No. 22-16158

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AIU INSURANCE COMPANY and NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA,

Plaintiffs and Counterclaim Defendants – Appellee

v.

McKESSON CORPORATION

Defendant, Counterclaim Plaintiff, Third Party Plaintiff, and Third Party Counterclaim Defendant - Appellant

v.

ACE PROPERTY AND CASUALTY INSURANCE COMPANY

Third Party Defendant and Third Party Counterclaim Plaintiff - Appellee

On Appeal from the United States District Court
for the Northern District of California,
Hon. Jacqueline Scott Corley

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

Kathryn M. Bayes
REED SMITH LLP
355 South Grand Ave.
Suite 2900
Los Angeles, CA 90071
213-457-8000 – Telephone
kbayes@reedsmith.com

Courtney C.T. Horrigan
David A. Ledet
REED SMITH LLP
225 Fifth Avenue
Pittsburgh, PA 15222
412-288-4246 – Telephone
chorrigan@reedsmith.com
dledet@reedsmith.com

Attorneys for Amicus Curiae
United Policyholders

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BRIEF OF *AMICUS CURIAE*

STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

Effectuating the purpose of insurance and interpreting insurance contracts require special judicial handling. United Policyholders ("UP") respectfully seeks to assist this Court in fulfilling this important role. UP is a unique non-profit, tax-exempt, charitable organization founded in 1991 that provides valuable information and assistance to the public concerning insurers' duties and policyholders' rights. UP monitors legal developments in the insurance marketplace and serves as a voice for policyholders in legislative and regulatory forums. UP helps preserve the integrity of the insurance system by educating consumers and advocating for fairness in policy sales and claim handling. Grants, donations, and volunteers support the organization's work. UP does not accept funding from insurance companies.

In furtherance of its mission, UP cautiously chooses cases and regularly appears as *amicus curiae* in courts nationwide to advance the policyholder's perspective on insurance cases likely to have widespread impact. UP has been advocating for policyholders' rights in the courts for decades and has submitted *amicus* briefs in more than 500 cases. For instance, UP's *amicus* brief was cited in the U.S. Supreme Court's opinion in *Humana Inc. v. Forsyth*, 525 U.S. 299, 314 (1999). In addition, UP has submitted *amicus* briefs in many cases before this Court.

UP seeks to fulfill the classic role of *amicus curiae* by supplementing the efforts of counsel and drawing the Court's attention to law that may have escaped consideration. *See* Fed. R App. P. 29(a)(4)(D). As commentators have stressed, an *amicus* is often in a superior position to focus the court's attention on the broad implications of various possible rulings. R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice, 570–71 (1986) (quoting Bruce J. Ennis, *Effective Amicus Briefs*, 33 Cath. U. L. Rev. 603, 608 (1984)).

ARGUMENT

I. The California Supreme Court Should Determine Whether California Will Break With Other Jurisdictions and Constrict the Scope of an Insurer's Defense Obligation Under General Liability Policies.

Wholesale Distributor McKesson Corporation ("McKesson") asks this Court to certify to the California Supreme Court the following two questions:

1. Can bodily injury resulting from an insured's negligence be caused by an "accident," even if the insured's conduct was "deliberate," so long as the insured did not intend or expect to cause injury?
2. Can an insured's mistaken belief or failure to realize the consequences of its conduct itself be an unexpected or unintended "happening" constituting an "accident"?

Dkt. 86-1 at 3.

UP supports McKesson's petition because the resolution of these questions may determine whether California policyholders are willing to manufacture and distribute medication necessary for the provision of healthcare and end-of-life treatment to California residents.

California's Supreme Court is the ultimate arbiter of California law. *See, e.g.*, *Adolph v. Uber Techs., Inc.*, 14 Cal. 5th 1104, 1119 (2023). This Court has previously held that the California Supreme Court should resolve disputes via certified questions when "state law issues are unclear," and that "certification may be especially necessary when a panel faces complex state law issues carrying significant policy implications." *Potter v. City of Lacey*, 46 F.4th 787, 791 (9th Cir. 2022) (citations and internal quotations omitted) (certifying a question to another state's highest court); *accord Kremen v. Cohen*, 325 F.3d 1035, 1037-38 (9th Cir. 2003) (certifying a question to the California Supreme Court and explaining that the Ninth Circuit has "an obligation to consider whether novel state-law questions should be certified—and [the Court has] been admonished in the past for failing to do so" (citation and internal quotation omitted). Both of those factors support certification here, where the questions McKesson seeks to certify involve unsettled issues of California law, the resolution of which will significantly impact the ability of policyholders to obtain defense coverage under general liability insurance policies. Moreover, as explained in more detail in Section II, the Panel's decision deviates from every other court in the United States

that has considered whether the allegations against opioid distributors constitute an "occurrence" or "accident" under the terms of insurance policies like those at issue here—all of which have concluded that the suits against distributors alleged negligent conduct that triggered liability insurers' duty to defend.

