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No. 22-0872

IN THE SUPREME COURT OF TEXAS

IN RE ILLINOIS NATIONAL INSURANCE COMPANY, ET AL.

On Petition for Writ of Mandamus from the 125th Judicial District, Harris County, Texas Cause No. 2016-31648 Honorable Kyle Carter, Presiding

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BRIEF OF AMICUS CURIAE, DALLAS REGIONAL CHAMBER

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IDENTITY OF AMICUS CURIAE

No fee has been charged by the undersigned counsel for the preparation and filing of this brief.

DALLAS REGIONAL CHAMBER (DRC) is one of America's most established business organizations and serves as the voice of business and the champion of economic development and growth in the Dallas Region. DRC works with its member companies and regional partners to strengthen Dallas' business community by advocating for pro-growth public policies, improving the educational system, attracting talented workers from around the world, promoting diversity, equity, and inclusion, and enhancing the quality of life for all.

DRC, a non-profit membership organization founded in 1909, is made up of over 700 member companies representing approximately 600,000 employees in the North Texas region. The DRC is a non-partisan organization that represents the interests of its members through consensus building and partnerships to improve the quality of life for all people in North Texas. DRC's goal is to make the Dallas Region the best place in the United States for all people to live, work, and do business.

As discussed in more detail below, DRC's interest in the issues raised in this original proceeding principally stem from the potential serious implications of a ruling by this Court that places directors and officers of a bankrupt or otherwise insolvent business corporation in a position to have to defend themselves personally against

enormous corporate liabilities when they no longer have access to indemnity rights from the corporation to help protect them, and where the liability insurer has refused to participate in defending or resolving the claims against the individual directors and officers.

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Public and private companies depend upon corporate indemnity agreements and directors and officers ("D&O") liability insurance to secure qualified people to serve on corporate boards.[1] Without these necessary protections, board service would be a perilous personal and professional gamble. And without qualified corporate leadership, businesses and the economy are equally at risk. In recognition of these facts, jurisdictions like Delaware and New York have implemented and enforced rigorous safeguards aimed at protecting corporate indemnity.[2] These same business-friendly jurisdictions have adopted various policies and rules of law favoring insureds in insurance coverage disputes.[3]

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[1] *See Daileader v. Certain Underwriters at Lloyd's London,* 2023 U.S. Dist. LEXIS 69413, 2023 WL 3026597, at *29 (S.D.N.Y. Apr. 20, 2023) ("D&O insurance is not only designed to provide financial security for the individual insureds, but also plays an important role in corporate governance in America. Unless directors can rely on the protections given by D&O policies, good and competent men and women will be reluctant to serve on corporate boards." (quoting *In re WorldCom, Inc. Sec. Litig.*, 354 F. Supp. 2d 455 (S.D.N.Y. 2005))).

[2] *See, e.g.*, *Witco Corp. v. Beekhuis*, 38 F.3d 682, 691 (3rd Cir. 1994) ("The invariant policy of Delaware legislation on indemnification is to 'promote the desirable end that corporate officials will resist what they consider' unjustified suits and claims, 'secure in the knowledge that their reasonable expenses will be borne by the corporation they have served if they are vindicated.' Beyond that, its larger purpose is 'to encourage capable men to serve as corporate directors, secure in the knowledge that expenses incurred by them in upholding their honesty and integrity as directors will be borne by the corporation they serve.'" (quoting *Merritt-Chapman & Scott Corp. v. Wolfson*, 321 A.2d 138, 141 (Del. Super. Ct. 1974))).

