a defense—“one of the main benefits of the insurance contract,” *VanPort*, 147 Wn.2d at 760—this Court should confirm that the rule announced in *American Cyanamid* and *Horace Mann* is the same rule that Washington follows—namely, that an insurer’s failure to negate the duty to defend necessarily entitles a policyholder to an immediate defense under its liability policy.

C. **Delaying Adjudication of Whether the Duty to Defend Has Arisen to Permit an Insurer to Conduct Discovery Violates Longstanding Duty to Defend Principles and Prejudices Policyholders.**

The trial court compounded its initial error by refusing even to adjudicate Expedia’s ongoing right to defense until Expedia completed discovery requested by Zurich. 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.” *SmartReply, Inc. v. Hartford Cas. Ins. Co.*, No. 10-1606, 2011 WL 338797, at *2 (W.D. Wash. Feb. 3, 2011); *see also Woo*, 161 Wn.2d at 54. This is because insurers “have a duty to provide a defense to [the policyholder] upon tender of those claims” unless and until they are able to “conclusively establish[] that there is no potential for coverage.” *Haskel*, 33 Cal. App. 4th at 976-77.

If, at the time the court first adjudicates the insurer's duty to defend, the insurer lacks sufficient evidence to negate coverage, the insurer cannot delay "an immediate judicial recognition of the fact that a defense obligation *then* existed." *Id.* Thus, for example, while discovery into whether tender was late and whether an insurer suffered actual and substantial prejudice may ultimately provide an insurer with sufficient evidence to *extinguish* its coverage obligations going forward, an insurer may not use such discovery to avoid its duty to defend while the issue remains unresolved. The same is true for evidence related to the myriad other coverage defenses insurers may assert in cases like these.

Washington law is consistent with the duty to defend principles underlying *Haskel*—adjudicate the duty to defend first, then deal with discovery, with no overlapping discovery allowed while the underlying action is ongoing.⁴ 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 clarity concerning the scope and timing of the insurer's duty to defend.

⁴ 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 because California, unlike Washington, permits an insurer to rely on facts extrinsic to the complaint to defeat a defense duty. *Compare Haskel*, 33 Cal. App. 4th at 975 with *Woo*, 161 Wn.2d at 53. 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. *Haskel*, 33 Cal. App. 4th at 976-77.

Contrary to this Court’s precedents, the trial court relied on the circumstances and timing of Expedia’s tender as purported justification for denying Expedia’s right to a defense. Washington law places a heavy burden on an insurer seeking to benefit from any delay in the policyholder’s tender and refuses to excuse an insurer from defending based on a mere allegation of late tender. Instead, “the insurer is not relieved of its duties under the insurance contract unless it can show that the late notice caused it actual and substantial prejudice.” *Mut. of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d 411, 426, 191 P.3d 866 (2008); *accord Immunex*, 176 Wn. 2d at 889 (“[T]he insurer must show that late notice actually and substantially prejudiced its interests before performance of its duties will be excused.”).⁵ Contrary to *USF* and *Immunex*, the trial court excused Zurich from its duty to defend while it gathers evidence necessary to attempt to meet its burden.

There is nothing unique about the late notice defense Zurich asserted that would justify such an egregious departure from binding precedent. Notice provisions are common features of liability policies and thus, in *amici*’s experience, late notice is one of the most, if not the most, commonly asserted defenses by insurers. The trial court’s ruling, if left

⁵ 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.

undisturbed, gives insurers license to use a commonly raised defense 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.

D. The Trial Court's Orders Have a Significant Adverse Effect on All Washington Policyholders.

Amici and their various constituents frequently face litigation arising out of their services and operations. They maintain liability insurance to ensure that the costs of that litigation do not usurp scarce resources from their core purposes: providing essential tribal governmental services and support, overseeing commerce entering Washington State, providing gas and electricity to millions of Washington citizens, building homes, improving infrastructure, building airplanes, harvesting timber, manufacturing paper, gathering food, and performing services within the community.

An insurer's denial of a defense diverts resources away from these important purposes, requiring Washington policyholders to unilaterally shoulder the burden of defending underlying litigation and, simultaneously, to pursue coverage litigation against its insurer. Indeed, with respect to *amici* like the Swinomish Tribe, the cost of defending litigation diverts precious resources from the governmental and social

support network that the Tribe provides to its members, such as law enforcement, land-use planning, medical and dental clinics, senior and fitness centers, and safety net and other community support programs. Similarly, with respect to *amici* like Avista and Puget Sound Energy, the cost of defending litigation when insurers refuse to defend ultimately will be borne by Washington residents through rate-making or other procedures.⁶ For other *amici*, costs ultimately are shifted to the public through price increases or other measures. In short, liability insurance helps ensure that lawsuits cause minimal disruption to the day-to-day operations of *amici* and their various constituents.

For this among other reasons, 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 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 its promised defense coverage. For many policyholders, the absence of insurance inhibits their ability to mount an adequate defense at all.

⁶ Rate-making involves many assumptions, including that the utilities have adequate reserves and insurance coverage to fund potential liabilities and lawsuits. A change in the law that calls those assumptions into question would have additional impacts on the rate-making process, which again would be borne by Washington residents.

The Washington Legislature, the Insurance Commissioner, and this Court require 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. 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 encourage insurers to defend under a reservation of rights if there is uncertainty as to coverage, so that the insurer may preserve its defenses to coverage should it ultimately be able to prove them but the policyholder will receive the benefit of the promised defense while the situation remains in doubt. *See Am. Best*, 168 Wn.2d at 405.

