BEFORE THE IOWA SUPREME COURT

No. 17-1979

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33 CARPENTERS CONSTRUCTION, INC.,

Plaintiff-Appellant/Cross-Appellee,

vs.

THE CINCINNATI INSURANCE COMPANY,

Defendant-Appellee/Cross-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR SCOTT COUNTY
HONORABLE HENRY W. LATHAM II, JUDGE

BRIEF OF IOWA INSURANCE INSTITUTE, IOWA DEFENSE COUNSEL ASSOCIATION, AND MUTUAL INSURANCE ASSOCIATION OF IOWA, AS AMICI CURIAE, IN SUPPORT OF APPELLEE

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STATEMENT OF THE CASE

Iowa Code Chapter 522C imposes strict licensure requirements on public adjusters who wish to advocate to insurance companies on behalf of Iowans. Iowa Code § 103A.71 declares "void" contracts entered into by residential contractors who perform or offer public adjuster services – i.e., who "represent or negotiate on behalf of, or offer or advertise to represent or negotiate on behalf of, an owner or possessor of residential real estate on any insurance claim in connection with the repair or replacement of roof systems, or the performance of any other exterior repair . . . replacement . . . or reconstruction work." These requirements – which are similar to licensure requirements in 44 other states plus the District of Columbia – exist for good reason: residential contractors are often in position to exploit unwitting consumers and insurance companies, particularly in the aftermath of tornadoes, hail storms, and other natural disasters.

The position advocated by Petitioner 33 Carpenters, if accepted, would undermine the language and purpose of Iowa Code Chapter 522C and § 103A.71 by allowing residential contractors and other unlicensed public adjusters to reap the benefits of their unlawful activity at the expense of insurance companies and policyholders. The Court should reject Petitioner's position and affirm the conclusion of the Iowa Court of Appeals and District

Court that an assignment of benefits contract between an unlicensed public adjuster and policyholder is void and unenforceable.

IDENTITY AND INTEREST OF THE AMICI

Amici's interest in the case arises from their collective desire to ensure fair and competitive insurance markets in which consumers and insurers alike are protected from harmful and deceptive trade practices. Amicus Iowa Insurance Institute is an Iowa not-for-profit association comprised of property and casualty insurers. Amicus Iowa Defense Counsel Association is an Iowa not-for-profit association whose members are lawyers and claims professionals actively engaged in the practice of law or in work relating to the handling of claims and defense of legal actions. Amicus Mutual Insurance Association of Iowa is an association of member companies formed under Iowa Code Chapters 518 or 518A. Amici support the position of Respondent The Cincinnati Insurance Company.

This brief was not authored in whole or part by counsel for any party to the case. Amici paid for the brief from a fund available for amicus curiae submissions and other advocacy efforts. No party or party's counsel contributed money to fund the preparation or submission of the brief except insofar as Respondent pays annual membership dues to Amici on the same basis as all other members.

ARGUMENT

I. THE IOWA LEGISLATURE ENACTED IOWA CODE CHAPTER 522C AND § 103A.71 TO ENSURE THE INTEGRITY OF THE INSURANCE ADJUSTMENT PROCESS AND PROTECT IOWA CONSUMERS FROM IMPROPER AND EXPLOITATIVE TRADE PRACTICES.

Under Iowa law, a "public adjuster" is "any person who for compensation or any other thing of value acts on behalf of an insured" by, *inter alia*, negotiating with an insurance company on the insured's behalf or "[d]irectly or indirectly soliciting business investigating or adjusting losses, or advising an insured about first-party claims for loss or damage to real or personal property of the insured." Iowa Code § 522C.2(7). Iowa Code §§ 522C.4 and 522C.6 require public adjusters to obtain licenses prior to performing public adjustment services and impose civil and criminal penalties on companies and individuals who fail to do so. The Iowa Code further declares "void" any contracts entered into by residential contractors who attempt to serve as public adjusters – i.e., who "represent or negotiate on behalf of, or offer or advertise to represent or negotiate on behalf of, an owner or possessor of residential real estate on any insurance claim in connection with the repair or replacement of roof systems, or the performance of any other exterior repair . . . replacement . . . or

reconstruction work on the residential real estate." Iowa Code § 103A.71(3), (5).

