IN THE SUPREME COURT
STATE OF ARIZONA

CENTERPOINT MECHANIC LIEN CLAIMS, LLC, Plaintiff/Appellant/Appellee, vs. COMMONWEALTH LAND TITLE INSURANCE COMPANY, Defendant/Appellee/Appellant.	No. CV-23-0164-PR Court of Appeals, Division One No. 1 CA-CV 21-0039 Maricopa County Superior Court No. CV2011-008600

COMMONWEALTH LAND TITLE INSURANCE COMPANY'S SUPPLEMENTAL BRIEF

David M. Satnick (*pro hac vice*)
LOEB & LOEB LLP
345 Park Avenue, 18th Floor
New York, New York 10154
(212) 407-4000
dsatnick@loeb.com

Robert R. Berk, Bar #010162
Eileen Dennis GilBride, Bar #009220
Charles M. Callahan, Bar #014984
JONES, SKELTON & HOCHULI P.L.C.
40 N. Central Avenue, Suite 2700
Phoenix, Arizona 85004
(602) 263-1700
rberk@jshfirm.com
egilbride@jshfirm.com
ccallahan@jshfirm.com

Attorneys for Defendant/Appellee/Appellant
Commonwealth Land Title Insurance Company

I. <u>COMMONWEALTH IS ENTITLED TO CONTEST COVERAGE</u>

A. <u>The policies condition coverage on the existence of actual loss and exclude coverage where no actual loss exists.</u>

The title policies at issue, which are first-party insurance policies, expressly *condition* coverage on the existence of an "actual monetary loss," and *exclude* coverage if the insured did not have a "loss." The conditions are found in two places: Condition 8 provides,

> This policy is a contract of indemnity *against actual monetary loss* or damage sustained or incurred by the Insured Claimant who has suffered loss or damage…

and Condition 10(b) states that repayment of the loan "shall terminate all liability of the Company. . . ." [TE 10, 22 (emphasis added).] The exclusion is found in Exclusion 3(c), which provides:

> The following matters are <u>*expressly excluded from the* **coverage** of this policy</u>… 3. Defects, <u>*liens*</u>, encumbrances, adverse claims, or other matters…(c) <u>*resulting in no loss* or damage</u> to the Insured Claimant…

[*Id.* (emphasis added).] The court of appeals thus plainly erred in stating that "Commonwealth did not otherwise exclude or exempt from coverage the mechanics' lien claims. . . ." *Centerpoint Mechanic Lien Claims, LLC v. Commonwealth Land Title Ins. Co.*, 255 Ariz. 261, 272, ¶ 49 (App. 2023) ("*Commonwealth*").

B. Actual loss is an issue of coverage, not liability.

Based on the language quoted above, proof of actual loss is clearly a coverage issue, not a liability issue. Yet the court of appeals stated that Conditions 8(a)(ii) and 10(b) are "defenses to liability and not to coverage," and that the Conditions "are unrelated to the question of what constitutes a covered event under the policies." *Commonwealth*, ¶¶ 51, 50. This was the court's second clear error. This ruling ignored not only the language quoted above, but also the Covered Risks section of the policy:

COVERED RISKS

> **SUBJECT TO** THE EXCLUSIONS FROM COVERAGE…**AND THE CONDITIONS**, Commonwealth Land Title Insurance Company (the "Company") insures…**against loss or damage**, not exceeding the Amount of Insurance, sustained or incurred by the Insured…

[TE 10, 22 (emphasis added).] The plain, ordinary meaning of this language—"subject to"—is that satisfaction of the Conditions is a prerequisite to coverage. *See generally Cundiff v. State Farm Mut. Auto. Ins. Co.*, 217 Ariz. 358, 361-62, ¶ 14 (2008) (statutory definition of uninsured motorist coverage provides that coverage is "subject to the terms and conditions of that coverage") (citation omitted); *see also Fla. Wellness & Rehab. v. Allstate Fire & Cas. Ins. Co.*, 201 So.3d 169, 172 (Fla. App. 2016) (the phrase "subject to" in policy "indicates that coverage is governed by or limited by" referenced provisions); *Allstate Fire & Cas. Ins. v. Stand-Up MRI of Tallahassee, P.A.*, 188 So.3d 1, 4 (Fla. App. 2015) ("'subject to' is very commonly used to signal subordination"); *Librizzi v. State Farm Fire & Cas. Co.*, 603 N.E.2d 821, 826 (Ill. App. 1992). In short, to trigger coverage, CMLC had to prove not only that the mechanic's liens fell within the enumerated "Covered Risks" of the policies—which was the extent of the court of appeals' coverage analysis[1]--***but also*** that Universal and VRCP suffered an "actual loss."

