2d Civil No. B170079

IN THE COURT OF APPEAL
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION TWO

FULLER-AUSTIN INSULATION COMPANY,

Plaintiff, Respondent, and Appellant,

v.

CERTAIN UNDERWRITERS AT LLOYD'S LONDON, and
CERTAIN LONDON MARKET INSURANCE COMPANIES,
INTERNATIONAL INSURANCE COMPANY, and
HIGHLANDS INSURANCE COMPANY,

Defendants, Appellants and Respondents.

AND RELATED CROSS-ACTIONS

Appeal from the Los Angeles County Superior Court
LASC Case No. BC 116835
Honorable Judith C. Chirlin

APPELLANTS' OPENING BRIEF FOR CERTAIN UNDERWRITERS AT LLOYD'S LONDON, and CERTAIN LONDON MARKET INSURANCE COMPANIES

HANCOCK ROTHERT & BUNSHOFT LLP
Patrick A. Cathcart (SBN 65413)
William J. Baron (SBN 111288)
515 South Figueroa Street, 17th Floor
Los Angeles, California 90071-3334
(213) 623-7777

WACHTELL, LIPTON, ROSEN & KATZ
Michael W. Schwartz (admitted *pro hac vice*)
Douglas K. Mayer (admitted *pro hac vice*)
William Savitt (admitted *pro hac vice*)
51 West 52nd Street
New York, New York 10019-6150
(212) 403-1000

GREINES, MARTIN, STEIN & RICHLAND LLP
Irving H. Greines (SBN 39649)
Robert A. Olson (SBN 109374)
Peter O. Israel (SBN 50806)
5700 Wilshire Boulevard, Suite 375
Los Angeles, California 90036-3626
(310) 859-7811

Attorneys for Defendants, Appellants and Respondents
CERTAIN UNDERWRITERS AT LLOYD'S LONDON, and
CERTAIN LONDON MARKET INSURANCE COMPANIES

TABLE OF CONTENTS

TABLE OF CONTENTS (cont'd)

TABLE OF CONTENTS (cont'd)

TABLE OF CONTENTS (cont'd)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES

Page

Cases (cont'd)

TABLE OF AUTHORITIES

Page

Cases (cont'd)

TABLE OF AUTHORITIES

Page

Cases (cont'd)

TABLE OF AUTHORITIES

Page

Cases (cont'd)

TABLE OF AUTHORITIES

Page

Cases (cont'd)

TABLE OF AUTHORITIES

TABLES OF AUTHORITIES

INTRODUCTION

This appeal arises from a coverage action by a bankrupt former asbestos installer, Fuller-Austin Insulation Company, against its excess insurers. The court below held that an agreement between the bankrupt policyholder and lawyers representing existing and potential asbestos plaintiffs can force the bankrupt company's excess insurers to make accelerated, up-front, lump-sum payment of the company's entire potential insurance coverage limits. The court below held that this bilateral agreement, approved by the federal bankruptcy court without the insurers' participation or consent, conclusively determines the excess insurers' coverage obligations – a result the bankruptcy court had explicitly disclaimed. Based on these holdings and resulting jury verdict, the court entered judgment for more than $80 million against these appellants, London Market Insurers.

These holdings and the resulting verdict violate the plain language of the insurance policies and controlling decisions of the California Supreme Court as well as the bankruptcy court's explicit rulings. Accordingly, the judgment of the Court below was clearly erroneous and must be reversed.

This enormous judgment purports to constitute indemnity for the policyholder's supposed asbestos-injury liabilities; but in fact it does not. Fuller-Austin has paid no such sums to its claimants, and it has no present legal obligation to do so. The actual amounts for which Fuller-Austin may become liable to its asbestos-injury claimants, and the times in the future that those liabilities may arise, are unknown – so unknown, in fact, that the

bankruptcy court entered a final judgment adjudicating that they "cannot be determined."

The trial court wrongly refused to adhere to that federal court judgment. The erroneous legal rulings that followed that critical blunder effectively deprived the insurers of a fair trial – or any trial at all – on almost every essential element of the policyholder's case, culminating in submission to a jury of the very issue already adjudicated by the federal court: whether Fuller-Austin's asbestos-injury liabilities can be determined. The result is the prodigious judgment from which this appeal is taken, requiring the insurers to pay Fuller-Austin now for its unknown, and unknowable, future liabilities.

The rulings that led to the judgment trample the insurers' rights at every turn, contravening the insuring agreements, settled principles of insurance law, and elementary constitutional precepts:

- Must an insurer indemnify its policyholder before the policyholder's underlying liabilities are established or fixed in amount? The judgment says it must. The law says it need not: An insurer cannot be required to indemnify its policyholder until the policyholder's liabilities have been established by an actual trial on the merits – something that did not occur here.
- Is an insurer bound to pay whatever settlement a defended policyholder enters into without the carrier's consent? Yes, says the judgment. No, says the law: A defended policyholder cannot bind an insurer to settlements entered without the insurer's consent.

- When a policyholder sues its insurer to establish coverage for underlying claims, is coverage presumed unless the insurer can prove otherwise? The judgment holds yes. The law holds no: A policyholder must always prove that its liabilities fall within coverage.
- Must an insurer "indemnify" its policyholder for more than the policyholder is (or ever will be) obligated to pay to resolve an underlying liability; and must it pay before the policyholder becomes obligated to pay? The judgment says yes to both questions. The law, again, says no: The duty to indemnify cannot exceed the policyholder's underlying liability obligation; it is triggered only after the policyholder has become legally obligated to pay the underlying claim.

Each of these errors contributed to the perverse and unfair result in this case. They impermissibly transformed the insurance bargain and the law into something they are not, requiring indemnity for claims that have not been adjudicated – nor even yet asserted – against the policyholder. They mandate an unprincipled transfer of more than $80 million for presumed liabilities that do not exist and may never exist.

The significance of these errors extends far beyond this case. Although it is without legal basis, the decision in this case portends far-reaching consequences for asbestos liability litigation, and indeed for all litigation. It would nullify vast portions of California's insurance law; it would rewrite thousands of insurance policies with billions of dollars in

limits; and it would transform bankruptcy proceedings from a shield to protect a company from creditors into a sword that can be used to force insurers to accelerate indemnity payments for supposed claims that have neither been filed nor adjudicated against the policyholder.

The insurance policies, the law, and plain common sense require that the judgment must be reversed. But reversal is just the first step. The reversal must be with directions that judgment be entered in favor of the insurers for the claims tried in this action. The reason: There is no legal or factual basis – none – for liability on these claims in any amount. Not $80 million; not even a penny.

STATEMENT OF THE CASE

A. The Parties.

1. Respondent Fuller-Austin Insulation Company.

Fuller-Austin Insulation Company installed asbestos building materials from the 1940s to the 1970s. It later became a subsidiary of Dynalectron Corporation (later known as DynCorp). Beginning in the late 1980s, Fuller-Austin was sued by thousands of people claiming to have been injured by exposure to its asbestos materials. (17 AA tab 75 at 4723; TE 551, 14 ExApp at 4054 ¶ 2.5.)[1] Fuller-Austin tendered these claims as

[1] This brief cites to Appellants' Appendix ("AA") by volume, tab number, and page, and to trial exhibits ("TE") by volume and page in the Appendix of Trial Exhibits ("ExApp").

they were asserted to its primary carriers, which defended Fuller-Austin until it filed for bankruptcy in 1998. (36 RT 7191.)[2]

2. The London Market Insurers ("LMI").

Appellants are those Underwriters at Lloyd's, London, and solvent London Market Insurance Companies (collectively "LMI") that subscribed severally, and not jointly, to certain excess-level insurance policies issued in favor of Fuller-Austin. (When no differentiation is necessary, this brief refers to LMI and the other defendant excess insurers collectively as "the insurers.")

B. The LMI Excess Insurance Policies.

LMI subscribed to two categories of excess and umbrella policies involving Fuller-Austin, the "London General policies" and the "Cities Service policies."[3]

The London General policies provided coverage from January 1966 through June 1971, for the third through fifth layers of Fuller-Austin's excess liability insurance. (TE 384, 10 ExApp at 2716.)[4] The Cities

---

[2] Fuller-Austin, its corporate parent, and the Fuller Austin Settlement Trust (a trust formed in connection with Fuller-Austin's bankruptcy) are referred to collectively as "Fuller-Austin."

[3] Excess and umbrella policies are referred to as "excess" unless the distinction is significant to the issues. Policies no longer involved in this case are not discussed.

[4] The London General policies are: TE 61, 4 ExApp at 1015 (1/1/76-1/31/77); TE 67, 5 ExApp at 1235 (1/31/77-3/2/78); TE 68, 5 ExApp at 1308 (3/2/78-2/1/79); TE 69, 5 ExApp at 1336 (2/1/79-7/1/80); and TE 70, 5 ExApp at 1397 (7/1/80-7/1/81). (See Ph. 1A SOD, 8 AA tab 44 at 2260-2267.)

Service policies provided coverage in excess of $100,000 per person or $300,000 per accident (with one exception) for the work of specific contractors, including Fuller-Austin, at a particular site in Lake Charles, Louisiana, from May 1966 through April 1971.[5]

The policies for the most part "follow form," incorporating underlying policies' coverage grants, exclusions, and policy language. (Ph. 1A SOD, 31 AA tab 143 at 8858-8859, 8884-8892.) They provide coverage (either expressly or by incorporation) for the "ultimate net loss" Fuller-Austin "paid or [is] held liable to pay" for "liability" imposed by law or assumed by contract. (Ph. 1B SOD, 31 AA tab 143 at 8927-8933; TE 61, 62, 64, 4 ExApp at 1017, 1060, 1130; TE 65-70, 5 ExApp at 1153, 1199, 1239, 1320, 1346, 1410.)

Under the LMI policies, there is no obligation to indemnify a policyholder until (1) "after the Assured's liability shall have been fixed and rendered certain either by final judgment against the Assured after actual trial or by written agreement of the Assured, the claimant, and Underwriters," and (2) "the Assured, or the Assured's underlying insurer, shall have paid the amount of the underlying limits on account of such occurrence."[6] The insurers have a right (but not a duty) to control the

---

[5] The Cities Service policies are: TE 62, 4 ExApp at 1059 (5/1/66-5/1/67); TE 64, 4 ExApp at 1130 (5/1/67-5/1/68); TE 65, 5 ExApp at 1153 (5/1/68-5/1/71); and TE 66, 5 ExApp at 1199 (5/1/68-5/1/71). (See Ph. 1A SOD, 31 AA tab 143 at 8884-8892.)

[6] Ph. 1A SOD, 31 AA tab 143 at 8886-8888; Ph. 1B SOD, 31 AA tab 143 at 8927 fn. 14; see (with some variation in wording) TE 61, 62, 64, 4 ExApp at 1017, 1113, 1133; TE 65, 5 ExApp at 1156; see also TE 66 [incorp. loss payable provision from TE 65], TE 69 [incorp. loss payable

(continued...)

settlement and defense of claims that might involve their coverage. LMIs' policies – all of which are excess – contain no duty to defend Fuller-Austin. (See Instr., 34 AA tab 153 at 9792, 56 RT 11291.)

C. Fuller-Austin's Coverage Lawsuit.

Fuller-Austin filed this action in 1994 against its primary and excess insurers to establish coverage for asbestos bodily injury claims – past, present, and future. (1 AA 1.) It initially sought coverage under more than a hundred comprehensive general liability, umbrella, and excess policies issued by many insurers over the 41-year period from 1944 to 1985. (Ph. 1B SOD, 31 AA tab 143 at 8911.) Eventually, it settled and dismissed its claims against many insurers (including claims involving LMIs' first-layer excess policies other than the Cities Service policies), and added claims for breach of contract. (5th Am. Compl., 1 AA tab 7 at 70; 31 AA tab 143 at 8934; Plan Discl. Stmt., TE 384, 10 ExApp at 2715-2717.)

D. The Baggett Settlement of Cities Service Site Claims.

In May 1998 Fuller-Austin signed the "Baggett" settlement, resolving 658 potential asbestos injury claims arising from the Cities Service work site for about $4 million ($6,000 per claimant). LMI did not consent. The settlement called for payment in installments – an initial $600,000 within 90 days to settle 100 asserted claims, and the balance (about $3.4 million) to settle the remaining 558 unasserted claims. (TE

---

[6] (...continued)
provision from TE 34], TE 70 [incorp. loss payable provision from TE 35], 5 ExApp at 1199. 1336, 1397.

384, 10 ExApp at 2716-2717 & fn. 3, 2721; TE 551, 14 ExApp at 4085; TE 2116, 24A ExApp at 6874.4.)

One of Fuller-Austin's primary carriers paid the initial $600,000 installment. (TE 551, 14 ExApp at 4085; TE 384, 10 ExApp at 2721; 36 RT 7191; 52 RT 10348, 10445.) The $3.4 million settlement balance (not yet due when Fuller-Austin filed for bankruptcy) and the remaining claims were subsumed within the bankruptcy settlement. (17 RT 3004; 52 RT 10447; TE 552, 15 ExApp at 4135 ¶ 74.)

E. Without Insurer Participation, Fuller-Austin and Representatives of Asbestos Claimants Draft a Stipulated, Prepackaged Bankruptcy Plan.

