Case No. 16-16056

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HARTFORD FIRE INSURANCE COMPANY,

Plaintiff–Appellant,

v.

TEMPUR-SEALY INTERNATIONAL, INC., *et al.*,

Defendants–Appellees

On Appeal from the United States District Court
For the Northern District of California

BRIEF OF *AMICI CURIAE* UNITED POLICYHOLDERS AND INTERNATIONAL SLEEP PRODUCTS ASSOCIATION IN SUPPORT OF APPELLEES REQUESTING AFFIRMANCE OF LOWER COURT'S DECISION

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DISCLOSURE STATEMENT

Pursuant to Rule 26.1(a) of the Federal Rules of Appellate Procedure, *Amicus* United Policyholders is a non-profit 501(c)(3) organization, has no parent corporation, and no publicly held corporation owns 10% or more of its stock. *Amicus* International Sleep Products Association is a non-profit 501(c)(6) organization, it does not have a parent corporation or shareholders.

Dated: March 24, 2017

REED SMITH LLP

By: /s/ David E. Weiss
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INTEREST OF AMICI CURIAE

United Policyholders ("UP") and the International Sleep Products Association ("ISPA") submit this brief of *amici curiae* in support of Appellees Tempur-Sealy International, Inc. and Tempur-Pedic North America, LLC. Amici ask this Court to affirm the District Court's Order granting summary judgment in favor of Appellees on the issue of whether Appellant Hartford Fire Insurance Company ("Hartford") has a duty to defend against an underlying lawsuit alleging that their products are defective and have caused bodily injuries and property damage to consumers. Amici UP and ISPA seek to assist this Court in evaluating the issues on appeal by focusing on arguments made by the Complex Insurance Claims Litigation Association and American Insurance Association ("Insurance Amici") in their *amici curiae* brief on behalf of the Appellant.

Under California law, the coverage provisions of a liability insurance policy must be read broadly in favor of the policyholder. This includes affording coverage for forms of liability that might not have been anticipated when the policy was written. It also is well-settled that the third-party claimant is not the "arbiter" of coverage and cannot manipulate whether its opponent can obtain coverage through clever pleading tactics. There also is no place in insurance policy interpretation for considering the unexpressed "estimation of exposure" or "risk calculation" performed by an insurance underwriter as Insurance Amici

suggest. Nevertheless, the insurance industry, including Hartford, has long understood that product manufacturers facing allegations that their products are defective and cause bodily injuries and property damage expect coverage under their liability insurance policies unless there is a clear and unambiguous exclusion that applies. The potential for coverage for the type of litigation underlying this insurance case has been long known and Hartford could have either (1) factored that into its risk calculations; or (2) excluded such claims from coverage through a clearly worded exclusion. It did neither.

UP is a non-profit organization dedicated to helping preserve the integrity of the insurance system by serving as a voice and an information resource for consumers in all 50 states. UP's work is supported by donations, grants, and volunteer labor. UP does not sell insurance or accept funding from insurance companies. While much of UP's work is aimed at helping individuals and businesses purchase appropriate insurance, UP engages with regulators, public officials, academics, and various stakeholders regarding legal and marketplace developments relevant to all policyholders and all lines of insurance. A diverse range of individual and commercial policyholders throughout the United States regularly communicate their insurance concerns to UP which allows UP to submit *amicus curiae* briefs to assist state and federal courts in deciding cases involving important insurance principles. UP's *amicus curiae* brief was recently cited by the

California Supreme Court in *Association of California Insurance Cos. v. Dave Jones, Insurance Commissioner,* Case No. S226529, Cuellar, J., January 23, 2017 (Ct.App. 2/1B248622, Los Angeles County Super. Ct. No. BC463124) and its arguments have been adopted by the Supreme Court in *TRB Investments, Inc. v. Fireman's Fund Ins. Co.*, 40 Cal. 4th 19 (2006) and *Vandenburg v. Superior Court*, 21 Cal. 4th 815 (1999). UP has filed *amicus curiae* briefs in over 400 cases throughout the United States.

