

Appeal No. F069953

**IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

ARTUN VARDANYAN

Plaintiff and Appellant,

v.

AMCO INSURANCE COMPANY

Defendant and Appellee.

FRESNO COUNTY
JUDGE: MARK W. SNAUFER
FRESNO COUNTY NO. 11CECG02112

**AMICUS BRIEF OF UNITED POLICYHOLDERS
IN SUPPORT OF PLAINTIFF AND APPELLANT**

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TABLE OF CONTENTS

I. INTRODUCTION.....	6
II. STATEMENT OF INTEREST.....	9
III. STANDARD OF REVIEW.....	12
IV. ARGUMENT.....	12
A. CALIFORNIA LAW IS CLEAR: WHEN MULTIPLE PERILS CONTRIBUTE TO THE SAME LOSS, IF THE PREDOMINATE CAUSE IS A COVERED PERIL, THE INSURANCE POLICY PAYS.....	12
1. The Law of Efficient Proximate Cause.....	9
2. The Trial Court’s Clear Error.....	14
3. A Case of Policy-Statutory Conflict.....	17
B. CALIFORNIA CONSUMERS ARE HARMED WHEN COURTS MISUNDERSTAND THE PURPOSE OF INSURANCE AND ALLOW INSURERS TO CONTRACT OUT OF THEIR LEGAL OBLIGATION.....	18
1. <i>Julian</i> Does Not Authorize AMCO's Interpretation.....	18
2. The Nature of Insurance.....	19
3. The Decision is Harmful to California Residents.....	21
V. CONCLUSION.....	23

TABLE OF AUTHORITIES

STATE CASES

<i>Garvey v. State Farm Fire & Cas. Co.</i> (1989) 48 Cal.3d 395	<i>passim</i>
<i>Julian v. Hartford Underwriters Ins. Co.</i> (2005) 35 Cal.4th 747	<i>passim</i>
<i>Gillis v. Sun Ins. Office, Ltd.</i> (1965) 238 Cal.App.2d 408	7 (fn.2)
<i>Sauer v. General Ins. Co.</i> (1964) 225 Cal.App.2d 275	7 (fn.2)
<i>Howell v. State Farm Fire & Cas. Co.</i> (1990) 218 Cal.App.3d 1446	7 (fn.2), 15, 16, 17
<i>Mansur v. Ford Motor Co.</i> (2011) 197 Cal.App.4th 1365	12
<i>Veronese v. Lucasfilm Ltd.</i> (2012) 212 Cal.App.4th 1	12
<i>People v. St. Martin</i> (1970) 1 Cal.3d 524	12
<i>State Farm Mut. Auto. Ins. Co. v. Partridge</i> (1973) 10 Cal.3d 94	14
<i>Clemmer v. Hartford Ins.</i> (1978) 22 Cal.3d 865	15, 20
<i>J.C. Penny Casualty Insurance Company v. M.K.</i> (1991) 52 Cal.3d 1009	17

<i>Reserve Ins. Co. v. Piscciotta</i> (1982) 30 Cal.3d 800	18
<i>Egan v. Mutual of Omaha Ins. Co.</i> (1979) 24 Cal. 3d 809	20
<i>Crane v. State Farm Fire & Cas. Co.</i> (1971) 5 Cal.3d 112	19

FEDERAL CASES

<i>Carter v. Kentucky</i> (1981) 450 U.S. 288	9
<i>Miller Wohl Co. v. Commissioner o/Labor & Indus.</i> (1982) 694 F.2d 203.....	11

STATUTES

Cal. Ins. Code. Sec. 530.....	<i>passim</i>
Cal. Civ. Code, Sec. 1667.....	7 (fn.2), 15
Cal. Rules of Ct. 8.204.....	12

OTHER AUTHORITIES

California Civil Jury Insruction 2306.....	<i>passim</i>
Robert L. Stem, et al., <i>Supreme Court Practice</i> 570-71 (1986).....	11
Ennis, <i>Effective Amicus Briefs</i> , 33 CATH. U. L. REV. 603 (1984).....	12
<i>Couch on Insurance</i> (1930) § 1466.....	13 (fn.4)