Iowa is one of 45 states (plus the District of Columbia) with laws requiring licensure of public adjusters. *See Public Adjusters: Licensing and Education Requirements*, 0110 SURVEYS 78, Westlaw (December 2018). As an appellate court in one of these states explains, the purpose of the licensure requirement is to "curtail unethical and abusive practices" by public adjusters who "present[] danger to the public by 'chasing fires' and soliciting clients under conditions of duress." *Bldg. Permit Consultants, Inc. v. Mazur*, 122 Cal. App. 4th 1400, 1411-12, 19 Cal. Rptr. 3d 562, 570 (2004). Such unethical practices can take many forms, including "price gouging . . . collusion . . . high-pressure sales tactics, fraud, and incompetence." *Id.* at 1412, 571; *see also, e.g.*, *Reyelts v. Cross*, 968 F. Supp. 2d 835, 839-40 (N.D. Tex. 2013) (contractor misled homeowner into believing it would negotiate and reach agreement with insurance company as to cost of repairs). Consumers and insurers may be especially susceptible to exploitation "in the wake of earthquakes, fires, floods, and similar catastrophes." *Mazur*, 122 Cal. App. 4th at 1412, 19 Cal. Rptr. 3d at 571.

The Iowa Legislature was clearly motivated by concerns about post-natural-disaster exploitation when it enacted Iowa Code Chapter 522C and

Iowa Code § 103A.71. The latter statute specifically requires a contractor to give written notice to the homeowner that a "contract . . . to repair damage resulting from a naturally occurring catastrophe including but not limited to a fire, earthquake, tornado, windstorm, floor or hail storm is void" if the contractor attempts to perform as a public adjuster by negotiating or offering to negotiate on behalf of a policyholder with the insurance carrier. Iowa Code § 103A.71(4) (emphasis added). Chapter 522C and § 103A.71 passed the Iowa Legislature with strong bipartisan support. *See* S. Journal 82nd G.A., Reg. Sess., at 1191 (Iowa 2007) (reflecting passage of H.F. 499 – later codified as Chapter 522C – by 50-0 vote); H. Journal 82nd G.A., Reg. Sess., at 1422 (Iowa 2007) (reflecting passage of H.F. 499 by 99-0 vote, with one absent); S. Journal 84th G.A., Reg. Sess., at 913 (Iowa 2012) (reflecting passage of S.F. 466 – later codified as Section 103A.71 – by 45-1 vote, with four absent); H. Journal 84th G.A., Reg. Sess., at 945-46 (Iowa 2012) (reflecting passage of S.F. 466 by 72-23 vote).

II. THE LANGUAGE AND PURPOSE OF IOWA CODE CHAPTER 522C AND SECTION 103A.71 WOULD BE DEFEATED IF COURTS ENFORCE ASSIGNMENT OF BENEFITS CONTRACTS ENTERED INTO BY UNLICENSED PUBLIC ADJUSTERS.

Petitioner 33 Carpenters argues that invalidation of its "assignment of benefits" contract with the homeowner is an inappropriate and unlawful remedy for violating the public adjuster licensure requirements. This

argument fails, first, because the plain language of Iowa Code § 103A.71 requires courts to declare void a contract between a residential contractor and homeowner if the contractor "represent[s] or negotiate[s] on behalf of, or offer[s] or advertise[s] to represent or negotiate on behalf of, an owner or possessor of residential real estate." 33 Carpenters cannot seriously dispute that it ran afoul of § 103A.71 when, among other things, it: promised in a website advertisement to "meet personally with your insurance adjuster, as an ADVOCATE on YOUR behalf" (App. 117); told the homeowner that it would help "determine how [the insurer] intends to make you whole" (App. 129); demanded to be present when the insurer investigated damage to the home (App. 127); and told the insurer's representative that 33 Carpenters intended to "make his job very difficult." (Id.) In light of this undisputed evidence of advocacy on behalf of the homeowner, the plain language of Iowa Code § 103A.71 is reason alone to void the assignment of benefits contract.

Petitioner's argument also fails, however, because it undermines the Iowa Legislature's *purpose* in enacting Chapter 522C and § 103A.71. Public adjuster licensure requirements are designed to protect consumers and improve the efficiency of the claims-handling system by protecting against price-gouging and other exploitative practices. *See Mazur*, 122 Cal. App.