During the year leading up to its 1998 bankruptcy filing, Fuller-Austin and its parent DynCorp drafted a global settlement agreement to be embodied in a prepackaged bankruptcy reorganization plan approved by representatives for present and potential future asbestos claimants. (TE 384, 10 ExApp at 2693-2697, 2711.)[7] Fuller-Austin neither sought nor obtained its insurers' consent to the agreement. (TE 9024, 51 ExApp at 14716 ¶ 23; 10 RT 1797:6-7 [Fuller-Austin's counsel: "They clearly did not consent to it. We acknowledge that."].)[8]

---

[7] In a "prepackaged" plan, before the debtor files for bankruptcy it agrees with representatives of its existing and potential future asbestos creditors to the terms of the reorganization plan, typically (as here) without participation of its insurers. (See Plan Discl. Stmt., TE 384, 10 ExApp at 2708; 13 RT 2255-2256; 20 RT 3510.)

[8] Fuller-Austin advised many of its insurers of the settlement negotiations a few days before they commenced, promising that their outcome would

(continued...)

F. Fuller-Austin Files for Bankruptcy, Seeking Confirmation of the Prepackaged Reorganization Plan.

On September 4, 1998, Fuller-Austin filed for Chapter 11 bankruptcy reorganization in the Delaware Federal District Court, staying all claims against it and seeking confirmation of the prepackaged Plan it had earlier agreed to with representatives of existing and potential claimants. (TE 383, 9-10 ExApp at 2420-2663; TE 413, 12 ExApp at 3346; 11 U.S.C. § 362 (a).) According to Fuller-Austin, about 18,500 asbestos injury suits had then been filed against it. (TE 551, 14 ExApp at 4077-4078 at ¶¶ 113-114.) Fuller-Austin admitted that at all times before its bankruptcy filing its primary insurers had defended and indemnified it against all asbestos claims. (36 RT 7191; TE 9024, 51 ExApp at 14716 ¶ 21 [Reichardt]; DynCorp 10/1/98 SEC 10-Q, TE 8353, 40 ExApp at 11726.)

In conjunction with its prepackaged Plan, Fuller-Austin filed a detailed disclosure statement setting forth the factual basis for the Plan. (TE 384, 10 ExApp at 2664; see 43 RT 8440.) Neither the Plan nor the disclosure statement were provided to Fuller-Austin's insurers until some weeks later. (TE 416, 13 ExApp at 3546.)

---

[8] (...continued)
"obviously be subject to review" by the insurers. It warned the insurers that it would stop the negotiations only if it received a writing signed by all potential insurers agreeing to defend and indemnify Fuller-Austin without any reservation of rights. (TE 7683, 40 ExApp at 11636-11637.)

G. The Reorganization Plan.

The Plan called for Fuller-Austin to be reconstituted as the Fuller-Austin Settlement Trust ("the Trust") created under Bankruptcy Code section 524, subdivision (g) (11 U.S.C. §524(g) ("Section 524(g)")). (Plan Disc. Stmt., TE 384, 10 ExApp at 2693-2701.)[9] The Trust would use Fuller-Austin's assets – primarily its available insurance coverage – to fund payments to existing and future claimants over an anticipated 40-year period ending in 2039. Channeling injunctions would require all existing and future asbestos injury claims to be asserted against and paid solely by the Trust under the Plan's claims resolution procedures. (Plan Disc. Stmt., TE 384, 10 ExApp at 2704-2705, 2779-2781 §§ 1.2(b), 6.1(d)(3), 6.2, 6.3; 11 U.S.C. § 524(g)(1).) The proposed Plan provided detailed procedures under which the Trust would resolve claims alleging asbestos injuries, although claimants who wanted to bypass the red tape and delay of those procedures could opt for a speedier, few-questions-asked $800 cash settlement. (Plan CRP, TE 383, 9 ExApp at 2516-2518.)

---

[9] Section 524(g), enacted in 1994, provides a trust mechanism for bankruptcies stemming from asbestos mass tort litigation to allocate available resources among existing and potential future asbestos claimants in order to "enhance the likelihood that future claimants . . . would be treated equally with present claimants." (Ph. 1B SOD, 31 AA tab 143 at 8916:25-26, fn. 6.) Among the statutory prerequisites for a Section 524(g) trust are that: (1) the debtor is likely to be subject to substantial future asbestos claims in numbers that will threaten its ability to deal equitably with its present and future claims; (2) the actual numbers and values of future demands cannot be determined; and (3) 75% of its claimants and representatives of potential future claimants must approve the Plan. (Section 524(g)(2)(B)(ii).)

The Plan's claims resolution procedures required that, as actual claims are presented, the Trust would evaluate which of five asbestos disease categories the claim falls into. If the claim is allowed, the Trust would then assign the claim a pre-set "allowed liquidated value" corresponding to the appropriate category (with discretion to set a different value if the claim does not fall neatly within any category). The claimant could then either agree to the Trust's determination or seek a different ruling through non-binding or binding arbitration, or a jury trial. (Plan CRP, TE 383, 9 ExApp at 2512, 2518-2526.) That figure would be the claim's "allowed amount," which, according to the Plan, would be equivalent to a judgment against Fuller-Austin. (Plan CRP, TE 383, 9 ExApp at 2455 ¶ 10.7.)

Although nominally a "judgment," the "allowed amount" was not the amount the Trust would be obligated to pay. Rather, it would then be multiplied by a fractional "payment sum percentage" set (subject to periodic adjustment) by the Trust in light of the resources available to pay existing and anticipated future claims. The product of that multiplication – a small fraction of the "allowed amount" – would become the Trust's actual obligation to the claimant. (Plan CRP, TE 383, 9 ExApp at 2514-2515, 2523; TE 551 ¶ 79, 14 ExApp at 4072.)

The Plan contemplates that the Trust could deny claims altogether, but would resolve and pay claims without actual proof of injury or causation (i.e. that the claimant was actually injured by Fuller-Austin's asbestos handling at any specific time or place). (See 31 AA tab 143 at 8917, fn. 8 [trial court acknowledges Trust's procedures do not require

"legally sufficient proof of the claims"].) The Plan's claims-resolution framework was procedural only. By its terms, it could create no "substantive right for any claimant." (Plan CRP, TE 383, 9 ExApp at 2513 ¶ 1.3.)

As originally proposed, the Plan would also have identified an "aggregate" amount of Fuller-Austin's total asbestos liabilities to present and future claimants. (Plan CRP, TE 383, 9 ExApp at 2455, ¶ 10.7.) The proposed Plan's paragraph 10.7 provided that the Plan's confirmation by the bankruptcy court would constitute "a determination of a sum that Fuller-Austin and the Trust shall be legally obligated to pay." (*Ibid.*) The Plan was amended to delete that provision before its confirmation, as discussed below.

H. The Insurers Seek to Intervene and File Objections to the Proposed Plan in the Delaware Bankruptcy Court.

LMI and other insurers sought to intervene in the bankruptcy proceedings, filing objections to the Plan. (TE 441, 445, 446, 447, 452, 539, 13 ExApp at 3549-3788; 14 ExApp at 3789-3851, 4034-4038.) Their concerns, accurately summarized by the bankruptcy court, were that "confirmation of the proposed Plan would 'summarily adjudicate the liability of excess carriers under excess insurance policies,' thus impacting and possibly influencing the resolution of the pending Coverage Litigation and impairing the rights and obligations of Objecting Insurers under their insurance policies." (Order, TE 544, 14 ExApp at 4042, fn. omitted.) The insurers predicted (with considerable prescience as it turned out) that if the Plan were confirmed, Fuller-Austin would contend in the still-pending Los

Angeles Superior Court coverage lawsuit that the confirmation order established Fuller-Austin's liability for coverage purposes; that it established the insurers' obligation to pay Fuller-Austin for pending claims that had not yet been resolved or paid and for future claims that were not yet (and might never be) asserted; that it obviated Fuller-Austin's duty to establish that particular claims fall within their policies' coverage; and that it eliminated the insurers' right to insist that underlying coverage layers be exhausted before excess coverage is triggered as the policies, by definition, provide. (E.g., TE 441, 446, 447, 452, 13 ExApp 3570 et seq., 3729 et seq.; 14 ExApp 3802 et seq., 3829 et seq.)

I. Fuller-Austin Represents to the Bankruptcy Court that Plan Confirmation Cannot Bind the Insurers or Affect Their Coverage Rights, and Fuller-Austin Amends the Plan to Expressly so Provide.

Fuller-Austin pressed the bankruptcy court not to hear the insurers' objections. It unilaterally amended the proposed Plan – in direct response to the insurers' objections – excising all references to aggregate amounts as set forth in paragraph 10.7, and it added a new provision to the Plan, paragraph 12.9.1:

> "Notwithstanding any other provision in this Plan, all claims and defenses of any Asbestos Insurance Company that is a party to the Coverage Litigation shall be adjudicated in the Coverage Litigation, and all rights of the Asbestos Insurance Companies under the Asbestos Insurance Policies shall remain unaffected by the Plan and the Confirmation Order."

(TE 525 at 39:7-13, 14 ExApp at 3997; see Orders, TE 544, 552, 14 ExApp at 4044, 15 Ex App 4133.)

Fuller-Austin then urged that the amendments rendered the Plan powerless to affect the insurers' coverage rights. Because their rights would not be affected, it argued, LMI and the other insurers lacked standing to have their objections to the Plan heard:

> "[Insurer] contends that the Plan is intended to 'summarily adjudicate . . . all present and future asbestos claims, gut the pending Coverage Litigation and force the Excess Carriers to pre-fund the full amount of the asbestos claims. . . .' To the contrary, the Amended Plan makes clear that [insurer's] fears are unfounded." (TE 489, 14 ExApp at 3876.)

> "The *sine qua non* of standing is that one's rights have to be affected by what has happened. And we have stated that they are not. . . . I think we have made perfectly clear in our amendment to the plan of reorganization that [the insurers'] rights are not affected, and we have made perfectly clear in our amended plan that their claims and defenses in the coverage litigation is [*sic*] not affected. . . ." (TE 525, 14 ExApp at 3998.)

J. The Bankruptcy Court Confirms the Amended Plan, Ruling that the Plan and Confirmation Order Do Not and Cannot Affect any Coverage Issues.

The bankruptcy court ruled LMI and the other insurers lacked standing to intervene or object to the Plan because "in view of the amendments made by Debtor to the proposed Plan," its confirmation could not impact any coverage issues. (Order, TE 544, 14 ExApp at 4046 [insurers' rights under their policies "are preserved for adjudication in the Coverage Litigation . . . ."].)

After declining to hear the insurers' objections to the Plan, the bankruptcy court confirmed the amended Plan on November 13, 1998. (TE 552, 15 ExApp at 4104.) As Section 524(g) requires as a condition of confirmation, the bankruptcy court found that "[t]he actual amounts, numbers and timing" of future claims against Fuller-Austin "cannot be determined." (TE 551, 14 ExApp at 4078 ¶ 120; § 524(g)(2)(B)(ii)(II); see fn. 8, above.) In confirming the Plan, the court's order also barred Fuller-Austin from relying on the Plan or the confirmation order to bind the insurers in the pending coverage litigation:

> "Notwithstanding any other provision in the Plan, all claims and defenses of [the insurers] shall be adjudicated in the Coverage Litigation, and all rights of the Asbestos Insurance Companies under the Asbestos Insurance Policies shall remain unaffected by the Plan and the Confirmation Order." (TE 552, 15 ExApp at 4133 ¶ 68.)

In a later hearing, Fuller-Austin again renounced any use of the Plan confirmation to affect the insurers' rights in the coverage action:

> "What we want to make clear is that . . . with respect to any rights [the insurers] have in the coverage litigation to avoid paying claims, whatever they may be, those rights are preserved and they can litigate that with Fuller-Austin and the trust until the cows come home." (TE 6806, 38 ExApp at 10895:14-19.)

Relying on these renewed assurances, the bankruptcy court reconfirmed that its order could not be construed to determine issues relevant to coverage. (TE 6803, 38 ExApp at 10897, 10900-10902.) The Plan became effective December 11, 1998. (31 AA tab 143 at 8915:3-4.)

K. The Superior Court Coverage Action Proceeds to Trial.

The reorganized Fuller-Austin resumed its coverage action against the insurers before the Honorable Judith Chirlin.[10] The trial court bifurcated the trial, reserving Phases 1A and 1B for a bench trial to resolve issues of law and Phase 2 for a jury trial of all factual issues. (31 AA tab 143 at 8828.)

1. Phase 1A bench trial.

In Phase 1A, the trial court resolved legal disputes about specific provisions of the policies and exhaustion of underlying insurance. Its

---

[10] References to Fuller-Austin after the bankruptcy confirmation are to the reorganized Fuller-Austin Settlement Trust. (See TE 552, 15 ExApp at 4110, 4113-4114 ¶¶ 19, 30, 31.)

rulings included that the excess policies for the most part "follow form" of the underlying coverage (Ph. 1A SOD, 31 AA tab 143 at 8856-8858; see 8 AA tab 44 at 2227); and that horizontal (rather than vertical) exhaustion determines when underlying coverage is exhausted (i.e., *all* primary and lower-layer excess coverage must be exhausted before *any* higher-layer excess coverage obligation attaches). (31 AA tab 143 at 8898; see TE 384, 10 ExApp at 2716 [London General policies provide 3rd through 5th layer excess coverage].)

