S267746

IN THE SUPREME COURT OF CALIFORNIA

ALLIED PREMIER INSURANCE,
Respondent,

v.

UNITED FINANCIAL CASUALTY COMPANY,
Petitioner.

ON A CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
CASE NO. 20–55099

OPENING BRIEF ON THE MERITS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Miscellaneous

OPENING BRIEF ON THE MERITS

STATEMENT OF THE ISSUE

The United States Court of Appeals for the Ninth Circuit has certified to this Court the following question:

> Under California's Motor Carriers of Property Permit Act, Cal. Veh. Code §§ 34600 et seq., does a commercial automobile insurance policy continue in full force and effect until the insurer cancels the corresponding Certificate of Insurance on file with the California Department of Motor Vehicles, regardless of the insurance policy's stated expiration date?

INTRODUCTION

Commercial truckers buy liability insurance to protect their interests. But some might irresponsibly "go bare," leaving motorists they injure unable to collect damages. So, to protect the public, the Legislature requires a trucker to procure liability insurance, requires the insurer to file with the DMV a certificate as proof of that insurance, and requires the DMV to suspend the trucker's operating permit if that certificate lapses or is otherwise terminated. In this dispute between two insurers over who owes coverage for an accident, a trucker switched from one insurer to a second insurer, then had an accident. The first insurer's policy had expired; the second insurer paid the accident claim, but then sued the first insurer on a technicality—claiming a right of contribution because the first insurer had not filed a proper notice canceling a prior certificate on file with the DMV. This Court must decide whether the certificate on file had the effect of extending the first insurer's coverage. The answer is no.

Here, a commercial trucker purchased liability insurance from United Financial, which supplied the DMV with a certificate complying with the Motor Carriers of Property Permit Act (Veh. Code, § 34600 et seq.) (MCPPA) and related regulations. The trucker did not renew coverage with United Financial and switched his insurance to Allied. United Financial filed a notice canceling its certificate, but it had not properly canceled an *earlier* certificate that remained in the DMV file. The trucker later caused a fatal accident and was sued. Allied, whose policy was in force at the time of the accident, settled the suit for $1 million and now seeks contribution of half that amount from United Financial, despite the undisputed expiration of United Financial's policy before the accident.

A federal district court granted summary judgment to Allied on the theory that United Financial's expired policy provided continuing coverage via its certificate on file with the DMV. United Financial appealed to the Ninth Circuit, which certified the state-law question to this Court.

The district court erred. Allied's argument hinges on an MCPPA provision that says a "certificate of insurance shall not be cancelable" without notice to the DMV. Allied concludes this means United Financial's *policy* remained in effect so long as an old *certificate* was not canceled. But that argument improperly conflates the certificate (which aids the DMV's regulatory functions) and the policy (which provides insurance coverage).

The certificate does not provide coverage. At most, the certificate requires an insurer to attach an endorsement to the

policy, and the endorsement creates a surety-like obligation. The endorsement (as some courts have construed it) obligates an insurer to pay an injured third party who obtains a judgment against a trucker when there is no coverage under the policy and no other insurer can pay. (That is a benefit to the public, not to the uninsured trucker, who must reimburse the insurer for that surety-like payment.) That did not happen here. Allied paid to settle the accident claim. Because no conceivable surety obligation was triggered, the endorsement cannot give rise to Allied's equitable claims against United Financial.

That said, there is a different construction of the statutory scheme—leading to the same result—that also harmonizes the MCPPA with other statutes. Properly understood, the certificate should not be construed to create an independent suretyship through the endorsement—much less an open-ended extension of liability insurance coverage. The MCPPA does not even mention an "endorsement," let alone an endorsement giving rise to a surety obligation. Nor does the MCPPA suggest an insurer should owe anything after its policy period expires. Allied's position to the contrary starts and ends with an insurer's duty to file a notice if it cancels its certificate. But the certificate serves a different and less exalted role than Allied surmises. As we explain below, when United Financial's policy period expired, it owed nothing to the trucker, or Allied, or third parties.

Finally, Allied's equitable claims fail as a matter of law even if United Financial could be thought to owe policy benefits to the trucker or injured third parties at the time of the accident.

Imposing liability for contribution would be inequitable. United Financial received no premiums for the period when the accident occurred (while Allied did). And the Ninth Circuit highlighted that Allied's position would lead to a windfall. As for subrogation, United Financial was not a wrongdoer, nor did it occupy an inferior equitable position, so the doctrine does not apply. It follows, as a matter of law, that Allied's action against United Financial should fail even if this Court disagrees with United Financial's arguments on the Ninth Circuit's certified question.

STATEMENT OF THE CASE

A. The MCPPA is a comprehensive scheme that protects the public by withholding operating permits from uninsured commercial truckers.

The State of California initially regulated commercial truckers through the Highway Carriers' Act of 1951, which the Public Utilities Commission administered. (Former Pub. Util. Code, § 3501 et seq.) In 1996, the Legislature repealed that Act, replaced it with the MCPPA, and transferred primary regulatory responsibility to the DMV. (See *Hill Brothers Chem. Co. v. Superior Court* (2004) 123 Cal.App.4th 1001, 1005.)

The MCPPA regulates every " 'motor carrier of property,' " a term that embraces most persons and companies who operate large motor vehicles for commercial hire. (Veh. Code, § 34601, subd. (a).) "[A] motor carrier of property shall not operate a commercial motor vehicle on any public highway in this state, unless it . . . holds a valid motor carrier permit issued to that motor carrier by the department." (*Id.*, § 34620, subd. (a).) And a

motor carrier cannot obtain a permit unless it procures a certificate of insurance that is "proof of financial responsibility." (*Id.*, §§ 34630, subd. (a), 34631.)