[3] *See, e.g.*, *RSUI Indem. Co. v. Murdock*, 248 A.3d 887, 906, 2021 Del. LEXIS 90, *34, 2021 WL 803867 (Del. 2021) ("Insurance contracts should be interpreted as providing broad coverage to align with the insured's reasonable expectations."); *Intelligent Digital Sys., LLC v. Beazley Ins. Co.*, 207 F. Supp. 3d 242, 245 (E.D.N.Y. 2016) ("Under New York law, 'an insurance contract is interpreted to give effect to the intent of the parties as expressed in the clear language of the contract.' '[T]he insured bears the burden of showing that an insurance coverage covers the loss, but the insurer bears the burden of showing that an exclusion applies to exempt it from covering a claim,' and '[d]oubts are resolved in favor of the insured.'" (citations omitted)).

In addition to insurance policies, corporations also rely on settlements to avoid both the uncertainty and dramatic expense in attorneys' fees and other costs associated with trial. In recognition of both realities, many jurisdictions, including Texas, have adopted public policies favoring settlements and disfavoring duplication of effort and waste of judicial resources.[4] Without the ability to control one's own destiny through settlement, individual board members and the corporations they serve are again subject to unnecessary and damaging risk.[5]

The issues presented in Relators' Brief on the Merits threaten to jeopardize the reliance individual board members and corporations reasonably place on both D&O insurance and settlements to mitigate and avoid risk. Specifically, if corporate insureds

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[4] *See, e.g.*, *Forest Oil Corp. v. McAllen*, 268 S.W.3d 51, 60 (Tex. 2008) ("Refusing to honor a settlement agreement—an agreement highly favored by the law—under these facts would invite unfortunate consequences for everyday business transactions and the efficient settlement of disputes."); *Wright v. Sydow*, 173 S.W.3d 534, 551–52 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) ("Texas law strongly favors and encourages voluntary settlement and orderly dispute resolution. Indeed, 'the law has always favored the resolution of controversies through compromise and settlement rather than through litigation[,] and it has always been the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy.' Settlement agreements are not only favored because they are beneficial in themselves, but also because they are 'conducive to peace and harmony.' This strong public policy in favor of voluntary settlements is also embodied in Texas's statutes. *See* TEX. CIV. PRAC. & REM. CODE § 154.002 (stating Texas public policy encourages the peaceable resolution of disputes and the early settlement of pending litigation through voluntary settlement)." (case citations omitted)); *see also Meleski v. Estate of Albert Hotlen*, 240 Cal. Rptr. 3d 552, 556 (Cal. Ct. App. 2018) ("The policy in favor of settlement 'primarily is intended to reduce the burden on the limited resources of the trial courts. The trial of a lawsuit that should have been resolved through compromise and settlement uses court resources that should be reserved for the resolution of otherwise irreconcilable disputes.'" (citation omitted)).

[5] *See, e.g.*, *Spegele v. USAA Life Ins. Co.*, 2021 U.S. Dist. LEXIS 204744, *17 (W.D. Tex. Aug. 26, 2021) ("When the prospect of ongoing litigation threatens to impose high costs of time and money on the parties, the reasonableness of approving a mutually-agreeable settlement is strengthened." (*quoting In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1064 (S.D. Tex. 2012))).

are required to pay the cost of defending and settling high-stakes litigation before there is a "loss" triggering coverage, the protective benefit of D&O insurance will be eliminated. Similarly, if a non-recourse settlement will never be binding on a non-defending liability insurer, the intrinsic value of settling will be entirely lost to corporate insureds, who are forced to undergo the cost, distraction, and uncertainty of trial at the whim of a recalcitrant insurance carrier. There is absolutely no reason to position Texas as a jurisdiction hostile to business or to alienate qualified professionals from Texas boards through an anti-insured ruling on these issues—particularly when the facts of this case are fundamentally different from those of *Great Am. Ins. Co. v. Hamel.*[6]

Where the fairness of a settlement has been reviewed and approved through the rigorous processes of a U.S. Bankruptcy Court, requiring full litigation of the underlying claims to run its entire course for D&O insurance benefits to be available does not raise the problems the Court was addressing in *Hamel.* While not serving any beneficial purpose, the rule sought by Relators in this matter would undermine the ability of corporations to get quality persons to act as directors and officers and multiply and extend litigation unnecessarily to the detriment of both the parties and the courts. DRC therefore urges the Court to deny Relators' Petition for Writ of Mandamus.

