

CHARLES A. BIRD, PARTNER  
DIRECT DIAL NUMBER 619.699.2406  
DIRECT FAX NUMBER 619.645.5360  
E-MAIL ADDRESS: [cbird@luce.com](mailto:cbird@luce.com)

March 14, 2002

Hon. Ronald M. George  
Chief Justice of California  
Honorable Associate Justices  
Supreme Court of California  
350 McAllister Street  
San Francisco, California 94102

Re: *Dart Industries, Inc. v. Commercial Union Insurance Company*  
Case No. S086518

Dear Chief Justice George and Associate Justices:

On behalf of Dart Industries, we request leave to file this letter brief in response to the letter brief of Commercial Union dated March 1, 2002 which enclosed a copy of the recent Court of Appeal decision in *Scottsdale Insurance Company v. National Union Fire Insurance Company of Pittsburgh, Pennsylvania, et al.* (January 30, 2002) 2002 Cal.App. LEXIS 1006.

Commercial Union claims that the *Scottsdale* case supports its argument that the policy issued to Dart should act only as excess insurance because of the other insurance clause in that policy. Commercial Union also claims that the "effect of the *Scottsdale* case is that Dart must bear the burden of proving the 'other insurance' clause." The *Scottsdale* case does not support these conclusions.

First, the *Scottsdale* case makes no mention of who has the burden of proving an other insurance clause. Commercial Union cites *Executive Aviation, Inc. v. National Ins. Underwriters* (1971) 16 Cal.App.3d 799 to support that proposition, but the Court of Appeal in that case actually said that while the insured has the burden of proving the contract of insurance and its terms, the burden of bringing itself within any exculpatory clause is on the insurer. (*Id.* at p. 806.) More importantly, Supreme Court stated in *Garvey v. State Farm Fire & Casualty Co.* (1989) 48 Cal.3d 395 that once the insured

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shows that an event falls within the scope of basic coverage under the policy, the burden is on the insurer to prove a claim is specifically excluded. (*Id.* at p. 406.) Finally, this Court has previously held that exclusionary clauses in an insurance policy are to be interpreted narrowly. (*Ibid.*) Thus, the *Scottsdale* case does not change Commercial Union's burden to prove that there is an "other insurance" clause which limits or excludes coverage otherwise available under the policy issued to Dart.

Second, Commercial Union claims that Dart brought forth no evidence of an other insurance clause in the missing policy, and that Commercial Union presented evidence suggesting that the "other insurance" clause was a null and void clause, like the one in the *Scottsdale* case. Commercial Union's only evidence on the other insurance issue was from its lead underwriter in the 1940s (Peter Fortuna), who only testified that there were three different clauses that could have been used and that he did not know anything about an other insurance clause in the policy issued to Dart. Mr. Fortuna did not know whether the policy issued to Dart had an other insurance clause or, if there was one, whether it was an escape (null and void) clause, an excess clause or a pro rata clause.

Third, Commercial Union argues that the *Scottsdale* court found that the other insurance clause there applied to the duty to defend and therefore Commercial Union has no obligation to pay for Dart's defense. However, the policy at issue in the *Scottsdale* case was an excess policy, whereas the policy issued to Dart was a primary policy. Moreover, the *Scottsdale* court's focus was on the other insurance language applicable to the duty to defend and contained in the insuring agreement (i.e., grant of coverage). Commercial Union admitted that its standard other insurance clauses were not part of the insuring agreement of its policies. (R.T. 485:1-22)

Finally, the *Scottsdale* court was clear that the *Scottsdale* policy's other insurance clause was only enforceable as long as the insured was fully protected by other insurance. Dart has no other primary insurance for the 1946-51 policy period other than Commercial Union's and no other valid and collectible insurance for that level of coverage. The *Scottsdale* court noted that other insurance clauses were designed to prevent multiple recoveries when more than one policy provides coverage for a particular loss. Those

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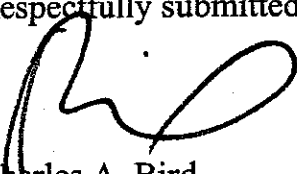
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clauses were not designed to leave the insured without coverage - the result Commercial Union incorrectly suggests.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'CAB', written over the typed name 'Charles A. Bird'.

Charles A. Bird

of

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CAB/

PROOF OF SERVICE

***Dart Industries, Inc. v. Commercial Union Insurance Company***  
California Supreme Court, No. S086518  
Court of Appeal, Second Appellate District, Div. One, No. B129601  
Los Angeles County Superior Court, No. C519554

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to this action; my business address is 777 S. Figueroa Street, 36<sup>th</sup> Floor, Los Angeles, California 90017, and I served the document(s) described as:

**LETTER BRIEF ON BEHALF OF DART INDUSTRIES IN RESPONSE TO  
LETTER BRIEF OF COMMERCIAL UNION DATED MARCH 1, 2002**

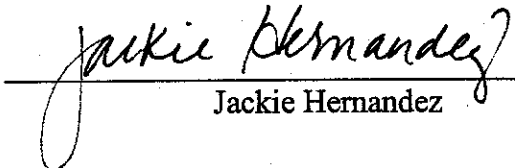
on the interested parties in this action by placing a true copy thereof, enclosed in a sealed envelope, addressed as follows:

**PLEASE SEE ATTACHED SERVICE LIST**

**X** **BY MAIL.** By placing a copy in a separate envelope, with postage fully prepaid, for each addressee named below for collection and mailing on the below indicated day following the ordinary business practices at Luce, Forward, Hamilton & Scripps, at 600 west Broadway, Suite 2600, San Diego, California. I certify I am familiar with the ordinary business practices of my place of employment with regard to collection for mailing with the United States Postal Service.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed March 15, 2002, at Los Angeles, California.