C. The absence of actual loss is dispositive on coverage.

Because the policies condition coverage on proof of actual loss, and exclude coverage where no loss exists, the undisputed fact that Universal and VRCP were fully repaid, as the court of appeals acknowledged,[2] should have been dispositive on the issue of coverage. Because CMLC raises meritless arguments attempting to manufacture a "loss" where there was none, Commonwealth further addresses this issue below.

---

[1] *See Commonwealth*, ¶ 49 ("both policies expressly define lack of priority of a deed of trust as a covered circumstance, . . .").

[2] *Commonwealth*, ¶ 58 ("Universal and VRCP received full repayment of their loans. . ." (emphasis added)).

D. The court of appeals' decision contravenes *Quihuis*.

As shown above, the requirement of "actual loss" is inextricably tied to coverage under the policies. Yet the court of appeals said the existence of an "actual loss" is not relevant to whether coverage exists, and instead affects only the amount of insurers' liability to their insureds. This conclusion directly contravenes *Quihuis v. State Farm Mut. Auto. Ins. Co.*, 235 Ariz. 536 (2014). There, the insurer denied coverage for a 'negligent entrustment of a vehicle' claim because the insured did not own the car at the time of the accident. The plaintiff and insured then entered a *Damron* agreement in which they stipulated that the insured did own the vehicle, so as to try to force coverage for the claim. *Id*. at 538, ¶ 3.

In the subsequent coverage action, the plaintiff argued that because ownership was an element of plaintiff's negligent entrustment theory against the insured, the *Damron* judgment in the liability case precluded the insurer from litigating/relitigating the ownership issue in the coverage action. *Id.* at 539, ¶ 3. This Court said no—the plaintiff and the insured could not manipulate coverage like that. Instead, when disputing coverage, an insurer may litigate a "coverage requirement" that might also be an essential element of the insured's liability to the plaintiff. *Id*. at 543, ¶ 22.

The opinion below conflicts with *Quihuis* in other ways as well. Preliminarily, there is no meaningful distinction between a "coverage requirement," which the insurer in *Quihuis* was entitled to litigate in the coverage action, *id.*, and a "Condition" to coverage, which the court of appeals held Commonwealth was precluded from litigating. Furthermore, in holding that the "stipulated finding" of liability in the *Morris* judgment precluded Commonwealth from litigating the issue of actual loss for purposes of coverage, the court of appeals failed to recognize that the limitation on "re-litigation" applies only to those issues that relate solely to liability. *Where an issue is determinative of coverage*—like the ownership of the car in *Quihuis* or the existence of an actual loss in this case—an insured's stipulation regarding its liability to the plaintiff does *not* preclude an insurer from litigating the issue for purposes of coverage (*i.e.*, its liability to its insured). *Quihuis*, 235 Ariz. at 541, ¶ 15.[3]

[3] Under *Quihuis*, the only issues that cannot be relitigated are issues that were actually "'determined in the action' through actual litigation." *Id.* at 543, ¶ 22 (emphasis added). As explained in Commonwealth's Petition, whether Universal and VRCP sustained an actual loss on their loans was not, and could not have been, litigated in the lien priority case because the only issues there were the validity and priority of the mechanics' liens. Because Universal and VRCP never faced personal, monetary liability to the

CMLC's Response to the Petition for Review ("Resp.") largely ignores *Quihuis,* effectively conceding the irreconcilable conflict between the holding in that case and the opinion below. Indeed, CMLC makes a single reference to *Quihuis* (Resp., p. 8), and only then cites it for the erroneous proposition that an insurer challenging coverage is restricted to relying only on policy exclusions. That is simply wrong, as explained in the next section.

