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July 12, 2022

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

Re: Letter of United Policyholders in Support of Petition for Review of *ConAgra Grocery Products Company, et al. v. Certain Underwriters at Lloyd's, London, et al.*, No. S274797 (First Appellate District, Division Two, Case No. A160548)

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

I write on behalf of United Policyholders in support of the petition for review in *ConAgra Grocery Products Company v. Certain Underwriters at Lloyd's, London*, No. S274797, reported at (2022) 77 Cal.App.5th 729 ("*ConAgra*").

ConAgra provides the first opportunity in 30 years for this Court to address Insurance Code section 533 in the context of liability insurance. That statute codifies California's public policy against indemnifying an insured for "a loss caused by the wilful act of the insured," as well as the public policy in favor of indemnification for negligent conduct. *ConAgra* misconstrues section 533 in several critical respects.

First, *ConAgra* extends the scope of section 533 far beyond any prior decision addressing the statute. This Court held that section 533 applies only if the insured (a) committed an intentional act and (b) *either* acted with a "preconceived design to inflict injury" *or* committed a "wrongful act [where] the harm is inherent in the act itself." *J.C. Penney Casualty Insurance Co. v. M.K.* (1991) 52 Cal.3d 1009, 1020-21, 1025. Many appellate courts apply that standard. Other appellate courts apply a lesser standard that allows reckless conduct to trigger section 533. But *ConAgra* went so far as to apply section 533 to a cause of action that requires only negligence to impose liability.

Second, *ConAgra* created a split among the appellate courts concerning the evidence that could show "wilful" misconduct for purposes of section 533. Prior decisions have applied a subjective standard, determining whether conduct is "wilful" from the actual perspective of the insured.[1] *ConAgra* instead applied an *objective* standard, holding that *constructive* knowledge of the consequences of an act is sufficient to prove that an act is "wilful" under section 533. *ConAgra*, 77 Cal.App.5th at 749 ("Fuller (and therefore ConAgra) 'must have known by the early 20th century' that lead-based paint "posed a serious risk of harm"). *ConAgra* gives this Court the opportunity to confirm whether a subjective standard still governs.

Third, and perhaps most important, *ConAgra* threatens to undermine the longstanding public policy in California that allows courts to impose liability on product manufacturers and then permits the manufacturers to shift a portion of the cost of that liability to their insurers. This public policy has been a bedrock principle of California tort law since it was first articulated by then-Justice Traynor in his concurring opinion in *Escola v. Coca-Cola Bottling Co.* (1944) 24 Cal.2d 453, 462 ("Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health 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*.") (emphasis added).

In reliance on *ConAgra*'s interpretation of section 533, insurers are likely to argue that, as a matter of California public policy, manufacturers of risky products no longer are entitled to insurance coverage for liabilities arising from their products: If a manufacturer is aware that injury is possible, insurers will contend, section 533 eliminates coverage. Under the reasoning of *ConAgra*, insurers could suggest, public policy precludes insurance coverage even if the product does not injure the overwhelming majority of the manufacturer's customers, and even for injuries arising out of product sales occurring before the manufacturer learned that the product could cause harm.

To eliminate any misunderstanding on the part of the lower courts and insurers regarding insurance coverage for products that become the subject of public nuisance lawsuits, eliminate the split in California authority between *ConAgra* and the decades of

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[1] *See* cases cited at note 6 *infra*.

California cases holding that section 533 does not bar coverage for negligent or reckless conduct, and protect the interests of tens of thousands of California businesses that have purchased and rely on products liability insurance coverage, this Court should grant ConAgra's petition for review.

Interest of United Policyholders, the Amicus Curiae

United Policyholders was founded in 1991. It is a non-profit organization, tax-exempt under Internal Revenue Code §501(c)(3), that is dedicated to educating the public on insurance issues and consumer rights. United Policyholders is funded by donations and grants from individuals, businesses, and foundations, and does not sell insurance or accept money from insurance companies.

United Policyholders serves as a resource for insurance claimants and actively monitors legal and marketplace developments affecting the interests of policyholders. United Policyholders receives frequent invitations to testify at legislative and other public hearings and to participate in regulatory proceedings on rate and policy issues.