I. *HAMEL* SHOULD NOT BE EXTENDED BEYOND ITS LIMITED FACTS TO SETTLEMENTS INVOLVING UNINDEMNIFIED DIRECTORS & OFFICERS FOR INSOLVENT CORPORATE INSUREDS.

[6] *Great Am. Ins. Co. v. Hamel*, 525 S.W.3d 655 (Tex. 2017).

Hamel involved a unique set of unusual facts that do not translate to this case. In *Hamel*, homeowners sued a general contractor for defective construction of their home's stucco exterior, which led to water intrusion and related damage.[7] The contractor's general liability insurer, Great American, refused to defend the homeowners' suit, on grounds the insurer later conceded were erroneous.[8] Without the benefit of insurance coverage, the contractor, Terry Mitchell, had difficulty funding his own defense.[9] But instead of simply settling and concluding the litigation, Mitchell and the homeowners, the Hamels, entered into a Rule 11 agreement that contemplated (1) a future trial at which Mitchell would appear without seeking a continuance; and (2) in the event of a judgment against Mitchell, the Hamels would only seek to recover the assets of Mitchell's company, as opposed to his personal tools and truck.[10] Following this agreement, Mitchell also executed stipulations that conceded duties and facts he had previously denied in discovery, including admissions that (1) Mitchell had a duty to inspect the work of his subcontractors as well as the work performed by a previous contractor; (2) the residence was subject to construction defects resulting in water damage; and (3) Mitchell committed a "mistake" in failing to discover the defects in his inspection of the residence.[11]

[7] *Hamel*, 525 S.W.3d at 659.
[8] *Id.* at 660.
[9] *Id.*
[10] *Id.*
[11] *Id.*

At the subsequent trial, the Hamels presented evidence, including the testimony of Mitchell, consistent with the stipulations.[12] Mitchell presented no witnesses in his defense.[13] When the trial court asked for proposed findings of fact and conclusions of law, only the Hamels made a submission.[14] Not surprisingly, the trial court gave the Hamels everything they asked for, and Mitchell assigned his rights against Great American to the Hamels.[15]

In the subsequent coverage dispute between the Hamels and Great American, the trial court entered judgment in favor of the Hamels, which the Court of Appeals affirmed after finding, among other things, that the underlying judgment in the liability case was the result of a fully adversarial trial.[16] On appeal to this Court, Great American argued that the underlying judgment was not the result of a fully adversarial trial and therefore not binding on the insurer for purposes of coverage.[17]

At the very outset of its analysis, this Court acknowledged the unique factual circumstances presented by the Hamel trial are distinct from the prior cases in *Block*, *Gandy* and *ATOFINA*.[18] Instead of focusing exclusively on the insurer's participation

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[12] *Id.*
[13] *Id.* at 661.
[14] *Id.*
[15] *Id.*
[16] *Id.* at 662.
[17] *Id.* at 663.
[18] *Id.* at 665 ("This case gives us the opportunity to clarify how our holdings in *Block*, *Gandy*, and *ATOFINA* apply in cases that do not match their exact factual circumstances.") (citing *Emp'rs Cas. Co. v. Block*, 744 S.W.2d 940 (Tex. 1988), *State Farm Fire & Cas Co. v. Gandy*, 925 S.W.2d 696, 714 (Tex. 1996) and *Evanston Ins. Co. v. ATOFINA Petrochemicals, Inc.*, 256 S.W.3d 660, 671 (Tex. 2008)).

