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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ZHAOYUN XIA, et al.

Plaintiff/Petitioner,

vs.

PROBUILDERS SPECIALTY INSURANCE
COMPANY RRG, et al.,

Defendant/Respondent.

BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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On Behalf of
Washington State Association for Justice Foundation

 ORIGINAL

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation under Washington law, and a supporting organization to Washington State Association for Justice. WSAJ Foundation operates an amicus curiae program and has an interest in the rights of persons seeking legal redress under the civil justice system, including an interest in the rights of insureds (or their assignees) under Washington law.

II. INTRODUCTION AND STATEMENT OF THE CASE

This case presents the Court with an opportunity to apply its precedent regarding an insurer's duties to defend and indemnify in the context of an absolute pollution exclusion. The case was filed by Zhaoyun Xia (Xia) against ProBuilders Specialty Insurance Company RRG (ProBuilders), based on a covenant judgment and related assignment of rights from ProBuilders' insured. The underlying facts are drawn from the Court of Appeals opinion and the briefing of the parties. See Xia v. ProBuilders Specialty Ins. Co., 2015 WL 5011474, *noted at* 189 Wn. App. 1041 (2015), *review granted*, 185 Wn.2d 1024 (2016); Xia Br. at 4-17; ProBuilders Br. at 5-10; Xia Pet. for Rev. at 3-8; ProBuilders Ans. to Pet. for Rev. at 2-7; Xia Supp. Br. at 1-5; ProBuilders Supp. Br. at 1-4.

For purposes of this amicus curiae brief, the following facts are relevant. In May, 2006, Xia purchased a home from ProBuilders' insured. Later that year, she suffered injuries attributed to carbon monoxide poisoning resulting from allegedly negligent installation of a water heater. The gas water heater was apparently never connected to an exterior vent.¹

ProBuilders denied defense and indemnity for its insured as to any claim made by Xia on multiple grounds. The insured subsequently settled Xia's tort claim by means of a covenant judgment in the amount of \$2 million along with an assignment of rights against ProBuilders. The trial court found the settlement to be reasonable.

Xia then filed suit against ProBuilders on the assignment, alleging that its failure to defend and indemnify its insured on the underlying claim constituted breach of contract, insurance bad faith, negligence, and violations of the Consumer Protection Act, Ch. 19.86 RCW ("CPA"), and the Insurance Fair Conduct Act, RCW 48.30.015 ("IFCA").

On cross motions for summary judgment, the trial court dismissed all claims on grounds of a "townhouse exclusion" and failure of ProBuilders' insured to properly tender the claim. The trial court rejected

¹ The Court of Appeals opinion and briefing of the parties are unclear on the precise role of carbon monoxide and how and when it manifests during installation or use of a gas water heater. See *Xia*, 2015 WL 5011474, at *4-5; Xia Pet. for Rev. at 3-4; ProBuilders Ans. to Pet. for Rev. at 2-3; ProBuilders Supp. Br. at 7-8.

ProBuilders' argument that it had no obligation to defend or indemnify its insured under an "absolute pollution exclusion."

Xia appealed the trial court's summary judgment order, and ProBuilders cross appealed the ruling on the pollution exclusion. The Court of Appeals affirmed summary judgment in part in an unpublished opinion, but rejected the trial court's reasoning regarding the townhouse exclusion and tender.² Instead, the court found no duty to defend or indemnify on the alternative basis of the absolute pollution exclusion.

The absolute pollution exclusion provides, in pertinent part, that there is no coverage for:

Bodily injury, property damage, or *personal injury* caused by, resulting from, attributable to, contributed to, or aggravated by the *actual*, alleged or threatened discharge, dispersal, seepage, migration, *release or escape of pollutants*, or from the presence of, or exposure to, pollution of any form whatsoever, and regardless of the cause of the pollution or pollutants.

This Exclusion applies regardless of the cause of the pollution and whether any other cause of said bodily injury, property damage, or personal injury acted jointly, concurrently or in any sequence with said pollutants or pollution. This Exclusion applies whether any other cause of the bodily injury, property damage, or personal injury would otherwise be covered under this insurance ...

