No. S114778

Court of Appeal, Fourth Appellate District, Division One – No. D038707

IN THE SUPREME COURT OF CALIFORNIA

COUNTY OF SAN DIEGO,
Cross-complainant and Appellant,

v.

ACE PROPERTY AND CASUALTY INSURANCE COMPANY,
Cross-defendant and Respondent.

BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS IN SUPPORT OF CROSS-COMPLAINANT and APPELLANT COUNTY OF SAN DIEGO

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STATEMENT OF THE CASE

United Policyholders adopts the Statement of the Case contained in the Appellant's Opening Brief, dated June 23, 2003.

INTEREST OF AMICUS CURIAE

In this brief, United Policyholders seeks to fulfill the "classic role of amicus curiae by assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." Miller-Wohl Co., Inc. v. Commissioner of Labor & Indus., 694 F.2d 203, 204 (9th Cir. 1982). This is an appropriate role for amicus curiae. As commentators have often stressed, an amicus is often in a superior position to "focus the court's attention on the broad implications of various possible rulings." R. Stern, E. Greggman & S. Shapiro, Supreme Court Practice, 570-71 (1986) (quoting Bruce J. Ennis, Effective Amicus Briefs, 33 Cath. U.L. Rev. 603, 608 (1984)).

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

United Policyholders's first major project was working with thousands of home and business owners whose properties were destroyed in a devastating firestorm in the Oakland/Berkeley, California hills. Since that time, United Policyholders has conducted educational meetings and workshops on insurance issues in New Mexico, Florida, Texas, Michigan, Washington State, Oregon and throughout California.

While much of our work is aimed at individuals and businesses affected by disasters, United Policyholders actively monitors legal and marketplace developments affecting the interests 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.

A diverse range of residential and commercial policyholders throughout the United States communicate their insurance concerns on a regular basis to United Policyholders. United Policyholders advances policyholders' interests in courts throughout the country by filing amicus curiae briefs in cases involving important insurance principles.

United Policyholders's amicus brief was cited in the U.S. Supreme Court's opinion 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. ___, 123 S. Ct. 1513 (2003). We have been invited by several divisions of the California Court of Appeal, to participate in oral argument as amicus curiae. Arguments from our amicus curiae brief were cited with approval by the California Supreme Court in Vandenburg v. Superior Court, 21 Cal.4th 815 (1999). United Policyholders has filed amicus briefs on behalf of policyholders in over one hundred and twenty cases throughout the United States in the past six years.

ARGUMENT

The Court of Appeals should be reversed and the County of San Diego should prevail because:

- Outside of the unique context of standard primary comprehensive general liability insurance policies, the term "damages" historically has been interpreted broadly to include much more than simply monies ordered by a court.

- Powerine I [1] applies only to standard primary comprehensive general liability policies. The ACE Policy sold to the County of San Diego is an umbrella-form policy, which specifically were sold to cover losses not covered under primary-level liability insurance policies such as those at issue in Powerine I.

- The County of San Diego purchased an umbrella-form policy from ACE which provides exceptionally broad coverage including money expended in settlement or satisfaction of its environmental claims.

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[1] Certain Underwriters at Lloyd's of London v. Superior Court, 24 Cal.4th 945 (2001) ("Powerine I").

- The ACE Policy is an umbrella-form GL policy, which type of policy specifically was marketed and sold as a broader, "backstop," "kitchen sink," "worry free," "peace of mind," "sleep easy," gap-filling type of insurance policy. Umbrella-form policies are sold to cover losses not covered by standard form general liability insurance policies.

I. The Term "Damages" Has Always Been Broadly Construed And Includes Monies Ordered By Administrative Agencies

This Court consistently has held that the word "damages" has a broad meaning and does not necessarily have to be ordered by a court. In AIU Ins. Co. v. Superior Court, 51 Cal.3d 807 (1990), the Court reasoned that terms not defined in an insurance policy must be interpreted by looking to its "ordinary and popular meaning." Looking to the "ordinary and popular meaning" of the term "damages," the Court held that costs and expenses incurred to investigate, monitor and clean-up contaminated sites were "damages" that activated the insurance company's duty to indemnify." AIU, 51 Cal.3d at 825-6.

