IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

21st CENTURY INSURANCE COMPANY, Defendant and Petitioner, vs. SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SAN BERNARDINO Respondent. ESTATE OF CORY ALLEN DRISCOLL and CY TAPIA, Plaintiffs and Real Parties in Interest.	4th Civ. No. E062244 San Bernardino Superior Court, Case No. CIVDS 1014138 Hon. Brian S. McCarville Department S30J Telephone: (909) 708-8714

PETITIONER'S SUPPLEMENTAL BRIEF IN RESPONSE TO THE COURT'S ORDER OF JANUARY 27, 2015

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INTRODUCTION

Petitioner 21st Century Insurance Company hereby responds to the three questions that the Court posed in its January 27, 2015, order. The short answers are:

1. *Hamilton v. Maryland Casualty Co.* (2002) 27 Cal.4th 718, 722, 726, 729-731, is unequivocal. The covenant not to execute precludes the agreed-upon judgment from being even presumptive evidence of the insured's, Cy Tapia's, liability.

2. That Cy Tapia was *not* insured under his aunt's and grandmother's policies for driving the Ford Ranger was apparent on the face of those policies and of his sister's policy, under which he *was* insured. The aunt's and grandmother's policies only covered him while driving a listed vehicle (the Ford Ranger was not listed in either policy), or driving a vehicle not regularly available to him, or driving a vehicle that was a temporary substitute for a listed vehicle out for repair. His sister's policy listed the Ford Ranger and identified Tapia as one of its regular drivers, meaning that he was not covered under his aunt's and grandmother's policies while driving that vehicle. In any event, Tapia (and others) confirmed in deposition testimony *before* he settled the underlying case that the Ford Ranger was his regular vehicle, not a temporary replacement vehicle such as might be covered under the aunt's or grandmother's policies.

3. *Risely v. Interinsurance Exchange of the Automobile Club* (2010) 183 Cal.App.4th 196, is both distinguishable and wrongly decided.

It is distinguishable because, unlike here, there (1) the policy under which the carrier failed to defend had much greater limits than the one under which it did defend, and (2) the carrier had not shown that there was no indemnity coverage under the "nondefending" policy. It is wrong because *Hamilton* made clear that when an insured is being defended, the insured cannot show that the carrier's actions, even if in breach of its good faith obligations owed to the insured, forced or caused him to settle.

DETAILED RESPONSES TO THE COURT'S QUESTIONS

1. What is the effect of the covenant not to execute under *Hamilton v. Maryland Casualty Co.* (2002) 27 Cal.4th 718?

The Supreme Court's decision in *Hamilton v. Maryland Casualty Co.*, *supra*, 27 Cal.4th 718, says repeatedly that a covenant not to execute precludes a stipulated judgment from being even presumptive evidence of an insured's liability. Specifically, *Hamilton* states:

- "[I]n light of the settlement before trial *and the covenant not to execute against the insured*, the stipulated judgment is insufficient to prove that the insured suffered any damages from the insurer's breach of its settlement duty." (*Id.* at p. 722, emphasis added.)
- "[W]here the insurer has accepted defense of the action, *no trial has been held* to determine the insured's liability, *and a covenant not to execute excuses the insured from bearing any actual liability from the stipulated judgment*, the entry of a stipulated judgment is

insufficient to show, even rebuttably, that the insured has been injured to *any* extent by the failure to settle, much less in the amount of the stipulated judgment." (*Id.* at p. 726, first and second emphases added.)

- "We conclude that [Civil Code] section 877.6 approval cannot transform an agreed judgment *that, by covenant, the insured will never have to pay*, into a determination of the existence and extent of the insured's liability." (*Id.* at p. 729, emphasis added.)
- "A defending insurer cannot be bound by a settlement made without its participation *and without any actual commitment on its insured's part to pay the judgment*, even where the settlement has been found to be in good faith for purposes of [Civil Code] section 877.6." (*Id.* at p. 730, emphasis added.)
- "Where, as here, the insured, without the insurer's agreement, stipulates to a judgment against it in excess of both the policy limits and the previously rejected settlement offer, *and the stipulated judgment is coupled with a covenant not to execute,* the agreed judgment *cannot fairly be attributed to* the insurer's conduct, even if the insurer's refusal to settle within the policy limits was unreasonable." (*Id.* at p. 731, emphasis added.)