United Policyholders has been granted leave to file *amicus curiae* briefs on behalf of policyholders in cases across the country, including *Humana Inc. v. Forsyth* (1999) 525 U.S. 299, 314 (favorably citing UP's amicus brief), *Pitzer College v. Indian Harbor Ins. Co.* (2019) 8 Cal.5th 93, 104-105 (favorably citing UP's amicus brief), and *Assoc. of Cal. Ins. Cos. v. Jones* (2017) 2 Cal.5th 376 (favorably citing UP studies).

Background to the ConAgra Decision

The underlying litigation from which ConAgra's liability arises dates back to 2000, when Santa Clara County filed a complaint against lead-based paint and pigment manufacturers. *County of Santa Clara v. Atlantic Richmond Co.* (2006) 137 Cal.App.4th 292, 299. Over the course of the protracted litigation, several other counties and governmental entities joined with Santa Clara County to form a plaintiffs' class. *ConAgra*, 77 Cal.App.5th at 736. The operative complaint alleges only a claim for public nuisance, based on the defendants' promotion of the use of lead-based paint. *Ibid.* ConAgra was named in the lawsuit as the corporate successor to W.P. Fuller & Co ("Fuller"), which manufactured and promoted lead-based paint. *Id.* at 740.

Following a 2013 trial, the court found the defendants jointly and severally liable under a public nuisance theory and ordered them to pay $1.15 billion toward the abatement of lead-based paint in pre-1978 homes in the jurisdictions represented in the case, an amount that was later reduced to $409 million after the Court of Appeal remanded the case for recalculation to exclude the cost of remediating lead hazards in homes constructed after 1950. *Id.* at 736-737.

When each defendant's insurers denied coverage for the amounts ordered paid into the abatement fund, ConAgra and the other defendants sued their liability insurers in California, New York, and Ohio respectively. The Ohio and New York courts ruled, and a New York appellate court affirmed, that the knowledge findings in the public nuisance action were insufficient to meet the higher knowledge standard required to preclude coverage. *See Certain Underwriters at Lloyd's, London v. NL Indus, Inc.* (N.Y. App.Div. 2022) 2022 NY Slip Op. 02056 (holding that the findings in the underlying action did not show "knowing and intentional conduct uninsurable under public policy and the [exclusion for expected or intended injuries in] … the policies"); *Sherwin-Williams Co. v. Certain Underwriters at Lloyd's, London* (Ohio Com. Pl. Dec. 3, 2020) (same). Both courts recognized the significant distinction between awareness of a risk, which was sufficient for the public nuisance count's liability finding, and "wilful" misconduct, which might excuse an insurer's coverage obligations.

ConAgra rejected both rulings, holding that the trial court's finding, that the insured had promoted the sale of lead-based paint with "actual knowledge" of the *potential* for harm, established the existence of conduct so extreme as to constitute "wilful" misconduct under section 533. *ConAgra*, 77 Cal.App.5th at 738 fn. 5, 752. As to the first prong of the section 533 test, *ConAgra* found that the "intentional act" was Fuller's promotion of lead-based paint. *Id.* at 747. As to the second prong, the court did not find that Fuller marketed the product with the purpose of injuring the public. Instead, *ConAgra* based its holding of "wilfulness" on the finding that Fuller had promoted the product after learning that lead-based paint can be dangerous if the paint deteriorates, flakes off, and is ingested. *Id.* at 748. The underlying opinion did not specify when ConAgra's predecessor, Fuller, became aware that lead-based paint could cause injury, finding actionable only Fuller's promotional campaigns beginning in 1931, 37 years after it first began marketing the product and well after sales had declined. *See People v.*

ConAgra Grocery Prods. Corp. (2017) 17 Cal.App.5th 51, 71, 77, 97. Yet the trial court's holding, which the appellate opinion affirmed, extended section 533 to eliminate all insurance coverage, not differentiating between the cost of remediating paint applied to structures before or after 1931.

On top of that, by rejecting coverage completely, *ConAgra* necessarily held that ConAgra had no insurance for its joint and several liability for damages resulting from the activities of the *other defendants*—even though the courts in the other defendants' insurance coverage actions found that those defendants did not expect or intend injury and there was no finding that ConAgra's predecessor, Fuller, knew more about those defendants' products than the defendants knew.

