No. 20-16858

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MUDPIE, INC.,

Plaintiff and Appellant,

v.

TRAVELERS CASUALTY INSURANCE COMPANY OF AMERICA,

Defendant and Appellee.

BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING EN BANC

Appeal from the United States District Court
for the Northern District of California
Case No. 4:20-cv-03213-JST
Honorable Jon S. Tigar, Judge Presiding

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, United Policyholders (UP) is a nonprofit 501(c)(3) organization, has no public ownership, no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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STATEMENT ON THE AUTHORSHIP OF THIS BRIEF

UP confirms that: (1) no party's counsel authored any part of this brief; (2) no party or party's counsel contributed any money to fund preparation of submission of this brief; and (3) no person, other than UP and UP's counsel, contributed any money to prepare or submit this brief.

CONSENT TO FILE PURSUANT TO FED. R. APP. PROC. 29(a)(2)

All parties have consented to UP filing this amicus curiae brief. Fed. R. App. Proc. 29(a)(2).

SOURCE OF AUTHORITY TO FILE PURSUANT TO FED. R. APP. PROC. 29(a)(4)(D)

UP's executive management has authority to authorize filing this amicus curiae brief, and has done so. Fed. R. App. Proc. 29(a)(4)(D).

STATEMENT OF INTEREST OF THE AMICUS CURIAE

UP is a non-profit organization whose mission is to serve as an effective voice and a source of information and guidance for insurance consumers around the country. UP is funded by donations and grants. It does not sell insurance or accept money from insurance companies.

During the COVID-19 pandemic, UP's commitment to advocating for policyholders' rights to coverage for their devastating losses is more vital than ever. The public at large has a significant interest in this matter, which is being actively litigated in other SARS-CoV-2 coverage disputes across the country. This Court's disposition of this matter has the potential to affect thousands of policyholders, not only in the Ninth Circuit, but nationwide.

Because of the public interest and the importance of this Court's decision, UP has a special interest in fulfilling the traditional role of *amicus curiae* by supplementing the efforts of counsel and drawing the Court's attention to law that may have escaped consideration. The Court will benefit by reviewing the perspective of UP, which has considerable experience in briefing courts on insurance-coverage issues and an interest in ensuring a proper ruling under the well-established principles of policy interpretation.

STATEMENT OF THE CASE

Rule 35(a)(2) of the Federal Rules of Appellate Procedure authorizes en banc reconsideration of an appeal when "the proceeding involves a question of exceptional importance." This standard is met here because the panel's decision affirming the

judgment against appellant Mudpie, Inc. will have a wide-ranging effect on both SARS-CoV-2-related coverage disputes in this Circuit and in California, and more broadly with respect to the application of the so-called "efficient proximate cause" doctrine under California law in all manner of first-party insurance-coverage disputes.

In particular, the panel's analysis of the efficient-proximate cause doctrine misapplies the controlling decisions of the California Supreme Court, blunting the effect of that doctrine to the detriment of the policyholders the doctrine was created to protect. En banc review is necessary to ensure that the "law of the circuit" on this vital issue of California insurance law is congruent with California law as declared by the California Supreme Court.

ARGUMENT

A. The panel's opinion relies upon a definition of "efficient proximate cause" that the California Supreme Court abandoned in 1989

"In California, the efficient proximate cause doctrine is 'the preferred method for resolving first party insurance disputes involving losses caused by multiple risks or perils, at least one of which is covered by insurance and one of which is not.'" *Vardanyan v. AMCO Ins. Co.,* 243 Cal.App.4th 779, 786 (2015) ("*Vardanyan*"),

citing *Julian v. Hartford Underwriters Ins. Co.,* 35 Cal.4th 747, 753 (2005).

Under the efficient-proximate-cause doctrine, "When a loss is caused by a combination of a covered and specifically excluded risks, the loss is covered if the covered risk was the efficient proximate cause of the loss." *State Farm Fire & Casualty Co. v. Von Der Lieth*, 54 Cal.3d 1123, 1131 (1991).

The doctrine is codified in California Insurance Code section 530. *Vardanyan*, 243 Cal.App.4th at 786.[1] As a result, "Policy exclusions are unenforceable to the extent that they conflict with Insurance Code section 530 and the efficient proximate cause doctrine." *Id*. This means that an insurer "cannot contract around the efficient proximate cause doctrine to give broader effect to its policy exclusions." *Id*.

The seminal efficient-proximate-cause case in California is *Sabella v. Wisler*, 59 Cal.2d 21 (1963). In *Sabella*, a building

[1] California Insurance Code section 530 states: "An 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."

contractor constructed a house on uncompacted fill and negligently installed a sewer line. Eventually the sewer line ruptured, causing water to saturate the ground surrounding the insureds' house, resulting in subsidence. *Id.* at 26, 27. The homeowner's policy specifically excluded "settling," but because it was an "all risk" policy that covered all perils other than those specifically excluded, it provided coverage for loss caused by the contractor's negligence. *Id.* at 30-31.

