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Via e-filing

July 2, 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 *Montrose Chemical Corp. of California v. Superior Court (Canadian Universal)*, Case No. S285083

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

I write on behalf of *amicus curiae* United Policyholders ("UP") in support of the Petition for Review that Montrose Chemical Corporation of California filed on May 20, 2024, in Case No. S285083.

The Petition presents both:

(a) an important and recurring issue of California insurance law concerning whether and when a policyholder may offer extrinsic evidence to prove that language in an insurance policy that a court has found to be unambiguous in fact is either latently ambiguous or has a special meaning through usage, *see* Civ. Code, § 1644; as well as

(b) a substantive legal issue affecting dozens of pending insurance coverage disputes that has been addressed by more than twenty state supreme courts – but not this Court – that is, whether the exception to the standard form qualified pollution exclusion for a "sudden and accidental" discharge, dispersal, release or escape of pollutants is limited to "abrupt" polluting events.

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 Issues Presented by Montrose's Petition for Review

In 1966, the insurance industry adopted a new standard form comprehensive general liability insurance policy that provides express coverage for long-tail claims. A few years later, after policyholders had experienced pollution claims, including claims arising from a "front page news" oil spill off the coast of Santa Barbara in 1969, the insurance industry commissioned its drafting organizations to prepare an exclusion that would place limits on coverage for environmental litigation. To that end, the drafters borrowed language from boiler and machinery policies (an early form of property insurance covering damage to boilers, turbines, and similar equipment), which insured

against loss to equipment resulting from a "sudden and accidental breakdown."[1] As courts construing the boiler and machinery policies had long recognized, the phrase "sudden and accidental" was a term of art in the insurance industry and referred to an "unforeseen" or "unexpected" breakdown, rather than a breakdown that occurs abruptly.[2]

Thus, when the insurance policy drafting organizations debated and agreed upon exclusionary language, they borrowed from boiler and machinery policies to exclude coverage for bodily injury or property damage arising out of a "discharge, dispersal, release or escape" of pollutants unless "the discharge, dispersal, release or escape is sudden and accidental."[3] The drafters' meeting minutes, contemporary insurance industry commentators, and the drafting organizations in their regulatory submissions all represented that this exclusion, referred to in the Petition for Review as the Qualified

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[1] The drafting history of the resulting qualified pollution exclusion is extensive. For a summary of that history, *see* Carl A. Salisbury, *Pollution Liability Insurance Coverage, the Standard-Form Pollution Exclusion, and the Insurance Industry: A Case Study in Collective Amnesia* (1991) 21 Envt'l L. Rev. 357 ("Salisbury"); *see also* Petition, pp. 32-37; Christopher C. French, *Insurance Policies: The Grandparents of Contractual Black Holes* (2017) 67 Duke L.J. 40, 56-63; *Morton Int'l, Inc. v. General Acc. Ins. Co. of Am.* (N.J. 1993) 629 A.2d 831; *Just v. Land Reclamation, Ltd.* (Wis. 1990) 456 N.W.2d 570; *Sunbeam Corp. v. Liberty Mut. Ins. Co.* (Pa. 2001) 781 A.2d 1189.

[2] *See Couch on Insurance 2d* (1984), § 42:396 ("When coverage is limited to a sudden 'breaking' of machinery the word 'sudden' should be given its primary meaning as happening without previous notice, or as something coming or occurring unexpectedly, as unforeseen or unprepared for"); Salisbury, *supra*, 21 Envt'l L. Rev. at 379-382; *Alabama Plating Co. v. U.S. Fid. & Guar. Co.* (Ala. 1996) 690 So.2d 331, 336 & fn. 7 (citing cases).

[3] *See* Salisbury, *supra*, 21 Envt'l L. Rev. at 361 fn.8, 368-69 & fn. 34. The insurance policy drafting organization referenced in various decisions of this Court, the Insurance Services Office or ISO, was formed when the organizations that drafted the qualified pollution exclusion, the Insurance Rating Bureau and the Mutual Insurance Rating Bureau, merged in 1971. *Id*. at 361 fn. 8; *see generally Montrose Chem. Corp. of Cal. v. Admiral Ins. Co.* (1995) 10 Cal.4th 648, 671 & fn.13 (discussing the ISO).