E. Insurers are not limited to arguing policy exclusions.

CMLC has argued (Resp. at 7-8) that *Morris* and its progeny limit an insurer to arguing only exclusionary clauses when challenging coverage and preclude an insurer from relying on any other policy terms (*e.g.*, Conditions). Our case law imposes no such limitation. Indeed, in arguing this point,

---

mechanics' lienors, there was no issue of whether Universal and VRCP had a "loss."

In addition, after Commonwealth intervened and argued, in part, that the amount of the *Morris* agreement was unreasonable because Universal and VRCP's loans were repaid, the court never determined whether Universal and VRCP suffered an actual monetary loss – it simply ruled the settlement amount was "reasonable"; *i.e.*, was "what a reasonably prudent person in [Universal and VRCP's] position would have settled for. . . ." *United Servs. Auto. Ass'n v. Morris,* 154 Ariz. 113, 121 (1987). Finally, the trial court noted (and CMLC did not contend otherwise) that any findings from the reasonableness hearing would not be binding for purposes of coverage. [R. 284 at ¶¶ 39, 40, Ex. 16 at 30, 132; *see also* R. 284, Ex. 17 at 1-6.]

CMLC misstates the facts and holding of *Quihuis*. In *Quihuis*, State Farm's policy, like most auto policies, provided coverage only for cars the insured owned. *Id.* at 538, ¶ 3. Ownership of the vehicle was a *condition of coverage*—there was no exclusionary clause at issue. And this Court properly held State Farm was entitled to litigate the ownership issue in the coverage action despite the insured stipulating to ownership in the *Damron* judgment. *Id.* at 543, ¶ 22.

CMLC's argument also makes no practical sense. Most liability policies cover an insured for (i) an "occurrence" (ii) in the "coverage territory" (iii) during the policy period, that (iv) results in "bodily injury" or "property damage." *See e.g. Keggi v. Northbrook Prop. and Cas. Ins. Co.*, 199 Ariz. 43, 46, ¶ 12 (App. 2000). These coverage requirements are an integral part of the insuring agreement. CMLC, however, posits that if these conditions are not redundantly set forth in policy exclusions, the insurer is precluded from challenging coverage when an insured tries to manipulate coverage by stipulating to the existence of the conditions in a *Morris* agreement. The argument is contrary to *Quihuis* and *Morris* itself, where this Court held that "<u>any</u> stipulation of facts essential to <u>establishing coverage</u> [not for applying an exclusion] would be worthless," and that an "insured's settlement agreement should not be used to obtain coverage that the insured did not purchase." *Morris*, 154 Ariz. at 120 (emphasis added).

F. Exclusion 3(c) expressly precludes coverage.

Even if insurers were somehow limited to challenging coverage based upon exclusionary clauses (they're not), coverage would still be excluded as a matter of law. Exclusion 3(c) plainly states that when liens "result[] in no loss or damage to the Insured Claimant," those liens "are expressly excluded from the coverage of this policy." In its Answering Brief below (at 12, n. 11), Commonwealth specifically cited to Exclusion 3(c), and the absence of an actual loss, as a basis for excluding coverage, but the court of appeals did not address the Exclusion in its opinion. Instead, contrary to the express terms of the policies, which were exhibits at trial and part of the record the court of appeals reviewed *de novo*, the court incorrectly found that "Commonwealth did not otherwise exclude or exempt from coverage the mechanics' lien claims. . . ." *Commonwealth*, ¶ 49.