This last statement makes clear that *Hamilton*'s rationale was causation. When the carrier is defending the insured, it cannot be said that any of its conduct, even a tortious failure to accept a reasonable settlement

offer as alleged in *Hamilton*, *caused* the stipulated judgment.

The present case is just like *Hamilton* in every material respect. While being defended and over insurer 21st Century's express objection, the insured, Tapia, agreed to entry of a multi-million dollar judgment against him (in this instance pursuant to Code of Civil Procedure section 998) in return for a covenant not to execute. Under *Hamilton*, that judgment is not the carrier's responsibility. (See also *Valentine v. Membrila Ins. Services, Inc.* (2004) 118 Cal.App.4th 462, 471-472 [discussing the "covenant not to execute" aspect of *Hamilton*].) Period.

2. At what time did it become legally indisputable that Cy Tapia was not covered under his aunt's or grandmother's policies?

From the outset of the claim here it was indisputable that Cy Tapia was not insured under his aunt's or grandmother's policies. (See Petition 8-11, 40-42; Reply 7-8.)

A. Face Of The Policies.

That's true from the face of the policies.

The three alternative coverage prerequisites. Tapia's aunt's and grandmother's policies might have applied *only* if one of three conditions was present: Tapia was driving an automobile (a) described in those policies' declarations, (b) temporarily used as a substitute for one described in those policies' declarations while the described vehicle was out of service, or (c) not available for his regular use. (1 Exh. 139, 156, 173.) Without at least one of those conditions being present, there was not even a

potential for coverage under either policy. But *none of the conditions was present.*

Not a listed vehicle. The Ford Ranger is not a described vehicle under either the aunt's or the grandmother's policies. (See Petition 9-10 [grandmother's policy described only a Chrysler Concorde; aunt's policy described only a Toyota Corolla DX].) That eliminates condition (a) as a basis for asserting coverage.

Not a temporary substitute vehicle. Condition (b), that Tapia was driving a temporary substitute for one of the described vehicles while it was out for repair, did not apply because the Ford Ranger was the vehicle that he regularly drove. It was not a temporary substitute for any vehicle. Tapia was listed as an insured driver under his sister's policy and the Ford Ranger was an insured vehicle under that policy. (1 Exh. 126, 134-148; 3 Exh. 525.) In the complaint in this action, Tapia expressly alleged that "The Declarations Page of the Truck Policy included Plaintiff CY TAPIA as being one of the drivers of the Subject Truck as well." (2 Exh. 344.) The truck could not be a temporary substitute for his aunt's or grandmother's listed vehicle because it was already his and his sister's regular vehicle.

Regularly available for Tapia's use. The Ford Ranger was also indisputably regularly available for Tapia's use. He was listed as a regular driver of the vehicle under his sister's policy.

B. Tapia's Pre-Settlement Deposition Testimony.

And, if the face of the policies was not enough, Tapia testified clearly and unambiguously in deposition in the underlying *Driscoll v. Tapia*

action in February 2008, well before the settlement of that action, that he regularly drove the truck. (See 3 Exh. 732 [face sheet showing deposition date of February 15, 2008]; 2 Exh. 312-313 ["Q. Okay. How did you come to find out that he (Tapia's grandfather) bought the truck? A. Well, my uncle passed away and he bought the truck off his son, and then he brought it to me one day, showed me that he bought it, and asked me if I wanted it. Q. Okay. A. Then I just waited until I got my license, and then I started driving it"]; 3 Exh. 747 [Tapia sometimes let his grandmother or aunt drive the Ford Ranger "(i)f they wanted to borrow my truck for something"]; 3 Exh. 747-748 [his aunt or grandmother had to get his permission if they wanted to drive the truck]; 3 Exh. 748-749 ["Q. And I had asked you about Leith (the grandfather) and his providing to you the – the truck for use. You understood that Leith gave you permission to have the truck? A. Yes. Q. And to drive the truck? A. Yes. Q. Everyone in your family understood that was to be, kind of like, quote, 'your truck'? A. Yes"]; 3 Exh. 551 [undisputed that Code of Civil Procedure section 998 offers were served on October 2, 2008]; 2 Exh. 430-434 [judgment entered in underlying action on January 29, 2009].)