Xia, 2015 WL 5011474, at *4 (quoting CP 375; formatting & ellipses in original).

² The Court of Appeals remanded for trial Xia's CPA and IFCA claims based on alleged violation of Insurance Commissioner claims-handling regulations. See Xia, 2015 WL 5011474, at *13-14.

The policy also defines "pollutant," in pertinent part as:

[A]ny solid, liquid, *gaseous* or thermal irritants or contaminants, which include but are not limited to smoke, vapor, soot, *fumes*, acids, alkalis, chemicals, waste, biological elements and agents, and intangibles such as noise, light and visual esthetics, the presence of any or all of which *adversely affects human health* or welfare, unfavorably alters ecological balances or degrades the vitality of the environment for esthetic, cultural or historical purposes, whether such substances would be or are deemed or thought to be toxic, and whether such substances are naturally occurring or otherwise.

...

Pollution as used herein means any form of pollutant which forms the basis for liability, whether the pollution is said to cause physical injury or not, which by volume or timing or any other factor is said to give rise to liability.

Id. (quoting CP 389; formatting & ellipses in original); see also Xia Pet. for Rev. at 5-6; ProBuilders Ans. to Pet. for Rev. at 3-4.

The Court of Appeals held that the absolute pollution exclusion unambiguously excludes coverage for injuries caused by gases or fumes such as carbon monoxide, regardless of the cause. See Xia at *4 (stating "Xia's allegations fall within the plain language of this exclusion"). The court rejected Xia's argument that the effect of the pollution exclusion is, at a minimum, uncertain in light of this Court's decisions addressing the effect of similar absolute pollution exclusions. See Xia at *5-7 (discussing Kent Farms, Inc. v. Zurich Insurance Co., 140 Wn.2d 396, 998 P.2d 292

(2000), and Quadrant Corp. v. American States Ins. Co., 154 Wn.2d 165, 110 P.3d 733 (2005)).

Xia successfully petitioned for review in this Court, which was granted.³

III. ISSUE PRESENTED

Is there a duty to defend based upon "legal uncertainty" or "legal ambiguity" regarding application of an absolute pollution exclusion in an insurance policy to a claim for injuries caused by negligent installation of a water heater that led to the release of toxic levels of carbon monoxide?

See Xia Pet. for Rev. at 1-3; ProBuilders Ans. to Pet. for Rev. at 2; Xia Supp. Br. at 5.⁴

IV. SUMMARY OF ARGUMENT

The parties and the Court of Appeals below do not question this Court's recent unanimous opinion in Expedia, Inc. v. Steadfast Ins. Co., 180 Wn.2d 793, 329 P.3d 59 (2014), addressing the contours of an insurer's duty to defend. Under this Court's precedent, the insurer's duty to defend applies if there is *conceivable coverage* of the claims alleged against its insured. The insurer is relieved of the duty to defend only if the claims are *clearly not covered*. Uncertainty regarding legal principles

³ The townhouse exclusion and tender issues do not appear to be before the Court on review. See Xia Supp. Br. at 5 n.2.

⁴ Xia separately challenges whether ProBuilders breached its duty to indemnify. This issue is not directly addressed in this brief, although the duty to defend analysis presented here may impact resolution of this issue, if reached by the Court.

bearing on policy interpretation may serve as a basis for conceivable coverage of the allegations of the complaint and trigger the duty to defend.

Here, there is, at a minimum, legal uncertainty or legal ambiguity regarding the effect of an absolute pollution exclusion under this Court's decisions in Kent Farms and Quadrant, *supra*. More particularly, there is uncertainty or ambiguity regarding application of the absolute pollution exclusion when the conduct giving rise to liability may *not* involve a pollutant “being used as it was intended,” as explained in Quadrant, 154 Wn. 2d at 179.

V. ARGUMENT

A. Overview Of The Duty To Defend When There Is Uncertainty Regarding The Legal Principles Governing Interpretation And Application Of Insurance Policy Language.