Since its founding in 1915, ISPA has been committed to supporting the mattress industry through active public policy, public affairs, and education initiatives.[1] It has grown to represent the full bedding industry on a host of commercial, health, safety and environmental issues. ISPA represents mattress manufacturers and bedding component, machinery and service suppliers in the United States and in over 50 countries around the world. ISPA members range from multinational mattress and sleep products manufacturing companies to small, family-owned operations. This diverse membership base gives ISPA strong credibility and influence as the voice of the sleep products industry. ISPA provides a wide range of legislative, statistical, consumer research and educational services that benefit its entire membership. The availability of liability insurance against claims seeking damages because of allegedly defective products is an issue

[1] This is brief is not filed on behalf of Appellees who are members of the ISPA.

of critical importance to ISPA and its members. Most importantly, it is critical to ISPA and its members that insurance policies clearly provide what they cover and what they do not cover, and that insurers do not seek to hide behind vague policy language to avoid covering risk they understood their insureds reasonably expected to be covered.

In this brief, UP and ISPA seek 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. v. Commissioner of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982).

BRIEF OF AMICI CURIAE

I. SUMMARY OF ARGUMENT

This insurance case arises from an underlying class action lawsuit in which customers allege that certain mattress and pillow products manufactured and sold by Appellees emit a chemical odor from the off-gassing of volatile organic compounds ("VOCs") such as Formaldehyde, and that this chemical off-gassing has caused them to suffer allergic symptoms and other adverse reactions. The claimants also allege that these products have caused damage to property. *Todd v.*

Tempur Sealy International, Inc., et al., Case No. 3:13-cv-04984-JST (N.D. Cal.). Plaintiffs allege that Formaldehyde has various health effects including eye, nose, and throat irritation, wheezing and coughing, fatigue, skin rash and severe allergic reactions." Formaldehyde is listed as a known human carcinogen.

Among the common questions of law and fact identified in the underlying complaint is whether products manufactured and sold by Appellees caused the plaintiffs' damages. The complaint contains eighteen pages of allegations detailing alleged bodily injuries and property damage caused by Appellees' products, and because the products cause and have caused these damages, plaintiffs allege they are entitled to relief. Each of the named plaintiffs allege they "suffered a cognizable injury," although the various subclasses identified in the complaint state that they are not seeking "damages for physical injuries." That is the only qualification to their request for damages. "Damages for physical injuries" is not the same thing as damages "because of" bodily injury or property damage. All of the consumers who allegedly suffered bodily injuries and property damage are part of the class, and they would not be seeking relief but for their injuries and damage.

After reviewing the allegations in the *Todd* complaint, Hartford agreed to defend Appellees under a reservation of rights, but when the defense costs got too high, it decided to sue its insureds for a declaration that it had no duty to defend. It also sought reimbursement of the defense expenses it had paid. The District Court

correctly ruled that Hartford had an obligation to defend Appellees under nine comprehensive general liability insurance policies it issued from December 31, 2004 to March 1, 2013. The District Court determined that the underlying complaint contained allegations of "bodily injury" and "property damage" and that the claimants sought damages "because of" such injury or damage within the terms of the Hartford policies or, at the very least, there was a potential that the complaint could be amended to assert such damages. The District Court was correct.

The District Court applied well-settled insurance principles in reaching its decision. The underlying complaint clearly alleges that Appellees' products caused actual bodily injuries and property damage and that plaintiffs seek damages "because of" such injuries or damage. The District Court noted that the complaint includes 18 pages of detailed factual allegations regarding bodily injury and property damage allegedly caused by Appellees' products. The fact that the class action plaintiffs claim they are not seeking damages "for physical injuries," whatever that even means, does not negate Hartford's duty to defend, as third party plaintiffs are not the arbiters of coverage. The District Court also correctly determined that given the detailed factual allegations, even if the plaintiffs were disclaiming certain damages, there was at least the potential that plaintiffs would

assert a covered claim for damages because of bodily injury and/or property damage.