  
\_\_\_\_\_  
Jackie Hernandez

*Dart Industries, Inc. v. Commercial Union Insurance Company*  
California Supreme Court, No. S086518  
Court of Appeal, Second Appellate District, Div. One, No. B129601  
Los Angeles County Superior Court, No. C519554

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**SERVICE LIST**

Neil H. Selman, Esq.  
Jeffrey C. Segal, Esq.  
SELMAN, BREITMAN & BURGESS  
11766 Wilshire Blvd., 6<sup>th</sup> Floor  
Los Angeles, CA 90025-6538  
Tel: (310) 445-0800

Attorneys for Defendant and Appellant  
COMMERCIAL UNION INSURANCE  
COMPANY

BILL LOCKYER  
Attorney General  
RANDALL P. BORCHERDING  
Supervising Deput Attorney General  
JULIAN O. STANDEN  
Deputy Attorney General  
455 Golden Gate Avenue, Suite 11000  
San Francisco, CA 94102  
Telephone: (415) 703-5535

Attorneys for AMICUS CURIAE THE  
INSURANCE COMMISSIONER OF  
THE STATE OF CALIFORNIA

Elliot L. Bien, Esq.  
BEIN & SUMMERS, LLP  
23 Palomino Road  
Novato, California 94947  
Telephone: (414) 898-2900

Attorneys for AMICUS CURIAE  
INSURANCE ENVIRONMENTAL  
LITIGATION ASSOCIATION

Laura A. Foggan, Esq.  
Daniel E. Troy, Esq.  
Kimberly Hrabosky, Esq.  
WILEY, REIN & FIELDING  
1776 K. Street, N.W.  
Washington, D.C. 20006  
Telephone: (202) 719-7000

Of Counsel

Paul J. Killion, Esq.  
Max H. Stern, Esq.  
Kate Cutler, Esq.  
HANCOCK ROTHERT & BUNSHOFT  
4 Embarcadero Center, 3<sup>rd</sup> Fl.  
San Francisco, CA 94111-4168  
Telephone: (415) 981-5550

Attorneys for AMICI CURIAE LONDON  
MARKET INSURERS

Randy M. Hess, Esq.  
Duane W. Shewaga, Esq.  
Michelle L. Fogliani, Esq.  
ADLESON, HESS & KELLY  
577 Salmar Avenue, 2<sup>nd</sup> Fl.  
Campbell, CA 95008  
Telephone: (408) 341-0234

David L. Alexander, Esq.  
Michele Heffes, Esq.  
PORT OF OAKLAND  
530 Water Street  
Oakland, CA 94607  
Telephone: (510) 272-1100

Deborah S. Ballati, Esq.  
Pamela H. Davis, Esq.  
FARELLA BRAUN & MARTEL LLP  
235 Montgomery Street  
San Francisco, CA 94101  
Telephone: (415) 954-4400

Michael Y. Horton, Esq.  
David S. Cox, Esq.  
ZEVNIK HORTON GUIBORD  
McGOVERN PALMER & FOGNANI  
333 South Grand Ave., 21<sup>st</sup> Floor  
Los Angeles, CA 90071  
Telephone: (213) 437-5200

Gabriel A. Jackson, Esq.  
William P. Buranich, Esq.  
JACHSON & WALLACE  
580 California Street, 15<sup>th</sup> Floor  
San Francisco, CA 94104  
Telephone: (415) 982-6300

Richard C. Darwin, Esq.  
COVINGTON & BURLING  
601 California Street, 19<sup>th</sup> Floor  
San Francisco, CA 94108  
Telephone: (415) 591-6000

Attorneys for AMICUS CALIFORNIA  
TRUSTEE'S ASSOCIATION

Attorneys for AMICUS CURIAE CITY  
OAKLAND, a MUNICIPAL  
CORPORATION, ACTING BY AND  
THROUGH IT S BOARD OF PORT  
COMMISSIONERS

Attorneys for AMICUS CURIAEITT  
INDUSTRIES, INC.

Attorneys for AMICI CURIAE KELLY-  
MOORE PAINT COMPANY UNISYS  
CORPORATION

Attorneys for PHARMACEUTICAL  
RESEARCH AND MANUFACTURERS  
OF AMERICA

Robert A. Long, Jr. Esq.  
Karin L. Kizer, Esq.  
COVINGTON & BURLING  
1201 Pennsylvania Ave., N.W.  
Washington, D.C. 20004  
Telephone: (202) 662-6000

John A. MacDonald, Esq.  
ANDERSON KILL & OLICK, P.C.  
1600 Market Street, Suite 3201  
Philadelphia, PA 19103  
Telephone: (215) 568-4202

Attorneys for AMICUS CURIAE  
UNITED POLICYHOLDERS

Amy Bach, Esq.  
UNITED POLICYHOLDERS  
42 Miller Avenue  
Mill Valley, CA 94941

David M. Halbreich, Esq.  
BROBECK, PHLEGER & HARRISON  
550 S. Hope Street  
Los Angeles, CA 90071  
Telephone: (213) 489-4060

Attorneys for AMICI CURIAE WESTERN  
MAC ARTHUR COMPANY AND MAC  
ARTHUR COMPANY

Thomas M. Peterson, Esq.  
Marilyn Fisher, Esq.  
BROBECK PHLEGER & HARRISON  
One Market Spear Tower  
San Francisco, CA 94105  
Telephone: (415) 442-0900

Office of the Clerk  
Attn: Hon. Loren Miller, Judge  
One Regent Street  
Department "N"  
Inglewood, CA 90301

Clerk of the Court  
California Courts of Appeal  
Second Appellant District, Div. One  
300 S. Spring Street, Floor 2, N. Tower  
Los Angeles, CA 90013-1213