C. Facts Essential to Coverage Were Never Proffered Or Even Asserted.

At no time, from the inception of the claim to the present day, has 21st Century ever had any information even suggesting that the Ford Ranger wasn't Tapia's regular vehicle. At *no time* has anyone ever suggested that the Ford Ranger was a temporary substitute for his aunt's or

grandmother's listed vehicles because they were out of service as required for coverage under the policies.

A duty to defend is not created by speculation about facts that do not exist. (See, e.g., *Ulta Salon, Cosmetics & Fragrance, Inc. v. Travelers Property Casualty Co. of America* (2011) 197 Cal.App.4th 424, 433; *Hurley Construction Co. v. State Farm Fire & Casualty Co.* (1992) 10 Cal.App.4th 533, 538; *Gunderson v. Fire Ins. Exchange* (1995) 37 Cal.App.4th 1106, 1114.) That rule should apply as much to critical coverage facts extrinsic to the underlying complaint as to those alleged in the third-party complaint. It is the insured's initial burden to show that he falls within the potential coverage of a policy. (*Aydin Corp. v. First State Ins. Co.* (1998) 18 Cal.4th 1183, 1188; *Roberts v. Assurance Co. of America* (2008) 163 Cal.App.4th 1398, 1407.) Tapia has never even attempted to so do here. He *never* asserted to 21st Century that the Ford Ranger was not his regular vehicle or that his Ford Ranger was a temporary substitute for his aunt's or grandmother's vehicle while such vehicle was out of service.

* * *

For all these reasons, it has been clear and indisputable from the outset that Tapia was a regular driver of the Ford Ranger and that it was not a temporary substitute vehicle – a fact that negates any possibility of coverage for him under his aunt's or grandmother's policies. Accordingly, as soon as he claimed coverage under his sister's policy for the accident that occurred while he was driving the Ford Ranger listed as covered under that policy, it was legally indisputable that he did not qualify for coverage under

either his aunt's or his grandmother's policies.

3. Is *Risely v. Interinsurance Exchange of the Automobile Club* (2010) 183 Cal.App.4th 196 distinguishable?

Risely v. Interinsurance Exchange of the Automobile Club, *supra*, 183 Cal.App.4th 196 is both distinguishable and wrongly decided. (See Petition 33-38; Reply 5).

A. *Risely* is distinguishable.

Distinction #1: 21st Century defended under the policy with the *highest*, not the lowest, limit. *Risely* held that an insurer's defense under one policy but failure to defend under another is equivalent to no defense at all where the policy under which the defense is provided has far *lower* policy limits than the other available policy. As *Risely* emphasized, all of the cases it relied on involved a defense provided under a policy with limits far lower than the policy under which a defense was not offered. (*Id.* at pp. 211-212, 216.) And that was the case in *Risely*. There, the carrier defended only under a $50,000 policy, refusing to defend under a $300,000 policy.

According to *Risely*, the bar established in *Hamilton v. Maryland Casualty Co.*, *supra*, 27 Cal.4th 718, does not apply where the insured holds an additional policy with the same carrier under which a defense is not being provided, *and the defense is instead afforded under a policy with substantially lower policy limits* from those afforded by the policy under which a defense should have been provided. (*Risely v. Interinsurance Exchange of the Automobile Club*, *supra*, 183 Cal.App.4th at p. 216 [relying on "the *Wint* [*v. Fidelity & Casualty Co.* (1973) 9 Cal.3d 257] court's

statement 'regarding the inequality of a defense provided under a policy *with a lower limit,*'" emphasis added]; see also *Safeco Ins. Co. of America v. Parks* (2009) 170 Cal.App.4th 992, 1004-1005 [relied on in *Risely*, making the same much greater policy limits point].)

