No. G036451

IN THE COURT OF APPEAL OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

———————————

PADILLA CONSTRUCTION COMPANY, INC.,

Plaintiff and Appellant,

v.

TRANSPORTATION INSURANCE COMPANY,

Defendant and Respondent.

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Superior Court of California, County of Orange
Case Number 04CC03467
Honorable Randell L. Wilkinson, Judge

———————————

REQUEST FOR PERMISSION TO FILE AMICUS CURIAE BRIEF, AND BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS REQUESTING MODIFICATION OF COURT'S MAY 14, 2007 OPINION

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AMY BACH (Bar No. 142029)
UNITED POLICYHOLDERS
222 Columbus Avenue, Suite 412
San Francisco, California 94133
(415) 713-3048

Attorney for Amicus Curiae
United Policyholders

I. REQUEST FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Amicus curiae United Policyholders respectfully requests permission to file this amicus curiae brief, which asks the Court to modify its recent opinion in *Padilla Construction Company, Inc. v. Transportation Insurance Company*, a copy of which is attached to this brief. The proposed modifications would *not* alter the Court's judgment. However, they would eliminate confusion that is likely to arise in the lower courts because of statements in the *Padilla* decision that are not necessary to the Court's ruling and appear to conflict with prior Supreme Court decisions and decisions of other Courts of Appeal.

United Policyholders takes the unusual step of asking for leave to file an amicus curiae request for modification because *both* Appellant and Respondent in the *Padilla* appeal appear to have advocated positions concerning the "scope" of coverage for defense and indemnity payments under standard form commercial general liability ("CGL") insurance policies that are inconsistent with settled California law, and the parties therefore did not properly frame the issues for the Court to resolve. Thus, neither party is likely to bring the pertinent authorities to the Court's attention in a petition for rehearing.

II. INTEREST OF AMICUS CURIAE

United Policyholders is a not-for-profit corporation founded in 1991 to educate the public, the judiciary and elected officials on insurance issues and the rights of policyholders. The organization is tax-exempt under Internal Revenue Code sec. 501(c)(3) is based in California. It is based in Northern California but operates across the United States. United Policyholders is funded by donations and grants from individuals, businesses, and foundations and governed by an eight member Board of Directors.

United Policyholders monitors legal and marketplace developments that impact insureds and participates in forums aimed at formulating public policy on insurance

transactions. United Policyholders publishes materials that give practical guidance on buying, coverage and claim issues to property and business owners and advocates, disaster relief personnel, attorneys and adjusters at www.unitedpolicyholders.org.

Businesses and individuals rely on insurance to protect their property and livelihoods against risk, while insurance companies are in business to earn profits by assuming risk. While the financial interests of the policyholder and insurance company sectors are distinct, both sectors need the overall insurance system to function. Insurers' interests are very well represented in judicial, legislative and media forums through trade associations, lobbyists, attorneys and spokespeople. Policyholders' interests are far less so, and United Policyholders is working to increase the representation of both large and small insureds in forums throughout the country.

United Policyholders previously has appeared as *amicus curiae* in over two hundred and twenty cases throughout the United States, including numerous cases in the California courts.[1] The organization recently accepted an invitation to submit an amicus brief from this Division in the matter of *Cindy Hailey et al v. California Physicians' Service et al*, Case No. G035579. United Policyholders also has appeared

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[1] These cases include: *County of San Diego v. Ace Property & Cas. Ins. Co.* (2005) 37 Cal.4th 406; *Powerine Oil Co., Inc. v. Superior Court* (2005) 37 Cal.4th 377; *Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191; *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159; *Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747; *Garamendi v. Golden Eagle Ins. Co.* (2005) 127 Cal.App.4th 480; *American Ins. Ass'n v. Garamendi* (2005) 127 Cal.App.4th 228; *Watts Industries, Inc. v. Zurich American Ins. Co.* (2004) 121 Cal.App.4th 1029; *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780; *Marselis v. Allstate Ins. Co.* (2004) 121 Cal.App.4th 122; *Hameid v. National Fire Ins. of Hartford* (2003) 31 Cal.4th 16; *Rosen v. State Farm General Ins. Co.* (2003) 30 Cal.4th 1070; *County of San Diego v. Ace Property & Casualty Ins. Co.* (2002) 103 Cal.App.4th 1335; *Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059; *Bialo v. Western Mut. Ins. Co.* (2002) 95 Cal.App.4th 68; *Vu v. Prudential Property & Casualty Ins. Co.* (2001) 26 Cal.4th 1142; *20th Century Ins. Co. v. Superior Court* (2001) 90 Cal.App.4th 1247; and *AICCO, Inc. v. Insurance Co. of North America* (2001) 90 Cal.App.4th 579.