A motor carrier's permit is effective only as long as its insurer's certificate remains on file, neither lapsed nor canceled. (Veh. Code, § 34630, subd. (c).) The DMV "shall suspend the carrier's permit" if the certificate "lapse[s] or [is] terminated." (*Ibid.*)

When an insurer notifies the DMV that a certificate is canceled, the motor carrier may need time to cure the problem. If the insurer's notice of cancellation were effective immediately, the motor carrier's permit would "stand suspended immediately." (See Veh. Code, § 34631.5, subd. (b)(5)–(7).) That would leave the motor carrier no chance to continue operations while obtaining replacement coverage and a replacement certificate. Instead, to allow an operating permit to remain in force temporarily until proof of financial responsibility is restored, the MCPPA provides that a certificate "shall not be cancelable on less than 30 days' written notice." (*Id.*, § 34630, subd. (b).) This period affords the DMV time to process a cancellation notice, and affords a motor carrier time to procure and "provide[ ] evidence of valid insurance coverage," while paying any necessary "reinstatement fee." (*Id.*, § 34630, subd. (c) & (c)(1).)

The DMV has prepared three forms to implement these aspects of the statutory scheme:

Certificate of Insurance (DMV Form 65): The certificate (see SER 74) provides basic information about the motor carrier, the insurer, and their insurance policy.

Endorsement (DMV Form 67): The certificate requires the insurer to attach an endorsement to the policy. (See SER 75.) Under this endorsement, an insurer agrees to pay a third party for "any legal liability of insured for bodily injury, death, or property damage arising out of the . . . use" of a permitted vehicle. (*Ibid.*) The endorsement does not require the insurer to provide the motor carrier a *defense* (as the insurer must do under the policy to protect the motor carrier), and if the insurer does make a payment to a third party under the endorsement, it may seek reimbursement from the motor carrier. (*Ibid.*) The endorsement provides that, in all other respects, the "terms, *conditions*, *and limitations* of this policy remain in full force and effect." (*Ibid.*, emphasis added.)

Notice of Cancellation (DMV Form 66): This notice informs the DMV that the certificate of insurance on file is terminated. (See SER 81.)

B. José Porras, a commercial trucker, purchases liability insurance from United Financial beginning in 2013.

José Porras was a commercial trucker, a "motor carrier of property" subject to the MCPPA. (SER 4.) He drove his truck under the business name Horizon Transporters. (*Ibid.*)

Porras obtained an operating permit from the DMV and commercial liability insurance from United Financial in 2013.

(SER 4, 8.) The policy provided bodily injury liability coverage of $750,000. (*Ibid.*) The policy specified a one-year "policy period" and provided coverage for accidents that occurred during that period. (SER 8, 33.)

Coverage under the policy could end in one of two ways. First, if Porras failed to renew the policy and pay a new premium, the policy would lapse—"automatically terminate at the end of the current policy period." (SER 37.) Second, before the policy lapsed, either Porras or United Financial could "cancel this policy" for various reasons, in which case United Financial might owe Porras a pro-rata refund of his premium. (SER 58–59.)

C. United Financial complies with the MCPPA by filing DMV certificates of insurance for Porras.

United Financial furnished the DMV multiple "certificates of insurance" for Porras during the period it successively renewed his policy. (SER 5–6.)

As required by each certificate, United Financial issued Porras an endorsement to be "made a part of" his insurance policy. (SER 75, bold omitted.)

D. Porras switches insurers from United Financial to Allied in 2015.

After renewing his United Financial policy (and later increasing the coverage limit to $1 million), Porras allowed the policy to expire on April 12, 2015, as he was purchasing coverage from a different insurer. (SER 5.) United Financial promptly filed a notice of cancellation for its certificate on file with the DMV.

(SER 5, 81.) There is no evidence that this cancellation was ineffective.

Porras purchased comparable replacement liability insurance from Allied. (SER 5.) Like United Financial's policy, Allied's policy provided $1 million in coverage for bodily injury liability. (*Ibid.*) A few days after its policy took effect, Allied filed a certificate of insurance demonstrating Porras's financial responsibility to the DMV. (SER 5–6, 90.)

Two years *earlier*, United Financial had filed a notice of cancellation pertaining to an earlier certificate of insurance (referencing the same insurance policy number), but the DMV had rejected that notice for clerical reasons. (SER 91–92.) As Allied's policy period commenced, United Financial's *earlier* uncanceled certificate remained on file with the DMV.

E. Porras is involved in an accident and Allied pays to defend and settle a lawsuit against him.

Almost six months after switching insurers, on September 1, 2015, Porras was involved in an automobile collision in which another driver, Jennifer Jones, died. (SER 6.) At the time of the collision, Allied's policy was in force and United Financial's policy had expired. But the DMV had on file certificates of insurance from both Allied and United Financial. (*Ibid.*)

Jones's parents sued Porras for wrongful death. (SER 6, 93–100.) Allied defended Porras and paid to settle the case for its policy limit of $1 million. (SER 6.) United Financial did not contribute to the settlement. (SER 7.)

F. Allied successfully sues United Financial for contribution, relying on the fact that a United Financial DMV certificate remained on file (without a notice of cancellation) after its insurance policy expired.

Allied later sued United Financial (seeking half of the settlement amount) on equitable theories of contribution and subrogation. (2 ER 112–114.) Allied sued in the superior court and United Financial removed the action to federal district court. (2 ER 107–114.)

The parties filed cross-motions for summary judgment based (primarily) on stipulated facts and documents. (2 ER 81–85, 119.) United Financial argued it had no obligation to share in Allied's settlement payment because United Financial's policy had expired on its own terms before the accident. (2 ER 72.) Allied countered that United Financial's policy had not expired at the time of the accident because one of its earlier certificates of insurance remained on file with the DMV with no corresponding notice of cancellation. (See 1 ER 9.) Allied relied extensively (2 ER 57–59) on *Transamerica Ins. Co. v. Tab Transportation, Inc.* (1995) 12 Cal.4th 389 (*Transamerica*), where this Court addressed a similar factual scenario under the now-repealed Highway Carriers' Act.

