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Via e-filing

November 4, 2024

Honorable Chief Justice Patricia Guerrero
and the Honorable Associate Justices
of the California Supreme Court
350 McAllister Street
San Francisco, California 94102-7303

Re: Request of United Policyholders for Depublication of *Fox Paine & Company, LLC et al. v. Twin City Fire Insurance Company, et al.*, Case No. A168803 (Issued Sept. 5, 2024; final October 7, 2024)

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

Pursuant to Rule 8.1125 of the California Rules of Court, I write on behalf of *amicus curiae* United Policyholders ("UP") to ask the Court, to depublish the opinion in *Fox Paine & Company, LLC v. Twin City Fire Insurance Co.*, No. A168803 ("Opinion" or "Opn."). UP seeks depublication because the Opinion departs from decades of cases that have allowed policyholders to obtain declaratory relief from recalcitrant excess insurers that have denied coverage for claims large enough to reach the coverage of those excess insurers, suggesting instead that unless and until the immediately underlying insurer has paid its policy limits, a policyholder may not obtain a coverage declaration from its excess insurers. I attach a copy of the *Fox Paine* Opinion.[1]

[1] UP is separately submitting a letter in support of the Petition for Review in *Fox Paine*, No. S287404.

Interest of the Amici

UP was founded in 1991. It is a non-profit organization that is dedicated to educating the public on insurance issues and consumer rights. The organization is tax-exempt under Internal Revenue Code § 501(c)(3). It serves as a resource for insurance claimants and actively monitors legal and marketplace developments affecting the interests of policyholders. UP receives frequent invitations to testify at legislative and other public hearings and to participate in regulatory proceedings on rate and policy issues. In addition, UP's executive director, Amy Bach, served as an Adviser to the drafters of the Restatement of the Law of Liability Insurance.

UP 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 Insurance Co.* (2019) 8 Cal.5th 93, 104–105 (same), and *Association of California Insurance Cos. v. Jones* (2017) 2 Cal.5th 376, 383 (favorably citing UP's studies). UP has submitted letters supporting petitions for review in cases in which the Court granted review, including *Montrose Chemical Corp. of Cal. v. Superior Court* (2020) 9 Cal.5th 215.

Background to the *Fox Paine* Opinion

Excess Insurance: Follow-form excess insurance has been a staple of the insurance market since the 1950s.[2] From its inception, the purpose of follow form excess insurance has been to provide additional liability limits over a primary policy while retaining that policy's scope of coverage. (*See Commercial Union Assur. Cos. v. Safeway Stores, Inc.* (1980) 26 Cal.3d 912, 919 ["The object of the excess insurance policy is to provide additional resources should the insured's liability surpass a specified

[2] See Randolph M. Fields, *The Underwriting of Unlimited Risks: The London Market Umbrella Liability Policy 1950-1970,* Coverage, July August, 1995 at 36 38.

sum."].)[3] Excess insurance is designed to protect the policyholder against the possibility that a claim will exceed the primary policy limits by providing a seamless web of consistent coverage.[4] The insurance industry and government regulators tout excess insurance policies for precisely this unity of coverage between the primary policy and the excess follow form policies above it.[5]

As a matter of industry custom and practice, the promise of a "seamless web of consistent coverage" is relied upon by policyholders and insurers alike in structuring multilayered follow form risk management programs.[6] Typically, most major corporations purchase multiple layers of follow form insurance to form a carefully-

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[3] Mitchell F. Dolin, *Excess Defense Coverage and Long-Tail Liabilities*, 32 Tort & Ins. L.J. 875, 886 (Spring 1997) (hereinafter ,"Dolan") ("[T]he insured would want to be certain that this multilayered program provided a seamless web of consistent coverage.").

[4] Dolin, *supra*, at 886; Scott M. Seaman, *Excess Liability Insurance: Law and Litigation*, 32 Tort & Ins. L.J. 653, 657-658 (1997) ("[E]xcess insurance generally is written by design. This type of insurance commonly is referred to as 'following form' or 'specific' excess coverage. Most major corporate insureds now obtain multiple layers of excess insurance to cover losses aggregating in the hundreds of millions of dollars. A 'pure' following form excess contract, in essence, expands the limits of the underlying contract. 'All it protects the insured against is the possibility that a claim will exceed the limits of the primary policy.'" [Citation omitted]).

