

January 26, 2022

Honorable Chief Justice Tani G. Cantil-Sakauye
and the Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-7303

Letter in Support of Petition for Review of *The Inns By The Sea v. California Mutual Insurance Company*, No. S272450 (Sixth Appellate District, Case No. HO48443)

To the Honorable Chief Justice and Associate Justices of the California Supreme Court:

I write on behalf of amici curiae United Policyholders, The Thomas Keller Restaurant Group, The Madera Group, Garden Fresh Restaurants, The Simon Wiesenthal Center, Consumer Federation of California, and The Hospitality Industry Reimagined Security Trust to support the petition for review filed in *The Inns By The Sea v. California Mutual Insurance Company*, No. S272450. The Court should grant review because a decision from this Court is “necessary to secure uniformity of decision” and “to settle an important question of law.” California Rules of Court, Rule 8.500(b)(1).

Interest of the Amici Curiae

United Policyholders (“UP”) is a non-profit organization based in California that has served as a respected voice for the interests of consumers and policyholders across the country for 30 years. The organization is tax-exempt under Internal Revenue Code §501(c)(3). UP is funded by donations and grants. It does not sell insurance or accept money from insurance companies. Individual policyholders across the country routinely call upon UP for help in the wake of large-scale national disasters such as hurricanes in the Gulf and across the Eastern Seaboard; floods and windstorms in the Midwest; wildfires in the West; and most recently, during the COVID-19 pandemic. UP’s work is divided into three program areas: *Roadmap to Recovery* (disaster recovery and insurance claim help for survivors of wildfires, floods, hurricanes, windstorms, earthquakes and other natural disasters); *Roadmap to Preparedness* (insurance and financial literacy education and disaster preparedness); and *Advocacy and Action* (advancing pro-consumer laws and public policy).

UP’s Executive Director, Amy Bach, has served as an official consumer representative to the National Association of Insurance Commissioners since 2009. In that role, UP assists state regulators in monitoring policy language and claims practices and contributes to the development of model laws and regulations. Since the creation of the elected position in 1988, UP has worked closely with each California

Insurance Commissioner, including now Ricardo Lara. UP is also a member of the Federal Advisory Committee on Insurance to the U.S. Treasury, and a regular participant before the National Association of Insurance Legislatures. Public officials, regulators, legislatures, academics, and journalists regularly seek UP's input on insurance and related legal matters.

As part of its *Advocacy and Action* initiative, UP is committed to assisting courts in upholding the fundamental purpose of insurance, which is loss indemnification. A diverse range of policyholders throughout California regularly communicate with UP, which allows UP to provide courts with topical information through the submission of amicus briefs. This Court recently cited UP's brief in *Association of California Insurance Companies v. Dave Jones, Insurance Commissioner*, (2017) 2 Cal. 5th 376, 83. The U.S. Supreme Court has done the same. *See, Humana Inc. v. Forsyth*, 525 U.S. 299, 314 (1999).

In connection with the COVID-19 pandemic, UP has assisted impacted business owners by maintaining a library of resources at uphelp.org/COVID. UP has also sought to counter the insurance industry's attempt to use the pandemic to realize a dramatic narrowing of the historically broad "all risks" property and business insurance. UP has filed *amicus curiae* briefs in state and federal courts around the country that push back against the insurance industry's campaign to upend decades of carefully reasoned decisions – including California state court decisions such as *Hughes v. Potomac Ins. Co. of D.C.*, 199 Cal. App. 2d 239 (1962) – regarding the meaning of words "physical loss" and/or "damage" when used in property insurance policies.

KRM Inc., D/B/A Thomas Keller Restaurant Group is the managing entity for the French Laundry and Bouchon Bistro. The French Laundry is a world-renowned, three-Michelin-starred restaurant which serves Chef's daily nine-course tasting menu and nine-course vegetable tasting menu made with the finest quality ingredients available. Bouchon Bistro has a one-star rating recipient from the France-based Michelin Guide San Francisco, Bay Area & Wine Country, a three-and-a-half star rating from the Santa Rosa Press Democrat, as well as a three star rating from the San Francisco Chronicle.

