No. S 113295

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

POWERINE OIL COMPANY, INC.,
Plaintiff-Petitioner in the Court of Appeal-Real Party in Interest Herein,
vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES,
Respondent,

CENTRAL NATIONAL FIRE INSURANCE COMPANY,
Defendant-Real Party in Interest in the Court of Appeal-Petitioner Herein.

APPLICATION TO AND BRIEF OF AMICUS CURIAE

On Review from the Decision of the Court of Appeal, Second Appellate District, Division Three, No. B156216,
Granting a Writ of Mandate Directed to the Superior Court of the State of California,
Los Angeles County, No. VC025661 (The Honorable Daniel Solis Pratt, Presiding)

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APPLICATION

Pursuant to California rules of Court, Appellate Rule 13(c), United Policyholders and Richard Giller ("Giller") respectfully request leave to appear as amici curiae and file their accompanying joint brief in support of Real-Party-in-Interest Powerine Oil Company, Inc. ("Powerine").

United Policyholders is a non-profit organization dedicated to educating the public on insurance issues and consumer rights and protecting the interests and presenting the positions of policyholders through amicus curiae participation in insurance coverage cases. United Policyholders' growing reputation as a source of useful information for appellate courts was confirmed when its amicus brief was cited in the U.S. Supreme Court's opinion in Humana v. Forsyth (1999) 525 U.S. 299. United Policyholders has filed amicus briefs on behalf of policyholders in over one hundred and twenty cases throughout the United States.

Richard C. Giller is the author of numerous nationally published articles concerning insurance coverage the most recent of which, entitled "Equity Seeps Into Insurance Coverage For Environmental And Toxic Tort Claims," appeared in the September 23, 2003, issue of Mealey's Insurance Litigation Report. Insurance coverage has been the focus of Giller's legal practice since 1988 and he frequently lectures on insurance topics, most recently on November 5, 2003 as one of the featured speakers in an Insurance Bad Faith seminar in Los Angeles.

This case concerns claims made against Powerine and

insurance coverage therefore under Powerine's insurance policies, including the umbrella/excess policies issued by Central National Insurance Company ("Central National"). However, its outcome will likely have a broad impact on the coverage environmental response costs and, as such, it is an issue worth billions of dollars. This Court should permit United Policyholders and Giller to participate as amici curiae because of the importance of these issues. Their appearance as amicus curiae herein will assist the Court, because they can provide the Court with their perspective on, and expertise in, the substantive issues before the Court.

For the foregoing reasons, United Policyholders and Giller respectfully request that the Court grant this application for leave to appear as amici curiae and file the accompanying brief in support of Real-Party-in-Interest, Powerine Oil Company, Inc.

DATED: November 5, 2003

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

United Policyholders was founded in 1991 as a non-profit organization dedicated to educating the public on insurance issues and consumer rights. The organization is tax-exempt under Internal Revenue Code § 501(c)(3). It 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, United Policyholders actively monitors legal and marketplace developments affecting the interest of all policyholders. United Policyholders receives frequent invitations to testify at legislative and other public hearings, and to participate in regulatory proceedings on rate and policy issues.

United Policyholders 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 United Policyholders, it provides current information on insurance matters to courts throughout the country.

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

information concerning United Policyholders can be accessed on the Internet at www.unitedpolicyholders.org.

As noted above, Richard C. Giller is the author of numerous nationally published articles concerning insurance coverage the most recent of which, entitled "Equity Seeps Into Insurance Coverage For Environmental And Toxic Tort Claims," appeared in the September 23, 2003, issue of Mealey's Insurance Litigation Report. Insurance coverage has been the focus of Giller's legal practice since 1988 and he frequently lectures on insurance topics, most recently on November 5, 2003 as one of the featured speakers in an Insurance Bad Faith seminar in Los Angeles.

I. INTRODUCTION

In much the same way this Court refused to rewrite the primary policies at issue in Certain Underwriters at Lloyd's of London v. Superior Court (2001) 24 Cal.4th 945 ("Powerine I") "to shift to the insurer some or all of the potentially substantial costs that might be imposed on the insured," this Court should refuse the invitation of Central National to rewrite the umbrella policies it issued in order to relieve the insurer of the burdens it clearly accepted when drafting the policies.

II. THIS COURT SHOULD NOT REWRITE THE INSURING AGREEMENT OF THE UMBRELLA POLICIES

The umbrella policies issued by Central National each contain the following insuring language:

> [Central National] hereby agrees . . . to indemnify [Powerine] for all sums which [Powerine] shall be obligated to pay by reason

> of liability . . . imposed upon the insured by law . . . for damages, direct or consequential[,] and expenses, all as more fully defined by the term 'ultimate net loss' on account of . . . property damage . . . caused by or arising out of each occurrence happening anywhere in the world.
>
> (Exhibits to Petition for Writ of Mandate ["Exh."], Vol. 1, p. 89) (emphasis added).

