**TRIAL DATE: March 9, 2015**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

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

# PETITION FOR WRIT OF MANDATE, PROHIBITION OR OTHER APPROPRIATE RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES

[Exhibits Filed Under Separate Cover]

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Attorneys for Petitioner 21st Century Insurance Company

**Court of Appeal**
**State of California**
**Fourth Appellate District, Division Two**

## CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Number: _____

Case Name: 21st Century Ins. Co. v. Superior Ct.(Estate of Cory Allen Driscoll, et al.)

Please check the applicable box:

[ ] There are no interested entities or parties to list in this Certificate per California Rules of Court, Rule 14.5(d)(3).

[ ] Interested entities or parties are listed below:

| Name of Interested Entity or Person | Nature of Interest |
|---|---|
| | |
| | |
| | |

*Please attach additional sheets with Entity or Person Information if necessary.*

_____
Signature of Attorney/Party Submitting Form

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State Bar No: 109374
Party Represented: Petitioner 21st Century Insurance Company

## TABLE OF CONTENTS

**TABLE OF CONTENTS**
(Continued)

**TABLE OF CONTENTS**
(Continued)

**TABLE OF CONTENTS**
(Continued)

## INTRODUCTION

### A. Issues Presented.

Cy Tapia was driving his grandfather's truck, which he regularly used, when he got into an accident, severely injuring Cory Driscoll. 21st Century Insurance Company insured the truck under a $100,000 policy. Driscoll sued Tapia for his injuries and 21st Century selected and retained counsel and defended the suit under the $100,000 policy. Tapia and Driscoll claimed that two other policies applied, each of which had a $25,000 limit and had been issued by 21st Century to members of the household where Tapia resided. When 21st Century did not accept a 15-day drop-dead $150,000 demand (defense counsel failed to promptly forward it), Tapia allowed judgment to be entered against him, over 21st Century's express objection, for $4.5 million and a covenant not to execute and assignment of rights to Driscoll. Tapia and Driscoll then sued 21st Century for bad faith, and 21st Century moved unsuccessfully for summary judgment.

The bad faith suit – the underlying case in this writ petition – raises two purely legal questions:

(1) Can Tapia and Driscoll avoid the controlling Supreme Court precedent which holds that a carrier that is defending its insured is not bound by – does not have to pay – the insured's unilaterally negotiated settlement and that, rather, the carrier gets to choose whether to settle or not, subject to bearing the

consequences of such a decision *after a trial on the merits of the underlying action*; and,

(2) Was 21st Century correct that only its one auto policy, the one under which it was defending, applied?

### 1. Does *Hamilton v. Maryland Casualty* Apply Here, Where A Defended Insured Agreed, Over The Carrier's Objection, To Entry Of A Multi-Million Dollar Judgment Against Him?

In *Hamilton v. Maryland Casualty Co.* (2002) 27 Cal.4th 718, the California Supreme Court announced a simple, straightforward causation rule: If an insurance carrier is providing its insured with a defense and the insured settles the litigation, including a covenant not to execute, without the carrier's consent, the carrier is not obligated to pay the settlement. The rule is effectively one of causation. Unless and until the matter has proceeded to a trial on the merits, there is no causative link between the refusal to settle and self-generated harm to the insured.

Here, the insured did precisely that which *Hamilton* proscribes. 21st Century was affording its insured a full defense under the applicable $100,000 auto insurance policy. Nonetheless, the insured acquiesced, over 21st Century's objection, in entry of a multi-million dollar judgment against him.

In considering 21st Century's summary judgment motion, respondent court found *Hamilton* "instructive," but declined to follow it. At real

parties' invitation, it held that *Hamilton* doesn't apply if the insurance company selects the insured's defense counsel (e.g., where the carrier does not reserve any rights other than policy limits). Under that view, defense counsel represents the carrier and *not* the insured client. Under that view, the *carrier*, not the client, controls counsel. And under that view, *counsel* binds the carrier even when the carrier expressly objects to what the counsel recommends.

The trial court's ruling is flat wrong. There is no such novel exception to or limitation on *Hamilton's* holding or application. So long as the carrier is affording the insured a full defense, the insured cannot settle absent the carrier's blessing; the carrier may require the insured to play out his hand at trial.

That's not what happened here. Here, *the insured* unilaterally agreed the judgment could be entered (receiving a covenant not to execute in return). Whether that arrangement had defense counsel's blessing or not is irrelevant. Defense counsel owes a fiduciary duty *to the client.* And, it's not defense counsel's money. It's the carrier's money. The carrier, not defense counsel, gets to choose whether it wants to settle. The settlement here did not have *the carrier's* consent.

Likewise, that the arrangement here was agreeing that judgment could be entered pursuant to a Code of Civil Procedure section 998 offer should make no difference to *Hamilton*'s application. That procedure is substantively no different than a stipulated judgment.

Real parties (but apparently not the trial court) also relied on

*Risely v. Interinsurance Exchange of Auto Club* (2010) 183 Cal.App.4th 196. *Risely* held that *Hamilton* does not apply where a carrier defends under one insurance policy, but not under another insurance policy with a *greater* policy limit. *Risely* does not apply here because 21st Century defended under the policy with the greater limit. In any event, *Risely* is wrongly decided. Again, *Hamilton*'s rationale is one of causation. Where the insured is being defended, the insured cannot prove that it would have suffered an adverse judgment or an adverse judgment for the multi-million dollar agreed-upon amount without allowing the insurer to complete the defense. That rationale does not depend on whether the carrier is defending under one or twenty policies.

**2. Do Multiple Insurance Policies Apply Where The Vehicle Was Only Insured Under One Policy And The Other Policies Did Not Apply To A Driver Who Regularly Used A Non-Scheduled Vehicle?**

There's another insurmountable problem with the plaintiffs' insurance bad faith claim. The claim is premised on the carrier's supposed failure to settle for the *combined* $150,000 policy limits of *three* policies. The problem is that plaintiffs are wrong about the applicable policy limits because they are wrong that three policies apply. There is only one applicable policy here.

How policies are to be read is a question of law where, as here, there is no extrinsic evidence. (E.g., *American Alternative Insurance Corp. v. Superior Court* (2006) 135 Cal.App.4th 1239, 1245.) 21st Century offered

(and paid) the $100,000 policy limit of the auto policy under which it provided a defense. The two other auto policies (each with a $25,000 limit) did not afford coverage. Both were issued to relatives with whom Tapia resided. Tapia was not a named insured under either of them. As a "relative" of the policyholders, he qualified as an additional insured under them *only* when driving an "insured automobile." But the Ford Ranger he drove in the accident that injured Cory Driscoll wasn't an insured automobile under either policy. Thus, neither additional policy applied. If neither additional policy applied, there never was a demand within policy limits and never was a breach of contract even arguably allowing Tapia to unilaterally allow judgment to be entered against him. Again, 21st Century was manifestly entitled to summary judgment.