The Madera Group, LLC is a California limited liability company with its principal place of business in West Hollywood, California. Madera owns a host of casual and upscale restaurants in California and Arizona, offering full menu, in-store dining for brunch, lunch, and dinner, together with event function spaces, catering, take-out service, and delivery.

Garden Fresh Restaurants, LLC ("Garden Fresh") is the debtor in a pending Chapter 7 case. Garden Fresh operated buffet-style chain restaurants under the brand names, Souplantation and Sweet Tomatoes, throughout the United States. At the time of the bankruptcy filing, Garden Fresh operated over 90 restaurants across the United States. To supply its restaurants, Garden Fresh operated "central kitchens," and stored food and other supply inventory in distribution centers in Riverside, California, and in Kennesaw, Georgia.

The Simon Wiesenthal Center is a global human rights organization researching the Holocaust and hate in both a historic and contemporary context. With a constituency of over 400,000 households in

the United States, it is accredited as an NGO with international organizations, including the United Nations, UNESCO, Organization of American States, the Latin American Parliament, and the Council of Europe. The Simon Wiesenthal Center also has an acclaimed educational arm, The Museum of Tolerance, which is the only museum of its kind in the world. Moriah Films, the two-time Academy Award winning film division of the Simon Wiesenthal Center, was created to produce theatrical documentaries to educate both national and international audiences, with a focus on contemporary human rights, ethical issues, and the Jewish experience.

The Consumer Federation of California (CFC) is a nonprofit advocacy organization that, for the last 61 years, has been a powerful voice for consumer rights. CFC campaigns for state and federal laws that place consumer protection ahead of corporate profit. Each year, CFC testifies before the California Legislature on dozens of bills that affect millions of California consumers, including advocating for proper and comprehensive consumer protection in the insurance marketplace, including opposing insurance industry proposals that seek to undermine foundational consumer protection statutes that protect California consumers and small businesses. CFC also appears before state agencies in support of strong and comprehensive consumer regulations. CFC's mission is to protect consumers and seek justice in the marketplace. CFC's Executive Director, Robert Herrell, served for almost six years as a Deputy Insurance Commissioner at the California Department of Insurance. CFC is concerned that after the devastating impact the COVID-19 pandemic has had on businesses and their owners, individual policyholders are being denied coverage after purchasing a broad "all-risk" insurance policy from insurance companies.

The Hospitality Industry Reimagined Security Trust (THIRST) began as a targeted advocacy organization focused on state-by-state business interruption insurance reform across the United States. With teams in over 18 states and DC, THIRST seeks meaningful and lasting action to adequately support and protect the hospitality industry through legislation, reform, and community support.

UP, Thomas Keller Restaurant Group, The Madera Group, Garden Fresh, The Simon Wiesenthal Center, CFC, and THIRST seek to fulfill the "classic role of *amici 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 v. Commissioner of Labor & Indus.* (9th Cir. 1982) 694 F. 2d 203, 204.

The undersigned is not charging for its services in connection with this request.

The Court should grant review so that policyholders can benefit from a proper and consistent interpretation of California law as resolved by this Court

The Court should grant review to settle whether policyholders are entitled to coverage under state insurance law for business income losses resulting from the SARS-CoV-2 virus and the COVID-19 pandemic or, at least, whether they can proceed past the pleading stage, given the court of appeal's sustaining of a demurrer without leave to amend based on unprecedented fact finding at the pleading stage.