as *amicus curiae* in cases before the United States Supreme Court in *Humana, Inc. v. Forsyth*, No. 97-303 (U.S. Sept. 18, 1998); *FL Aerospace v. Aetna Casualty and Surety Co.*, No. 90-289 (U.S. Sept. 13, 1990), and the United States Supreme Court cited United Policyholders' brief in *Humana, Inc. v. Forsyth*, 525 U.S. 299 (1999). United Policyholders was the only national consumer organization to submit an *amicus* brief in the landmark case of *State Farm v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513 (2003).

III. BRIEF OF AMICUS CURIAE REQUESTING MODIFICATION OF COURT'S MAY 14, 2007 OPINION

Amicus curiae will first set forth the specific modifications to the *Padilla* Opinion that amicus curiae respectfully requests the Court to make and then will explain the reasons for the requested modifications.

A. Proposed Modifications to the Opinion

Proposed Change No. 1

The third paragraph on page 3 of the Court's Opinion reads as follows:

> The solution to this problem is relatively easy. As we show below, under *Buss v. Superior Court* (1997) 16 Cal.4th 35, the lone defending primary insurer had a duty to "defend entirely," and so, from the point of view of the excess insurer, there was indeed "other insurance" available – that is, other insurance to undertake the task of *defending* the insured. Accordingly, there mere fact that portions of the continuous damage could not possibly have been covered by the primary insurer makes no difference as far as the excess insurer's duty to defend is concerned.

Amicus curiae requests the Court to modify this paragraph to read as shown below, with deletions crossed out and additions in bold:

> The solution to this problem is relatively easy. As we show below**,** under **settled California law, including *Aerojet-General Corp. v. Transport Indemnity Co.* (1997) 17 Cal.4th 38, *Montrose Chemical Corp. v. Admiral Insurance Co.* (1995) 10 Cal. 4th 645, and *Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co.* (1996) 45 Cal.App.4th 1,** ~~*Buss v. Superior Court* (1997) 16 Cal.4th 35~~ the lone defending primary insurer had a **contractual** duty **to defend the entire action because all of**

> **the alleged continuous property damage was potentially covered by those policies,** ~~"defend entirely,"~~ and so, from the point of view of the excess insurer, there was indeed "other insurance" available – that is, other insurance to undertake the task of *defending* the insured. Accordingly, the mere fact that portions of the continuous damage **may have occurred before or after the defending primary insurer's policy period** ~~could not possibly have been covered by the primary insurer~~ **makes no difference as far as the excess insurer's duty to defend is concerned.**

Proposed Change No. 2

Section IV.A. of the Court's Opinion provides the Court's analysis of the "Policy Period Problem." The first paragraph of this section reads:

> The main focus of the insured's briefing involves the logical implications of the "policy period" language in the State 4 Primary Insurer's policy. Here is the logic:

Amicus curiae requests the Court to modify this paragraph with the additions shown below in bold:

> The main focus of the insured's briefing involves **what the insured considers** the logical implications of the "policy period" language in the State 4 Primary Insurer's policy. Here is the **insured's** logic:

Proposed Change No. 3

Amicus curiae further requests that the Court delete from its Opinion the text beginning with the first non-numbered paragraph on page 12 (which starts with "The insured's argument is not without considerable force") through and including the third paragraph on page 17 (which starts with "*Buss* made clear that the insurer can seek reimbursement"). In place of these paragraphs, we respectfully request that the Court insert the following text:

> **But there is a core flaw in the insured's logic. The insured is mistaken that the Stage 4 Primary Insurer's policies do not cover liability for property damage outside its policy periods. It is the settled rule of the case law that an insurer whose policy contains a typical CGL insuring clause, like the Stage 4 Primary Insurer's policies at issue here, which**

is on the risk for a continuous or progressively deteriorating property damage or bodily injury claim because some portion of the property damage or bodily injury has occurred during the insurer's policy period, is obligated to indemnify the insured for the entire loss (subject only to the limit of coverage provided by the policy), including the insured's liability for that portion of the property damage or bodily injury that did not occur during the insurer's policy period. (*Aerojet-General, supra,* 17 Cal.4th at p. 57 & fn.10; *Montrose Chemical Corp., supra,* 10 Cal.4th at p. 678*; Stonewall Ins. Co. v. City of Palos Verdes Estates* (1996) 46 Cal.App.4th 1810, 1855, 1861; *California Pacific Homes, Inc. v. Scottsdale Ins. Co.* (1999) 70 Cal.App.4th 1187, 1193; *Armstrong*, *supra*, 45 Cal.App.4th at pp. 57, 105.) The Supreme Court has explained this obligation in several decisions, including in *Aerojet-General, supra,* where it stated: "In pertinent part, standard comprehensive or commercial general liability insurance policies provide that the insurer has a duty to indemnify the insured for those sums that the insured becomes legally obligated to pay as damages for a covered claim. . . . It [the duty to indemnify] is triggered if specified harm is caused by an included occurrence, . . . so long as at least some such harm results within the policy period. . . . It extends to all specified harm caused by an included occurrence, even if some such harm results beyond the policy period. . . . In other words, if specified harm is caused by an included occurrence and results, at least in part, within the policy period, it perdures to all points of time at which some such harm results thereafter." (*Id.* at pp. 56-57 [citations and footnotes omitted]).

The Supreme Court further explained that the basis for this rule is the important distinction between the "trigger" of coverage and the "scope" of coverage: "'[T]he event which triggers an insurance policy's coverage does not define the extent of the coverage. Although a policy is triggered only if [bodily injury or] property damage takes place 'during the policy period,' once a policy is triggered, the policy obligates the insurer to pay 'all sums' which the insured shall become liable to pay as damages for bodily injury or property damage. The insurer is responsible for the full extent of the insured's liability . . . , not just for the part of damage that occurred during the policy period.'" (*Id.* at p. 57, fn.10 [quoting *Armstrong, supra*, 45 Cal.App.4th at p. 105].)

The *Aerojet-General* Court further held, based on this settled rule, that when a potential for coverage, and hence a duty to defend, exists for a continuous or progressively deteriorating property damage or bodily

injury claim, the duty to defend extends to the entire claim, even as to portions of the property damage or bodily injury that did not occur during the policy period. The Court stated: "[The duty to defend] is triggered if specified harm may possibly have been caused by an included occurrence, so long as at least some such harm may possibly have resulted in the policy period. (Cf. *Montrose Chemical Corp. v. Admiral Ins. Co., supra*, 10 Cal.4th at pp. 669-673 [holding to such effect as to the duty to indemnify].) It extends to all specified harm that may possibly have been caused by an included occurrence, even if some such harm may possibly have resulted beyond the policy period. (Cf. *id*. at p. 686 [holding to such effect as to the duty to indemnify].) In other words, if specified harm may possibly have been caused by an included occurrence and may possibly have resulted, at least in part, within the policy period, it perdures to all points of time at which some such harm may possibly have resulted thereafter. . . . To illustrate again by a hypothetical: Insurer has a duty to defend Insured as to a claim for damages for property damage cause by its discharge of hazardous substances brought by Neighbor. Insured may possibly have discharged such a substance. It thereby may possibly have caused property damage to Neighbor's land within the policy period of year one. It may possibly have caused further damage as the substance may possibly have spread under the surface in year two through year thirty. Insurer must defend Insured as to the claim in its entirety." (*Aerojet-General, supra,* 17 Cal.4th at pp. 58-59 [footnote omitted].) Similarly, in *Montrose Chemical Corp., supra*, the Supreme Court approved the portion of a Court of Appeal decision that, in turn, relied on a Washington appellate decision, stating, "progressive property damage should be deemed to occur over the entire process of the continuing injury, with a CGL carrier liable at any point in the process for the entire loss up to the policy limits, even though the continuous or progressively deteriorating damage extends over successive policy periods." (10 Cal.4th at p. 681 [citations omitted].) Thus, the obligation to defend the action in its entirety applies whether the continuous or progressively deteriorating property damage or bodily injury commenced before inception of the insurer's policy or continued after the end of the policy period, or both. (See, e.g., *Aerojet-General, supra,* 17 Cal.4th at pp. 58-59; *Haskel, Inc. v. Superior Court* (1995) 33 Cal.App.4th 963, 976, fn.9 [in connection with continuous property damage claim alleging property damage before, during and after insurer's policy period, insurer breached its duty to defend by refusing to defend the claim in its entirety]; *Travelers Cas. & Sur. Co. v. Century Sur. Co.* (2002) 118