According to Central National, the insuring agreement cited above limits its indemnity obligation solely to damages awarded by a court of law and the costs of defending lawsuits brought therein, as opposed to damages awarded by a court and expenses incurred in resolving other claims not adjudicated in a court of law. Central National's position, however, requires this Court to engage in revisionist drafting, something this Court has refused to do in the past and should refrain from doing here.

A. Coverage May Exist For "Claim[s], Suit[s] or Proceeding[s]"

Central National contends that the purportedly clear intent of its insuring agreement is to limit all of its obligations under the policies to damages and costs solely arising by way of a lawsuit as opposed to any other type of proceeding or claim. This contention is belied by the "assistance and cooperation" condition of the policies. As Central National noted in its opening brief, the umbrella policies contain the following clause:

> [T]he Company shall have the right and shall be given the opportunity to associate with the Insured or the Insured's underlying insurers, or both, in the defense and control of any claim, suit or proceeding relative to an occurrence

> where the claim or suit involves, or appears reasonably likely to involve the Company, in which event the insured and the Company shall cooperate in all things in the defense of such claim, suit or proceeding.
>
> Central National's Opening Brief at p. 15 (emphasis added).

If Central National is correct in its assertion that the use of the phrase "damages . . . and expenses" in the insuring agreements of its policies limit any coverage under those policies solely and exclusively to damages awarded by a court of law and the costs associated with defending lawsuits brought therein, then under what circumstances would Central National have any right or need to be given an opportunity to participate in "any claim, suit or proceeding . . . where the claim or suit involves, or appears reasonably likely to involve the Company"? More importantly, the question Central National never raises or answers is, if coverage under its policies is solely limited to damages and costs associated with a legal proceeding instituted in a court of law, then how could a "claim . . . or proceeding" ever "involve or appear to involve" Central National?

What Central National requests this Court to do is to rewrite the insuring agreement of its policy by adding the highlighted language set forth below and by striking out other language as indicated. Under Central National's interpretation of "damages . . . and expenses", the new insuring agreement might read:

> Central National "hereby agrees . . . to indemnify [Powerine] for all sums which [Powerine] shall be obligated to pay by reason of liability . . . imposed upon the insured by law

> . . . for damages, direct or consequential and expenses ***[related to the defense of lawsuits seeking such damages]***, ~~all as more fully defined by the term 'ultimate net loss'~~[1] on account of . . . property damage . . . caused by or arising out of each occurrence happening anywhere in the world."

Just as this Court refused to rewrite the primary policies in this case to add language in addition to "damages" in the insuring agreement, it should reject Central National's invitation to rewrite the insuring agreement in the umbrella policies.

B. Central National's Use of the Conjunctive "And" In The Insuring Agreement --- Covering Both Damages And Expenses -- Evidences An Intent To Cover Two Distinct Types Of Costs For Different Types Of Claims

Under California law, words in an insuring agreement separated by the conjunctive "and" are presumed to have represented separate and additional insured items. Hurd v. Republic Ins. Co. (1980) 113 Cal.App.3d 250, 254 (analyzing a homeowner's policy entitled ""Dwelling Building(s) and Contents" the court concluded that "the title and language of the policy provide coverage for contents as well as the building structures. We note the title joins these items of coverage in the conjunctive, not disjunctive, and the natural assumption is the insured is receiving coverage for both items." (Emphasis added).)

Other jurisdictions have similarly concluded that the use of

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[1] As set forth more fully below, Central National's argument in this regard necessarily requires deletion of the "all as more fully defined by the term 'ultimate net loss'" because of that term's use of "suits and claims" evidencing an intent to cover more than just legal proceedings.

the conjunctive "and" in an insurance policy signifies the drafter's intent to define the terms coming before and after the conjunction differently. For example, courts have routinely concluded that use of the conjunctive "and" in the "sudden and accidental" exception to the pollution exclusion "indicates the drafters' intent to define the two words differently, stating two separate requirements." Sylvester Bros. Development Co. v. Great Central Ins. Co. (Minn. Ct. App. 1992) 480 N.W.2d 368, 375; Hartford Acc. & Indem. Co. v. U.S.F. &G. (10th Cir. 1992) 962 F.2d 1484, 1489 ("Giving effect to every provision obliges us to construe 'sudden' and 'accidental' as separate, conditional requirements for coverage.") And when analyzing the covering language "reasonable and medically necessary," the court in Vencor Hospitals v. Blue Cross (11th Cir. 2002) 284 F.3d 1174, concluded that the two terms, "reasonable" and "medically necessary," "must refer to different things -- an expense must be for a treatment of a type that is medically necessary, and the cost of such treatment must be reasonable." (Ibid. at 1182 (emphasis added).) In other words, the word following the conjuncture does not simply modify the preceding word, it must be treated differently.

Here, the insuring agreement in the Central National policies obligates the insurer to indemnify Powerine for direct and consequential damages as well as expenses. The interpretation of expenses as simply modifying direct and consequential damages is strained at best. Central National complains that if "expenses" is interpreted in conjunction with the definition of damages and expenses found in the "ultimate net loss" section of the policy (as it must be according to the express terms of the covering

language)[2] then "expenses" subsumes "damages." That is not and cannot be true. If damages is given the meaning attributed to it by this Court in Powerine I; i.e., limited to damages awarded in a court of law, and "expenses" is defined as amounts paid to settle, adjust and investigate "claims" (as set forth in the definition of "ultimate net loss") then the two terms are mutually exclusive and one does not subsume the other.

III. DAMAGES AND EXPENSES ARE DEFINED IN THE "ULTIMATE NET LOSS" CLAUSE TO INCLUDE THE COSTS ASSOCIATED WITH BOTH "SUITS" AND "CLAIMS"

The Central National policies define the terms "damages" and "expenses" within the definition of "ultimate net loss":

> The term 'ultimate net loss' means the total amount which [Powerine] . . . become[s] obligated to pay by reason of property damage . . . claims, either through adjudication or compromise, and shall also include . . . all sums . . . for litigation, settlement, adjustment and investigation of claims and suits which are paid as a consequence of any occurrence covered hereunder. . . .

Several aspects of this provision are critically important.

A. The Insuring Agreement Is, By Its Terms, Inexplicably Intertwined With The Ultimate Net Loss Provision

As discussed above, the insuring agreement provides coverage for all sums Powerine becomes obligated to pay as damages and

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2 The phrase "damages . . . and expenses" is immediately followed by the direction, "all as more fully defined by the term 'ultimate net loss'" in the insuring agreement.

expenses "all as more fully defined by the term 'ultimate net loss.'" Central National cannot explain why this Court should not analyze the plain language of the policy and import into the insuring agreement the provisions of the ultimate net loss clause to define what was intended by inclusion of both damages and expenses in the insuring agreement. Instead, Central National simply claims, without citation to any supporting evidence, facts or legal authority, that "the fact that certain non-lawsuit costs are included in 'ultimate net loss' does not logically mean that they all constitute 'expenses' that Central National is obliged to cover" and that the "incidental costs" listed in the "ultimate net loss" "do not include the sums actually paid to extinguish or resolve the third-party claim." (Opening Brief at p. 24.)

Central National drafted its insuring agreements in such a way as to create a connection between the scope of coverage for "damages . . . and expenses" and the provisions of the ultimate net loss clause. In an attempt to sidestep the connection it created, Central National claims that the ultimate net loss clause is actually two clauses and only the first clause has any connection to the insuring agreement. Of course, nothing in the policy either supports or explains this schizophrenic relationship between the provisions. Apparently, Central National would like this Court to revise its insuring agreement to add yet another new clause. To support Central National's interpretation of the relationship between the insuring agreement and the ultimate net loss clause, the former would have to be re-written to now read:

> Central National "hereby agrees . . . to indemnify [Powerine] for all sums which

> [Powerine] shall be obligated to pay by reason of liability . . . imposed upon the insured by law . . . for damages, direct or consequential and expenses ***[related to the defense of lawsuits seeking such damages]***, all as more fully defined by the ***[the first prong of the]*** term 'ultimate net loss' ***[up to the phrase 'and shall also include' but not including anything after that phrase,]*** on account of . . . property damage . . . caused by or arising out of each occurrence happening anywhere in the world."

Without those revisions, an insured would have no idea that the phase "all as more fully defined by the 'ultimate net loss'" did not really include the entire description of "ultimate net loss" in the policy, but only a selected portion of that clause. Once again, the only way to accept Central National's arguments is to engage in a convoluted and complex game of linguistic gymnastics that strains the bounds of reason.

B. <u>Inclusion Of The Term Claims In Addition To Suits In The Ultimate Net Loss Provision Supports A Conclusion That Coverage Exists For Responding To Administrative Orders</u>

As this Court has previously noted, the use of the terms "suit" and "claims" in a policy demonstrates the insurer's intent to distinguish lawsuits ("suit") from other types of proceedings ("claims"). In <u>Foster-Gardner, Inc. v. National Union Fire Ins. Co.</u> (1998) 18 Cal.4th 857 this Court analyzed the distinction between these two terms of art and noted that "the primary attribute of a 'suit,'" as that term is <u>commonly</u> understood, is that parties to an action are involved in actual court proceedings initiated by the filing of complaint" whereas a "claim" can be "any number of things, none of which rise to the formal level of a suit -- it may be a demand for

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payment communicated in a letter, or a document filed to protect an injured party's right to sue a governmental entity, or the document used to initiate a wide variety of administrative proceedings . . . While a claim may ultimately ripen into a suit, 'claim' and 'suit' are not synonymous." (Ibid. at 879 (citations omitted) (emphasis added).