The California Supreme Court has observed that "[t]he insured's desire to secure the right to call on the insurer's superior resources for the defense of third party claims is, in all likelihood, typically as significant a motive for the purchase of insurance as is the wish to obtain indemnity for possible liability." *Montrose Chemical Corp. v. Superior Court,* 6 Cal.4th 292, 295-296 (1993). For this reason, "California courts have been consistently solicitous of insureds' expectations on this score." *Id.* at 296. The Insurance Amici, nevertheless, argue that the Court should find no duty to defend here because it would amount to an unfair expansion of coverage for which insurers have not set premiums. Whether insurers have set premiums in anticipation of defending claims like this cannot be a consideration in analyzing coverage. The only relevant consideration is whether there is a potential for coverage under the policy based on the insured's reasonable expectations. Certainly, a manufacturer of products reasonably expects a defense against claims of any type that assert its products contain defects that have caused injuries to consumers under policies that provide coverage for claims seeking damages "because of" bodily injury and property damage and which specifically include products liability coverage. That is why manufacturers purchase insurance. Manufacturers would not expect that clever class action lawyers could effectively

void their insurance based on pleading maneuvers designed to make class certification more likely or to prevent a defendant from obtaining coverage. The law does not allow the third party plaintiff to be the arbiter of coverage, and the law does not permit insurers to disavow coverage just because a particular type of claim may not have been anticipated when the insurer wrote its policy or set premiums.

In any event, these so-called "no injury" class actions have been brought by class action lawyers for years and manufacturers have been seeking coverage for them under general liability policies for years. Courts have found coverage in at least some of these cases, including cases involving Hartford. In 2004, for example, this Court held that Hartford had a duty to defend class action lawsuits against cell phone companies where the plaintiffs alleged that radio frequency radiation from cell phones caused injuries including adverse health effects, but were not seeking compensation for such injury. Rather, the plaintiffs sought the cost of headsets to prevent future injuries. *See Voicestream Wireless Corp. v. Federal Insurance Co.*, 112 Fed.Appx. 553 (9th Cir. 2004). Hartford and other insurers have had plenty of time to incorporate the risks of such cases into premium and risk calculations (and may have done so for all we know). Alternatively, insurers could have amended their policies to clearly exclude such claims from coverage. Hartford issued the policies in this case from 2004 to 2013

and did nothing to change the wording of its policies to explicitly exclude claims of this type even though it was aware of the risk, knew it could be held liable to provide coverage and, most importantly, knew and understood that manufacturers expected such coverage. Hartford added other exclusions to its policies over the years to deal with new or increased risks that it decided not to insure. For example, Hartford added an exclusion to its policy to preclude coverage for liabilities arising from data breaches, and excluded claims brought under the Telephone Consumer Protection Act. Hartford knows how to exclude forms of risk it wants to avoid covering.

Instead of including a clear exclusion for what Insurance Amici call "no injury" class actions, Hartford and the rest of the industry did nothing. They kept their policies the same even though they knew manufacturers expected coverage. Presumably, they did so to avoid having to explain to their customers why claims expected to be covered were being excluded. It would be hard to sell coverage to a product manufacturer that excludes coverage for a whole class of claims involving alleged product defects. Better to wait until claims arise and then attempt to deny coverage under existing policy language. But that is not the way insurance is supposed to work. If insurers know that their policyholders expect coverage, they either must write a clear exclusion and inform their customers that coverage is excluded, or they must provide the coverage their policyholders expect. This is

mandated by the duty of good faith and fair dealing that is inherent in the insurer/insured relationship:

> "[I]nsurers' obligations are . . . rooted in their status of purveyors of a vital service labeled quasi-public in nature. Suppliers of services affected with a public interest must take the public's interest seriously, where necessary placing it before their interest in maximizing gains and limiting disbursements . . . [A]s a supplier of a public service rather than a manufactured product, the obligations of insurers go beyond meeting reasonable expectations of coverage. The obligations of good faith and fair dealing encompass qualities of decency and humanity inherent in the responsibility of a fiduciary." (citations omitted

Egan v. Mut. Of Omaha Ins. Co., 24 Cal. 3d 809, 820 (1979).