Houser & Kent, *Concurrent Causation in First-Party Insurance Claims: Consumers Cannot Afford Concurrent Causation*, TORT & INS. L.J. 573 (1986).13 (fn.4)

James M. Fischer, *Why Are Insurance Contracts Subject to Special Rules of Interpretation? Text Versus Context*, 24 ARIZ. ST. L.J., 995 (1992).....19 (fn.8)

Christopher C. French, *The Ensuing Loss Clause in Insurance Policies: The Forgotten and Misunderstood Antidote to Anti-Concurrent Causation Exclusions*, 13 NEV. L.J. 215 (2012)..22 (fn.10)

Michael C. Phillips & Lisa L. Coplen, *Concurrent Causation Versus Efficient Proximate Cause in First-Party Property Insurance Coverage Analysis*, 36 Brief 32 (Winter 2007).....22 (fn.11)

Jacqueline Young, Notes - *Efficient Proximate Cause: Is California Headed for a Katrina-Scale Disaster in the Same Leaky Boat?* 758 HASTINGS L.J. 62 (2011).....23 (fn.12)

I. INTRODUCTION

The insurance implications of our seismic faults and the frequency with which destructive weather events are headline news in California make this case ideal for an *amicus curiae* contribution.

This case centers on the interpretation of an insurance principle that is likely to impact large segments of the public and business community.

Each year California property owners pay great sums toward insurance premiums for the peace of mind and security that if catastrophe strikes and their property is destroyed or seriously damaged, they can recover and rebuild their lives. Our state leads the nation in consumer protection standards *and* construction costs.

California insurers cannot be permitted to collect premiums for post-loss economic recovery support, then turn around and creatively draft their way out of that support. The stakes for our state's residents and economy are simply too high to allow that to happen.

United Policyholders ("UP") respectfully submits this brief of *amicus curiae* in support of Plaintiff and Appellant Artun Vardanyan ("Appellant"). We strongly support Appellant's view that the Trial Court's refusal to instruct the jury on predominant cause was reversible error. California statutory *and* case law is clear: When

multiple perils contribute to causing a loss, if the most important (predominant) cause is a covered peril, the insurance policy pays.¹ This is true regardless of how the policy is written. Policy exclusions are unenforceable to the extent that they conflict with California Insurance Code Section 530 (“Section 530”) and the efficient proximate cause doctrine. *Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal. 4th 747 (discussed at length below).²

Because the California Department of Insurance does not routinely review the wording in the property insurance policies sold in this state, our courts play a critical role in that regard. It is worrisome that the Trial Court disregarded California law and sent a dangerous signal to California insurers when it refused to appropriately instruct the jury to identify the predominant peril that contributed to the collapse of Mr. Vardanyan’s property. With its ruling, the Trial Court signaled that California insurance companies are free to draft their own policy exclusions and standards for determining applicability.

¹ See *Garvey v. State Farm* (1989) 48 Cal.3d 395; Cal. Ins. Code. Sec. 530; and California Civil Jury Instruction (“CACI”) 2306.

² See also Civ. Code, § 1667, subd. (2); *Howell v. State Farm Fire & Casualty Co.* (1990) 218 Cal.App.3d 1446, 1452, 1454; *Gillis v. Sun Ins. Office, Ltd.* (1965) 238 Cal.App.2d 408, 423; *Sauer v. General Ins. Co.* (1964) 225 Cal.App.2d 275, 279-280.

The California Supreme Court has consistently rejected this unsound approach. Judgment should be reversed and a new trial should be granted.

UP's *amicus curiae* brief seeks to assist this Court in evaluating the equities and reviewing applicable precedents. The core issue is whether an insurer doing business in California, is allowed to draft, label as "all-risk," and sell an insurance policy containing language that defies Section 530 as well as the coverage and exclusion principles set forth in decades of insurance case law. The answer to that inquiry has to be a resounding no.