in the underlying defense, the Court in *Hamel* focused on "whether the underlying judgment accurately reflects the plaintiff's damages and thus the insured's covered loss."[19] Although an adversarial proceeding is one way of validating the accuracy of an underlying judgment,[20] the Court recognized that a hindsight examination of trial strategies and tactics "often produces an inaccurate and unreliable result."[21] Consequently, the Court held that "the controlling factor is whether, at the time of the underlying trial or settlement, ***the insured bore an actual risk of liability for the damages awarded or agreed upon, or had some other meaningful incentive to ensure that the judgment or settlement accurately reflects the plaintiff's damages*** and thus the defendant—insured's covered liability loss."[22]

The emphasis on risk and incentives in the Court's "adversity" formulation is notable for at least two reasons. First, it is narrowly derived from the peculiar facts of the *Hamel* case itself, including the unusual Rule 11 agreement and stipulation that preceded the trial between Mitchell and the Hamels. How many other cases present the need or opportunity to question whether at the time of trial the insured defendant bore an actual risk of liability or damages? There was no comparable Rule 11 agreement that proceeded a trial of the underlying securities claims against Cobalt in this case. Nor

[19] *Id.*
[20] *Id.* ("One way to ensure that a judgment accurately reflects the plaintiff's damages is to require that the loss be determined through a proceeding in which the parties 'fully'—or at least actually and effectively—oppose and contest each other's positions.").
[21] *Id.* at 666.
[22] *Id.* (emphasis added).

will there be in most litigation matters where an agreement between plaintiff and defendant is intended to end litigation and avoid trial altogether.

Because settlements by nature are intended to eliminate risk, a rule that examines the allocation of risk and incentives "at the time of the underlying trial or settlement" will either be meaningless (if determined upon execution of the agreement removing future risk)[23] or (if determined immediately before execution) fraught with the kind of post-hoc second-guessing that has led to "inaccurate and unreliable result[s]" in other cases.[24] Moreover, any standard that necessitates a factual determination of risks and incentives will inevitably require an entire coverage trial just to determine whether the first liability trial (or settlement) was even effective. And if it is determined that the first trial lacked sufficient adversity, a third trial may be needed to prove the amount of the insured's loss.[25]

Second, in calling for an examination of the "actual risk of liability" and the insured's "incentive to ensure that the judgment or settlement accurately reflects the plaintiff's damages,"[26] the Court has assumed that such risks and incentives exist and are relevant considerations in all cases. The Cobalt case proves the exception.

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[23] *In the Estate of Riefler*, 2020 Tex. App. LEXIS 9443, *17, 2020 WL 7063486 (Tex. App.—Fort Worth 2020, no pet.) ("The purpose of mediation is to assist parties in arriving at a settlement to avoid the expense and investment of time in litigation.").

[24] *Hamel*, 525 S.W.3d at 666 ("The court of appeals' approach necessarily requires courts to retroactively evaluate and thus second-guess trial strategies and tactics, which—as we have noted in other circumstances—often produces an inaccurate and unreliable result.").

[25] *See, e.g.*, *Hamel*, 525 S.W.3d at 670 (remanding after a trial in the liability case and a bench trial in the original coverage case).

[26] *Id.* at 666.

Individual insured directors and officers are not supposed to bear personal risk for their service on corporate boards.[27] Insurance policies and indemnity agreements are intended to avoid this. In the case of Cobalt, its Chapter 11 bankruptcy in 2017 removed, or at least radically altered its financial ability to pay. As a result, the underlying rule announced in *Hamel* does not hold in cases involving corporate insolvency or in other circumstances where liability insurance recovery is the only asset available to satisfy a plaintiff's claims.