Cal.App.4th 1156, 1161-1162 [1996 insurer had duty to defend lawsuit alleging progressive damage beginning in 1987].)

Here, the underlying construction defect claim alleged continuous property damage as a result of the insured's allegedly defective stucco work. Property damage may have occurred during the Stage 4 Primary Insurer's policy period, as well as before the State 4 Primary Insurer came on the risk. All of the property damage was potentially covered by the Stage 4 Primary Insurer's policies. The Stage 4 Primary Insurer had a contractual duty to defend the entire claim.

Proposed Change No. 4

The first full paragraph on page 18 of the Court's Opinion reads:

All of which is by way of saying that there was indeed primary insurance available to the insured as regards the *defense* of the underlying suits from the Stage 4 Primary Insurer, even though there was an increment of harm claimed in the suit that was not even potentially covered by the Stage 4 Primary Insurer's policy. There being such primary insurance available, there would be no *defense* obligation triggered by the Stage 1 Umbrella Insurer's "defense" clause, while its "other insurers" affirmatively relieved it of any obligation to defend.

We request the Court to modify this paragraph as shown below:

All of which is by way of saying that there was indeed primary insurance available to the insured as regards the *defense* of the underlying suits from the Stage 4 Primary Insurer, even though there was an increment of harm claimed in the suit that **possibly occurred prior to the inception of** ~~was not even potentially covered by~~ the Stage 4 Primary Insurer's policy. There being such primary insurance available, there would be no *defense* obligation triggered by the Stage 1 Umbrella Insurer's "defense" clause, while its "other insurers" affirmatively relieved it of any obligation to defend.

B. Reason For Proposed Modifications

In *Buss, supra,* 16 Cal.4th at p. 35, the Supreme Court explained that when a suit includes at least one claim for damages that a CGL insurance policy potentially covers and other claims for damages that the CGL policy does not cover at all – a "mixed

action" – the CGL insurer must provide a complete defense as a prophylactic matter (not as a contractual duty) and then, upon conclusion of the lawsuit, may recover from the policyholder those defense expenses that were devoted solely to the noncovered claims. (*Id*. at pp. 52-53.) The potential confusion in the lower courts arising out of the *Padilla* Opinion (at pp. 13-14, 17-18) – which amicus curiae noted at the beginning of this brief and respectfully requests the Court to clarify – arises from the argument of both Appellant and Respondent that a continuous or progressive injury construction defect case is a "mixed action," i.e., their suggestion that a standard form CGL insurance policy that is triggered because some part of the continuous property damage occurred during the policy period cannot cover *all* of damages that the policyholder is legally obligated to pay as a result of the occurrence, including damages related to the harm that occurred before and after the policy period. In making that suggestion to this Court, the parties misunderstood and misstated settled California law.

As we discuss below, the CGL policies at issue potentially cover all damages because of the property damage alleged in the *Padilla* lawsuit, including property damage that may have occurred prior to inception of the Stage 4 Primary Insurer's policies. Therefore, the *Padilla* lawsuit was *not* a "mixed action." That means that Stage 4 Primary Insurer's duty to defend the entire lawsuit was a contractual duty rather than the prophylactic duty discussed in *Buss* and the Stage 4 Primary Insurer would not be entitled to seek reimbursement of defense costs related solely to damages because of property damage that occurred outside of the Stage 4 Primary Insurer's policy period. Thus, the portions of the Court's Opinion that discuss the defense obligations of insurers in "mixed" actions and an insurer's right to seek reimbursement of defense costs are not necessary to the Court's holding.