CMLC argues that because Commonwealth, in its motion for summary judgment, only argued CMLC's failure to meet the "actual loss" Condition of coverage, Commonwealth waived its right to assert Exclusion 3(c). Nonsense. Commonwealth *prevailed* in the trial court, and it appropriately argued on appeal that Exclusion 3(c) was an additional reason in the record to affirm, regardless of whether the trial court considered it. *KB Home Tucson, Inc. v. Charter Oak Fire Ins. Co.*, 236 Ariz. 326, 329, ¶ 14 (App. 2014) ("We will affirm summary judgment if it is correct for any reason supported by the record, even if not explicitly considered by the superior court."). In any event, CMLC never argued the waiver point below, nor did CMLC argue that Exclusion 3(c) does not apply.[4] It is CMLC's argument that is waived, not Commonwealth's. *Webster v. Culbertson*, 158 Ariz. 159, 163 (1988) ("plaintiff waived the applicability of § 335 by failing to raise the issue in his opening brief in the court of appeals").

G. Universal and VRCP/CMLC suffered no loss.

Commonwealth's policies require the insured to incur "actual monetary loss" before coverage exists. And as discussed, the fact that Universal/VRCP were fully repaid, as the court of appeals acknowledged, *Commonwealth*, ¶ 58, should have been dispositive on the issue of coverage. Commonwealth's policies make this very clear in the limits of coverage:

> The extent of liability of the Company for loss or damage under this policy shall not exceed the least of (i) the Amount of

[4] *See* CMLC Opening Brief at 41-55; CMLC Reply Brief at 11-28.

> Insurance, (ii) the Indebtedness, [or] (iii) the difference between the value of the Title as insured and the value of the Title subject to the risk insured against by this policy…

[TE 10, 22, Condition 8(a).] And critically, the policies mandate that "the Indebtedness is <u>reduced by the total of all payments</u> and by any amount forgiven by an Insured." [*Id.*, Definition 1(d)(ix) (emphasis added).] Because Universal and VRCP were fully repaid, the amount of the indebtedness was zero and there was no "actual monetary loss or damage." *US Bank, N.A. v. HLC Escrow, Inc.*, 919 F.3d 17, 24 (1st Cir. 2019) (coverage under lender's title policy limited to lesser of outstanding indebtedness or policy limit); *Hodas v. First Am. Title Ins. Co.*, 696 A.2d 1095, 1097–98 (Me. 1997) (same).

VRCP's loan was secured only by the Centerpoint property, and VRCP's principals received $5.9 million from its sale, which was the full amount of principal and interest due under the loan. [TE 126; TR Day 4, pp. 11-13.] Universal's loan was secured by not only the Centerpoint property, but also more than 40 other properties. Universal received $4.2 million from the Centerpoint sale, and the remainder of its loan *plus $17.9 million in profit* was repaid through the sale of the other loan collateral, <u>exactly as contemplated by the lender, the borrower, and the title insurer</u>. [TR Day 4,

117205328.1

pp. 9-11, 17-20, 25-31.][5] Because the loan repayments occurred months before Universal and VRCP assigned their rights to CMLC, there was no "loss" and thus no claim for CMLC to assert.

Authorities around the country agree that where there is sufficient collateral to fully repay the indebtedness, there is no loss under a lender's policy. Put another way, a lender is damaged "only to the extent there has been a debt loss," which is non-existent "should the debt be repaid or should the remaining lands [securing the loan] provide sufficient security for payment." *Green v. Evesham Corp.*, 430 A.2d 944, 946 (N.J. App. 1981).[6] That should be the beginning and end of the analysis here.

---

[5] The fact that Universal only obtained a $5 million policy in connection with its $20 million loan reflects its expectation that its loan would be repaid from collateral other than Centerpoint. [TR Day 4, pp. 31-34, 41.]

[6] *See also CMEI, Inc. v. Am. Title Ins. Co.*, 447 So.2d 427, 428 (Fla. App. 1984) (under a lender's title policy, lender does not sustain a loss if "the indebtedness is otherwise secured or paid"); *Falmouth Nat'l Bank v. Ticor Title Ins. Co.*, 920 F.2d 1058, 1062-63 (1st Cir. 1990) ("the loss must be actual; the mere existence of a defect covered by the policy in and of itself is not sufficient to justify recovery…[A] mortgagee-insured's **loss cannot be determined unless the note is not repaid and the security for the mortgage proves inadequate.**") (emphasis added); *Karl v. Commonwealth Land Title Ins. Co.*, 24 Cal.Rptr.2d 912, 917 (Cal. App. 1993) ("a secured lender's interest in the security is limited to repayment of its loan; **if the loan is fully satisfied a lender ordinarily suffers no damage**") (emphasis added, internal citations