Given the unusual settlement agreement and stipulations at issue in *Hamel* and the distinctions from the current case involving Cobalt, the rule in *Hamel* should not be expanded beyond its limited facts. A rule that multiplies the number of trials an insured must undergo to receive the benefit of insurance coverage does not serve Texas' interest in promoting settlements and conserving judicial resources.[28] A standard of "adversity" that requires individual and corporate insureds to remain at risk—even in settlement—eliminates the incentive to compromise before trial when insurance proceeds are the only asset standing between a plaintiff and a corporate defendant. When "actual risk of liability" is eliminated by corporate bankruptcy, any settlement between a plaintiff

[27] *See, e.g.*, *Mt. Hawley Ins. Co. v. Lopez*, 156 Cal. Rptr. 3d 771, 799 (Cal. Ct. App. 2013) ("Corporate managers insist on D&O insurance to protect their personal wealth from the risk of shareholder litigation, making such coverage necessary to attract qualified persons to board service and executive-level employment." (quoting Griffith, *Uncovering a Gatekeeper: Why the SEC Should Mandate Disclosure of Details Concerning Directors' and Officers' Liability Insurance Policies*, 154 U. PA. L. REV. 1147, 1171 (2006))).

[28] *Transport Ins. Co. v. Faircloth*, 898 S.W.2d 269, 280 (Tex. 1995) ("Settlements are favored because they avoid the uncertainties regarding the outcome of litigation, and the often exorbitant amounts of time and money to prosecute or defend claims at trial.").

and a bankrupt corporation for insurance proceeds will be subject to challenge by a non-defending insurer, if the rule of *Hamel* is expanded to these facts. Likewise, if *Hamel* is to be extended beyond its limited facts, individual board members and insured officers will be required to put their own personal fortunes at risk for a settlement to be binding on a non-defending insurance carrier.

This not only disincentivizes settlement – lengthening and even multiplying litigation – but it also defeats the purpose of D&O insurance, which in turn discourages qualified professionals from serving on the boards of Texas companies.[29] Accordingly, concerned that such a rule could have terrible and foreseeable impacts on Texas business and the Texas economy, DRC urges the Court to reject Relators' mandamus petition and not to extend *Hamel* beyond its limited facts and into non-recourse settlements involving unindemnified directors and officers and/or a bankrupt corporate insured, as is the situation in this case.

II. "LOSS" DOES NOT REQUIRE AN OUT-OF-POCKET EXPENDITURE, WHICH WOULD ELIMINATE ANY INSURANCE COVERAGE FOR INSOLVENT AND UNINDEMNIFIED INDIVIDUAL INSUREDS.

In many ways, Relators' "loss" and *Hamel* arguments are two sides of the same coin. Relators would have the Court believe that if the non-recourse settlement

[29] *See, e.g.*, *Dougherty v. Nat'l Union Fire Ins. Co.*, 2022 Phila. Ct. Com. Pl. LEXIS 4, *16 (Pa. Cnty. Ct. Common Pleas Mar. 17, 2022) ("Organizations that purchase D&O insurance must be able to assure their officers and board members that personal and family assets are covered, or they may not be able to find officers and board members willing to serve—and if there is a dispute, courts have a responsibility to protect the rights of the parties until the merits are decided by judge, jury or arbitrator.").

between Cobalt and the underlying securities plaintiffs is not "binding" on the insurers, it does not exist at all for purposes of satisfying the policy's requirement for a "loss" that the insureds are "legally obligated to pay."[30] For all of the reasons stated above, while *Hamel's* "actual risk of liability" formulation may have been appropriate in the context of that specific Rule 11 agreement and stipulations agreed to between the Hamels and Mitchell, this rule cannot be extended to a non-recourse settlement between a plaintiff and unindemnified board members for a bankrupt corporate insured without doing violence to Texas' public policy favoring settlements or dissuading qualified professionals from risking board service in the first place. To the extent that the settlement is binding on Cobalt's non-defending insurers, as the trial court found, Relators' "loss" argument quickly unravels and can be easily seen as contrary to and harmful to important public policies.