The presence of the virus and the COVID-19 pandemic have had a devastating impact on businesses throughout California. At least one state supreme court has characterized the COVID-19 pandemic as a natural disaster just like a wildfire, flood, earthquake or tornado. *See Friends of Devito v. Wolf*, 227 A. 3d 872 (Pa. 2020). California businesses purchase broad “all risk” insurance policies to cover losses from natural disasters like these. Absent an applicable exclusion, a policyholder would reasonably expect coverage for such losses.

The basic coverage provision at issue in this case is the same standard policy language that is at issue in many other cases pending before the state and federal courts in California.¹ Until now, the federal courts have led the way, without guidance from this Court, in deciding these critical issues against policyholders on motions to dismiss. The decision of the court of appeal below, while also decided against the policyholder at the pleading stage, contradicts key underpinnings of the federal court decisions. Specifically, the court of appeal recognized that a deadly virus might cause physical damage to property and resulting losses. This is something the federal decisions have refused to recognize. Nevertheless, the court of appeal found that while the insured may have pled that it suffered physical damage to its property from the virus, the insured’s losses were not caused by such physical damage. Instead, the court of appeal made a factual determination that governmental orders caused the policyholder’s losses despite contrary factual allegations in the complaint. This factual finding, improperly reached on a demurrer, contradicts what the federal courts have decided and what the insurers have argued in many cases, particularly those cases involving a standard virus exclusion. In cases with virus exclusions, the insurers have argued, and the courts have held, that the virus caused the losses – not the governmental orders. In this case, where there is no virus exclusion, the court below held the opposite, sustaining the policyholder’s demurrer without leave to amend.

This is a rare case. Most of the California COVID-19 insurance cases are proceeding in federal court. This is because in most cases California businesses must purchase coverage from insurers located outside California. Of the top twenty-five property/casualty insurers in the country as ranked by *Insurance Business* magazine² only one is located in California.³ This means that in most cases there will be federal diversity jurisdiction. Thus, California policyholders either file in federal court to avoid delay knowing that if they file in state court their insurers will remove anyway, or they file in state court and the insurers immediately remove. As Petitioner points out in the Petition for Review, while there are only 12 appeals pending in the California Courts of Appeal, there are 53 appeals before the Ninth Circuit. As a result, California policyholders are having their cases decided by federal judges left only to guess how this Court might resolve the disputed issues, even though insurance issues are uniquely the province of state law. *See Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

¹ There are a variety of other policy forms at issue in the COVID-19 litigation with different coverage provisions and exclusions, but the standard policy language at issue here is the most common, and a ruling in this case will eliminate uncertainty and provide guidance to lower state and federal courts in California dealing with the vast majority of cases.

² (See <https://www.insurancebusinessmag.com/us/guides/these-are-the-top-25-property-casualty-insurance-companies-in-the-us-32630.aspx>.)

³ The undersigned researched all of the insurance companies listed and only Farmers is located in California.

While the Ninth Circuit has the ability to certify questions of unresolved state law to this Court, the Ninth Circuit has refused. For example, in *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.* (9th Cir. 2021) 15 F. 4th 885, 890, n. 3, the Ninth Circuit rejected the policyholder’s certification request, even though the panel recognized that in the absence of California Supreme Court precedent it had to determine what result the California Supreme Court would reach. *Id.* at 889. The three-judge panel in that case certainly recognized the importance of its decision. Under Ninth Circuit jurisprudence, a single decision on an issue by a three-judge panel is binding on the entire circuit *Morton v. De Oliveira* (9th Cir. 1993) 984 F. 2d 289, 292. Given that, we now have a decision by a single three-judge panel (with one member from Alaska, another from Oregon, and the third member a district court judge sitting by designation) that is binding California precedent over the vast majority of California COVID-19 insurance cases involving the same issues decided in *Mudpie*. If this Court does not step in and grant review in this case, California policyholders will quickly lose any ability to have their cases evaluated based on guidance supplied by the only Court tasked with making a definitive decision regarding California law in this critical area.