The district court agreed with Allied, concluding that if an insurer's *certificate* is not the subject of a proper cancellation notice, its "*policy* remains in effect, even though it may have lapsed under its own terms or been cancelled by the parties." (1 ER 13, emphasis added.) Accordingly, the district court ruled that Allied and United Financial both provided "insurance coverage on

the same risk," so they should share equal responsibility for the $1 million settlement, entitling Allied "to equitable contribution [from United Financial] in the amount of $500,000." (1 ER 20.)

G. United Financial appeals. The Ninth Circuit requests this Court's review.

United Financial appealed to the Ninth Circuit, which certified the parties' disputed issue to this Court. (*Allied Premier Ins. v. United Financial Cas. Co.* (9th Cir. 2021) 991 F.3d 1070, 1071 (*Allied*).) The Ninth Circuit explained that the appeal turned on a question of statutory interpretation: "If the MCPPA requires a commercial auto insurance policy to remain in effect indefinitely until the insurer cancels the Certificate of Insurance on file with the DMV, then Allied must prevail. If not, United must prevail." (*Id.* at p. 1073.)

The Ninth Circuit showed that the Legislature had replaced key terms in the original Highway Carriers' Act with different terms in the MCPPA. (*Allied*, *supra*, 991 F.3d at p. 1071.) According to the Ninth Circuit, Allied would have prevailed under the repealed Highway Carriers' Act as construed by *Transamerica*, *supra*, 12 Cal.4th 389. But the court was skeptical of that result under the MCPPA: "We have reason to doubt that the same principle applies to the currently-effective MCPPA, however, as the language of the new statute differs from that of the old one." (*Allied*, at p. 1073.) The Ninth Circuit emphasized that the MCPPA's key provisions decoupled the insurance policy from the certificate of insurance, in contrast to the Highway Carriers' Act. (*Id.* at pp. 1073–1074.)

This Court subsequently accepted the Ninth Circuit's certified request for review.

LEGAL ARGUMENT

I. Allied's contribution claim fails because United Financial was not a co-insurer at the time of the accident.

A. United Financial's policy expired on its own terms before the accident, barring any contribution claim.

"Where multiple insurance carriers insure the same insured and cover the same risk, each insurer has independent standing to assert a cause of action against its coinsurers for equitable contribution when it has undertaken the defense or indemnification of the common insured." (*Fireman's Fund Ins. Co. v. Maryland Cas. Co.* (1998) 65 Cal.App.4th 1279, 1293 (*Fireman's v. Maryland*).) Equitable contribution is therefore "reimbursement to the insurer that paid on the loss for the excess it paid over its proportionate share of the obligation." (*Ibid.*)

The concept underlying the doctrine is that a debt "was *equally* and *concurrently* owed by the other insurers and should be shared by them pro rata in proportion to their respective coverage of the risk." (*Fireman's v. Maryland*, *supra*, 65 Cal.App.4th at p. 1293.) "Equitable contribution thus assumes the existence of two or more valid contracts of insurance covering the particular risk of loss and the particular casualty in question." (*Id.* at p. 1295.) The right to contribution is codified in Civil Code section 1432: "a party to a joint, or joint and several obligation, who satisfies more than his share of the claim against

all, may require a proportionate contribution from all the parties joined with him."

Here, United Financial's policy expired by its own terms in April 2015, when Porras decided not to pay premiums to renew his policy. (SER 5.) United Financial's contractual coverage obligation was terminated then—upon expiration of the policy period. Porras chose to purchase replacement insurance from a different insurer, Allied, which provided coverage to Porras under a different insurance policy. In other words, at the time of Porras's September 2015 accident, Allied owed coverage under its policy, but United Financial did not.

Because the two insurers did not share a common insurance coverage obligation, United Financial could owe nothing to Allied by way of contribution unless, by operation of law, United Financial could be deemed to owe a continuing obligation to Porras as his liability insurer, notwithstanding the expiration of United Financial's policy. As we now explain, that is not the case.

B. The district court erred in concluding that United Financial's DMV certificate extended insurance coverage beyond the policy period.

In granting summary judgment for Allied (1 ER 20), the district court looked beyond the terms of United Financial's insurance policy and focused on United Financial's certificate of insurance. Adopting Allied's argument (2 ER 61), the district court concluded that coverage under an expired policy persists

until an insurer supplies proper notice canceling all certificates of insurance on file with the DMV (1 ER 21).

The position that a certificate indefinitely extends insurance coverage under an *expired* policy (absent a notice of cancellation) encounters immediate difficulty. It conflates the certificate with the insurance policy. But a certificate is *not* a policy. They are different documents that serve different purposes. The policy furnishes coverage. The certificate is "*proof* of financial responsibility"—"*evidence*[ ]" of a trucker's required insurance coverage. (Veh. Code, § 34631, subd. (a), emphasis added.) The MCPPA contrasts them by referring to "the policy *represented by* the certificate." (*Id.*, § 34630, subd. (a), emphasis added.) There are numerous separate mentions of "certificate" and "policy" in the pertinent sections of the MCPPA (Veh. Code, §§ 34630–34634), and "[w]here different words or phrases are used in the same connection in different parts of a statute, it is presumed the Legislature intended a different meaning" (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1117).

In drafting the MCPPA, the Legislature required the DMV to collect certificates, not policies. Understandably so—by collecting one-page certificates (SER 74), the DMV avoids keeping track of 65-page policies (SER 8–73) for each of the many regulated motor carriers on each occasion when they procure or switch coverage. The DMV avoids the task of analyzing the terms of each policy to ensure it meets the minimum statutory criteria for financial responsibility. The Legislature put that burden on

insurers, who must attest to the DMV (via the certificate) that a motor carrier has purchased adequate liability insurance and is therefore eligible for an operating permit.

The certificate serves a particular regulatory function that allows the DMV to know when it should grant, and when it should withhold or suspend, an operating permit. If an insurer cancels its policy, it must alert the DMV by filing a notice that it has done so—providing a form of advance notice allowing the motor carrier to cure the problem. (Veh. Code, § 34630, subd. (b) ["The certificate of insurance shall not be cancelable on less than 30 days' written notice from the insurer to the department …."].)[1] If the motor carrier does not cure, the DMV suspends the operating permit. (*Id.*, § 34630, subd. (c).)