In subsequent cases, the Court reaffirmed that the word "damages" is not limited to monies ordered by a court but also includes monies ordered by an administrative agency. See, e.g., Currie v. Workers' Comp. Appeals Bd., 24 Cal.4th 1109 (2001) (stating that "[b]ackpay awarded by an administrative agency...may be considered damages").

In fact, only in the unique context of standard primary comprehensive general liability ("CGL") policies which contain "duty to defend suits" provisions—i.e., the Powerine I situation—has this Court construed the term "damages" narrowly. In all other contexts, "damages" always has been a broad term under California law meaning "compensation in money, recovered by a party for loss or detriment it has suffered through the acts of another." AIU, 51 Cal.3d at 826. Since the County purchased an umbrella-form liability insurance policy from ACE (the "Policy"), the narrow definition of "damages" applicable to standard primary CGL policies under Powerine I cannot apply. Indeed, the word of limitation relied upon in Powerine I—"damages"—does not even appear in the "ultimate net loss" provision of the Policy that defines the scope of coverage.

II. The ACE Insurance Policy Purchased By The County Of San Diego Was An Umbrella-Form Liability Insurance Policy, Not A Standard Primary Policy

The County of San Diego (the "County") purchased an umbrella-form "gap-filling," liability insurance policy—not a standard form primary liability insurance policy—from ACE. The decision in Powerine I pertains only to standard primary general liability policies. Moreover, umbrella-form liability policies such as the one the County purchased specifically were intended to provide coverage to "fill

gaps" and serve as a "backstop" to provide coverage for claims not covered by standard-form general liability policies such as those at issue in Powerine I.

A. Powerine I Turns on Language In Standard Primary Comprehensive General Liability Policies Which Is Not Contained in the County's Policy

This Court decided in Certain Underwriters at Lloyd's of London v. Superior Court, 24 Cal.4th 945 (2001), that an insurance company's duty to indemnify under a standard CGL insurance policy is limited only to monies ordered by a court. In reaching this conclusion, this Court focused on the language in the "duty to defend suits" and "duty to indemnify" provisions of standard CGL policies which speak of the insurance company's obligation to defend the policyholder "in any suit seeking damages" and pay "all sums that the insured becomes legally obligated to pay as damages." Powerine I, 24 Cal.4th at 950 (emphasis added).

The umbrella-form policies sold to the County specifically were intended to provide broader coverage and fill gaps otherwise left uncovered in standard form CGL policies. Unlike the standard CGL policies analyzed in Powerine I, the umbrella-form liability policy sold by Aetna Insurance Company ("ACE") to the County of San Diego was intended to be substantively different. The

ACE Policy explicitly contains broad "Limits of Liability" and "Ultimate Net Loss" provisions which specifically provide coverage for "sums which the assured shall become legally obligated to pay in settlement or satisfaction of claims, suits or judgments...and shall include all expenses from the investigation, negotiation and settlement of claims." Appellant's Opening Brief at 6 (emphasis added). Notably, the word "damages" does not appear once in these important provisions.

In fact, the sweeping "Limits of Liability" and "Ultimate Net Loss" provisions in the non-standard ACE Policy are virtually indistinguishable from the language contained in umbrella general liability ("umbrella GL") insurance policies. Umbrella GL policies are not standard throughout the industry—i.e., they are not patterned on forms written and copyrighted by the Insurance Services Office—but they generally do contain standardized wording which is reflected in the ACE Policy's expansive "Limits of Liability" and "Ultimate Net Loss" provisions.

An umbrella GL insurance policy's broad obligations to pay are activated at the exhaustion of the underlying CGL insurance policy's limits for occurrences covered by that primary policy or above the policyholder's "retained limit" for occurrences not covered

by the primary CGL insurance policy.[2] In other words, they are designed to cover losses not otherwise covered by the standard form underlying primary policies.

Likewise, the Policy requires ACE to pay "such additional amounts" of the "ultimate net loss liabilities" as will provide the County with a "total coverage" of $1 million per occurrence once the County's self-insured retention is fulfilled; therefore, the provision defining "ultimate net loss" explains exactly what the Policy covers. The "ultimate net loss" provision in the Policy states that ACE is to pay for the sums which the County pays in "settlement or satisfaction of claims, suits or judgments" and for "all expenses from the investigation, negotiation and settlement of claims," including "legal costs." Plainly, the ACE Policy contains an entirely different and broader promise from the standard CGL insurance policy. Unlike standard CGL policies, the Policy requires ACE to pay for sums in settlement or satisfaction of suits, judgments, and claims and the expenses involved in the investigation, negotiation and settlement of such. Again, there is no mention of "damages."