Assuming the Ninth Circuit panels deciding the 52 cases currently on appeal to that court adhere to *Mudpie* and reject the policyholder claims involving the issues decided in that case, those California policyholders will have no recourse if this Court at some future point in time decides to take up the issues in another case. Thus, the three-judge panel that decided *Mudpie* would have sealed the fate for California policyholders with cases pending in the federal courts that involve the same issues resolved in *Mudpie*. These policyholders cannot wait for these issues to “germinate” in the lower state appellate courts before this Court steps in.

An article written years before the current pandemic succinctly sums up the problem and why the Court should grant review so that California policyholders can at least know that their coverage disputes are being decided under a proper interpretation of California state insurance law.

Federal courts exercising diversity jurisdiction decide cases differently than state courts despite their obligation under the *Erie* doctrine to apply substantive law in the same manner as the state courts. Federal courts periodically make incorrect *Erie* guesses” of unsettled questions of state law as later determined by the state’s highest court. In many instances, however the state’s highest court will not have the opportunity to correct the error because the issue never reaches it.

J. Watkins, *Erie Denied: How Federal Courts Decide Insurance Coverage Cases Differently and What to do About it*, 21.2 Ct. Ins. Law. J. 456 (2015).

The author further commented that the “misapplication of state law [by federal courts] has serious consequences that directly undermine the fundamental principle of federalism underlying *Erie*, namely the state courts’ ability to decide and shape state law.” *Id.* at 473.

This case presents critical and undecided state insurance law issues. The federal courts are now making law without the benefit of this Court’s guidance, and they are refusing to seek it. California businesses have suffered incredibly from the COVID-19 pandemic and are seeking to have their insurance

Honorable Chief Justice Tani G. Cantil-Sakauye and the
Honorable Associate Justices
January 26, 2022
Page 6

ReedSmith

policies enforced according to California law. The Court should take this opportunity to decide these issues so that California citizens can all benefit from a uniform rule of law and not be governed by federal court “guessing” as to how this Court might rule.

The Court should review the *Inns* decision.

Very truly yours,



David E. Weiss

DEW:gg

Document received by the CA Supreme Court.

PROOF OF SERVICE

I am employed in the City of San Francisco, State of California, in the office of a member of the bar of this Court, at whose direction the service is made. I am over the age of eighteen years, and not a party to the within action. My business address is Reed Smith LLP, 101 Second Street, Suite 1800, San Francisco, CA 94015-3659. On January 26, 2022, I served the document titled **LETTER IN SUPPORT OF PETITION FOR REVIEW** on the parties in this action as follows:

[See Attached Service List]

- ☐ by transmitting via facsimile on this date from fax number +1 415 391 8269 the document(s) listed above to the fax number(s) set forth below. The transmission was completed before 5:00 PM and was reported complete and without error. The transmission report, which is attached to this proof of service, was properly issued by the transmitting fax machine. Service by fax was made by agreement of the parties, confirmed in writing. The transmitting fax machine complies with Cal. R. Ct. 2.306.
- ☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as listed on the attached Service List. I am readily familiar with the firm's practice of collection and processing of correspondence for mailing. Under that practice, it 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 in this Declaration.
- ☐ by placing the document(s) listed above in a sealed envelope(s) and by causing personal delivery of the envelope(s) to the person(s) at the address(es) set forth below.
- ☐ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
- ☒ by placing the document(s) listed above in a sealed envelope(s) and consigning it to an express mail service for guaranteed delivery on the next business day following the date of consignment to the address(es) listed on the attached Service List.
- ☒ by transmitting via email to the parties at the email addresses listed on the attached Service List via TrueFiling:

Document received by the CA Supreme Court.

I declare under penalty of perjury that the foregoing is true and correct. Executed this
26th day of January, 2022, at San Francisco, California.



Glenn E. Guzik

Document received by the CA Supreme Court.