II. ARGUMENT

A. Liability Insurance Covers Not Only Risks The Insurance Company Anticipated But Also Risks That May Not Have Been Expected When The Coverage Was Written

The Insurance Amici argue that the District Court's ruling amounts to an expansion of coverage that insurers like Hartford did not factor into their risk calculation. Specifically, Insurance Amici posit that "expanding coverage" to include an obligation to defend the *Todd* action "would undermine the risk-for-premium exchange," and would render the risk calculation "next to impossible." But as discussed, the insurance industry has known about these claims for years and that manufacturers expected coverage, so they could have included them in

their risk calculation if, indeed, they haven't already done so.[2] Nonetheless, it is not a defense to coverage that a risk was not anticipated by the insurance company when the policy was written. The only consideration is whether the policy can be read to provide a potential for coverage in keeping with the insured's reasonable expectations.

In *AIU Ins. Co. v. Superior Court*, 51 Cal.3d 807 (1990), the California Supreme Court held that general liability insurance policies cover environmental cleanup and response costs incurred pursuant to the Comprehensive Environmental Response and Compensation and Liability Act (CERCLA). The insurance policies at issue, like those at issue here, were standard policies adopted by the insurance industry. One of the issues the Court addressed was whether the environmental response costs constituted damages "because of" property damage. The government seeking to impose the liability had not suffered any damage, but still was seeking to hold the policyholder liable "because of" damage that had occurred. The Court recognized that although the coverage analysis is focused on the insured's expectations at the time the policy is made, "this emphasis does not

[2] Insurance Amici offer no evidence to support the suggestion that the insurance industry does not already factor the risk of such claims into their premium calculations. Indeed, since Hartford and other carriers have been on notice for years (as we discuss below) that courts will hold them responsible for coverage claims like these, it seems inconceivable that a sector so focused on risk analysis would have ignored this information to its financial peril.

preclude coverage of forms of liability—such as those at issue here—created after the formation of the policy." Id. at 824, n. 8. The Court added:

> "Because the policies in question here are 'comprehensive,' it was within the insured's reasonable expectation that new types of statutory liability would be covered, as long as they were within the ambit of the language used in the coverage provision. As one court has pointed out, failure to cover new liabilities would create a 'discordant result, for it would mean that where courts enlarge liability during the effective period of a liability policy, an insured who contracted for complete coverage of a possible risk would be left without coverage because the scope of the risk had been enlarged by decisional law.' (*Travelers Ins. Co. v. Industrial Indem. Co.* (1971) 18 Cal.App.3d 628, 632, 96 Cal.Rptr. 191.) The same is true when legislatures create entirely new forms of liability. The sole relevant inquiry in determining whether such types of liability are covered is whether, in view of the reasonable expectations of the insured, policy language can be interpreted to embrace the liability that may accrue under new statutory schemes."

Id.

It is not a valid argument, therefore, to claim there is no coverage because *insurers* did not anticipate covering a particular form of liability when they wrote the policy. Coverage exists so long as the policy can be interpreted to cover the liability in keeping with the *insured's* reasonable expectations.

B. The Insurance Industry Has Understood For Years That Manufacturers Expect Coverage In Cases Like *Todd* And Could Have Taken That Into Account In Setting Premiums Or Drafting Policy Language

The form of liability in the underlying *Todd* case, and the expectation of manufacturers that they would be covered for such liabilities, are not new. It has long been the case that manufacturers expect coverage for consumer class actions alleging bodily injuries and/or property damage, where the claimants seek damages "because of" such injuries or damage, even where they purport to disavow certain damages so they can obtain class certification. Not only that, insurers have long understood that their policyholders expect such coverage under standard Commercial General Liability ("CGL") policy language, and this includes Hartford. There is no question that Hartford could have taken this into account in either (1) setting its premiums for the coverage it sold to Appellees; or (2) writing a clear exclusion to eliminate coverage. Instead, Hartford kept its policy language the same and purposefully vague for years as did the rest of the industry.