The operative facts here are vastly different than in *Risely*. Unlike *Risely*, 21st Century defended under the policy with the far higher policy limits. It defended under the policy with $100,000 policy limits. The aunt's and grandmother's policy limits were each $25,000 (and mutually exclusive as the truck could not have been simultaneously being used as a temporary substitute for two different listed insured vehicles).

Risely, on its face, therefore, does not apply to the situation here where the carrier defended under a policy with greater limits.

Distinction #2: Unlike the carrier in *Risely*, 21st Century has negated the possibility of coverage under the other policies. In *Risely*, the Court of Appeal found that the carrier had failed to negate the possibility that it owed indemnity coverage under the homeowner's policy under which it declined to defend. (*Risely v. Interinsurance Exchange of the Automobile Club*, *supra*, 183 Cal.App.4th at p. 217.) *Risely* specifically did *not* decide the far different case where the carrier established no duty to indemnify under the "undefended" policy: "We need not decide in this appeal the more difficult question of whether Risely can establish that [the insured] suffered damages from [the carrier]'s alleged breach of the duty to defend even if the homeowner's policy does *not* provide indemnity coverage for Risely's false imprisonment claim." (*Ibid.*)

Here, in contrast, 21st Century has by undisputed evidence conclusively negated the possibility of coverage under the aunt's or grandmother's policies by showing that in the accident Cy Tapia was driving a vehicle regularly available for his use (the Ford Ranger), and not a temporary substitute for the aunt's or grandmother's vehicles, a circumstance that did *not* qualify him for coverage under their policies. (See Petition 8-11, 40-42; Reply 7-8; Section 2, *ante*.)

Risely found "no reason why the law should differ depending on whether the policies in question are issued by a single insurer, or instead, by multiple insurers. If, in [*Risely*], [the carrier] had issued only the homeowner's policy and refused to defend, and a different insurer had issued the automobile policy and defended, [the nondefending carrier] would not be in a position to argue, as it does here, that its refusal to defend under the homeowner's policy was, as a matter of law, 'of no consequence' to the insured." (*Risely v. Interinsurance Exchange of the Automobile Club*, *supra*, 183 Cal.App.4th at p. 216.) But applying that same disaggregating analysis, a carrier which refuses to defend but ultimately has no indemnity coverage is *not* liable for the ensuing settlement. (E.g., *Hogan v. Midland National Ins. Co.* (1970) 3 Cal.3d 553, 564-565; *DeWitt v. Monterey Ins. Co.* (2012) 204 Cal.App.4th 233, 246; *Pruyn v. Agricultural Ins. Co.* (1995) 36 Cal.App.4th 500, 527-528.) As Tapia was fully defended up until the time he settled, he has no defense cost damages. And he has no indemnity damages as regards the policies that afford no indemnity coverage even though he claims he was not defended under them.

Rather, his claim is that there is indemnity coverage under the policy under which 21st Century *was* defending him (i.e., his sister's $100,000 policy). *Hamilton* makes clear that an insured being defended under a policy cannot settle without the carrier's consent and claim that the carrier owes an indemnity obligation under that same policy.

As 21st Century has shown here that there is no indemnity coverage under the two policies plaintiff claims 21st Century should have defended under but did not, *Risely*, on its face, does not apply.

B. *Risely* is wrong.

In any event, *Risely* is wrongly decided. Its rationale appears to be that a less vigorous defense will be afforded to the insured if the policy limit is $50,000 than if it is $300,000. (Or here, if the applicable policy limits are $100,000 instead of $150,000.) But there is no reason to believe that to be true. The duty to defend is independent of the duty to indemnify. The duty to defend is as extensive under a $25,000 limit policy as it is under a $1 million limit policy. As long as there is a potential for liability, there is a full, complete and unlimited duty to defend. (E.g., *Buss v. Superior Court* (1997) 16 Cal.4th 35, 46-48; *Prichard v. Liberty Mutual Ins. Co.* (2000) 84 Cal.App.4th 890, 903-904 [duty to provide complete defense continues even after verdict with no covered claims, where potential exists for covered liability following appeal].)