[5] *See, e.g.*, *https://www.chubb.com/us-en/individuals-families/resources/why-excess-liability-coverage-is-important.html* (advertisement from Chubb urging the purchase of excess coverage); https://www.travelers.com/resources/business-industries/manufacturing/how-much-excess-casualty-insurance-do-manufacturers-need (same; Travelers); https://www.insurance.ca.gov/01-consumers/105-type/95-guides/09-comm/commercialguide.cfm (advice from California Department of Insurance to commercial policyholders).

[6] *Monsanto v. Am. Centennial Ins.* Co., 1991 WL 35714 (Del. Super. Feb. 20, 1991) (policyholder broker testifying that the goal of its excess insurance program was to "make absolutely certain that they had continuity of coverage").

structured insurance "tower" designed to protect against catastrophic loss.[7] These programs are presented to policyholders, and understood by them, to be a "monolithic block of coverage."[8] If there is coverage under the primary policy, there will be coverage under the excess policies, assuming that the loss is large enough to reach the excess policies – and vice versa. This system of coverage is built on the premise that policy holders can adjudicate their rights as to the whole insurance tower in one go. If this is not the case, the system of excess insurance cannot function as intended.

For purposes of insurance coverage litigation like the *Fox Paine* case, this means that (a) if a claim is large enough to reach the excess policies, the excess policies will present the same insurance coverage issues as the primary policy and (b) a coverage declaration as to the primary policy will equally affect coverage under the excess policies.

Fox Paine's Insurance Claim: Fox Paine, a private equity firm, and other individuals and entities connected with that firm, were named as defendants in litigation in the Delaware Court of Chancery. When the claim was made, the Fox Paine Parties had in place a primary director and officer insurance policy from Houston Casualty and the following excess policies:

Excess Policies	Policy Amount	Attachment Point
Twin City	$10 million	$10 million
St. Paul	$10 million	$20 million
Twin City	$10 million	$30 million

[7] Michael M. Marick, Excess Insurance: An Overview of General Principals and Current Issues, 24 Tort & Ins. L.J. 715, 718 (1989).

[8] *Monsanto v. Am. Centennial Ins.* Co., 1991 WL 35714 at 2 (Del. Super. Feb. 20, 1991).

Liberty Mutual	$10 million	$40 million
Total Excess Policies	$40 million	

(Opn. at p. 3.) The primary insurer paid its limits (*id.* at p. 4) but the excess insurers denied coverage. The Fox Paine Parties sued their excess insurers, alleging a covered loss of $43 million including interest and that the excess insurers had denied coverage. Their complaints included claims for breach of contract, declaratory relief, and breach of implied covenant of good faith and fair dealing. (*Id.* at p. 5-6.) The Superior Court sustained the demurrers of St. Paul, Twin City (under the third layer excess policy), and Liberty Mutual without leave to amend on the ground that the Fox Paine Parties had failed to show that the first layer excess policy had exhausted its policy limits. (*Id.* at 7). The Court of Appeal affirmed.[9]

Reasons for Depublication

The fundamental and recurring question presented by the Opinion concerns whether a policyholder that pleads a potential liability above the limits of its excess insurance policies and has been denied coverage by its excess insurers may sue for declaratory judgment against the entire insurance tower.

In answering this question in the negative, the Court of Appeal erred on both legal and policy grounds.

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[9] The Court of Appeal based its affirmance of the judgment in favor of Liberty Mutual on the ground that the Liberty Mutual policy attached at $40 million but the allegation that the covered loss was $43 million included interest (presumably, pre-judgment), which would not erode the underlying limits, so the claim could not reach Liberty Mutual's layer. (Opn. at p. 16.) Fox Paine did not plead the amount of interest included in that $43 million figure, however (*id.* at 15), and since a court considering a demurrer must construe all factual allegations against the moving party (Code Civ. Proc., § 452), the court's ruling on the Liberty Mutual policy is questionable.

