S267746

No. 20-55099

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALLIED PREMIER INSURANCE,

Plaintiff-Appellee

v.

UNITED FINANCIAL CASUALTY COMPANY,

Defendant-Appellant

United States District Court
Central District of California
No. 5:18-cv-00088-JGB-KK
Hon. Jesus G. Bernal

APPELLEE'S BRIEF

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Corporate Disclosure Statement

Pursuant to Fed. R. App. P. 26.1, Allied Premier Insurance makes the following disclosures:

1. For non-governmental corporate parties please list all parent corporations:

None.

2. For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

None.

3. If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

None.

Booth LLP

Respectfully submitted,

Dated: September 4, 2020 By: /s/ Ian P. Culver

Attorney for Plaintiff and Respondent
Allied Premier Insurance

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

Statutes:

Court Rules:

Other:

Memorandum of Points and Authorities

Introduction

The District Court did not err. The District Court entered a thoughtful, well-reasoned Order after long and due deliberation. On stipulated facts, after receiving supplemental briefs and holding two hearings, the District Court denied summary judgment to Appellant United Financial Casualty Company ("UFCC" or Appellant) and granted summary judgment in favor of Appellee Allied Premier Insurance, a Risk Retention Group ("Allied" or Appellee). Admittedly, the standard of review is *de novo*; however, Appellee submits that the District Court's legal analysis of the issues that were set before it under existing legal authorities cannot be improved upon and should be upheld.

As a practical matter, the result is just and proper. It gives insurers a greater incentive to apprise diligently the California Department of Motor Vehicles when there are changes to a motor carrier's insurance, which effectuates the objective of the law, which is to ensure that only motor carriers with sufficient proof of financial responsibility are permitted to operate in California. To avoid the result, all Appellant, a sophisticated, respected, and long-established insurer, had to do was correctly complete a simple form. In all likelihood, Appellant will not make the same mistake again.

For all the reasons set forth herein, this Court should affirm the Judgment.

Statutory and Regulatory Authorities

The following statutes and regulation are relevant to the issues on appeal and are reproduced in the Addendum to this brief for the convenience of the Court, in their current form: Cal. Veh. Code §§ 34630, 34631, 34631.5; 13 Cal. Code Regs. § 220.06.

Statement of the Case

Appellee takes this opportunity to urge the Court not to defer to Appellant's rhetorical gloss but to look to the actual record, particularly the Joint Statement of Stipulated Facts and Exhibits ("Stipulation") and the Order (1) DENYING Defendant's Motion for Summary Judgment (Dkt. No. 19); and (2) GRANTING Plaintiff's Motion for Summary Judgment (Dkt. No. 20).[1] The operative facts are those set forth in the Stipulation and the later agreement by the parties to the fact that Porras' truck was a scheduled vehicle on Appellant's Policy. 1

[1] The entirety of the Joint Statement of Stipulated Facts and Exhibits is contained in the Supplemental Excerpts of Record ("SER"), filed herewith. SER 3-100.

ER 20. These facts should be considered *verbatim*, as Appellant stipulated, and not as Appellant has now massaged them with added nuance.

Most relevant to this appeal are the following facts:

The vehicle involved in the accident was a scheduled vehicle on Appellant's Policy. 1 ER 20.

Fact 3 – "UFCC issued José Porras an endorsement to the UFCC policy, on DMV form MCP 67." 2 ER 82:18–20.

Fact 7 – "Prior to April 12, 2015, UFCC also submitted to the California Department of Motor Vehicles at times MCP 65 certificates of insurance to evidence José Porras' financial responsibility as a motor carrier of property" 2 ER 83:4–6.

Fact 13 – "Prior to September 1, 2015, the California Department of Motor Vehicles returned to UFCC a notice of cancellation form DMV MCP 66 that UFCC had previously submitted in an attempt to cancel evidence of José Porras' financial responsibility as a motor carrier of property through the UFCC policy on the grounds that the policy number or the effective date on the Notice of Cancellation was not on file with the department." 2 ER 84:3–9.

Fact 14 – "Thus, on September 1, 2015, [the date of the accident] the California Department of Motor Vehicles had in its file certificates of

insurance from both UFCC and Allied to evidence José Porras' financial responsibility as a motor carrier of property pursuant to California Vehicle Code sections 34630, *et seq*." 2 ER 84:10–13.

Fact 16 – "On September 1, 2015, the California Department of Motor Vehicles' internet-based Motor Carrier Permit Active Carrier List listed Mr. Porras as an active carrier and identified his liability insurer as UFCC." 2 ER 84:18–20.

Fact 18 – "The September 1, 2015 loss was covered under the terms of the Allied policy. Allied retained counsel to defend José Porras in the wrongful death lawsuit. In November 2016, Allied settled the wrongful death lawsuit for $1 million." 2 ER 84:25–28.

Further, the MCP-67 form submitted to the DMV by UFCC states that it is "made a part of" the UFCC insurance policy, that the "terms, conditions, and limitations of this policy remain in full force and effect," and that "[t]his insurance policy covers all vehicles used in conducting the service performed by the insured …" 2 ER 92. The endorsement itself makes clear that it and the policy are one and the same. The Certificate of Insurance ("COI") filed with the DMV by Appellant certifies that Porras was "covered by an insurance policy" and that the COI "shall not be cancelled" except upon strict compliance with the DMV and statutory requirements. 2 ER 92. It cannot be disputed that Appellant failed to properly cancel the COI, even though it may have attempted to do so. *See* Cal. Veh. Code § 34630(c).

The cross-motions were all procedurally proper, and Appellant does not contend they were not. *See* 1 ER 4–5, 2 ER 36–104.

Summary of the Argument

Appellant failed to properly cancel the insurance policy it issued to José Porras, as required by the California DMV. *See* 2 ER 84 (Stipulated Facts 13, 14, and 15). In an effort to avoid the ramification of its error, Appellant presents contorted arguments that find no support under California Law. Appellant's primary argument is that despite its failure to submit a proper Notice of Cancellation to the DMV, its private cancellation of its policy should be given effect.

Appellant now claims that the required Notice of Cancellation is intended only for the cancellation of the Certificate of Insurance ("COI"), not for the policy itself. Appellant's arguments disregard the language contained in the three primary documents – the COI (DMV 65), the DMV 67 Endorsement, and the DMV 66 Notice of Cancellation. 2 ER 91, 92, and 93. The Endorsement itself confirms that it is made a part of all insurance policies insuring motor carriers of property. The COI states that the statutorily mandated insurance for motor carrier is in effect (present tense). The Notice of Cancellation states expressly that, when properly submitted to the DMV, it cancels an insurance policy (not the COI itself). Despite the clear language, and logical statutory scheme assuring financial responsibility for motor carriers

operating in California, Appellant now argues that despite its failed attempt to cancel the insurance policy as required by the DMV, its private cancellation of that policy was in fact successful. Such an interpretation of the law would undermine the entire statutory and regulatory framework designed to ensure the financial responsibility of motor carriers.

Further, the only applicable and relevant California law holds contrary to the arguments set forth by Appellant. Both *Transamerica Ins. Co. v. Tab Transp., Inc.*, 12 Cal.4th 389, 401 (1995) and *Fireman's Fund Ins. Co. v. Allstate Ins. Co.*, 234 Cal.App.3d 1154, 1166–67 (1991) hold that insurers must strictly comply with the DMV cancellation notice requirements under the financial responsibility statutes regulating motor carriers of property. Failing to give that notice, the insurer must pay the motor carrier's financial responsibility obligations to third parties. In both of those cases, an original insurer, like Appellant here, failed to properly cancel its policy with the DMV and therefore remained liable, despite the private cancellation or expiration of the policies as to the named insured.

The District Court properly granted summary judgment to Appellee, consistent with the case law precedent and the relevant statutes.

Legal Argument

A. Appellant's Policy Was in Force at the Time of the Accident

Both in the District Court and on this appeal, Appellant seeks to create a false distinction between the insurance policy it issued on the one hand, and the DMV 67 Endorsement to that policy and the COI on the other hand. However, the Endorsement, by its own language, is a part of the insurance policy, and the COI itself is not an insuring agreement, but instead evidences the existence of the policy and states the requirements for the cancellation of the policy. 2 ER 91, 92; Cal. Veh. Code § 34631. *See also Narver v. California State Life Ins. Co.*, 211 Cal. 176, 181 (1930) (endorsements are part of a policy and must be construed as a whole with the policy).

Further, the required Notice of Cancellation form states "Insurer hereby gives notice that the above referenced policy … is hereby cancelled." 2 ER 93. The Notice of Cancellation does not cancel the COI – it cancels the policy itself. Because Appellant failed to submit a proper Notice of Cancellation to the DMV, the policy itself (including the DMV 67 endorsement) remained in effect.

As the District Court properly found, "If the cancellation procedure does not refer to cancellation of the policy, it is unclear what significance the procedure has." 1 ER 13. Appellant tries to create

significance where none exists by arguing that the Notice of Cancellation is required to cancel only the COI, but not the policy itself, which may be cancelled anytime by the insurer without notice to the DMV or the public. This argument fails for at least two reasons. One, UFCC acknowledges that the Endorsement was not cancelled and continued to be in effect. However, the Endorsement is made a part of the policy and cannot be separated from it. What UFCC is actually arguing is that insurers may unilaterally cancel a part of the policy without notice to the DMV, and that the other portion of the policy (the Endorsement) survives until it and the COI are cancelled through the notice procedure. This position is not supported by either law or logic.

The second reason UFCC's argument fails is that the statutes requiring motor carriers to take on financial responsibility permit them to do so through insurance policies, and specifically designated COI forms. Cal. Veh. Code § 34631; Cal. Code Regs. Tit. 13, § 220.06(a). The COI form states that it will remain in effect until properly cancelled according to the DMV rules. The required form for a cancellation provides notice that the insurance policy itself, not just the COI, is being cancelled. 2 ER 93. There is no approved form that cancels the COI without cancelling the policy itself. Thus, the policy remains in effect until properly cancelled, which UFCC failed to do. This argument is consistent with the fact that the COI is merely evidence of coverage and not coverage itself.

Insurers like both Appellant and Respondent must strictly comply with the DMV cancellation notice requirements under the financial responsibility statutes regulating motor carriers of property. *See Transamerica Ins. Co. v. Tab Transp., Inc.*, 12 Cal.4th at 401; *Fireman's Fund Ins. Co. v. Allstate Ins. Co.*, 234 Cal.App.3d at 1166–67. Failing to give that notice, the insurer must pay the motor carrier's financial responsibility obligations to third parties.

In the former case, the California Supreme Court considered the strict compliance requirement under the predecessor Highway Carrier's Act. Transamerica Insurance Company insured a motor carrier (then referred to as "highway carriers,") covering its financial responsibility under the Act. Transamerica filed an insurance certificate with the PUC. After the policy expired in 1981, it failed to notify the PUC of the expiration/cancellation of its policy. The motor carrier, Tab Transportation, Inc., obtained replacement coverage with Federal Insurance Company, which filed an insurance certificate with the PUC.[2] Later, Tab replaced that policy with a Home Indemnity Company policy, which also filed a certificate with the PUC. Almost nine years after the expiration of the Transamerica policy, a Tab tractor-trailer truck collided with an Amtrak passenger train, resulting in multiple fatalities. When Tab was sued for $6 million for wrongful death,

[2] Prior to 1966, the PUC performed the functions now performed by the DMV.

personal injury and property damage to the train, Federal and Home agreed to pay their policy limits to settle the suit. Transamerica, as Appellant has done in the present case, claimed its policy had been canceled and denied any obligation to contribute toward the settlement.

The Supreme Court disagreed, holding Transamerica was required to provide coverage under the terms of the financial responsibility laws deemed incorporated into its policy:

> Ordinarily, an insurance company incurs no liability for an accident that occurs after the policy period has ended. But this is not an ordinary case, as explained briefly below.
>
> Highway carriers licensed in California are subject to a regulatory scheme administered by the Public Utilities Commission (hereafter PUC), requiring them to obtain adequate liability insurance and to submit proof thereof to the PUC. Underlying this requirement is the recognition of the need to protect the public "'against ruinous carrier competition and such possible attendant evils as ... inadequate insurance....' [Citation.]" (*Samson v. Transamerica Ins. Co.* (1981) 30 Cal.3d 220, 233, 178 Cal.Rptr. 343, 636 P.2d 32.)
>
> To ensure that the public is so protected at all times, the regulatory scheme requires—by means of a standard PUC form endorsement attached to the policy—that a liability policy issued to a highway carrier continue "in full force and effect until canceled," by giving 30 days' written notice to the PUC. The effect of attaching the endorsement to the policy, as we held in *Samson v. Transamerica Ins. Co., supra,* 30 Cal.3d 220, 231, 178 Cal.Rptr. 343, 636 P.2d 32, is to automatically incorporate the provisions of the endorsement into the policy. Here, incorporation of the provisions of the endorsement into the Transamerica policy converted it from

> a one-year term policy that covered the period from February 1, 1980, until February 1, 1981, to a policy that remained continuously in effect until canceled. Because Transamerica failed to give the PUC the required notice of cancelation when there was no policy renewal by Tab, the policy was still in effect and thus provided coverage for Tab at the time of the 1989 accident.

Transamerica Ins. Co. v. Tab Transp., Inc., 12 Cal.4th at 393–94.

Strict compliance with the cancellation requirements was also upheld in *Fireman's Fund Ins. Co. v. Allstate Ins. Co.*, 234 Cal.App.3d 1154. The insured owner of a tractor, purchased a commercial automobile policy from Fireman's Fund with a $1 million liability limit. The insured changed its primary insurance carrier from Fireman's Fund to Central National Insurance Company. Fireman's Fund failed to notify the PUC of the cancellation of its policy.

After the Fireman's Fund policy was replaced, the insured's tractor-trailer rig collided with a passenger vehicle resulting in serious injuries. Fireman's Fund, Allstate Insurance Company, Central National and other insurers settled the resulting personal injury litigation. Fireman's Fund paid $250,000 of its $1 million limit. In the coverage action between Fireman's Fund and Allstate, the court held that Fireman's Fund's noncompliance with the statutory advance notice requirement to the PUC resulted in "continued, uninterrupted coverage". *Fireman's Fund* at 1162. Therefore, Fireman's Fund, the original insurer, remained liable despite the cancellation of its policy as to the named

insured. As a result, Fireman's Fund's full policy limits were exposed and it was required to reimburse Allstate the remaining $750,000 under its policy.

The court listed the "sound reasons" for strict compliance with the notice of cancellation provisions. First, "continuing coverage until the PUC receives notice of cancellation may deter lax practices in the insurance industry." *Id.* at 1166. Second, "Fireman's exposure, despite the lapse of six months between cancellation and the .... accident, may seem unjust. · However, the relevant legal and regulatory scheme has been on the books for decades." *Id.* Finally, "Fireman's could have easily eliminated its exposure by simply filing the appropriate notice with the PUC. This is a minimal burden--one that is required to maintain the trustworthiness and vitality of statutes and regulations enacted to protect the public interest." *Id.*

The same result should follow here. There is no dispute that UFCC provided insurance to José Porras, and that the vehicle involved in the underlying accident was scheduled on its policy. 1 ER 20. While UFCC may have attempted to cancel its obligation, the DMV had returned to UFCC the notice of cancellation form that UFCC had previously submitted. As a result, UFCC knew it obligations had not been cancelled, and on September 1, 2015, the California Department of Motor Vehicles ("DMV") had in its file certificates of insurance from both UFCC and Allied to evidence José Porras' financial responsibility

as a motor carrier of property. *See* 1 ER 84. By returning the form, the DMV did not come into possession of the cancellation and therefore never "actually received" it. *See* Cal. Veh. Code § 34631.5. According to the DMV, if a cancellation form does not exactly match the insurance certificate it seeks to cancel, it will be returned to the insurer. *See* SER 110.

Despite Appellant's criticism of the opinions, both *Transamerica Ins. Co. v. Tab Transp., Inc.*, 12 Cal.4th 389 and *Fireman's Fund Ins. Co. v. Allstate Ins. Co.*, 234 Cal.App.3d 1154 remain good law, even though California intrastate motor carriers are now regulated by the DMV and no longer by the Public Utilities Commission. The former has been criticized only once in *Escobedo v. Estate of Snider*, 14 Cal.4th 1214 (1997), and then it was because there was a distinction between the California Uniform Aircraft Financial Responsibility Act and the laws regulating motor carrier financial responsibility.

In this case, Appellant advances a novel theory – that the current statutory scheme distinguishes between insurance policies and certificates of insurance and that, under the current scheme, it is only the COIs that remain in effect because of Appellant's failure to cancel them. This position, however, was rejected by the District Court, in part because it conflicts with the express language of the certificates and endorsements that Appellant signed repeatedly, agreeing and certifying:

- The motor carrier of property (Insured) identified herein is covered by an ***insurance policy*** providing bodily injury or death liability, property damage liability insurance, or workers' compensation insurance within the coverage limits identified above as required by California Vehicle Code (CVC) Sections 34630, 34631.5 and 34640, and by Part 387 of Title 49 of the Code of Federal Regulations.
- This ***insurance policy*** covers all vehicles used in conducting the service performed by the insured for which a motor carrier permit is required whether or not said vehicle is listed in the insurance policy.

See 2 ER 91 (emphasis added).[3]

In a footnote, Appellant proposes that this Court strike down form MCP 66, contained within and enacted by the California Code of Regulations because of its inconsistency with the legislative enactments. Of course, under *Erie* principles, that would not be appropriate. Appellant chose to remove to federal court and must abide by such limitations.

Consistent with the *Transamerica Ins.* and *Fireman's Fund* cases, *supra*, and pursuant to Appellant's own representations made under penalty of perjury, Appellant's policy continued in existence despite its nonrenewal on September 1, 2015, and is therefore available for contribution and subrogation. Because the District Court was sitting in

[3] Just as the federal laws (*e.g.*, 49 U.S.C. § 13906; 49 C.F.R. §§ 387.1, et seq.) differ from the California ones, the federal forms are materially different from the California forms such that the supposedly analogous federal decisions are of limited value.

diversity, it is bound by *Transamerica Ins.* and *Fireman's Fund*. For these reasons, therefore, the Appellant's policy was in force as of September 1, 2015.

B. Appellant's Policy Provided Coverage for the Incident of September 1, 2015, and Was Co-Primary

Given the undisputed facts, the relevant statutes (California Vehicle Code §§ 34630 and 34631.5), and cases such as *Fireman's Fund Ins. Co.* and *Transamerica Ins. Co.* Appellant's policy was in effect on September 1, 2015. The next question is whether, under the terms of the policy, coverage would be afforded for the incident. The insuring agreement provides as follows:

> Subject to the Limits of Liability, if **you** pay the premium for liability coverage for the **insured auto** involved, **we** will pay damages, other than punitive or exemplary damages, for **bodily injury**, **property damage**, and **covered pollution cost or expense**, for which an **insured** becomes legally responsible because of an **accident** arising out of the ownership, maintenance or use of that **insured auto**.

See 2 ER 88–1.

On the allegations of the Complaint in the underlying lawsuit, the Appellant's policy would have been obligated to defend and indemnify Porras. *See* SER 93–100. It was in effect and the insured auto was the one involved in the collision. *See* 2 ER 84. Based on the policy's plain language and pursuant to California Insurance Code sections such as

11580.1 and the cases thereunder, the UFCC policy, as continued in effect by the failure of Appellant to properly cancel the policy, provides coverage for the incident. In *Fireman's Fund*, *supra*, the court concluded that the policy continued in effect by the failure to cancel, like Appellant's here, was co-primary with the Allstate policy. *Fireman's Fund Ins. Co. v. Allstate Ins. Co.*, 234 Cal.App.3d at 1168.

In arguing that the Endorsement itself would not require it to share coverage obligations with Allied, Appellant fails to cite any relevant law, and instead resorts to a Tenth Circuit case (*Carolina Cas. Inc. Co. v. Yeats*, 584 F.3d 868 (10th Cir. 2009)) interpreting different law applied to different facts. In fact, the Endorsement is a part of the policy and failure to properly cancel the Endorsement requires the policy to remain in effect. The Endorsement states: "Except as specified in this endorsement, the terms, conditions, and limitations of this policy remain in full force and effect." The policy clearly provides for primary coverage and for Appellant's obligation to contribute its share of the loss.

In asserting that it is not obligated to share the risk with Appellee, Appellant again confuses the meaning and purpose of an endorsement and a certificate of insurance, apparently arguing that only the COI survived its failed attempt to cancel the insurance policy. However, if an insurance company were able to cancel an insurance policy and the required endorsement without proper notice to the DMV, leaving only

the bare COI, the entire system of financial responsibility would be undermined. *See* Cal. Veh. Code §§ 34630(a), 34631(a)(1). In fact, the language of the COI itself undermines Appellant's position. The COI states that the insured motor carrier "is covered by an insurance policy …" 2 ER 91. The statement is in the present tense and confirms that as long as the COI remains on record with the DMV, as it did here, the insured motor carrier is in fact covered by a policy of insurance.

C. This Court Should Decline to Take Judicial Notice of the Legislative History

This Court has the discretion to choose not to take judicial notice of material that were not brought to the attention of the District Court. *See In re Oracle Secur. Litig.*, 627 F.3d 376, 386, n. 1 (9th Cir. 2010); *Kohn Law Grp., Inc. v. Auto Parts Mfg. Miss., Inc.*, 787 F.3d 1237, 1241 (9th Cir. 2015) ("It is rarely appropriate for an appellate court to take judicial notice of facts that were not before the district court" (internal quotes omitted)); *Rodriguez v. Robbins*, 803 F.3d 502, 503 (9th Cir. 2015).

The "legislative history" Appellant advances was not before the District Court, is not in the record, and should not be considered on appeal. If Appellant insists that it be considered, let Appellant move

this Court to remand and explain why the "legislative history" was not initially brought to the District Court's attention consistent with the Central District of California's Local Rule 7–18.

This Court should utilize its discretion and decline to take judicial notice of the material.[4]

D. This Court May Certify a Question to the California Supreme Court

A district court's interpretation of state law is reviewed *de novo*. *See Flores v. City of Westminster*, 873 F.3d 739, 748 (9th Cir. 2017); *JustMed, Inc. v. Byce*, 600 F.3d 1118, 1125 (9th Cir. 2010); *Hauk v. JP Morgan Chase Bank USA*, 552 F.3d 1114, 1118 (9th Cir. 2009); *Laws v. Sony Music Entm't, Inc.*, 448 F.3d 1134, 1137 (9th Cir. 2006); *Rabkin v. Oregon Health Sciences Univ.*, 350 F.3d 967, 970 (9th Cir. 2003); *see also Feature Realty, Inc. v. City of Spokane*, 331 F.3d 1082, 1086 n.3 (9th Cir. 2003). This court's role is to determine what meaning the state's highest court would give to state law. *See Goldman v. Standard Ins. Co.*, 341 F.3d 1023, 1027 (9th Cir. 2003); *Paulson v. City of San Diego*, 294 F.3d 1124, 1128 (9th Cir. 2002) (*en banc*).

Cal. Rules of Court, rule 8.548(a) provides the following:

On request of the United States Supreme Court, a United States Court of Appeals, or the court of last resort of any state, territory, or

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[4] Certain of the hyperlinks are, moreover, invalid.

commonwealth, the Supreme Court may decide a question of California law if: (1) The decision could determine the outcome of a matter pending in the requesting court; and (2) There is no controlling precedent.

Appellant contends that "no published California case has addressed the separate roles of a trucker's insurance policy and his MCP 65 certificate of insurance[.]" Appellant's Opening Brief, 26. The District Court likewise acknowledged the absence of authority: "The Court is aware of no published case interpreting the meaning of the cancellation provisions of the current statute, regulation, or forms." 1 ER 12.

Appellee contends that the interpretations of prior law and the cases cited herein remain relevant and controlling, and that this Court need not look elsewhere for guidance. However, if, this Court believes that an answer from the California Supreme Court regarding the Motor Carriers of Property Permit Act would be beneficial, Appellee would not object to this Court filing such an order of request.

E. Appellant's Circuity Argument is a Mere Hypothetical and Cannot Eliminate is Obligations

Even assuming contribution is owed under the endorsement and not under the policy itself as Appellee maintains, the circuity of action argument is little more than an academic exercise. Appellant states that if it were made to satisfy the Judgment, it "would expose Porras to United Financial's right of reimbursement" without taking the

affirmative position that it would actually do so and without citation to any evidence as to how often Appellant pursues motor carriers for moneys paid out under MCP 67 endorsements. Without any analysis of the policy's language or exclusions, Appellant concludes that the Allied Premier policy would afford coverage to Porras if Porras was made to reimburse Appellant and that Allied Premier would seek subrogation and contribution from Appellant as Appellee has done here. The argument contains no legal or evidentiary support and should not be credited.

F. Appellee Need Not Have Suffered Judgment to Obtain Contribution

In a last ditch effort to avoid responsibility under its Policy, UFCC argues that Allied has no rights to recovery because it paid the claim instead of forcing the insured to undergo trial and incur the risk of a judgment in excess of the policy limits. However, this position is contrary to the law. "Where two or more insurers independently provide primary insurance on the same risk for which they are both liable for any loss to the same insured, the insurance carrier who pays the loss or defends a lawsuit against the insured is entitled to equitable contribution from the other insurer or insurers …" *Am. Cont'l Ins. Co. v. Am. Cas. Co.*, 86 Cal.App.4th 929, 936–37 (2001).

Appellant did not defend or contribute to the settlement of the wrongful death lawsuit, despite having received and denied a tender upon the UFCC policy. 2 ER 85. Having waived any ability to control the litigation, Appellant cannot now complain that it was resolved by way of settlement and not judgment. The underlying lawsuit was settled for policy limits. *See* 2 ER 83, 84. Refusing to settle for policy limits could have exposed Appellee to an excess judgment. *E.g.*, *Howard v. Am. Natl. Fire*, 187 Cal.App.4th 498 (2010), 527, 115 Cal. Rptr. 3d 42, 67, *as modified on denial of reh'g* (Sept. 9, 2010). Under these circumstances, Appellee should not have been made to take the case to judgment to be entitled to subrogation and/or contribution from Appellant.

Conclusion

For each of the foregoing reasons, this Court should affirm the District Court's Judgment.

Booth LLP
Respectfully submitted,

Dated: September 4, 2020

By: /s/ Ian P. Culver

Attorney for Plaintiff and Respondent
Allied Premier Insurance

Statement of Related Cases

Counsel knows of no related cases within the meaning of Ninth Circuit Rule 28–2.6.

Booth LLP

Respectfully submitted,

Dated: September 4, 2020

By: /s/ Ian P. Culver

Attorney for Plaintiff and Respondent
Allied Premier Insurance

Certificate of Compliance

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains **4,802 words**, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface, **14-pt Century Schoolbook**, using TypeLaw.com's legal text editor.

Booth LLP
Respectfully submitted,

Dated: September 4, 2020 By: /s/ Ian P. Culver

Attorney for Plaintiff and Respondent
Allied Premier Insurance

ADDENDUM

California Vehicle Code section 34630 provides as follows:

(a) A motor carrier permit shall not be granted to any motor carrier of property until there is filed with the department proof of financial responsibility in the form of a currently effective certificate of insurance, issued by a company licensed to write that insurance in this state or by a nonadmitted insurer subject to Section 1763 of the Insurance Code, if the policy represented by the certificate meets the minimum insurance requirements contained in Section 34631.5. The certificate of insurance or surety bond shall provide coverage with respect to the operation, maintenance, or use of any vehicle for which a permit is required, although the vehicle may not be specifically described in the policy, or a bond of surety issued by a company licensed to write surety bonds in this state, or written evidence of self-insurance by providing the self-insured number granted by the department on a form approved by the department.

(b) Proof of financial responsibility shall be continued in effect during the active life of the motor carrier permit. The certificate of insurance shall not be cancelable on less than 30 days' written notice from the insurer to the department except in the event of cessation of operations as a permitted motor carrier of property.

(c) Whenever the department determines or is notified that the certificate of insurance or surety bond of a motor carrier of property will lapse or be terminated, the department shall suspend the carrier's permit effective on the date of lapse or termination unless the carrier provides evidence of valid insurance coverage pursuant to subdivision (a).

(1) If the carrier's permit is suspended, the carrier shall pay a reinstatement fee as set forth in Section 34623.5, and prior to

conducting on-highway operations, present proof of financial responsibility pursuant to subdivision (a) in order to have the permit reinstated.

(2) If the evidence provided by the carrier of valid insurance coverage pursuant to subdivision (a) demonstrates that a lapse in coverage for the carrier's operation did not occur, the reinstatement fee shall be waived.

Section 34631 provides:

The proof of financial responsibility required under Section 34630 shall be evidenced by the deposit with the department, covering each vehicle used or to be used under the motor carrier permit applied for, of one of the following:

(a) A certificate of insurance, issued by a company licensed to write insurance in this state, or by a nonadmitted insurer subject to Section 1763 of the Insurance Code, if the policies represented by the certificate comply with Section 34630 and the rules promulgated by the department pursuant to Section 34604.

(b) A bond of a surety company licensed to write surety bonds in the state.

(c) Evidence of qualification of the carrier as a self-insurer as provided for in subdivision (a) of Section 34630. However, any certificate of self-insurance granted to a motor carrier of property shall be limited to serve as proof of financial responsibility under paragraphs (1) and (2) of subdivision (a) of Section 34631.5 minimum limits only and shall not be acceptable as proof of financial responsibility for the coverage required pursuant to paragraph (3) or (4) of subdivision (a) of Section 34631.5.

(d) Evidence on a form that indicates that coverage is provided by a charitable risk pool operating under Section 5005.1 of the Corporations Code, if the registered owner of the vehicle is a nonprofit organization that is exempt from taxation under paragraph (3) of subsection (c) of Section 501 of the United States Internal Revenue Code. The form shall include all of the following:

(1) The name and address of the motor carrier.

(2) The name and address of the charitable risk pool providing the policy for the motor carrier.

(3) The policy number, effective date, and liability limits of the policy.

(4) A statement from the charitable risk pool that the policy meets the requirements of Section 34631.5.

Section 34631.5 provides:

(a) (1) Every motor carrier of property as defined in Section 34601, except those subject to paragraph (2), (3), or (4), shall provide and thereafter continue in effect adequate protection against liability imposed by law upon those carriers for the payment of damages in the amount of a combined single limit of not less than seven hundred fifty thousand dollars ($750,000) on account of bodily injuries to, or death of, one or more persons, or damage to or destruction of, property other than property being transported by the carrier for any shipper or consignee whether the property of one or more than one claimant in any one accident.

(2) Every motor carrier of property, as defined in Section 34601, who operates only vehicles under 10,000 pounds GVWR and who does not transport any commodity subject to paragraph (3) or (4), shall provide and thereafter continue in effect adequate protection against liability imposed by law for the payment of damages caused by bodily injuries to or the death of any person; or for damage to or destruction of property of others, other than property being transported by the carrier, in an amount not less than three hundred thousand dollars ($300,000).

(3) Every intrastate motor carrier of property, as defined in Section 34601, who transports petroleum products in bulk, including waste petroleum and waste petroleum products, shall provide and thereafter continue in effect adequate protection against liability imposed by law upon the carrier for the payment of damages for personal bodily injuries (including death resulting therefrom) in the amount of not less than five hundred thousand dollars ($500,000) on account of bodily injuries to, or death of, one person; and protection against a total liability of those carriers on account of bodily injuries to, or death of more than one person as a result of any one accident, but subject to the same limitation for each person in the amount of not less than one million dollars ($1,000,000); and protection in an amount of not less than two

hundred thousand dollars ($200,000) for one accident resulting in damage to or destruction to property other than property being transported by the carrier for any shipper or consignee, whether the property of one or more than one claimant; or a combined single limit in the amount of not less than one million two hundred thousand dollars ($1,200,000) on account of bodily injuries to, or death of, one or more persons or damage to or destruction of property, or both, other than property being transported by the carrier for any shipper or consignee whether the property of one or more than one claimant in any one accident.

(4) Except as provided in paragraph (3), every motor carrier of property, as defined in Section 34601, that transports any hazardous material, as defined by Section 353, shall provide and thereafter continue in effect adequate protection against liability imposed by law on those carriers for the payment of damages for personal injury or death, and damage to or destruction of property, in amounts of not less than the minimum levels of financial responsibility specified for carriers of hazardous materials by the United States Department of Transportation in Part 387 (commencing with Section 387.1) of Title 49 of the Code of Federal Regulations. The applicable minimum levels of financial responsibility required are as follows:

	Commodity Transported	Combined Single Limit Coverage
(A)	Oil listed in Section 172.101 of Title 49 of the Code of Federal Regulations; or hazardous waste, hazardous materials and hazardous substances defined in Section 171.8 of Title 49 of the Code of Federal Regulations and listed in Section 172.101 of Title 49 of the Code of	$1,000,000

	Federal Regulations, but not mentioned in subparagraph (C) or (D).	
(B)	Hazardous waste as defined in Section 25117 of the Health and Safety Code and in Article 1 (commencing with Section 66261.1) of Chapter 11 of Division 4.5 of Title 22 of the California Code of Regulations, but not mentioned in subparagraph (C) or (D).	$1,000,000
(C)	Hazardous substances, as defined in Section 171.8 of Title 49 of the Code of Federal Regulations, or liquefied compressed gas or compressed gas, transported in cargo tanks, portable tanks, or hopper-type vehicle with capacities in excess of 3,500 water gallons.	$5,000,000
(D)	Any quantity of division 1.1, 1.2, or 1.3 explosives; any quantity of poison gas (Poison A); or highway route controlled quantity radioactive materials as defined in Section 173.403 of Title 49 of the Code of Federal Regulations.	$5,000,000

(b) (1) The protection required under subdivision (a) shall be evidenced by the deposit with the department, covering each vehicle used or to be used in conducting the service performed by each motor carrier of property, an authorized certificate of public liability and property damage insurance, issued by a company licensed to write the insurance in the State of California, or by a nonadmitted insurer subject to Section 1763 of the Insurance Code.