Pollution Exclusion, or QPE, was intended as a *clarification* of coverage, not as a limitation on coverage. Thus, the drafting organizations told the insurance community and regulators that the general liability form would continue to cover pollution liabilities as long as the polluting event was unexpected and unintended; an "abrupt" polluting event was not necessary for a claim to fall within the exception to the QPE, they explained.[4]

With the increase in number and size of environmental claims after the adoption of state and federal environmental laws such as CERCLA in the 1970s and early 1980s, the insurance industry did an about-face and took the position that "sudden" in the QPE had a temporal requirement: no coverage would be available, the industry said, unless the discharge, dispersal, release or escape of pollutants occurred abruptly. Insurance coverage litigation concerning the QPE ensued and continues to this day.[5]

When courts have addressed the QPE, their decisions have generally fallen into one of two camps:

- Courts that found that the term "sudden" is ambiguous and can refer to either unexpected or abrupt events, and then consulted extrinsic evidence such as the drafting history and regulatory filings to resolve the ambiguity, almost always ruling in favor of coverage (Pet. for Review, p. 10); and

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4 *See* Salisbury, *supra*, 21 Envt'l L. Rev. at 368-379.

5 Although the insurance industry discontinued the QPE in the 1980s, many pending claims involve damage from polluting events occurring over many years, including years in which the QPE was a standard form exclusion, triggering insurance policies in effect during those years. *See Montrose Chem. Corp. of Cal. v. Admiral Ins. Co., supra*, 10 Cal.4th at 686-87.

- Courts that concluded that "sudden" is unambiguous and necessarily refers to an "abrupt" event, thereby rendering extrinsic evidence irrelevant.[6]

The first California appellate decision to address the QPE, *Shell Oil Co. v. Winterthur Swiss Insurance Co.* (1992) 12 Cal.App.4th 715, 752-56, fell in the second camp, concluding that "sudden" is unambiguous and refers to a temporarily abrupt release of pollutants. Because the trial that led to the *Shell* appeal took place before any drafting history was developed, no one asked the *Shell* court to go beyond the policy language.

In contrast, in the second California case, *ACL Technologies, Inc. v. Northbrook Property & Casualty Insurance Co.* (1993) 17 Cal.App.4th 1773, the policyholder offered some drafting history evidence to show that the exception to the QPE was latently ambiguous, but the appellate court refused to consider it. That court concluded that the QPE was facially unambiguous (*id.* at 1791) and that this Court's decision authorizing the consideration of extrinsic evidence even when contract language is facially unambiguous, *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.* (1968) 69 Cal.2d 33, "has been criticized," and only applies if a party wishes to show that contract language has a "special meaning" from usage. *Id*. at 1793. Deciding (incorrectly) that the drafting history evidence would not show a special meaning, *ACL Technologies* declined to consider such evidence. *Id*. at 1791-94. Subsequent California decisions on the QPE that reject coverage have followed *ACL Technologies.*

The trial court in the present case concluded that it was compelled by this appellate precedent to opt for the second camp, notwithstanding post-*ACL Technologies* decisions approving the consideration of drafting history evidence and the longstanding

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[6] *See* Randy Maniloff and Jeffrey Stempel, *General Liability Insurance Coverage – Key Issues in Every State* (5th ed. 2021), ch. 14 (50-state survey of decisions construing the QPE).

California rule from *PG&E v. Thomas Drayage* that extrinsic evidence can be relevant to the interpretation of even facially unambiguous contract language.

The Court Should Grant the Petition for Review

The fundamental and recurring question presented by the Petition concerns whether *ACL Technologies* was wrong, specifically, whether a court construing insurance policy language must consider extrinsic evidence such as the insurance policy provision's drafting history even if the court believes that the policy language is facially unambiguous.

The Court of Appeal erred in answering that question in the negative in *ACL Technologies*, for two principal reasons.

