No. S063823

IN THE SUPREME COURT OF THE STATE OF OREGON

WEST HILLS DEVELOPMENT COMPANY, an Oregon corporation,
Plaintiffs /Respondent / Respondent on Review,
v.
CHARTIS CLAIMS, INC, et. al.,
Defendants,

and,

OREGON AUTOMOBILE INSURANCE COMPANY, an Oregon company,
Defendant / Appellant / Petitioner on Review.

OREGON AUTOMOBILE INSURANCE COMPANY,
Third Party Plaintiff,

v.

QUANTA SPECIALTY LINES INSURANCE COMPANY,
Third Party Defendant.

Circuit Court No. C107384CV
Court of Appeals No. A152556

AMICUS BRIEF OF (1) PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA ("PCI") AND (2) NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES ("NAMIC")

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A. Statement of Interest

The Property Casualty Insurers Association of America ("PCI) promotes and protects the viability of a competitive private insurance market for the benefit of consumers and insurers, and advocates its members' positions on important issues in legislatures and courts across the country. PCI is composed of nearly 1,000 member companies, representing the broadest cross section of insurers of any national trade association. PCI members write more than $195 billion in annual premiums, 35 percent of the nation's property and casualty insurance. Member companies write 42 percent of the U.S. Automobile insurance market, 28 percent of the homeowner's market, 33 percent of the commercial property and liability market and 35 percent of the private workers' compensation market.

In Oregon, PCI members write 26.2 percent of the property casualty market including 31.7 percent of the personal lines market and 20.4 percent of the commercial lines market.

The National Association of Mutual Insurance Companies ("NAMIC") is the largest property/casualty insurance trade association in the country, with more than 1,400 member companies. NAMIC supports regional and local mutual insurance companies on main streets across America and many of the country's largest national insurers. NAMIC members represent 40 percent of the total property/casualty insurance market, serve more than 170 million policyholders, and write nearly $225 billion in annual premiums. NAMIC has

153 members who write P & C Insurance in the State of Oregon, which represents 46% of the marketplace.

PCI and NAMIC are vitally interested in the case at bar because the decision of the Court of Appeals threatens to undermine an important rule of insurance law pertaining to how insurers are to determine whether their duty to defend has been triggered.

B. Amici Adopt, by Reference, the Brief of Petitioner.

Pursuant to ORAP 5.77(4)(b), Amici PCI and NAMIC concur with the arguments set forth in the Petition for Review of Defendant/Appellant Oregon Automobile Insurance Company, and adopt, by reference, those arguments here.

C. The Court of Appeals' Decision Undermines Oregon's Well-Established "Four Corners" Approach to Duty to Defend Determinations.

The Court of Appeals' Decision, *West Hills Development Company v. Chartis Claims, Inc.*, 273 Or App 155, 359 P3d 339 (2015) ("the Decision"), effectively – and unnecessarily – turns longstanding Oregon law governing an insurance company's duty to defend on its head. This Court has long held, and thereby provided guidance relied upon by insurance carriers and insureds alike, that, when evaluating whether an insurer has a duty to defend, an insurer must examine the four corners of two documents ("the four corners rule") – and only two documents – the insurance policy and the complaint – to determine whether

any facts alleged in the complaint provide a basis for recovery that could be covered by the policy. *Ledford v. Gutoski*, 319 Or 397, 400, 877 P2d 80 (1984); *Bresee Homes, Inc. v. Farmers Ins. Exchange*, 353 Or 112, 116, 293 P3d 1036 (2012).

The Decision pays lip service to *Ledford* and its progeny while actually undermining this well-established line of Supreme Court authority. Once an insurer receives a tender letter, the Decision requires an insurer to now *verify* the information in the letter "whether by reference to its declaration pages, a telephone call to its named insured, or, upon reasonable inquiry, a review of the subcontract between [the Additional Insured and the Named Insured]." 273 Or App at 164. Yet, according to the Court of Appeals, the Additional Insured, who is seeking defense and indemnity from the insurer, has no burden to come forward with facts beyond those alleged in the complaint. 273 Or App at 167.

In setting forth the general rule governing an insurer's evaluation of its duty to defend, this Court, in *Ledford*, reasoned that if a contrary rule were adopted, requiring the insurer to take note of facts other than those alleged in the complaint, the insurer frequently would be required to speculate upon whether the facts alleged could be proved:

> We do not think such speculation is a reasonable interpretation of the bargain to defend. It is more reasonable to assume that the parties bargained for the insurer's participation in the lawsuit *only* if the action brought by the third party, if successful, would impose liability upon the insurer to indemnify the insured.

Ledford, 319 Or at 400, quoting *Isenhart v. General Casualty Co.*, 233 Or 49, 54, 377 P2d 26 (1962).