This Court described the duty to defend in Expedia, 180 Wn.2d at 802–04, as follows:

This court has “long held that the duty to defend is different from and broader than the duty to indemnify.” *Am. Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 404, 229 P.3d 693 (2010) (citing *Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 392, 823 P.2d 499 (1992)). While the duty to indemnify exists only if the policy covers the insured's liability, the duty to defend is triggered if the insurance policy conceivably covers allegations in the complaint. *Id.* (citing *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 53, 164 P.3d 454 (2007)). “ ‘The duty to defend 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.’ ” *Id.* at 404–05, (internal quotation marks omitted) (quoting *Truck Ins. Exch. v. VanPort Homes, Inc.*, 147

Wn.2d 751, 760, 58 P.3d 276 (2002)). Furthermore, exclusionary clauses in the insurance contract “ ‘are to be most strictly construed against the insurer.’ ” *Id.* at 406 (quoting *Phil Schroeder, Inc. v. Royal Globe Ins. Co.*, 99 Wn.2d 65, 68, 659 P.2d 509(1983)).

It is a cornerstone of insurance law that an insurer may never put its own interests ahead of its insured's. *Id.* at 405 (citing *Mut. of Enumclaw Ins. Co. v. T&G Constr., Inc.*, 165 Wn.2d 255, 269, 199 P.3d 376 (2008)). “ ‘[T]he duty to defend requires an insurer to give the insured the benefit of the doubt when determining whether the insurance policy covers the allegations in the complaint.’ ” *Id.* at 412 (quoting *Woo*, 161 Wn.2d at 60). A court will construe an ambiguous complaint liberally in favor of triggering the duty to defend. *Woo*, 161 Wn.2d at 52 (quoting *Truck Ins. Exch.*, 147 Wn.2d at 760). In *Truck Insurance Exchange*, we held that “[o]nce the duty to defend attaches, insurers may not desert policyholders and allow them to incur substantial legal costs while waiting for an indemnity determination.” 147 Wn.2d at 761 (citing *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 563, 951 P.2d 1124 (1998)). An insurer must accordingly defend its insured until it is clear that a claim is not covered under the policy. *Am. Best Food*, 168 Wn.2d at 405 (citing *Truck Ins. Exch.*, 147 Wn.2d at 765).

The duty to defend generally is determined from the “eight corners” of the insurance contract and the underlying complaint. There are two exceptions to this rule, and both favor the insured. *Woo*, 161 Wn.2d at 53 (quoting *Truck Ins. Exch.*, 147 Wn.2d at 761). First, if coverage is not clear from the face of the complaint but coverage could exist, the insurer must investigate and give the insured the benefit of the doubt on the duty to defend. *Id.* Second, if the allegations in the complaint conflict with facts known to the insurer or if the allegations are ambiguous, facts outside the complaint may be considered. *Id.* at 54. However, these extrinsic facts may only be used to trigger the duty to defend; the insurer may not rely on such facts to deny its defense duty. *Id.*

(Citations & formatting in original.) The parties and the Court of Appeals below cite Expedia and the cases on which it relies as controlling. See e.g. Xia at *3; Xia Br. at 18; ProBuilders Br. at 27.

The Woo and Alea decisions cited with approval in Expedia indicate that uncertainty regarding a question of law bearing on coverage triggers the duty to defend. See Woo v. Fireman's Fund Ins. Co., 161 Wn.2d 43, 59-60, 164 P.3d 454 (2007) (holding an insurer may not rely on an equivocal interpretation of case law to deny its insured a defense); Am. Best Food, Inc. v. Alea London, Ltd., 168 Wn.2d 398, 405, 229 P.3d 693 (2010) (stating "[t]he insurer is entitled to investigate the facts and dispute the insured's interpretation of the law, but if there is any reasonable interpretation of the facts or the law that could result in coverage, the insurer must defend").⁵

Notwithstanding the foregoing, ProBuilders contends that, under the "eight corners rule" referenced in Expedia, "there was no need for the Court of Appeals to refer to Washington law on the absolute pollution exclusion or explain this Court's rulings in *Kent Farms* or *Quadrant*." ProBuilders Ans. to Pet. for Rev. at 12; see also ProBuilders Supp. Br. at 12 & n.13.