AMCO drafted its all-risk policy to circumvent Section 530 and avoid providing a bargained-for economic safety net to its insured. The Trial Court endorsed AMCO's strategy by refusing to instruct the jury on the applicable legal standard, CACI 2306.³ The U.S. Supreme Court has recognized that "[j]urors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed

³ **CACI 2306: Covered and Excluded Risks - Predominant Cause of Loss:** *You have heard evidence that the claimed loss was caused by a combination of covered and excluded risks under the insurance policy. When a loss is caused by a combination of covered and excluded risks...the loss is covered only if the most important or predominant cause is a covered risk.*

in the law... [and] arguments of counsel cannot substitute for instructions by the Court.” *Carter v. Kentucky*, 450 U.S. 288, 302-304 (1981). The Trial Court’s failure to properly instruct the jury constitutes reversible error.

Our larger concern relates to the *carte blanche* drafting authority the Trial Court’s ruling seems to grant insurance companies with regards to their property policies in California. If this ruling stands, it will seriously erode the safety net value of policies retained by businesses and individuals in the state, and will be detrimental to our state’s economy.

II. STATEMENT OF INTEREST

UP is a unique national non-profit dedicated to promoting and preserving integrity in insurance transactions, including protecting the reasonable expectations of insurance consumers. The organization is funded by donations and grants. UP does not sell insurance or accept financial support from insurance companies.

Through its *Roadmap to Preparedness* program, UP guides consumers on buying insurance and being economically prepared for adverse events. UP’s *Roadmap to Recovery*TM program, helps individuals and businesses navigate the insurance claims process and

recover fair and timely settlements. Finally, UP's *Advocacy and Action* program, works with public officials, other non-profits, faith-based organizations, and a diverse range of entities – including insurance producers and insurance trade associations – to solve problems related to claims and coverage.

Since UP was founded in 1991 in Northern California, the organization has provided direct services to consumers across the country after floods, winds, fires and other events have damaged and destroyed homes and businesses. UP has seen firsthand the economic and personal devastation caused by the application of insurance policy exclusions; exclusions that would not be upheld in California.

UP has a particular interest in this case because of genuine concerns over the harm the Trial Court's ruling could bring to California residents and our state's overall economy. UP's Executive Director, Amy Bach, is uniquely qualified to speak to the issues contained herein, as she has advised California lawmakers on insurance issues for decades and is serving her sixth consecutive term as an official consumer representative to the National Association of Insurance Commissioners ("NAIC"). Additionally, UP coordinates

with the California Department of Insurance and its Commissioner Dave Jones on a variety of issues.

UP strives to aid courts via the submission of *amicus curiae* briefs in cases involving insurance principles that are likely to impact large segments of the general public and business communities. One of UP's *amicus curiae* briefs was cited in the U.S. Supreme Court opinion *Humana v. Forsyth*, 525 U.S. 299 (1999), and its arguments have been adopted by the California Supreme Court in *TRB Investments, Inc. v. Fireman's Fund Ins. Co.* (2006) 40 Cal.4th 19; *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815 and numerous other state and federal courts across the U.S.

UP seeks to fulfill the "classic role of *amicus curiae* 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. v. Commissioner of Labor & Indus.*, 694 F.2d 203, 204 (1982). An *amicus curiae* is often in a superior position to "focus the court's attention on the broad implications of various possible rulings." Robert L. Stem, et al., *Supreme Court Practice* 570-71 (1986) (quoting Ennis, *Effective Amicus Briefs*, 33 CATH. U. L. REV. 603, 608 (1984)).