By refusing to enforce the duty to defend, and then compounding that error 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 trial court upset these carefully crafted rules and encouraged insurers to refuse their defense obligations. 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 at some point in the future.

This Court should reinforce the promised security of the duty to defend in Washington State in order to protect policyholders—and ultimately their respective community members, constituents, shareholders, and the public at large—from the burdens of costly litigation and help ensure that their resources are available to fund job creation, technological development, charitable and community services, and the myriad other functions that *amici* are designed to perform.

This Court should also reinforce its longstanding rule that large and small policyholders should be treated alike. The trial 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. June 15, 2012 RP 36:12-13. Washington law does not treat policyholders with “adequate funds” different from those without. Courts should not require policyholders to present evidence of indigence before they are afforded the rights provided to them by their insurance policies. The duty to defend does not exist only for those policyholders who will face certain bankruptcy from litigation costs—it exists equally and under equal terms for all policyholders in this state.

Delaying a bargained-for defense puts the policyholder at risk of changed market circumstances. Insurers go bankrupt or face severe financial distress, as the recent experiences of the London Market and AIG illustrate. Moreover, even financially sound organizations do not have access to free money. Capital comes at a cost—often a high cost⁷—and the loss of the benefit of a defense forces policyholders to incur the costs of capital to replace those funds. And both large and small policyholders alike may lack the funds necessary to provide an adequate defense to the liabilities they become threatened with. As a result, *amici* and their constituents often cannot perform their core vital services and business activities if their insurers wrongly refuse the duty to defend.

V. CONCLUSION

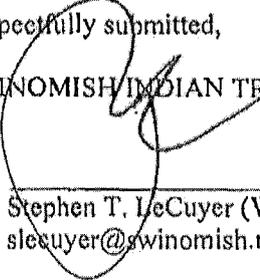
Policyholders facing liability are entitled to an immediate defense. When that defense is wrongly withheld, policyholders are entitled to a prompt adjudication of the insurer's duty without any extrinsic and costly discovery. This Court should correct the errors made by the trial court and ensure that the duty to defend retains its protective function under Washington law.

⁷ For example, recent studies indicate that privately owned businesses, on average, have a weighted average cost of capital of 16.67%. See Maretno A. Harjoto & John K. Paglia, *Cost of Capital and Capital Budgeting for Privately-Held Firms: Evidence from Business Owners Survey*, *Journal of Accounting & Finance* vol. 12(5) at 71-72 (2012).

DATED this 11th day of February, 2014.

Respectfully submitted,

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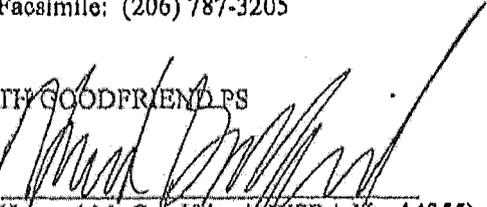
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DECLARATION OF SERVICE

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 February 11, 2014, I caused a copy of (1) Motion of *Amici Curiae* Associated General Contractors of Washington, Avista Corporation, The Boeing Corporation, Building Industry Association of Washington, Georgia-Pacific LLC, Mainstreet Property Group LLC, Pacific Seafood Group, Port of Seattle, Puget Sound Energy, and Weyerhaeuser Co. for Leave to File *Amici Curiae* Brief; (2) Brief of *Amici Curiae* Associated General Contractors of Washington, Avista Corporation, The Boeing Corporation, Building Industry Association of Washington, Georgia-Pacific LLC, Mainstreet Property Group LLC, Pacific Seafood Group, Port of Seattle, Puget Sound Energy, and Weyerhaeuser Co.; 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
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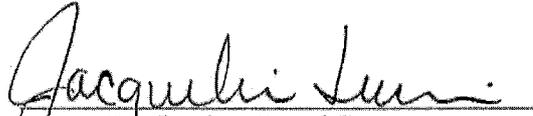
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Seattle, WA 98104-7097

On February 11, 2014, I further served via FedEx copies of the
above-referenced documents to:

J. Randy Evans
Joanne L. Zimolzak
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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 11th day of February, 2014, at Seattle, Washington.


Jacqueline Lucien, Legal Secretary
Gordon Tilden Thomas & Cordell, LLP

OFFICE RECEPTIONIST, CLERK

To: Jaci Lucien
Subject: RE: Expedia, Inc., et al v. Steadfast Insurance Company, et al.; Washington Supreme Court Cause No. 88673-3

Received.

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: Tuesday, February 11, 2014 1:09 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: Expedia, Inc., et al v. Steadfast Insurance Company, et al.; Washington Supreme Court Cause No. 88673-3

Dear Clerk:

Attached for filing is a Motion of *Amici Curiae* Swinomish Indian Tribal Community, Associated General Contractors of Washington, Avista Corporation, The Boeing Company, Building Industry Association of Washington, Georgia-Pacific LLC, MainStreet Property Group LLC, Pacific Seafood Group, Port of Seattle, Puget Sound Energy, and Weyerhaeuser Company for Leave to File Amici Curiae Brief; and Brief of *Amicus Curiae* Swinomish Indian Tribal Community, Associated General Contractors of Washington, Avista Corporation, The Boeing Company, Building Industry Association of Washington, Georgia-Pacific LLC, 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. 88673-3

This email is being sent on behalf of Franklin D. Cordell, WSBA #26392
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