In a bench trial, the trial court found that the loss was not covered because settling was a specifically excluded peril under the policy. *Id.* at 24. The Supreme Court granted review and reversed, based on the efficient-proximate-cause doctrine. *Id.* at 31 ("Plaintiff Sabellas alternatively and correctly argue, however, that defendant National Union is liable because the rupture of the sewer line attributable to the negligence of a third party, rather than settling, was the efficient proximate cause of the loss").

In reaching this conclusion, the Supreme Court explained that the efficient proximate cause of the loss is "the one that sets others in

motion." *Id*. at 31. The Court found that the broken pipe was the "predominating or moving efficient cause of the loss." *Id*. at 32.

The *Mudpie* panel relied on this definition of "efficient proximate cause" in its opinion, finding that the SARS-CoV-2 virus (Virus) was "'the efficient cause,' i.e., the one that set the others in motion". (Typed opn. at 18.)

But the California Supreme Court expressly abandoned this definition of "efficient proximate cause" in *Garvey v. State* Farm *Fire & Casualty Co.*, 48 Cal.3d 395, 403 (1989), explaining: "We use the term 'efficient proximate cause' (meaning predominating cause) when referring to the *Sabella* analysis because we believe the phrase 'moving cause' can be misconstrued to deny coverage erroneously, particularly when it is understood literally to mean the 'triggering' cause."

Hence, after *Garvey*, the "efficient proximate cause" of the loss is understood to mean "the predominant cause or the most important cause of the loss." *Vardanyan*, 243 Cal.App.4th at 787.

In *Garvey*, the policyholders were insured under an all-risk policy that included exclusions for losses "caused by, resulting from,

contributed to or aggravated by any earth movement" as well as losses caused by settling of foundations, walls, floors, roofs, or ceilings." *Id.*, 48 Cal.3d at 399-400. The policyholders filed a claim after an addition to their home began to pull away from the main structure. The insurer denied the claim based on the exclusions for earth movement and settling. *Id.* at 400.

Although the policy purported to exclude coverage if earth movement or settling merely "contributed to" the loss, the Supreme Court held that the efficient-proximate-cause doctrine applied, so that the exclusion precluded coverage only if an excluded peril—earth movement or settling—was the efficient proximate cause of the plaintiffs' loss. *Id.* at 412-413.

The same logic applies here. Mudpie's business-interruption loss was the product of two distinct perils, the Virus itself and the closure orders that required Mudpie to close its business. But the panel concluded that, because the closure orders were adopted to prevent the spread of the Virus, the Virus was necessarily the "efficient proximate cause" of the loss because it "set the others in motion." (Typed opn. at 18, citing *Sabella*.)

The panel's analysis is problematic because *Garvey* specifically abandoned this definition of efficient cause and replaced it with "predominating cause" because of its concern that the original *Sabella* definition could be "misconstrued to deny coverage erroneously." *Garvey*, 48 Cal.3d at 403-404. The *Mudpie* panel appeared to overlook this change. As a result, it committed the very error that the *Garvey* court sought to foreclose.

The flaw in the panel's approach is precisely why the *Garvey* court abandoned *Sabella's* framing of the "efficient proximate cause" as the triggering cause that sets the others in motion. The panel accurately pointed out that it cannot be debated that closure orders were issued in response to the Virus, in an attempt to limit its spread. (Typed opn. at 18.) In short, it pointed out that the Virus was a "but for" cause of the closure orders and was also their "triggering cause."

But the "triggering cause" of a loss will *always* be a "but for" cause of the loss because it precedes the other causes and sets them in motion. *Garvey*, however, specifically explained that the triggering cause is not necessarily the predominant cause of the loss. *Id.*,

48 Cal.3d at 404-404. The *Garvey* court observed that the efficient-proximate-cause approach applies "whenever there exists a causal *or dependent* relationship between covered and excluded perils." *Id.*, 48 Cal.3d at 404 (emphasis added). This reference to a "dependent relationship" between the perils makes clear that "but for" causation is not the test for determining the predominant cause of a loss.

The panel essentially found that, because the closure orders were issued in response to the Virus, the Virus will necessarily be the predominant cause of a policyholder's loss that flows from the closure orders. But the relevant question for application of the efficient-proximate-cause doctrine is not, "What caused the authorities to issue the closure orders?" It is instead, "What was the predominant cause of the policyholder's loss?"

This is a factual question for the jury to decide, not an issue of law for courts to resolve on the pleadings, as the panel did here. *See Garvey,* 48 Cal.3d at 412 ("Coverage should be determined by a jury under an efficient proximate cause analysis."); *Howell v. State Farm Fire & Casualty Co.*, 218 Cal.App.3d 1446, 1459 (1990) ("what is

clear after *Garvey* is that the issue of efficient proximate causation is a question of fact for the jury").