First, the Court of Appeal decision runs contrary to every prior California appellate decision to consider the issue by creating an actual exhaustion requirement for policyholders facing liability beyond their excess policy limits before they can plead a claim for declaratory relief from their excess insurers. (*See, e.g., Ludgate Ins. Co. v. Lockheed Martin Corp.* (2000) 82 Cal.App.4th 592, 605–608; *Lockheed Martin Corp. v. Continental Ins. Co.* (2005) 134 Cal.App.4th 187, 220; *Home Indem. Co. v. Mission Ins. Co.* (1967) 251 Cal.App.2d 942, 965–66.) In fact, many decisions of this Court address coverage issues in towers of excess insurance where the plaintiff has pleaded significant liabilities but has not pleaded exhaustion of the underlying policies. (*See, e.g.*, *Montrose Chem. Corp. of Cal. v. Superior Court* (2020) 9 Cal.5th 215 [addressing claim for coverage under various excess policies if the underlying policies were to pay their limits]; *State of Cal. v. Continental Ins. Co.* (2012) 55 Cal.4th 186 [declaratory relief concerning the stacking of excess policies but not considering whether the underlying policies have exhausted their limits]; *Ameron Int'l Corp. v. Ins. Co. of the State of Pa.* (2010) 50 Cal.4th 1370 [declaratory relief concerning meaning of "suit" under primary and excess policies where insurers had denied coverage]; *Powerine Oil Co. v. Superior Court* (2005) 37 Cal.4th 377 [addressing coverage under excess policies where primary policy did not pay]; *Aydin Co. v. First State Ins. Co.* (1998) 18 Cal.4th 1183 [declaratory relief concerning the burden of proof under both primary and excess policies].) If the Opinion remains published, this split in previously settled law on basic pleading requirements will confuse the lower courts and lead to a cascade of contradictory outcomes in excess insurance cases.

Second, nothing in the facts presented is outside of the relief authorized by the declaratory relief statute, Section 1060 of the Code of Civil Procedure. There is an actual controversy: The Fox Paine Parties plead a $43 million loss and that their excess insurers have denied coverage for that loss. The appellate court's suggestion that no actual

controversy can exist because the underlying insurer has not paid its limit is both mistaken and likely to confuse the lower courts, which are empowered to grant declaratory relief even if the plaintiff may lose. (*See* H. Walter Croskey, *Cal. Prac. Guide: Ins. Litig.* (rev. ed. 2024), ¶ 15:157 ("Where an excess insurer denies coverage of a claim, the insured may sue for declaratory relief without alleging that its primary coverage limits have been exhausted: 'The complaint is sufficient if it shows an actual controversy; it need not show that plaintiff is in the right." [quoting *Lockheed Martin Corp. v. Continental Ins. Co.* (2005) 134 Cal.App.4th 187, 221, *disapproved on other grounds by State of Cal. v. Allstate Ins. Co.* (2009) 45 Cal.4th 1008]).) Indeed, this reading of a non-statutory exhaustion requirement into Section 1060 has potential to create confusion in *any* declaratory judgment case, not just insurance litigation.

Third, the practical consequences of the decision below, if it remains published, are of great concern as they threaten to upset the excess insurance system, impede settlement, and delay relief both for policyholders and for plaintiffs in underlying liability actions. The Court of Appeal's reasoning that a "strict exhaustion requirement brings stability and predictability to the excess insurance system" fundamentally misunderstands how excess insurance works. A strict exhaustion requirement would *undermine* the stability and predictability that excess insurance is meant to provide, harming both policyholders as well as plaintiffs in underlying liability actions.

