S153852

No. S153852

IN THE

Supreme Court

OF THE

STATE OF CALIFORNIA

AMERON INTERNATIONAL CORPORATION,
Plaintiff and Appellant,

v.

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, et al.,
Defendants and Respondents.

ANSWER BRIEF OF OLD REPUBLIC INSURANCE COMPANY ON THE MERITS

FROM THE DECISION BY THE COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION FIVE, CASE NO. A109766

FROM AN ORDER OF THE SAN FRANCISCO COUNTY SUPERIOR COURT, CASE NO. 419929, HONORABLE ELLEN CHAITIN

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CERTIFICATE OF INTERESTED ENTITIES

Old Republic Insurance Company is a publicly-traded corporation.

Based on inquiry, I am informed and believe that:

(1) No person or entity has an ownership interest in Old Republic greater than 10 percent;

(2) No person or entity has a financial or other interest in the outcome of this case.

Andrew P. Sclar
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I. INTRODUCTION

OLD REPUBLIC INSURANCE COMPANY ("Old Republic") issued a one-year excess liability insurance policy to AMERON INTERNATIONAL CORPORATION ("Ameron") providing indemnity "for damages."

After Ameron paid money to settle a dispute which had been pending in a federal administrative agency, Ameron sought indemnity from Old Republic and the other Respondents herein.

The trial court entered judgment in favor of Old Republic after sustaining Old Republic's demurrer to Ameron's third amended complaint. The Court of Appeal affirmed, following the law established by this Court's precedents that a policy indemnifying for damages limits the indemnity obligation to "money ordered by a court." *Certain Underwriters* at *Lloyd's of London v. Superior Court of Los Angeles County* (2001) 24 Cal.4th 945 ("*Powerine I*"), *County of San Diego v. Ace Property & Casualty Insurance Company* (2005) 37 Cal.4th 406 ("*Ace*").

Ameron petitioned this Court for review with regard to an issue relevant to some of the other Respondents: Whether the underlying administrative proceeding constituted a "suit" so as to trigger a defense obligation in those policies issued by other Respondents which promised to defend against "suits."

Despite the narrow scope of Ameron's Petition for Review, Ameron's Opening Brief Argues that both the trial court and the Court of Appeal erred in applying this Court's well-reasoned "damages" precedents. Old Republic submits that questions

pertaining to indemnity are not "fairly included" in Ameron's petition, so Old Republic will refrain from fully briefing those issues herein.

Old Republic joins in the brief submitted by the other respondents and will submit a further brief on indemnity if requested by the Court pursuant to California Rule of Court 8.516(b)(2).

Ameron's argument against Old Republic—that language in the Old Republic policy's limit of liability provision should be interpreted as an expansion of the "damages" indemnification coverage—is based on a material misrepresentation of the policy language and is directly contrary to the law as confirmed in *Ace*.

II. STATEMENT OF THE CASE

A. The Old Republic Policy

Old Republic issued its umbrella liability policy no. ORZU4242 to Ameron, with a policy period of July 1, 1981 through July 1, 1982. AA[1] 749-751 (stipulation under which policy deemed attached to and incorporated into Third Amended Complaint; AA754-784 (policy); AA759 (policy declarations); AA756 (Insuring Agreement).

The Old Republic policy is expressly excess of an underlying policy issued by non party Truck Insurance Exchange (AA 762) or, if there is no coverage afforded by the underlying policy, a deductible amount of $25,000. AA756, 759, AA1051, paragraph 24D, AA1058, paragraph 61.

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[1] Citations to "AA" refer to Appellant's Appendix. As this appeal is from a demurrer, most of the factual citations are to Appellant's Third Amended Complaint (AA1048-1120, including the contents of the Old Republic Policy AA755-784) which, by stipulation (AA749-754), is deemed incorporated into the Third Amended Complaint.

The Old Republic policy contains a single coverage grant which provides indemnity "for damages" and does not extend coverage for "expenses" or incorporate the policy's definition of "ultimate net loss." AA756. The Old Republic policy does not contain a defense obligation.