In Virus-related business-interruption cases that proceed to trial, insurers will be entitled to argue to the jury that the Virus was the predominant cause of the loss. But in response, and depending on the facts of the case, policyholders will be able to argue that, had the closure orders not been issued, the Virus may not have forced them to close their facilities and shutter their businesses. The panel erred in deciding this factual question in favor of the insurer at the pleading stage.

B. En banc review is warranted to ensure that this Circuit applies the efficient-proximate-cause doctrine in a way that is congruent with the California Supreme Court's decisions

The efficient-proximate-cause doctrine is not a niche rule that applies to a narrow range of insurance disputes. Rather, it can apply in all manner of first-party cases where the loss has been the result of the interaction of multiple perils. Its application has resulted in coverage for homeowners whose houses have been damaged by floods, fires, landslides, earth movement, insects, and negligent

construction.[2] It also been applied to allow coverage for commercial losses for rain damage, negligent product labeling, inventory damage, damage to a dock, and leaking gasoline storage tanks.[3] Its reach has even extended to losses by a movie company that was forced to relocate after a filming site in Israel was struck by rockets, and to losses under a professional-liability policy.[4]

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[2] See, e.g., *Sabella,* 59 Cal.2d at 24 (earth movement, water leaks, negligence); *Sauer v. General Ins. Co. of America*, 225 Cal.App.2d 275, 279 (1964)(same); *State Farm Fire & Casualty Co. v. Von Der Lieth*, 54 Cal.3d at 1127 (landslide); *Howell v. State Farm Fire & Casualty Co.*, 218 Cal.App.3d at 1449 (burn damage to hillside resulting in landslide from rains); *Vardanyan v. AMCO Ins. Co.*, 243 Cal.App.4th at 796 (insect and water damage); *Davis v. United Services Auto. Assn.*, 223 Cal.App.3d 1322, 1328 (1990)(negligent construction and earth movement).

[3] See, e.g., *Tento Intern., Inc. v. State Farm Fire and Cas. Co.,* 222 F.3d 660, 662 (9th Cir. 2000)(damage to commercial property from rain during roof repair); *Berry v. Commercial Union Ins. Co.*, 87 F.3d 387, 389 (9th Cir. 1996)(mislabeled fungicide flushed through irrigation system); *Brian Chuchua's Jeep, Inc. v. Farmers Ins. Group*, 10 Cal.App.4th 1579, 1581 (1992)(leaking underground gasoline tanks); *Gillis v. Sun Ins. Office, Limited*, 238 Cal.App.2d 408, 417 (1965)(damage to dock from wind and waves); *Pyramid Technologies, Inc. v. Hartford Cas. Ins. Co.*, 752 F.3d 807, 821 (9th Cir. 2014)(damage to contents of warehouse after flood).

[4] *Universal Cable Productions, LLC v. Atlantic Specialty Insurance Company*, 929 F.3d 1143, 1161 (9th Cir. 2019)(movie company filming-site relocation); *Conestoga Services Corp. v. Executive Risk*

In short, the efficient-proximate-cause doctrine is a vital part of California insurance law that assures that all policyholders receive the benefit of California Insurance Code section 530 and, hence, of the insurance coverage they purchase. The panel's misapplication of the doctrine will necessarily narrow its scope within this Circuit, depriving California policyholders whose claims are litigated in federal court of the full benefit of the California Supreme Court's decisions.

From UP's perspective, the potential damage to California policyholders' rights resulting from the *Mudpie* panel's misapplication of the doctrine is substantial enough to warrant—indeed, to require—en banc review.

CONCLUSION

There should not be two versions of the efficient-proximate cause doctrine, a broad one that is applied in the California courts and a narrower one that is applied by the federal courts within this Circuit. This Court should accordingly grant en banc review to ensure that its application of the efficient-proximate-cause doctrine

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Indemnity, Inc., 312 F.3d 976, 983 (9th Cir. 2002)(dispute over whether loss caused by a bankruptcy or by malpractice).

is fully congruent with the controlling decisions of the California Supreme Court.

Dated: November 4, 2021

Respectfully submitted,

SHERNOFF BIDART ECHEVERRIA LLP

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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This brief contains 2,319 **words**, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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Mudpie, Inc. v. Travelers Casualty Insurance Company of America
Ninth Circuit No. 20-16858
USDC No.: 4:20-cv-03213-JST

CERTIFICATE OF SERVICE

I hereby certify that on **November 4, 2021,** I filed the foregoing document entitled **BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING EN BANC** with the United States Court of Appeals for the Ninth Circuit through the Court's CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system, as follows:

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I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on **November 4, 2021,** at Claremont, California.

/s/ *Isabel Cisneros-Drake*
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