ADLESON HESS & KELLY
ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION
www.ahk-law.com

PHILLIP M. ADLESON
RANDY M. HESS
PATRIC J. KELLY
DUANE W. SHIWAGA
STEVEN B. HALEY
QUENTIN F. MOMMAERTS
GERALDINE M. SOOSEBEEBS

577 SALMAR AVENUE
SECOND FLOOR
CAMPBELL, CALIFORNIA 95008
TELEPHONE (408) 341-0234
FACSIMILE (408) 341-0250

November 29, 2001

Ronald M. George, Chief Justice
and Associate Justices
California Supreme Court
Ronald Reagan Bldg.,
300 S. Spring St., 2nd Fl
Los Angeles CA 90013-1233

California Supreme Court
303 Second Street
South Tower, 8th Floor
San Francisco, CA 94107-1317

Re: **REQUEST FOR REVIEW AND**
REQUEST FOR DEPUBLICATION
Continental Casualty Company v. Superior Court (Paragon Homes, Inc.).
Second Appellate District, Appellate Case No. B147084
Supreme Court Case No.: S101679
Our Client: United Policyholders

Dear Honorable Justices of the California Supreme Court:

We represent United Policyholders (UP), a nonprofit organization founded in 1991 and dedicated to educating the public on insurance issues and consumer rights. The organization is tax-exempt under Internal Revenue Code §501(c)(3). UP is funded by donations and grants from individuals, businesses, and foundations.

In addition to serving as a resource on insurance claims for disaster victims and commercial insureds, UP actively monitors legal and marketplace developments affecting the interests of all policyholders. UP receives frequent invitations to testify at legislative and other public hearings, and to participate in regulatory proceedings on rate and policy issues.

UP submits *amicus curiae* briefs in cases involving important insurance principles that are likely to impact large segments of the public. Because a diverse range of policyholders

throughout the United States communicate on a regular basis with UP, UP provides current information on insurance matters to courts throughout the country.

UP's growing reputation as a source of useful information for appellate courts was confirmed when our amicus brief was cited in the U.S. Supreme Court's opinion in *Humana v. Forsyth*, 525 U.S. 299 (1999), and our arguments were adopted by the California Supreme Court in *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815. UP has filed amicus briefs on behalf of policyholders in over ninety cases throughout the United States.

On behalf of United Policyholders, we respectfully request that the decision of the Court of Appeal in the case of *Continental Casualty Co. v. Superior Court of Los Angeles County (Paragon Homes, Inc.)* Second Appellate District , No. B 147084, September 20, 2001, be accepted for review, or depublished.

This decision deprives policyholders in California of the insurance coverage they would reasonably expect for claims of indemnification arising out of construction defect litigation. Under well-established case law, there is a duty to defend when there is the "potential" for coverage – the "potential" that the underlying complaint will seek damages for "property damage". *Gray v. Zurich* (1966) 65 Cal. 2d 263.

It is our understanding that this case involves a very straightforward claim by a building owner that its general contractor has committed construction defects – that is, "property damage" within the meaning of the insurance policies. These allegations are clearly set forth in the underlying complaint. Nevertheless, the Court of Appeal turned the duty to defend upside down by ruling that there was no duty to defend because there were no "real" allegations of property damage. The Court determined that this was a partnership dispute, so the complaint could not possibly involve allegations of property damage, as a matter of law. The problem with this reasoning is that it is so fatally overbroad that it will lead to erroneous denials of coverage in future, garden-variety duty to defend cases.

The Court of Appeal erroneously posits that the mere label of a "partnership dispute" deprives Paragon Homes, Inc. of coverage. This flies in the face of this Court's holding in *Vandenberg v Superior Court* (1999) 21 Cal. 4th 815 that labels do not determine coverage, but that the underlying allegations do. It is also inconsistent with the recent Fourth District Court of Appeal opinion in *Barnett v. Firemen Fund Ins.* (2001) 90 Cal.App.4th 500, holding that factual allegations in a complaint determine whether a duty to defend has been triggered, not the legal theories pursued by the underlying claimant.

If left standing, this decision will certainly be misapplied and overextended by the insurance industry. Continental Casualty's brief in opposition to the Petition for Review argues that there is no coverage because the complaint involves the "economic relations" between the

parties. (Answer to Petition for Review at 1, 3, 10, 13.) Under Continental's argument, nearly all losses would be "economic". To argue that there is no coverage for "economic" losses between parties that are in the business of building homes would render insurance coverage meaningless. For example, under Continental's reasoning a subcontractor sued for property damage resulting from the negligent construction of a home would be covered if sued directly by the homeowner, but not if that same subcontractor is sued by the contractor on a cross-complaint for indemnity. Under Continental's argument such a claim would be considered to be arising from "economic damage", thus not covered.

The Court of Appeal decision also rests on the erroneous assumption that the case against Paragon Homes, Inc. does not need to be defended because other cases against Paragon Homes, Inc. were being defended by Continental Casualty. Once again, this logic turns the duty to defend on its head. Each lawsuit must be considered individually. We know of no case that has ever used the logic that there is no duty to defend one case because the insurance company was defending another case. On the contrary, the fact that the insurance company was defending other cases involving the same construction defects alleged in the complaint at issue indicates that this case should have been defended as well. The fact that Paragon Homes, Inc. was facing duplicative lawsuits, in different forums, for the same construction defects supports, rather than negates, the duty to defend.

The Court of Appeals also appears to have misunderstood the facts and misread the complaint in the underlying action. It is our understanding that there is no partnership dispute between the owner, FN Development and its general contractor, Paragon Homes, Inc. Paragon Homes, Inc. was not a partner and was not sued for partnership dissolution.

The Court of Appeals never discussed the difference between the Fourth Cause of Action for construction defects and the Sixth Cause of Action for partnership dissolution. The general contractor, Paragon Homes, Inc., was sued for construction defects in the Fourth Cause of Action, but was not sued for partnership dissolution in the Sixth Cause of Action. It was not a partner. Therefore, the appellate court's conclusion that this is a partnership dissolution case that can never give rise to the duty to defend – is simply wrong.

Even if this case were a partnership dispute, that fact alone would not deprive a policyholder of coverage. The critical question is whether the complaint alleges property damage. Here, the underlying complaint clearly makes these allegations in the Fourth Cause of Action for construction defects.

Accordingly, on behalf of United Policyholders we respectfully request that this Court grant the previously filed Petition for Review. In the alterative, pursuant to Rule 979 of the California Rules of Court, on behalf of the United Policyholders, we request depublication of

the Court of Appeal's opinion in *Continental Casualty Company v. Superior Court (Paragon Homes, Inc.)* (2001) 92 Cal.App.4th 430, a copy of which is attached.

Respectfully submitted.

ADLESON, HESS & KELLY

By:_____
Randy M. Hess
Duane W. Shewaga
Attorneys for the United Policyholders

RMH/DWS:jns
Enclosure
cc; Jordan S. Stanzler (Paragon Homes)
Mark A. Graf, Esq. (C.V. Starr, AIG Technical Services, Insurance Co. of PA)
Michael F. Hardiman, Esq. (Homestead Ins. Co.)
Craig S. Simon (Continental Casualty Co.)
Harry Griffith, Esq. (Scottsdale)
Clerk, Court of Appeal, Second Appellate District
Hon. Carolyn Kuhl