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[2] Ray R. Poulton, et al., Umbrella Liability Coverage: A Study Project of the Northern California Chapter Society of Chartered Property and Casualty Underwriters, CPCU Annals at 261 (Winter 1960) ("Poulton").

Thus, because the ACE Policy is a non-standard GL policy containing a broader promise and umbrella-form language, the rule promulgated in Powerine I restricting the duty to indemnify to "money ordered by a court" cannot apply to the County's policy. Powerine I, 24 Cal.4th at 957. Instead, the Policy sold by ACE is an umbrella GL policy and must be interpreted as an umbrella GL policy.

B. Umbrella-Form Policies Specifically Were Designed and Sold to Provide Much Broader Coverage Than Standard Primary Policies

Typical, umbrella GL insurance policies like the ACE Policy obligate the selling insurance companies to pay for nearly every conceivable liability expense. The insurance companies must pay these costs—typically denominated the policyholder's "ultimate net loss"—above either the limits of the policyholder's underlying insurance, or, if the underlying insurance does not apply, above a retained limit. The tremendous scope of such coverage is, in fact, the main selling point of policies like the ACE Policy. Umbrella policies are designed to cover any liabilities that "slip through the cracks" in the coverage of the primary CGL insurance policy. Umbrella GL insurance policies literally sit as an umbrella over

primary CGL insurance policies, giving the policyholder "backstop,"[3] "kitchen sink,"[4] "worry free,"[5] "peace of mind,"[6] "sleep easy,"[7] insurance coverage — i.e., "errors and omissions" coverage for insurance buyers.[8]

The breadth of this language is no accident—coverage for that excluded by underlying primary liability policies is the reason why umbrella-form policies exist. Lloyd's underwriters originated umbrella GL insurance policies "to provide in one policy, additional limits of liability, often not available in the domestic market, over all exposures covered by underlying insurance; and, in addition, to provide protection for exposures not normally insured under a primary program, as well as excess coverage over those areas

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[3] Bernard J. Daezner, "Excess Liability, Umbrella, Aggregates, and Deductibles," in John D. Long & Davis W. Gregg, Property and Liability Insurance Handbook, at 606 (1965) ("Daezner").

[4] L.F. Hawley, "'Umbrella,' 'Kitchen Sink,' 'All Risk': Special Risk Underwriting," The National Insurance Buyer (Mar. 1957) ("Hawley").

[5] Poulton, at 245-46.

[6] 8A John A. Appleman, Insurance Law and Practice, § 4909.85 (1981) ("Appleman").

[7] Sales Opportunities in EXCESS LINE COVERAGE, Home Insurance Company (1960) ("Home Sales Opportunities").

[8] Daezner, at 606; Poulton, at 245-46.

voluntarily self-insured."[9] Thus, coverage for that omitted by underlying policies drove the development of the umbrella GL forms:

> [Umbrella policies were] aimed at large buyers of insurance with the idea of providing broader protection with the new concept of picking up all of the gaps in other coverages—over a self-insured retention by the insured. The new contract served almost as an errors and omissions policy for any exposure which may have been overlooked. The umbrella "backstopped" all of the individual policies. Thus, if there were a gap resulting from a policy exclusion or a missing policy, the capital and surplus of the insured had at least catastrophe protection over the self-insured amount....

Daezner, at 606 (emphasis added). Understandably, this breadth of coverage accounts for the vast popularity of the umbrella policies with policyholders like the County of San Diego:

> About 1955 that interesting phenomenon known as the "Umbrella" Policy came upon the scene, and swiftly became the vehicle for the provision of catastrophe insurance for a very great number of risks throughout the country. . . . Here was a policy which improved upon the terms and conditions of underlying insurance while providing the catastrophe limits required by enterprises of all kinds and sizes.[10]

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[9] Poulton, at 245 (emphasis added); see also The Attorney's Umbrella Book, "Introduction," Vol. 1, at 3-8 (1994).