The respondent court's conclusion that a potential did exist for coverage under the two other policies is wrong. The court didn't explain why it reached its conclusion. Plaintiffs never contested that coverage was not afforded under the policy language presented. Rather, they argued only that 21st Century didn't produce the original $25,000 policies. But 21st Century provided *uncontradicted evidence that the exemplar policies found in its underwriting files* are true and correct copies of the actual policies. The Supreme Court has held that a party need not produce the actual policy issued, but can prove policy language by way of exemplar or other source. (*Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059, 1069-1070.) 21st Century should not have to proceed to trial when, as a matter of law, it is entitled to judgment.

### B. Why Writ Review Is Necessary.

The questions presented here are ones of law based on undisputed facts. Their outcome is clear. But there is no plain, speedy, or adequate remedy at law for the trial court's legal error in denying 21st Century's summary judgment motion. (Code Civ. Proc., § 1086.)

The Legislature has specifically authorized writ review of orders denying summary judgment or summary adjudication. (Code Civ. Proc., § 437c, subd. (m).) In doing so, it has recognized that summary judgment motions play a central role in resolving claims that are without controversy and winnowing out unsubstantiated claims so that they do not clog the judicial system. "'Where the trial court's denial of a motion for summary judgment will result in trial on nonactionable claims, a writ of mandate will issue.'" (*Arnall v. Superior Court* (2010) 190 Cal.App.4th 360, 364.)

Appellate courts routinely intervene by writ at the summary judgment stage to prevent non-meritorious claims from proceeding to trial, where they would consume limited judicial resources. (E.g. *Certain Underwriters at Lloyd's of London v. Superior Court* (2001) 24 Cal.4th 945, 972 [directing trial court to vacate order denying summary adjudication; insurance policy interpretation]; *Travelers Casualty & Surety Co. v. Superior Court* (1998) 63 Cal.App.4th 1440, 1450 [same]; *West Shield Investigations & Security Consultants v. Superior Court* (2000) 82 Cal.App.4th 935, 946, 957 [directing trial court to vacate order denying summary adjudication]; see *Prudential Ins. Co. of America, Inc. v. Superior*

*Court* (2002) 98 Cal.App.4th 585, 594 [summary judgment, insurance policy interpretation].)

Intervention is particularly appropriate for insurance policy interpretation issues. (*Ibid*.; see *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18 ["(I)nterpretation of an insurance policy is a question of law"].)

This Court should act now, issue the requested writ and direct that respondent court grant 21st Century summary judgment.

## PETITION

By this verified Petition, petitioner 21st Century Insurance Company alleges:

### A. Parties.

1. The Estate of Cory Allen Driscoll and Cy Tapia, real parties in interest in this proceeding, are the plaintiffs in the underlying insurance bad faith action now pending in respondent San Bernardino Superior Court, entitled *Estate of Cory Allen Driscoll and Cy Tapia v. 21st Century Insurance Company, etc., et al.* (No. CIVDS 1014138) (the insurance bad faith action). (__ Exh. __.)[1]

2. The insurer, 21st Century Insurance Company ("21st Century"), petitioner in this proceeding, is the defendant in the insurance bad faith action. (__ Exh. __.)

3. Respondent San Bernardino County Superior Court is the court exercising jurisdiction over the bad faith action. (__ Exh. __.)

### B. Undisputed Material Facts Presented On Motion For Summary Judgment Or Summary Adjudication.

#### 1. The Automobile Accident.

4. Cy Tapia was driving a Ford Ranger with the permission of its owner, his grandfather Charles Leith, when he was involved in an

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[1] The exhibits are bound separately and accompany this petition. Each exhibit is a true and correct copy of what it purports to be, and each is a document in the underlying action except for exhibit 16, which is a certified reporter's transcript. We cite the exhibits as follows: ([Volume] Exh. [page]).

automobile accident that caused serious bodily injury to Tapia's passenger, Cory Driscoll. (__ Exh. __.)

5. Tapia was a regular, full-time driver of the Ford Ranger. (__ Exh. __.)

6. When the accident occurred, Tapia resided in the same household with his grandmother Norma Velasquez and his aunt Donna Leith. (__ Exh. __.)

**2. The Underlying *Driscoll v. Tapia* Personal Injury Lawsuit.**

7. Cory Driscoll and his mother, Jenny Driscoll, sued Tapia seeking damages for bodily injury sustained by Cory Driscoll, who was rendered quadriplegic in the accident. (__ Exh. __.)

**3. The Three 21st Century Policies.**

8. *The McGuire Policy*: 21st Century issued a policy to Tapia's sister, Melissa McGuire. The declarations page lists the Ford Ranger and another vehicle as the sole described vehicles. The McGuire policy has a $100,000 limit per person for bodily injury. Cy Tapia is listed as an insured driver. (__ Exh. __.) 21st Century acknowledged coverage and defended Tapia under the McGuire policy. (__ Exh. __.)

9. *The Velasquez Policy*: 21st Century also issued a policy to Norma Velasquez. The declarations page lists a Chrysler Concorde as the sole described vehicle. The bodily injury policy limit is $25,000 per person. Tapia is not identified as a named insured or an additional insured. (__

Exh. __.) He qualifies as Norma Velasquez's relative under the policy. (__ Exh. __.)

10. *The Leith Policy*: 21st Century issued a third policy to Donna Leith. The declarations page lists a Toyota Corolla DX as the sole described vehicle. The limit of liability for bodily injury is $25,000 per person. Tapia is not identified as a named insured or an additional insured. (__ Exh. __.) He qualifies as Donna Leith's "relative" under the policy. (__ Exh. __.)

11. *The Velasquez and Leith Policies' Insured Automobile Coverage.* The Velasquez and Leith policies afford coverage for a relative using "your insured automobile with your permission." (__ Exh. __.) In relevant part, an "insured automobile" is defined as,

(a) "an automobile described in the declarations,"

(b) "an automobile . . . [(1)] not owned by you [(2)] while *temporarily used*, with the permission of the owner, [(3)] *as a substitute for* any automobile . . . insured under this part which is owned by you when withdrawn from normal use for servicing or repairs or because of its breakdown, loss or destruction; or,

(c) "a newly acquired automobile."

(__Exh. __, emphasis added.)

12. The Ford Ranger was identified only in the McGuire Policy declarations and was not a temporary replacement automobile or a newly acquired automobile. (__ Exh. __.)

13. *The Velasquez and Leith Policies' Additional Insured Automobile Coverage.* The Velasquez and Leith policies also each cover a relative's use of an "additional insured automobile." (__ Exh. __.) An "Additional Insured Automobile" is defined as "an automobile not owned *nor available for regular use* by you, *a relative or a resident of the same household in which you reside*, used with the permission of the owner." (__ Exh. __.)

14. The Ford Ranger was Tapia's regularly used vehicle. (__ Exh. __.)

15. *The Defense And Settlement Provisions In All Three Policies.* Each policy promised to defend, through attorneys selected by 21st Century, any suit covered by the policy; each states that "**We** may make settlement of any claim or lawsuit as we think appropriate." (__ Exh. __, original emphasis.) The policies also required the insured to cooperate with 21st Century in the defense of any claim, and to refrain from voluntarily making any payments. (__ Exh. __.)