It should not matter whether the defense is being provided under one policy or multiple policies or even whether it is being provided by one carrier or multiple carriers. The general rule is that the defense afforded by

one carrier obviates any harm by another's refusal to defend: "An insurer's refusal to defend is of no consequence to an insured whose representation is provided by another insurer: Under such circumstances, the insured '[is] not faced with "an undue financial burden" or deprived "of the expertise and resources available to insurance carriers in making prompt and competent investigations as to the merits of lawsuits filed against their insureds."'" (*Horace Mann Ins. Co. v. Barbara B.* (1998) 61 Cal.App.4th 158, 164, quoting *Ceresino v. Fire Ins. Exchange* (1989) 215 Cal.App.3d 814, 823.) There is no reason why the rule should be any different just because the same insurer issued the two policies and is defending under one but not the other.

Hamilton makes clear that its rationale is causation. (27 Cal.4th at p. 731; see pp. 3-4, *ante*.) So long as the insured is being defended, "the agreed judgment *cannot fairly be attributed to* the insurer's conduct, even if the insurer's refusal to settle within the policy limits was unreasonable." (*Ibid.*, emphasis added) That doesn't change whether the insured is being defended under five policies or one.

The trigger for insurer liability for an excess-of-policy-limits amount is a *litigated judgment*, *not* how the defense or settlement opportunities are handled *before* judgment. If the carrier affords an insufficiently vigorous defense, if the carrier lets reasonable settlement opportunities slip by, if the carrier misjudges the applicable policy limits in play (whether due to not appreciating that there might be coverage under multiple policies or due to misreading the policy limits available under a single policy), the solution is

to allow the insured to recover when actual harm occurs – when there is an excess-of-limits adverse judgment – not to permit insureds to preemptively opt out of the litigation and enter into a settlement with a covenant not to execute that will have no monetary effect on the insured. That is what *Hamilton* holds. *Risely* is at direct odds with that holding.

Risely attempted to avoid *Hamilton* by relying on *Wint v. Fidelity & Casualty Co.* (1973) 9 Cal.3d 257, 263, decided 29 years before *Hamilton.* But *Risely* misreads *Wint* and, in doing so, contravenes *Hamilton.* In *Wint*, the defending carrier paid its $10,000 policy limit as part of a settlement, *terminating its duty to defend*; that left the insured with two carriers who were *not* defending and $70,000 unpaid on a stipulated $80,000 judgment. The only *defending* carrier had agreed to the settlement and was *ceasing its defense*. On those facts, *Wint* held that where the defending carrier pays its policy limit, relieving it from any further ongoing duty to defend, *other* non-defending carriers could not rely on a defense that had *previously* been provided by the first carrier (but was ending) to extricate themselves from extending coverage. *Wint* nowhere addresses the circumstance of a single carrier providing an *ongoing* defense under one of multiple policies claimed to be applicable to a single loss. Indeed, *Wint* did not even address whether an insured could unilaterally settle when one carrier was defending it and was prepared to continue with the ongoing defense. "'[C]ases are not authority for propositions not considered.'" (*In re Marriage of Cornejo* (1996) 13 Cal.4th 381, 388.) The key in *Wint* was that the only defending carrier terminated its defense by paying its policy limits, leaving the insured

undefended. *Wint* did not begin to address the circumstance in *Risely*. But *Hamilton* did.