III. STANDARD OF REVIEW

An appellate court reviews a trial court's failure to give the appropriate jury instruction *de novo*. *Mansur v. Ford Motor Co.* (2011) 197 Cal.App.4th 1365. Accordingly, an appellate court will not view the evidence in the record in the light most favorable to the successful party, but rather an appellate court will view the evidence favoring the party claiming error for failure to give the proper jury instruction. *Veronese v. Lucasfilm Ltd.* (2012) 212 Cal.App.4th 1. As a procedural matter, jurisdictional issues cannot be raised on appeal where they were not raised or decided below. *People v. St. Martin* (1970) 1 Cal.3d 524; Cal. Rules of Ct. 8.204(a)(2)(C).

IV. ARGUMENT

A. CALIFORNIA LAW IS CLEAR: WHEN MULTIPLE PERILS CONTRIBUTE TO THE SAME LOSS, IF THE PREDOMINATE CAUSE IS A COVERED PERIL, THE INSURANCE POLICY PAYS.

1. The Law of Efficient Proximate Cause

Section 530, states, in relevant part: “[a]n insurer is liable for a loss of which a peril insured against was the proximate cause, although a peril not contemplated by the contract may have been a remote cause of the loss; but he is not liable for a loss of which the peril insured against was only a remote cause.” In *Garvey v. State*

Farm (1989) 48 Cal.3d 395, 401-404 (fn. 1), the California Supreme Court held that "...whether a claim is covered or excluded under the terms of the policy turns not on whether the alleged cause of the loss was a concurrent cause of the damage, but whether it was the 'efficient proximate cause' of the loss."

Then in *Julian* 35 Cal.4th at 747, the Supreme Court, relying on Section 530, held that "[a]n insurer is liable for a loss of which a peril insured against was the proximate cause, although a peril not contemplated by the contract may have been a remote cause of the loss; but he is not liable for a loss of which the peril insured against was only a remote cause." (citing *Sabella v. Wisler* (1963) 59 Cal.2d 21). Collectively, this body of law is known as the Efficient Proximate Cause ("EPC") doctrine.⁴

EPC is the governing law in California, unlike many states that follow the doctrine of Anti-Concurrent Causation ("ACC"). In

⁴ *Garvey*, 48 Cal.3d at 403, "[I]n determining whether a loss is within an exception in a policy, where there is a concurrence of different causes, the efficient cause - the one that sets others in motion - is the cause to which the loss is to be attributed, though the other causes may follow it, and operate more immediately in producing the disaster.'" (Citing *Sabella*, 59 Cal.2d at 31-32; *Couch on Insurance* (1930) § 1466; Houser & Kent, *Concurrent Causation in First-Party Insurance Claims: Consumers Cannot Afford Concurrent Causation* TORT & INS. L.J. 573 (1986)).

jurisdictions adopting the ACC, when multiple perils contribute to the same loss, if one peril is excluded, the insurer will deny coverage and a reviewing court will agree.⁵ California courts generally reject this view. *State Farm Mut. Auto. Ins. Co. v. Partridge*, 10 Cal.3d 94 (1973), explains that, “Under certain circumstances, an [insurer] may be liable for coverage so long as the covered peril was one of two or more independent, concurrent proximate causes of harm, even if the covered peril was not the efficient proximate cause.”

2. The Trial Court’s Error

According to the *Garvey* Court, “...policy exclusions are unenforceable to the extent that they conflict with Section 530 and the

⁵ A typical ACC provision reads: “*We do not cover loss to any property resulting directly or indirectly from any of the following... [Commonly excluded causes/perils include: flooding, including storm surge and most water damage including sewer backup and overflow, earth movement, volcanic eruption, etc.]. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.*” or “*We do not cover loss to any property resulting directly or indirectly from any of the following... [See example above for common excluded causes/perils]. Such loss or damage is excluded regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these [excluded causes/perils].*”