The Panel's decision to deny coverage rested on its conclusion that:

> [a]t bottom, the complaints charge McKesson with intentionally oversupplying opioids on a massive scale. It is simply not credible that when doctors prescribed the drugs McKesson allegedly pushed, when pharmacists filled those prescriptions with drugs McKesson distributed, and when end users became addicted to those drugs, overdosed, resorted to heroin, and died, that was a mere matter of fortuity.

AIU Ins. Co. v. McKesson Corp., No. 22-16158, 2024 U.S. App. LEXIS 1806, at *9 (9th Cir. Jan. 26, 2024) (citation and internal quotations omitted). In effect, the Panel improperly conditioned the availability of defense coverage under a liability policy on the Panel's judgment as to whether the policyholder could successfully defend the merits of the lawsuits, even going so far as to make credibility judgments regarding the ultimate success of any defenses the policyholder might raise. Even more striking was the Panel's decision to disregard the explicit negligence causes of action in the exemplar lawsuits and ignore the possibility that any liability established could be based on unintentional conduct. *See AIU Ins. Co. v. McKesson*, 2024 U.S. App. LEXIS 1806, at *5-*6 (acknowledging that "the complaints include standalone causes of action for negligence," but dismissing them by concluding shortly thereafter that "[t]he mere fact that [allegedly] intentional conduct gives rise to causes of action for

negligence does not transform those allegations into allegations of merely accidental conduct").

At essence, the Panel read the complaints and decided based upon the allegations that too many opioids were in circulation and that McKesson was at least partially responsible for that oversupply because it deliberately transported medications from the manufacturers to pharmacies. While it is true that McKesson deliberately distributes medications, this fact in and of itself should not determine whether McKesson or any other policyholder can obtain insurance coverage in California for unexpected harm (an "accident") arising from deliberate business activities. Otherwise, no insurance company would ever have a duty to defend California businesses against allegations of bodily injury or property damage arising from their normal operations. *See Walmart, Inc. v. ACE Am. Ins. Co.*, 04CV-22-2835-4, 2023 WL 9067386, (Ark. Cir. Ct. Dec. 29, 2023) (finding coverage for alleged harm resulting from Walmart's intentional distribution of medications).

Further, such an eviscerating interpretation of an insurance policy's coverage terms and defense obligation would be contrary to the public interest in construing liability insurance policies so as to protect policyholders and injured claimants. *See, e.g.*, *Ray v. Alad Corp.*, 560 19 Cal. 3d 22, 30-31 (1977) (the rule of strict products liability "rests . . . on the proposition that the cost of an injury . . . may be an overwhelming misfortune to the person injured, and a needless one for the risk of

injury can be insured by the manufacturer and distributed among the public as a cost of doing business" (citation and internal quotation marks omitted)); *see also UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358, 372 (1999) (noting that California courts "emphasized the public policy of this state in favor of compensating insureds" when interpreting insurance policies) (collecting cases); *Pitzer College v. Indian Harbor Ins. Co.*, 8 Cal. 5th 93, 102-04 (2019) (finding that an insurance-specific doctrine served a "fundamental public policy" where the doctrine "promotes objectives that are in the general public's interest because it protects the public from bearing the costs of harm that an insurance policy purports to cover"). The Panel's decision failed to consider California public policy when interpreting coverage. Further, the Panel's improper decision on the merits was decided in a vacuum, and failed to recognize that the federal government, not the policyholder, determines the volume of opioid medications available annually in the U.S.

The federal government makes clear that the DEA sets annual production quotas for Schedule I and Schedule II controlled substances that are FDA-approved for medical use, including opioids, "to be manufactured each calendar year to provide for the estimated medical, scientific, research, and industrial needs of the United States . . .." 21 U.S.C. § 826(a)(1); *see also* 21 C.F.R. § 1303 (addressing "[p]rocedures governing the establishment of production and manufacturing quotas"). Nowhere in the Panel's decision does it consider that McKesson's distribution activities secure the

availability of medications that the federal government has determined should be in circulation to meet "medical, scientific, research, and industrial needs" of U.S. residents.