A series of decisions since *Ledford* permit the limited use of extrinsic evidence to demonstrate *the identity* of the insured (i.e., whether the party seeking coverage was actually an insured within the meaning of the policy). *See, e.g., Fred Shearer & Sons, Inc. v. Gemini Ins. Co.*, 237 Or App 468, 476, 240 P3d 67 (2010) (But, "when the question is whether the insured is being held liable for conduct that falls within the scope of a policy, it makes sense to look exclusively to the underlying complaint. That complaint sets the boundaries of the insured's liability"). The Decision takes this limited exception to the general rule, which exception heretofore has been applied in circumstances where the identity of the insured was not in dispute and evidently readily ascertainable, and states that the mere submission of a recital of claimed facts in a tender letter is sufficient to trigger an open-ended duty of inquiry on the part of the insurer. Thus, the Decision plainly requires the insurer not only to take note of facts not alleged in the complaint, but also requires the insurer to respond to unsupported statements in a tender letter by launching an investigation limited only by a court's notion of what is the outer boundary of a "reasonable" inquiry.

It is one thing to require a party seeking insurance coverage to submit conclusive proof of its status as an insured. It is quite another to allow a

putative additional insured to send a tender letter with factual contentions, which do not appear in the complaint, as to why it qualifies as an additional insured, and require the insurer to investigate the truth of those allegations. This Court should reject the Decision's untoward watering-down of this state's "four corners" approach to duty to defend determinations, which adopts an amorphous duty to investigate triggered by nothing more than a putative insured's unsupported assertion of facts regarding its status as an insured.

D. "Ongoing Operations" Does Not Encompass Liability Arising After the Subcontractor's Work was Completed. The Decision's Adoption of a "Not Pled, Therefore Unknown, Therefore Possibly Covered" Approach to Whether A Duty to Defend has Arisen for "Ongoing Operations" Vitiates the "Four Corners" Approach to Duty to Defend Determinations.

The general liability policy issued by Oregon Automobile Insurance Company ("Oregon Auto") to L&T Enterprises, Inc. ("L&T") provides coverage for West Hills Development Company ("West Hills"), as an additional insured, under certain limited conditions pursuant to an Additional Insured Endorsement.[1] The Additional Insured coverage for West Hills is limited to liability arising out of L&T's **ongoing operations** performed for West Hills. The Decision strains to interpret this Additional Insured Endorsement in a case where the underlying complaint clearly alleges that the work of West Hills' subcontractors was ***completed***. West Hills is not covered as an Additional

[1] ER 30 (Ex. 201, p. 30).

Insured under the L&T policy with Oregon Auto for completed operations. That should have been the end of the inquiry.

The history of coverage for additional insureds under an "ongoing operations" endorsement makes this clear. In 1993, the Insurance Services Office ("ISO")[2] revised the language of the form 2010 endorsement utilized by many in the insurance industry to expressly restrict coverage for an additional insured to the "ongoing operations" of the named insured. This revised language effectively precluded application of the endorsement's coverage to completed operations losses. *See* Wielinski, Woodward & Gibson, *Contractual Risk Transfer* (International Risk Management Inst. ("IRMI") 1998), § XI.C, p. 26. One insurance commentator has stated regarding the 1993 revisions of the standard additional insured endorsement forms:

> The restriction of coverage in the two endorsements to only ongoing operations makes it clear that additional insureds will have no coverage under the named insured's policy for liability arising out of the products-completed operations exposure. The effect of this change—restricting the coverage to ongoing operations—is, however, much more profound on [form 2010].

[2] "ISO is a nonprofit trade association that provides rating, statistical, and actuarial policy forms and related drafting services to approximately 3,000 nationwide property or casualty insurers. Policy forms developed by ISO are approved by its constituent insurance carriers and then submitted to state agencies for review. Most carriers use the basic ISO forms, at least as the starting point for their general liability policies." *Montrose Chemical Corp. v. Admiral Ins. Co*. 10 Cal 4th 645, 671, n 13, 42 Cal Rptr 2d 324, 913 P2d 878 (1995) (citations omitted).

> Previous editions of [that form] contained no completed operations exclusion and, thus, could be called on to cover an additional insured for liability arising out of the products-completed operations hazard.

Malecki, *The Additional Insured Book* (3d ed IRMI 1997), ch 9, pp 141-142. Construction industry and underwriting spokespersons have echoed this assessment:

> **Completed Operations Coverage**. Prior to the 1993 ... revisions, the standard ISO additional insured endorsements provided the additional insured with coverage for liability arising out of 'your operations performed for' the additional insured, which included completed operations. More recent editions of these endorsements provide coverage only with respect to 'your ongoing operations,' which effectively eliminates coverage for completed operations.

Construction Risk Management (IRMI 1999), § VI, p VI.C.25.

In the construction industry, damage resulting from a subcontractor's work often does not arise for years. Thus, it is prudent for general contractors to obtain completed operations coverage as additional insureds from their subcontractors' insurers. West Hills *did not do so in this instance* and can have no expectation of coverage for damages arising from the completed operations of L&T. It is likewise unreasonable to impose a duty upon Oregon Auto to defend West Hills given the express limitation of Additional Insured coverage for ongoing operations only.

The Decision begins by casting doubt on this well-established structure of insurance law in the field of construction. Having done so, the Decision then

pivots to find a duty to defend based on the following claim in the complaint to implicate damages caused by the "ongoing operations" of L&T:

> When the [homeowners] purchased their units at Arbor Terrace Townhomes, they did not know that the deficiencies in the building envelope and other components existed and had already started to cause property damage.