2. Phase 1B bench trial.

During the Phase 1B bench trial, Fuller-Austin argued exactly what it had represented to the bankruptcy court and to the insurers it would not: It argued that by virtue of the confirmed bankruptcy Plan, LMI and the other insurers became immediately obligated to pay Fuller-Austin the Plan's stipulated values for all existing and anticipated future asbestos claims. (E.g., 4 AA tab 25 at 973; 4 AA tab 26 at 979; 4 AA tab 27 at 986; 20 RT 3731:9-13, 3749-3750. See insurers' objections, 1 AA tab 18 at 151; 5 AA tab 33 at 1448; 5 AA tab 34 at 1453; 12 AA tab 47 at 3242; 16 AA tab 71 at 4551-4555; 23 AA tab 127 at 6467-6468, 6477:22-6778:8.)[11] Despite the bankruptcy court's explicit contrary orders, the trial court agreed with Fuller-Austin. Specifically, it ruled:

---

[11] The trial court ruled that the Cities Service policies are "specific" excess policies, applying only to claims arising from the Cities Service site in Lake Charles, Louisiana, and are triggered after exhaustion of primary coverage but before other excess coverage attaches. (Ph. 1B SOD, 31 AA tab 143 at 8921.)

a. The Plan confirmation establishes Fuller-Austin's liability to claimants in fixed amounts, obligating Fuller-Austin "to pay damages to all present and future asbestos claimants." (Ph. 1B SOD, 31 AA tab 143 at 8948-8949 ¶ 2.)

b. The Plan confirmation is a "judgment and adjudication" that binds LMI and the other insurers, constituting an "actual trial" of Fuller-Austin's underlying tort liability. (*Id.* at 8948-8949 ¶¶ 2, 3.)

c. Even if the bankruptcy proceeding were not an actual trial of Fuller-Austin's liability to claimants, the Plan constitutes a settlement that binds Fuller-Austin's insurers without their consent. (*Id.* at 8945-8949.)

d. The insurers' indemnity obligations were automatically triggered when they received notice that Fuller-Austin's existing and potential future liabilities might exceed underlying coverage and when they learned that Fuller-Austin would commence global settlement negotiations. (*Id.* at 8948 ¶ 1, 8950 ¶ 2.)

e. The "asbestos liabilities adjudicated in the bankruptcy are presumed to be harm within coverage" under the insurers' policies and "[i]t is [the insurers'] burden at trial to prove otherwise." (*Id.* at 8949 ¶ 6.)

f. Once the Plan was confirmed, the insurers became obligated to pay Fuller-Austin the entire "allowed amount" of each existing and anticipated future asbestos claim, even though Fuller-Austin was not and would not actually be obligated to pay that amount, or any amount at all, for each claim. (*Id.* at 8949 ¶ 4.)

g. Despite the bankruptcy court's finding that "the actual amounts, numbers and timing" of claims against Fuller-Austin "cannot be determined," a jury can use expert opinions about the likely amounts, numbers and timing of future claims against Fuller-Austin to determine "the aggregate value of Fuller-Austin's asbestos liability." (*Id.* at 8918, 8929, 8949 ¶ 4; see *id.* at 8915 & fn. 3.)

The trial court's Phase 1B rulings, and their application in the Phase 2 trial, give rise to the issues in this appeal.[12]

3. Phase 2 jury trial.

A jury was empaneled to determine what amount the insurers "should pay" to Fuller-Austin for existing and future liabilities to asbestos claimants. The trial court instructed the jury in accordance with its Phase 1B rulings and, over the insurers' objections, the jury heard expert and statistical evidence estimating the numbers and values of the "pending and future asbestos claims" against Fuller-Austin. (See Instr., 34 AA tab 153 at 9801, 56 RT 11303:25-11304:1. See RT vol. H at 72-91; 2 AA tab 19 at 407; 3 AA tab 20 at 773; 4 AA tab 21 at 907; 23 AA tab 127 at 6494 [objections].)

Among other directions, the trial court instructed the jury that the bankruptcy confirmation established Fuller-Austin's liability and damages owed to all existing and future claimants (34 AA tab 153 at 9794; 56 RT 11292:11-22); that the insurers are bound by reasonable settlements without their consent (34 AA tab 153 at 9792, 9795-9796, 9798-9799; 56 RT

---

[12] The insurers' petition for writ relief following the Phase 1B rulings was summarily denied. (2d Civil No. B160737.)

11290, 11294, 11296, 11298); that the bankruptcy court found the bankruptcy Plan settlement was reasonable (34 AA tab 153 at 9794; 56 RT 11293:14-15); and that all pending and future asbestos claims resolved by the bankruptcy are presumed to be covered under the insurers' policies unless the insurers proved otherwise (34 AA tab 153 at 9790-9791, 9794; 56 RT 11288:5-9, 11292).

L. The Jury Returns Special Verdicts Holding LMI Liable for $80.9 Million.

The jury returned the following special verdicts:

1. Fuller-Austin's liability for claims already paid or allowed by settlements and the Trust totaled $108,175,000; its estimated present liability for claims asserted but not yet resolved by the Trust totaled $108,000,000; and its future liability for asbestos claims totaled $750,000,000. (Spec. Verdict, 31 AA tab 143 at 8837-8839.)

2. LMI breached no obligations under the London General policies before the bankruptcy Plan confirmation; they breached some unidentified obligation under the Cities Service policies before the bankruptcy Plan confirmation, which caused damage to Fuller-Austin. (*Id.* at 8831-8834.)

3. LMI must pay Fuller-Austin $63,271,270 for their General-policy obligations and $17,585,238 for their Cites Service-policy obligations – a total of $80,856,508 – to indemnify Fuller-Austin for its "present liability for allowed, pending, and future asbestos claims." (*Id.* at 8840-8843.)

M. The Superior Court Enters an $80.9 Million Judgment Against LMI and Denies their Post-trial Motions.

On August 1, 2003, the trial court entered judgment in favor of Fuller-Austin and against LMI for $80,904,900.[13]

On September 18, 2003, LMIs' timely motions for judgment notwithstanding the verdict and for new trial were denied. (40 AA tab 170 at 11577; see 34-39 AA tabs 153-154 at 9605-11113; 40 AA tabs 166-167 at 11447-11483.)

N. Appeals and Cross-Appeals.

LMI appealed on September 22, 2003 from the judgment and from denial of judgment NOV, and on November 12, 2003 from the cost award. (40 AA tab 173 at 11600; 43 AA tab 191 at 12285.) On October 16, 2003, Fuller-Austin cross-appealed from the judgment. The appeals have been consolidated.

STATEMENT OF APPEALABILITY

The appeals by LMI from the August 1, 2003 judgment and from the September 18, 2003 denial of post-trial motions are timely under Rule 2(a)(2), California Rules of Court, as filed within 60 days of notice of

---

[13] The total consists of $63,271,270 plus post-verdict prejudgment interest of $1,067,386 with respect to the London General policies, and $16,291,408 plus post-verdict prejudgment interest of $274,836 with respect to the Cities Service policies. (Judgment, 31 AA tab 143 at 8846-8849 ¶¶ 4.a, 5.a, 5.b.) Because the jury undisputedly awarded amounts that exceed the Cities Service coverage, the judgment reflects reductions from the Special Verdict. (See Fuller-Austin brief in support of Judgment, 24 AA tab 130 at 6781.)

entry of the judgment and the dates of the orders appealed from. The appeals are also timely under Rule 3(a)(1), California Rules of Court, because they were filed within 30 days of the trial court's denial of the new trial motion.

ARGUMENT

I. THE INDEMNITY JUDGMENT MUST BE REVERSED BECAUSE THERE WAS NEITHER AN ACTUAL TRIAL OF FULLER-AUSTIN'S LIABILITY NOR A SETTLEMENT WITH THE INSURERS' CONSENT.

It is a bedrock principle of California insurance law that before an insurer is obligated to indemnify a defended policyholder, one of two conditions must be satisfied: the policyholder's liability must be established in a fixed amount by an actual trial on the merits, or the insurer must consent to a settlement of the policyholder's liability.

Neither condition is satisfied here. Fuller-Austin's liabilities to claimants have not been established by any actual trial – not in the bankruptcy court, and not in the trial court. LMI did not consent to any settlement between Fuller-Austin and its claimants, and nothing occurred that could excuse the requirement for their consent. The judgment therefore must be reversed with directions to enter judgment in LMIs' favor.[14]

---

[14] Most of the issues in this appeal present pure questions of law arising from the impact of undisputed facts on rights afforded by law and by (continued...)

A. The Policies and Controlling Law Require Either an Actual Trial of Fuller-Austin's Liabilities to Claimants or the Insurers' Consent to a Settlement with Claimants in Order to Obligate the Insurers to Pay Indemnity.

Under the policies, the insurers' indemnity obligation arises only when "the Assured's liability shall have been fixed and rendered certain either by final judgment against the Assured after actual trial or by written agreement of the Assured, the claimant, and Underwriters." (31 AA tab 143 at 8886-8888, 8927 fn. 14; see [with some wording variations] TE 61, 62, 64, 4 ExApp at 1017, 1113, 1133; TE 65, 5 ExApp at 1156; see also TE 66 [incorp. loss payable provision from TE 65], TE 69 [incorp. loss payable provision from TE 34], TE 70 [incorp. loss payable provision from TE 35], 5 ExApp at 1199, 1336, 1397.)

California law precisely tracks these requirements. Until the policyholder's losses are "fixed in their amount" by a judgment following an actual trial of its liabilities, the insurer has no indemnity duty. (*Certain Underwriters at Lloyd's of London v. Superior Court* (2001) 24 Cal.4th 945, 958 ("*Powerine*"), citing *Aerojet-General Corp. v. Transport Indemnity Co.* (1997) 17 Cal.4th 38, 56 [indemnity obligation cannot arise until claim is conclusively established in fixed amount]; *Buss v. Superior*

---

[14] (...continued)
policies of insurance. (*Century Transit Systems, Inc. v. American Empire Surplus Lines Ins. Co.* (1996) 42 Cal.App.4th 121, 125; *Alex Robertson Co. v. Imperial Casualty & Indemnity Co.* (1992) 8 Cal.App.4th 338, 343].) Review therefore is de novo. (*Ibid.*; *Smith Kandal Real Estate v. Continental Casualty Co.* (1998) 67 Cal.App.4th 406, 414 [application of insurance policy to undisputed facts].)

Court (1997) 16 Cal.4th 35, 45-46 [no indemnity duty until policyholder's liability is "proved" in underlying action]; *Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, 659, fn. 9 [no indemnity obligation where "no damages were awarded in the underlying action against the insured"]; see also Civ. Code, § 2778, subd. 1 [indemnitee is entitled to payment only "upon becoming liable"].) Justice Mosk stated the rule in *Buss v. Superior Court*: "By definition" an insurer's obligation to indemnify "arises only after liability is established." (*Buss v. Superior Court*, *supra*, 16 Cal.4th at 46.)

A policyholder's liability for claims that have been asserted is established by judgment entered after an actual trial. (*Powerine*, *supra*, 24 Cal.4th at 962 ["it is in a 'suit' that 'damages' are fixed in their amount through the court's order"].) For claims that have not yet been asserted, there can be no trial or liability because, as our Supreme Court has recognized, "'damages,' i.e., money ordered by a court, cannot be fixed in their amount since they have not been sought in the first place." (*Powerine*, *supra*, 24 Cal.4th at 968.)

Alternatively, an insurer's consent to a settlement with the policyholder's claimants can trigger its indemnity obligation. But unless the insurer has breached a duty to defend the insured – and LMI owed no such duty to Fuller-Austin[15] – a policyholder's stipulated settlement without the insurers' consent "is ineffective to impose liability upon the insurer."

---

[15] Fuller-Austin was fully defended by its primary carriers. (36 RT 7191; TE 9024, 51 ExApp at 14716 ¶ 21; TE 8353, 40 ExApp at 11726 [Fuller-Austin was fully defended and indemnified before bankruptcy filing]; 31 AA tab 143 at 8831-8832 [jury finds LMI breached no General policy obligation until after bankruptcy settlement was confirmed].)

(*Safeco Ins. Co. v. Superior Court* (1999) 71 Cal.App.4th 782, 787; see also *Isaacson v. California Ins. Guarantee Assn.* (1988) 44 Cal.3d 775, 791-792 [after insurer's wrongful failure to defend, insurer may become liable for policyholder's reasonable settlement]; *Low v. Golden Eagle Ins. Co.* (2003) 110 Cal.App.4th 1532, 1544 [unless insurer breaches duty to defend, insureds cannot unilaterally settle claim before liability is established].)[16] The insurers' right to consent – or to withhold consent – to settlements thus "'protects against coverage by fait accompli.'" (*Low*, *supra*, 110 Cal.App.4th at 1544.)