ProBuilders' argument seems to overlook that an insurer must take into account relevant legal principles bearing on the interpretation or

⁵ In order to resolve such uncertainty, and avoid breaching the duty to defend, the insurer may defend its insured under a reservation of rights and seek a declaratory judgment that it has no duty to defend. See Woo, 161 Wn. 2d at 54; Alea, 168 Wn. 2d at 405. Breach of the duty to defend may result in liability for insurance bad faith and coverage by estoppel, and may require an insurer to indemnify its insured beyond the policy limits. See Truck Ins. Exchange v. VanPort Homes, 147 Wn.2d 751, 757-59, 763-66, 58 P.3d 276 (2002).

application of policy language in assessing whether there is a duty to defend. In Woo, this Court specifically held that uncertainty or ambiguity regarding such legal principles triggers the duty to defend. The Court rejected the insurer's reliance on the equivocal advice from its attorney regarding the applicability of case law, holding that this argument "flatly contradicts one of the most basic tenets of the duty to defend." Woo at 60.

The Court explains that:

[The insurer] is essentially arguing that an insurer may rely on its own interpretation of case law to determine that its policy does not cover the allegations in the complaint and, as a result, it has no duty to defend the insured. However, the duty to defend requires an insurer to give the insured the benefit of the doubt when determining whether the insurance policy covers the allegations in the complaint. Here, [the insurer] did the opposite—it relied on an equivocal interpretation of case law to give *itself* the benefit of the doubt rather than its insured.

Id. (brackets added; emphasis in original.)

Subsequently, in Alea, which involved the duty to defend and an assault and battery exclusion, this Court further illuminated the full breadth of an insurer's duty to defend. It held that existing Washington case law finding no duty to defend under this type of exclusion was not determinative when postassault negligence was involved and case law from other jurisdictions had recognized this distinction and this issue had not been resolved by Washington courts. See id., 168 Wn.2d at 404-11. The Court concluded that "[t]he lack of any Washington case directly on

point and a recognized distinction between preassault and postassault negligence in other states presented a *legal uncertainty* with regard to Alea's duty." Id. at 408 (brackets & emphasis added). In upholding the duty to defend under the circumstances, the Court held that "a balanced analysis of the case law should have revealed at least a *legal ambiguity* as to the application of an 'assault and battery' clause with regard to postassault negligence[.]" Id. at 411 (brackets & emphasis added).

The question before the Court is whether there is any "legal uncertainty" or "legal ambiguity" in interpretation and application of ProBuilders' absolute pollution exclusion that triggers the duty to defend under the circumstances of this case.

B. There Is, At A Minimum, Legal Uncertainty Regarding Applicability Of An Absolute Pollution Exclusion When The Conduct Giving Rise To Liability May *Not* Involve Use Of A Pollutant As Intended.

The Court of Appeals rejected Xia's argument that the effect of the pollution exclusion is uncertain in light of the Supreme Court's decisions in Kent Farms, and Quadrant. See Xia at *5-7.

In Kent Farms, the Court held that an absolute pollution exclusion did *not* apply to claims made by a fuel deliveryman who was injured when a fuel storage tank intake valve malfunctioned and diesel fuel spilled from the tank, dousing the delivery man and entering his throat, lungs and

stomach, because pollution exclusions apply to environmental harms and not bodily injury caused by negligently maintained or operated equipment. See 140 Wn.2d at 401-02. The Court also held that a pollution exclusion does not apply outside the context of "traditional environmental harms." See id. at 402.

On the other hand, in Quadrant, the Court distinguished Kent Farms on the facts, and held that a pollution exclusion barred coverage for injury caused by fumes from the negligent application of a toxic deck sealant, "where the pollutant was being used as it was intended." See Quadrant, 154 Wn.2d at 179. The Court also appears to retreat from the limitation on application of the pollution exclusion in Kent Farms to traditional environmental harms. See Quadrant at 183 (stating "we conclude that the *Kent Farms* discussion of traditional environmental harms is limited by the facts of that case").⁶

Regardless of how Kent Farms and Quadrant can otherwise be distinguished or reconciled,⁷ there appears to be legal uncertainty or legal

⁶ In distinguishing Kent Farms on the facts, the Court in Quadrant also notes that "[a]n absolute pollution exclusion clause can be ambiguous with regard to one case but not another." Quadrant, 154 Wn. 2d at 181.