Distributors like McKesson play no role in setting quotas for prescription opioids. *See City of Huntington v. AmerisourceBergen Drug Corp., et al.*, 609 F. Supp. 3d 408, 414 (S.D. W. Va. July 4, 2022) (describing the role of distributors).[1] In fact, the trial court in the bellwether National Opioid MDL suit against distributors concluded after a three month trial that "[n]o culpable acts by [distributors] caused an oversupply of opioids" and "there is nothing unreasonable about distributing controlled substances to fulfill legally written prescriptions." *Id.* at 449, 476. There is a striking contrast between the trial court's determination that McKesson did not act unreasonably and the Panel's determination after reading only complaint allegations that the underlying conduct at issue could only be intentionally wrongful.

If government regulated businesses providing essential healthcare are deprived of coverage because their business activities (like prescription drug distribution) involve risk, and therefore decide to suspend activities in California, that puts individual Californians at risk of losing access to necessary medicines and appropriate care. Numerous publications have recently noted that changes to opioid policies and the effect of opioid litigation have had harmful consequences for patients, who are

[1] McKesson brought this fact to the Panel's attention in its Reply Brief, *see* Dkt. 63 at 11-12, but the Panel appears to have overlooked it.

now being deprived of medications. *See, e.g.*, Christina Jewett & Ellen Gabler, *Opioid Settlement Hinders Patients' Access to a Wide Array of Drugs*, N.Y. TIMES (March 13, 2023) (updated March 14, 2023) https://www.nytimes.com/2023/03/13/us/drug-limits-adhd-depression.html (noting the difficulty patients are having obtaining drugs to treat many conditions, including anxiety, attention deficit hyperactivity disorder and addiction in the wake of new constraints on distributors' business operations). Again, these public policy concerns support certification to the California Supreme Court so that it can assess the state's interests in these vital issues.

II. All Other Courts Have Held that Opioid Allegations Against Distributors Constitute an Occurrence or Accident.

Another factor supporting certification is that the Panel is the only court in the United States that did not read the allegations in opioid liability lawsuits against distributors to allege an "occurrence" or "accident" sufficient to trigger a liability insurer's duty to defend. If California law is to break with the law of its sister states, the California Supreme Court should make that determination.

In *Cincinnati Ins. Co. v. H.D. Smith, L.L.C.*, 829 F.3d 771 (7th Cir. 2016), the United States Court of Appeals for the Seventh Circuit considered whether a lawsuit filed by West Virginia against opioid distributors ("WVAG Lawsuit") alleged a potentially covered occurrence (a term effectively equivalent to accident). The Seventh Circuit concluded that it did, and that the insurer had a duty to defend the distributor. *Id.* On remand, a federal district court held that general liability insurers

also had a duty to indemnify the distributor for its settlement of the WVAG Lawsuit because the court determined the WVAG Lawsuit was covered under general liability insurance policies as a suit seeking damages because of bodily injury caused by an occurrence. *Cincinnati Insurance Co. v. H.D. Smith Wholesale Drug Co.*, 410 F. Supp. 3d 920, 935 (C.D. Ill. 2019) (finding that the primary risk of liability in the WVAG Lawsuit was due to the negligence allegations).

Similarly, in *Liberty Mut. Fire Ins. Co. v. JM Smith Corp.*, 602 F. App'x 115 (4th Cir. 2015), the United States Court of Appeals for the Fourth Circuit considered whether the WVAG Lawsuit alleged a potentially covered "occurrence." The insurer in that case, Liberty Mutual, "contend[ed] on appeal that the [WVAG Lawsuit] d[id] not charge an 'occurrence' within the meaning of JM Smith's CGL policy because the complaint alleges willful and intentional misconduct on the part of the insured that does not constitute an 'accident.'" *Id.* at 119. The Fourth Circuit noted that the insurer's description of the allegations "mischaracterize[d] the complaint," and instead determined that the "actual conduct alleged by the state of West Virginia is the drug distributors' failure to implement sufficient controls and systems to identify and alert regulatory authorities to suspicious prescription drug orders" and that "[t]his type of failure to take reasonable care and the resultant harm is the hallmark of negligence claims." *Id*. at 120. The Fourth Circuit found that opioid-related lawsuits alleged an "occurrence" because "it is at least possible that the state court will find that the

defendant did not take sufficient care to catch suspicious activity and therefore accidentally caused harm to prescription drug abusers and the state of West Virginia," ultimately holding that the insurer had a duty to defend. *Id.* at 120-22.