The result is the same under Louisiana law, which governs the Baggett settlement arising under the Cities Service policies. (31 AA tab 143 at 8912, fn. 1 [Louisiana law governs Cities Service policies].) Like California law, Louisiana law requires either the insurers' consent or an

---

[16] Numerous cases support this proposition. See, e.g., *Jamestown Builders, Inc. v. General Star Indemnity Co.* (1999) 77 Cal.App.4th 341, 346 [insurer is not bound by defended policyholder's settlement of claim]; *Pruyn v. Agricultural Ins. Co.* (1995) 36 Cal.App.4th 500, 515 [where insured is not denied defense, settlement without insurer's consent does not bind insurer]; *Wright v. Fireman's Fund Ins. Companies* (1992) 11 Cal.App.4th 998, 1024 [stipulated judgment without insurer's consent cannot bind insurer]; *Rose v. Royal Ins. Co.* (1991) 2 Cal.App.4th 709, 716-717 [policy precludes coverage for settlement made without non-breaching insurer's consent]; *Studley v. Benica Unified School Dist.* (1991) 230 Cal.App.3d 454, 460 (questioned on unrelated ground in *Fire Ins. Exchange v. Altieri* (1991) 235 Cal.App.3d 1352, 1357) [defending insurer is not bound by stipulated judgment entered into between insured and claimant]; *Clark v. Bellefonte Ins. Co.* (1980) 113 Cal.App.3d 326, 337 ["The carrier may become obligated to reimburse the insured for payments to claimants only where it has breached the contract by wrongfully denying coverage or refusing to defend"]; see *Hogan v. Midland National Ins. Co.* (1970) 3 Cal.3d 553, 564 [insurer that wrongfully fails to defend insured is bound only by issues actually determined by litigation against insured].)

actual trial of the policyholder's liabilities before the insurers can be bound by a policyholder's unilateral settlement. (*Grefer v. Scottsdale Ins. Co.* (E.D.La. 2001) 207 F.Supp.2d 546, 549-550 [policyholder's settlement with claimant does not bind insurer]; *In re Combustion, Inc.* (W.D.La. 1997) 960 F.Supp. 1051, 1055 [under Louisiana law, policyholder's settlement with claimants does not fix insurer's liability; policyholder's liability can be determined only by trial].)

B. The "Actual Trial" Element was not Satisfied Because the Bankruptcy Proceedings Do Not Qualify as an Adjudication of Fuller-Austin's Liability.

The trial court held that the bankruptcy court's order confirming the Plan constitutes a judgment establishing Fuller-Austin's liabilities and obligation to pay fixed amounts to all claimants; that "the process employed by the bankruptcy court meets the definition of 'actual trial'"; and that "the liabilities established by the confirmed bankruptcy plan trigger coverage under the insurance policies." (31 AA tab 143 at 8918, 8941-8942.) Those rulings squarely violate controlling decisions of the California Supreme Court and courts of appeal, and they have no support in the record. The Plan confirmation could not transform Fuller-Austin's prepackaged bankruptcy Plan into an actual trial of its liabilities. The "actual trial" prong of the indemnity test was not satisfied.

1. Controlling law and the record in this case preclude the trial court's ruling that the bankruptcy Plan confirmation constituted an actual trial of Fuller-Austin's liabilities.

It is now black-letter law that judicial approval of a consensual settlement between a policyholder and a claimant does not satisfy the requirement of an "actual trial." Our Supreme Court recently reaffirmed that rule in *Hamilton v. Maryland Casualty Co.* (2002) 27 Cal.4th 718. Where, as here, the policyholder is defended by its insurers and will not be obligated to come up with its own funds to pay the settlement amount, "the entry of a stipulated judgment is insufficient to show, even rebuttably, that the insured has been injured to *any* extent . . . , much less in the amount of the stipulated judgment." (*Id.* at 726.)

Under *Hamilton*, even judicial confirmation of a settlement's good faith "cannot transform an agreed judgment . . . into a determination of the existence and extent of the insured's liability." (*Id.* at 729; see *Pruyn v. Agricultural Ins. Co.*, *supra*, 36 Cal.App.4th at pp. 516-517 [defended policyholder cannot bind its insurer to a settlement without its insurer's consent].) And the policyholder's liability to its claimants cannot be determined in the policyholder's coverage action against its insurers; the policyholder's liability must be established *before* the insurers' coverage for that liability can be determined. (*Hamilton*, *supra*, 27 Cal.4th at 734 [trial of policyholder's liability and insurers' breach of duty in same action "threatens to unfairly prejudice the insurer"]; *Smith v. State Farm Mut. Auto. Ins. Co.* (1992) 5 Cal.App.4th 1104, 1112 [same].)

Following close on *Hamilton's* heels, *Wolkowitz v. Redland Ins. Co.* (2003) 112 Cal.App.4th 154, 163-166) (Croskey, J.) removed any doubt that *Hamilton* applies to bankruptcy settlement confirmations such as the Plan confirmation in this case. In *Wolkowitz*, the policyholder had settled a claim and – just as here – the bankruptcy court had confirmed the settlement. The bankruptcy trustee then prosecuted coverage litigation to enforce the settlement terms against the policyholder's carrier, much as Fuller-Austin prosecuted this case against its insurers. *Wolkowitz* held that a policyholder's liability cannot be established by a settlement – not even when the settlement is judicially approved and embodied in a federal bankruptcy court judgment:

> "As with the 'good faith' settlement in *Hamilton, supra* [citation], the bankruptcy court's order was not a judicial finding that [the policyholder] was actually liable to [the claimant] in the agreed amount." (*Id.* at 165.)

Thus, *Wolkowitz* held, "the [bankruptcy court order] may well be binding on [the policyholder]; *but it is not binding on* [*the insurer*]." (*Ibid.*, emphasis in original.) Controlling authority therefore squarely proscribes the trial court's conclusion that the Plan confirmation fulfills the requirement for an "actual trial" of Fuller-Austin's liabilities to its claimants.

The record corroborates that the bankruptcy court confirmation proceedings had none of the attributes of an actual trial of Fuller-Austin's liabilities. There was no adversarial presentation of facts or arguments

relating to Fuller-Austin's actual liability to any claimant for any claim; the bankruptcy court allotted just one hour for Fuller-Austin to argue in favor of confirmation, "with no cross-examination." (TE 525, 14 ExApp at 3988.) No party to the bankruptcy proceedings had any motive to protect Fuller-Austin from undeserved liabilities. The bankruptcy court's role was to protect the interests of asbestos claimants and other creditors; Fuller-Austin (and its corporate parent) sought only approval of the stipulated Plan, not to minimize its liabilities, because only the absent insurers would be called upon to pay anything beyond the Plan's stipulated contributions. (See 43 RT 8465-8468 [bankruptcy Plan caps Fuller-Austin's responsibility for asbestos claims, per Fuller-Austin expert].) With no evidence of liability or damages and no adversarial presentation, the bankruptcy proceedings could not meet any definition of an actual trial of Fuller-Austin's liability to asbestos claimants. (See *Schaefer/Karpf Productions v. CNA Ins. Companies* (1998) 64 Cal.App.4th 1306, 1314 [issue is not "actually litigated" where contrary evidence is restricted].)

2. The trial court completely misread the bankruptcy court's orders; the bankruptcy court made no liability determination.

The trial court reached its conclusion that the bankruptcy court conducted an actual trial of Fuller-Austin's liabilities only by completely misreading what the bankruptcy court actually ordered. (31 AA tab 143 at 8918:3-11, 8941:1-8, 8942:26-8943:3, 8945:10-8946:4.) By confirming the Plan, the Delaware bankruptcy court made no liability determination because the Plan does not determine Fuller-Austin's liability.

The Plan expressly creates no "substantive right for any claimant," and it defers for future determination by the Trust all issues involving liability and amounts – including whether the claimant will be entitled to anything at all – on a claim-by-claim basis. (Plan CRP, TE 383, 9 ExApp at 2513 § 1.3, 2516-2518.) While reciting that the allowed amounts would be equivalent to a judgment against Fuller-Austin once they are determined by the Trust (TE 383, 10 ExApp 2455 ¶ 10.7), the final Plan confirmed by the bankruptcy court does not establish Fuller-Austin's liability to any claimant, for any claim, in any amount.

In fact, the bankruptcy court emphatically ruled, time and again, that its proceedings and order confirming the Plan did *not* adjudicate rights that could affect coverage. In unmistakably clear language, it ruled:

- "Objecting Insurers' rights under their respective insurance policies are preserved for adjudication in the Coverage Litigation . . . ." (TE 544, 14 ExApp at 4046.)
- The confirmation order's effect on the coverage action should be – as Fuller-Austin represented – as if "this whole [bankruptcy] filing never occurred," because the bankruptcy proceedings "have no application. . . ." to the coverage action. (TE 6806, 38 ExApp at 10897, 10902:1-6.)
- "Notwithstanding any other provision in the Plan, all claims and defenses of any Asbestos Insurance Company that is a party to the Coverage Litigation shall be adjudicated in the Coverage Litigation, and all rights of the Asbestos Insurance Companies under the Asbestos Insurance Policies shall remain unaffected by

the Plan and the Confirmation Order." (Order, TE 552, 15 ExApp at 4133.)

Indeed, the bankruptcy court *could not* adjudicate Fuller-Austin's legal obligation to claimants without completely scuttling Fuller-Austin's settlement Plan. The reason: Section 524(g) is a bankruptcy remedy available only where the debtor's liabilities *cannot* be determined. As required by Section 524(g)(2)(B)(ii)(II), therefore, the bankruptcy court affirmatively found that "the actual amounts, numbers and timing" of future claims against Fuller-Austin "cannot be determined." (TE 551, 14 ExApp at 4078 ¶ 120.) Had the bankruptcy court adjudicated Fuller-Austin's liabilities – as the trial court concluded it did – it would have destroyed Fuller-Austin's eligibility for the Section 524(g) remedy.

Under controlling decisional authority as well as the record in the trial court and in the bankruptcy court, neither the bankruptcy settlement nor the Baggett settlement could trigger LMIs' indemnity obligations. The trial court erred in concluding they did.

C. LMI Did Not Consent to any Settlement of Fuller-Austin's Liabilities and Did Not Forfeit Their Right to Withhold Consent.

Under their policies, the insurers are not bound by a settlement without a "written agreement" between "the Assured, the claimant, *and Underwriters*." (31 AA tab 143 at 8886-8888, 8927 fn. 14, emphasis added.) By holding LMI bound by Fuller-Austin's bankruptcy Plan and Cities Service settlements on the ground LMI either constructively

consented or forfeited their right to withhold consent, the trial court effectively wrote the underwriters out of this equation. In effect, it rewrote the policies to eliminate this provision. (31 AA tab 143 at 8944-8950.)[17]

The trial court then translated these rulings into jury instructions that mandated a verdict against the insurers: It instructed the jury that "[o]nce the Plan was confirmed, Fuller-Austin became liable to pay all pending and future asbestos claimants"; that the bankruptcy confirmation established Fuller-Austin's liability and damages owed to existing and future claimants; that the insurers are bound by settlements unless they are unreasonable, and the bankruptcy court found the bankruptcy settlement to be reasonable; and that by reserving their rights and failing to accept a reasonable settlement, the insurers forfeited their right to withhold consent to Fuller-Austin's settlements. (Instr., 34 AA tab 153 at 9792, 9794-9796, 56 RT 11289-11290, 11292-11296.)

These rulings and instructions constituted prejudicial error. They are directly contradicted by the jury's special verdict, finding that LMI had breached *none* of their General policy obligations before the bankruptcy confirmation.[18] LMI did not consent either to the bankruptcy settlement of

---

[17] The trial court went so far as to bar the insurers from referring in their Phase 2 opening statements to the policy provisions that require the insurers' consent to settlements, as though the policies contained no such requirement. (RT 2/14/03, pp. 167-168 [Insurer's counsel: "Are you saying that our consent defense is out?" The court: "Yes, that is what I'm saying."].)

[18] The jury's finding that LMI breached their Cities Service policy obligations before the bankruptcy confirmation resulted from erroneous rulings and jury instructions, and is completely without factual basis. (See this brief, Section VI, below.)

the General policy claims or the Baggett settlement of Cities Service claims, and did nothing to compromise their right to withhold their consent to Fuller-Austin's unilateral settlements. (TE 9024, 51 ExApp at 14716 ¶ 23; 10 RT 1797:6-7; 36 RT 7170.) The trial court's contrary rulings and instructions require reversal.

1. The jury's findings confirm the insurers' right to withhold their consent to the bankruptcy settlement.

The jury specially found that LMI breached no obligations under the London General policies before the bankruptcy confirmation. (Spec. Verdict, 31 AA tab 143 at 8831-8832.) Therefore no breach existed that could have resulted in forfeiture of LMIs' right to withhold their consent to the bankruptcy settlement. (*Safeco Ins. Co. v. Superior Court*, *supra*, 71 Cal.App.4th at 787; *Low v. Golden Eagle Ins. Co.*, *supra*, 110 Cal.App.4th at 1544 ["'insureds cannot unilaterally settle a claim before the establishment of the claim against them and the insurer's refusal to defend in a lawsuit to establish liability'"].)

Because LMI was not in breach of its obligations when Fuller-Austin entered into the bankruptcy settlement, its failure to pay under that settlement breached no duty. The trial court's contradictory determination that LMI consented to the settlement cannot stand.

2. Neither the insurers' objections nor their reservation of rights constituted constructive consent to the bankruptcy settlement.