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[1] The MCPPA requires a trucker's permit to be suspended if the certificate has "lapsed" *or* is "terminated." (Veh. Code § 34630, subd. (c).) The distinction between lapse (or expiration) at the end of the policy period and earlier termination by cancellation exists as to policies as well. Under the Insurance Code, coverage *expires* upon lapse, when the policy period ends: " 'Expiration' means termination of coverage by reason of the policy having reached the end of the term for which it was issued or the end of the period for which a premium has been paid." (Ins. Code, § 660, subd. (i).) Alternatively, the parties to an insurance contract may *cancel* coverage *before* the policy period ends: " 'Cancellation' means termination of coverage by an insurer (other than termination at the request of the insured) during a policy period." (*Id.*, § 660, subd. (g).) The difference is one of timing. Cancellation is the termination of an insurance policy before it otherwise expires on its own terms. (*CalFarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 826, fn. 19 [" 'Cancellation,' as opposed to 'non-renewal,' refers to termination of a policy before its expiration date"].)

Allied and the district court built an entire argument for extending *insurance coverage* based on a single sentence about sending a notice of a *certificate*'s cancellation. But nothing in Vehicle Code section 34630 states that the private contract between the insurer and the motor carrier—the *insurance* policy—cannot lapse or expire absent notice to the DMV canceling a separate document—the certificate.

The law used to be otherwise when insurers or motor carriers canceled a policy. In the Highway Carriers' Act that the MCPPA replaced, the Legislature had directed insurers to send notices canceling their *policies*, not their *certificates*: a "policy of insurance or surety bond shall not be cancelable on less than 30 days' written notice to the commission." (Former Pub. Util. Code § 3634.) Thus, the Legislature knew how to say—but chose *not* to say in the MCPPA—that cancellation notices must be sent before coverage may cease. (See *People v. Mendoza* (2000) 23 Cal.4th 896, 916 [the Legislature's repeal of prior statute "together with its enactment of a new statute on the same subject ... with significant differences in language, strongly suggests the Legislature intended to change the law"]; cf. *Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 228 ["when the Legislature intends to require a formal evidentiary hearing, it knows how to say so"].)

The Highway Carriers' Act arguably gave a motor carrier 30 days of free coverage when its insurer decided to cancel a policy (for reasons such as discovering the insured's material misrepresentations, or a breach of some condition of coverage).

But the MCPPA uses materially different language. The *certificate* that enables the motor carrier to continue operating under a permit remains in force for 30 days, but the statute no longer says the same about the *insurance policy*.

The Legislature did not change course inadvertently. An early draft of the MCPPA (in August 1995) would have carried forward the conceptual framework of the Highway Carriers' Act by foreclosing a motor carrier from registering with the DMV until filing "a policy of insurance" or similar instrument with the DMV. (Assem. Bill 1683 (1995–1996 Reg. Sess.) (as amended, Aug. 30, 1995).) But a later draft removed that reference to the insurance policy and replaced it with a "certificate of insurance" serving as the "[*p*]*roof of financial responsibility*," the language that was ultimately enacted and persists today. (Assem. Bill 1683 (1995–1996 Reg. Sess.) (as amended, June 10, 1996).)

In arguing that coverage nonetheless persists until 30 days after notice that a certificate is canceled, Allied takes refuge in *Transamerica*, *supra*, 12 Cal.4th 389, on which the district court also relied. There, Transamerica filed a certificate of insurance at the inception of its one-year policy period and did not file a cancellation notice when the policy expired. Eight years later, the insured trucker collided with an Amtrak train, causing three deaths and millions of dollars in legal claims. This Court found coverage: Transamerica had failed to give "the required notice of cancelation," so its "policy was still in effect and thus provided coverage for [the insured] at the time of the … accident." (*Id.* at p. 394.) Transamerica was required to compensate the insured's

subsequent insurers that had paid claims arising from the train accident. (*Id.* at p. 403.)

The fact pattern in *Transamerica* is close to this case. But the background legal principles have changed. *Transamerica* interpreted the Highway Carriers' Act, administered by the PUC, which had promulgated a general order "requiring the policy to remain in 'full force and effect until canceled.' " (*Transamerica*, *supra*, 12 Cal.4th at p. 400.) Canceling the policy required filing the statutory notice, so this Court reasoned that a policy "could never lapse by reason of expiration of the policy term." (*Id.* at p. 401.)

This result doesn't make sense under the MCPPA, however. Today, unlike the days of the Highway Carriers' Act, an insurer need not send the DMV a notice canceling its *policy*. Only cancellation of a *certificate* is required under the MCPPA. In other words, on the central issue in this case—whether coverage can persist after a policy's expiration—the Legislature has changed the rules since *Transamerica*.

Applying the old statute requiring notice of cancellation of a policy would, as the Ninth Circuit observed, "result[ ] in an apparent windfall for Allied based on United's minor clerical error" in failing to cancel a certificate. (*Allied*, *supra*, 991 F.3d at p. 1075.) Allied's position should therefore fail.

C. A DMV certificate may lead to the creation of a surety-like obligation.

1. An endorsement required by the certificate creates an obligation that differs from insurance coverage.

The MCPPA makes no mention of an "endorsement" to a motor carrier's policy. But the DMV form certificate does. It requires an insurer to "certif[y]" that "[a] fully executed endorsement, on a form authorized by the [DMV] is attached to the referenced policy." (SER 74.) The complete text of the DMV form endorsement appears below:

This Endorsement shall be attached to and made a part of all policies insuring motor carriers of property required to obtain a permit pursuant to the Motor Carriers of Property Permit Act, commencing with California Vehicle Code section 34600. The purpose of this Endorsement is to assure compliance with the Act and related rules and regulations.