Most recently, in *Walmart*, a trial court in Benton County, Arkansas considered "whether a sample of the thousands of opioid-related lawsuits (the "Representative Suits") brought against Walmart assert[ed] allegations that [we]re potentially within the coverages of a sample of commercial general liability insurance policies, and thus trigger[ed] the duty to defend or pay defense costs." *Walmart*, 2023 WL 9067386 at *1. The first issue was whether the Representative Suits alleged an "occurrence," which was a requirement for coverage. *Id.* at *1. The court held that "Walmart's intentional distribution and dispensing of medications . . . can give rise to an 'occurrence' under the [policies] so long as the resulting harm was due to alleged negligence and was not expected or intended." *Id.* at *4. The court looked past the insurers argument that "the so-called 'true nature' of the Representative Suits preclude[d] a finding of an 'occurrence,'" and instead found that the lawsuits were "replete with negligence-based allegations, including that Walmart failed to put in place adequate policies, training, and procedures to prevent improper diversion of opioids." *Id.* at *6. As a result, the court concluded "that the Representative Suits allege an 'occurrence' under the [policies]" and that the insurer "owed Walmart a defense obligation in the Representative Suits." *Id.*

As demonstrated above,[2] every other court that has considered whether the allegations in opioid-related lawsuits against distributors such as those in the Exemplar Suits were an "occurrence" has determined that the suits are negligence-based and constitute an "occurrence" under substantially identical CGL policies. Given the nature of the allegations in the Exemplar Suits, the purpose of comprehensive general liability insurance, and the nature of pharmaceutical distributors' business, this makes sense. As the Walmart court noted, "[c]overage for liability arising out of the . . . distribution of drugs would be meaningless if foreseeable adverse consequences of ingesting such drugs were not covered." *Id.* at *4. This also weighs in favor of certifying the questions raised by McKesson to the California Supreme Court.

III. The Panel's Holding Is Far Out of Step with Many Years of California Jurisprudence on the Breadth of a Duty to Defend in Cases Involving Allegations of Deliberate Acts Creating Unintended Consequences.

Beyond the points raised in the first two sections, the Panel's decision also represents a break with long-standing California jurisprudence on the breadth of the

[2] The cases above all involve allegations against opioid distributors. We note that California has considered coverage for opioid manufacturers in *Actavis*, which the Panel looked to "[f]or guidance," but the Panel glossed over and failed to fully consider that the California Court of Appeals clearly distinguished the allegations against manufacturers in *Actavis* from the allegations against distributors, which it explicitly stated were "appreciably different." Dkt. 85-1 at 6; *Travelers Prop. Cas. Co. of Am. v. Actavis Inc.*, 16 Cal. App 5th 1026, 1042 (2017). In addition, the Actavis policies contained products exclusions eliminating coverage for claims involving bodily injury due to a product. This exclusion appears to be the decisive factor in eliminating coverage, give the California Supreme Court's subsequent decision in *Ledesma*. The insurance policies at issue here do not have products exclusions.

duty to defend, and the California Supreme Court should determine whether the duty should be narrowed in the manner suggested by the Panel.

Over thirty years ago, in *Montrose Chemical Corp. v. Superior Court*, 6 Cal. 4th 287 (1993), the California Supreme Court explained the sweeping nature of the duty to defend under California law. There, the Court "recognized that the insured is entitled to a defense if the underlying complaint alleges the insured's liability for damages *potentially* covered under the policy, or if the complaint might be amended to give rise to a liability that would be covered under the policy." *Montrose*, 6 Cal. 4th at 299 (emphasis in original). Put another way, an insurer's duty to defend arises where there is "a bare potential or possibility of coverage." *Id.* at 300 (citation and internal quotations omitted). Further, "[a]ny doubt as to whether the facts establish the existence of the defense duty *must* be resolved in the insured's favor." *Id.* at 299-300 (citations omitted) (emphasis added).

The California Supreme Court has repeatedly reinforced the broad nature of the duty to defend post-*Montrose*, continuing to describe the duty as follows:

- "[A]n insurer may be excused from a duty to defend only when the third party complaint can by no conceivable theory raise a single issue which could bring it within the policy coverage." *Hartford Cas. Ins. Co. v. Swift Distribution, Inc.*, 59 Cal. 4th 277, 288 (2014) (citation and internal quotations omitted).

- "[T]hat the precise causes of action pled by the third-party complaint may fall outside policy coverage does not excuse the duty to defend where, under the facts alleged, reasonably inferable, or otherwise known, the

complaint could fairly be amended to state a covered liability." *Scottsdale Ins. Co. v. MV Transp.*, 36 Cal. 4th 643, 654 (2005) (citation omitted).