In Phase 1B, the trial court concluded that LMI and the other insurers constructively consented to the bankruptcy settlement because they

"participated in the [bankruptcy] confirmation hearing" by filing objections – objections that, at Fuller-Austin's behest, were never heard – and that they waived their consent rights by reserving their right to contest coverage. (Ph. 1B SOD, 31 AA tab 143 at 8945-8946.) But objections do not constitute acquiescence; nor do reservations of rights constitute a forfeiture of rights. On their face, both signal exactly the opposite meaning from what the trial court attributed to them.

The trial court did not merely misapprehend the meaning of the insurers' objections and reservations of rights, however. More fundamentally, implicit in the trial court's rulings is its unfounded assumption that there was something wrongful or improper about the insurers' refusal to consent to the settlements, their reservation of rights, and even their attempts to have their objections heard by the bankruptcy court. It ruled that "[i]f an excess insurance company reserves its right to contest coverage, the policyholder is excused from any provision requiring insurance company consent." (31 AA tab 143 at 8939:2-4.) And it instructed the jury that a reservation of rights does not fulfill insurers' obligations, and an insurer loses its right to control settlements by failing to accept settlement obligations. (34 AA tab 153 at 9788, 9795, 56 RT 11284, 11294.) These assumptions and rulings make no sense.

Objecting to a settlement does not (except under the legendary Catch 22) constitute consent to the settlement. Nor does an insurer waive its consent right by declining to waive it. (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 31-32 [burden is on party claiming waiver to prove it by clear and convincing evidence "'that does not leave the matter to

speculation'"]; *J.C. Penney Casualty Ins. Co. v. M.K.* (1991) 52 Cal.3d 1009, 1017-1018 [no waiver of insurer's right to deny coverage without affirmative evidence of insurer's intention to relinquish right].)[19]

Nor does reserving a right to deny coverage signal a consent to a settlement despite the reserved right. When coverage is unclear, an insurer is *supposed* to reserve its rights; it implies no consent and breaches no duty by doing so. (*Prichard v. Liberty Mutual Ins. Co.* (2000) 84 Cal.App.4th 890, 895, 908; see, e.g., *Low v. Golden Eagle Ins. Co.*, *supra*, 110 Cal.App.4th at 1544 [insurer defending under reservation of rights held not bound by settlement without consent]; *Rose v. Royal Ins. Co.*, *supra*, 2 Cal.App.4th at pp. 716-717 [same].)

Both the insurance contracts and controlling law preclude the trial court's rulings and instructions depriving the insurers of their contractual right to withhold consent to Fuller-Austin's unilateral settlements.

---

[19] Instead of following California law on this point, the trial court relied on authority from other jurisdictions such as Arizona, Florida, and Wyoming. (Ph. 1B SOD, 31 AA tab 143 at 8939, 8941, 8945-8946, citing *Insurance Co. of North America v. Spangler* (D.Wyo. 1995) 881 F.Supp. 539, 544; *United Services Auto. Assn. v. Morris* (Ariz. 1987) 741 P.2d 246; *Taylor v. Safeco Ins. Co.* (Fla. 1978) 361 So.2d 743.) This, too, was error. California law is settled and the trial court lacked power to disregard it. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 [Superior Court lacks authority to disregard law set forth in decision of Court of Appeal].)

3. The LMI cannot be bound by Fuller-Austin's settlements because the trial court prevented the jury from determining whether the settlements were reasonable.

The trial court's ruling and instruction to the jury that the insurers had "a duty to accept reasonable settlements" – in effect that the insurers' refusal to accept settlements bound them to pay those settlements – exacerbated rather than cured the error. (Instr., 34 AA tab 153 at 9795, 56 RT 11294; Ph. 1B SOD, 31 AA tab 143 at 8937-8938.) Even if these rulings and instructions did not violate *Hamilton*, still Fuller-Austin's settlements could not bind LMI.[20] That is because the jury was not asked to find, and did not find, that any settlement was reasonable. After instructing the jury that the bankruptcy court had already determined the bankruptcy settlement amounts "are reasonable," the trial court summarily refused the insurers' request to submit the reasonableness issue for jury determination. (Instr., 34 AA tab 153 at 9789, 9792, 9794, 9796, 9798-9799, 56 RT 11294; see 56 RT 11359:13-11360:7 [trial court rebuffs insurers' request for jury determination of reasonableness issue: "That is out. Move on."].)

The resulting special verdict therefore included no finding that either the Baggett settlement or the bankruptcy settlement was reasonable. Its failure to address those issues precludes any implication that the jury would

---

[20] The rulings and instructions squarely violate *Hamilton's* holding that a nonrecourse settlement "is insufficient to show, even rebuttably, that the insured has been injured to *any* extent by the failure to settle, much less in the amount of the stipulated judgment." (*Hamilton*, *supra*, 27 Cal.4th at 726, original emphasis.)

have reached that conclusion – a conclusion that would be essential to bind the insurers even under the trial court's theory. "With a special verdict, we do not imply findings on all issues in favor of the prevailing party, as with a general verdict." (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 285; see *Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960-961 [punitive damage judgment reversed because special verdict failed to require factual findings essential to support tort cause of action].)

Proof that the settlement it seeks to impose on its insurer is reasonable is the policyholder's burden. (*Isaacson v. California Ins. Guarantee Assn.* (1988) 44 Cal.3d at 791-792; *Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co.* (1996) 45 Cal.App.4th 1, 85; see 20 RT 3725:3-5.) Fuller-Austin failed to carry that burden here.

D. These Errors Require Reversal of the Judgment With Directions to Enter Judgment in Favor of LMI.

Indemnity liability of $80.9 million was imposed on LMI without proof of important prerequisites to indemnity. Fuller-Austin proved no obligation on Fuller-Austin's part to pay claimants any fixed amount, determined either by an actual trial of its liability or by a settlement with the insurers' consent. It proved no breach that could excuse its failure to obtain LMI's consent to its settlements, and the jury affirmatively found at least as to the General policies that LMI were guilty of no pre-settlement breach at all. And it failed to establish that any of its settlements was reasonable – a prerequisite to the insurers' indemnity obligation even if there had been a breach.

Because Fuller-Austin failed to establish any factual or legal basis upon which LMI could be bound by Fuller-Austin's settlements or the bankruptcy proceedings, reversal of the judgment is required with directions to enter judgment for LMI. (Code Civ. Proc., § 629; *Bank of America v. Superior Court* (1990) 220 Cal.App.3d 613, 624 [reversal with directions is required when trial court should have entered directed verdict or judgment NOV].)

II. THE JUDGMENT VIOLATES THE FULL FAITH AND CREDIT AND DUE PROCESS CLAUSES OF THE CONSTITUTION, AND IT IS BARRED BY THE DOCTRINES OF COLLATERAL ESTOPPEL AND JUDICIAL ESTOPPEL.

A. The Superior Court Failed to Give Full Faith and Credit to the Orders of the Federal Bankruptcy Court.

The United States Supreme Court has long and consistently held that state courts must accord full faith and credit to federal judicial rulings. (See *DuPasseur v. Rochereau* (1874) 88 U.S. 130, 134 [22 L.Ed. 588]; *Stoll v. Gottlieb* (1938) 305 U.S. 165, 167 [59 S.Ct. 1021, 83 L.Ed.2d 104]; *Semtek Internat. Inc. v. Lockheed Martin Corp.* (2001) 531 U.S. 497, 508 [121 S.Ct. 1021, 149 L.Ed.2d 32].) California courts also recognize that federal court judgments - including judgments in bankruptcy proceedings – must receive full faith and credit. (*Levy v. Cohen* (1977) 19 Cal.3d 165, 172-173 [bankruptcy court order must be afforded full faith and credit in later state court action]; *George v. County of San Luis Obispo* (2000) 78 Cal.App.4th

1048, 1052 ["Full faith and credit must be given to final bankruptcy court orders"]; *Conrad v. Bank of America* (1996) 45 Cal.App.4th 133, 149-150 [state court "must give full faith and credit to final orders and judgments of a federal court," including in bankruptcy proceedings].) And the bankruptcy court in this case explicitly ruled that its judgment is binding "with respect to all proceedings in other courts, state and federal." (TE 551, 14 ExApp at 4103 ¶ 213.)

The trial court's rulings fail to heed these requirements. The trial court ruled that the Plan effectively determined Fuller-Austin's liabilities to claimants; the bankruptcy court had ruled it did not. The trial court ruled that the insurers are bound by the bankruptcy proceedings; the bankruptcy court had ruled they are not. The trial court ruled that the numbers and amounts of Fuller-Austin's liabilities can be determined, and submitted that issue to the jury; the bankruptcy court had entered an express finding that no such determination can be made.

By snubbing these binding federal court orders, the trial court exceeded its constitutional authority. The Phase 2 trial constituted an unjustifiable departure from principles of federal-state comity and an affront to our federal system (*Allen v. McCurry* (1980) 449 U.S. 90, 95-96 [101 S.Ct. 411, 66 L.Ed.2d 308]), as well as a clear violation of controlling California and federal precedent (*Martin v. Martin* (1970) 2 Cal.3d 752, 758; *Matter of Cook* (7th Cir. 1995) 49 F.3d 263, 266, citing *Federated Department Stores, Inc. v. Moitie* (1981) 452 U.S. 294 [101 S.Ct. 2424, 69 L.Ed.2d 103] ["One adjudication per issue is enough."]). For this failure to

accord full faith and credit where required by law, the judgment must be reversed.

B. The Superior Court Denied LMI Due Process of Law by Ruling that the Bankruptcy Proceedings had Pre-Determined Issues Central to Coverage.

Fuller-Austin brought this action to adjudicate the insurers' coverage obligations. But that adjudication never took place. Under the trial court's erroneous rulings, liability was imposed by judicial fiat, not by trial.

The trial court ruled that virtually every critical element of Fuller-Austin's coverage cause of action was already established by the bankruptcy court's confirmation of Fuller-Austin's settlement Plan. It ruled that the bankruptcy Plan had established Fuller-Austin's liabilities to all present and future claimants, binding on the insurers; that all present and future asbestos-injury claimants are presumed to have been exposed to, and injured by, Fuller-Austin's asbestos-containing products either before or during the term of one or more of the insurers' policies; that the insurers must pay Fuller-Austin in advance of Fuller-Austin's actual liabilities, in amounts greater than Fuller-Austin will have to pay to resolve claims against it; and that underlying coverage was exhausted even though exhaustion had not been established.[21]

How were these essential elements of Fuller-Austin's coverage action established before the trial even began? The trial court's answer: They had been determined in the bankruptcy court proceedings – without

---

[21] These rulings are discussed in Section I and in the succeeding sections of this brief.

the insurers' participation. But what the trial court forgot to consider was due process of law. It saddled the insurers with an $80.9 million liability without having afforded them any opportunity to contest the merits of the case.

A fair opportunity to be heard is "an essential requisite of due process of law in judicial proceedings":

> "'[A state] cannot, without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein.'" (*Richards v. Jefferson County* (1996) 517 U.S. 793, 797, fn. 4 [116 S.Ct. 1257, 135 L.Ed.2d 76.)

This principle flows from the Fourteenth Amendment to the United States Constitution and from article I, sections 7 and 15 of the California Constitution, which guarantee parties a "meaningful" hearing before litigants may be deprived of property. (*Beaudreau v. Superior Court* (1975) 14 Cal.3d 448, 458; *Bell v. Burson* (1971) 402 U.S. 535, 539, 541-542 [91 S.Ct. 1586, 29 L.Ed.2d 90] ["It is a proposition which hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision . . . does not meet" the due process standard]; see *Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital* (1994) 8 Cal.4th 100, 118, fn. 15 ["When a party . . . wields the settlement as a sword to enforce its rights as an indemnitee, due process mandates at a minimum . . . an opportunity for the indemnitor to contest both liability and the amount of damages"].) Here, the insurers were

afforded no opportunity to be heard – not in the bankruptcy court, and not in the trial court in this case – on the key factual issues that determined coverage under their policies and their liability in this case.

LMI cannot lawfully be bound by determinations made in the bankruptcy court proceedings – proceedings from which they were excluded. When a litigant has been deprived of the trial to which it is entitled as a matter of due process – a fundamental constitutional right guaranteed by both the federal and California constitutions – that result itself constitutes prejudice requiring reversal of the judgment. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 310 [111 S.Ct. 1246, 1265, 113 L.Ed.2d 302] [structural defects in trial mechanism require reversal without reference to "harmless-error" analysis].)

C. The Equitable Doctrines of Collateral Estoppel and Judicial Estoppel Preclude Relitigation of Issues Determined by the Bankruptcy Court.

The constitutional strictures requiring full faith and credit and due process of law are fortified by the well-established doctrines of collateral estoppel and judicial estoppel. These equitable doctrines bar Fuller-Austin from asserting positions contrary to those it argued – and won – in another judicial forum.

When Fuller-Austin urged the insurers' liability in this coverage action based on the bankruptcy court's Plan confirmation, the bankruptcy court had already ruled that its orders do not determine Fuller-Austin's liability to any claimant for any claim; that its orders cannot affect the insurers' coverage rights and obligations; and that the amounts and values

of Fuller-Austin's future liabilities "cannot be determined." (TE 383, 9 ExApp at 2516-2518; TE 544, 14 ExApp at 4046; TE 551 ¶ 120, 14 ExApp at 4078; TE 552, 15 ExApp at 4133.) Each of these issues was litigated and determined in the bankruptcy proceedings at Fuller-Austin's behest.