Insurer agrees to each of the following:

- The coverage provided by the endorsement excludes any costs of defense or other expense that the policy provides.
- To pay, consistent with the minimum insurance coverage required by California Vehicle Code Section 34631.5, and consistent with the limits it provides herein, any legal liability of insured for bodily injury, death, or property damage arising out of the operation, maintenance, or use of any vehicle(s) for which a motor carrier permit is required, whether or not such vehicle(s) is described in the attached policy.
- No provision, stipulation, or limitation contained in the attached policy or any endorsement shall relieve insurer from obligations arising out of this Endorsement or the Act, regardless of the insured's financial solvency, indebtedness or bankruptcy.
- The Certificate of Insurance shall not be canceled on less than thirty (30) days notice from the Insurer to the DMV, written on an authorized Notice of Cancellation form and that the thirty (30) day/period commences to run from the date the Notice of Cancellation was actually received at the office of the California Department of Motor Vehicles, Motor Carrier Services Branch, in Sacramento, California.
- To furnish DMV with a duplicate original of the referenced policy, DMV authorized endorsement, and all other related endorsements and documentation upon request.
- Except as specified in this endorsement, the terms, conditions, and limitations of this policy remain in full force and effect. This endorsement shall not prevent insurer from seeking reimbursement from insured for any payment made by insurer solely on account of the provisions herein.

Insurer certifies to each of the following:

- 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(s) is listed in the insurance policy.

I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

(SER 75.)

Several features of the DMV endorsement differentiate it from the insurance coverage provided by the policy. The

endorsement obliges an insurer to pay the motor carrier's "legal liability" arising from his use of vehicles for which an operating permit is required. (SER 75.) But the insurer need not protect the motor carrier by providing a defense against such claims for liability. (*Ibid.* ["The coverage provided by the *endorsement* excludes any costs of defense or other expense that the *policy* provides" (emphasis added)].) And if an insurer makes such a payment, it may "seek[ ] reimbursement from insured." (*Ibid*.) These provisions make clear that the endorsement required by the certificate creates a limited obligation designed to protect the public, unlike the insurance policy, which is designed to protect the insured motor carrier.

The endorsement further provides that, "[e]xcept as specified in this endorsement, the terms, *conditions, and limitations* of this policy remain in full force and effect." (SER 75, emphasis added.) This signifies that, for example, the terms providing for *lapse or termination* of the policy remain in effect. In sum, the endorsement serves a different function than the policy and does not itself furnish liability insurance coverage.

2. When applicable, the endorsement creates a surety-like obligation.

Though the endorsement does not create insurance coverage (as just explained), it does create a payment obligation. What is the nature of that obligation?

Courts construing comparable federal law governing interstate trucking have developed a body of law on this subject. Under federal regulations implementing the Motor Carrier Act of

1980 and later amendments, an interstate trucker must establish "financial responsibility" via "[p]olicies of insurance, surety bonds," or the like. (49 C.F.R. § 387.7(b)(1) & (e)(1).) "To satisfy this insurance requirement, most interstate trucking companies obtain a specific endorsement to one or more of their insurance policies—the MCS–90 endorsement." (*Carolina Cas. Ins. Co. v. Yeates* (10th Cir. 2009) 584 F.3d 868, 870 (*Carolina Casualty*); see Form MCS–90, United States Department of Transportation <https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/2021-06/FMCSA%20Form%20MCS-90%2006032021_508.pdf> [as of July 30, 2021].)

The Tenth Circuit in *Carolina Casualty* canvassed federal authorities and explained that the MCS–90 endorsement does *not* provide insurance coverage: "the endorsement and the underlying insurance policy, while linked, impose different obligations based on different requirements." (*Carolina Casualty, supra*, 584 F.3d at p. 882.) Those "different obligations" are mutually exclusive: "an insurer's obligation under the MCS–90 endorsement is not triggered unless … the underlying insurance policy (to which the endorsement is attached) *does not provide liability coverage* for the accident." (*Id.* at p. 879, emphasis added.) "Any policy exclusions, or outright lack of coverage by the policy for the accident at issue, remain valid and enforceable as between the motor carrier and its insurer." (*Id.* at p. 882.) "In sum, the MCS–90 endorsement creates an obligation entirely separate from other obligations created by the policy to which it is attached." (*Id.* at p. 884.)

From these principles, the Tenth Circuit discerned that the payment owed under the MCS–90 endorsement amounts to a surety obligation. (*Carolina Casualty, supra*, 584 F.3d at p. 878; accord, *Westchester Surplus Lines v. Keller Transp*. (Mont. 2016) 365 P.3d 465, 470 ["The federally-mandated MCS–90 endorsement is a surety provision, not a modification of the policy to which it is attached"].) The endorsement operates as "a safety net to protect the public where none of a motor carrier's liability insurance policies satisfies at least a minimum amount of an injured party's judgment." (*Carolina Casualty*, at p. 880.) This view of the endorsement as creating a surety obligation is buttressed by the federal regulatory scheme, which treats a surety bond as an alternative to an endorsement. (*Ibid*., citing 49 C.F.R. § 387.7(d).) So too, under the MCPPA, a certificate of insurance and a surety bond are alternative "proof[s] of financial responsibility." (Veh. Code, § 34631, subds. (a)–(b).)

In keeping with the nature of suretyship, the endorsement's payment obligation "is triggered only when . . . no other insurer is available to satisfy the judgment against the motor carrier . . . ." (*Carolina Casualty*, *supra*, 584 F.3d at p. 878.) Indeed, the obligation to pay under the endorsement should evaporate when the motor carrier procures replacement insurance. (See *Northland Ins. Co. v. New Hampshire Ins. Co.* (D.N.H. 1999) 63 F.Supp.2d 128, 134 ["An MCS 90 Endorsement also will be canceled automatically notwithstanding the insurer's failure to comply with the endorsement's cancellation

requirements if the policyholder purchases 'replacement' insurance"].)