The central insuring agreement in the Old Republic policy extends coverage as follows:

> I. COVERAGE -
> The Company hereby agrees, subject to the limitations, terms and conditions hereinafter mentioned, to indemnify the Assured for all sums which the Assured shall be obligated to pay by reason of the liability
> (a) imposed upon the Assured by law,
> or (b) assumed under contract or agreement by the Named Assured and/or any officer, director, stockholder, partner or employee of the Named Assured, while acting in his capacity as such,
> **for damages** on account of:
> (i) Personal Injuries
> (ii) Property Damage
> (iii) Advertising Liability,
> caused by or arising out of each occurrence happening anywhere in the world. AA756 (emphasis added); AA1058, line 25-AA1059, line 1.

The Old Republic policy uses the term "ultimate net loss" only in connection with the policy's monetary liability limits. AA756; AA1059, paragraph 63.

The Old Republic limit of liability provision provides in relevant part:

> II. LIMIT OF LIABILITY -
> The Company hereon shall only be liable for the ultimate net loss in excess of either
> (a) the limits of the underlying insurances as set out in the attached schedule in respect of each occurrence covered by said underlying insurances,

or (b) the amount as set out in Item 2(c) of the Declarations ultimate net loss in respect of each occurrence not covered by said underlying insurances,

(hereinafter called the "underlying limits")

and then only up to a further sum as stated in Item 2(a) of the Declarations in all in respect of each occurrence - subject to a limit as stated in Item 2(b) of the Declarations in the aggregate for each annual period during the currency of this Policy... AA756; AA1059, paragraph 63[2]

The term "ultimate net loss," incorporated into the Policy's limit of liability provision but not its central insuring agreement, is defined as follows:

ULTIMATE NET LOSS -

The term "Ultimate Net Loss" shall mean the total sum which the Assured, or his Underlying Insurers as scheduled, or both, become obligated to pay by reason of personal injuries, property damage or advertising liability claims, either through adjudication or compromise, and shall also include hospital, medical and funeral charges and all sums paid as salaries, wages, compensation fees, charges, and law costs, premiums on attachment or appeal bonds, interest, expenses for doctors, lawyers, nurses and investigators and other persons, and for litigation, settlement, adjustment and investigation of claims and suits which are paid as a consequence of any occurrence covered hereunder, excluding only the salaries of the Assured's or of any underlying insurer's permanent employees.

The Company shall not be liable for expenses as aforesaid when such expenses are included in other valid and collectible insurance. AA 756; AA 1059, paragraph 64.

---

[2] Ameron materially misrepresents the limit of liability provision in arguing that the provision constitutes a "separate grant of coverage." Appellant's Opening Brief ("AOB") 38-40. At AOB 38 Ameron drops the word "only" from the limit of liability provision (providing that if coverage is triggered under the policy Old Republic "shall *only* be liable for the ultimate net loss" excess of the underlying limits) by arguing that the policy affirmatively provides that Old Republic "shall be liable for the ultimate net loss."

B. The Trial Court Ruling In Favor Of Old Republic

After demurrers were sustained with leave to amend, Ameron filed its Third Amended Complaint ("TAC") in San Francisco County Superior Court on July 20, 2004. AA 1048-1120. On its own behalf and as purported assignee of primary insurer Truck, Ameron alleged that the Old Republic policy's definition of ultimate net loss expanded the scope of coverage beyond the central insuring agreement indemnity limitation to damages so as to require that Old Republic defend and indemnify against the underlying administrative proceeding. AA1059, lines 14-15 (After quoting definition of ultimate net loss Ameron alleged "Old Republic is thus obligated to pay for the defense and settlement of the government's claims").

Old Republic demurred to the TAC (AA 1916-1929), arguing that as a matter of law Ameron could not state a valid cause of action against Old Republic because Old Republic's policy provided indemnity for "damages" only and Ameron's settlement of the administrative proceeding did not amount to " money ordered by a court." AA1924-1925.

Ameron's opposition again asserted that the policy's definition of "ultimate net loss" expanded the scope of coverage to include settlement of non lawsuit claims. AA 2139-2142.

The trial court sustained the demurrer of Old Republic (and others). In ruling on the "duty to settle" cause of action the trial court observed that Old Republic's indemnity obligation was limited to "damages" and that under *Powerine I* as a matter of law "damages" are limited to "money ordered by a court." The trial court concluded that

settlement of the underlying administrative dispute therefore did not constitute "damages." AA10, lines 1-4, incorporating AA7, lines 7-24.