In other words *ConAgra* reached the extraordinary conclusion that Fuller acted "wilfully" in selling paint even before it knew of any risks, and later, in promoting a product that was risky but was also beneficial[2] and legal to sell.[3] To support that holding, *ConAgra* concluded that the findings in the underlying action that the paint industry "must have been aware" that the product *could* injure some users established that Fuller acted with substantial certainty that harm would result from promotion of lead-based paint, triggering section 533 under the standard for "wilfulness" that *ConAgra* adopted. *ConAgra*, 77 Cal.App.5th at 752.

Reasons Why the Court Should Grant Review

It is time for this Court to clarify the scope of section 533, in part to eliminate splits among the lower courts and in part to confirm that California public policy does not render liability arising from the sale of risky products uninsurable as a matter of law.

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[2] *See, e.g.,* James Crow, *Why Use Lead Paint*, Chemistry World (August 21, 2007) ("As well as giving the paint its tint, lead pigments are highly opaque, so that a relatively small amount of the compound can cover a large area. White lead is very insoluble in water, making the paint highly water-resistant with a durable, washable finish.").

[3] Fuller stopped manufacturing lead-based paint in 1958 yet the government continued to allow the sale of lead-based paint until the 1970s. *People v. ConAgra*, 17 Cal.App.5th at 71, 73.

What Standard Governs a Finding of "Wilful" Misconduct under Section 533?

The leading California insurance law treatise comments that the "standard for uninsurable 'wilful' injury under [section] 533 is still evolving."[4] That is because the lower courts are split as to whether the rules in *J.C. Penney* are still good law, whether section 533 eliminates insurance coverage for conduct that qualifies as "reckless," and whether the statute extends so far as to eliminate coverage for liabilities, like the public nuisance liability imposed on ConAgra in the underlying action, that are based on negligence.[5]

Under the plain language of section 533, which expressly excepts negligence from any public policy limits on insurance coverage, the Court of Appeal should have reversed the judgment below, not affirmed it. *See Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1016 ("'If conduct is negligent, it is not willful'") (quoting Justice Traynor's majority opinion in *Donnelly v. Southern Pac. Co.* (1941) 18 Cal.2d 863, 869). Instead, the court looked not to the negligence liability imposed on the insured as a result of its predecessor's promotion of the sale of paint, but on facts found in the underlying action: that Fuller intentionally promoted lead-based paint when there was general knowledge in the industry that the paint would degenerate, and if then ingested, could cause injury. *ConAgra*, 77 Cal.App.5th at 748.

But selling a beneficial but risky product, with knowledge that it could injure some users, amounts at most to *reckless* conduct. *See City of Santa Barbara* (2007) 41 Cal.4th 747, 754 fn. 4 (recklessness "describes conduct by a person who … intentionally performs an act so unreasonable and dangerous that he or she knows or should know it is highly probable that harm will result'") (citing to *Donnelly*, 18 Cal.2d at 868). And under this Court's prior rulings, reckless conduct does not trigger section 533's public policy bar on insurance coverage. *See J.C. Penney*, 52 Cal.3d at 1020-21 (recklessness is not enough to constitute "wilful" misconduct under section 533); *Peterson v. Superior Court*

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4 J. Walter Croskey et al., *Cal. Prac. Guide: Ins. Litig.* (rev. ed. 2022), ¶ 7:251.

5 *See People v. Acuna* (1997) 14 Cal.4th 1090, 1105 (public nuisance turns on whether the defendant's conduct was "unreasonable," citing *Restatement (Second) of Torts,* § 821F).

(1982) 31 Cal.3d 147, 159 (acting "with conscious disregard of the rights or safety of others," such as drunk driving, is insufficient to trigger section 533); *see also Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 500 ("Acts of gross negligence or recklessness are not wilful acts within the meaning of section 533").

ConAgra acknowledged this Court's rulings on the scope of section 533 and then proceeded to ignore them, holding that conduct that is "reckless" under the standard that this Court has enunciated is nonetheless uninsurable as a matter of public policy under section 533. *See ConAgra*, 77 Cal.App.5th at 740 (a "wilful act" means an intentional act "'performed with knowledge that damage is highly probable or substantially certain to result'") (citing *Shell Oil Co. v. Winterthur Swiss Ins. Co.* (1993) 12 Cal.App.4th 715, 742-43); *ibid.* ("'section 533 precludes indemnification for liability arising from deliberate conduct that the insured expected … to cause damage'") (citation omitted).