That explains why the endorsement has no role to play in disputes *between insurers*, like this one. (See, e.g., *John Deere Ins. Co. v. Nueva* (9th Cir. 2000) 229 F.3d 853, 858 ["[T]he integral purpose of the MCS–90, to protect third party members of the public, is not implicated in a dispute between two insurers"]; *Lynch v. Yob* (Ohio 2002) 768 N.E.2d 1158, 1164 ["[C]ases involving disputes between two insurance companies, unlike those involving an injured member of the public seeking recovery under a MCS–90 endorsement, do not implicate the key rationale behind the MCS–90 endorsement, which is the protection of the public"].)

In any event, when another insurer actually pays a judgment or settles a claim against the motor carrier, there is no debt for which the insurer-as-surety could be responsible. (See Civ. Code, § 2787 [a surety promises to answer for the debt of another]; *R.P. Richards, Inc. v. Chartered Const. Corp*. (2000) 83 Cal.App.4th 146, 154–155 [a settlement releasing the principal exonerates the surety].)

3. United Financial's endorsement to an expired policy created no joint obligation with Allied, foreclosing contribution.

Applying the principles above, United Financial owes Allied nothing because it owed nothing to Porras as its former insured. (Allied's policy also compensated the victim of Porras's accident.)

Absent joint insurance coverage, Allied's contribution claim against United Financial fails as a matter of law.

1. *United Financial owed no insurance coverage to Porras for the accident*. Porras's insurance policy with United Financial had expired at the time of his accident. When the policy period ended, United Financial no longer faced the potential of owing insurance coverage. Nothing in the DMV form endorsement can change that result. The endorsement preserves "in full force and effect" the terms and limitations in the policy—necessarily including the policy period itself. The endorsement simply does not create insurance coverage.

2. *At most, the endorsement made United Financial a surety*. The endorsement imposes a surety-like obligation in which a former insurer guarantees payment after a third party has established a motor carrier's "legal liability." (SER 74.) The insurer provides a safety net to protect the public from truckers who cause accidents and cannot compensate victims up to the minimum amounts specified in the MCPPA.

Here, however, no safety net was required. Porras *could* compensate his victim because he had obtained replacement liability insurance from Allied. When Allied paid to settle the claim against Porras, the public was protected and any potential surety obligation disappeared.

3. *The endorsement does not create any obligation by United Financial to contribute to Allied's settlement*. Allied contends that United Financial should pay a share of the settlement it paid in Porras's accident case. But, as a threshold matter, Porras's

liability to the injured party was never established as a legal obligation. Allied settled before that occurred, so the endorsement never came into play. (See *Carolina Casualty*, *supra*, 584 F.3d at p. 878 [payment under the endorsement "is triggered only when … no other insurer is available to satisfy the *judgment* against the motor carrier" (emphasis added)]; cf. *ante*, pp. 28–29.)

And even if the underlying personal injury case had gone to judgment, United Financial still would not be a *co-insurer of Porras* on the same risk as Allied; so again, no contribution duty could arise. (See, e.g., *Fireman's v. Maryland*, *supra*, 65 Cal.App.4th at p. 1289 [equitable contribution applies when multiple insurers "are both liable for any loss"].)

All of this shows that the endorsement "is irrelevant to and has no effect on the ultimate allocation of a judgment against a motor carrier as between the carrier and its various insurers." (*Carolina Casualty*, *supra*, 584 F.3d at p. 879.) For these reasons, Allied has no viable claim against United Financial.

II. Alternatively, a DMV certificate extends *neither* insurance coverage *nor* a surety-like obligation after the insurer's policy expires—with or without notice of cancellation.

As noted, the endorsement required by the DMV certificate states that all terms of the policy remain in force unless otherwise specified in the endorsement. (*Ante*, pp. 25–26.) That means the terms for terminating the *policy* apply equally to terminating the *endorsement* that is attached to the policy. Thus, if the motor carrier decides not to renew the policy and stops

paying premiums, any surety-like obligation under the endorsement should be extinguished when the policy expires.

While the Legislature required that a *certificate* remain in force until 30 days after notice of its cancellation, the Legislature said no such thing about canceling policies or endorsements. (Indeed, the *Legislature* did not require an endorsement at all; that is solely a function of the DMV's certificate form.) And as we have explained, the certificate has a unique regulatory function—to enable the DMV to issue and suspend operating permits depending on motor carriers' compliance with the statutory requirement that proof of financial responsibility be filed. (Veh. Code, §§ 34630, subd. (b), 34631.5, subd. (a)(1).)

Each insurance policy states its policy period, and it is predictable that polices will lapse or expire (when motor carriers switch insurers or leave the business). But termination through cancellation before the end of the policy period is not predictable. That explains why the certificate "shall not be cancelable on less than 30 days' written notice." That period gives the DMV adequate time to process a cancellation notice. In addition, that period provides a motor carrier time to obtain a replacement insurance policy—and a replacement certificate to "provide[ ] evidence of valid insurance coverage." (Veh. Code, § 34630, subd. (c).) Allied's argument that a certificate carries greater legal significance—beyond proof of insurance—assumes that, if the certificate remains in force indefinitely until the insurer files a proper notice of cancellation, the insurer's expired policies and

endorsements must also remain in force. But that analysis is not in keeping with the permit-monitoring purpose of the certificate.

The DMV need not concern itself when motor carriers shift coverage from one insurer to another with no gap in coverage. The new insurer will file a new certificate, which alerts the DMV (at least by implication) that the prior insurer's policy period has ended or the policy has otherwise been terminated—whether or not the prior insurer files *any* sort of notice. A notice of "cancellation" serves no purpose at that point, so the lack of a notice of cancellation should have no legal effect.

The calculus is different when, without notice to the DMV, a policy is *canceled*, usually based on misconduct by the insured. (See, e.g., SER 58.) In that situation it would be important for the DMV to receive affirmative notice of cancellation of the certificate. A motor carrier whose policy is canceled before the end of its period might not find another insurer willing to write the "next" policy. Or worse—such an insured might be willing to cut corners and drive without coverage. Those are matters of concern to the DMV and the Legislature.

The point is that policy cancellation is often more serious and significant than policy expiration, so it was sensible for the Legislature to channel the DMV's efforts into monitoring cancellation—via the insurers' notice of cancellation of the corresponding certificates. That is the topic of Vehicle Code section 34630, which should have no bearing on this case because United Financial's policy was not canceled; rather, that policy expired and was replaced with substitute coverage from Allied.

The Eleventh Circuit made this very point in similar circumstances in *Waters v. Miller* (11th Cir. 2009) 564 F.3d 1355. Waters sued Miller, a trucker who had caused a serious accident. Miller's policy with Progressive Insurance had expired two months before the accident, but Waters argued that coverage persisted because Progressive had failed to notify Florida authorities of the policy's expiration. (*Id*. at pp. 1356–1357.) Waters invoked a Florida law that provided a trucker's "policy 'may not be *canceled* on less than 30 days' written notice ….' " (*Id.* at p. 1357, quoting Fla. Stat. § 320.02(5)(e), emphasis added.) The Eleventh Circuit rejected the argument because Waters had misunderstood the difference between cancellation and expiration. "[The statute] applies when an existing policy is *cancelled*, but not when a policy *expires* because of non-renewal by the insured. The distinction between these two terms is recognized by insurance treatises and Florida law." (*Ibid*.) The court therefore affirmed a summary judgment for Progressive, holding that the statute requiring a notice of cancellation did not require it to provide notice of "the Policy's *expiration*." (*Ibid.*, emphasis added; see *Fireman's Fund Ins. Co. v. Allstate Ins. Co.* (1991) 234 Cal.App.3d 1154, 1164 & fn. 6 (*Fireman's v. Allstate*) [looking to Florida authority "to justify strict construction of cancellation provisions"]; accord, *Hartford Acc. & Indem. Co. v. Sentry Ins. Co.* (N.H. 1987) 536 A.2d 185, 188 [insurer's failure to file a notice of cancellation after its policy expired did not extend coverage: "the New Hampshire insurance statutes generally use 'cancellation' to signify the ending of a policy before the

expiration of its term, and non-renewal to signify the ending of a policy on the date the term expires"].)

Three Justices of this Court who dissented in *Transamerica* would apparently agree that, in this case, the MCPPA provides no basis for a coverage obligation by United Financial, and thus no basis for a contribution claim by Allied. Justice Baxter explained (for three dissenting Justices)[2] that the cancellation notice provision of the Highway Carriers' Act "does not require notice when a policy *expires* at the end of its term. The statute provides only that notice must be provided if the policy is *cancelled*. The policy at issue here expired at the end of the policy period, approximately eight years prior to the accident giving rise to the coverage dispute." (*Transamerica*, *supra*, 12 Cal.4th at p. 410, emphasis added (dis. opn. of Baxter, J.).) Justice Baxter demonstrated that "[t]he word 'cancel' has a specific meaning in the insurance context," and that " 'there is a difference between cancellation of a policy and its lapse by reason of the expiration of the term for which written. Cancellation implies a termination prior to the expiration of the term for which written.' " (*Id*. at pp. 409–410, quoting *Farmers Ins. Exchange v. Vincent* (1967) 248 Cal.App.2d 534, 541.) Finally, Justice Baxter showed that "[t]he Legislature certainly was aware of this usage in enacting the statute. . . . Had the Legislature intended to require notice to the PUC in situations where the policy was terminated by means

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[2] A fourth, future Justice also agreed: Justice Baxter "incorporate[d]" the Court of Appeal opinion in which Justice Chin had concurred. (*Transamerica*, *supra*, 12 Cal.4th at p. 408.)

other than cancellation, it could easily have done so." (*Id.* at p. 410.)

Although a dissenting opinion is not binding, Justice Baxter's dissent in *Transamerica* is persuasively reasoned, is consistent with provisions in the Insurance Code distinguishing expiration from cancellation (*ante*, p. 21, fn. 1), and should be followed here.

In contrast, the majority opinion in *Transamerica* has no claim to precedent here because it was construing the now-repealed Highway Carriers' Act, while the materially different MCPPA provides even less reason to imbue a certificate of insurance with attributes of coverage. (Cf. Civ. Code, § 3510 ["When the reason of a rule ceases, so should the rule itself"].)

The *Transamerica* majority's answer to Justice Baxter's distinction between cancellation and expiration was a non-sequitur: "because the Transamerica policy was *amended* by the PUC's standard form endorsement to remain 'in full force and effect until canceled,' it could never lapse by reason of expiration of the policy term; instead, as the result of the endorsement, the policy was to provide coverage 'until canceled.' " (*Transamerica*, *supra*, 12 Cal.4th at p. 401.) Stating that a policy cannot expire on its own because it remains effective until canceled presumes that the terms *cancellation* and *expiration* mean the same thing. But Justice Baxter showed they do not, and the majority did not attempt to justify treating those terms as equivalents.

The cancellation/expiration distinction is at least consistent with a *different* aspect of the *Transamerica* majority opinion. The

main authority relied on by the *Transamerica* majority was *Fireman's v. Allstate*. (See *Transamerica*, *supra*, 12 Cal.4th at pp. 401–402). In that case, a trucker caused an accident in May 1985—during the Fireman's policy period, which ran from July 1983 to July 1985. (*Fireman's v. Allstate*, *supra*, 234 Cal.App.3d at p. 1158.) The insured's risk manager had *canceled* the Fireman's policy in November 1984—before the end of Fireman's two-year policy term—and replaced it with another insurer's policy, but Fireman's "did not notify the PUC of cancellation." (*Id.* at p. 1159.) Fireman's sought a declaration that it owed no coverage for the 1985 accident because its policy was canceled in November 1984, but other carriers objected that the Fireman's policy term remained in effect until it expired in July 1985 because Fireman's had failed to comply with PUC cancellation requirements. (*Id.* at pp. 1159–1160.) The superior court granted summary judgment against Fireman's and the Court of Appeal, construing the Highway Carrier's Act, affirmed. (*Id.* at pp. 1160, 1166, 1174.)