The trial court employed the same rationale and conclusions in determining that the TAC failed to state a cause of action against Old Republic for "breach of duty to indemnify." AA10, lines 6-9, incorporating AA8, lines 1-17.[3]

Pursuant to the trial court's order sustaining demurrer, judgment was entered in favor of Old Republic on January 28, 2005. AA55-57.

C. The Court of Appeal Ruling in Favor of Old Republic

Ameron argued to the Court of Appeal that the policy's definition of ultimate net loss expanded the scope of coverage to include settlement of non lawsuit claims. Ameron made this argument despite this Court's decision in *Ace* (issued after the trial court sustained demurrer but before Ameron filed its Opening Appellate Brief) that expressly rejected an identical argument. *Ace*. 37 Cal.4th 406, 419-420.

The Court of Appeal, applying and following *Ace*, rejected this argument. The court noted in an unpublished portion of its decision[4]:

> The central insuring provision in the *Ace* policy, like the Puritan and Old Republic policies, obligated the insurer to indemnify the insured for sums the insured was obligated to pay for "damages." Thus, "damages" was the sole term of limitation in the indemnity

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[3] The trial court also determined there was no legal basis for Ameron's "waiver and estoppel" cause of action or for the "bad faith" and "declaratory relief" causes of action which were dependent on coverage under the Old Republic policy. AA 10, lines 11-14 (incorporating AA 4, line 21-AA 5, line 18); AA 5, line 20-AA 6, line 8; AA 10, lines 22-25 (incorporating AA 9, lines 1-5).

[4] While the majority of the Court of Appeal decision was published, the court decided not to publish certain portions of its decision, including section VII, Slip Opinion pages 47-49, in which the court affirmed the trial court's judgment in favor of Old Republic.

> agreement. (*Ace*, supra, 37 Cal.4th at pp. 416-417.) The Supreme Court explained that including the definition of "ultimate net loss" in the limits of liability provision "merely serves to define the insured's total loss that will count toward such policy limits." (*Id.* at p. 420.) "Nothing in the 'limits of liability' provision of the *Ace* policy purports to expand *Ace's* indemnification obligation, once triggered, to anything other than 'damages.'" (Ib*Id.*) (Slip Opinion at p. 48.)

The Court of Appeal applied *Powerine I* in concluding that the Old Republic central insuring agreement providing indemnity for damages was "limited to money ordered by a court." Slip Opinion at p. 48.

The Court of Appeal also rejected Ameron's argument that the "cross liability" condition could "be read to limit or expand the coverage obligation." Slip Opinion at p. 49, citing *CDM Investors v. Travelers Cas. & Sur. Co.* (2006) 139 Cal.App.4th 1251, 1264.

Because the Old Republic policy indemnifies for "damages" and because Ameron's settlement of the underlying administrative proceeding did not constitute "damages," the Court of Appeal affirmed the trial court judgment in favor of Old Republic. Slip Opinion at p. 49.

III. AS AMERON'S PETITION FOR REVIEW DID NOT RAISE ANY ISSUE REGARDING "DAMAGES" OR INDEMNITY, THIS COURT SHOULD NOT EXTEND ITS REVIEW TO THE ISSUES ON WHICH OLD REPUBLIC PREVAILED BELOW

Ameron's Petition for Review presented two questions. First, Ameron asked whether the underlying administrative procedure constituted "a suit" under a comprehensive general liability policy. Second, Ameron asked whether this Court should modify or overrule its interpretation of the word "suit" in *Foster-Gardner, Inc. v. National Union Fire Ins. Co.* (1998) 18 Cal.4th 857 ("*Foster-Gardner*"), a case analyzing

defense obligation. Neither of these questions apply to the legal issues on which Old Republic prevailed below.

The Old Republic policy does not use the word "suit" in its coverage grant, does not contain a defense obligation, and is not a "comprehensive general liability policy." Old Republic prevailed in the lower courts based on a finding that it owed no duty to indemnify under its policy. The duty to indemnify is not before this Court, as Ameron chose to limit its Petition to issues pertinent to the duty to defend under CGL policies that contain the term "suit" but do not define it. As the Court simply granted review on the issues raised by Ameron, and no other issues have been raised by Respondents, this proceeding is limited to the two issues raised by Ameron and any issues "fairly included" within those issues. California Rule of Court 8.516(b)(1).

IV. THE COURT OF APPEAL PROPERLY APPLIED THIS COURT'S DECISIONS IN *POWERINE I* AND *ACE* IN AFFIRMING THE TRIAL COURT AND IN CONCLUDING OLD REPUBLIC DID NOT OWE INDEMNITY TO AMERON

In *Powerine I* (2001) 24 Cal.4th 945 this Court held that the scope of an insurance policy provision providing indemnity "for all sums that the insured shall become legally obligated to pay as damages" is "limited to money ordered by a court." *Id.* at 951, 963, and 966. The Court's construction of the "damages" limitation interpreted the words of the insuring agreement in their "ordinary and popular sense" (*Id.* at 969). The Court also noted that the indemnity limitation to money ordered by a court was "conspicuous, plain, and clear." *Id.* at 970.

In 2005, this Court affirmed the holding and rationale of *Powerine I* in holding that the "'damages' means money ordered by a court" rule must be applied to

interpretation of excess or umbrella policies like Old Republic's whose central insuring agreements indemnify "for damages" and neither mention nor incorporate "expenses" or "ultimate net loss." *Ace* (2005) 37 Cal. 4th 406, and *Powerine Oil Company, Inc. v. The Superior Court* (2005) 37 Cal. 4th 377 ("*Powerine II*").

The insuring agreement before the Court in *Powerine II* was not limited to "damages." It provided broader coverage as follows:

> The Company hereby agrees... to indemnify the Insured for all sums which the Insured shall be obligated to pay by reason of the liability... imposed upon the insured by law... *for damages, direct or consequential and expenses, all as more fully defined by the term "ultimate net loss" on account of... property damage...* *Id.* at 385, emphasis supplied by court.

The Court distinguished this policy from the policy language at issue in *Powerine I* as follows:

> We agree with the Court of Appeal that the addition of the term "expenses" in the central insuring clause of these excess/umbrella policies **extends coverage beyond the limitation imposed were the term "damages" used alone, and thereby enlarges the scope of coverage beyond "money ordered by a court."**
>
> In addition to the inclusion of the term "expenses," which itself broadens the scope of coverage beyond that afforded under the standard primary CGL policy, the central insuring clause of these policies "further define[s]" the indemnification obligation by reference to and incorporation of a definition of "ultimate net loss." *Id.* at 397, emphasis added.

The court went on to conclude that the coverage afforded by the policies at issue in *Powerine II* was not limited to money ordered by a court. The court specifically noted that the result would be different (and the rule of *Powerine I* would apply) if "damages"

was the only "term contained in the insuring clause" defining the scope of coverage. *Id.* at 399.

In contrast to the broader coverage extended by the policy at issue in *Powerine II*, the policy interpreted by this Court in *Ace* expressly limited indemnity coverage only to "damages." For this reason, the court applied the rule of *Powerine I* to the policy there at issue, interpreting it as limiting the indemnity obligation to money ordered by a court.

The policy in *Ace* contained a central insuring provision indemnifying:

> for "all sums which [the County] is obligated to pay by reason of liability imposed by law or assumed under contract or agreement" for "*damages* ... by reason of injury of any nature sustained by any person or persons" and "*damages* because of injury to or destruction of tangible property." *Id.* at 416 (emphasis supplied by Court).

This language is virtually identical to the central insuring agreement in the Old Republic policy.[5]

Also like the Old Republic policy, the policy at issue in *Ace* contained a "limits of liability" provision which incorporated by reference a policy definition of "ultimate net loss." *Id.* at 417-418.

The insured there, like Ameron here, argued that the definition of ultimate net loss "contained in the limits of liability provision" "creates an independent basis for extending the insurer's indemnification obligation under the policy beyond damages to the costs and expenses of responding to" orders issued by an administrative agency "or settling related third party liability claims outside the context of a lawsuit." *Ibid.* This Court rejected

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[5] AA 756: Indemnity "for all sums which the Assured shall be obligated to pay by reason of the liability ... imposed upon the Assured by law ... for damages on account of Personal Injuries [or] Property Damage."

this argument and distinguished *Powerine II*, noting (in language determinative of this appeal as to Old Republic):

> [T]he central insuring provision of the standard excess/umbrella policies at issue in *Powerine II* ... expressly purports to "more fully define [ ]" "damages, direct or consequential and expenses" through incorporation of a definition of "ultimate net loss" into the insuring clause itself. *In contrast, the definition of "ultimate net loss" here is neither incorporated into, referenced, nor a part of the central insuring clause of the Ace policy.* Instead, as explained, it is referenced in the "limits of liability" policy provision, the main function of which appears to be the setting forth of limits of excess liability coverage ... . In that specific context, the definition of "ultimate net loss" merely serves to define the insured's total loss that will count toward such limits. ... Nothing in the "limits of liability" provision of the Ace policy purports to expand Ace's indemnification obligation, once triggered, to anything other than "damages." *Id.* at 419-420 (Emphasis in original).

This Court also distinguished *Powerine II* by observing "the term 'expenses' was expressly contained in the central insuring clause," but the Ace policy limited its indemnity obligation to "damages." *Id.* at 419.

The central insuring agreement in the Old Republic policy, like the central insuring agreement at issue in *Ace*, provides indemnity "for damages" but not for "expenses" or "ultimate net loss." The term "ultimate net loss" is used only with respect to the policy's limit of liability provision and merely serves to define the amount of "underlying limits" and maximum payment that would be owed if coverage is triggered under the central insuring agreement.

Under the holding and rationale of both *Powerine I* and *Ace*, the Court of Appeal correctly affirmed the trial court in interpreting the Old Republic policy as providing indemnification only for "money ordered by a court."

Because the underlying federal administrative agency is not "a court" the demurrer in Old Republic's favor was properly entered and should be affirmed.

V. BECAUSE THE ARGUMENTS AMERON ADVANCES TO TRY TO AVOID *POWERINE I* AND *ACE* ARE REFUTED BY BASIC RULES OF INSURANCE POLICY INTERPRETATION, THIS COURT SHOULD NOT EXPAND ITS REVIEW TO INCLUDE THEM

A. Policy Interpretation Is Dependent On Policy Language

In an argument not advanced in either court below, Ameron goes to great lengths in asserting that the *limit* of liability provision in the Old Republic policy is a separate grant of coverage providing "umbrella" protection so that *Ace* (which examined an excess policy) should not apply. AOB 37-42.

This argument is easily rejected because under California law, coverage analysis is not dependent upon the "type" of policy at issue, it is dependent upon the actual language of the policy. *Travelers Ins. Co. v. National Union Fire Ins. Co.* (1989) 207 Cal.App.3d 1390, 1395; *Harbor Ins. Co. v. Central National Ins. Co.* (1985) 165 Cal.App.3d 1029, 1034-1035.

Indeed, it is axiomatic under California law that insurance policies are interpreted by their specific provisions. Initial focus must be on "the written provisions of the contract." *AIU Ins. Co. v. Superior Court* (1990) 51 Cal. 3d 807,821-822. "If contractual language is clear and explicit, it governs." *Bank of the West v. Superior Court* (1992) 2 Cal. 4th 1254, 1264.

The indemnity provision in the Old Republic policy indemnifies Ameron only "for damages." That term has been judicially construed by this Court on multiple occasions to

mean that Old Republic's indemnity obligation is limited to "money ordered by a court." The term "damages" is not ambiguous. *Ace*, 37 Cal.4th 406, 423.

The central insuring agreement of the Old Republic policy is clear and explicit in limiting the indemnity obligation to money ordered by a court in plain language, a limitation "which must be respected." *Continental Cas. Co. v. Phoenix Const. Co.* (1956) 46 Cal.2d 423, 432.

B. The Limit Of Liability Provision Is Not An Extension Of Coverage

Ameron's argument that the Old Republic policy's *limit* of liability provision constitutes an *extension* of coverage- an additional coverage grant- was properly rejected by both the trial court and the Court of Appeal. Undeterred, Ameron continues to make that argument before this Court without even acknowledging that the argument was expressly rejected by this Court in *Ace*.

Factually, Ameron misrepresents the limit of limit of liability provision in the Old Republic policy by omitting the word "only" in a purported verbatim quote (AOB 38), attempting to mislead this Court into concluding that the policy contains an affirmative promise to indemnify for "ultimate net loss." The policy actually says that if an occurrence is covered, Old Republic will indemnify "only" to the extent ultimate net loss exceeds the "underlying limits" and is less than the policy limits. AA 756

Legally, as this Court has confirmed, it is the central insuring agreement of the policy which governs the scope of indemnity coverage, not the limit of liability provision. *Ace*, 37 Cal.4th 406, 420.[6]

Ameron's argument, if accepted, would render the central insuring agreement of the Old Republic policy meaningless and would read out of the policy the express limitation that indemnity is owed only "for damages."