The Court should grant review and end the confusion among the trial and appellate courts on the relevant standard.

Can a Finding of Wilful Conduct under Section 533 Be Based on an Objective, "Collectivized Knowledge" Standard, or Must the Insurer Come Forward with Evidence That a Business's Responsible Management Actually Acted Wilfully?

In the absence of "inherently harmful" misconduct—which is not at issue in this case—the section 533 rulings to date have looked to the subjective intentions and actual knowledge of the insured and, for businesses, to the subjective intentions and actual knowledge of responsible management.[6] However, there was no such finding in

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[6] *See, e.g., Gonzalez v. Fire Ins. Exchange* (2015) 234 Cal.App.4th 1220, 1239 ("it is the insured's subjective belief as to whether his or her conduct would cause the type of damage claimed that excludes coverage"); *California Cas. Mgt. Co. v. Martocchio* (1992) 111 Cal.App.4th 1527, 1532 (same); *B & E Convalescent Center v. State Compensation Ins. Fund* (1992) 8 Cal.App.4th 78, 94 (same); *Republic Indem. Co. v. Superior Court* (1990) 224 Cal.App.3d 492, 500-01 (same); *Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co.* (1993) 14 Cal.App.4th 1595, 1604 (looking to the "intentional and willful acts of [a business's] high managerial agents and policy makers" in finding that section 533 bars coverage); *cf. Melugin v. Zurich Canada* (1996) 50 Cal.App.4th 658, 665-67 (section 533

ConAgra. In fact, there was no evidence regarding what knowledge, if any, was held by any specific individual at Fuller, or what the corporation itself knew. Instead, knowledge was imputed to Fuller based "exclusively on circumstantial evidence" of what was known generally in the early 20th century when Fuller promoted its paint products. *ConAgra*, 17 Cal.App.5th at 84.

Fuller began manufacturing and selling white lead carbonate pigment in 1894. *Id.* at 71. The circumstantial evidence upon which the trial court imputed knowledge of lead-based paint's harms to Fuller consisted of "what was generally known in the paint industry" at certain points last century, derived from a 1910 congressional hearing on lead-based paint, a published speech from 1914 that detailed the dangers posed by lead-based paint for interior residential use, and a letter circulated by the Lead Industries Association in the 1930s that promulgated information about lead poisoning to members of its trade association. *Id.* at 77, 87. Based on that and similar evidence, the court concluded that Fuller and the other defendants "must have been aware at that time, in the early 1930s, of the hazard" of lead-based paint. *Id.* at 84.

While this evidence may have sufficed for a finding of public nuisance liability, which can be based on negligence, *ConAgra* failed to recognize that "must have been aware" falls short of constituting proof that Fuller engaged in "wilful" misconduct.[7] And it certainly does not provide a basis for rejecting coverage for the portion of the judgment

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does not bar coverage for a company that faces liability for the intentional tort of its non-managerial employee); *but see Shell Oil*, 12 Cal.App.4th at 739 (a subjective standard does not apply if the insured commits an "inherently harmful" act).

[7] Although *ConAgra* may be the only case to find a violation of section 533 on such relatively flimsy evidence, one published case, the frequently criticized opinion in *FMC Corp. v. Plaisted & Cos.* (1998) 61 Cal.App.4th 1132, mentioned a similar test for the standard exclusion for expected or intended injuries. *Id.* at 1212-1213 (discussing the possibility of imputing knowledge of harm to a corporation based on the collective knowledge of its employees). The same year, another court actually imputed "collective knowledge" to a corporation in determining that injury was "expected or intended," but this Court granted review, *Syntex Corp. v. Lowsley-Williams & Cos*, No. S075573, and the case settled before this Court heard the appeal. (The undersigned was counsel for the petitioner in the *Syntex* appeal.)

imposing joint and several liability on ConAgra for damage caused by the other defendants.