In *Voicestream Wireless Corp. v. Federal Insurance Co.*, 112 Fed.Appx. 533 (9th Cir. 2004), CGL insurers, including Hartford, were sued by their policyholders, manufacturers of cellular telephones. The manufacturers sought a defense against underlying consumer class action lawsuits alleging that radio frequency radiation emitted by cellphones caused cellular level bodily injuries. The plaintiffs sought damages including the cost of headsets to ameliorate the risk of injury but were not

seeking compensation for injuries they actually suffered. The insurers argued that there was no coverage because the plaintiffs were not seeking damages "because of" bodily injury. In their joint appellate brief to this Court, the insurers argued that "the Underlying Actions—all nominative class actions—share one key characteristic: each of them specifically excludes from the proposed class any person seeking to recover damages on account of actual injury…Rather, the underlying plaintiffs seek headsets for their wireless handheld cellular telephones…to eliminate or reduce the alleged risk of future harm." The insurers added that the "underlying claims did not make allegations of bodily injury—as highlighted by the wholesale exclusion from the putative classes of those claiming damages from actual injury—nor did they seek damages on account of bodily injury."

Like Hartford in this case, the insurers in *Voicestream*—Hartford included—argued that the plaintiffs specifically excluded any claims for actual injury as part of their "litigation strategy," as including claims for particularized injuries "would in all probability eliminate the possibility of class certification." In other words, the plaintiffs were seeking damages because the policyholders' products allegedly caused bodily injuries, but the plaintiffs were not seeking compensation for any injuries they suffered so they could maintain a class action. That is exactly the situation here, and the Ninth Circuit ruled that the insurers, including Hartford, had

a duty to defend. In *Ericsson, Inc. v. St. Paul Fire and Marine Ins. Co.*, 423 F.Supp.2d 587 (N.D. Tex. 2006), the court relied on *Voicestream*, also holding that a CGL insurer had a duty to defend a cell phone manufacturer against a consumer class action seeking to recover the cost to purchase headsets to prevent bodily injuries caused by radio frequency radiation. The insurer argued the plaintiffs were not seeking damages "because of" bodily injury, and the court rejected this argument. The court found that the term "damages" or "damages because of 'bodily injury' is ambiguous and must be construed against" the insurance company "in favor of the duty to defend." *Id*. at 593-594.

While *Voicestream* is unpublished and, therefore, is not cited here as precedent, it is evidence that the insurance industry, including Hartford, has been on notice since at least the early to mid-2000s that product manufacturers expected coverage for consumer class actions involving allegations of bodily injuries and/or property damage, even where the claimants were not seeking damages for individualized injuries as a litigation tactic to maintain class action status.[3] They also were aware that courts might find coverage for such cases, as was the case in *Voicestream* and later *Ericsson*. Nevertheless, insurers like Hartford decided to keep their policies the same and not include an exclusion for such claims that they now contend are not covered, despite court rulings saying that they *are* covered.

[3] Ninth Circuit Rule 36-3 provides that unpublished decisions prior to 2007 can be cited for factual purposes, including notice.

Recognizing that manufacturers expected coverage, and knowing that at least some courts had determined that there was coverage for these types of claims, Insurance Amici's argument that affirming the District Court's decision would somehow amount to an unexpected expansion of coverage that Hartford could not have anticipated defies logic. Hartford issued policies to Appellees from 2004 through 2013 with full knowledge that it had lost a coverage fight in this Court over a virtually identical issue, yet it did nothing to change its policy by issuing a clear and explicit exclusion.

