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New York County Clerk's Index No. 653590/20
Appellate Division– First Department Appellate
Case Nos. 2022-00209 and 2022-00438

Court of Appeals

of the

State of New York

REGINA FARAGE,

Plaintiff-Appellant,

– against –

ASSOCIATED INSURANCE MANAGEMENT CORP., LEGION INSURANCE GROUP, COLONIA INSURANCE COMPANY, AXA GLOBAL RISKS US INSURANCE COMPANY, GLOBAL FACILITIES, INC., MORSTAN GENERAL AGENCY, INC., NATIONAL GENERAL INSURANCE COMPANY and NATIONAL GENERAL HOLDINGS CORP.,

Defendants,

(For Continuation of Caption See Inside Cover)

BRIEF FOR *AMICUS CURIAE* AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION IN SUPPORT OF RESPONDENTS

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– and –

TOWER INSURANCE COMPANY OF NEW YORK, AMTRUST FINANCIAL SERVICES, INC., AMTRUST NORTH AMERICA, CASTLEPOINT INSURANCE COMPANY, TOWER RISK MANAGEMENT CORP., TOWER GROUP, INC., TOWER GROUP COMPANIES, E.G. BOWMAN CO., INC., MARK LAURIA ASSOCIATES, INC.,

Defendants-Respondents.

CORPORATE DISCLOSURE STATEMENT

American Property Casualty Insurance Association is a trade association that has no parents, subsidiaries or affiliates.

STATEMENT OF AMICUS CURIAE

Pursuant to Rule 500.23(a)(4)(iii) of the Rules of Practice of the Court of Appeals of the State of New York, American Property Casualty Insurance Association states that no party's counsel contributed content to the brief or participated in the preparation of the brief in any other manner; no party or party's counsel contributed money that was intended to fund preparation or submission of the brief; and no person or entity, other than movants or movants' counsel, contributed money that was intended to fund preparation or submission of the brief.

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INTEREST OF AMICUS CURIAE

American Property Casualty Insurance Association (APCIA) is the primary national trade association for home, auto, and business insurers. APCIA promotes and protects the viability of private competition to benefit consumers and insurers, with a legacy dating back 150 years. APCIA's member companies represent approximately 65 percent of the U.S. property-casualty insurance market and write more than $39 billion in premiums in the State of New York. On issues of importance to the insurance industry and marketplace, APCIA advocates sound and progressive public policies on behalf of its members in legislative and regulatory forums at the federal and state levels and submits amicus curiae briefs in significant cases before federal and state courts, including this Court.

The issues presented in this case concerning the enforceability of suit limitation provisions will impact APCIA's members, their policyholders, and New York's property insurance marketplace. APCIA believes its perspective will aid the Court in its analysis of the important issues before it.

SUMMARY OF ARGUMENT

APCIA seeks to fulfill the classic role of amici curiae by "[h]ighlighting factual, historical, or legal nuance glossed over by the parties," "[e]xplaining the broader regulatory or commercial context in which a question comes to the court," and "[p]roviding practical perspectives on the consequences of potential outcomes." *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 976 F.3d 761, 763 (7th Cir. 2020) (Scudder, J., in chambers).

First, APCIA explains how the history of suit limitation provisions in New York strongly supports the Appellate Division's decision. This Court has upheld such provisions for 160 years, and they have been legislatively authorized in this State for approximately 140 years. This Court's decision in *Executive Plaza, LLC v. Peerless Insurance Co.*, 22 N.Y.3d 511 (2014) created only a narrow exception in a highly unusual case. To accept Plaintiff's broad reading of *Executive Plaza* would eviscerate longstanding precedent and cannot be what this Court intended.

Second, APCIA explains how the purposes of suit limitation provisions further support the Appellate Division's decision. The rationales for these provisions include enabling insurers to accurately forecast future liabilities, close the books on claims within a reasonable time, and set accurate reserves on one and two-year cycles, as required by law. Suit limitation provisions serve the public

interest because a shorter time period for closing claims encourages policyholders to diligently enforce their rights and also results in lower premiums. Plaintiff's position, if adopted, would defeat these purposes, and potentially could require insurers to keep claim files open and maintain reserves on their books for six years.

For these reasons, in addition to those briefed by Respondents, this Court should affirm the Appellate Division's decision.

ARGUMENT

I. THE HISTORY OF SUIT LIMITATION PROVISIONS IN NEW YORK STRONGLY SUPPORTS THE APPELLATE DIVISION'S DECISION

Contractual suit limitation provisions have been held valid in this State since 1864, *Roach v. New York & Erie Ins. Co.*, 30 N.Y. 546, 548 (1864), and expressly authorized by statute since at least 1886. *See Hamilton v. Royal Ins. Co.*, 156 N.Y. 327, 336 (1898). In *Proc v. Home Insurance Co.*, 17 N.Y.2d 239 (1966), this Court traced the modern history of contractual suit limitation provisions, explaining that the New York standard fire insurance policy, enacted in 1943, required that suit be brought within one year "after the inception of the loss," which was "an unmistakable indication that … even though a cause of action could not accrue until some later time, the 12 months were to be measured, as they had previously been … from the occurrence of the destructive event." *Id.* at 244 (emphasis removed). While the 12-month

period in the standard fire policy was later changed to 24 months, it remains in effect today. Ins. Law § 3404(e). The CPLR also expressly authorizes parties to shorten a statute of limitations in a contract. CPLR § 201.