First, as Montrose points out in its Petition for Review (at 7-8), two years after *ACL Technologies* was decided, this Court held that drafting history evidence is relevant to the interpretation of standard form insurance policy language like the QPE, even when the policy language is facially unambiguous. *See Montrose Chem. Corp. of Cal. v. Admiral Ins. Co., supra,* 10 Cal.4th at 668, 670-71 (finding the policy language "unambiguous" and then proceeding to consider and rely on the drafting history); *Another Planet Entertainment, LLC v. Vigilant Ins. Co.*, No. S277893 (May 23, 2024), slip op. at pp. 46-51 (noting that a court must consider extrinsic evidence even if the contract language is facially unambiguous but finding the extrinsic evidence offered by the petitioner unpersuasive). No appellate decision has reconsidered *ACL Technologies* in light of that change in the law. To the contrary, cases both inside and outside of the QPE context have followed the holding in *ACL Technologies* and have refused to consider extrinsic evidence if the court has concluded that the policy language is facially

unambiguous. *See* Answer at p. 20, fn. 7 (string cite of cases, including decisions that address and follow *ACL Technologies*).[7]

Second, this Court has never limited the rule in *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.* (1968) 69 Cal.2d 33 to extrinsic evidence concerning a "special meaning" that contract language may have. In contrast, *ACL Technologies* concluded that *PG&E v. Thomas Drayage* was so limited, and a subsequent decision, *In re Marriage of Shaban* (2001) 88 Cal.App.4th 398, cited *ACL Technologies* for the proposition that *PG&E v. Thomas Drayage* "is directed to situations where parties give words special meanings or use a 'code.'" *See also Abers v. Rounsavell* (2010) 189 Cal.App.4th 348, 356 (citing *ACL Technologies* for the proposition that extrinsic evidence is relevant to show a special meaning). This Court should resolve that conflict in the case law.

UP submits that the Court should use this case to address and disapprove the reasoning and result in *ACL Technologies*. But even if the Court agrees with the interpretation of *PG&E v. Thomas Drayage* in that case, the drafting history of the QPE shows that the words "sudden and accidental" had a special or technical meaning in the insurance industry: as noted, those words were drawn from boiler and machinery policies where the insurance industry understood them to refer to unexpected (rather than temporally "abrupt") events. That background also provides evidence of "the surrounding circumstances" in which the contract was prepared, which is likewise relevant to contract interpretation regardless of whether facial ambiguity exists. *See*

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[7] Other cases following *ACL Technologies* include*, e.g., Fraley v. Allstate Ins. Co.* (2000) 81 Cal.App.4th 1282; *Ray v. Valley Forge Ins. Co.* (2000) 77 Cal.App.4th 1039; and *Franklin EWC, Inc. v. Hartford Fire Servs. Group* (N.D. Cal. 2020) 506 F.Supp.3d 854, 860 (*citing ACL Technologies* for the proposition that contract language must be ambiguous before extrinsic evidence may be admitted).

People v. Shelton (2006) 37 Cal.4th 759, 767; *PG&E v. Thomas Drayage*, 69 Cal.2d at 38, 40.[8]

A decision from this Court disapproving the rules of construction applied in *ACL Technologies* and confirming that *PG&E v. Thomas Drayage* and its progeny remain good law in California would go a long way to clarifying apparently unsettled and hotly disputed issues of California contract law and amply warrant a grant of review.[9]

Finally, review is also amply warranted because the specific insurance coverage issue presented – whether the words "sudden and accidental" in the exception to the QPE have a special meaning in the insurance industry, as reflected in the drafting history, contemporaneous commentary, and contemporaneous regulatory filings, and are not limited to bodily injury or property damage arising from "abrupt" polluting events – is one that a score of state supreme courts has addressed and remains an issue of importance in numerous pending insurance coverage disputes in this State.

For all of these reasons, UP urges the Court to grant the Petition for Review in this matter.

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[8] *See also PMC v. Sherwin-Williams Co.* (7th Cir. 1998) 151 F.3d 610, 614 (a judge who refuses to consider surrounding circumstances "would be like a judge who tried to interpret a contract written in French without knowing the French language") (Ohio law); 11 Richard A. Lord, *Williston on Contracts* (4th ed. 2009), § 32:7 ("the circumstances surrounding the execution of a contract may always be shown and are always relevant to a determination of what the parties intended by the words they chose").

[9] Although the Insurers contend that *ACL Technologies* is binding under the "prior judicial construction" principle, as Petitioner notes, this Court has ample power to address a legal issue that a Court of Appeal considered more than 30 years ago and to reach a different result in light of subsequent precedent from this Court. Moreover, the "prior judicial construction" of the QPE occurred after the claimed releases of pollutants at issue occurred, as well as after the effective dates of the insurance policies in dispute, so the construction was not "prior" to the relevant occurrence.

Respectfully submitted,

/s/

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