C. A Claim For Damages "Because Of" Property Damage Or Bodily Injury Can Exist Without The Claimant Seeking Recovery For Such Injuries And The Motivation Of The Claimant Seeking Damages Or The Type of Damages Sought Is Irrelevant

In *AIU v. Superior Court, supra*, the California Supreme Court determined there is coverage for damages "because of" property damage even if the claimant suffered none of the harm. The Court also said that the motivation of the claimant seeking damages is not relevant. "[T]he mere fact that the government may seek reimbursement of response costs or injunctive relief without themselves having suffered any tangible harm to a proprietary interest does not exclude the recovery of cleanup costs from coverage under the 'damages' provision of CGL policies." *Id*. at 842.

> "For similar reasons, in plain and ordinary terms such recovery is 'because of' property damage. It is immaterial whether motivations other than protection of property—for example, protection of the

> health of persons living near hazardous waste sites—also contribute to the agencies' pursuit of statutory relief. The Court of Appeal's emphasis on the fact that the agencies' objectives may be regulatory rather than proprietary is misplaced. Whatever their dominant motive, the event precipitating their legal action is contamination of property. The costs that result from such action are therefore incurred 'because of' property damage.

Id. at 842-843.

AIU was decided in 1990. At least since that time the insurance industry has been on notice that claims "because of" property damage or bodily injury can be brought by claimants who suffered no injuries, or who are not seeking redress for any injuries. What matters is whether the "event precipitating their legal action" is bodily injury or property damage. If insurers wanted to exclude coverage for claims based on alleged bodily injury or property damage that are not brought by the party suffering such injuries, or where the damages sought are "economic" or something other than compensation for actual injuries, then they could have written an exclusion for such claims.

The event precipitating the legal action in *Todd* is the alleged "off-gassing" of harmful chemicals and the purported bodily injuries and property damage that resulted. The plaintiffs seek damages because they purchased products with this alleged condition. If the products did not cause these alleged injuries, the plaintiffs would not have brought their action. Plaintiffs spend at least eighteen pages in their complaint making that perfectly clear. Plaintiffs allege that "[c]ustomers

have complained about the amount of chemical odor, and the allergic reactions and symptoms customers attribute to Tempur-pedic's products." In order to recover, plaintiffs must establish that Appellees' products are harmful and that they have been damaged. The fact that for strategic reasons they are seeking some damages and not others does not preclude coverage, and certainly does not eliminate the potential for coverage, the standard for assessing the duty to defend. It is not the type of damages plaintiffs seek but the nature of the risk involved that governs the coverage determination.

In *Vandenburg v. Superior Court*, 21 Cal.4th 815 (1999), the California Supreme Court held that a general liability policy that provides coverage for amounts the insured is "legally obligated to pay as damages" does not preclude coverage where the underlying plaintiff seeks losses pled as contractual damages as opposed to damages in tort. "In holding that coverage for property damage losses is not necessarily precluded because they are pled as contractual damages, the Court of Appeal properly focused on the property itself and the nature of the risk causing the injury." *Id*. at 838. "Coverage under a CGL insurance policy is not based upon the fortuity of the form of action chosen by the injured party . . . determination of coverage must be made individually by considering 'the nature of the [the] property, the injury, and the risk that caused the injury, in light of the particular provisions of each applicable insurance policy.'" *Id*.

The type of damages or form of remedy the *Todd* plaintiffs sought to pursue, and those they decided not to pursue, is of no moment. What matters is that they seek damages, and the damages they seek are "because of" alleged bodily injuries and property damage caused by Appellees' products. Adopting the rule advocated by Hartford and Insurance Amici—that the type of damages sought controls coverage—would erroneously "permit the injured third party to determine coverage," something that is not permitted. *Id*. at 840. "Instead, courts must focus on the nature of the risk and the injury, in light of the policy provisions, to make that determination. In *AIU*, for example, in rejecting a 'form of remedy' approach for a determination of coverage, we focused on the nature of the injury and the specific policy language to decide whether there was coverage . . . ." *Id*. at 841.