A number of other decisions both within and outside of California are wholly consistent with or have amplified the Foster-Gardner distinction between suits and claims:

- Fireman's Fund Ins. Co. v. Superior Court (1997) 65 Cal.App.4th 1205, 1215 ("a construction that reads 'suit' to include a 'claim' makes the reference to 'claim' superfluous and leaves us with no explanation for the disjunctive use of the two words, a result that is contrary to accepted rules of interpretation.");

- Safeco Surplus Lines Co. v. Employer's Reinsurance Corp. (1992) 11 Cal. App. 4th 1403, 1408 ("'[T]here is an inherent difference between the 'making' of a claim and the 'bringing' of a lawsuit. The former, by its very nature, involves some kind of notice. The latter only requires the filing of a complaint.'" (Italics omitted.).);

- The Home Ins. Co. v. Spectrum Information Technologies, Inc. (E.D.N.Y. 1996) 930 F. Supp. 825, 846 ("Courts have found that the term 'claim' as used in liability insurance policies is unambiguous and generally means a demand by a third party against the insured for money damages or other relief owed," what "Home and Aetna fail to appreciate, is that the concept of 'claim' within the meaning of insurance policies is textual rather than procedural");

- Detrex Chemical Industries, Inc. v. Employers Ins. of Wausau (N.D. Ohio 1988) 681 F.Supp. 458, 460 ("this Court reaffirms its conclusion that 'the PRP letters, taken together with the [unadopted] Record of

> Decision and its attachments, constitutes a claim against Detrex under the insuring language of the insurance policies;' but that 'a claim for damages made against Detrex that might result in its legal liability is not synonymous with a 'suit' so as to trigger Wausau's duty to defend Detrex under their insurance policies.'")

Here, Central National's "ultimate net loss" provision clearly uses both "suit" and "claims" which, under the authority cited above, means that the insurer meant to include both a lawsuit in a court of law and other types of non-judicial proceedings.

IV. CONCLUSION

For all the foregoing reasons, this Court should refrain from rewriting the Central National policies to comport with the insurer's convoluted analysis and should affirm the Court of Appeal's ruling granting Powerine's petition for write of mandate.

DATED: November 5, 2003 Respectfully submitted,

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PROOF OF SERVICE

I, Sandra Barela, declare:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is Weston, Benshoof, Rochefort, Rubalcava & MacCuish LLP, 333 South Hope Street, Sixteenth Floor, Los Angeles, CA 90071. I am over the age of eighteen years and not a party to the action in which this service is made.

On November 5, 2003, I served the document(s) described as **AMICUS CURIAE BRIEF** on the interested parties in this action by enclosing the document(s) in a sealed envelope addressed as follows: See attached service list

☒ BY MAIL: I am "readily familiar" with this firm's practice for the collection and the processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, the correspondence would be deposited with the United States Postal Service at 333 South Hope Street, Los Angeles, California 90071 with postage thereon fully prepaid the same day on which the correspondence was placed for collection and mailing at the firm. Following ordinary business practices, I placed for collection and mailing with the United States Postal Service such envelope at Weston, Benshoof, Rochefort, Rubalcava & MacCuish LLP, 333 South Hope Street, Los Angeles, California 90071.

☐ BY FEDERAL EXPRESS ☐ UPS NEXT DAY AIR ☐ OVERNIGHT DELIVERY: I deposited such envelope in a facility regularly maintained by ☐ FEDERAL EXPRESS ☐ UPS ☐ Overnight Delivery [specify name of service:] with delivery fees fully provided for or delivered the envelope to a courier or driver of ☐ FEDERAL EXPRESS ☐ UPS ☐ OVERNIGHT DELIVERY [specify name of service:] authorized to receive documents at Weston, Benshoof, Rochefort, Rubalcava & MacCuish LLP, 333 South Hope Street, Los Angeles, California 90071 with delivery fees fully provided for.

☐ BY FACSIMILE: I telecopied a copy of said document(s) to the following addressee(s) at the following number(s) in accordance with the written confirmation of counsel in this action.

☒ [State] I declare under penalty of perjury under the laws of the laws of the United States that the above is true and correct.

☐ [Federal] I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 5, 2003, at Los Angeles, California.

____
[Signature]

Powerine Oil Company, Inc. v. Superior Court and Central National Insurance Company
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