Risely attempts to harmonize itself with *Hamilton* by characterizing the Supreme Court's holding as relying on an insurer not breaching any aspect of a duty to defend. (*Risely v. Interinsurance Exchange of the Automobile Club*, *supra*, 183 Cal.App.4th at pp. 208-210.) But *Hamilton* is not so limited. *Hamilton*'s rationale is causation, not breach. *Hamilton assumed* that the carrier had breached its good faith obligations, had unreasonably failed to accept a settlement offer within policy limits. It found that, even so, there can be no causation without an adjudicatory *judgment*, not just a settlement and stipulated or other agreed-upon judgment.

As discussed above and in the petition, *Hamilton* holds broadly that an insurer is not bound by its insured's self-inflicted judgment even where unreasonable carrier conduct was the insured's impetus for settling without authorization and accepting liability under a stipulated judgment. *Hamilton*'s rationale should have led *Risely* to affirm summary judgment for the insurer. In *Risely*, as in *Hamilton*, the insured had engineered an outcome that was not fairly attributable to the insurer's conduct. The only rationale advanced in *Risely* for the insured's conduct – fear of an excess verdict – was rejected in *Hamilton* (which assumed that the carrier had turned down a reasonable settlement, exposing the insured to an excess judgment).

As in *Hamilton*, the insured in *Risely* had a causation-consistent remedy – play out the defense that, in fact, was being provided. If a judgment in excess of relevant policy limits resulted (i.e., in excess of $350,000 under the insured's view in *Risely*), the remedy was to *then* seek recompense from the carrier. Under *Hamilton*, the remedy is not to circumvent the adjudicatory process.

And so it was here. If Tapia truly believed that there should be coverage under three policies and that 21st Century had wrongfully failed to accept a 15-day, sudden-death settlement offer within policy limits (but see *Yan Fang Du v. Allstate Ins. Co.* (9th Cir. 2012) 697 F.3d 753 [carrier not necessarily in bad faith where plaintiff unduly limits time to accept settlement offer]), under *Hamilton* his remedy was to take advantage of the defense being afforded to see if a judgment exceeding any policy limit (either single or aggregate) would be entered and, if so, then to seek recourse against 21st Century. His options decidedly did not include stipulating to an uncontested, multi-million dollar judgment to be entered against him without the carrier's consent, indeed over its objection, while the carrier was still defending him.

* * *

The bottom line:

1. *Risely* is distinguishable because it involves, unlike here:
   a. A failure to defend under a policy with greater limits;
   b. No showing that there was no indemnity coverage under the nondefending policies.

2. Under *Hamilton*'s controlling precedent, as 21st Century was defending the insured here with no threat of terminating that defense, the insured had no right to allow an uncontested judgment to be entered over the carrier's objection in return for a covenant not to execute. He could not thereby bind the carrier to that judgment. *Hamilton* is clear. Plaintiffs and insureds are not allowed to set up carriers which, in fact, are funding a defense, with judgments for which they have no liability.

CONCLUSION

For all the reasons addressed above and in 21st Century's petition and prior briefs, this Court should grant the petition and direct the trial court to vacate its order denying summary judgment and to instead enter summary judgment in 21st Century's favor.

DATED: February 13, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, Rules 8.204(c) and 8.486(a)(6), I certify that this **PETITIONER'S SUPPLEMENTAL BRIEF IN RESPONSE TO THE COURT'S ORDER OF JANUARY 27, 2015** contains 4,005 words, not including the cover, the tables of contents and authorities, the caption page, the signature blocks, or this Certification page.

DATED: February 13, 2015

Feris M. Greenberger

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On **February 13, 2015**, I served the foregoing document described as: **PETITIONER'S SUPPLEMENTAL BRIEF IN RESPONSE TO THE COURT'S ORDER OF JANUARY 27, 2015** on the parties in this action by placing a true copy thereof enclosed in sealed envelope(s) addressed as follows:

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[Case No. CIVDS 1014138]

(X) **By Envelope** - by placing () the original **(X)** a true copy thereof enclosed in sealed envelopes addressed as above and delivering such envelopes:

(X) **By U.S. Mail:** As follows: I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on **February 13, 2015**, at Los Angeles, California.

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

Joyce McGilbert