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Via e-filing

December 9, 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: Letter of United Policyholders in Support of Petition for Review in *Fox Paine & Company, LLC et al. v. Twin City Fire Insurance Company, et al.*, Case No. S287404

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

I write on behalf of *amicus curiae* United Policyholders ("UP") to support the Petition for Review that Fox Paine & Company LLC and its affiliates filed on October 15, 2024, in Case No. S287404.

The Petition presents an important and recurring issue of California insurance law concerning a policyholder's remedies against recalcitrant excess insurers. Specifically, may a policyholder that faces liability above the attachment points of its excess insurance policies obtain declaratory relief against its entire insurance tower after its excess insurers have denied coverage? The Court of Appeal answered that question in the negative unless the underlying insurer has already paid its policy limits. Every other published California decision to address the issue has answered the question in the affirmative, and countless other California courts—including this Court—have *assumed* that declaratory relief is proper in this scenario.

UP urges this Court to grant review and reverse.[1]

Interest of the Amici

For over three decades, UP has served as a non-profit, tax-exempt organization dedicated to educating the public on insurance and consumer rights and advocating for public policies and laws that preserve the loss indemnification function of insurance products. UP serves as a resource for individual and commercial policyholders, actively monitoring legal and marketplace developments affecting the interests of policyholders. UP is an advisor to the Federal Office of Insurance (U.S. Treasury) and an official consumer representative to the National Association of Insurance Commissioners. 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* Decision

Excess Insurance: Follow-form excess insurance has been a staple of the insurance market since the 1950s.[2] Follow-form excess insurance provides additional liability limits over a primary policy while retaining that policy's scope of coverage, to

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[1] UP takes no position on whether review should be granted on Petitioner's second issue, concerning breach of the implied covenant of good faith and fair dealing.

[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.

ensure a "seamless web of consistent coverage."[3] The insurance industry and government regulators tout excess insurance policies for precisely this unity of coverage between the primary policy and the follow-form excess policies above it.[4]

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 risk management programs.[5] Typically, most major corporations purchase multiple layers of follow-form insurance to create a carefully-structured insurance "tower" to protect against catastrophic loss.[6] Such programs are presented to

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[3] Mitchell F. Dolin, *Excess Defense Coverage and Long-Tail Liabilities*, 32 Tort & Ins. L.J. 875, 886 (Spring 1997); *see also 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 sum."); 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]).

[4] *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).

[5] *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").

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

policyholders, and understood by them, to be a "monolithic block of coverage."[7] 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. The use of a "tower" of insurance is built on the premise that policyholders can adjudicate their rights as to the entire insurance tower in one go. If that were not the case, the system of excess insurance would not 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 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 Delaware. When the claim was made, the Fox Paine Parties had in place a primary director and officer insurance policy 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
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 and that the excess insurers had denied coverage. Their complaints included claims for breach of contract, declaratory relief, and insurance bad faith. (*Id*. at

[7] *Monsanto v. Am. Centennial Ins.* Co., 1991 WL 35714 at 2.

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 limits of the first layer excess policy had been exhausted. (*Id.* at 7.) The Court of Appeal affirmed in a published opinion.

Reasons for Granting Review

The fundamental and recurring question presented by the Petition 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 relief against the entire insurance tower. In answering this question in the negative, the Court of Appeal erred on both legal and public policy grounds.

First, the Court of Appeal decision runs contrary to every prior California appellate decision to consider the issue, creating an "actual exhaustion" requirement for policyholders facing liability beyond their primary policy limits before the policyholders can plead a claim for declaratory relief against 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.)

Fox Paine described *Ludgate*'s statement that "[e]xhaustion of underlying limits, while necessary to entitle the insured to recover on the excess policy, is not necessary to create actual controversy" as "pure dictum" without elaboration (Opn. at 18) and did not address the other appellate decisions at all. *Fox Paine* also failed to address the many decisions of this Court involving coverage issues in towers of excess insurance where the plaintiff pleaded significant liabilities but did not plead 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].) In the absence of a grant of review, this split in previously settled law on basic pleading requirements will confuse the lower courts and could well lead to a cascade of contradictory outcomes in excess insurance cases.[8]

In fact, a very recent Superior Court ruling relied on *Fox Paine* even though excess insurance was not involved. The court characterized *Fox Paine* as standing for the proposition that, "absent exhaustion [of the limits of every other policy that might pay first], there [i]s no actual controversy" between a policyholder and recalcitrant *primary* insurers. Because the court believed the insurers in the case were "in a position closely analogous to that of excess insurers where the primary policy has not yet been exhausted," it held that there was no ripe dispute.[9] This reasoning demonstrates that, far from being a "fact-bound" exercise of "discretion,"[10] *Fox Paine* is likely to be treated as an expansive decision that upends existing precedent and hamstrings the ability of policyholders – and plaintiffs generally – to obtain declaratory relief.

Second, nothing that the policyholders sought in *Fox Paine* is outside of the relief

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[8] Respondents' argument that *Fox Paine* established no "brightline" rule (*see* Liberty Mutual's Answer to Petition for Review at 14) misses the point: review is needed because of the *uncertainty* that *Fox Paine* interjects into previously settled insurance law.