4th at 1411-12, 19 Cal. Rptr. 3d at 570-71; *see also, e.g.*, Iowa Admin. Code 191-55.14 (imposing numerous requirements on public adjusters, including disclosure requirements relating to their self-interest). This efficiency should, in turn, result in better outcomes and lower premiums for policyholders. If, however, unlicensed public adjusters are allowed to bring claims against insurance carriers under assignment of benefits contracts despite violating licensure requirements, the Legislature's desire for greater efficiency will be defeated. *Cf. Bergaztzel v. Mlynarik*, 619 N.W.2d 309, 318 (Iowa 2000) ("[T]aking the economic benefit out of contracts that violate public policy by holding them unenforceable very definitely would promote the public policy.") (internal punctuation omitted) (quoting *Mincks Agri Center, Inc. v. Bell Farms, Inc.*, 611 N.W.2d 270, 280 (Iowa 2000)). Insurance carriers will have to absorb – and, in all likelihood, pass on to consumers – the costs imposed by the unlicensed public adjusters.[1]

Legislatures and other interested parties have been particularly concerned about exploitation by out-of-state contractors who swoop in after a storm event, enter contracts with homeowners under duress, charge

[1] Public adjuster licensure requirements also help protect against the unauthorized practice of law. *See generally Bergantzel*, 619 N.W.2d at 313-14 (expressing "great[] concern" with non-lawyers who negotiate with insurance companies).

excessive fees or fail to complete their work, and then leave the state to chase the next storm. *See*, *e.g.*, *Mazur*, 122 Cal. App. 4th at 1412, 19 Cal. Rptr. 3d at 570 ("A number of adjusters have come from the east coast where they have run afoul of the regulatory authority of those states."); *see also* Iowa Attorney General's Office, *Latest Consumer Alert: Miller cautions Iowa flood victims about price-gouging, fraud* (July 3, 2018)[2] (warning Iowans to be "wary of home-repair scams and shady cleanup and construction contractors who tend to solicit victims of natural disasters. Many of these contractors come from out of state, seek business door-to-door, and ask for advance payment."); Iowa Attorney General's Office, *Contractor Agrees to Changes Following 'Storm Chaser' Roofing Dispute* (August 17, 2016)[3] (describing agreement between Iowa Attorney General and interstate roofing contractor who, *inter alia*, allegedly "negotiate[d] a roof damage insurance claim on a consumer's behalf" despite not being licensed to do so). The elderly are particularly at risk to such unscrupulous contractors, who could be long gone by the time the Iowa Insurance

[2] *See* https://www.iowaattorneygeneral.gov/newsroom/flooding-iowa-fraud-miller-contractor (last visited August 10, 2019).

[3] *See* https://www.iowaattorneygeneral.gov/newsroom/contractor-agrees-to-changes-following-storm-chaser-roofing-dispute (last visited August 10, 2019).

Commissioner is able to complete an enforcement action. If, in the meantime, courts permit the contractors to sue insurers under assignment of benefits or similar contracts, the contractors will end up profiting from the very unfair and deceptive tactics the Legislature sought to prevent. Insurance companies and their policyholders will be forced to bear the costs.

For these reasons, among others, courts in other states have generally refused to enforce contracts between unlicensed public adjusters and policyholders. *See Lon Smith & Assocs., Inc. v. Key*, 527 S.W.3d 604, 618-19 (Tex. App. 2017) (unlicensed public adjuster's contract was void under Texas law); *Mazur*, 122 Cal. App. 4th at 1411-14, 19 Cal. Rptr. 3d at 570-72 (void under California law); *Zarrell v. Herb Gutenplan Assocs., Inc.*, 444 N.Y.S.2d 39, 40 (Sup. Ct. 1981) (unenforceable under New York law); *Dowling v. Paules*, 18 Pa. D & C.3d 111, 112-13 (Pa. Com. Pl. 1981) *aff'd*, 328 Pa. Super. 558, 476 A.2d 65 (1984) (unenforceable under Pennsylvania law); *Empl. Mut. Cas. Co. v. United Huskies Mart, LLC*, No. 4:12CV1292 HEA, 2014 WL 684114, at *8 (E.D. Mo. Feb. 21, 2014) (unenforceable under Missouri law); *Schwartz v. Zsiba Smolover, Ltd.*, No. LLICV116005712S, 2012 WL 2362374, at *6 (Conn. Super. Ct. May 29, 2012) (void under Connecticut law); *James R. Beneke, Inc. v. Aon Risk Servs., Inc. of Ga.*, No. A-05-CA-927 RP, 2007 WL 9701564, at *6 (W.D.