The bankruptcy court's rulings on these issues therefore bind Fuller-Austin, and the trial court, as a matter of collateral estoppel. (*Trevino v. Gates* (9th Cir. 1996) 99 F.3d 911, 923-924.) These issues had been "actually litigated" once by Fuller-Austin; they may not be litigated again. (*St. Paul Mercury Ins. Co. v. Williamson* (5th Cir. 2000) 224 F.3d 425, 448; *Dodd v. Hood River County* (9th Cir. 1998) 136 F.3d 1219, 1224; 18 Moore's Federal Practice (3d ed. 2004) § 132.03[2][c].)

The bankruptcy court rulings are also binding as a quintessential example of judicial estoppel. "Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position . . . ." (*Davis v. Wakelee* (1895) 156 U.S. 680, 689 [15 S.Ct. 555, 558, 39 L.Ed. 578].) California law applies the doctrine of judicial estoppel in exactly these circumstances, where: "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake." (*Scripps Clinic v. Superior Court* (2003) 108 Cal.App.4th 917, 943.)

Each of these criteria is satisfied here. Fuller-Austin should be bound by its word. Its word – relied upon by the bankruptcy court and the insurers – precludes the Plan confirmation from being interpreted to resolve factual issues that Fuller-Austin must prove in order to establish coverage. Fuller-Austin was estopped in the trial court – and is no less estopped in this appeal – to urge positions inconsistent with the rulings it sought and obtained from the bankruptcy court.

III. THE TRIAL COURT PREJUDICIALLY ERRED BY IMPOSING A PRESUMPTION OF COVERAGE UNDER FULLER-AUSTIN'S INSURANCE POLICIES.

The trial court ruled and instructed the jury that all pending and future asbestos claims involved in the bankruptcy Plan "are presumed to arise from exposure to Fuller-Austin products before or during the insurance companies' policy periods" unless the insurers prove otherwise. (Instr., 34 AA tab 153 at 9790-9791; Ph. 1B SOD, 31 AA tab 143 at 8949.)[22] This presumption erroneously relieved Fuller-Austin of its burden of proving coverage – an indispensable element of its cause of action against the insurers. The error was prejudicial because it imposed on the insurers a burden that belonged to Fuller-Austin. Indeed, the burden was not just prejudicial; it was impossible. Shifting to the insurers the burden of

---

[22] The claims involved in the bankruptcy Plan include all asbestos injury claims for which Fuller-Austin asserts coverage under LMIs' policies except the 100 existing claims that were resolved by the Baggett settlement's $600,000 initial payment.

disproving coverage for claims that do not yet exist and may never be asserted effectively directed the verdict on the coverage issue in Fuller-Austin's favor.

A. The Trial Court Improperly Shifted to LMI the Burden of Proving that Claims against Fuller-Austin Are Not Covered by their Policies.

The long-established rule is that "[t]he burden is on an insured to establish that the occurrence forming the basis of its claim is within the basic scope of insurance coverage." A policyholder that fails to meet this burden cannot recover under the policy. (*Aydin Corp. v. First State Ins. Co.* (1998) 18 Cal.4th 1183, 1188; *Waller v. Truck Ins. Exchange, Inc.*, *supra*, 11 Cal.4th at p. 16; *Weil v. Federal Kemper Life Assurance Co.* (1994) 7 Cal.4th 125, 148; *Searle v. Allstate Life Ins. Co.* (1985) 38 Cal.3d 425, 437-438.) The trial court's ruling and instructions violated this elementary precept.

The impact of this shift in the burden of proof was profound. The prejudicial impact of instructional error is ordinarily judged by viewing the record most favorably to the appellant (*Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663, 674; *Mock v. Michigan Millers Mutual Ins. Co.* (1992) 4 Cal.App.4th 306, 322), and by presuming the jury might have decided in the appellants' favor under correct instructions (*Shell Oil Co. v. Winterthur Swiss Ins. Co.* (1993) 12 Cal.App.4th 715, 773). Where the error places the burden of proof on the wrong party on a dispositive issue, it is "a major instructional error." (*Buzgheia v. Leaseco Sierra Grove* (1997)

60 Cal.App.4th 374, 393-398 [wrong burden of proof resulted in miscarriage of justice].)

Here, the error is necessarily prejudicial. Proving that claims against it are within coverage afforded by the insurers' policies ordinarily requires the policyholder to adduce evidence that each claim satisfies the criteria essential to its cause of action – here, that the claimant was injured by exposure to a Fuller-Austin asbestos installation during or after the period of each policy's coverage. By eliminating these essential elements of Fuller-Austin's coverage case from its burden of proof without legal justification, the trial court did more than merely assign to the insurers a task the law requires Fuller-Austin to fulfill; it rendered the undertaking unattainable.

As to existing claims, the critical information is uniquely within Fuller-Austin's exclusive access and control; but as to future claims, information that could prove or disprove coverage does not yet exist and is *impossible* to produce. The erroneous burden of proof therefore transformed Fuller-Austin's unprovable coverage action into one in which coverage was established beyond challenge.

B. None of the Reasons or Authorities Relied Upon by the Trial Court Justified Shifting the Burden of Proving Coverage.

The trial court shifted the burden of proving coverage to LMI and the other insurers ostensibly because they failed to consent to Fuller-Austin's settlements. (31 AA tab 143 at 8938, 8941, 8949 ¶ 6.) This ruling is bereft of factual or legal support.

First, the insurers breached no obligation by declining to consent to Fuller-Austin's unilateral settlements. As the jury found, when the bankruptcy settlement was confirmed LMI had not breached any obligations under their General policies. (Spec. Verdict, 31 AA tab 143 at 8831-8832.)

Second, the insurers had a right to withhold their consent. (See Section I.C, above.)

Third, even if the insurers' refusals to bless Fuller-Austin's settlements had breached some obligation, such a breach would not automatically eliminate the policyholder's burden to affirmatively establish that the settled claims were actually covered. (*Aydin Corp. v. First State Ins. Co.*, *supra*, 18 Cal.4th at 1188.) An insurer's breach of a duty to enter into a settlement – even a reasonable settlement – is actionable only if a covered policyholder is left undefended and a judgment exceeding the insurer's obligation is entered. (*Isaacson v. California Ins. Guarantee Assn.*, *supra*, 44 Cal.3d at 790, 793-794 ["the insured must demonstrate that the claim was covered by the policy, or that the insurer breached its duty to defend"].) That did not happen here. Thus Fuller-Austin still would be required to establish coverage. (*Id.* at p. 793 [indemnity claim for plaintiffs' settlement fails because they offered no "proof that (the insurer) failed to accept a reasonable settlement offer on a '*covered* claim' . . . ."], emphasis added.)

Finally, the trial court's reliance on *Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co.*, *supra*, 45 Cal.App.4th 1, is woefully misplaced. (*Id.* at 85; see Ph. 1B SOD, 31 AA tab 143 at 8938.) The *Armstrong* case has nothing whatever to do with the policyholder's burden

to present prima facie proof of coverage; its discussions of shifting burdens of proof concern different issues altogether – timing of trigger and identity of manufacturer in multi-manufacturer litigation. (45 Cal.App.4th at 62-63.) But the *Armstrong* opinion need not be parsed; since *Armstrong* was decided, the Supreme Court reaffirmed that the policyholder's burden to prove that its claims fall within coverage does not shift in the absence of factors not even arguably relevant here. (*Aydin Corp. v. First State Ins. Co.*, *supra*, 18 Cal.4th at 1193.)

C. The Judgment Should Be Reversed with Directions to Enter Judgment in Favor of LMI.

Fuller-Austin offered no evidence that any claim against it comes within coverage under any policy. This failure of proof is fatal to its coverage case. (*Aydin Corp. v. First State Ins. Co.*, *supra*, 18 Cal.4th at 1188; *Waller v. Truck Ins. Exchange, Inc.*, *supra*, 11 Cal.4th at 16.) Having failed to prove a case, Fuller-Austin is not entitled to a second try. The judgment should be reversed with directions to enter judgment in LMI's favor.

IV. THE JUDGMENT IMPROPERLY REQUIRES LMI TO INDEMNIFY FULLER-AUSTIN BEFORE FULLER-AUSTIN'S OBLIGATION TO PAY ARISES, AND IN AMOUNTS THAT EXCEED WHAT FULLER-AUSTIN WILL BE LEGALLY OBLIGATED TO PAY TO ANY CLAIMANT.

Even if the bankruptcy order had established the amounts of Fuller-Austin's liabilities to its claimants, it did not establish those amounts as a *present* obligation, nor as an obligation to pay the Plan's nominal "allowed" values. The judgment thus violates two elementary insurance precepts: It requires LMI to indemnify Fuller-Austin *now*, rather than when Fuller-Austin actually becomes obligated to pay its claimants; and it requires LMI to indemnify Fuller-Austin for nominal liabilities in amounts *greater* than the amounts Fuller-Austin must actually pay to resolve the claims against it.

The goal of insurance is to cover *actual* present obligations to pay *actual* amounts. It is not intended to bestow a windfall on policyholders based on theoretical or future liabilities for nominal or fictitious amounts. Because the judgment awards indemnity for obligations not yet due, in amounts not actually owed, reversal is required.

A. The Judgment Erroneously Requires LMI to Indemnify Fuller-Austin Before Fuller-Austin Must Pay any Claimant.

The controlling principles are virtually self-evident: A payment is not due until it is due; an obligation to pay in the future is not a present obligation to pay. (*Deocampo v. Ahn* (2002) 101 Cal.App.4th 758, 775-776

["By definition . . . , a periodic payment due on some future date is not unpaid until that date"]; *Schiernbeck v. Haight* (1992) 7 Cal.App.4th 869, 874 [same].)

The judgment in this case requires LMI to indemnify Fuller-Austin *now*. But Fuller-Austin established no present obligation to pay. As to each claim, Fuller-Austin's obligation to pay arises only after each claimant has asserted his or her claim to the Trust and the claim has been assessed under the Plan's detailed procedures. The principle is no different from that involved in common credit transactions: A homeowner may have a liability in the amount of his or her entire mortgage balance; but that does not render the entire balance due *now*. It is only as the payments come due under the lending agreement that the homeowner becomes legally obligated to pay; and it is only on default of a present obligation that the lender can enforce the agreement.

So too here. Fuller-Austin is not legally "obligated to pay" claimants for the unresolved pending claims and unasserted future claims on which the judgment is based. Because the judgment unlawfully orders LMI to pay $80.9 million on the come, it must be reversed.

B. The Judgment Erroneously Requires LMI to Pay Fuller-Austin More than Fuller-Austin Will Ever Be Obligated to Pay for Each Claim.

The trial court ruled and instructed the jury that LMI and the other insurers must pay Fuller-Austin the Plan's nominal allowed values, even though the Plan actually obligates Fuller-Austin to pay claimants only a fraction of these amounts. (31 AA tab 143 at 8942-8943; Instr., 34 AA tab

153 at 9794, 56 RT 11292-11293.) The result: The insurers are charged with more than they bargained to pay, and Fuller-Austin receives more than it is due. This is impermissible; profit on each claim is not part of the indemnity equation. (See *Powerine*, *supra*, 24 Cal.4th at 968 [courts cannot rewrite insurance contract to "compel insurers to give more than they promised and . . . allow insureds to get more than they paid for"]; *Cates Construction, Inc. v. Talbot Partners* (1999) 21 Cal.4th 28, 35 [insurance policies are obtained for peace of mind and security, not profit or advantage].)

It is the policyholder's *actual* obligation, not its nominal obligation, that fixes the insurers' indemnity obligation. That is the rule of *Farmers Ins. Exchange v. Hurley* (1999) 76 Cal.App.4th 797, 805. In *Hurley*, an accident victim settled with the tortfeasor's insurer, nominally for the policy's full $15,000 limit but actually agreeing to full satisfaction when the insurer paid $5,000 within 30 days. Notwithstanding the settlement's nominal $15,000 label, *Hurley* held that the $5000 actual payment established the tortfeasor's legal obligation. (See also *Mercury Ins. Co. v. Enterprise Rent-A-Car Co.* (2000) 80 Cal.App.4th 41, 50-51 [settlement for less than the underinsured policy limit does not satisfy exhaustion requirement, even if credit is given for full amount of underlying policy limit]; *United States Fire Ins. Co. v. Lay* (7th Cir. 1978) 577 F.2d 421 [primary limits are not exhausted where primary carrier settled for less than its limits even where later judgment exceeded primary limits].)

Bankruptcy cannot enhance Fuller-Austin's position or increase the insurers' indemnity obligation. Under bankruptcy law, "whatever rights a

debtor has in property at the commencement of the case continue in bankruptcy – no more, no less." (*Moody v. Amoco Oil Co.* (7th Cir. 1984) 734 F.2d 1200, 1213.) Bankruptcy "is not intended to expand the debtor's rights against others more than they exist at the commencement of the case." (H.R. Rep. No. 595, 95th Cong., 1st Sess., reprinted in 1978 U.S. Code Cong. & Ad. News 5787; see *In re Coupon Clearing Service, Inc.* (9th Cir. 1997) 113 F.3d 1091, 1099 [bankrupt has "no greater rights in property than those held by the debtor prior to bankruptcy"].) The insurers can have no duty to indemnify Fuller-Austin for amounts it is not actually obligated to pay.