Yet Hartford and the Insurance Amici are advocating a rule in this case that would permit the injured third party to determine coverage. In its opening brief, Hartford admits that the plaintiffs have pled the case the way they did just so that they can obtain class certification, because "it is virtually impossible to maintain a class action in which the plaintiffs allege different types of physical injury." A ruling in Hartford's favor here would allow the third-party plaintiff to be the "arbiter of coverage" which is something that California courts have rejected for decades. *Montrose Chemical Corp. v. Superior Court*, 6 Cal.4th 287, 296 (1993) ("The third party plaintiff cannot be the arbiter of coverage.") Under the

"American Rule," each party to a lawsuit pays its own legal costs, regardless of who wins or loses and generally regardless of merit. Insurance for the costs of defending litigation helps mitigate the harshness of this rule on defendants faced with litigation, and in so doing serves an important public purpose. It allows a manufacturer (1) to make and sell competitive products that consumers want and need, and (2) to hedge its future litigation risks associated with possible product defects by paying insurance premiums in exchange for comprehensive coverage. If manufacturers were unable to hedge against these risks with such coverage, manufacturers would be much more reluctant to design, assemble and sell products, and consumers would consequently be harmed by reduced competition, less diverse product offerings and higher prices. The result urged here by Hartford and the Insurance Amici would permit clever plaintiffs' attorneys to financially hobble targeted manufacturers by artful pleading grounded on product defects, but in a way that deprives the manufacturer of the ability to look to the insurance it paid premiums to obtain to cover such litigation risks. Such an outcome is contrary to public policy. It would create an unhealthy incentive for manufacturers to avoid litigation costs by settling meritless lawsuits, bankrupt manufacturers that cannot afford the cost of such litigation and harm the consumer who, ultimately, will have to absorb all these costs through increased prices.

The cases cited by Insurance Amici and Hartford for the proposition that claims for pure "economic losses" are not covered have no bearing on the issues in this case. In those cases, the plaintiffs alleged financial losses and resulting emotional distress. Those cases were not product defect cases where the plaintiffs were seeking damages "because of" bodily injury or property damage caused by an allegedly defective product. Here, the damages sought by the *Todd* plaintiffs arose because the products they purchased caused bodily injuries and property damage. The bodily injuries and property damage did not arise from uncovered financial losses.

Keating v. National Union Fire Ins. Co. of Pittsburgh, Pa., 995 F.2d 154 (9th Cir. 1993), for example, involved an underlying securities fraud lawsuit where the plaintiffs alleged financial investment losses, and resulting emotional injuries. The Court found there was no coverage because "[T]he injuries that the third-party plaintiffs allegedly suffered, including emotional and physical distress, arose from economic loss. Economic loss is not damage or injury to tangible property covered by a comprehensive general liability policy." *Id*. at 156. The damages the plaintiffs sought were not because of bodily injury. The plaintiffs suffered emotional distress because of financial losses. In our situation, the opposite is true. The plaintiffs seek damages because of bodily injuries and property damage from the allegedly defective bedding products. Similarly, the question in *Waller v. Truck*

Ins. Exch., Inc., 11 Cal.4th 1 (1995), was "whether a commercial general liability insurer is required to defend a third party action that seeks incidental emotional distress damages caused by the insured's noncovered economic or business torts." *Id.* at 10. This distinction between economic losses that cause incidental emotional distress, and cases like ours where damages are sought because of bodily injury and property damage, even if those damages are economic, was recognized in *Anthem Electronics, Inc. v. Pacific Employers Ins. Co.*, 302 F.3d 1049 (9th Cir. 2002). The Court distinguished *Waller*, and the insurance company's attempt to misuse *Waller* as the insurers attempt to do here.

> "[T]he insurers argue that the so-called 'economic loss rule' precludes an occurrence here. The cases they rely on, however, simply reiterate that tangible property, as opposed to purely economic interests, must be affected to meet the CGL definition of 'property damage.' *See, e.g., Waller v. Truck Ins. Exchange Inc.* . . . . Here tangible property, in the form of the KLA scanners, was damaged within the meaning of the policies through loss of use. We decline to hold that coverage is precluded simply because the extent of such damage is expressed as an economic loss."