[10] Robert S. Gillespie, "Evolution of Umbrella Liability Policy: Blanket catastrophe liability insurance with a "drop down" into areas uninsured or underinsured is now a permanent part of the insurance programs of industries large and small," The Local Agent, at 18

Indeed, in 1957, a Director of the Association of Lloyd's Brokers noted that umbrella GL insurance policies provided such comprehensive protection that they had been referred to as "the Kitchen Sink." Hawley, at 12. Mr. Hawley defined the scope and nature of umbrella GL insurance as follows:

> The unforeseeable perils of the present and future are what create the need for an adequate insurance program, devised to protect not only every conceivable risk but also those which may be unknown at the moment to any of the individuals involved in a given enterprise. Such protection has been introduced in recent years, and for lack of a better name has been referred to in the industry as an "Umbrella Liability" policy...
>
> Since it literally covers all risks, thereby insuring the unknown hazards, it is written as excess insurance applying both in excess of an existing insurance program and when no insurance is carried on a particular exposure, then in excess of a substantial self-insured deductible. For those exposures which are not specifically insured, the assured is required to be a self-insurer for a minimum amount of $25,000, which deductible of course may be increased upwards as required.

Gillespie, at 12.

(Feb. 1961) ("Gillespie") (emphasis added). At the time Mr. Gillespie wrote this article, he was the Vice President of the Indemnity Insurance Company of North America. Gillespie, at 18.

Thus, umbrella GL coverage can be triggered if "coverage is not provided in the 'primary' or 'excess' policies," wherein "the umbrella policy drops down to provide primary coverage":

> Umbrella insurance can be considered "excess" in two respects: (1) it provides extra limits with a combined blanket single limit over other existing liability coverages. . ., and (2) it provides extra coverage for other existing liability exposure not covered by the underlying liability contracts, above a self-retention limit (if any). The umbrella can include many coverages that the insured does not usually have in its underlying insurance, such as worldwide operations liability, personal injury liability and many others. These are only insured above the insured's retention limit or deductible (if any). The result is that important catastrophe liability protection is achieved.

The Attorney's Umbrella Book, "Introduction," Vol. 1, at 10. See also Daezner at 607 ("The third important feature of the umbrella is that it drops down to $25,000 or $10,000 in those areas which are not covered in the primary.

This "drop down" feature means that (1) coverage which would otherwise have required separate policies is picked up and (2) that exclusions in primary coverage are in effect eliminated for losses above $10,000 or $25,000."); Appleman, § 4909.85 ("One very important type of coverage in these days of potentially high

verdicts is that provided by so-called umbrella or catastrophe policies.... It should be noted that these policies often provide a primary coverage in areas which might not be included in the basic coverage, since it is the intent of the company to afford a comprehensive protection in order that such peace of mind may truly be enjoyed. In those areas, such coverage will, in fact, be primary."); Poulton, at 248 ("The umbrella policy is designed to float above all primary policies for automobile, general, employers' and other liability, and to 'drop down' to a minimum deductible amount where underlying insurance is not carried but where the loss falls within the terms and conditions of the umbrella.").

Insurance companies have even boasted about the breadth of coverage provided by their umbrella forms to lure customers like the County of San Diego. According to a sales manual of the Home Insurance Company, umbrella GL insurance is "sleep-easy" insurance:

> The coverage afforded under [an umbrella] contract is perhaps the broadest form of comprehensive liability on the market. It affords the insured the nearest thing to complete "sleep-easy" insurance — assuring him of broad, all-inclusive insurance with few, if any, exceptions.
>
> **Extensive . . . Popular**

> Among the outstanding features in this contract is the fact that in addition to providing the same coverage as that obtained from primary policies — but on an Excess basis — it extends beyond the primary coverage and affords protection where the primary would not respond. This extension of coverage in the Excess "Umbrella" comes in over a self-retention or out-of-pocket participation on the part of the insured. In other words, this "Umbrella' [sic] coverage acts as an over-all policy: It grants Excess limits and coverage both of insurance in force on an underlying basis, and also of self-insurance where coverage is not afforded.