Fuller-Austin's actual legal obligation (not yet determined) will be to pay only a fraction of the "allowed" values for each claim. Because the judgment compels LMI to pay more to Fuller-Austin for each claim than Fuller-Austin must pay to satisfy its legal obligations to each claimant, the judgment must be reversed.

C. Expert Estimates of Fuller-Austin's Potential Future Asbestos Liabilities are no Substitute for a Present Obligation to Pay Fixed Amounts.

The trial court permitted expert testimony to substitute for the missing evidence of a present obligation to pay claimants fixed amounts. It permitted the jury to estimate the amount of Fuller-Austin's potential *future* payment obligations using expert opinions about the value of pending claims and the anticipated numbers, timing, and values of future claims. Then it used the resulting sum as a surrogate for the missing proof. (Instr., 34 AA tab 153 at 9801, 56 RT 11303-11304.)

But forecasting Fuller-Austin's anticipated *future* obligations does not transform them into *present* obligations. (See *Amatex Corp. v. Stonewall Ins. Co.* (E.D.Pa. 1989) 102 B.R. 411, 414 [despite evidence of high probability that policies would be triggered and even exhausted by future asbestos claims, "the debtor has no property interest in the insurance until the debtor is legally obligated to pay damages which fall under the definitions contained in the policies"].) The void in Fuller-Austin's proof remains.

The trial court's justification for using this procedure – that courts and juries frequently award future damages they believe will be suffered by victims of tort and contract breaches – misperceives the issue. (Ph. 1B SOD, 31 AA tab 143 at 8918 fn. 10, 8943-8944.) The evidence missing here is not the amount of future damages owed a victim of a breach, as in the trial court's examples; rather it is evidence that Fuller-Austin has any present legal obligation to pay any particular amount to any particular claimant.

The fact that the Trust or even the court can – and for some purposes must – estimate the amount of future liabilities (as the trial court notes, 31 AA tab 143 at 8918 fn. 10) does not transform those estimates into proof that the estimated amounts are due. Just as evidence of a home mortgage balance does not establish that the entire mortgage balance is now due, Fuller-Austin's evidence of the amount of its anticipated future liabilities does not constitute evidence that Fuller-Austin had *any* present obligation

to pay *any* amount to *any* claimant.[23] *That's* the proof that is missing. Because Fuller-Austin failed to prove this key element of its cause of action – its present obligation to pay – the judgment must be reversed with directions to enter judgment for LMI.

D. The Seventh Circuit Decision in *UNR Industries, Inc. v. Continental Insurance Co.* Does Not Support the Indemnity Judgment.

In holding the insurers must indemnify Fuller-Austin before Fuller-Austin's payment obligations become due, and that they must do so in amounts that exceed Fuller-Austin's actual obligations, the trial court relied heavily on a 1991 Seventh Circuit Court of Appeals decision applying Illinois law. (*UNR Industries, Inc. v. Continental Casualty Co.* (7th Cir. 1991) 942 F.2d 1101; Ph. 1B SOD, 31 AA tab 143 at 8944-8945.) The reliance cannot be justified.

In *UNR*, an insured asbestos manufacturer filed for bankruptcy in the face of asbestos claims. The bankruptcy court approved a settlement with its creditors under which UNR transferred a portion of its stock into a trust for asbestos claimants. The Seventh Circuit Court of Appeals held that, under Illinois law, the manufacturer's excess insurer thereby became liable for the full value of the claims.

---

[23] *Insurance Co. of State of Pennsylvania v. Associated Internat. Ins. Co.* (9th Cir. 1991) 922 F.2d 516 (cited at 31 AA tab 143 at 8942-8944), actually *undermines* its ruling. There, a reinsurer challenged its duty to contribute to the underlying insurer's settlement of present and future asbestos claims. Far from requiring indemnity before the policyholder became legally obligated to pay, the court confirmed that the reinsurer must pay only "as and if such claims arise," no sooner. (922 F.2d at p. 526.)

The *UNR* decision is contrary to controlling California and Louisiana law.[24] Even if it correctly reflected the law of Illinois (it apparently does not), the decision has no application here.

First, California and Louisiana law, not Illinois law, govern this case. Under California law and Louisiana law, an insurer is *not* bound by a settlement without its consent where (as here) its policyholder is defended. Bankruptcy court approval does not suffice. (See Section I.B, above.)[25]

Second, unlike in UNR, the excess insurers here had no opportunity to participate in the bankruptcy proceedings. In *UNR*, the excess insurer was provided an opportunity to participate in the UNR bankruptcy proceeding. (942 F.2d at 1105.) Here, at Fuller-Austin's urging the bankruptcy court refused to hear the merits of the insurers' objections. (TE 544, 14 ExApp at 4039.)

Third, unlike in UNR, there was no incentive here to minimize payments to claimants. UNR held that bankruptcy court approval of the settlement had provided adequate safeguards to protect the insurer's interests because the competing interests of non-asbestos creditors (who stood to lose dollar-for-dollar for the value placed on the asbestos claims)

---

[24] The trial court held that Louisiana law governs the Cities Service policies. (31 AA tab 143 at 8912 fn. 1.)

[25] It is not clear that *UNR* read Illinois law correctly on this point. (See *Zurich Ins. Co. v. Carus Corp.* (Ill.App. 1997) 689 N.E.2d 130, 133-134 [no indemnity duty absent lawsuit by claimant against insured for compensation].) No Illinois court has applied the waiver doctrine in this circumstance; and the case on which *UNR* relied involved a carrier's refusal to defend – a critical circumstance that does not exist here. (See 942 F.2d at 1105, citing *Maneikis v. St. Paul Ins. Co.* (7th Cir. 1981) 655 F.2d 818, 827.)

acted as a constraint against any excessive settlement of the asbestos claims. (942 F.2d at 1106.) This factor was absent here; the non-asbestos creditors claims were separately – and fully – paid. (TE 551 ¶¶ 44, 90, 14 ExApp at 4065, 4074.) Unlike in *UNR*, here there was no voice in the bankruptcy proceeding to exert any moderating influence on the settlement.

Fourth, the law has changed very significantly since UNR. In 1994, Congress enacted Section 524(g), imposing jurisdictional conditions on the trust remedy used in the 1991 *UNR* settlement – conditions the *UNR* settlement could not have met. Under Section 524(g) the law now requires that the bankruptcy court must find, as it did here, that the amounts of Fuller-Austin's actual asbestos liabilities "cannot be determined." (TE 551 ¶ 120, 15 ExApp at 4078; Section 524(g)(2)(B)(ii)(II).) But the *UNR* settlement did in fact determine the policyholder's liabilities, precluding its eligibility under Section 524(g).

Finally, even the federal court in UNR did not go as far as the trial court in this case. In remanding the *UNR* case, the federal Court of Appeals made clear – contrary to the trial court's rulings here – that the *claimants* bear the burden of establishing both that their claims are within coverage under the policies and that underlying coverage has been exhausted before the insurers can become obligated to pay. (*UNR*, *supra*, at 1106-1108.) Here, the trial court erred prejudicially by shifting both those burdens to the insurers. (See discussion in Section III, above, and Section V, below.)

The *UNR* decision is incompatible with California law and with current bankruptcy law. It lends no support to the judgment.

Without a present obligation to pay, the insurers have no possible duty to indemnify; there can be no breach, and no damages. Because this key element of Fuller-Austin's indemnity cause of action is missing, the judgment must be reversed with directions to enter judgment in LMIs' favor.

E. The Insurers Gain No Windfall by Paying Fuller-Austin Only the Amounts Fuller-Austin Actually Must Pay for Allowed Claims, and Only When it Actually Must Pay.

The insurers will gain no windfall – as the trial court mistakenly suggested they would – if they pay Fuller-Austin no more, and no sooner, than their policies provide. (Ph. 1B SOD, 31 AA tab 143 at 8944:17-20.) The trial court's erroneous rulings afford Fuller-Austin more protection than its premiums purchased; under them it is Fuller-Austin, not the insurers, that obtains the windfall.

The fact that each claimant will receive less from the Trust than the nominal "allowed" value the Plan recites for his or her claim reveals no windfall. It is the inevitable consequence of the artificial and unrealistic nominal values that the prepackaged Plan recites. Those values constitute wholly artificial benchmarks, set in a pact contrived to ensure that *someone else's* money would be used to pay those amounts, and designed to relieve its participants of responsibility for any payments at all.

The insurers are not responsible for any discrepancies between the arbitrary claim values recited in Fuller-Austin's prepackaged Plan and the coverage their policies actually provide. Indeed, such discrepancies will *always* be present when a Section 524(g) bankruptcy trust is available; a

shortage of available resources to satisfy anticipated claims is the very circumstance that warrants use of the Section 524(g) remedy.

Even if the insurers pay indemnity only if and when the Fuller-Austin Trust becomes obligated to pay each claim, and pay only in the amount the Trust becomes obligated to pay, the insurers are in no way relieved of their insurance obligations. Under the Plan as the bankruptcy court (and even Fuller-Austin) conceived it, the amounts that will actually be paid to asbestos injury claimants (along with the recoverable expenses of paying those claims) are intended eventually to meet and exceed the total amount of all the insurers' remaining coverage; the Trust's resources are intended to be entirely dissipated. If and when claims are actually tried, settled with LMIs' consent, or otherwise resolved consistent with LMIs' rights, Fuller-Austin will have a basis upon which to seek indemnity from LMI for those claims. But the bankruptcy proceedings cannot be used – as the trial court used them here – to *increase* the insurers' obligations or to provide coverage benefits beyond those Fuller-Austin purchased.

The perverse rule to be drawn from the judgment in this case is that *bankrupt* insureds are entitled to accelerated prepayment, up to their policy limits, for anticipated claims that have yet to be asserted or paid; only *solvent* insureds must continue to honor their insurance bargains, seeking indemnity only on a claim-by-claim basis as their obligations arise. That is not the role bankruptcy law is intended to play. (See *In re Powers* (C.D.Cal. 1991) 135 B.R. 980, 993, quoting *In re Waldron* (11th Cir. 1986) 785 F.2d 936, 940 [bankruptcy law is intended to act as shield, not sword].)

Nothing in bankruptcy law confers a preferred status on bankrupt asbestos tortfeasors such as Fuller-Austin, advancing them to the head of the line while pushing all other insured risks to the rear. The insurers cannot be required to pay sooner, or in amounts greater, than Fuller-Austin must actually pay to resolve each claim as it arises.

V. THE JUDGMENT IMPROPERLY REQUIRES INDEMNITY UNDER THE LONDON GENERAL POLICIES BEFORE EXHAUSTION OF UNDERLYING COVERAGE.

The London excess policies typically provide (with slight wording variations) that no liability shall attach to the insurers until after the policyholder or its underlying insurers "have paid or have been held liable to pay the full amount of their respective ultimate net loss liability . . . ."[26] Controlling law provides the same: an excess insurer is not required to pay indemnity (or even respond to a claim) until all underlying coverage limits are exhausted.[27]

---

[26] TE 62, 64, 65, 67, 68, 69, 70, 4 ExApp at 1064 ¶ J, 1113 ¶ J, 1133 ¶ J, 5 ExApp at 1156 ¶ J, 1239, 1320, 1346, 1410.

[27] E.g., *Signal Companies, Inc. v. Harbor Ins. Co.* (1980) 27 Cal.3d 359, 366-367; *Community Redevelopment Agency v. Aetna Casualty & Surety Co.* (1996) 50 Cal.App.4th 329, 337; *Stonewall Ins. Co. v. City of Palos Verdes Estates* (1996) 46 Cal.App.4th 1810, 1850; *State Farm Fire & Casualty Co. v. Jioras* (1994) 24 Cal.App.4th 1619, 1626-1627; *Denny's, Inc. v. Chicago Ins. Co.* (1991) 234 Cal.App.3d 1786, 1793-1794; *Olympic Ins. Co. v. Employers Surplus Lines Ins. Co.* (1981) 126 Cal.App.3d 593, 600; *Iolab Corp. v. Seaboard Surety Co.* (9th Cir. 1994) 15 F.3d 1500, 1504-1505 [applying California law].

Horizontal exhaustion applies to the London General policies, the trial court ruled. (31 AA tab 143 at 8897-8899.) This means that until all underlying coverage layers are exhausted, Fuller-Austin had no right to indemnity from the upper-layer excess coverage of LMIs' General policies.

But the record shows that underlying coverage was not yet exhausted – and in fact *could not possibly* have been fully exhausted – either when Fuller-Austin filed for bankruptcy or when judgment was entered in this case.[28] Indeed, when judgment was entered some indemnity payments under the underlying carriers' settlements were not yet even due, let alone paid. (E.g., TE 874, 16 ExApp at 4428; TE 878, 16 ExApp at 4569-4571 [settlement provides limits of liability of subject policies "*shall be* exhausted" upon payments to become due in either 2004 or 2006], emphasis added.)