CMLC tries to avoid this reality by arguing that "loss" is ambiguous. But there is nothing ambiguous about "actual monetary loss" because "[t]he word 'actual' means something that exists in fact or reality [and] is not merely possible, but real," and therefore requires the insured to prove "a real loss, one based on fact, not speculation or possibility." *Chicago Title Ins. Co. v. Huntington Nat'l Bank*, 719 N.E.2d 955, 960 (Ohio 1999). Furthermore, this Court long ago abandoned the "easy way out" of finding policy terms to be ambiguous and then construing alleged ambiguities against insurers. *Ohio Cas. Ins. Co. v. Henderson*, 189 Ariz. 184, 186 (1997) ("We do not favor artificial findings of ambiguity."); *Transamerica Ins. Grp. v. Meere*, 143 Ariz. 351, 355 (1984) ("a finding of ambiguity is the easy way out" and "an approach we have abandoned"). Instead, policy provisions are given their plain and ordinary meaning. *Sparks v. Republic Nat'l Life Ins. Co.*, 132 Ariz. 529, 534 (1982) ("insurance policies are to be construed in a manner according to their plain and ordinary meaning.").

---

omitted); Palomar, 2 Title Ins. Law, § 19:27 Multiproperty and Multistate Transactions (2019 ed.) ("In multiproperty transactions…a lender has suffered ***no loss*** requiring indemnity because…***the other unaffected properties may adequately secure the loan***.") (emphasis added).

CMLC then erroneously argues that the proper measure of loss is the difference between the value of the property if the liens did not exist and the value of the property with the liens. [Resp., p. 9.] Wrong again. That calculation applies to owner's policies, not lender's policies. A loss under a lender's policy can be ascertained only by reference to the loan indebtedness; and where, as here, the underlying loans are fully repaid and the remaining "Indebtedness" is zero, *there is no loss*.[7]

CMLC next attempts to avoid the "no actual loss" reality by suggesting a different/earlier date (*i.e.*, before the loans were repaid) for calculating loss [Resp., p 10], but this argument directly contradicts the policy language. Condition 8(b)(ii), upon which CMLC relies, allows the insured to select the date of loss only when "the [insurer] pursues its rights under Section 5 of these Conditions[8] and is unsuccessful in establishing the Title or the lien of

---

[7] CMLC patently misstates the holding in *Blackhawk Prod. Credit Ass'n v. Chicago Title Ins. Co.*, 423 N.W.2d 521 (Wis. 1988). [Resp., p. 9-10.] What the court actually held was that a "mortgagee's loss cannot be measured unless the underlying debt is not repaid and the security for the mortgage proves inadequate." *Id.* at 525 (emphasis added).

[8] Condition 5(c) provides Commonwealth the right to "pursue the litigation to a final determination by a court of competent jurisdiction[.]"

the Insured Mortgage, as insured[.]" [TE 10, 22, Condition 8(b)(ii).] In other words, if a title insurer attempts to resolve title defects and is unsuccessful, it is not entitled to benefit from the passage of time associated with those efforts. Here, Commonwealth retained counsel to defend its insureds against the mechanics lien claimants' suit arguing the insured deeds of trust were inferior to the mechanic liens, but Commonwealth was not "unsuccessful" because Universal and VRCP entered into the *Morris* agreement and settled the lien priority dispute before it was judicially resolved. Thus, the insured's option under the policy to choose the date of loss was never triggered.

CMLC's reliance on *First Am. Title Ins. Co. v. Johnson Bank*, 239 Ariz. 348 (2016), fares no better. [Resp., p. 10.] Unlike here, it was undisputed in *Johnson Bank* that there was a "loss" under the policy; the only disputed issue was the date upon which that loss should be measured. This Court held that although the usual date for fixing a loss under a lender's policy is the date of foreclosure, the date of loss in situations where the defect causes the borrower to default is the date the policy was issued. *Id.* at 356, ¶ 37. But here, the alleged defect—the claimed inferiority of the lenders' deeds of trust—did not cause the borrowers to default under either loan and the absence of an "actual loss" is dispositive.