Tex. Nov. 15, 2007) (void under Florida law). The Iowa Court of Appeals and District Court correctly reached the same result here.

The Court of Appeals also correctly rejected 33 Carpenters' argument that it did not violate public adjuster licensure requirements because it was advocating solely on its own behalf in its post-October 2016 communications with the insurer. The homeowner owned the home at all relevant times, and 33 Carpenters' dispute with the insurer revolved around repair work that had not been performed but which 33 Carpenters insisted was necessary to "make [the homeowner's] home look like it did prior to the event." (App. 129.) Accordingly, 33 Carpenters clearly was advocating on behalf of the homeowner in its negotiations with the insurer – just as Iowa Code Chapter 522C and § 103A.71 forbid.

If the Court were to hold otherwise, it would become far too easy for a contractor to use an "assignment of benefits" contract as a vehicle to avoid the requirements of Chapter 522C and § 103A.71. As explained in *Mazur*:

> It would be improper and contrary to the clear legislative intent of the Public Adjusters Act to allow firms to bypass the licensure requirement and associated standards by packaging public adjusting services [as something else] while still presenting the same dangers of dishonesty, sharp dealing, and incompetence to the consumer.

122 Cal. App. 4th at 1413, 19 Cal Rptr. 3d at 571. This, in turn, would increase the risk of inflated claims, higher insurance premiums, and other

costly outcomes to insurers and policyholders. *See, e.g.*, Insurance Information Institute, *Florida's assignment of benefits crisis: Runaway litigation is spreading, and consumers are paying the price*, (March 2019) (concluding that assignment of benefits abuse in Florida led to $2.5 billion in increased costs on Florida consumers).[4] This Court should enforce, not defeat, the legislative intent here by treating 33 Carpenters' "assignment of benefits" contract as unenforceable.

Finally, to the extent the issue has not been waived – which it almost certainly has – the Court should reject 33 Carpenters' argument that a balancing test must be performed prior to invalidating an assignment of benefits contract between an unlicensed public adjuster and policyholder. Iowa Code § 103A.71 creates a bright-line rule: contracts between a residential contractor and homeowner are void, period, if the contractor performs or offers to perform public adjuster services. The Court should enforce this bright-line rule by categorically prohibiting contractors like 33 Carpenters from recovering on their unlawful contracts.

CONCLUSION

The Iowa Legislature enacted Iowa Code Chapter 522C and Iowa Code § 103.71 to ensure that consumers and insurance companies would be

[4] *See* https://www.iii.org/sites/default/files/docs/pdf/aobfl_wp_031319.pdf.

protected from attempts by unscrupulous companies and individuals to manipulate the insurance claims-handling process. 33 Carpenters violated these statutes when it began performing unlicensed public adjusting services for a homeowner. Accordingly, the Court of Appeals and District Court correctly refused to enforce the company's putative assignment of benefits contract.

Respectfully submitted,

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CERTIFICATE OF FILING/SERVICE

I hereby certify that on August 16, 2019, I electronically filed the foregoing Brief of Iowa Insurance Institute, Iowa Defense Counsel Association, and Mutual Insurance Association of Iowa, as Amicus Curiae, in Support of Appellee with the Clerk of the Supreme Court by using the Iowa Electronic Document Management System which will send notice of electronic filing to the following. Per Rule 16.317(1)(a), this constitutes service of the document on the following for purposes of the Iowa Court Rules.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. This Brief complies with the type-volume limitation of Iowa Rule of Appellate Procedure 6.906(4) because this Brief contains 2,420 words, excluding the parts of the Brief exempted by Iowa Rule of Appellate Procedure 6.903(1)(g)(1).

2. This Brief complies with the typeface requirements of Iowa Rule of Appellate Procedure 6.903(1)(e) and the type-style requirements of Iowa Rule of Appellate Procedure 6.903(1)(f) because this Brief has been prepared in a proportionally spaced typeface using Word 2007 in Times New Roman 14 pt.

Dated: August 16, 2019

/s/ Stephen H. Locher

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