The Court of Appeal failed to appreciate the difference between, on one hand, the minimal constructive knowledge standard that the circumstantial evidence was able to satisfy so that the trial court could impose tort liability based on Fuller's promotions of lead-based paint in the underlying public nuisance litigation and, on the other hand, the wilful conduct standard required to trigger section 533. Quite the contrary: "ConAgra's argument that the knowledge required for application of section 533 required proof of what knowledge was held by specific individuals within the company is in effect a challenge to factual determinations made in the underlying litigation that are now final and binding." 77 Cal.App.5th at 752.

ConAgra failed to appreciate that the court in the underlying action held only that the finding that Fuller "must have been aware" of the risks posed by interior residential lead-based paint was "sufficient to support a reasonable inference" that Fuller "*must have known*" of the risks "by the early 20th century." *ConAgra*, 17 Cal.App.5th at 85 (emphasis in original). In other words, the court inferred that Fuller must have known of the risks of lead-based paint because evidence showed that it had reason to know of these risks. But promoting a product after gaining that information constitutes negligence or, at most, reckless conduct; and neither should have been sufficient to trigger section 533. Indeed, even conduct that amounts to a "conscious disregard of the safety of others," which could "support punitive damages" in certain contexts, does not constitute a "wilful act" under section 533. *Peterson*, 31 Cal.3d at 158.

The Court of Appeal plainly confused the findings that imposed liability on the insureds with the higher standard that applies to section 533, ignoring the admonition from the late Justice J. Walter Croskey, California's leading insurance expert during his time on the bench, that not "all 'intentional' or 'willful' acts within the meaning of traditional tort principles fall within the purview of the statute." *B&E Convalescent*, 8 Cal.App.4th at 94.

Potential for Misapplication of ConAgra

Despite the plain language of Section 533 stating that negligence on the part of a policyholder will *not* exonerate an insurer from its coverage obligations, *ConAgra* held

that section 533 eliminates an insurer's coverage obligations even though the insured was only found liable for the negligent consequences of intentional conduct and where the court made no findings about Fuller's specific knowledge, let alone the specific knowledge of its responsible managerial employees. That is not, and should not become, the law in California, as this would lead to an unprecedented degree of uncertainty in how manufacturers can mitigate the risks associated with their products.

For more than 80 years, the tort system in California has been based on the assumption that products manufacturers can purchase insurance to mitigate the liabilities they may face from the use of their products. To take surely the most prominent example, asbestos, no California court has held that the marketing of products containing asbestos triggers section 533, not even for asbestos products sold after *Borel v. Fibreboard Paper Products Corp.* (5th Cir. 1973) 493 F.2d 1076, the seminal appellate decision imposing asbestos-related liabilities. Yet under the ruling in *ConAgra*, insurers will argue, the promotion or sale of any risky product will trigger the statute. That cannot be the case. From the soft drink bottles in *Escola v. Coca Cola Bottling*, which the defendant sold knowing that some may explode, to a pharmaceutical that will cause a percentage of users to experience side effects, to scooters that frequently end up in traffic accidents, where would the courts draw the line? Few products are 100% safe. Does *ConAgra* really mean that those products and activities cannot be insured as a matter of California public policy? This Court should grant review and answer that question "no."

United Policyholders respectfully requests the Court to grant review of the *ConAgra* decision.

Respectfully submitted,

/s/ David B. Goodwin

David B. Goodwin (Bar No. 104469)

PROOF OF SERVICE

Certain Underwriters at Lloyd's, London, et al. v. ConAgra Grocery Products Company, et al.,
California Supreme Court No. S274797,
First District Court of Appeal, Division Two, No. A160548,
San Francisco County Superior Court, No. CGC-14-536731

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. I am employed in the office of a member of the bar of this court at whose direction the service was made. My business address is 415 Mission Street, Suite 5400, San Francisco, CA 94105. On July 12 2022, I served the following document(s) by the method indicated below:

Letter of United Policyholders in Support of Petition for Review of ConAgra Grocery Products Company, et al. v. Certain Underwriters at Lloyd's, London, et al., No. S274797 (First Appellate District, Division Two, Case No. A160548)

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☑	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 set forth below. 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.

San Francisco County Superior Court 400 McAllister Street San Francisco, CA 94102	Trial Court

I declare under penalty of perjury under the laws of the United States that the above is true and correct and that this proof of service is executed on July 12, 2022 at Dublin, California.

/s/ Dawn Halverson

Dawn Halverson