**4. 21st Century Defends Its Insured Tapia Under The Policy With The Greatest Coverage.**

16. 21st Century provided a defense to Tapia under the McGuire Policy – the one with the $100,000 limit. (__ Exh. __.) 21st Century first retained Bollington and Ochora (later renamed Bollington and Hellesen) to defend Tapia. (__ Exh. __.) 21st Century thereafter retained the law firm of Gates, O'Doherty, Gonter and Gates, LLP, to substitute in as Tapia's defense counsel. (__ Exh. __.)

17. Throughout the defense, 21st Century authorized defense counsel to perform all services that such counsel recommended for Tapia's defense. (__ Exh. __.)

**5. Tapia Settles With The Driscolls Over 21st Century's Objection.**

18. In October 2007, about six months after suit had been filed, 21st Century offered to settle *Driscoll v. Tapia* for the McGuire policy's $100,000 policy limit. (__ Exh. __.) The offer was not accepted. (__ Exh. __.)

19. Nine months later, in July 2008, Cory Driscoll alone (i.e., not offering to settle his mother Jenny Driscoll's claims) demanded the combined limits of the McGuire Policy, the Velasquez Policy, and the Leith Policy – totaling $150,000 – to settle his claim. The demand had a 15-day deadline. Defense counsel failed to timely communicate the demand to *either* Tapia or 21st Century. (__ Exh. __.)

20. In early September 2008, having belatedly learned of the expired offer, 21st Century offered to pay $150,000 to settle *Driscoll v. Tapia*. (__ Exh. __.) The offer was rejected. (__ Exh. __.)

21. As the case proceeded toward trial, the insured, Tapia, accepted offers made by both Driscolls (Cory and his mother, Jenny) under Code of Civil Procedure section 998 to allow judgment to be entered against him and, in return, for a covenant not to execute against him and an assignment of rights against 21st Century. (__ Exh. __.)

22. He did so without 21st Century's consent and over its objection. (__ Exh. __.)

23. 21st Century's objection/lack of consent was clear and unmistakable. Well before Tapia accepted the section 998 demands and consummated the settlement with the covenant not to execute, 21st Century informed Tapia of its objection and that accepting the settlement demand would negate insurance coverage:

> "Please be advised that any decision on your part to accept the CCP section 998 offers is a decision which 21st Century (now AIG) has not agreed to, does not acquiesce in, and will not be bound by in any way. Please be further advised that your decision to accept the CCP section 998 offers may constitute a violation of your duties as outlined in the 21st Century (now AIG) policy under which coverage is being provided for you in this case (policy number 2197387)."

(__ Exh. __.)

24. Nonetheless, Tapia agreed to entry of judgment against him in the amount of $3,000,000 for Cory Driscoll and $1,500,000 for Jenny Driscoll, plus 10% postjudgment interest. (__ Exh. __.)

25. Tapia assigned his assignable rights against 21st Century to Cory Driscoll, who is now deceased. (__ Exh. __.)

26. 21st Century paid $120,000 plus $30,411.04 in interest to Cory Driscoll and $30,000 plus $50,726.27 in interest to Jenny Driscoll as partial satisfaction of the judgment. (__ Exh. __.)

### 6. The Driscoll Estate And Tapia Sue 21st Century Seeking Bad Faith Damages Excess-Of-The-Policy-Limits.

27. Tapia and the Driscoll Estate as his assignee filed the present action against 21st Century for breach of contract, bad faith, direct action (Ins. Code, § 11580), negligence, negligent infliction of emotional distress, and punitive damages. (__ Exh. __.) Plaintiffs allege that 21st Century breached a duty to pay the combined limits of the three policies in settlement of *Driscoll v. Tapia*; they further allege that 21st Century breached its duties to Tapia by failing to communicate Cory Driscoll's combined-limits, $150,000 settlement offer to him in time for him to come up with the $50,000 above the McGuire policy limit that would have enable him to settle Cory Driscoll's (but not his mother's) claim. (__ Exh. __.)

28. The Driscoll Estate and Tapia seek $4,000,000, plus an unstated amount for emotional distress, plus punitive damages. (__ Exh. __.)

## C. Respondent Court Denies 21th Century's Summary Judgment Motion.

29. 21st Century moved for summary judgment. It relied principally on the ground that *Hamilton v. Maryland Casualty Co.*, *supra*, 27 Cal.4th 718, bars any liability in the bad faith action because, while 21st Century was defending him in the personal injury action, Tapia agreed to allow judgment to be entered against him without 21st Century's consent and over its objection. 21st Century also argued that it satisfied its

obligations to Tapia under the only 21st Century policy that potentially provided coverage in the underlying action. (__ Exh. __.)

30. In opposition, plaintiffs sought to distinguish *Hamilton*, arguing that it does not apply if:

(a) the carrier, in performing its duty to defend, directly hires the counsel who defends the insured, or

(b) the insured capitulated to a judgment other than literally by stipulation, such as under the Code of Civil Procedure section 998 process. (__ Exh. __.)

31. Plaintiffs also argued that 21st Century's claims handling amounted to participation in the settlement process and that such participation somehow sufficed to negate *Hamilton*. (__ Exh. __.)

32. Plaintiffs claimed further that under *Risely v. Interinsurance Exchange of Auto Club* (2010) 183 Cal.App.4th 196, Tapia was not defended, because the defense was provided under only one out of three available policies. (__ Exh. __.)

33. Plaintiffs' only response as to the insurance policy coverage under the Velasquez and Leith policies was to assert that 21st Century's provision of the exemplar policies from the underwriting files for those two policies did not suffice to establish the policy forms. (__ Exh. __.)

34. In reply, 21st Century pointed out that plaintiffs never disputed that a defense *was* provided under the McGuire policy or that the policy language 21st Century relies on excludes coverage under the Leith and Velasquez policies. (__ Exh. __.)

35. Respondent court heard the motion on September 22, 2014. Following argument, the court took the matter under submission. (__ Exh. __.)

36. On September 26, 2014, respondent court issued its minute order denying 21st Century's motion. The clerk mailed notice of entry of the minute order on September 29, 2014. The minute order specifically directed plaintiffs to prepare and submit a formal order. (__ Exh. __.)

37. In its minute order, the respondent court found *Hamilton* "instructive," but "factually distinct" because "the proffered evidence discloses factual disputes as to whether defendant actively participated" (presumably in the settlement negotiations). (__ Exh. __.)

38. As triable issues of fact, the court cited disputed facts concerning:

a. whether Tapia was the full-time driver of the Ford Ranger;

b. whether Cory Driscoll made a demand to settle his claims in the personal injury action for the combined limits of the three policies;

c. the effect of Tapia's having capitulated to entry of judgment under the Code of Civil Procedure section 998 process rather than by stipulation; and

d. the basis for plaintiffs' negligence and emotional distress claims. (__ Exh. __.)

39. The court further conclusorily opined that 21st Century had "not shown 'no potential for additional coverage' under Leith and Velasquez policies[.]" (__ Exh. __.)