H. <u>Lower courts and litigants need this Court's guidance.</u>

The court of appeals' misapplication of *Morris* in this case indicates a serious need for this Court's guidance. "*Morris* agreements are fraught with risk of abuse, [and] a settlement that mimics *Morris* in form but does not find support in the legal and economic realities that gave rise to that decision is both unenforceable and offensive to the policy's cooperation clause." *Leflet v. Redwood Fire and Cas. Ins. Co.*, 226 Ariz. 297, 302, ¶ 21 (App. 2011). The "economic reality" of this case is Universal and VRCP were paid all the money they were owed, and more, before assigning their rights to CMLC.

The risk of abuse is what led this Court in both *Morris* and *Quihuis* to prevent insureds, through imaginatively crafted agreements, from binding insurers on facts or issues that impact whether coverage exists. The court of appeals' opinion erases the lines drawn in *Morris* and *Quihuis* and will encourage parties to draft *Morris* agreements so as to deprive insurers of otherwise applicable, and often dispositive, coverage defenses, and to effectively create coverage beyond the terms of the insurance contracts.

Commonwealth suggests that in addition to vacating the court of appeals' opinion, the Court should reiterate these points: (i) "any stipulation of facts essential to establishing coverage [are] worthless," and an "insured's settlement agreement should not be used to obtain coverage that the insured did not purchase," *Morris*, 154 Ariz. at 120 (emphasis added); and (ii) an insurer is entitled to litigate coverage, and a stipulation in a *Morris* agreement on an issue common to both coverage and liability (whether the insured's liability to a third party or the insurer's liability to the insured) is not binding on the issue of coverage. *Quihuis*, 235 Ariz. at 541-42.

II. NO LOSS MEANS NO BAD FAITH CLAIM

The fact that Universal and VRCP were fully repaid should also have been dispositive of CMLC's bad faith claim because a bad faith tort claim requires proof of actual damages. *Nunn v. Mid-Century Ins. Co.*, 244 P.3d 116, 121 (Colo. 2010) ("proof of actual damages is an essential element of a bad faith breach of an insurance contract claim"); *Safeco Ins. Co. of America v. Butler*, 823 P.2d 499, 503 (Wash. 1992) ("harm is an essential element of an action for bad faith handling of an insurance claim").

Here, Universal and VRCP were both "single purpose entities" formed *solely* for the purpose of making the loans at issue. As LLCs that were not conducting any other business,[9] they had no claims for damage to credit reputation or emotional distress damages. *Ginsberg v Google Inc.*, 586 F.Supp.3d 998, 1009 (N.D.Cal. 2022) (business entities cannot recover emotional distress damages). The loans themselves were the *only* potential source of monetary damage. Stated differently, Universal and VRCP could not have suffered actual monetary loss other than through the non-repayment of the loans,[10] and because both loans were fully repaid (and then some), Universal and VRCP suffered no loss or damages. Because CMLC could not prove a necessary element of its bad faith claim, the claim should have been dismissed. *See Farr v. Transamerica Occidental Life Ins. Co. of California,* 145 Ariz. 1, 6 (App. 1984) ("Speculative or uncertain damages, however, will not support a judgment and *proof of the fact of damages must be of a higher order* than proof of the extent thereof.") (emphasis added).

In an effort to manufacture a "loss" where none existed, CMLC argued that Universal and VRCP suffered "diminished value" to the deeds of trust

---

[9] [TR Day 3, p. 163-64, 171-73; R. 257, Ex. 3, p. 191-92.]