Specifically, the Stage 4 Primary Insurer's policies, like many standard form CGL insurance policies, contain an insuring agreement that provides, in part:

> We will pay those sums that the insured becomes legally obligated to pay as 'damages' because of 'bodily injury' and 'property damage' to which this insurance applies.

Court's Opinion at p.8 fn.9. This language and similar language in earlier CGL forms raise two key issues: (a) what event triggers coverage, and (b) what are the payment obligations of each triggered insurance policy?

As to the event that "triggers" coverage under a standard CGL policy, the Supreme Court explained in *Montrose Chemical Corp., supra*, 10 Cal.4th at p. 689, that property damage during the policy period will trigger the insurer's coverage obligations, and if the property damage is continuous or progressive, a "continuous trigger" will apply and consecutive CGL policies in effect when any property damage occurred must all respond to the claim.

As to the payment obligations of each triggered CGL policy – what courts refer to as the "scope" of CGL coverage – California courts have consistently interpreted this standard insuring agreement language as obligating each CGL policy that a continuous injury claim triggers to pay the insured "in full" for the entire loss, subject only to the limits of liability, deductibles and retentions set forth in the policy. (See, e.g., *Aerojet-General, supra,* 17 Cal.4th at pp. 56-57 & fn.10; *Montrose Chemical Corp., supra,* 10 Cal.4th at p. 678 [each insurer sharing coverage with other successive insurers is individually liable for the full amount of the loss up to its policy limits]; *Dart Industries, Inc., v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059, 1080 [same]; *Stonewall, supra,* 46 Cal.App.4th at p. 1861 [in a construction defect claim involving four years of continuous injury, "each of the primary carriers covering the liability of the [policyholder during those four years] is potentially liable for all of the [policyholder]'s liability, up to the limits of the particular primary policy issued by that carrier and subject to the deductible, retention and 'other insurance' clauses of that policy"]; *Armstrong, supra,* 45 Cal.App.4th at pp. 54, fn. 18, 57, 105 [noting agreement with the Pennsylvania Supreme Court "that each insurer must bear potential liability for the

entire claim," and that once a CGL policy is triggered, each insurer is obligated to pay the loss in full [citation omitted]]; *Fireman's Fund Ins. Co. v. Maryland Cas. Co*. (1998) 65 Cal.App.4th 1279, 1297 [same]; see also *Royal Globe Ins. Co. v. Industrial Acc. Comm.* (1965) 63 Cal.2d 60, 63 [when covered injury occurs in successive policy periods, each insurer has a duty to pay the entire claim, with allocation among insurers to be determined later].)

Thus, in discussing the "scope" of the duty to indemnify in a continuous injury claim, the court in *Armstrong, supra,* stated:

> [T]he event which triggers an insurance policy's coverage does not define the extent of the coverage. Although a policy is triggered only if property damage takes place 'during the policy period,' once a policy is triggered, the policy obligates the insurer to pay 'all sums' which the insured shall become liable to pay as damages for bodily injury or property damage. The insurer is responsible for the full extent of the insured's liability (up to policy limits), not just for the part of damage that occurred during the policy period.

(45 Cal.App.4th at p. 105; see also *Aerojet-General, supra,* 17 Cal.4th at p. 57 & fn.10 [citing with approval the important distinction between the trigger of coverage and the scope of coverage in the above passage from the *Armstrong* decision].)

Therefore, once a continuous injury claim triggers an insurer's duty to indemnify because of property damage occurring during the insurer's policy period, the insurer has a duty to indemnify the insured for the *entire* loss, including for the insured's liability due to portions of the property damage occurring outside the insurer's policy period. (*Ibid.*) To be sure, an insurer has the right, after paying the claim, to seek equitable contribution from other insurers that provide coverage, but that does not affect each insurer's separate contractual obligation to indemnify the insured for the entire loss:

> [A]pportionment among multiple insurers must be distinguished from apportionment between an insurer and its insured. When multiple policies

> are triggered on a single claim, the insurers' liability is apportioned pursuant to the 'other insurance' clauses of the policies [citation] or under the equitable doctrine of contribution [citations]. That apportionment, however, has no bearing upon the insurers' obligations to the policyholder. [Citation.] . . . *The insurers' **contractual** obligation to the policyholder is to cover the full extent of the policyholder's liability* (up to the policy limits).