**D. Respondent Court Clearly Erred, As A Matter Of Law, In Denying Summary Judgment.**

40. Respondent trial court's ruling denying 21st Century summary judgment is erroneous as a matter of law.

**1. 21st Century Is Entitled To Summary Judgment Under A Straightforward Application Of *Hamilton*.**

41. *Hamilton v. Maryland Casualty Co.* applies:

a. Neither 21st Century's selection of defense counsel nor Tapia's acquiescence in judgment under the Section 998 process rather than by stipulation undermines the application of *Hamilton v. Maryland Casualty Co.*, *supra*, 27 Cal.4th 718. The Supreme Court's analysis in *Hamilton* is a causation analysis and the decision establishes a causation rule: Unless and until there is a litigated judgment (not a settlement, or a default, or an accepted Code of Civil Procedure section 998 offer), one does not and cannot know whether the carrier's conduct caused any damage, let alone damages in the amount of the insured's self-inflicted liability. "Unopposed proceedings are not a reliable basis to establish damages proximately caused by a insurer's refusal to settle." (Croskey, et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2009) ¶¶ 12:475-476.5, p. 12B-63.)

b. The exception is if the carrier somehow agreed to the *pre-judgment* disposition of the lawsuit – "participated in it." Hiring counsel who represents the insured's interests is not an agreement to everything that the insured on that counsel does or to any multi-million dollar judgment that the insured may agree to have entered against him. That's especially true where the carrier *objects* to the contemplated agreed judgment. (See *Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 406.) Likewise, seeking to negotiate a potential settlement or resolution is not "participating in" the insured's agreement to a judgment where the carrier specifically objects to that agreement.

c The facts that the court identified as raising triable issues do not undermine *Hamilton*'s conclusive applicability. They cannot negate that 21st Century indisputably objected – in writing – to Tapia's agreement that judgment be entered against him while 21st Century continued to defend Tapia. (__ Exh. __.)

d. In particular:

(1) whether Cory Driscoll made a demand to settle his claims in the personal injury action for the combined limits of the three policies is immaterial under *Hamilton*, which stated its rule assuming that the carrier had unreasonably failed to accept a reasonable settlement offer (the premise is also unfounded as only one policy limit applied);

(2) the effect on a *Hamilton* analysis of Tapia's having capitulated to entry of judgment under the Code of Civil Procedure section 998 process rather than by stipulation is a question of law; and

(3) the basis for plaintiffs' negligence and emotional distress claims is irrelevant to the legal questions of causation under *Hamilton*.

e. *Risely v. InterInsurance Exchange*, *supra*, does not apply because:

(1) There was only one applicable policy, the policy under which 21st Century was defending;

(2) Even if there were more than one applicable policy, 21st Century was defending under the policy with the greatest limits; and,

(3) *Risely* is wrongly decided; there is and should be no multiple policy defense obligation exception to *Hamilton.*

**2. 21st Century Satisfied Its Obligations To Tapia Under The Only Policy Potentially Affording Coverage In The Personal Injury Action.**

42. 21st Century's uncontradicted evidence shows that the policies found in the underwriting files are true and correct copies of the actual Leith and Velasquez policies that were in fact issued. (__ Exh. __.) Under controlling Supreme Court precedent, that suffices to establish the policies' terms. (*Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059, 1069-1070.) There is, and can be, no dispute that Tapia was not covered under the Velasquez or Leith policy because (a) the truck was *not* listed as an insured vehicle under either policy and (b) the truck was regularly available for use (and regularly used) by Tapia --- whether Tapia was the only or full-time driver of the Ford Ranger is immaterial; the

coverage issue revolves around whether the vehicle was *available* for his regular use.

**E. Petitioner Has No Plain, Speedy Or Adequate Remedy At Law.**

43. Code of Civil Procedure section 437c, subdivision (m)(1) expressly provides that upon denial of a motion for summary judgment or summary adjudication, a party may "petition an appropriate reviewing court for a peremptory writ." 21st Century has no plain, speedy, or adequate remedy at law.

44. "Where the trial court's denial of a motion for summary judgment will result in trial on non-actionable claims, a writ of mandate will issue." (*Farmers Insurance Exchange v. Superior Court* (2013) 220 Cal.App.4th 1199, 1204; *Arnall v. Superior Court* (2010) 190 Cal.App.4th 360, 364 [same (summary adjudication)].) Writ relief is warranted here because the superior court's ruling is legally insupportable.

**F. This Writ Petition Is Timely.**

45. On September 26, 2014, respondent superior court filed its minute order denying 21st Century's motion. The Deputy Clerk mailed notice of the ruling on September 29, 2014. (__ Exh. __.) At the earliest, the initial statutory deadline to file this writ was 25 days from that date. (Code Civ. Pro., § 437c, subd. (m)(1).)

46. On October 20, respondent court granted 21st Century a 10-day extension of time to file this writ petition pursuant to Code of Civil Procedure section 437c, subdivision (m). (__ Exh. __.) This petition is

filed within the extended period as calculated from the Deputy Clerk's service of the minute order, and therefore is timely.

47. Moreover, the court's September 26 minute order directed the prevailing party to prepare a formal order. Real parties served and submitted a proposed order on October 16, 2014, which, to date, the trial court has not signed. (__ Exh. __.) Therefore, it would appear that time may not yet be running. We will provide the signed formal order when it is filed.

48. Confusingly, also on October 16, 2014, real parties served notice of entry of the court's September 26 minute order. (__ Exh. __.) Assuming that service of that notice triggered the statutory period, again, this petition is filed well within the allotted time; again, accordingly, this petition is timely.

**G. No Stay Is Requested At The Present Time; Trial Is Set For March 9, 2015.**

49. Trial is set to commence on March 9, 2015. (__ Exh. __.) Accordingly, 21st Century does not seek a stay at this time, but reserves the right to do so, should this matter remain pending as the trial date approaches.

## PRAYER

**WHEREFORE**, Petitioner 21st Century Insurance Company prays as follows:

1. That this Court issue a peremptory writ of mandate or other appropriate relief directing respondent court to vacate its order denying 21st Century's motion for summary judgment and to instead enter an order granting the motion;

2. In the alternative, that this Court issue an alternative writ of mandate or other appropriate relief directing respondent court to show cause why such a peremptory writ should not issue, and then to issue such a peremptory writ;

3. That petitioner be awarded its costs of suit herein; and

4. That this Court grant petitioner such other relief as is just and proper.

DATED: October 30, 2014

Respectfully submitted,

HOLLINS-LAW
Andrew S. Hollins
Brieanna M. Dolmage

GREINES, MARTIN, STEIN & RICHLAND LLP
Robert A. Olson
Feris M. Greenberger

By: _____
Robert A. Olson

Attorneys for Defendant and Petitioner
21st Century Insurance Company

## VERIFICATION

I, Andrew S. Hollins, declare as follows:

I am an attorney duly licensed to practice law in California. I am a partner at Hollins Law, one of the attorneys of record for defendant and petitioner 21st Century Insurance Company in this proceeding. I have reviewed and am familiar with the records and files that are the basis of this petition. I make this declaration because I am more familiar with the particular facts, i.e., the state of the record and the litigation, than is my client. I certify that the petition's allegations are true and correct.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this verification is executed on October __, 2014, at Irvine, California.