This claim, however, in no way suggests that the work done on the building envelope and other components was anything but completed. While the phrase "ongoing operations" is generally not defined in the policy, courts have described "ongoing operations" as the practical application of the principles or processes as a part of a series of actions that is actually in progress or that is making progress. *Pardee Const. Co. v. Ins. Co. of the West*, 77 Cal App 4th 1340, 1359, n 16, 92 Cal Rptr 2d 443, 456 (2000), as modified on denial of reh'g (Feb. 23, 2000) ("When the named insured's operations for the additional insured are no longer 'ongoing,' the additional insured no longer has coverage, regardless of how long the endorsement is maintained as part of the policy."); *Weitz Co., LLC v. Mid-Century Ins. Co.*, 181 P3d 309, 313 (Colo App 2007); *Hartford Ins. Co. v. Ohio Cas. Ins. Co.*, 145 Wash App 765, 778, 189 P3d 195, 202 (2008). In other words, coverage is limited to liability arising out of operations occurring prior to the completion of the work contracted for. 3 S. Plitt, D. Maldonado, J. Rogers & J. Plitt Couch on Ins. § 40:28 (3d ed 2015).

In order for "ongoing operations" to have any meaning, it cannot encompass liability arising after the subcontractor's work was completed. *E.g.*,

United Fire & Cas. Co. v. Boulder Plaza Residential, LLC, 633 F3d 951, 958-59 (10th Cir. 2011); *Weitz Co., LLC, supra* 181 P3d at 313-15 (Colo App 2007); *Hartford Ins., supra,* at 777-778 (2008). Giving "ongoing operations" its plain and ordinary meaning, the Colorado Court of Appeals found this phrase referred to an action "actually in process." *Weitz*, 181 P3d at 313 (quoting *Webster's Third New International Dictionary* 1576 (2002)). Thus, this phrase, by definition, could not encompass "completed operations." *Id*. at 313-14. Because in *Weitz* the contractor had been sued for damage that was caused by the subcontractor's completed work, the insurer had no duty to defend or indemnify the general contractor. *Id*. at 315. The Tenth Circuit, applying *Weitz*, further explained, because

> [c]overage for 'ongoing operations' is distinct from coverage for 'completed operations' or 'completed work,' when a policy "only" covers "ongoing operations," the "result [is a] more limited coverage for the additional insured general contractor vis-vis the insured contractor.

Boulder Plaza, 633 F3d at 958-59 (quoting *Weitz*, 181 P3d at 313). Furthermore, to reach back to "the date of the earliest beginning of any prior event which might be regarded as having a causal relation to the unlooked for mishap would introduce ambiguity where none now exists." *Boulder Plaza*, 633 F3d at 959. By limiting coverage to property damage caused by "ongoing operations," the policy is clear that once a subcontractor completes its work, coverage ends. *Id*. The Tenth Circuit found that to hold otherwise – and agree

with the contractor's suggested interpretation that the damage merely has to be causally linked to operations that were once ongoing – would "transform [the] commercial general liability policy into a performance bond." *Id.* A CGL policy, however, is not meant to cover the business risk that the subcontractor's performance may be inadequate. *Id.* Rather, the purpose of the policy is to protect businesses from liability to third parties for bodily injury or property damage resulting from accidents. *See, e.g., Noble v. Wellington Associates, Inc*., 145 So 3d 714, 719-20 (Miss Ct App 2013).

The Decision, however, finds ambiguity in the fact that the key allegation in the complaint did not say expressly that the work had been completed. This approach, however, is plainly in conflict with the approach of the Court of Appeals in *Martin v. State Farm Fire & Casualty Co.*, 146 Or App 270, 932 P2d 1207 (1997), in which the court held that the failure to plead facts that could have triggered a duty to defend was fatal to the insured's right to a defense. The point made by the court in *Martin* is basic, and the only conclusion that logically follows from this Court's consistent enforcement of the "four corners" approach to duty to defend determinations. The absence of allegations supporting a duty to defend should be conclusive.

Here, the absence of an allegation that the damage arose before L&T had completed its work should foreclose any obligation of Oregon Auto to defend West Hills. To hold otherwise would have implications going far beyond the

immediate context of "ongoing operations" coverage. According to the Court of Appeals, so long as a complaint did not expressly state facts ruling out coverage, there would be a duty to defend. This kind of "possibility" of facts implicating coverage is nothing more than sheer speculation, and, based on this Court's holding in *Ledford*, a duty to defend should not be triggered by mere speculation.

E. Conclusion.

Amici respectfully request that this Court take this opportunity to reaffirm its longstanding adherence to the "four corners" approach to duty to defend determinations.

Respectfully submitted this 2nd day of June, 2016.

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CERTIFICATE OF FILING AND SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. I certify that I electronically filed the attached Motion- Appear Amicus with the State Administrator by using the Oregon Appellate system and that I electronically served the attached on the attorneys of record by using the Oregon Appellate eFiling system:

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