(*Armstrong, supra,* 45 Cal.App.4th at pp. 105-106 [emphasis added]; see also *FMC Corp. v. Plaisted and Co.* (1998) 61 Cal.App.4th 1132, 1185; *Dart Industries*, *supra*, 28 Cal.4th at pp. 1079-1080-1081; *Royal Globe, supra*, 63 Cal.2d at p. 63.)

It follows from these fundamental principles that when a potential exists for indemnity coverage, and thus a duty to defend, against a continuous property damage claim because a portion of the property damage may have occurred during the insurer's policy period, the potential for coverage and the contractual duty to defend extend to all of the claimed damages, even those portions that could not have occurred during the policy period. (*Aerojet-General, supra,* 17 Cal.4th at pp. 58-59.) Referring to the holdings in *Montrose* and *Armstrong* on the duty to indemnify, *Aerojet-General* stated:

> [The duty to defend] is triggered if specified harm may possibly have been caused by an included occurrence, so long as at least some such harm may possibly have resulted within the policy period. (Cf. *Montrose Chemical Corp. v. Admiral Ins. Co., supra*, 10 Cal. 4th at pp. 669-673 [holding to such effect as to the duty to indemnify].) It extends to all specified harm that may possibly have been caused by an included occurrence, even if some such harm may possibly have resulted beyond the policy period. (Cf. *id*. at p. 686 [holding to such effect as to the duty to indemnify].) In other words, if specified harm may possibly have been causes by an included occurrence and may possibly have resulted, at least in part, within the policy period, it perdures to all points of time at which some such harm may possibly have resulted thereafter. [FN11] To illustrate again by a hypothetical: Insurer has a duty to defend Insured as to a claim for damages for property damage caused by its discharge of hazardous substances brought by Neighbor. Insured may possibly have discharged such a substance. It thereby may possibly have caused property damage to Neighbor's land within the policy period of year one.

> It may possibly have caused further damage as the substance may possibly have spread under the surface in year two through year thirty. Insurer must defend Insured as to the claim in its entirety.

(*Aerojet-General, supra,* 17 Cal.4th at pp. 58-59 [footnote 11 omitted[2]].)

The *Padilla* Opinion appears to treat the *Aerojet-General* discussion of the above-hypothetical as a holding that a triggered insurance policy would have no duty to indemnify for damages representing the portion of a continuous injury that occurred *before* a particular insurance policy incepted, and that there would only be an extra-contractual, prophylactic duty under *Buss* to defend the portion of the claim alleging property damage prior to inception of the policy. However, the *Aerojet-General* Court held no such thing. As the passage from *Aerojet-General* quoted above reflects, the Court was only attempting to "illustrate" its point with a "hypothetical" that happened to concern additional damage *after* the policy period, and other courts have made it crystal clear that any triggered policy is obligated, contractually, to pay its full limits of liability to indemnify the policyholder for the entirety of a covered occurrence, even if the occurrence and property damage began *before* the policy period. (See, e.g., *Stonewall*, *supra*, 46 Cal.App.4th at p. 1861; *FMC, supra*, 61 Cal.App.4th at p. 1191; *California Pacific Homes, supra,* 70 Cal.App.4th at p. 1193 [in connection with the settlement of a construction defect claim alleging continuous property damage from at least 1984 until 1995, the CGL policies in effect from 1990 to 1995 had an obligation to indemnify the insured for the full amount of a settlement in excess of a single retained limit].)

If a duty to indemnify exists, then *ipso facto*, a duty to defend must exist. (See, e.g*., Aerojet, supra*, 17 Cal.4th at p. 59; *Buss, supra*, 16 Cal.4th at p. 46.) The duty to defend extends to the entire action, and applies whether the continuous property

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[2] Footnote 11 in the *Aerojet-General* decision refers to the Court's prior discussion of the holdings in *Montrose* and *Armstrong* on the duty to indemnify the entire loss in continuous injury claims.

damage commenced before inception of the insurer's policy or continued after the end of the policy period, or both. (See, e.g., *Haskel, supra,* 33 Cal.App.4th at p. 976, fn.9 [in connection with continuous property damage claim alleging property damage before, during and after insurer's policy period, insurer breached its duty to defend by refusing to defend the claim in its entirety]; *Travelers Cas. & Sur. Co., supra,* 118 Cal.App.4th at pp. 1161-1162 [decision of this Court holding that a 1996 insurer had a duty to defend a lawsuit alleging progressive damage beginning nine years earlier]; *Borg v. Transamerica Ins. Co.* (1996) 47 Cal.App.4th 448, 463 [insurer owed contractual duty to defend against continuous injury claim where damage began two years prior to the inception of the policy period and continued into the insurer's policy period].)