Andrew S. Hollins

## MEMORANDUM OF POINTS AND AUTHORITIES

### I. RESPONDENT COURT CLEARLY ERRED. *HAMILTON v. MARYLAND CASUALTY CO.* (2002) 27 CAL.4TH 718 BARS THE CLAIM, AS THE INSURED AGREED TO ENTRY OF AN ADVERSE JUDGMENT OVER THE CARRIER'S OBJECTION WHILE THE CARRIER WAS PROVIDING A DEFENSE.

A unanimous California Supreme Court straightforwardly held in *Hamilton v. Maryland Casualty Co.*, *supra*, 27 Cal.4th at p. 722, that where a carrier is defending an insured, the insured cannot abandon that defense, resolve the case, and hold the carrier liable for the agreed upon judgment. *Hamilton* so holds even though the carrier there allegedly acted wrongfully in failing to accept a reasonable settlement offer within policy limits.

Plaintiffs/real parties here persuaded respondent court not to follow *Hamilton*. They argued that (1) the carrier's selection of defense counsel or (2) the fact that the insured agreed to entry of judgment by accepting a Code of Civil Procedure section 998 offer instead of by "stipulation," circumvented *Hamilton*. But *Hamilton* says nothing about any such exceptions; and indeed, both the posited exceptions run counter to *Hamilton*'s causation-based analysis. As we demonstrate, *Hamilton* required summary judgment in 21st Century's favor.[2]

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[2] On writ petition, this Court reviews a summary judgment ruling de novo. (*Farmers Insurance Exchange v. Superior Court*, *supra*, 220

(continued...)

### A. Under *Hamilton*, a Defended Insured Cannot Hold a Carrier Liable for An Adverse Judgment Absent an Adjudication of the Insured's Liability, Even If the Carrier Has Unreasonably Declined a Settlement Offer Within Policy Limits.

Where an insurer unreasonably breaches its duty to accept a reasonable settlement demand within policy limits and a judgment against its insured ensues, the insurer becomes liable to pay the full judgment, including the portion in excess of policy limits, *only if* the action thereafter "proceeded to trial." (*Hamilton v. Maryland Casualty Co.*, *supra*, 27 Cal.4th at pp. 724, 725.) The insured cannot simply settle the claim (or accede to a judgment) without the carrier's consent (or over its objection) while being defended and hold the carrier liable for the agreed-upon amount. The insured's harm is not the carrier's responsibility.

*Hamilton* directly applies to the present case. There, as here, the carrier defended its insured in a personal injury action. During the pendency of the lawsuit, the carrier refused to accept the claimants' $1 million policy limits demand. The claimants and the insured then negotiated a settlement without the insurer's consent – a stipulated $3 million judgment against the insured and a covenant not to execute on

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[2] (...continued)
Cal.App.4th at p. 1204.) It does not defer to the trial court's decision and is not bound by the trial court's stated reasons supporting its ruling. (*Ibid.*; *Arnall v. Superior Court* (2010) 190 Cal.App.4th 360, 364.)

the judgment in exchange for the insured's assigning its rights against the carrier.

The claimants, as the insured's assignees, then sued the carrier for bad faith alleging that the carrier had wrongfully failed to accept the policy limits demand and seeking to recover the amount of their stipulated judgment as damages. The Supreme Court held: (1) the carrier, as a defending insurer, was not bound by the settlement, and (2) the claimants, as assignees, could not maintain an action against the insurer for wrongful refusal to settle because they could not show that their assignor, the insured, had suffered any compensable damages: "[A] defending insurer cannot be bound to a settlement to which it has not agreed and in which it has not participated, . . . . In this circumstance, we further conclude, the claimant may not maintain an action for breach of the duty to settle because, in 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. [¶] . . . . [¶] (27 Cal.4th at p. 722, emphasis added.)

The Supreme Court made clear that the analysis was a causation one. The insured could not recover because it could not show that the carrier's conduct caused the insured's self-inflicted judgment liability. "[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 stipulate judgment." (*Id.* at pp. 722, 726, emphasis added.)

*Hamilton* expressly so holds "even if the insurer's refusal to settle within policy limits was unreasonable." (*Id.* at p. 731.)

In their treatise on insurance litigation, the late Justice Croskey, et al., summarized the rationale underlying the *Hamilton* rule:

> "A *stipulated* judgment cannot be fairly attributed to the defending insurer's conduct even if its refusal to settle within policy limits was unreasonable. To ensure reliable findings as to the insured's liability and amount of damages to which the injured party is entitled, the judgment against the insured must result from a *contested* evidentiary proceeding. *Unopposed proceedings are not a reliable basis to establish damages proximately caused by an insurer's refusal to settle.*"

(Croskey, et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2009) ¶¶ 12:475-476.5, p. 12B-63, emphasis in original, final emphasis added.)

*Hamilton* bars plaintiffs' lawsuit here. This case is materially indistinguishable from *Hamilton*. Regardless whether Tapia was satisfied with how his counsel conducted the defense, 21st Century defended Tapia under the McGuire policy. (See __ Exh. __ [21st Century authorized defense counsel to perform all services such counsel recommended].) Even if plaintiffs were correct that 21st Century failed to accept a settlement

demand within the available policy limits (they aren't) or otherwise mishandled settlement obligation, under *Hamilton* that does not create liability for the agreed-to judgment. Tapia agreed to that judgment *without 21st Century's consent and over its objection.*

*Hamilton* applies and bars real parties' claim.

### B. *Hamilton* Applies Regardless Of Whether The Carrier Selected Defense Counsel Or The Insured Capitulated To Judgment By Means Other Than Stipulation. The Point Is That The Agreed-Upon Judgment Deprives The Carrier Of A Litigated Determination Of Causation.

Neither respondent court nor real parties in interest seriously contested that if *Hamilton* applies, it bars plaintiffs' claims. Instead, respondent court here apparently agreed with plaintiffs' arguments that *Hamilton* does not apply if (a) the carrier, in performing its duty to defend, directly hired the counsel who was defending the insured or (b) the insured capitulated to a judgment other than by stipulation, such as allowing an uncontested judgment to be entered under the Code of Civil Procedure section 998 process. No authority supports either proposition, nor could it.

Again, the Supreme Court's analysis in *Hamilton* is a causation analysis. *Hamilton* establishes a causation rule: Unless and until there is a *contested* judgment, one cannot *know* (no matter how an insured might speculate) how the insured would have been *injured* by the carrier's alleged wrongful conduct. (27 Cal.4th at p. 726.) As the leading treatise puts it, the issue is that without a contested trial there is no "basis to establish damages

*proximately caused* by an insurer's refusal to settle." (Croskey, et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2009) ¶¶ 12:475-476.5, p. 12B-63, emphasis added.)

The exception is if the carrier somehow agreed to result, that is, "participated in it." Objecting, strenuously and in writing, to the insured's course of conduct in acceding to judgment, however, is not "participating" in obtaining that judgment. It is the opposite.