efficient proximate cause doctrine.” *Garvey*, 48 Cal.3d at 401, citing *Howell v. State Farm Fire & Cas. Co.* (1990) 218 Cal.App.3d 1446; *see also* Cal. Civ. Code, § 1667.⁶ *Garvey* unambiguously holds that the insurance policy at issue in the case, which denies coverage when a loss results from any uncovered peril, no matter how remote, clearly conflicts with Section 530 and the EPC doctrine. The Trial Court refused, in error, to instruct on CACI 2306, confusing the jury and placing the burden on the Appellant to prove coverage.⁷ This instruction, or lack thereof, is especially problematic in light of the *Garvey* holding, which placed the burden on the insurer to prove that the predominant cause of the loss was an excluded peril. *Garvey*, 48 Cal.3d at 406. The *Garvey* Court explains, “[o]nce the insured shows that an event falls within the scope of basic coverage under the policy, the burden is on the insurer to prove a claim is specifically excluded.” *Id.* (emphasis added); *See also Clemmer v. Hartford Ins.* (1978) 22 Cal.3d 865.

⁶ That is not lawful which is: 1. Contrary to an express provision of law; 2. Contrary to the policy of express law, though not expressly prohibited.

⁷ CACI 2306, *supra*, note 2.

As Appellant points out, the California Supreme Court in *Garvey* agreed with *amicus curiae* UP's concern that under the 99% covered to 1% excluded scenario, coverage for a loss due to a covered peril (e.g., wind) could be denied where the damage could be linked to pre-existing damage or a remote excluded peril. The *Garvey* Court stated, "We agree with [*amicus curiae* UP] that the application of the policy language in situations like one described above would raise troubling concerns regarding the clause's consistency with the EPC. Denial of coverage for such a loss would suggest the provision of illusory insurance against weather conditions, raising concerns similar to those implicated in *Howell*." *Garvey*, 48 Cal.3d at 404. The *Garvey* Court went on to hold that phrases such as "contribute in any way with...seem particularly designed to circumvent the [EPC] doctrine." *Ibid.*

The *Garvey* Court disagreed with the insurers implicit argument that, "an insurer's ability to combine otherwise separate perils into a single peril will inevitably render Section 530 and the [EPC] doctrine irrelevant. This mechanistic approach toward avoiding [EPC] analysis would have us endorse excluded 'perils' regardless of how they mingle or concatenate distinct risks, and whether or not they provided

a fair result within the reasonable expectations of both the insured and the insurer.” The *Garvey* Court recognized that the 99% covered to 1% excluded scenario could be problematic, and that is precisely the issue this Court is now presented with. It is imperative that juries be instructed as to CACI 2306 so that insurers are not allowed to provide merely illusory coverage.

3. A Case of Policy-Statutory Conflict

The law is well settled when the language of an insurance policy directly violates a statute (*e.g.*, Section 530) – the statutory language controls. *J.C. Penny Casualty Insurance Company v. M.K.*, 52 Cal.3d 1009, 1019, fn. 8 (1991). Accordingly, the *Howell* Court noted that any deviation from such an application “would be an open invitation to insurance companies to continue tinkering with their policy language in the hope that they will stumble across the magic formula which will absolve them of liability. The approach we take in the majority opinion forecloses this possibility and consequently increases certainty and predictability for both the insured and the insurer.” 218 Cal.App.3d at 1457, fn. 5. The Trial Court’s failure to instruct on CACI 2306, in clear contradiction to Section 530, *Garvey*,

and *Julian*, invites insurance companies to tinker with their policy language, a practice which should be rejected.

B. CALIFORNIA CONSUMERS ARE HARMED WHEN COURTS MISUNDERSTAND THE PURPOSE OF INSURANCE AND ALLOW INSURERS TO CONTRACT OUT OF THEIR LEGAL OBLIGATION

1. *Julian* Does Not Authorize AMCO’s Interpretation

Appellee AMCO takes the untenable position that *Julian* authorizes its policy’s departure from the EPC and Section 530. AMCO concedes that insurers may not contract around the EPC and Section 530, while at the same time taking the position that “[an insurer] may, without violating [EPC and Section 530], exclude coverage for losses caused by a condition that ‘contributes in any way with’ an excluded cause.” Respondent’s Brief (“RB”) at p. 23. This semantic contradiction defies logic, and is certainly not a concept “that a reasonable insured would readily grasp,” RB at p. 24 (Citing *Julian*, 35 Cal. 4th at 760).