- "[There is] a duty to defend whenever the underlying action potentially sought damages covered by the indemnity provisions of the policy. [Citation]. [For example], while the underlying complaint in *Gray* [*v. Zurich Insurance Co.*, 65 Cal. 2d 263 (1966)] originally alleged bodily injury as a result of intentional conduct, it conceivably could have been amended to allege merely negligent conduct." *La Jolla Beach & Tennis Club, Inc. v. Indus. Indem. Co.*, 9 Cal. 4th 27, 39 (1994) (citing *Gray*, 65 Cal. 2d at 277.

- "The duty to defend exists if the insurer 'becomes aware of, or if the third party lawsuit pleads, facts giving rise to the potential for coverage under the insuring agreement.'" *Delgado v. Interins. Exch. of Auto. Club of S. Cal.*, 47 Cal. 4th 302, 308 (2009) (quoting *Waller v. Truck Exchange, Inc.*, 11 Cal. 4th 1, 19 (1995)).

- "We note [] that if facts known to the insurer suggest a possibility that what plaintiff alleges to be [uncovered conduct] may be found to be merely [negligence], then there is potential coverage and consequently a duty to defend." *Horace Mann Ins. Co. v. Barbara B*, 4 Cal.4th 1076, 1087 (1993) (internal citation omitted).

The broad nature of the duty to defend, and California court's expansive consideration of the complaint and matters outside of the complaint stems from the California Supreme Court's reasoning in *Montrose* that a "third party plaintiff cannot be the arbiter of coverage." *Montrose*, 6 Cal. 4th at 296 (citation omitted).

In fact, the California Supreme Court has observed that complaints are often drafted with hyperbole and that this approach by plaintiffs should *not* determine the scope of coverage. *See Gray*, 65 Cal. 2d at 276 ("In light of the likely overstatement of the complaint and of the plasticity of modern pleading, we should hardly designate

the third party as the arbiter of the policy's coverage."); *Lowell v. Maryland Cas. Co.,* 65 Cal. 2d 298, 302 (1966) (recognizing that "[t]he outcome of the third party suit illustrates again the likelihood of overstatement of allegations in a complaint" where the "complaint alleged that the insured engaged in an assault and battery" but "the court did not even hold defendant liable on a theory of negligence"; "[t]he insurer should have recognized this possibility and defended").

The Panel's decision disregarded these settled principles of California law. For example, the Panel acknowledged that the Exemplar Suits include causes of action for negligence, as well as allegations about things McKesson "should have known." *AIU Ins. Co.*, 2024 U.S. App. LEXIS 1806, at *5-6. But the Panel nevertheless accorded no weight to these allegations, reasoning that "the complaints allege that McKesson did know that it was engaging in such conduct and intentionally avoided taking remedial measures," and dismissed underlying plaintiffs' allegations that McKesson "should have known" its conduct was allegedly harmful as having been "deployed to establish that there was a foreseeable risk of harm stemming from McKesson's actions," and for their "legal effect," which the Panel reasoned "is necessary to prove that McKesson acted negligently." *Id.* at *6.

The Panel did not cite to any California law supporting its decision to accord no weight to negligence allegations, and failed to acknowledge and reconcile the

California Supreme Court precedent discussed above that would have suggested that the duty to defend was triggered.

CONCLUSION

The Court should grant the motion for rehearing and rehearing *en banc* and certify the questions identified in McKesson's Petition to the California Supreme Court.

Date: February 20, 2024

/s/ Courtney C.T. Horrigan

Courtney C.T. Horrigan
David A. Ledet
REED SMITH LLP
225 Fifth Avenue
Pittsburgh, PA 15222
(412) 288-4246
chorrigan@reedsmith.com
dledet@reedsmith.com

Kathryn M. Bayes
REED SMITH LLP
355 South Grand Ave.
Suite 2900
Los Angeles, CA 90071
(213) 457-8000
kbayes@reedsmith.com

Counsel for Amicus Curiae United Policyholders

STATEMENT ON THE AUTHORSHIP OF THIS BRIEF (FED. R. APP. PROC. 29(a)(4)(E)

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 consented to the filing of this *amicus curiae brief*. Fed. R. App. Proc. 29(a)(2) and Circuit Rule 29-2(a).

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).

Date: February 20, 2024

/s/ Courtney C.T. Horrigan
Courtney C.T. Horrigan
David A. Ledet
Kathryn M. Bayes

Counsel for Amicus Curiae
United Policyholders

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) No. 22-16158

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CERTIFICATE OF SERVICE

On February 20, 2024, a copy of the foregoing brief was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the Court's appellate CM/ECF system, and that service will be accomplished by the appellate CM/ECF system.

/s/ Courtney C.T. Horrigan
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