Id. at 1056-1057.

Insurance Amici also cite two Ninth Circuit decisions for the proposition that "this Court previously has found that when a class action suit is devoid of any claim for the type of injury covered by the policy, there can be no coverage." This argument fares no better. The mere statement of the proposition shows it to be misguided, because it ignores the many allegations of bodily injuries and property

damage in the *Todd* complaint as detailed by the District Court. The cases cited by Insurance Amici are far different.

For instance, in *Sony Computer Entertainment, Inc. v. American Home Assurance Co.*, 532 F.3d 1007 (9th Cir. 2008), the plaintiffs alleged that the PlayStation 2 video game console was inherently defective in a way that rendered it unable to play DVDs and certain game discs. *Id*. at 1011. In finding there was no duty to defend, the Court noted that there was a "lack of reference to property damages in the lawsuit." *Id*. at 1020. In *The Upper Deck Co., LLC v. Federal Ins. Co.*, 358 F.3d 608 (9th Cir. 2004), the insured sought a defense against underlying litigation brought against it under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), as well as certain gambling laws. The claimants asserted that the insured violated these laws by randomly inserting valuable cards into packages of entertainment and sports cards. There were no allegations of bodily injury in the complaint, but the insured sought to argue that such claims could possibly be brought at some point in the future and asked the Court to "connect the dots" to determine there was a possibility of coverage. *Id.* at 614. The Court refused, stating that the underlying plaintiffs did "not allege the type of damages covered by the policy. To support a finding of potential liability, the plaintiffs would need to allege *new facts* of bodily injury. Mere speculation that the plaintiffs could or will allege such facts does not give rise to a duty to defend."

Id. at 615-616. Both *Sony Computer* and *Upper Deck* relied on *Low v. Golden Eagle Ins. Co.*, 99 Cal.App. 4th 109 (2002), which Insurance Amici argue has "strikingly similar facts to those at issue here." That is not so. As described in the *Low* opinion, the underlying 17-page pleading contained 61 paragraphs with only one paragraph with even a hint of possible bodily injury. But even in that paragraph, the named plaintiff did not allege that she suffered any bodily injuries, just that the insureds manufactured and distributed diet drugs "without disclosure to her that these diet drugs were extremely dangerous to her health." *Id*. at 112, n. 3.

None of these cases come close to the detailed factual allegations setting forth numerous instances of bodily injuries and property damage allegedly suffered by the class claimants caused by Appellees' bedding products. There is no question that the damages sought by the plaintiffs are "because of" these injuries and damage, and the District Court correctly ruled that Hartford had an obligation to defend. There also is no basis to the argument by the Insurance Amici that finding coverage here would strain the policy terms "beyond their plain meaning" or that upholding the District Court's decision would be "unfair to the insurers here, and would disserve the insurance system." To the contrary, insurers have known for years that manufacturers expected coverage for claims such as those at issue in the *Todd* suit, and that courts have found coverage for similar claims.

Nevertheless, they failed to take any action to amend their policies to exclude these claims from coverage. It would be unfair and a disservice to the insurance system not to find coverage under these circumstances.

CONCLUSION

For all the foregoing reasons, *amici curiae* United Policyholders and the International Sleep Products Association respectfully request this Court to affirm the District Court's judgment.

Respectfully submitted,

Dated: March 24, 2017

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CERTIFICATION OF COMPLIANCE

This brief complies with the type-volume limitations set forth in Fed. R. App. P. 29(a)(5) and 32(a)(7)(B), because this brief contains 5,847 words. The "Word Count" function of Microsoft Word 2010 was used for this purpose.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman.

Dated: March 24, 2017

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PRODUCTS ASSOCIATION

CERTIFICATE OF SERVICE

I certify that on March 24, 2017, I electronically filed a copy of the foregoing motion with the Clerk of Court for the U.S. Court of Appeals for the Ninth Circuit via the appellate CM/ECF system, which will send electronic notification to all registered CM/ECF users in this case.

/s/ David E. Weiss
David E. Weiss