⁷ Uncertainty whether this case is more closely analogous to the facts of Kent Farms or Quadrant may present an additional reason for conceivable coverage. Xia also raises the efficient proximate cause rule as a potential basis for reconciling Kent Farms and Quadrant, although it was not addressed by the Court of Appeals. See Xia Reply Br. at 19 (arguing Kent Farms follows the efficient proximate cause rule); Xia Supp. Br. at 9-12. The efficient proximate cause rule "mandates coverage, even if an excluded event appears in the chain of causation that ultimately produces the loss." Vision One, LLC v.

ambiguity regarding application of a pollution exclusion when the conduct at issue may *not* involve the handling of a pollutant as intended. See Quadrant at 176-77, 181 (noting ambiguity in policy exclusion may depend on consideration of whole policy and particular factual context); id. at 179 (seemingly limiting application of absolute pollution exclusions to circumstances where “pollutant” is “being used as it was intended”); see also Xia Br. at 38-39 (discussing “intended use” language of Quadrant); Xia Pet. for Rev. at 11, 15 (same).

Quadrant and the cases it principally examines have a common thread, i.e., each involves the use or handling of a material that is itself a pollutant rather than something that produces a pollutant as a result of its handling or use. See Quadrant, 154 Wn.2d at 168 (involving application of toxic sealant); Kent Farms 140 Wn. 2d at 397-98 (involving delivery of diesel fuel); Cook v. Evanson, 83 Wn. App. 149, 151, 154, 920 P.2d 1223 (1996) (involving application of toxic chemical product); City of Bremerton v. Harbor Ins. Co., 92 Wn. App. 17, 18-20, 23, 963 P.2d 194 (1998) (involving processing of wastewater of sewage treatment plant; analysis relying on Cook, supra).

Philadelphia Indem. Ins. Co., 174 Wn.2d 501, 519, 276 P.3d 300 (2012). It "operates as an interpretive tool to establish coverage when a covered peril [here, allegedly negligent installation of a water heater] sets other causes into motion which, in an unbroken sequence, produce the result for which recovery is sought." Id. (quotation omitted; brackets added).

In light of the “intended use” limitation imposed on the absolute pollution exclusion in Quadrant at 179, it is insufficient for ProBuilders to deny a defense on grounds that Quadrant is, in its view, “clearly analogous,” ProBuilders Supp. Br. at 17. See Woo, 161 Wn.2d at 57-59 (rejecting duty to defend legal analysis based on an insurer’s reliance on allegedly analogous Washington law, concluding this precedent distinguishable);⁸ Alea, 168 Wn.2d at 406-08 (similar). For duty to defend purposes, at least, the Court of Appeals opinion and briefing of the parties reflect legal uncertainty or ambiguity whether installing a water heater entails using the pollutant carbon monoxide as intended. Any reasonable doubt on this question based upon the complaint and the absolute pollution exclusion analysis in Quadrant, would create a conceivable basis for coverage triggering the duty to defend.⁹

VI. CONCLUSION

The Court should adopt the analysis set forth in this brief, and apply it in resolving whether the duty to defend was triggered in this case.

⁸ The Court in Woo also criticized the Court of Appeals analysis below because the precedent relied upon by it involved the duty to indemnify and the issue of actual coverage, not the duty to defend and conceivable coverage. See Woo at 59.

⁹ Quadrant interpreted the absolute pollution exclusion solely in the context of the duty to indemnify, presenting the question of whether there was *actual* coverage (distinguished from *conceivable* coverage triggering the duty to defend). See 154 Wn.2d at 170 n.3. To the extent this Court confirms Quadrant requires that the pollutant is “being used as it was intended,” id. at 179, for application of the absolute pollution exclusion, this limitation would impact the duty to indemnify analysis, too.

DATED this 24th day of August, 2016.

George M. Ahrend
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Dear Ms. Carlson:

On behalf of the WSAJ Foundation, a letter request to file an Amicus Curiae Brief and accompanying Amicus Curiae Brief are attached to this email. Counsel for the parties and other Amicus Curiae are being served simultaneously by copy of this email, per prior arrangement.

Respectfully submitted,

--

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