Equally, hiring counsel to represent the insured's interests does not in any way amount to agreement to everything that the insured does, including the insured's total capitulation to liability and exorbitant damages. Who selected defense counsel does not make any difference. No matter who selected it, the O'Doherty firm represented *Tapia* and owed him a fiduciary duty. Yes, when the carrier selects defense counsel, the resulting tri-partite relationship means that counsel may owe duties to both the carrier and the insured. But it does not mean that defense counsel, in effect, *is* the carrier, as plaintiffs and respondent court appear to believe. (See, e.g., *Griffin Dewatering Corp. v. Northern Ins. Co. of New York* (2009) 176 Cal.App.4th 172, 196-197 ["Since insurance companies don't have law degrees, in practical effect the 'duty to defend' means a duty to hire competent counsel to conduct the defense of a lawsuit against the policyholder"]; *Kroll & Tract v. Paris & Paris* (1999) 72 Cal.App.4th 1537, 1542 ["In the usual tripartite insurer-attorney-insured relationship, the insurer has a duty to defend the insured, and hires counsel to provide the

defense"]; Rules Prof. Conduct, rule 3-510 [attorney's obligation to communicate settlement offer].)

Respondent court's finding that factual disputes existed as to whether 21st Century actively participated in the settlement flies in the face of established principles of insurance defense. The dispute is founded upon conflating defense counsel and 21st Century, that is, treating defense counsel's purported actions as actions of 21st Century. (See __ Exh. __ [Disputed Fact #24].) Plaintiffs did *not* dispute that *21st Century* objected to the settlement in writing. They dismiss that objection on grounds that the judgment "was agreed to upon the recommendation and with the participation of *21st Century's attorney*, Sean O'Doherty." But O'Doherty wasn't 21st Century's attorney, he was *Tapia*'s counsel. Tapia was the party to the litigation, not 21st Century. And even if O'Doherty was deemed 21st Century's attorney, in part, the act of an agent cannot control where the principal has expressly taken a contrary position. (Civ. Code, § 2315 [an agent has only "such authority as the principal, actually or ostensibly, confers upon him"]; *Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 406 [in attorney-client relationship, "[a]s in the case of any other agency," . . . [i]f authority is lacking, then nothing the agent does or says can serve to create it"].) 21st Century was clear – it objected to the judgment concession, and nothing underlying defense counsel did or said could change that.

That leaves the claim that allowing entry of judgment under Code of Civil Procedure section 998 (coupled with a covenant not to execute and

assignment) is somehow different from a stipulated judgment. Functionally, there is no difference. A different label should not matter. (See Civ. Code, § 3528 [the law respects form less than substance].) The critical fact under *Hamilton* is that "*no trial has been held* to determine the insured's liability . . . ." (27 Cal.4th at p. 726, emphasis added.)

Tapia's settlement with plaintiffs before trial is insufficient to establish that Tapia sustained any damages *because of* 21st Century's purported breach of the duty to settle.[3] (There really was no breach at all; see Section II, *post*.) Neither Tapia nor the Driscoll Estate, as assignee, can maintain any breach of contract or bad faith action against 21st Century. Accordingly, plaintiffs' causes of action, all predicated on 21st Century's refusal to accede to Cory Driscoll's $150,000 supposed combined-limits settlement demand, wholly lack merit and must fail.[4]

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[3] The same analysis applies to Tapia's assertion that he (as well as 21st Century) was not timely told of the $150,000 settlement offer. Under *Hamilton*, the fact remains that there is no way to determine how such conduct supposedly caused Tapia's self-inflicted harm. In any event, the defalcation there was by the law firm (21st Century was as much a victim as Tapia). An insurance carrier is not liable for the legal malpractice of the counsel it hires to defend an insured. (*Assurance Co. of America v. Haven* (1995) 32 Cal.App.4th 78, 90 ["the insurer is ordinarily not liable for the negligence of that counsel, who is considered an independent contractor"]; *Merritt v. Reserve Ins. Co.* (1973) 34 Cal.App.3d 858, 881-882 ["If trial counsel negligently conducts the litigation, the remedy for this negligence is found in an action against counsel for malpractice, and not in a suit against counsel's employer to impose vicarious liability"].)

[4] In addition to the causes of action for breach of contract and bad faith, the Driscoll Estate asserts a cause of action against 21st Century under Insurance Code section 11580, subdivision (b)(2) – i.e., as a judgment creditor under the manufactured judgment. *Hamilton's* reasoning and holding apply with full force to bar that cause of action. Even before *Hamilton*, case law established that a claimant may not bring a direct action

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### C. *Risely v. Interinsurance Exchange* Does Not Apply And, In Any Event, Was Wrongly Decided.

Real parties also relied on *Risely v. Interinsurance Exchange of Auto. Club* (2010) 183 Cal.App.4th 196. The trial court does not appear to have relied on *Risely* in its order. And for good reason. *Risely* on its face does not apply. In any event, *Risely* is wrongly decided.

#### 1. *Risely* does not apply here.

*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. (*Id.* at pp. 216-217.) The operative facts in *Risely* are far different from those here.

In *Risely*, the two policies' limits were $50,000 and $300,000, and the carrier defended only under the $50,000 policy, opening the door to the court's conclusion that the insured lost policy benefits to which she might have been entitled. 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

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[4] (...continued)
under section 11580, subdivision (b)(2) until *after* it has secured a final *independently adjudicated* judgment against an insured. (*National Union Fire Ins. Co. v. Lynette C.* (1994) 27 Cal.App.4th 1434, 1449.) That is the antithesis of the situation here. There is no independently adjudicated judgment, and hence there can be no section 11580 liability. (See also Section II(D), *post* [Section 11580 claim unavailing because two policies provided no coverage, and 21st Century discharged its obligations under the third].)

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* is expressly premised on a defense provided under the policy with the significantly lower limit. In contrast, here 21st Century defended under the policy with the *higher* limit (indeed, its $100,000 policy limit was *double* that of the other two policies combined). Thus, *Risely* does not begin to govern here; *Hamilton* does.

**2. *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 existed for covered liability following appeal].)

The general rules formulated in cases involving multiple insurers – that the defense afforded by one obviates any harm by another's refusal to defend – apply by square analogy:

> "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."

(*Safeco Ins. Co. of America v. Parks*, *supra*, 170 Cal.App.4th at pp. 1004-1005, internal quotation marks omitted, brackets in original.) 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 the trigger for insurer liability is an excess-of-policy-limits *judgment*, *not* how the defense or settlement opportunities are handled *before* judgment. If the carrier (or the lawyer selected by the carrier) affords an insufficiently vigorous defense, 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.*, *supra*, 9 Cal.3d at p. 263, decided 29 years before *Hamilton*. To begin with, *Hamilton*, as the more recent decision, controls over *Wint*.

Moreover, *Risely* both overreads *Wint* and, in doing so, contravenes *Hamilton*'s rationale.