As this Court has noted:

> [T]he provision imposing the duty to indemnify does in fact do so *with* a limitation to money ordered by a court. We cannot, and will not, act as if it did not. *Powerine I*, 24 Cal.4th 945, 965, emphasis in original.

C. <u>The Cross Liability Condition Does Not Expand Indemnity Coverage</u>

In yet another argument beyond the scope of the Petition for Review, Ameron makes a nonsensical argument that the cross liability condition (AA 758) in the Old Republic policy, by referencing the limit of liability provision, "confirms" that the limit of liability provision grants coverage. AOB 43. It does no such thing.

The cross liability condition, which has no application to the facts of this case, simply provides that the policy limits are not increased when one insured allegedly causes personal injury or property damage to another insured. The condition does not reference or in any way purport to alter the policy's central insuring agreement to indemnify "for damages."

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[6] See also *CDM Investors v. Travelers Casualty & Surety Co., supra,* 139 Cal. App. 4th 1251, 1263 ("ultimate net loss," even when contained in the coverage grant, can be "used in reference to what amount the insurer will pay after the insurer becomes obligated to pay rather than as a trigger of the insurer's obligation to pay.")

As the Court of Appeal properly stated (Slip Opinion p. 49), conditions of coverage "cannot be read to limit or expand the coverage obligation," citing *CDM, supra* (2006) 139 Cal.App.4th 1251, 1264.

Nor can Ameron argue that the cross-liability provision renders the central insuring agreement ambiguous. As this Court has acknowledged, this Court's judicial construction of the term "damages" in the central insuring agreement conclusively establishes that that term is not ambiguous. *Ace*, 37 Cal.4th 406, 423.

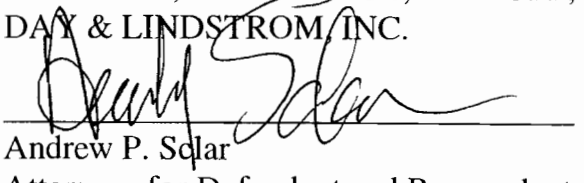
VI. CONCLUSION

Ameron's arguments against Old Republic exceed the scope of Ameron's Petition for Review and are not properly before this Court. As demonstrated by the limited briefing set forth herein on the "damages" issue, there is no reason for this Court to expand its review to consider that issue. Nor is there any reason for the court to consider the arguments Ameron advances to try to avoid *Powerine I* and *Ace.*

It is clear that both the trial court and the Court of Appeal correctly applied the law in concluding that Old Republic had no obligation to indemnify Ameron for the settlement of the administrative proceeding because Old Republic's policy provides indemnification only for "money ordered by a court." The administrative agency (Board of Contract Appeals) before whom the contract dispute was pending was not a "court."

Dated: February 29, 2008

ERICKSEN, ARBUTHNOT, KILDUFF, DAY & LINDSTROM, INC.



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CERTIFICATE OF WORD COUNT

The text of this brief consists of 4,215 words (including footnotes) as counted by the Microsoft Word 2002 word processing program used to generate this brief.

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PROOF OF SERVICE
[C.C.P. § 1013, C.R.C. § 2008, F.R.C.P. Rule 5]

I, Richard G. Hubbard, state:

I am a citizen of the United States. My business address is 111 Sutter Street, Suite 575, San Francisco, CA 94104. I am employed in the City and County of San Francisco where this mailing occurs. I am over the age of eighteen years and not a party to this action. On the date set forth below, I caused to be served the foregoing document described as:

ANSWER BRIEF OF OLD REPUBLIC INSURANCE COMPANY ON THE MERITS

On the following persons in this action by FIRST CLASS MAIL addressed as follows:

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X: BY FIRST CLASS MAIL – I am readily familiar with my firm's practice for collection and processing of correspondence for mailing with the United States Postal Service, to-wit, that correspondence will be deposited with the United States Postal Service this same day in the ordinary course of business. I sealed said envelope and placed it for collection and mailing this date, following ordinary business practices.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed this date at San Francisco, California.

Dated: February 29, 2008

Richard G. Hubbard