The *Aerojet-General* court's separate discussion of the duty to defend "mixed" actions, *i.e.*, lawsuits involving multiple claims, some potentially covered but others not even potentially covered because none of the alleged property damage could have occurred during the defending insurer's policy period (see, e.g., *Aerojet-General, supra,* 17 Cal.4th at pp. 71, 74-75), is not relevant to the matter presently before this Court.[3] In the "mixed" action situation involving multiple claims of different types of continuous property damage, the insurer that defends the entire action cannot seek reimbursement of any portion of the defense of the claim alleging property damage occurring, at least in part, during the policy period, but could, if it reserves rights properly and meets all the requirements of *Buss*, seek reimbursement of the costs incurred solely to defend the separate claims alleging different property damage ending *completely* before, or starting *completely* after, the policy period.

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[3] The *Aerojet* court described a continuous injury "mixed" action as one that included a separate claim or claims "involving acts or omissions that may possibly have caused bodily injury or property damage . . . only after its policy or policies expired . . . [or] only before its policy or policies incepted." (*Aerojet-General, supra,* 17 Cal.4th at p. 71.)

Because the *Padilla* case involves only a single claim alleging continuous property damage – a claim that foundation vents of a building were blocked by stucco installed by the insured, resulting in progressive property damage to the underlying floor framing – that occurred, at least in part, during the Stage 4 Primary Insurer's policy period, all of the alleged property damage was potentially covered by the Stage 4 Primary Insurer's policy. (*Aerojet-General, supra,* 17 Cal.4th at p. 57, fn.10; *Montrose, supra,* 10 Cal.4th at p. 678; *Borg v. Transamerica Ins. Co., supra,* 47 Cal.App.4th at p. 463; *Stonewall, supra*, 46 Cal.App.4th at p. 1861; *Armstrong, supra*, 45 Cal.App.4th at p. 105.) The lawsuit was not a "mixed" action, because it did not include other, separate claims for different property damage that could not have occurred, even in part, during the Stage 4 Primary Insurer's policy period, nor were there any damage claims that were based on legal theories that could not possibly have been covered by the Stage 4 policy. The Stage 4 Primary Insurer thus had a *contractual* duty to defend the entire action, without the right under *Buss* to seek reimbursement from the insured of any defense costs. (See *Aerojet-General, supra,* 17 Cal.4th at pp. 58-59; *Haskel, supra,* 33 Cal.App.4th at p. 976, fn.9.)

In short, the portions of the Court's Opinion on the duty to defend "mixed" actions, and the corresponding discussion of the right of the defending insurer to seek reimbursement of defense costs related solely to property damage that occurred before the policy period began, is not an issue that *Padilla* should raise and therefore is not necessary to the Court's holding. Under the modifications to the Opinion that amicus curiae proposes, the Court would come to the same conclusion as in the current version of the Opinion, namely, that the Stage 4 Primary Insurer had a duty to defend the underlying action in its entirety (contractually rather than prophylactically), and that the excess insurer therefore had no duty to defend the action. The proposed modifications would avoid potential confusion in future insurance coverage arising from the

suggestion that portions of a continuous trigger claim could give rise to a "mixed" action.

IV. CONCLUSION

For all of the foregoing reasons, amicus curiae respectfully requests that the Court modify its Opinion as described above.

DATED: June 26, 2007

Respectfully submitted,

By_____
Amy Bach

Attorney for Amicus Curiae United Policyholders

CERTIFICATION OF WORD COUNT
(Cal. Rule of Court, Rule 8.204(c)(1))

The text of this brief consists of 5268 words as counted by the Microsoft Word version 2003 word-processing program used to generate this brief.

DATED: June 26, 2007

By_____
Amy Bach

Attorney for Amicus Curiae United Policyholder

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES