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June 6, 2008

The Honorable Ronald M. George
Chief Justice of California
The Honorable Associate Justices of the
Supreme Court of California
The Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: *Qualcomm, Inc. v. Certain Underwriters at Lloyd's, London*, No. S163293 (Fourth App. Dist., Div. One, No. D050433; *San Diego Cty. Super. Ct. No. GIC873829*)
Amicus Curiae Letter in Support of Petition for Review

Dear Chief Justice and Associate Justices:

Pursuant to Rule 8.500(g) of the California Rules of Court, United Policyholders ("UP") submits this letter as amicus curiae in support of the petition for review by plaintiff and appellant Qualcomm, Incorporated. UP is familiar with the petition for review, the Court of Appeal's opinion, and the briefing of the parties below.

Interest of Amicus Curiae

UP is a non-profit organization founded in 1991 to help preserve the integrity of the insurance system by serving as an information resource regarding policyholders' interests, rights and duties. UP monitors the national insurance marketplace with a particular focus on California and other areas impacted by natural disasters. The organization's staff and volunteers disseminate information about the claim process, and file amicus briefs in cases involving coverage and claim disputes.

United Policyholders has appeared as amicus curiae in over two hundred and twenty cases throughout the United States, including numerous cases in the California courts.[1] Arguments from our amicus curiae brief were cited with approval by

1 *County of San Diego v. Ace Property & Cas. Ins. Co.* (2005) 37 Cal.4th 406 [33 Cal.Rptr.3d 583]; *Powerine Oil Co., Inc. v. Superior Court* (2005) 37 Cal.4th 377 [33 Cal.Rptr.3d 562]; *Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191 [29 Cal.Rptr.3d 401]; *Simon v. San Paolo U.S. Holding Co.,Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379]; *Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747 [27 Cal.Rptr.3d 648]; *Garamendi v. Golden Eagle Ins. Co.* (2005) 127 Cal.App.4th 480 [25 Cal.Rptr.3d 642];

the California Supreme Court in *TRB Investments, Inc. v. Fireman's Fund Ins. Co.* (2006) 145 P.3d 472, *Vandenburg v. Superior Court* (1999) 982 P.2d 229, *Julian v. Hartford* (2005) 35 Cal.4th 74 and *Watts Industries, Inc. v. Zurich American Ins. Co.* (2004) 18 Cal.Rptr.3d 61. UP has appeared as amicus curiae in the United States Supreme Court. *See e.g. Metlife v. Glenn, Campbell v. State Farm, FL Aerospace v. The Aetna Cas. and Surety Co.*, and *Humana, Inc. v. Forsyth* 525 U.S. 299 (1999) in which UP's brief was cited in the opinion.

Discussion

In this matter, UP asserts two arguments in support of the Petition for Review. First, *Qualcomm* presents important questions of law with impact within California and nationwide. Second, failure to review the lower court's decision will result in the adoption of a rule that runs counter to California's public policy in support of settlement in insurance coverage disputes.

The California Court of Appeal Decision in Qualcomm

In *Qualcomm*, the California Court of Appeal held that where a policyholder settled with its primary insurance company for less than the full primary insurance limit, the excess insurance company was under no obligation to pay, even though the amount of liability otherwise was within the layer covered by the excess insurance policy. *Qualcomm, Inc. v. Certain Underwriters at Lloyd's* (2008) --- Cal.Rptr.3d ---, 2008 WL 763483, *at* *1. The Court of Appeal found that the language of the excess policy required the underlying policy to be paid or there being legal liability to pay the full amount of the underlying limits prior to the excess carrier being obligated to pay, so as to overcome public policy concerns. *Qualcomm, 2008 WL 763483 at* *1. The effect of this determination is to contradict decades of settled insurance law.

Qualcomm Raises Important Questions of Law Which Require Review

The issues raised by *Qualcomm* present important questions of law both within California and nationwide.

American Ins. Ass'n v. Garamendi (2005) 127 Cal.App.4th 228 [24 Cal.Rptr.3d 905]; *Watts Industries, Inc. v. Zurich American Ins. Co.* (2004) 121 Cal.App.4th 1029 [18 Cal.Rptr.3d 61]; *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780 [16 Cal.Rptr.3d 374]; *Marselis v. Allstate Ins. Co.* (2004) 121 Cal.App.4th 122 [16 Cal.Rptr.3d 668]; *Hameid v. National Fire Ins. of Hartford* (2003) 31 Cal.4th 16 [1 Cal.Rptr.3d 401]; *Rosen v. State Farm General Ins. Co.* (2003) 30 Cal.4th 1070 [135 Cal.Rptr.2d 361]; *County of San Diego v. Ace Property & Casualty Ins. Co.* (2002) 103 Cal.App.4th 1335 [127 Cal.Rptr.2d 672]; *Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059 [124 Cal.Rptr.2d 142]; *Bialo v. Western Mut. Ins. Co.* (2002) 95 Cal.App.4th 68 [115 Cal.Rptr.2d 3]; *Vu v. Prudential Property & Casualty Ins. Co.* (2001) 26 Cal.4th 1142 [113 Cal.Rptr.2d 70]; *20th Century Ins. Co. v. Superior Court* (2001) 90 Cal.App.4th 1247 [109 Cal.Rptr.2d 611]; and *AICCO, Inc. v. Insurance Co. of North America* (2001) 90 Cal.App.4th 579 [109 Cal.Rptr.2d 359].

Rule 8.500(b)(1) of the California Rules of Court provides that the California Supreme Court review a California Court of Appeals decision if it presents "an important question of law."

In the matter in question, the California Court of Appeal set aside nearly eighty years of the clear "majority rule" established in *Zeig v. Massachusetts Bonding & Ins. Co.*, 23 F.2d 665, 666 (2d Cir. 1928).[2] This is the first California case to ever go against that established precedent.