Home Sales Opportunities.[11] Moreover, another early sales bulletin for umbrella liability insurance stated that it "purports to insure with very few exceptions the complete tort liability of the policyholder":

> This policy is not primarily designed to supplant existing coverage, but to make it possible to reduce the limits on existing policies and itself provide excess coverage in very substantial amounts as respects losses covered by existing contracts as well as high deductible coverage for losses excluded by underlying contracts.
>
> The Umbrella form purports to insure with very few exceptions the complete tort liability of the policyholder. . . .

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[11] Anderson Kill & Olick, P.C., counsel for United Policyholders, will provide the Court with copies of this or any other source referred to in the Brief at the Court's request.

> All in all, it would appear that this new policy is a logical development in the proper direction. It would certainly conduce to the worry-free slumber of the insurance buyer who can tie-up in one package all of the loose ends hanging from fifteen to twenty assorted liability policies. It might even be called a form of errors and omissions insurance for insurance buyers.

Poulton, at 245-46.

III. Courts Routinely Have Found Coverage Under Umbrella-Form Insurance Policies for Exposures Excluded by Primary CGL Insurance Policies

The very purpose of umbrella-form insurance policies, as made clear by their express language and case law construing them, is to provide coverage for claims not covered by CGL insurance policies. Courts have recognized the purpose and breadth of umbrella policies—and the coverage they provide for losses not covered by underlying insurance. For instance, in Commercial Union Insurance Co. v. Walbrook Insurance Co., 7 F.3d 1047 (1st Cir. 1993), the policyholder, itself an insurance company, sought coverage from its umbrella GL insurance company for damages stemming from negligent provision of loss-prevention services to a third party. Below the occurrence-based umbrella GL insurance policy at the time of the negligent acts, the policyholder had both a primary occurrence-based liability policy which specifically excluded losses of the type in question—"engineers

professional liability" ("EPL") losses—and an endorsement to the primary policy covering EPL losses, but only on a claims-made basis. Walbrook, 7 F.3d at 1048. The umbrella policy covered "all sums . . . imposed upon [the policyholder] by law . . . or assumed under contract . . . for damages on account of . . . personal injuries, property damage, [or] advertising liability . . . arising out of each occurrence." Walbrook, 7 F.3d at 1048. Moreover, the umbrella policy promised that it would cover, excess of a $25,000 self-insured retention, occurrences not covered by underlying policies. Walbrook, 7 F.3d at 1048. Finally, the umbrella policy contained both an express endorsement which (i) provided claims-made EPL coverage excess of the primary's EPL endorsement, and (ii) amended its limit of liability to $250,000 for occurrence-based EPL losses not covered by the primary policy. Walbrook, 7 F.3d at 1048-49.

As none of the EPL claims had been filed during the primary or umbrella policies' claims-made periods, the policyholder brought action against the umbrella insurance company, asserting its policy provided EPL coverage above a $250,000 self-insured retention. Walbrook, 7 F.3d at 1049. The district court found that the umbrella policy did not provide coverage, agreeing that the umbrella's claims-made EPL endorsement was the only font of EPL coverage (i.e., the umbrella provided no occurrence-based EPL

coverage), and that no claims had been brought during the policy period. Reversing the district court, the Court of Appeals first noted that, under the provisions of the umbrella, "when an occurrence is not covered by underlying insurance, the [u]mbrella 'drops down' and provides primary coverage." Walbrook, 7 F.3d at 1051. Then, noting that the EPL claims were covered by the broad terms of the umbrella policy, the court found the umbrella insurance company liable to provide coverage above the $250,000 retained limit:

> The parties agree that the [EPL claims] occurred within the [u]mbrella policy period. An explosion at an industrial plant plainly constitutes an "occurrence" within the meaning of the [u]mbrella, whose broad language provides that every activity which results in an occurrence for which [the policyholder] must respond...is covered, unless specifically excepted. Nowhere in the main body of the [u]mbrella are EPL acts or omissions excepted from coverage, either explicitly or implicitly. Accordingly, we concluded that the main body of the [u]mbrella extended indemnification for damages which [the policyholder] was obligated to pay due to EPL or any other (non-excepted) act or omission.