The trial court wrongly ruled and instructed the jury that the underlying insurers' coverage is deemed exhausted by their settlement with Fuller-Austin, notwithstanding the undisputed existence of unpaid indemnity liabilities owed by primary and underlying excess carriers.[29]

---

[28] Fuller-Austin represented in the bankruptcy court, to the SEC, to its claimants, and to the public, that very substantial underlying coverage remained when it filed for bankruptcy. (Bank. Disc. Stmt., TE 384, 10 ExApp at 2704 ["Approximately $4 million of primary indemnity coverage remains"]; DynCorp 10/1/98 SEC 10-Q, TE 8353, 40 ExApp at 11726 [$2.2 million unexhausted primary coverage remains, plus $39 million 1st tier excess coverage]; see Fuller-Austin Admission, TE 7648, 40 ExApp at 11569 [as of 8/18/98 Fuller-Austin "has at least $2.7 million in unexhausted primary coverage" for future claims]; 36 RT 7220-7221.)

[29] The jury instructions direct that exhaustion has occurred when "[a]n insurance company settled with Fuller-Austin and was dismissed from this (continued...)

And those erroneous instructions were exacerbated by yet another error: They improperly relieved Fuller-Austin of its burden of proving exhaustion of underlying coverage. (31 AA tab 143 at 8933.) The instructions thereby impermissibly directed the jury to fix liability on the excess insurers before exhaustion of underlying limits and before their indemnity obligations could have arisen; and they directed the jury to find the underlying coverage was exhausted even if the evidence showed otherwise.

Underlying coverage is not exhausted by settlements that require indemnity payments totaling less than their policy limits, nor by settlements that postpone indemnity payments for years into the future. "[I]t is the amount actually paid from the primary coverage, not the nominal amount of the settlement, that determines whether the primary coverage has been exhausted." (*Farmers Ins. Exchange v. Hurley*, *supra*, 76 Cal.App.4th at 804.)[30]

Any other reading of the insurers' obligations turns the relationships between carriers topsy-turvy. The parties' coverage bargains – reflected in the policies' premiums – rely on the fact that the excess insurers' payment

---

[29] (...continued)
case," identifying the settlement dates of various underlying carriers. (Instr., 34 AA tab 153 at 9785, 56 RT 11280-11281.)

[30] *American Home Assurance Co. v. Commercial Union Assurance Co.* (La.App. 1979) 379 So.2d 757, holds that under Louisiana law (applicable to Cities Service policies) an excess carrier has no equitable subrogation right against a primary carrier that has settled and paid in order to exhaust the underlying limits. But here the underlying insurers had not yet paid the bulk of the nominal $4 million Baggett settlement when its remaining claims were superseded by the bankruptcy settlement. (17 RT 3004; 52 RT 10447; TE 552, 15 ExApp at 4135 ¶ 74; see also TE 874, 16 ExApp at 4428; TE 878, 16 ExApp at 4569-4571.)

obligations will mature only *after* those of the primary and underlying excess insurers. LMI undertook no obligation to pay *before* the primary or underlying insurers have paid. (See *Reliance Nat. Indemnity Co. v. General Star Indemnity Co.* (1999) 72 Cal.App.4th 1063, 1082-1083 [primary carrier cannot subrogate to indemnity agreement against excess carrier's insured; doing so would distort nature of excess coverage].)

The trial court's erroneous rulings and jury instructions virtually wrote the exhaustion issue out of the case. Because it is indisputable that underlying coverage limits remained unpaid – therefore unexhausted – when judgment was entered in this case, the judgment against LMI must be reversed. The reversal should be with directions to enter judgment for LMI.

VI. ADDITIONAL ERRORS REQUIRE REVERSAL OF THE JUDGMENT AGAINST LMI FOR BREACH OF THE CITIES SERVICE POLICIES.

The grounds for reversal discussed in Sections I through V of this brief apply as well to the $17.6 million Cities Service award against LMI. The following additional reasons require reversal of the Cities Service portion of the judgment.

A. LMI Breached No Obligation to Fuller-Austin under the Cities Service Policies.

The jury determined that LMI breached their obligations under the Cities Service policies before Fuller-Austin's bankruptcy Plan was

confirmed. (31 AA tab 143 at 8831-8832.) The determination is completely contrary to the record.

Even if LMI were bound by Fuller-Austin's unilateral settlements, only the Baggett settlement signed May 10, 1998 could have given rise to Cities Service policy obligations before the bankruptcy filing. (TE 2116, 24A ExApp at 6874.10.) That settlement called for payment in two installments – the first, for $600,000, to be paid within 90 days. (*Id.* at 6874.4.)[31] That installment was paid on June 11, 1998 by one of Fuller-Austin's primary carriers. (TE 384, 10 ExApp 2721.)

Thus the only Baggett settlement payment owed before the September 4, 1998 bankruptcy filing was fully paid by an insurer. There was no pre-bankruptcy breach of Cities Service policy obligations. The $17.6 million award against LMI arising from the Cities Service policies should be reversed with directions requiring entry of judgment in LMIs' favor.

---

[31] The initial $600,000 payment settled 100 existing claims. The agreement provided that in the future – *after* the date on which Fuller-Austin filed its bankruptcy settlement Plan – "Fuller-Austin will settle and fund" 558 unasserted claims for $6000 each, totaling about $3.4 million. (TE 2116, 24 ExApp at 6874.4.) Those unasserted claims later were subsumed within the bankruptcy settlement Plan. (17 RT 3004; 52 RT 10447; TE 552, 15 ExApp at 4135 ¶ 74.)

B. The Trial Court Prejudicially Erred by Refusing to Apply Louisiana Law to Establish the Cities Service Policies' Coverage Trigger.

The trial court ruled that Louisiana law governs the Cities Service policies. (31 AA tab 143 at 8912 fn. 1.) And it acknowledged the Louisiana Supreme Court's holding that Louisiana law applies an "exposure" trigger rather than a "continuous" trigger to asbestos claims. (31 AA tab 143 at 8920-8921; *Cole v. Celotex Corp.* (La. 1992) 599 So.2d 1058.)[32]

The trial court refused to apply Louisiana law. Disregarding the controlling majority opinion in *Cole*, it opted instead to give precedence to a concurring justice's unilateral speculation that Louisiana might someday consider switching to a continuous trigger to result in larger payouts. (31 AA tab 143 at 8921:7-9 [continuous trigger would "fulfill Louisiana's stated policy of maximizing insurance coverage"]; see 12 RT 2070-2072 [insurers' objections].)

By refusing to apply an exposure trigger – Louisiana's governing law – the trial court exceeded its authority. Where the law of another state governs, as the trial court ruled it does here, that law must be followed.

---

[32] Under an "exposure" trigger, a claim is covered only by policies on the risk during a claimant's exposure to asbestos; policies on the risk before and after exposure provide no coverage. (*Cole v. Celotex Corp.*, *supra*, 599 So.2d at 1075-1077.) But under a "continuous" trigger, "[a]ll of Fuller-Austin's policies that were in effect from the date of first exposure to any asbestos or asbestos-containing product until the date of death or claim, whichever occurs first, are triggered with respect to an asbestos bodily injury claim." (Ph. 1B SOD, 31 AA tab 143 at 8922.)

(*Jones v. Jones* (1960) 182 Cal.App.2d 80, 83 ["When a question arises in the courts of this state as to the construction or effect of a statute of another state, our courts will follow the interpretation placed upon such statute by the court of last resort of the enacting state"], 88 ["the state of the law *as of the date of rendition of the judgment* herein would control in determining its correctness," emphasis added]; see *Cabrera v. City of Huntington Park* (9th Cir. 1998) 159 F.3d 374, 378 [where state law applies, court's "duty is to ascertain and apply the existing (state) law, not to predict that (the state) may change its law and then to apply (its) notion of what that change might or ought to be"], 379 [where California law applies, federal court is bound by California Supreme Court's interpretation of California law].)

The erroneous refusal to apply governing law was prejudicial. It was reflected in instructions wrongly requiring the jury to apply the continuous trigger to the Cities Service policies (Instr., 34 AA tab 153 at 9790, 56 RT 11286-11287), and in the assumptions and estimates of Fuller-Austin's experts as to future claims and damages (e.g., 46 RT 9266-9267, 9268 [experts use cumulative annual estimates of future claims]). Because the exposure trigger provides coverage under a policy only for claims arising from exposures during that policy's single coverage period (rather than also under all later policies), there is a huge difference between the scope of coverage under the exposure trigger that Louisiana law mandates and the continuous trigger the trial court imposed. As the trial court itself put it, using the continuous trigger had the effect of "maximizing insurance coverage" beyond that permitted by the exposure trigger. (Ph. 1B SOD, 31 AA tab 143 at 8921.)

Because the trial court erroneously and prejudicially applied the wrong trigger of coverage – a trigger of coverage that the Louisiana Supreme Court *rejected* – the $17.6 million award against LMI arising from the Cities Service policies must be reversed.

C. Fuller-Austin Failed to Prove Coverage for the Cities Service Claims Resolved Before its Bankruptcy.

The jury was instructed (erroneously, we demonstrate in Section III, above) that all claims resolved in the bankruptcy are presumed to constitute harm within coverage under the insurers' policies. But as to claims settled *before* the bankruptcy – such as those resolved by the initial $600,000 Baggett settlement payment – Fuller-Austin retained the burden of proving that the underlying claims were within coverage. (See Instr., 34 AA tab 153 at 9790, 56 RT 11287.)

Fuller-Austin failed to carry this burden. It offered no evidence that any claims settled before the bankruptcy are within coverage under any LMI policies. Without evidence that any of the claimant's injuries actually resulted from exposures to asbestos-containing materials installed by Fuller-Austin at the Cities Service site, and without evidence that those exposures occurred during (or even before) the terms of LMIs' policies, the record lacks any basis for coverage under the Cities Service policies.

For that failure of proof, the $17.6 million award against LMI arising from the Cities Service policies must be reversed with directions to enter judgment in LMIs' favor for those claims.

D. Fuller-Austin Failed to Establish that the Cities Service Policies were Triggered for any Policy Year.

Fuller-Austin offered no evidence to establish that any claim came within the minimum threshold for coverage under any Cities Service policy. It thus failed to prove that, either before or after the bankruptcy confirmation, LMI either had, or breached, any coverage obligation under the Cities Service policies.

Before coverage attaches under an excess policy, claims asserted against the policyholder arising from exposures during the policy year must exceed the applicable policy's minimum dollar attachment points. For the Cities Service policies, those attachment points were in excess of specific dollar amounts – above $100,000 per person or $300,000 per accident (or $100,000 per occurrence if there were no underlying coverage) for the first three policies, and above $1 million per person for the fourth. (TE 62, 64, 65, 66, 4 ExApp at 1111, 1135, 1137; 5 ExApp at 1157, 1160, 1200.) Thus, until claims for each year reached and surpassed these minimum amounts, the Cities Service policy obligations are not triggered.

Fuller-Austin offered no evidence that any claimant was injured in any amount by exposure to its asbestos materials at the Cities Service site during any particular policy year. That void is fatal to Fuller-Austin's case under the Cities Service policies. Absent proof that the minimum attachment points were satisfied for each policy, coverage under that policy is not triggered; and absent coverage under that policy, LMI neither had, nor breached, any indemnity duty.

For this independent reason, the $17.6 million award against LMI arising from the Cities Service policies must be reversed with directions to enter judgment for LMI.

CONCLUSION

Whether the flagrant errors that resulted in this judgment are put right is of enormous consequence to the parties, and to our system of laws. The outcome of this case will determine the parties' liabilities for the many millions of dollars the judgment wrongly awarded. And the importance of this case is unlikely to end there. Because of the fundamental social and legal importance of the issues raised by this case, its outcome will inevitably also influence the course of asbestos litigation in pending and future cases across the nation. But no matter how far-reaching its issues, and no matter how many its observers, this appeal remains subject to the same rules of law as any other – rules of law that in this case compel reversal.

Here, Fuller-Austin had its opportunity to establish coverage under LMIs' policies for the asbestos liabilities facing it. Just as in any other appeal, having failed to establish coverage under the terms of its policies and under the controlling law, Fuller-Austin is entitled to neither indemnity nor damages in any amount. The judgment should be reversed with directions to enter judgment in favor of LMI.

Dated: October 28, 2004

Respectfully submitted,

HANCOCK ROTHERT & BUNSHOFT LLP
Patrick A. Cathcart
William J. Baron

WACHTELL, LIPTON, ROSEN & KATZ
Michael W. Schwartz
Douglas K. Mayer
William Savitt

GREINES, MARTIN, STEIN & RICHLAND LLP
Irving H. Greines
Robert A. Olson
Peter O. Israel

By _____
Irving H. Greines

By _____
Peter O. Israel

Attorneys for Defendants, Appellants and Respondents
CERTAIN UNDERWRITERS AT LLOYD'S
LONDON, and CERTAIN LONDON MARKET
INSURANCE COMPANIES

CERTIFICATION

Pursuant to California Rules of Court, rule 14(c), I certify that this **APPELLANTS' OPENING BRIEF** contains 16,844 words, not including the tables of contents and authorities, caption page, signature blocks, or this Certification page.

Dated: October 28, 2004

Peter O. Israel