

<p>COLORADO COURT OF APPEALS</p> <p>Court Address: 2 East 14<sup>th</sup> Avenue Denver, CO 80203</p>	
<p>Plaintiff-Appellant: David Kisselman</p> <p>Defendant-Appellee: American Family Mutual Insurance Company</p>	<p>▲ COURT USE ONLY ▲</p>
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<p align="center"><b>AMENDED BRIEF OF AMICUS CURIAE THE COLORADO TRIAL LAWYERS ASSOCIATION</b></p>	

Appeal from the District Court  
City and County of Denver, State of Colorado  
The Honorable William W. Hood, III  
Case No. 08 CV 2444

ATTORNEYS FOR AMICUS CURIAE  
THE COLORADO TRIAL LAWYERS ASSOCIATION

Submitted: March 16, 2011

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules.

Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

Choose one:

It contains 1,236 words.

It does not exceed 30 pages.

The brief complies with C.A.R. 28(k).

For the party raising the issue: It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

For the party responding to the issue: It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

s/ Michael J. Rosenberg  
Signature of attorney or party

## TABLE OF CONTENTS

	<u>Page</u>
I. ISSUES ADDRESSED BY AMICUS CTLA.....	5
II. STATEMENT OF THE CASE.....	5
III. SUMMARY OF ARGUMENT.....	5
IV. ARGUMENT.....	6
V. CONCLUSION.....	10

**TABLE OF AUTHORITIES**

**CASES**

*James River Ins. Co. v. Rapid Funding, LLC*, 2009 WL 524994 (D. Colo. 2009)...5

*Creekside Townhomes Homeowners Association, Inc. v. Travelers Cas. Surety Co.*,  
Case No. 08-cv-02240-WYD-CBS.....7

*Cunningham v. Standard Fire Ins. Co.*, 2008 WL 4861928 (D. Colo. 2008).....9

**STATUTES**

C.R.S. § 10-3-1115 & 1116.....5, 6, 7, 8, 9, 10

COMES NOW the Colorado Trial Lawyers Association (“CTLA”), and pursuant to C.A.R. 29, presents its Amended Amicus Brief in support of Appellant’s position.

### **I. ISSUES ADDRESSED BY AMICUS CTLA**

Whether the district court erred when it ruled §§10-3-1115 and 1116, C.R.S. did not apply to David Kisselman’s claims where competent evidence demonstrated specific instances of American Family’s post-effective date unreasonable delay or denial of payment of benefits American Family owed to Kisselman?

### **II. STATEMENT OF THE CASE**

Amicus curiae adopts Appellant’s Statement of the Case, including the nature of the case, course of proceedings, disposition in the court below, and statement of facts.

### **III. SUMMARY OF ARGUMENT**

Relying exclusively on a single, inapposite, unreported, non-binding federal district court opinion, *James River Ins. Co. v. Rapid Funding, LLC*, 2009 WL 524994 (D. Colo. 2009), the trial court in the instant action erroneously dismissed Plaintiff’s claim against American Family for unreasonable delay of payment of first-party insurance benefits pursuant to C.R.S. § 10-3-1115 and 1116, concluding

that to permit the claim to go forward would effect an improper retroactive application of the statutes. Ironically, the trial court's concerns about retroactively applying the statutes actually resulted in it failing to give them the *prospective* application they were clearly and indisputably due. Indeed, Plaintiff conceded below that his claim for violation of the statutes was predicated *solely* on delays taking place *after* the statutes went into effect on August 6, 2008. The trial court's failure to apply the statutes prospectively was erroneous, and as such provides no justification for the dismissal of Plaintiff's statutory claims based on American Family's delay in paying benefits after August 6, 2008.<sup>1</sup>

#### IV. ARGUMENT

The trial court's exclusive reliance on the *James River* decision was misplaced. The case dealt with a fire loss which occurred more than 18 months prior to the enactment of the statutes in question, and as the district court noted in its decision, the plaintiff did "not allege any new injury or damages resulting from [the defendant's] behavior after August 6, 2008," *id.* at \*7-8, and, in fact, the

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<sup>1</sup> *Amicus Curiae* take no position on whether American Family engaged in dilatory conduct for purposes of C.R.S. § 10-3-1115 and 1116, though there appears to be an abundance of evidence in the record, as discussed in Plaintiff's Opening Brief, from which a jury could reasonably reach this conclusion. This brief is instead directed at the larger question of whether it was proper for the trial court to dismiss Plaintiff's statutory claim for unreasonable delay based on its

“entire claim stem[med] back to James River's 2007 failure to pay for the loss of the North Building,” *id.* By contrast, Plaintiff’s statutory claim in the extant action was founded solely on conduct – specifically additional delays – taking place after August 6, 2008. Plaintiff in this case was seeking to apply the statutes *prospectively*, not retroactively, and the trial court’s ruling cannot stand.