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. 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 the fact that a defense had *previously* been provided by the first carrier 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. "[C]ases are not authority for propositions not considered." (*In re Marriage of Cornejo* (1996) 13 Cal.4th 381, 388.) And to the extent *Wint* suggests that a defending carrier may be liable for a settlement reached without its consent, it is inconsistent with the later *Hamilton* decision.

*Risely* attempts to harmonize itself with *Hamilton* by characterizing that decision as holding only that an insurer that has not breached any duty to defend is not bound by the insured's "covenant not to execute"-insulated stipulated judgment. (*Risely v. Interinsurance Exchange of Auto. Club*, *supra*, 183 Cal.App.4th at pp. 208-210.) *Hamilton* is not so limited, however. *Hamilton*'s rationale is causation, not breach. *Hamilton assumed* that the carrier had breached, 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, stipulated or other agreed-upon judgment.

As discussed, *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 v. Maryland Casualty Co.*, *supra*, 27 Cal.4th at p. 731 [where "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 be fairly attributed to the insurer's conduct, even if the insurer's refusal to settle within the policy limits was unreasonable"].) *Hamilton*'s rationale should have led the court in *Risely* to affirm summary judgment for the insurer because, as in *Hamilton*, the insured had engineered an outcome that was not fairly attributable to the insurer's conduct and that afforded an insufficient basis on which to prove that the insured suffered any damages from the insurer's asserted breach of its settlement duty.

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 either the carrier (if it had refused a reasonable settlement offer within policy limits or somehow unduly controlled the defense) or

counsel. 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 *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 exceeded any policy limit (either single or aggregate) and then seek recourse against 21st Century (including by *then*, post-judgment, assigning his claims to the Driscolls). His options decidedly did not include allowing 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: As 21st Century was defending Tapia, *as a matter of law*, under *Hamilton*'s controlling precedent, he had no right to allow an uncontested judgment to be entered without its consent in return for a covenant not to execute and to bind the carrier to that judgment. *Hamilton* is clear. Plaintiffs and insureds are not allowed to so set up carriers which, in fact, are funding a defense.

## II. *HAMILTON* ASIDE, PLAINTIFFS' ACTION FAILS AS A MATTER OF LAW BECAUSE 21st CENTURY FULLY SATISFIED ITS OBLIGATIONS UNDER THE APPLICABLE INSURANCE POLICY.

Respondent court also erred in concluding that 21st Century failed to negate potential coverage under the Leith and Velasquez policies. 21st Century demonstrated that, *Hamilton* considerations aside, only the one $100,000 policy that it defended under applied and the Driscolls never offered to settle the underlying action for that amount.[5]

### A. 21st Century Properly Proved Policy Terms Through Undisputed Exemplars.

Although the trial court did not explain its reasons for concluding that 21st Century did not eliminate potential coverage under the Leith and Velasquez policies, the only basis plaintiffs advanced was that 21st Century did not produce copies of the actual Leith and Velasquez policies, but rather produced exemplars showing their terms. (__ Exh. __.) Controlling Supreme Court precedent is that 21st Century's showing was proper.

The evidence supporting 21st Century's motion establishes that the exemplar policies are true and correct copies of the policies issued to Leith and Velasquez. (See __ Exh. __.) The opposition put forward no contrary evidence; no reason was given (and none apparent) why 21st Century

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[5] How insurance policies are to be read is a question of law where, as here, the question does not turn on extrinsic evidence. (E.g., *American Alternative Insurance Corp. v. Superior Court*, *supra*, 135 Cal.App.4th at p. 1245.)

couldn't know the terms of the Leith or Velasquez policies without physically comparing the exemplars with the actual policies. There's a reason that insurance policies have form numbers – so that by easy reference to an exemplar one can know what a policy's terms were. Whether the policy language in 21st Century policies has changed over the years (__ Exh. __) is irrelevant. The evidence here – direct express and undisputed – is that this is the policy language that was issued to Leith and Velasquez. Controlling Supreme Court authority holds that a party need not produce the actual policy issued to the particular insured but can prove policy language by way of exemplar or other secondary source. (*Dart Industries, Inc. v .Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059, 1069-1070 [specifically approving using "standard form of the lost document" to prove its contents].)

Nowhere did plaintiffs present any *evidence* that the exemplars were not accurate depictions of the actual policy terms. Rather, all they present is speculation and innuendo. (E.g., *Johnson v. Alameda County Medical Center* (2012) 205 Cal.App.4th 521, 528 [speculation insufficient to defeat summary judgment]; *Howard v. Omni Hotels Management Corp.* (2012) 203 Cal.App.4th 403, 421 [same].)

**B. There Was No Coverage Potential Under The Leith Or The Velasquez Policies.**

Under the Leith and Velasquez policies (each with a $25,000 limit), 21st Century owes no duty to defend the driver, not a named insured, of an unlisted vehicle that is available for the driver's regular use. (__ Exh. __.)

Tapia is *not* a named insured under either the Leith or the Velasquez policy. (__ Exh. __.) He was driving a Ford Ranger when he had the accident. (__ Exh. __.) The Ford Ranger is *not* a listed vehicle under either policy. (__ Exh. __.) Nor is it the equivalent of a listed vehicle (i.e., a temporary substitute for a listed vehicle or a newly acquired vehicle). Rather, it was Tapia's regularly used vehicle belonging to his grandfather. (__ Exh. __.)

That leaves whether it was an "additional insured automobile." To qualify as an "additional insured automobile" the Ford Ranger had to *not* be "available for regular use by the named insured, a resident or a relative of the insured's household." (__ Exh. __.) But Tapia was admittedly both a resident and relative (grandson and nephew) of the insureds' (whether Leith's or Velasquez's) residing in their household. (__ Exh. __.) The Ford Ranger was available for his regular use. (__ Exh. __.)[6] There could be no coverage. (See, e.g., *Highlands Ins. Co. v. Universal Underwriters Ins. Co.* (1979) 92 Cal.App.3d 171, 176 [purpose of such provision "is to prevent abuse, by precluding the insured and his family from regularly driving two or more cars for the price of one policy"]; *id.* at pp. 175-176 ["regular use"

[6] Respondent court identified as a triable factual dispute plaintiffs' claim that Tapia wasn't the *only* driver of the Ford Ranger, i.e., that his aunt and grandmother also drove it. (__ Exh. __ [Order, p. 1; see Undisputed Fact #2].) That dispute simply isn't material; whether or not others drove it, Tapia customarily drove the Ford Ranger. It was regularly *available* for his use regardless whether others also used it. As such, it could not qualify as an "insured automobile."

means "the principal use, as distinguished from a casual or incidental use"]; *Interinsurance Exch. v. Smith* (1983) 148 Cal.App.3d 1128, 1133 [same].)[7]

Thus, there was not even potential coverage under the Leith or Velasquez policies.

Because there was no potential coverage under the Leith or Velasquez policies, 21st Century cannot have breached those contracts or committed bad faith as to them. (E.g., *Am. Star Ins. Co. v. Ins. Co. of the West* (1991) 232 Cal.App.3d 1320, 1325 ["If the claim does not fall within the insuring clause, there is no need to analyze further. There is no coverage. (citations omitted)]; *Horsemen's Benevolent & Protective Assn. v. Ins. Co. of N. America* (1990) 222 Cal.App.3d 816, 822 ["The absence of coverage . . . conclusively negates [the] causes of action for bad faith breach of contract as no duty to indemnify or defend existed"].)