Service List
Docket S272450

Electronic Service Via TrueFiling

Scott P. DeVries
Hunton Andrews Kruth LLP
50 California Street, Suite 1700
San Francisco, CA 94111
Tel: 415.975.3720
Fax: 415.975.3701
Email: sdevries@huntonak.com

Counsel for Petitioner:
The Inns by the Sea

Samuel I. Ferguson
Ferguson Law P.C.
1816 5th Street
Berkeley, CA 94710
Tel: 510.548.9005
Email: sam@fergusonlawpc.com

Michael J. Reiser
Matthew Whitacre Reiser
Isabella Martinez
Reiser Law
1475 N Broadway, Suite 300
Walnut Creek, CA 94596-4643
Tel: 925.256.0400
Email: michael@reiserlaw.com
Email: matthew@reiserlaw.com
Email: isabella@reiserlaw.com

Tyler Roberts Meade
The Meade Firm P.C.
12 Funston Avenue, Suite A
San Francisco, CA 94129-4507

Mark G. Bonino
Ryan Zachary Keller
Hayes Scott Bonino Ellingson Guslani
Simonson & Clause
999 Skyway Road, Suite 310
San Carlos, CA 94070
Tel: 650.486.2869
Fax: 650.637.8071
Email: mbonino@hayesscott.com
Email: rkeller@hayesscott.com

Counsel for Defendant/Respondent:
California Mutual Insurance Company

Document received by the CA Supreme Court.

Via U.S. Mail

Robert L. Wallan
Pillsbury Winthrop Shaw Pittman LLP
725 South Figueroa Street
36th Floor
Los Angeles, CA 90017-5524
Tel: 213.488.7100
Fax: 213.629.1033
Email: Robert.wallan@pillsburylaw.com

Counsel for Amicus Curiae:
In-N-Out Burgers

David B. Goodwin
Covington & Burling LLP
Salesforce Tower
415 Mission Street
Suite 5400
San Francisco, CA 94105-2533
Tel: 415.591.7074
Email: dgoodwin@cov.com

Counsel for Amici Curiae:
Padres LP
San Francisco Giants Baseball Club LLC
Los Angeles Dodgers LLC
Angels Baseball LP
Oakland Athletics Baseball Company

Mark D. Plevin
Crowell & Moring LLP
3 Embarcadero Center
26th Floor
San Francisco, CA 94111
Tel: 415.365.7446
Fax: 415.986.2827
Email: mplevin@crowell.com

Counsel for Amici Curiae:
National Association of Mutual Insurance
Companies
American Property and Casualty Insurance

Laura Foggan
Crowell & Moring LLP
1001 Pennsylvania Avenue NW
Washington, D.C. 20004
Tel: 202.624.2774
Fax: 202.628.5116
Email: lfoggan@crowell.com

Counsel for Amici Curiae:
National Association of Mutual Insurance
Companies
American Property and Casualty Insurance

Wystan M. Ackerman
Robinson & Cole, LLP
280 Trumbull Street
Hartford, CT 06103
Tel: 860.275.8388
Email: wackerman@rc.com

Counsel for Amici Curiae:
National Association of Mutual Insurance
Companies
American Property and Casualty Insurance

VIA UPS Overnight

California Court of Appeal
Fourth Appellate District, Division One
Symphony Towers
750 "B" Street
Suite 300
San Diego, CA 92101

Document received by the CA Supreme Court.

The Honorable Lydia M. Villareal
Superior Court of California
County of Monterey
1200 Aguajito Road
Dept. 15A
Monterey, CA 93940

Trial Court Judge

Document received by the CA Supreme Court.