That result comports with the distinction between expiration or lapse and the statutory reference to cancellation. At the time of the accident, the Fireman's policy had *not* expired on its own terms, *nor* had notice of its cancellation been conveyed under the statutory scheme. The *Transamerica* majority applied *Fireman's v. Allstate* to the expiration scenario in *Transamerica* without appreciating that *Fireman's v. Allstate* addressed only the cancellation scenario. This Court should decline to extend the *Transamerica* majority opinion to cases arising under the

MCPPA. This Court should also hold that *Transamerica* does not support a decision for Allied on the facts here—where neither the policy nor the certificate was (or needed to be) canceled.

* * *

Allied argues for perpetual insurance coverage—potentially for decades into the future—until an insurer files a valid notice canceling any DMV certificate on file. Yet there is no indication in the MCPPA that the Legislature intended perpetual coverage after a policy expires according to the contract terms. United Financial owed no obligations of any kind once its policy period expired—uncanceled certificate or not. Allied's contrary position is untenable and should be rejected.

III. Allied's claims against United Financial fail for independent reasons grounded in equity.

Even if this Court were to conclude that both United Financial and Allied jointly owed coverage under insurance policies in effect at the time of the accident, Allied still should not prevail in this action. Both of Allied's equitable claims against United Financial are beset with problems barring recovery.

1. *Equitable contribution*. Allied sought equitable contribution to partially recoup its settlement payment. (2 ER 113.) A contribution claim " 'flows " 'from equitable principles designed to accomplish ultimate justice in the bearing of a specific burden.' " ' " (*Fireman's v. Maryland*, *supra*, 65 Cal.App.4th at p. 1295.) A court "weighs the equities seeking to attain distributive justice and equity among the mutually liable insurers." (*Axis Surplus Ins. Co. v. Glencoe Ins. Ltd.* (2012) 204

Cal.App.4th 1214, 1231.) The court may consider " ' "the nature of the underlying claim, the relationship of the insured to the various insurers, the particulars of each policy, and any other equitable considerations." ' " (*Id.* at p. 1228.) Whether "an insurer has been compensated for its risk" through receipt of premiums "is a 'fact to be considered.' " (*State Farm General Ins. Co. v. Wells Fargo Bank, N.A.* (2006) 143 Cal.App.4th 1098, 1110–1111.)

Here, equity counsels against holding United Financial liable for contribution. The accident occurred during Allied's policy period, so Allied received a premium to cover the risk. In contrast, United Financial did not. Its policy period had expired, so it received no compensation for the risk it would now be required to bear if forced to share in the settlement with Allied.

In addition, United Financial properly canceled the last certificate of insurance it had filed for Porras (see SER 81), demonstrating its intention to cease any contractual policy obligation it might owe. This reduces Allied's theory of recovery against United Financial to a hypertechnicality. As the Ninth Circuit explained, "Allied is relying on a technically defective Notice of Cancellation from November 5, 2013, notwithstanding the fact that it must have been fully apprised that United's insurance policy terminated on April 12, 2015, and that the DMV accepted and processed United's final Notice of Cancellation. This sequence raises a serious question regarding the equitableness of Allied's position." (*Allied*, *supra*, 991 F.3d at p. 1072, fn. 1.)

2. *Equitable subrogation.* Allied pleaded a separate claim for (and the district court granted summary judgment as to)

equitable subrogation. (1 ER 21; 2 ER 113–114.) A subrogation claim seeks to " 'assign to the insurer the claims of its insured against the legally responsible party.' " (*AmeriGas Propane, L.P. v. Landstar Ranger, Inc.* (2010) 184 Cal.App.4th 981, 989.) This doctrine comes into play when "justice requires that the loss be *entirely* shifted from the insurer to the defendant." (*Fireman's v. Maryland*, *supra*, 65 Cal.App.4th at p. 1292, emphasis added.)

This doctrine has no place in this case. Allied alleges it was harmed by "pay[ing] toward the settlement for which it was not legally or contractually responsible." (2 ER 114.) Nonsense. Allied paid to settle the claim against Porras precisely because *its* policy was in effect and *it* was responsible for indemnifying him.

It makes no sense for Allied to say (and the district court did not find) that the *entire* settlement amount should be shifted to United Financial because its "equitable position is inferior to that of Allied." (2 ER 114.) Even indulging the inference that United Financial's policy covered Porras at the time of the accident, it cannot be said that Allied's equitable position was *superior* to United Financial. United Financial is not a wrongdoer like a defendant in an underlying case who causes injuries giving rise to an insurer's settlement obligation. Prioritizing Allied over United Financial would be inequitable. (See *Caito v. United California Bank* (1978) 20 Cal.3d 694, 707 [disallowing subrogation that would " 'work an injustice' "].) Thus, any claim for subrogation against United Financial fails.

For these reasons, Allied's claims against United Financial fail as a matter of law. (Allied also sought declaratory relief (2 ER

112–113), but it duplicates Allied's other claims and need not be separately considered.)

CONCLUSION

Coverage under a commercial trucker's insurance policy does *not* persist until the insurer cancels the corresponding certificate of insurance filed with the DMV. This Court should answer the Ninth Circuit's certified question in the negative.

August 10, 2021

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CERTIFICATE OF WORD COUNT
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The text of this brief consists of 8,186 words, as counted by the program used to generate the brief.

Dated: August 10, 2021

Peder K. Batalden

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Allied Premier Ins. v. United Financial Casualty Co.
Case No. S267746

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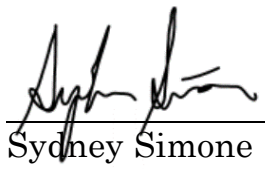

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STATE OF CALIFORNIA
Supreme Court of California

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