In *Zeig*, the excess insurance company, in language quite similar to that here, provided that the excess policy was triggered after the underlying policy was "exhausted in the payment of claims to the full amount of the expressed limits" of such insurance. *Zeig*, 23 F.2d at 666. The policyholder had $15,000 worth of underlying insurance, but settled its burglary claim with its insurance companies for $6,000. The trial court agreed with the excess insurance company's argument that it had no obligation to pay because the settlement did not "exhaust" the underlying insurance as contemplated by the policy language. Augustus Hand, writing for the United States Court of Appeals for the Second Circuit, rejected that assertion as "unnecessarily stringent," and irrational as it makes no difference to the excess insurance company whether or not the policyholder actually collected its full underlying limits of liability "*so long as it was only called upon to pay such portion of the loss as was in excess of the limits of those policies.*" *Zeig*, 23 F.2d at 666 (emphasis added). Justice Hand further found that the construction of the policy urged by the excess insurance company would be contrary to the public policy interest in promoting settlement:

> To require an absolute collection of the primary insurance to its full limit would in many, if not most, cases involve delay, promote litigation, and prevent an adjustment of disputes which is both convenient and commendable. *A result harmful to the insured and of no rational advantage to the insurer, ought only to be reached when the terms of the contract demand it. Zeig*, 23 F.2d at 666 (emphasis added).

Judge Hand found that the term "payment" included cash as well as "satisfaction of a claim by compromise, or in other ways." *Zeig*, 23 F.2d at 666.

A recent decision in the United States District Court for the Eastern District of New York affirmed the holding of *Zeig* that where a policyholder settles with a primary

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[2] *See* Petition at 10, n. 3. *See also Koppers Co. v. Aetna Cas. & Sur. Co.*, 98 F.3d 1140 (3d Cir. 1996); *Chemical Leaman Tank Lines, Inc. v. The Aetna Cas. & Sur. Co.*, 978 F. Supp. 589 (D.N.J. 1997); *In re Integrated Health Serv.*, No. 00-389, 2007 WL 2687593 (D.Del. 2007); *UMC/Stamford v. Allianz Underwriters*, 276 N.J. Super. 52 (N.J. Super. Ct. Law Div. 1994); *Westinghouse Elec. Corp. v. Am. Home Assurance Co.*, No. A-6706-01T5, 2004 WL 1878764 (N.J. Super 2004).

insurance company for less than the full amount of the policy, the policyholder may still collect from its excess insurance company if a judgment is rendered or a settlement reached for more than the limit of the primary policy. *Consolidated Edison Co. of New York v. FYN Paint & Lacquer Co., Inc.*, 2005 WL 139170, at *5 (E.D.N.Y. Jan. 24, 2005). The *FYN* Court further cited *Zeig* for its holding that a primary policy is considered exhausted once a settlement is reached between the policyholder and the primary insurance company for indemnification purposes. *FYN Paint & Lacquer Co., Inc.*, 2005 WL 139170 at *5.

Courts in most jurisdictions, including California follow the "majority rule" set forth in *Zeig* which reflects a public policy in favor of the settlement of disputes. The *Qualcomm* holding suggests that California is reversing direction and now adopting the opposite position. This is an important matter of law which should be examined by this Court. [3]

The Serious Economic Consequences of the Prior Decision Require Review

The *Qualcomm* decision has broad implications for the economic vitality of policyholders in the State of California and beyond. Indeed, already counsel is aware that insurance companies are attempting to "export" the Court of Appeal holding in *Qualcomm* to other states in an attempt to avoid paying claims. These attempts already are having a negative impact on the ability to resolve insurance claims without additional litigation. Indeed, if in the past it might have made economic sense to settle with a primary insurance company for some discounted amount of its limits, now such a resolution of a dispute potentially imperils all other available insurance. The net result is a serious encumbrance to settling insurance-related matters. What Judge Hand recognized in 1928 still obtains. A rule such as that determined by the Court of Appeal in *Qualcomm* will promote delay, encourage litigation and prevent the resolution of coverage disputes.

Director's and Officer's liability insurance, and insurance generally, is coverage vital to protecting the economic health of business operations in California. When policyholders face liability, especially liability potentially exceeding their primary coverage, tapping the resources necessary to defend against lawsuits may be their only

[3] *See* Petition at 16.

protection.[4] Encouraging cooperation and settlement with a primary insurance carrier is necessary to ensure the economic vitality of policyholders in the State of California.[5]

Insurance should be available when needed the most. Decisions such as the decision of the Court of Appeal in *Qualcomm* may encourage those insurance companies to engage in recalcitrant claims management. That decision runs contrary to the expectations of insurance policyholders in California and nationwide. *Gray v. Zurich Insurance Co.* (1966) 65 Cal.2d 263 [267 54 Cal. Rptr.104] ("[W]e test the meaning of the policy according to the insured's reasonable expectation of coverage..."). An irrational "forfeiture" rule - - such as that articulated in *Qualcomm* - - related to insurance disputes which otherwise would be resolved does not match anyone's expectation. This Court should accept the petition for review by the Appellant Qualcomm, Incorporated.

Conclusion

For the reasons stated above, as well as those stated in the Petition for Review, this Court should grant review.

Respectfully submitted,

ANDERSON KILL & OLICK, P.C.

William G. Passannante

WGP:pah

cc: All counsel on attached service list.

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[4] With regard to excess liability coverage, it is purchased to stand in reserve to the primary policy limit should a liability judgment be surprisingly large such as where a policyholder holder is legally responsible for an uncommon but devastating injury or for extracompensatory liability. 3 Stempel on Ins. Contracts 2 §16.01.

[5] See Petition at 1, fn 1.

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