In *Reserve Ins. Co. v. Piscciotta*, 30 Cal.3d 800 (1982), the California Supreme Court held that “words used in an insurance policy are to be interpreted according to the plain meaning which a layman would ordinarily attach to them.” *Id.* at 807. Further, “the policy should be read as a layman would read it and not as it might be

analyzed by an attorney or an insurance expert.” *Crane v. State Farm Fire & Cas. Co.*, 5 Cal.3d 112, 113 (1971) (en banc).⁸ It follows then, that a reasonable insured in Appellant’s position would not expect to be litigating semantics with their insurer, nor would they expect that an insurer’s clever draftsmanship would foreclose upon the protections afforded by California law, namely the EPC and Section 530.

2. The Nature of Insurance and Judicial Predisposition

Beyond the legal authority discussed at length above, and in the Appellant’s brief, the Court should be aware of the equities involved in this case specifically, and in the law of insurance generally. The purpose of insurance is to indemnify – to make one whole after a loss. Insurance is a contract, yet one that is imbued with the public interest. *Egan v. Mutual of Omaha Ins. Co.*, 24 Cal. 3d 809, 820 (1979).

⁸ The concept of the “reasonable or ordinary policyholder” is endorsed by almost every U.S. jurisdiction and has been the subject of numerous scholarly articles. *See*, James M. Fischer, *Why Are Insurance Contracts Subject to Special Rules of Interpretation? Text Versus Context*, 24 ARIZ. ST. L.J., 995, 1004 (1992) (“Courts frequently hold that...[t]he language of the insurance contract is to be construed in accordance with the reasonable understanding of a layperson.”). This is also the view that has been adopted in drafts of the American Law Institute’s forthcoming Restatement of the Law of Liability Insurance.

Accordingly, the conduct of insurers is subject to heightened judicial scrutiny.

As a preliminary matter, it is important for the Court to understand the nature of the insurance contract. Insurers draft the contracts, they offer them on a take-it-or-leave-it basis to consumers, and consumers purchase it with the *reasonable expectation* it will provide coverage. *See Clemmer v. Hartford Ins.*, 22 Cal.3d 865 (1978). The doctrine of *contra proferentem* has long-held that contract law requires courts to construe ambiguities *against* the drafter-insurer so as to effectuate coverage. *See Williston on Contracts*, 49:15.⁹

⁹ The fundamental reason which explains [contra proferentem] and other examples of judicial predisposition toward the insured is the deep-seated often unconscious but justified feeling or belief that the powerful underwriter, having drafted its several types of insurance contracts with the aid of skillful and highly paid legal talent, from which no deviation desired by an applicant will be permitted, is almost certain to overreach the other party to the contract. The established underwriter is magnificently qualified to understand and protect its own selfish interests. In contrast, the applicant is a shorn lamb driven to accept whatever contract may be offered on a ‘take-it-or-leave-it’ basis if he or she wishes insurance protection. In other words, insurance policies, while contractual in nature, are certainly not ordinary contracts, and should not be interpreted or construed as individually bargained for, fully negotiated agreements, but should be treated as contracts of adhesion between unequal parties. This is because insurance contracts are generally not the result of the typical bargaining and negotiating process between roughly equal parties that is the hallmark of freedom of contract.

This Court is presented with particularly egregious conduct on the part of AMCO. Not only did Appellant's insurance policy include an exclusion, one which would not have been obvious to a lay-insured, but the exclusion is contrary to California law. Even in a jurisdiction that did not follow the doctrine of *contra proferentem*, but had enacted a regulation similar to Section 530, the exclusion at issue would not be enforceable. However, the issue in this case is less about ambiguity and interpretation and more about a clear violation of the law.