"Considering the manner in which the [suit limitation provision] phrasing evolved over the years," this Court concluded in *Proc* that "there cannot be any doubt that the period of limitations was meant to run from the date of the fire, even though a cause of action against the insurer had not then accrued," and this Court declined to "subvert this clearly expressed legislative design." 17 N.Y.2d at 245. In circumstances where "conduct or action on the part of the insurer is responsible for the insured's failure to comply" with the suit limitation provision, "injustice is avoided and adequate relief assured, without doing violence to the plain language used by the Legislature, by resort to traditional principles of waiver and estoppel." *Id.*

This Court's decision in *Executive Plaza, LLC v. Peerless Insurance Co.*, 22 N.Y.3d 511 (2014) was narrow. Although it went slightly beyond the traditional waiver and estoppel principles referenced in *Proc*, this Court did not depart from its decades of precedent holding that courts should enforce suit limitation provisions in almost all circumstances, with the time to sue running from the date of loss. *Executive Plaza* involved a highly unusual scenario. The insured filed a timely declaratory judgment action, but that lawsuit was

dismissed as premature rather than being stayed pending completion of the repairs.[1] *Id.* at 517. The insured experienced a 17-month delay by local government authorities in granting a building permit. *See Executive Plaza, LLC v. Peerless Ins. Co.*, 717 F.3d 114, 115–16 (2d Cir. 2013). After the repairs were completed, the insured sued again, but the insurer moved to dismiss the case as untimely under the policy's two-year suit limitation provision. *Executive Plaza*, 22 N.Y.3d at 517. The facts demonstrated that the insured made reasonable efforts to preserve its rights and was told by the federal district court that its first suit was too soon and its second suit too late—putting it in a "Catch-22" position. Given how the insurer had litigated the dispute, and how the federal district court had handled the two cases, this Court held that it was unreasonable to enforce the suit limitation provision in those circumstances:

> Here, the insured did begin an action on the last day of the limitation period—and the insurer successfully argued that that

[1] In *Executive Plaza*, it does not appear that the federal district court was asked to or considered a stay rather than dismissal to avoid putting the insured in a "Catch-22" position. *See Executive Plaza, LLC v. Peerless Ins. Co*., No. 09-cv-1976 (LDW), 2010 WL 11632677 (E.D.N.Y. Feb. 8, 2010). The most practical solution in these circumstances is either: (1) the insurer agrees to a reasonable extension of the suit limitation provision; or (2) the insured brings a timely action and the court stays it pending completion of repairs. It is unclear why neither of those occurred in *Executive Plaza*.

> action was brought too soon. *It is unreasonable for it to now say, as it in substance does, that a day later would have been too late.*

Id. at 519 (emphasis added).

In this case, Plaintiff asks this Court to eviscerate its longstanding precedent enforcing suit limitation provisions. As Plaintiff interprets *Executive Plaza*, a suit limitation provision would be effectively unenforceable, at least on a motion to dismiss, in *any* case where a plaintiff merely "adequately alleged that the repairs could not be completed within two years." (Appellant's Br. at 27.) Plaintiff misreads *Executive Plaza* as creating "a hopelessly fact sensitive issue" regarding "what was reasonable under the circumstances" in *nearly every* case where such an allegation is made. (*Id.* at 26.) As Plaintiff would have it, she "was not required to [even] demonstrate that 'she attempted to repair the Property within [the] two years.'" (*Id.* at 30.) That makes no sense and could eviscerate the suit limitation provision.

Plaintiff's reading of *Executive Plaza* cannot be what this Court intended. It would be contrary to the Legislature's intent in enacting N.Y. Ins. Law § 3404(e) and CPLR § 201. This Court should clarify that the rule in *Executive Plaza* is limited to facts similar to that case: where the insured (1) filed a timely suit but the lower court dismissed it as premature rather than staying it; and (2) the insured began repairs and made reasonable efforts to

complete them within the time period provided for by the policy, but the insured was stymied by factors beyond its control, such that "completing repairs within the two-year window was actually impossible." *Ciobanu v. State Farm Fire & Cas. Co.*, No. 21-cv-288 (RPK)(RER), 2022 WL 889024, at *4 (E.D.N.Y. Mar. 25, 2022). This Court could not have intended to extend the suit limitation period for an insured who was "sleeping on [her] rights." *Proc*, 17 N.Y.2d at 246, and waited until 2020 to file suit for damage caused by a 2014 fire.