Walbrook, 7 F.3d at 1051. The Court found that its reading of the umbrella policy was the only one to make sense of the entire contract: the umbrella EPL claims-made endorsement provided excess coverage above the primary EPL claims-made endorsement,

while the umbrella policy itself provided occurrence-based coverage above the $250,000 retained limit. Walbrook, 7 F.3d at 1051.

Moreover, the court found its conclusion "comports with the basic nature and purpose of 'umbrella' policies":

> Umbrella policies differ from standard excess insurance policies in that they are designed to fill gaps in coverage both vertically (by providing excess coverage) and horizontally (by providing primary coverage). Moreover, this interpretation is consonant with the broader function served by umbrella policies: extending coverage even to unanticipated "gaps." As one authority has explained, umbrella policies effectively shift away from the insured the burden of choosing the risks to which the insured remains exposed:
>
> [an umbrella] arrangement contrasts with the method of providing Excess Liability insurance along traditional lines. Under the excess approach, it is up to the insured . . . to choose those exposures against which excess protection is desired. The obvious disadvantage lies in the possibility of a wrong guess about the critical exposures. Under the Umbrella Liability contract, the principal guesswork is in the [underwriter's] rating [of the overall risk] . . . .
>
> F.C. & S. Bulletins, "Companies and Coverages: Specialty Lines at U-1 (December 1980).

Walbrook, 7 F.3d at 1053 (certain citations omitted).

Similarly, in Prudential Property & Casualty Insurance Co. v. Lawrence, 724 P.2d 418 (Wash. App. 1986), the court

obligated an umbrella policy to provide coverage for a loss arguably excluded from an underlying homeowners policy sold to the same policyholder. At issue in Lawrence was whether "obstruction of view" constituted "property damage" under the homeowners and umbrella policies sold by the same insurance company. The umbrella policy provided that "[i]f there is no required underlying insurance that covered the claim, this policy will pay the amount you are legally obligated to pay over $500." Lawrence, 724 P.2d at 422-23.

The court held that it was unnecessary to resolve the question under the homeowners policy because obstruction of view clearly constituted property damage under the umbrella policy, and the umbrella policy was required to provide coverage in excess of $500 for a loss arguably excluded under the primary policy. In so doing, the court recognized that umbrella insurance policies serve the purpose of providing coverage for gaps created by underlying insurance policies: "The very nomenclature chosen to designate umbrella or catastrophe policies suggests an intent to protect against gaps in the underlying policy." Lawrence, 724 P.2d at 422 (citations omitted); see also County of Wyoming v. Erie Lackawanna Ry. Co., 360 F. Supp. 1212, 1221 (W.D.N.Y. 1973), aff'd, 518 F.2d 23 (2d Cir. 1975) (holding umbrella policy provided contractor's

liability over retained limit where such coverage was not provided in the underlying policy); Georgia-Pacific Corp. v. Aetna Casualty & Sur. Co., No. 92-2-21950-6, Order at 2 (Wash. Super. Feb. 28, 1995) (holding that "in the event [the policyholders] prove an otherwise covered claim at trial which is subject to a qualified pollution exclusion in the underlying 1970-1973 primary policies, the [umbrella insurance company] must 'drop down' and respond in excess of any self-insured retention."); see generally Garmany v. Mission Ins. Co., 785 F.2d 941, 948 (11th Cir. 1986) ("The purpose of the [lower] retained limit is to extend different kinds of coverage than the existing liability insurance provided by the underlying policy and the extra limits of the umbrella policy."); Ridgeway v. Gulf Life Ins. Co., 578 F.2d 1026, 1030 (5th Cir. 1978) (same); Continental Casualty Co. v. Roper Corp., 527 N.E.2d 998, 1001 (Ill. App. 1988) (umbrella insurance company noting that it provided "primary coverage for risks not covered by underlying insurance or for damages not covered by underlying insurance," and explaining "an example of the latter situation is when punitive damages are sought for an occurrence which is covered by the primary underlying policy[, i]f the primary policy does not pay punitive damages, coverage B would pay those damages"); Jostens, Inc. v. Mission Ins. Co., 387 N.W.2d 161, 165 (Minn. 1986) (holding that an umbrella insurance

company, which afforded "broader" coverage than the primary insurance company, and which broader coverage was essentially "primary," had a duty to defend claims falling both within the underlying primary coverage and the broader, umbrella, primary coverage); Bryan Construction Co. v. Employers' Surplus Lines Ins. Co., 290 A.2d 138, 139-40 (N.J. 1972) (an umbrella policy's "very nomenclature suggested a purpose to protect against gaps in underlying policies and indicated more than mere excess coverage"); American States Ins. Co. v. Maryland Casualty Co., 628 A.2d 880, 886 (Pa. 1993) (noting "[t]ypically, an umbrella carrier agrees to provide not only excess or umbrella coverage on claims within the ambit of the insured's general liability policy, but also primary coverage for those claims not included in the insured's basic general liability coverage").