[9] Order Granting Summary Judgment, *BBAM US LP v. KLN 510 Tokio Marine Kiln, et al.*, CGC-22-603451, at 19 (S.F. Super. Ct., Dec. 5, 2024) at 19 (Schulman, J).

[10] St. Paul Mercury Insurance Company's Answer to Petition for Review at 10, 12.

authorized by the declaratory relief statute, Section 1060 of the Code of Civil Procedure. There was an actual controversy: The Fox Paine Parties pleaded a $43 million loss and that their excess insurers 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 so the Fox Paine Parties cannot establish that their excess insurers must pay *right now* is both mistaken and likely to confuse the lower courts, which are empowered to grant declaratory relief even if the plaintiff could lose the case. (*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, the creation of a non-statutory requirement for Section 1060 claims has the potential to create confusion in *any* declaratory judgment case, not just insurance litigation.[11]

Third, the practical consequences of the decision below, if review is not granted, 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. *Fox Paine'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

[11] Respondents attempt to limit the scope of the *Fox Paine* decision as an isolated exercise of "discretion" under Code Civ. Proc., § 1061. That is incorrect: *Fox Paine* stated that it was *not* addressing a trial court's exercise of discretion. *See* Opn. at 19 ("[T]he trial court here did not indicate it was using its discretion to sustain the demurrers, so we cannot hold that the court's discretion was not abused.").

predictability that excess insurance is meant to provide, harming both policyholders as well as plaintiffs in underlying liability actions.

To understand why, assume that a policyholder has purchased a $100 million-dollar insurance tower, consisting of layers of excess insurance policies. Assume further that the policyholder faces a claim for more than $100 million and that all of the excess insurers have followed the lead of the primary insurer in denying coverage. Under *Fox Paine*, the policyholder could not obtain declaratory relief from any excess insurer until the primary insurer has actually paid its limits. That effectively precludes most policyholders from settling the underlying claim for more than the primary policy limits since most insureds cannot afford to pay $10 million, let alone $100 million, to a tort plaintiff in order to obtain standing to sue their insurers. Even if the policyholder pays the claim and then seeks a judgment in favor of coverage from the primary insurer, each excess insurer would argue that the policyholder must wait until the immediately underlying insurer has actually paid its policy limit before the next insurer in the tower can be the subject of a claim for declaratory relief. Then, and only then, each excess insurer would say, could the policyholder proceed to sue the rest of the tower, one insurer at a time. But no reasonable insured would expect to be required to litigate for years, or even decades, to obtain coverage from its tower of excess insurance.[12]

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[12] Making matters even worse, the policyholder could not get prejudgment interest from a recalcitrant excess insurer under the reasoning of *Fox Paine* since a policyholder could not sue an excess insurer that has denied coverage for breach of contract until the underlying insurer has paid its limits. Assume, for example, that the policyholder settles the hypothetical claim in the text and funds the cost of a $100 million settlement without any contribution from its excess insurers. Because *Fox Paine* precludes a breach of contract count against the excess insurers that denied coverage unless the primary insurer has paid its limits, the policyholder would not be entitled to prejudgment interest from its excess insurers even if it takes years to conclude the *seriatim* coverage litigation against the excess insurers that *Fox Paine* purports to require. Excess insurers could well treat
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All this uncertainty could levy a costly impact on the court system. A business facing potential liability up to the limits of its insurance tower typically will prefer to settle rather than bear the expense of protracted litigation. Certainly, our court system prefers settlement to litigation. But in order to settle, many insureds need certainty on the coverage provided by its insurance tower. Because excess insurance is meant to cover catastrophic instances of liability, often well in excess of a policyholder's ability to bear on its own, most policyholders would not be able to settle the lawsuits against them if the existence of excess insurance coverage for that settlement is disputed. A business in this situation would be forced to continue to litigate against both the underlying plaintiffs and, after resolution of that 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 immediately underlying insurer has paid.

This Court has long recognized that the insurance industry should function to distribute the risk of tort injury 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, J., concurring].) But under *Fox Paine*, liability plaintiffs might need to wait, potentially for years, to receive full relief, while the courts adjudicate insurance coverage disputes one excess layer at a time.

The *Fox Paine* insurers do not deny that the natural consequence of *Fox Paine* is "serial litigation." Instead, they argue that this is "simply what Petitioners bargained for" in negotiating an excess insurance policy. (Respondent St. Paul Mercury Insurance Company's Answer to Petition for Review at 14.) Not so. The defining bargain of the excess insurance system is, as explained above, a "seamless web of consistent coverage."

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such a scenario as an invitation to deny coverage as there would be no financial penalty attached to such a denial.

Respondents and the Court of Appeal cite to *Hartford Accident and Indemnity Company v. Continental National Insurance Cos.* (9th Cir. 1988) 861 F.2d 1184, 1187 to justify their backwards interpretation of the excess insurance system. *Hartford* provides no support for their position, however. *Hartford* makes the basic 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*.)

Fox Paine's reliance on *dictum* in a decision addressing federal civil 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 declaratory relief statute, 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 a procedural scheme that would harm the stability and predictability of the excess insurance industry, rather than help it. In short, *Fox Paine* is truly unprecedented.

UP urges the Court to grant the Petition for Review.

Respectfully submitted,

/s/

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