Relators' "loss" defense fails for fundamental reasons that are again rooted in Texas' policy favoring both settlements and the protections that must be afforded board members if Texas businesses are to thrive under qualified leadership. First, concluding that the "amount" of a settlement is not binding on an insurer and concluding that there has been no settlement at all are two very different things. Relators' attempt to equate the two is a non-sequitur. In the non-recourse settlement between the Cobalt Insureds

[30] *See, e.g.*, Relators' Brief on the Merits, at 27–28 ("Because the Cobalt Insureds are not legally obligated to pay for, not financially liable for, and are wholly absolved from paying the Settlement Amount, Relators owe no duty to 'indemnify' the Cobalt Insureds against a liability—or Loss—that does not exist and can never exist.").

and the underlying securities plaintiffs, there is a "legal obligation to pay" something, which triggers the threshold "loss" requirement under Relators' policies – whether that something is $220 million of insurance proceeds or a lesser figure. To conclude otherwise would be to completely disregard the legal obligations voluntarily undertaken by the parties to the non-recourse settlement agreement. Such a finding would be contrary to both Texas' policy favoring settlements[31] and the freedom to contract.[32]

Second, in arguing that "no judgment or agreement makes the Cobalt Insureds financially liable for or legally obligated to pay anything to GAMCO,"[33] Relators ask the Court to believe and assume that the proceeds of Relators' policies are nothing. Besides being overtly circular, this argument ignores the basic role and importance of insurance to Texas companies and their directors and officers. Texas companies rely on D&O insurance as a real and tangible benefit intended to attract qualified

[31] *See, e.g.*, *Klinek v. Luxeyard, Inc.*, 596 S.W.3d 437, 447 (Tex. App.—Houston [14th Dist.] 2020, pet. denied) ("'The legislature has declared that '[i]t is the policy of this state to encourage the peaceable resolution of disputes . . . and the early settlement of pending litigation through voluntary settlement procedures.' TEX. CIV. PRAC. & REM. CODE ANN. § 154.002. Texas courts likewise 'promote a public policy that encourages settlements.'"); *see also In re Caballero*, 441 S.W.3d 562, 575 (Tex. App.—El Paso 2014, orig. proceeding) ("The law has always favored the resolution of controversies through compromise and settlement rather than through litigation and it has always been the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy." (quoting *Hernandez v. Telles*, 663 S.W.2d 91, 93 (Tex. App.—El Paso 1983, no writ))).

[32] *See, e.g.*, *Shields Limited P'ship v. Bradberry*, 526 S.W.3d 471, 481 (Tex. 2017) ("We have repeatedly reaffirmed that competent parties 'shall have the utmost liberty of contract, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice.' This 'paramount public policy' mandates that courts 'are not lightly to interfere with this freedom of contract.' 'Absent compelling reasons, courts must respect and enforce the terms of a contract the parties have freely and voluntarily entered,' and '[a]s a rule, parties have the right to contract as they see fit as long as their agreement does not violate the law or public policy.'" (citations omitted)).

[33] Relators' Brief on the Merits, at 30.

professionals to corporate boards.[34] Corporate board members rely on D&O insurance to protect personal and family wealth from claims arising out of their service as directors and officers.[35] If D&O insurance only provides protection to the extent that an insured company or covered individual has the financial wherewithal to pay out-of-pocket in the first place, D&O insurance offers none of the protections it is intended to provide. Serving as a director or officer then begins to look like a potentially devastating financial trap in which the insurer can effectively seal off any exit – leaving directors and officers unprotected until they weather the entire litigation on their own first.

In the case of an insolvent company and unindemnified directors, as presented here, D&O insurance would be completely meaningless if the Relators' arguments are accepted at face value. This is not what Texas companies and individual insured directors and officers reasonably expect from their D&O insurers. This Court should

[34] Christopher French, *The Insurability of Claims for Restitution*, 18 U. PA. J. BUS. L. 599, 614–15 (2016) ("The most common explanation for why D&O insurance is allowed and considered desirable is that companies would not be able to attract talented people to run companies if corporate managers had to risk their own personal assets in order to do so. For similar reasons, many states, including Delaware where over 50% of all publicly traded corporations and over 63% of the Fortune 500 are incorporated, have passed statutes that allow companies to indemnify corporate managers for many types of misconduct and to purchase insurance to cover the losses they are allowed to indemnify as well as the ones they are unable to indemnify." (internal footnotes omitted)).