[10] *See* RAJI (Civil) 6th, Bad Faith 4 & 5; RAJI (Civil) 7th, Insurance Bad Faith 6 (2022) (adopted after the trial in this matter).

securing the loans—an argument the court of appeals apparently accepted. *Commonwealth*, ¶¶ 72, 75. But as Commonwealth explained in its Petition, CMLC's argument ignores the fact that a deed of trust lacks any intrinsic value; it serves *only* as a mechanism to secure the repayment of a loan. Once the loan secured by a deed of trust is repaid, any claimed "diminution in value" of the security is meaningless.

CMLC further argued that the proceeds from the Centerpoint sale were not applied to repay the loans, but rather were to purchase claims against Commonwealth. Based on this argument, the court of appeals found there was a "genuine disagreement" over damages. *Id.* at ¶¶ 71, 74. But the court of appeals nevertheless acknowledged that "the Universal loan was fully repaid from other security." *Id*. at ¶ 73. Thus, regardless of how the Centerpoint proceeds are characterized, it is undisputed that the Universal loan was fully repaid. As a matter of law, Universal suffered no damages.

As for the VRCP loan, it was fully repaid from the Centerpoint sale proceeds. [TR Day 4, pp. 10-13.] CMLC attempted to characterize the payment to VRCP (for the *exact* amount of principal and interest owed) as a purchase of the partnership interests instead of a loan repayment, but the trial court correctly rejected this subterfuge: "[a]llowing a lender to manipulate and extend mortgage insurance coverage by agreeing to term the repayment of its loan in the manner described above would have dangerous and far reaching consequences," including "allow[ing] coverage to be controlled by the artful pretense of insureds in situations where none was anticipated by either party." [R. 377.] The court of appeals implicitly agreed with that ruling when it held that "VRCP received full repayment of [its] loan," *Commonwealth,* ¶ 58, but inexplicably, it nevertheless allowed the "artful pretense" to prevail over the facts. *Id*. at ¶¶ 73-75.

The court of appeals' opinion unwisely opens the door for bad faith claims to survive based purely on far-fetched, never-realized harm. Because such a result undercuts a basic tenet of Arizona tort law, lower courts and litigants need this Court's clear guidance that proof of the fact of damage is a necessary element of bad faith, and the absence of damage/loss is fatal to such a claim.

III. <u>THE COLLATERAL SOURCE RULE DOES NOT APPLY</u>

Knowing that full repayment of the loans eliminates any loss, which precludes coverage, CMLC argues in its Cross-Petition for Review that the collateral source rule should have barred the jury from hearing evidence that the loans were fully repaid. CMLC asserts it should have been allowed to argue to the jury that Universal and VRCP did not receive any money—even though it is undisputed that they did.

As Commonwealth explained in its Response to the Cross-Petition, and as the court of appeals recognized, the source of the loan repayments was not "collateral" to Commonwealth's policies. The borrowers repaid Universal and VRCP's loans from the sale proceeds of various Mortgages Ltd. properties—*the very properties used to secure the loans when they were first made*. Repayment of loans by the actual borrowers, from the very source of repayment contemplated in the loan agreements, cannot be considered "collateral" to Commonwealth's policies. Instead, as the court of appeals held, the borrowers' obligation to repay the loans was "an intrinsic and integral part of the same transaction underlying Commonwealth's policies." *Commonwealth*, ¶ 56. This was clearly correct. Commonwealth more fully responded to this issue in its Response to Petition for Review and incorporates those arguments by reference.

For all the foregoing reasons, Commonwealth respectfully requests the Court to (i) vacate the court of appeals' opinion, (ii) order summary judgment in its favor be reinstated and (iii) direct the entry of judgment for Commonwealth on the bad faith claim.

RESPECTFULLY SUBMITTED this 27th day of June, 2024.

JONES, SKELTON & HOCHULI P.L.C.

By /s/ Robert R. Berk
Robert R. Berk
Eileen Dennis GilBride
Charles M. Callahan
40 N. Central Avenue, Suite 2700
Phoenix, Arizona 85004

David M. Satnick (*pro hac vice*)
LOEB & LOEB LLP
345 Park Avenue, 18th Floor
New York, New York 10154

Attorneys for
Defendant/Appellee/Appellant
Commonwealth Land Title Insurance
Company