To understand why, assume a $100 million-dollar insurance tower, consisting of ten layers of insurance policies, each with $10 million in limits. Assume further that the insured faces a claim for $100 million and that all of the excess insurers have followed the primary insurer in denying coverage. Under the Court of Appeal's decision, the policyholder could not obtain declaratory relief from any excess insurer until the primary insurer has actually paid $10 million. But many insureds cannot afford to pay $10 million (let alone $100 million) in order to have standing to sue their insurers. Even

worse, when the policyholder finally obtains a final judgment in favor of coverage against the primary insurer (perhaps after appeal), each excess insurer would argue that the policyholder must wait until the immediately underlying insurer has actually paid out the money owed up to the limit of its policy before that insurer can be the subject of declaratory relief. Then, and only then, each excess insurer would say, could the policyholder proceed to sue — one insurer at a time. Rinse and repeat eight more times. Under this system, it might take decades for a policyholder to learn what coverage it has under the excess insurance tower.[10]

This uncertainty levies a costly impact on the court system. A business facing potential liability up to the limits of its insurance might prefer to settle the case rather than bear the expense of protracted litigation. Certainly, our court system prefers settlement to litigation. But in order to settle, the insured needs certainty on the coverage provided under its insurance tower by both its primary and excess insurers. Because excess insurance is meant to cover catastrophic instances of liability, often well in excess of a policyholder's ability to front, most policyholders will not be able to agree to settle for large amounts if the existence of insurance coverage for that liability is uncertain. A business in this situation, rather than settling, would be forced to continue costly litigation against both liability plaintiffs and, after resolution of the case, its insurers. Indeed, as noted, under the Court of Appeal's reasoning, it is possible that the insurance litigation must proceed one policy at a time, up the tower of insurance, since a second layer excess policy attaches only after the underlying insurer has paid.

[10] Making matters even worse, the policyholder could not get prejudgment interest from a recalcitrant excess insurer under the reasoning of the Court of Appeal since, the court indicates, a policyholder cannot seek breach of contract remedies from an excess insurer until the underlying insurer has paid its limits.

This Court has long recognized that the insurance industry should function to distribute the risk of tort injury among the public so that those subject to "overwhelming misfortune" can receive relief without "needlessly circuitous" litigation. (*Escola v. Coca Cola Bottling Co. of Fresno*, (1944) 24 Cal. 2d 453, 462 [Traynor, concurring].) But under *Fox Paine*, liability plaintiffs would need to wait, potentially for years, to receive full relief, while the courts adjudicate insurance coverage disputes one excess layer at a time.

The cases cited by the Court of Appeal do not support its reasoning concerning the availability of declaratory relief. The court cited *Hartford Accident and Indemnity Company v. Continental National Insurance Cos.* (9th Cir. 1988) 861 F.2d 1184, 1187 for the elementary point that an excess insurer's premiums are based on the obligations it and the primary insurer undertake. (Opn. at 21). But excess insurers set premiums on the understanding that their obligations will rise or fall with the primary insurer and that these obligations will be determined through litigation involving the whole tower. By attempting to change the rules governing excess insurance litigation, it is the Court of Appeal that has "upset" these "settled expectations." (*Ibid.*)

The Court of Appeal's reliance on *dictum* in a decision under federal court procedure, *Iolab Corp. v. Seaboard Sur. Co.*, (9th Cir. 1994) 15 F.3d 1500, 1504, is similarly misplaced. In *Iolab*, the policyholder had "not established that the [] loss would ever trigger excess coverage" for the purpose of its breach of contract claim. (*Id.* at 1507.) The Ninth Circuit's discussion of declaratory relief not only is irrelevant to our state's procedural requirements, but *Iolab*'s reasoning does not apply to cases like *Fox Paine*, in which a policyholder alleging losses that reach the highest layer in its insurance tower sues its excess insurers for declaratory relief. Applying this factually inapposite case led the Court of Appeal to policy conclusions that would harm the stability and predictability of the excess insurance industry, rather than help it. (Opn. at 21.)

In short, the Court of Appeal has interjected uncertainty into the California insurance world, as well as into the scope of the declaratory relief statute. If this Court does not grant review of *Fox Paine*, the Court should depublish the *Fox Paine* decision.

Respectfully submitted,

/s/

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Enclosure