[35] *In re MF Global Holdings Ltd.*, 469 B.R. 177, 192 (S.D.N.Y. 2012) ("D&O policies are obtained for the protection of individual directors and officers . . . . In essence and at its core, a D&O policy remains a safeguard of officer and director interests and not a vehicle for corporate protection." (citation omitted)); *see also Quinlan v. Liberty Bank & Trust Co.*, 575 So. 2d 336, 341 (La. 1990) ("Since indemnification by the corporation is often discretionary, '[l]arge corporations . . . need . . . [insurance] protection, in order to attract and retain directors of substance and prominence.' D & O insurance comports with public policy by protecting officers and directors not only from personal liability, but from the costs incurred in defending lawsuits against them." (citations omitted)).

decline Relators' invitation to become a minority, anti-business jurisdiction where the essential benefits of insurance contracts can be eliminated at the whim of the insurer.

Other business-friendly jurisdictions, like Delaware, have recognized that insurers cannot benefit from their own wrongdoing—creating the circumstances where there is allegedly "no loss" by refusing payment until impecunious insureds can come up with the funds insurance policies were supposed to provide.[36] These jurisdictions have rejected the very argument Relators have urged this Court to adopt in distinguishing between a "legal obligation to pay" and satisfaction of that obligation by tender of actual payment.[37] Insurance is not insurance if the policyholder is only protected by its own financial ability to pay. This Court should not conclude otherwise

[36] *See, e.g.*, *Sycamore Partners Mgmt., L.P. v. Endurance Am. Ins. Co.*, 2021 Del. Super. LEXIS 584, *60, 2021 WL 4130631 (Del. Super. Ct. Sept. 10, 2021) ("An insurer cannot deny coverage, thereby forcing the insured to find alternate sources of capital, and then argue the third-party payment relieves it of its contractual obligation to cover the loss it agreed to pay on behalf of the insured in the first place. Such an 'iron[ic]' practice would undermine the purpose of pay-on-behalf-of insurance and would be inconsistent with Delaware law.").

[37] *Intelligent Digital Sys., LLC*, 207 F. Supp. 3d at 245–46 ("The question presented in this case is whether the Individual Insureds were 'legally obligated to pay' the settlement amounts and judgments against the Individual Insureds in the Underlying Action even though the Plaintiffs agreed to forebear collection on the portions of the unpaid judgments from the Individual Insureds personally. … [I]t appears that New York courts and a majority of courts in other jurisdictions have held that an insurance company remains 'legally obligated' to pay a claim under a policy even where, as here, the claim was assigned to a third party, and the third party agreed not to execute a judgment against the insured's personal assets." (collecting cases)); *cf. AT&T Corp. v. Clarendon Am. Ins. Co.*, 931 A.2d 409, 416 (Del. 2007) ("The question is whether, as a matter of California law, AT&T's agreement to indemnify the At Home Directors precludes any inference that those Directors became 'legally obligated' to pay those defense costs or to pay or contribute towards any judgment or settlement. We conclude that the Superior Court, by answering that question in the negative, erred as a matter of law for two separate reasons. First, the language of the D&O policies supports a contrary conclusion. Second, the California cases do not affirmatively require, in order to establish a 'Loss,' that the directors who are insured under a D&O policy must actually suffer the entry of a judgment, or otherwise contractually promise to pay any judgment and/or costs of defense.").

or place Texas in a minority position on whether a "loss" can exist in situations where the corporate insured is insolvent and/or the insured directors and officers are unindemnified.

CONCLUSION

Amicus Curiae Dallas Regional Chamber respectfully requests that the Court protect the interest of Texas corporations and their individual directors and officers by denying Relators' Petition for Writ of Mandamus.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been forwarded on this 23rd day of October, 2023, via the electronic service system provided through Texas.gov and via email to all counsel of record as follows:

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Associated Case Party: Beazley Insurance Company, Inc.

