

THE  
POLICYHOLDER ADVOCATE

January 2007



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- ◆ United Policyholders  
[www.unitedpolicyholders.org](http://www.unitedpolicyholders.org)
- ◆ California Supreme Court's [TRB Investment Opinion](#):  
[www.courtinfo.ca.gov/opinions/documents/S136690.PDF](http://www.courtinfo.ca.gov/opinions/documents/S136690.PDF)
- ◆ R. McCormick, "Vacancy" interpretations by courts show need for periodic check of commercial buildings.  
[www.findarticles.com/p/articles/mi\\_qa3615/is\\_199604/ai\\_n8736653](http://www.findarticles.com/p/articles/mi_qa3615/is_199604/ai_n8736653)

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CALIFORNIA SUPREME COURT  
VACATES ANTI-POLICYHOLDER RULING ON  
THE VACANCY EXCLUSION

By Lee M. Epstein

In a unanimous opinion, the California Supreme Court held that a Vacancy Exclusion to a first party property insurance policy did not apply to unoccupied buildings undergoing "substantial continuing" renovations. See [TRB Investments, Inc. v. Fireman's Fund Ins. Co.](#), 145 P.3d 472 (Cal. 2006). Fried & Epstein LLP submitted an *amicus curiae* (or friend of the court) brief to the Court on behalf of United Policyholders (see accompanying article for a description of United Policyholders and its *Amicus Project*) and in support of the policyholder, TRB Investments.

TRB Investments is the owner of a building that had been rented to a sole tenant who vacated the premises at the end of 2000. At that time, TRB Investments began renovating the building into a "leasable shell." Thereafter, TRB Investments entered into a lease with a new tenant and undertook further renovations to the building. While those renovations were underway, the building sustained significant water damage.

The insurer, Fireman's Fund, relied on the Vacancy Exclusion in denying coverage. The Vacancy Exclusion severely limited coverage for buildings left vacant for more than sixty (60) consecutive days. The exclusion, however, was not applicable to buildings "under construction." The California Court of Appeal, in a boon to insurers, determined that "under construction" encompassed only new buildings and did not include existing buildings that were being renovated.

The California Supreme Court reversed after concluding that the word "construction" was not limited to the erection of a new structure. Instead, "the term contemplates all building endeavors, whether classified as new construction, renovations or additions, which require the substantial and continuing presence of workers at the premises." [TRB Investments](#), 145 P.3d at 599. The Supreme Court reasoned further that its interpretation of "construction" served the purpose underlying the Vacancy Exclusion, which protects insurers from increased risks when properties are left unoccupied. "If, however, a construction project results in the continuous and substantial presence of workers on the property, then the underlying justifications for the vacancy exclusion no longer exists, a point recognized by the inclusion of an 'under construction' exception to the general vacancy exclusion." *Id.*

As recognized in [TRB Investments](#), courts around the country have split on the issue of whether the phrase "under construction" includes existing buildings under renovation. Compare [Myers v. Merrimack Mut. Fire Ins. Co.](#), 788 F.2d 468, 472 (7<sup>th</sup> Cir. 1986) (building "in the process of construction" is not regarded as vacant), with [Brouillette v. Phoenix Assur. Co.](#), 340 So.2d 667, 670-71 (La.Ct.App. 1976) ("construction" includes renovations to an existing structure). In resolving this issue, the [TRB Investments](#) court, at the urging of United Policyholders, applied California's rules of insurance policy interpretation. Ac-

cont. from page 1

cording to those rules, judicial interpretation is controlled by the “clear and explicit” meaning of contract provisions as interpreted in their “ordinary and popular sense.”

Contrary to the conclusion reached by the Court of Appeal, the Supreme Court held that the plain meaning of “construction” did not “exclude other types of building endeavors short of erecting a new structure, such as substantial improvements or modifications to an existing structure.” TRB Investments, 145 P.3d at 603. The Court also concluded that limiting “under construction” to only the erection of new structures would lead to an “anomalous result,” which was inconsistent with other provisions of the insurance policy at issue.

In the end, the California Supreme Court fashioned the following test for determining whether a building is “under construction:”

We believe the proper inquiry for determining whether a building is “under construction” for purposes of defining an exception to the vacancy exclusions is whether the building project, however characterized, results in “substantial continuing activities” by persons associated with the project of the premises during the relevant time period.

Id. at 605 (citations omitted).

According to this test, Vacancy Exclusions will be inapplicable and policyholders will remain insured so long as there is a continuing presence in the insured building, even though it is not occupied by tenants. By removing the artificial distinction between “new construction” and “renovations,” the California Supreme Court restored important insurance coverage for the benefit of policyholders.



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## United Policyholders

United Policyholders was founded in 1991 and is a not-for-profit organization dedicated to educating the public on insurance issues and consumer rights. Through its *Amicus Project*, United Policyholders participates as an *amicus curiae* in cases that involve insurance principles that are likely to affect large segments of the public. United Policyholders has filed *amicus* briefs on behalf of policyholders throughout the courts of the United States. A list of those cases as well as detailed information about the organization can be found at [www.unitedpolicyholders.org](http://www.unitedpolicyholders.org).



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