### C. 21st Century Fully Discharged Its Obligations Under The McGuire Policy.

21st Century defended Tapia under the McGuire Policy. It offered the full $100,000 policy limit in settlement, but that amount was not accepted. The Driscolls never offered to accept the $100,000 policy limit in settlement. Cory Driscoll's combined policy limits ($150,000) demand would not even have settled the whole case. (See *Strauss v. Farmers Ins. Exchange* (1994) 26 Cal.App.4th 1017, 1021-1122 [An insurer does not act

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[7] This all makes sense. McGuire, Leith and Velasquez had consistent automobile coverage. Tapia and his Ford Ranger were covered under McGuire's policy. There was no *duplicative* coverage under the Leith or Velasquez policies.

in bad faith in rejecting settlement demand that does not completely settle case].) And ultimately, 21st Century paid the full $100,000 policy limit and more. (__ Exh. __.) Simply put, 21st Century did not breach its contract; rather, it performed it. (See, e.g., *Aerojet-General Corp. v. Transport Indemnity Co.* (1997) 17 Cal.4th 38, 56-58 [liability policy imposes obligation on insurer (1) to "indemnify the insured for those sums that the insured becomes legally obligated to pay as damages for a covered claim" and (2) "to defend the insured in any action brought against the insured seeking damages for a covered claim"]; *Love v. Fire Ins. Exchange* (1990) 221 Cal.App.3d 1136, 1152, fn. 10 ["absent an actual withholding of benefits due, there is no breach of contract and likewise no breach of the insurer's implied covenant"].)

**D. The Absence Of A Breach Of Contract Defeats The Insurance Code §11580 Claim.**

The absence of any breach of contract is equally fatal to the Driscoll Estate's cause of action under Insurance Code section 11580, subdivision (b)(2).

Section 11580, subdivision (b)(2) allows a post-judgment direct by the injured party against the carrier. But the injured party, the judgment creditor in the undeerlying personal injury action, must prove, among other things, that (1) "The judgment was against a person insured under a policy that insures against loss or damage resulting from liability for personal injury" and (2) "The policy covers the relief awarded in the judgment." (*People ex rel. City of Willits v. Certain Underwriters at Lloyd's of London*

(2002) 97 Cal.App.4th 1125, 1130, fn. 2; *Wright v. Fireman's Fund Ins. Cos.* (1992) 11 Cal.App.4th 998, 1015.) The Driscoll Estate cannot satisfy these elements because (1) as to the McGuire policy, 21st Century paid all it owed; and (2) as to the Leith and Velasquez policies, 21st Century owed nothing at all – the policies did not cover the relief awarded. (See *Kindred v. Pacific Auto. Ins. Co.* (1938) 10 Cal.2d 463, 465-466 [creditor's claim not covered under the policy because "persons injured by said truck . . . have no greater rights than the assured who, by reason of his operation of the truck outside the terms of the policy, obviously had no coverage thereunder"].)

### E. Absent A Breach Of Contract – A Failure To Pay Policy Benefits – There Can Be No Tort Bad Faith Liability.

Because there is no contract breach, there can be no bad faith claim. "[B]ecause a contractual obligation is the underpinning of a bad faith claim, such a claim cannot be maintained unless policy benefits are due under the contract." (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 35, citations omitted; accord, e.g., *Love v. Fire Ins. Exchange*, 221 Cal.App.3d at p. 1151 ["where benefits are withheld for proper cause, there is no breach of the implied covenant"]; *MRI Healthcare Center of Glendale, Inc. v. State Farm General Ins. Co.* (2010) 187 Cal.App.4th 766, 784 [same]; cf *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 184 [to support finding of bad faith, not only must insurer have breached the contract, but its breach must be "prompted not by an

honest mistake, bad judgment or negligence *but rather by a conscious and deliberate act*," original emphasis; internal citations omitted].)

Absent unpaid policy benefits being due, there can be no tort bad faith claim.[8]

## CONCLUSION

*Hamilton* controls. It mandates that, Tapia having agreed to entry of judgment against him while being defended by 21st Century, plaintiffs cannot prevail. Where, as here, a carrier is defending the insured, the insured cannot simply agree, over the carrier's express objection, to allow judgment to be entered against him and hold the carrier liable for that judgment.

In any event, plaintiffs' premise – that multiple policies applied even though a defense and settlement were offered under only one – is wrong as

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[8] There is likewise no separate negligence claim. Tapia's causes of action for negligence and negligent infliction of emotional distress are premised upon 21st Century's supposed negligent failure to settle and supposed negligent handling of the defense in *Driscoll v. Tapia*. (__ Exh. __ [Complaint].) Both theories are stillborn. "Negligence is not among the theories of recovery generally available against insurers." (*Sanchez v. Lindsey Morden Claims Servs.*, *supra*, 72 Cal.App.4th at p. 254; e.g., *Merritt v. Reserve Ins. Co.*, *supra*, 34 Cal.App.3d at p. 880 ["actionable failure to settle must encompass bad faith[;] negligence alone is insufficient"].)

"There is no independent tort of negligent infliction of emotional distress." (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 984.) It is simply one species of negligence damages, and the usual negligence elements apply. (*Burgess v. Superior Court*, *supra*, 2 Cal.4th at p. 1072; *Schwarz v. Regents of University of California* (1990) 226 Cal.App.3d 149, 153-154.)

a matter of law. There was only one applicable policy. 21st Century defended fully and paid everything that was owed under that policy.

This Court should grant this 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: October __, 2014 Respectfully submitted,

HOLLINS LAW
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By: _____
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Attorneys for Plaintiff and Petitioner
21st Century Insurance Company

## CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, Rules 8.204(c) and 8.486(a)(6), I certify that this **PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES** contains 10,043 words, not including the cover, the certification of interested parties, the tables of contents and authorities, the caption page, the verification page, the signature blocks, the supporting Exhibits, or this Certification page.

DATED: October 30, 2014

Robert A. Olson

**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 October 30, 2014, I served the foregoing document described as: **PETITION FOR WRIT OF MANDATE, PROHIBITION OR OTHER APPROPRIATE RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES** on the parties in this action by placing a true copy thereof enclosed in sealed envelope(s) addressed as follows:

William D. Shapiro
Robinson Calcagnie Robinson Shapiro Davis
893 East Brier Drive
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TEL: (909) 890-1000
FAX: (909) 890-1001
**[Attorney for Real Parties In Interest]**

Clerk to the
Hon. Brian S. McCarville
San Bernardino Superior Court,
San Bernardino Justice Center
247 West Third Street
San Bernardino, California 92415
**[Case No. CIVDS 1014138]**

**(X) BY FED EX**: I caused such envelope to be delivered by the Federal Express delivery service to the offices of the addressees.

Executed on October 30, 2014, 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.

Anita F. Cole