Name	BarNumber	Email	TimestampSubmitted	Status

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Associated Case Party: Beazley Insurance Company, Inc.

Daniel McNeelLane, Jr.		neel.lane@nortonrosefulbright.com	10/23/2023 6:40:07 PM	SENT
Julie Martin		julie.martin@nortonrosefulbright.com	10/23/2023 6:40:07 PM	SENT

Associated Case Party: Hudson Insurance Company

Name	BarNumber	Email	TimestampSubmitted	Status
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Associated Case Party: Allied World National Assurance Company

Name	BarNumber	Email	TimestampSubmitted	Status
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Amanda Gordon		agordon@dykema.com	10/23/2023 6:40:07 PM	SENT
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Associated Case Party: Endurance American Insurance Company

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Matthew Pepping		mpepping@chasnoffstribling.com	10/23/2023 6:40:07 PM	SENT
Chad Schreiber		cschreiber@chasnoffstribling.com	10/23/2023 6:40:07 PM	SENT

Associated Case Party: Aspen American Insurance Company

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Christina Culver		cculver@thompsoncoe.com	10/23/2023 6:40:07 PM	SENT

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Associated Case Party: Federal Insurance Company and Westchester Fire Insurance Company

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Stephen Pate		spate@cozen.com	10/23/2023 6:40:07 PM	SENT
Gregory Hudson		ghudson@cozen.com	10/23/2023 6:40:07 PM	SENT
William J.Boyce		bboyce@adjtlaw.com	10/23/2023 6:40:07 PM	SENT

Associated Case Party: Alterra America Insurance Company (n/k/a Pinnacle National Insurance Company)

Name	BarNumber	Email	TimestampSubmitted	Status
Cary Economou		cary.economou@clydeco.us	10/23/2023 6:40:07 PM	ERROR
Raymond Pinkham		ray.pinkham@clydeco.us	10/23/2023 6:40:07 PM	ERROR

Associated Case Party: Freedom Specialty Insurance Company

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Andrew Nelson		nelson@wrightclosebarger.com	10/23/2023 6:40:07 PM	SENT

Associated Case Party: Navigators Insurance Company

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Kristie Johnson		kristie.johnson@wilsonelser.com	10/23/2023 6:40:07 PM	SENT

Associated Case Party: RSUI Indemnity Company

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Associated Case Party: RSUI Indemnity Company

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Tony Draper		tdraper@walkerwilcox.com	10/23/2023 6:40:07 PM	SENT

Associated Case Party: Starr Indemnity & Liability Company

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William Moye		wmoye@thompsoncoe.com	10/23/2023 6:40:07 PM	SENT

Associated Case Party: Swiss Re Corporate Solutions America Insurance Corporation, formerly North American Specialty Insurance Company

Name	BarNumber	Email	TimestampSubmitted	Status
F. DanielKnight		daniel.knight@chamberlainlaw.com	10/23/2023 6:40:07 PM	SENT

Associated Case Party: GAMCO Global Gold, Natural Resources & Income Trust and GAMCO Natural Resources, Gold & Income Trust

Name	BarNumber	Email	TimestampSubmitted	Status
Andrew Entwistle		aentwistle@entwistle-law.com	10/23/2023 6:40:07 PM	SENT
Callie Crispin		ccrispin@entwistle-law.com	10/23/2023 6:40:07 PM	SENT
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Joshua Porter		jporter@entwistle-law.com	10/23/2023 6:40:07 PM	SENT
Andrew Sher		asher@entwistle-law.com	10/23/2023 6:40:07 PM	SENT

Associated Case Party: Hon. Kyle Carter

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Associated Case Party: Hon. Kyle Carter

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Associated Case Party: Dallas Regional Chamber

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