(2) The protection required under subdivision (a) by every motor carrier of property engaged in interstate or foreign transportation of property in or through California, shall be evidenced by the filing and acceptance

of a department authorized certificate of insurance, or qualification as a self-insurer as may be authorized by law.

(3) A certificate of insurance, evidencing the protection, shall not be cancelable on less than 30 days' written notice to the department, the notice to commence to run from the date notice is actually received at the office of the department in Sacramento.

(4) Every insurance certificate or equivalent protection to the public shall contain a provision that the certificate or equivalent protection shall remain in full force and effect until canceled in the manner provided by paragraph (3).

(5) Upon cancellation of an insurance certificate or the cancellation of equivalent protection authorized by the Department of Motor Vehicles, the motor carrier permit of any motor carrier of property, shall stand suspended immediately upon the effective date of the cancellations.

(6) No carrier shall engage in any operation on any public highway of this state during the suspension of its permit.

(7) No motor carrier of property, whose permit has been suspended under paragraph (5) shall resume operations unless and until the carrier has filed an insurance certificate or equivalent protection in effect at the time and that meets the standards set forth in this section. The operative rights of the complying carriers shall be reinstated from suspension upon the filing of an insurance certificate or equivalent protection.

(8) In order to expedite the processing of insurance filings by the department, each insurance filing made should contain the insured's California carrier number, if known, in the upper right corner of the certificate.

(c) (1) Notwithstanding any other provision of law, the operator of a for-hire tow truck who is in compliance with subdivision (a) may perform emergency moves, irrespective of the load carried aboard the vehicle being moved.

(2) For the purposes of paragraph (1), an "emergency move" is limited to one or more of the following activities:

(A) Removal of a disabled or damaged vehicle or combination of vehicles from a highway.

(B) Removal of a vehicle or combination of vehicles from public or private property following a traffic collision.

(C) Removal of a vehicle or combination of vehicles from public or private property to protect public health, safety, or property.

(D) Removal of a vehicle or combination of vehicles from any location for impound or storage, at the direction of a peace officer.

(3) The authority granted under paragraph (1) applies only to the first one-way carriage of property from the scene of the emergency to the nearest safe location. Any subsequent move of that property shall be subject to subdivision (a), including, but not limited to, a requirement

that the for-hire tow truck operator have a level of liability protection that is adequate for the commodity being transported by the towed vehicle or combination of vehicles.

(4) Any transportation of property by an operator of an operator of a for-hire tow truck that is not an emergency move, as authorized under paragraph (1), shall be subject to subdivision (a), including, but not limited to, a requirement that the for-hire tow truck operator have a level of liability protection that is adequate for the commodity being transported by the towed vehicle or combination of vehicles.

Title 13 of the California Code of Regulations, Section 220.06 provides:

(a) Acceptable proof of financial responsibility, pursuant to Vehicle Code section 34630, shall be submitted to the department in the form of a Certificate of Insurance, [DMV 65 MCP (REV. 7/2002)] pursuant to Vehicle Code section 34631(a); or a surety bond, [DMV 55 MCP (REV. 10/2003)] pursuant to Vehicle Code Section 34631(b); or a Certificate of Self-Insurance, [DMV 131 MCP (NEW 4/98)] pursuant to Vehicle Code Section 34631(c), which are hereby incorporated by reference.

(1) The Certificate of Insurance [DMV 65 MCP (REV. 7/2002)] shall be submitted to the department by the motor carrier's insurance provider.

(2) Proof of financial responsibility pursuant to Division 7, Vehicle Code section 16000 et seq., shall not be substituted for the proof required for a Motor Carrier Permit.

(3) The name of the motor carrier on the Certificate of Insurance, surety bond or Self-Insurance Certificate shall match the name of the motor carrier entered in Part 2 of an Application for Motor Carrier Permit form [DMV 706 MCP, (REV. 4/2003).]

(b) An Insurance Policy Endorsement, [DMV 67 MCP (REV. 6/2001)], which is hereby incorporated by reference, amending the insurance policy to comply with insurance requirements imposed by the Motor Carriers of Property Permit Act, commencing with Vehicle Code section 34630, shall be attached to and made part of, the insurance policy insuring the motor carrier.

(1) The Insurance Policy Endorsement, [DMV 67 MCP (REV. 6/2001)] shall be retained by the insurer and a copy provided to the insured motor carrier.

(2) A duplicate and all related documentation shall be provided to the department upon request.

(c) Written notice of cancellation of the Certificate of Insurance, required under Vehicle Code section 34630(b), shall be submitted by the insurer to the department on a Notice of Cancellation of Insurance, [DMV 66 MCP (REV. 6/2001)], which is hereby incorporated by reference.

Certificate of Service

I, Ian P. Culver, hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 4th, 2020**.**

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Booth LLP

Dated: September 4, 2020 By: /s/ Ian P. Culver

Attorney for Plaintiff and Respondent
Allied Premier Insurance

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **Allied Premier Insurance v. United Financial Casualty Co.**
Case Number: **TEMP-B0J89BGY**
Lower Court Case Number:

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ADDITIONAL DOCUMENTS	20-55099_Appellant_EOR_Vol1
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