3. The Decision is Harmful to California Residents

If the Trial Court's legal error is allowed to stand, it will have far-reaching impacts on California residents who rely on the insurance system for financial security and recovery from losses. One can imagine the detrimental market implications if policyholders are unable to repair or rebuild following a loss because they are denied insurance coverage *carte blanche* for commonly accepted perils. Perhaps insurers do not fear this result because homeowners are often required to carry a basic fire policy and in many cases a separate policy for water damage.

California is unique with regard to consumer protection.

California residents enjoy many protections that other states' residents do not. The California Department of Insurance, the agency charged with administering the Insurance Code and regulating the conduct of insurance companies is among the most proactive in the nation.

California legislators have stepped in to curb abuses by insurance companies and make certain that the insurer-insured relationship is fair, balanced and rests on a level playing field.¹⁰ California courts favor consumer protection as evidenced by its governing principles, such as Section 530 and the EPC.

UP has guided property owners in connection with *many* causation insurance disputes throughout the country.¹¹ Time and time again we wish California's appropriately high standards for protecting consumers who buy and depend on insurance were uniform across the

¹⁰ For an in-depth discussion of the San Francisco Earthquake and the history of the "ensuing loss" doctrine in California and the subsequent enactment of Cal. Ins. Code §§ 2081, 10088, and 10088.5, *see generally*, Christopher C. French, *The Ensuing Loss Clause in Insurance Policies: The Forgotten and Misunderstood Antidote to Anti-Concurrent Causation Exclusions*, 13 NEV. L.J. 215 (2012).

¹¹ For an in-depth discussion of causation litigation nationwide, *see* Michael C. Phillips & Lisa L. Coplen, *Concurrent Causation Versus Efficient Proximate Cause in First-Party Property Insurance Coverage Analysis*, 36 Brief 32 (Winter 2007).

states.¹² To maintain California's high standards, we cannot allow insurers to sell policies that use cleverly worded exclusions to defeat the legislature's intent in enacting Section 530. And when presented with the opportunity, courts must not forget the legal precedent, contractual equities, and public policy rationale involved in interpreting insurance policies so as to uphold the purpose of insurance (indemnity in case of loss), and the reasonable expectations of the policyholder (an economic safety net).

V. CONCLUSION

For the foregoing reasons, United Policyholders respectfully requests that this Court reverse the decision of the Superior Court and remand with instructions that the jury be instructed on CACI 2306. There is no other sensible result but to find that the Superior Court's directed verdict order was erroneous.

¹² For an in-depth discussion of the evolution of the EPC doctrine in California and disagreement in the Courts of Appeal about its application, see Jacqueline Young, Notes - *Efficient Proximate Cause: Is California Headed for a Katrina-Scale Disaster in the Same Leaky Boat?* 758 HASTINGS L.J. 62 (2011).

DATED: June 4, 2015

UNITED POLICYHOLDERS

By ___s/ _____

DANIEL WADE
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CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

Pursuant to California Rule of Court, 8.360 and 8.412, I certify that this **AMICUS BRIEF OF UNITED POLICYHOLDERS IN SUPPORT OF APPELLANT** is proportionately spaced, has a typeface of 14-point, and contains 3,838 words, excluding footnotes, according to the word count feature of Microsoft Word 2010.

DATED: June 4, 2015

UNITED POLICYHOLDERS

By _____s/_____
DANIEL WADE
*Attorneys for Amicus Curiae
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PROOF OF SERVICE

I, declare that I am a resident of the State of California, member of the State Bar of California, over the age of eighteen years, and not a party to the within action. My business address is 381 Bush Street, 8th Floor, San Francisco, California 94104. On June 4, 2015, I served the following document(s):

**AMICUS BRIEF OF UNITED POLICYHOLDERS
IN SUPPORT OF PLAINTIFF AND APPELLANT**

on the parties listed below as follows:

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By Truefile procedure, email, and Certified Mail as appropriate.
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 4, 2015, at San Francisco, California.

____s/____

Daniel R. Wade