To the extent the trial court believed that no reasonable juror could conclude that American Family acted unreasonably in delaying payment of first-party benefits after August 6, 2008, it should have rested its decision *solely* on that basis and not on the additional grounds that application of the statutes to delays taking place after August 6, 2008 would be impermissibly retroactive. This is important, and it is the reason why *Amicus Curiae* have requested permission to be heard on the issue.

When confronted with allegations of insurer delay taking place after August 6, 2008, state and federal courts have not hesitated to permit claims for violations of §§ 10-3-1115 and 1116 to go forward, notwithstanding the fact that such claims arose out of disputes pre-dating the effective date of the statutes in question. *See Exs. 1-2.* For instance, Chief Judge Wiley Y. Daniel of the United States District Court for the District of Colorado issued an Order in *Creekside*

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conclusion that to permit the claim to go forward would result in an improper,

*Townhomes Homeowners Association, Inc. v. Travelers Cas. Surety Co.*, Case No. 08-cv-02240-WYD-CBS, addressing this very issue. **Ex. 1.** In *Creekside*, the defendant insurer sought summary judgment, in part, on Plaintiff’s statutory claim under C.R.S. § 10-3-1116. The insurer in *Creekside*, as here, argued that “Plaintiff’s claim must be dismissed because it has not denied any claim for payment, and any delays that occurred necessarily arose before the statute’s effective date.” **Ex. 1**, at 9. Judge Daniel ruled as follows:

Construing the facts in the light most favorable to Plaintiff, I find that Plaintiff has demonstrated the existence of material facts with respect to whether Defendant have unreasonably denied or delayed in resolving its claim for benefits *after the statute’s effective date*. The parties dispute whether Defendant’s decision to pay Plaintiff \$112,402.83 on August 12, 2008, for a portion of the repair costs payable under the policy was a denial of Plaintiff’s request for replacement of the roofs. In addition, the parties dispute the manner in which Defendant handled Plaintiff’s claim from August, 2008 until May 5, 2009, when Defendant agreed that it would provide payment for replacement of the roofs. As noted above, the parties dispute whether Defendant’s payments to date are sufficient to replace the roofs. Therefore, summary judgment is not proper as to Plaintiff’s claim pursuant to C.R.S. § 10-3-1116.

**Ex. 1**, at 9 (emphasis added). Thus, in *Creekside*, a significant amount of the delay took place after the effective date of the statute on August 6, 2008 and was

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retroactive application of the statutes in question.

actionable. *Id.*; see also *Cunningham v. Standard Fire Ins. Co.*, 2008 WL 4861928 (D. Colo. 2008) (Hon. Kristen L. Mix, United States Magistrate Judge, presiding).

*Cunningham* involved a homeowners' insurance claim submitted in 2007 and still unpaid by the insurer as of the date of the opinion (November 10, 2008). The claimant sought to amend the complaint to add a statutory claim under §§ 10-3-1115 and 1116. The insurer argued that the statute could not be applied "retroactively" to the insurer's delay. As here, the claimant in *Cunningham* sought "to apply the statute to the actions taken by Defendants that occurred after the date when the new law became applicable. . . ." *Id.* at 1. The Court rejected the Defendant insurer's argument and ruled that "the statute may properly apply to acts of unreasonable delay . . . that occurred after the effective date of the statute" and allowed the requested amendment to the complaint. *Id.* (emphasis added).

Similarly, a Boulder County, Colorado District Court judge recently concluded in the face of a retroactivity challenge that a health insurer's delay and denial of benefits after August 6, 2008 was actionable despite the fact that the bills arose from an accident which pre-dated the effective date of the statutes in question and the additional fact that numerous bills had been delayed and denied prior to the statutes' effective date. **Ex. 2.** As the court recognized, a first-party insurer's unreasonable delay or denial of benefits after August 6, 2008 is actionable

notwithstanding the fact that such delay or denial may arise out of a dispute which began prior to the time the statutes went into effect.

## V. CONCLUSION

For the reasons stated herein, and in the Opening Brief, it is clear that the trial court erred in dismissing Plaintiff's statutory delay claim on grounds of retroactivity when the claim was premised solely on conduct post-dating the effective date of §§ 10-3-1115 and 1116.

DATED this 16th day of March 2011.

Respectfully submitted,

**ROBERTS LEVIN ROSENBERG PC**

*/s Michael J. Rosenberg*

Michael J. Rosenberg

*Attorneys for Amicus Curiae*

*The Colorado Trial Lawyers Association*

## CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2011 a true and exact copy of the foregoing **AMENDED BRIEF OF AMICUS CURIAE THE COLORADO TRIAL LAWYERS ASSOCIATION** was served via Lexis-Nexis File and Serve on the following:

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