The Appellate Division correctly recognized that Plaintiff's claims failed because she "failed to allege that she reasonably attempted to repair the property within the two-year limitations period but was unable to do so." *Farage v. Associated Ins. Mgmt. Corp.*, 210 A.D.3d 470, 471 (1st Dep't 2022). Plaintiff completely failed to "protect [herself] by either beginning an action before expiration of the limitation period or obtaining from the carrier a waiver or extension of its provision." *Biltman Constr. Corp. v. Ins. Co. of N. Am.*, 66 N.Y.2d 820, 823 (1985); *see also Brown v. Royal Ins. Co. of Am.*, 210 A.D.2d 279, 279 (2d Dep't 1994) (insured "is bound by the terms of the contract to either commence an action prior to the expiration of the limitations period or obtain a waiver or extension of such provision"). As the trial court noted here, "[t]he sad but dispositive fact … is that plaintiff submitted her claim many

years too late." (A.12.) *See also Consol. Rail Corp. v. Aspen Specialty Ins. Co.*, No. 17-cv-12281 (RBK)(KMW), 2019 WL 2417704, at *5 (D.N.J. June 10, 2019) (distinguishing *Executive Plaza* where insured "d[id] not dispute that it took no action—unlike the diligent plaintiff in *Executive Plaza*—to protect itself from the expiration of the limitation period by filing any suit or requesting any extension from [the insurer]").

II. THE PURPOSES OF SUIT LIMITATION PROVISIONS SUPPORT THE APPELLATE DIVISION'S DECISION

Contractual suit limitation provisions in insurance policies serve important purposes. "They enable an insurer to fix its present and future liabilities and to close stale claim files. Without such a limitation provision, an insurer could not accurately forecast its future liabilities, set aside proper reserves, or close even ancient claim files." *Herman v. Valley Ins. Co.*, 928 P.2d 985, 990–91 (Or. Ct. App. 1996) (citations omitted). Being able to establish past exposure and close the books on older claims is essential to accurately setting insurance rates. *See* N.Y. Ins. Law § 2304 ("In the making of rates, consideration shall be given to past and prospective loss experience … within and without this state," along with other factors.); N.Y. Ins. Law § 4117 (requirements for loss and loss expense reserves). Timely closing claims is also necessary for insurers to establish accurate reserves. Changes in reserves are required by statute to be analyzed and reviewed by a qualified

independent loss reserve specialist on one and two-year cycles. *See id.* § 4117(g).

Suit limitation provisions also "'encourage plaintiffs to use reasonable and proper diligence in enforcing their rights' and protect courts from having to resolve claims years after the fact." *B.S.C. Holding, Inc. v. Lexington Ins. Co.*, 625 F. App'x 906, 910 (10th Cir. 2015) (quoting *Zieba v. Middlesex Mut. Assurance Co.*, 549 F. Supp. 1318, 1321 (D. Conn. 1982)). Here, Plaintiff seeks to litigate a case involving a 2014 fire ten years later.

In addition, "[t]he public interest is served by permitting the insurer to limit the time of its exposure." *Georgia Mut. Ins. Co. v. Glennville Bank & Tr. Co.*, 494 S.E.2d 103, 105 (Ga. Ct. App. 1997). "Because the insurer's reserves must be sufficient to meet the possible losses, a shorter period of exposure results in lower premiums for insureds. At the same time, the rights of insureds are not impaired, because a one [or two] year limitation is reasonable." *Id.*

Plaintiff's position, if adopted by this Court, would defeat the purposes of a suit limitation period. As Plaintiff would have it, in any untimely filed case in which an insured can allege, without more, that repairs could not be completed within the suit limitation provision, an insurer could not obtain a dismissal. (Appellant's Br. at 27.) Plaintiff further suggests that an insured can evade a policy provision requiring the insured to give notice within 180 days of a loss

of an intent to make a replacement cost claim, simply by alleging that she initially intended to make a claim on a replacement cost basis. (*Id.* at 33–34.) Plaintiff argues she can avoid complying with the 180-day notice requirement even after accepting an initial payment on an actual cash value basis and not giving *any* subsequent notice of intent to make a replacement cost claim, as required by the policy. (*Id.* at 12.)

If Plaintiff's position were adopted, it might require a prudent insurer to keep property insurance claim files open and maintain reserves for the full six-year statute of limitations period. This could negatively impact the property insurance marketplace in New York—which has been adversely affected by inflation and climate change in recent years—contrary to the public interest. *Glennville Bank & Tr. Co.*, 494 S.E.2d at 105.

CONCLUSION

APCIA respectfully urges the Court to affirm the Appellate Division's decision.

Dated: August 15, 2024

Respectfully submitted,

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

Pursuant to 22 NYCRR PART 500.1(j) the foregoing brief was prepared on a computer using 2010 Microsoft Word.

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) ss.:
COUNTY OF NEW YORK)

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Sworn to before me on 17th day of September 2024

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