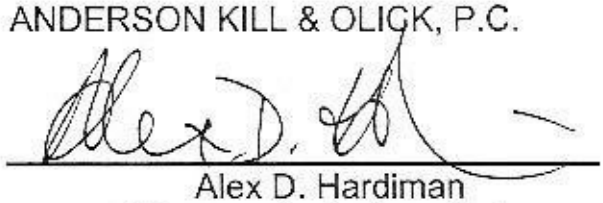
CONCLUSION

In sum, the Court of Appeal erred in its application of Powerine I to the ACE Policy involved in this appeal. As discussed above, Powerine I revolved around language contained in standard primary CGL policies and not contained in the ACE Policy. The ACE Policy is an umbrella-form GL policy, which type of policy specifically was marketed and sold as a broader, "backstop," "kitchen sink," "worry free," "peace of mind," "sleep easy," gap-filling type of insurance policy. Umbrella-form policies are sold to cover losses not covered by standard form general liability insurance policies. Therefore, respectfully, the decision of the Fourth District should be reversed, and this Court should find that the ACE Policy includes the coverage which the County purchased for the County's environmental claims.

Dated: October 31, 2003

Respectfully submitted,

ANDERSON KILL & OLICK, P.C.



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CERTIFICATE OF WORD COUNT

I, ALEX D. HARDIMAN, am appellate counsel to United Policyholders. I certify that the attached Amicus Curiae brief of United Policyholders in support of cross-claimant/appelant County of San Diego was produced on a computer using Word 97 word-processing program and is 5,183 words long.

Executed on October 31, 2003 at New York, New York.

Alex D. Hardiman

PROOF OF SERVICE

I, ALEX D. HARDIMAN, declare:

1. I am over the age of eighteen of years and not a party to this action. I am employed in the County of New York, State of New York, by the law firm of Anderson Kill & Olick, P.C. My business address is 1251 Avenue of the Americas, New York, NY 10020. I have firsthand personal knowledge of the following facts, and if called upon, could and would testify competently thereto.

2. On October 31, 2003, I caused to serve by Federal Express Priority Overnight the following document entitled:

BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS IN SUPPORT OF CROSS-COMPLAINANT AND APPELLANT COUNTY OF SAN DIEGO

on the Supreme Court of California in this action by placing the original and fourteen (14) true copies thereof enclosed in a properly addressed envelope and caused the same to be delivered to a messenger of Federal Express for priority overnight delivery:

SEE ATTACHED SERVICE LIST

3. On October 31, 2003, I served by mail the following document entitled:

BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS IN SUPPORT OF CROSS-COMPLAINANT AND APPELLANT COUNTY OF SAN DIEGO

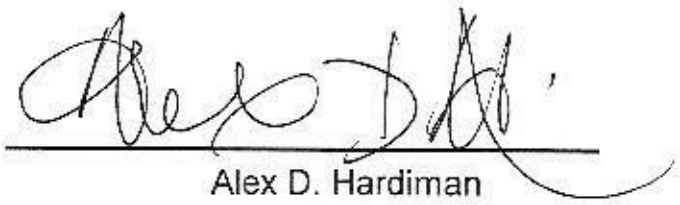
on the interested parties in this action by placing true copies thereof enclosed in a sealed envelope with postage thereon fully prepaid, placed for collection and mailing following ordinary business practices, addressed as follows:

SEE ATTACHED SERVICE LIST

4. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice the envelope for the Supreme Court of California would be picked up by a Federal Express messenger for priority overnight delivery. Under that practice the envelopes for the remaining parties would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing is this Declaration.

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

Executed on October 31, 2003 at New York, New York.



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