CA Supreme Court Court Name	PROOF OF SERVICE	S272450 Case Number
--------------------------------	-------------------------	------------------------

1. At the time of service, I was at least 18 years of age.
2. My email address used to e-serve: **dweiss@reedsmith.com**
3. I served a copy of the following document(s) indicated below:

Title(s) of documents served:

LETTER: 2022-01-26 Amici UP et al Letter in Support of Petition for Review

Person Served	Service Address	Type	Service Date
Lorelie Masters	lmasters@huntonak.com	e-Serve	01-26-2022 2:26:14 PM
Court Added		55957068-388b-4410-9299-d61e8de41ca1	
Dolores Mayorga	dmayorga@hayesscott.com	e-Serve	01-26-2022 2:26:14 PM
Hayes, Scott, Bonino & Ellingson, LLP		7eec1e14-e7d9-4eb7-ba7b-aed37b846e84	
Samuel Ferguson	sam@fergusonlawpc.com	e-Serve	01-26-2022 2:26:14 PM
Ferguson Law P.C.		cf260107-952a-40bc-a459-b064ddb60aae	
Scott DeVries	sdevries@huntonak.com	e-Serve	01-26-2022 2:26:14 PM
Hunton Andrews Kurth LLP		87e536af-de31-49aa-81cd-178ff234e531	
Jodi Green	jodi.green@millernash.com	e-Serve	01-26-2022 2:26:14 PM
MILLER NASH LLP		7ce2b6fb-f700-4efe-857c-2be4c094211c	
Tyler Meade	tyler@meadefirm.com	e-Serve	01-26-2022 2:26:14 PM
The Meade Firm P.C.		31e550b6-8c87-42b6-90ae-fe9d6834014e	
Edward Sangster	ed.sangster@klgates.com	e-Serve	01-26-2022 2:26:14 PM
K&L Gates LLP		81a9539c-f773-47e5-a436-53b129f9bbcc	
Scott Devries	sdevries@hunton.com	e-Serve	01-26-2022 2:26:14 PM
Hunton Andrews Kruth LLP		25688e54-d1f3-45dc-8d10-37cc2980126b	
Rey Eloriaga	reloriaga@hunton.com	e-Serve	01-26-2022 2:26:14 PM
Self Represented		082bd8ca-9858-45ee-a4fd-b93aa99e23b0	
Michael Finnegan	michael.finnegan@pillsburylaw.com	e-Serve	01-26-2022 2:26:14 PM
Pillsbury Winthrop Shaw Pittman LLP		17401ef4-75d2-4b6b-906e-9450d687e0c0	
Rachel Hudgins	rhudgins@huntonak.com	e-Serve	01-26-2022 2:26:14 PM
Court Added		b8368f94-2064-4dd2-8cdf-47d8780bea7f	
Mark Bonino	mbonino@hayesscott.com	e-Serve	01-26-2022 2:26:14 PM
Hayes Scott Bonino Ellingson Guslani Simonson & Clause		6c14d9f3-f861-401c-91ca-a4a115e01189	
John Hazelwood	jhazelwood@cohenziffer.com	e-Serve	01-26-2022 2:26:14 PM

Cohen Ziffer Frenchman & McKenna LLP		dd2553b0-e996-4baa-94e0-684146611271	
Robert Wallan	robert.wallan@pillsburylaw.com	e-Serve	01-26-2022 2:26:14 PM
Pillsbury Winthrop Shaw Pittman LLP		ad4f79e4-ec5f-481e-9a17-0cb64b85f21c	
Michael Reiser	michael@reiserlaw.com	e-Serve	01-26-2022 2:26:14 PM
Court Added		20480454-2e38-4880-8249-dfc6aab6576c	
Bridget Hirsch	bhirsch@andersonkill.com	e-Serve	01-26-2022 2:26:14 PM
ANDERSON KILL CALIFORNIA LLP.		f88efb24-495d-4324-888d-c8fee0d83b10	

TrueFiling created, submitted and signed this proof of service on my behalf through my agreements with TrueFiling.

The contents of this proof of service are true to the best of my information, knowledge, and belief.

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

01-26-2022

Date

/s/David Weiss

Signature

Weiss, David (148147)

Last Name, First Name (Attorney Number)

Reed Smith LLP

Firm Name