United Policyholders

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April 8, 2010

The Honorable Chief Justice Ronald M. George and
Associate Justices of the Supreme Court
California Supreme Court
350 McAllister Street
San Francisco, California 94102

Re: Request that the California Supreme Court order that an opinion that the California Court of Appeals has certified for publication not be published

Opinion: *Abdelhamid v. Fire Ins. Exchange*, --- Cal. Rptr. 3d ---, 182 Cal. App. 4th 990, 2010 WL 599329, Case No. C059098 (Cal. App. 3rd Dist. 2010).

Originally filed: February 22, 2010, Ordered published: March 9, 2010

Dear Justices,

Pursuant to California Rule of Court 8.1125, United Policyholders asks that the California Supreme Court order that the *Abdelhamid* opinion, which the Third District of the California Court of Appeals ordered published less than 30 days ago, be depublished.

The *Abdelhamid* opinion upheld a complete forfeiture of insurance benefits via summary adjudication. The ruling was against a homeowner whose home was destroyed in a fire. The Court sided with the insurer and found she had failed to provide sufficient documentation to substantiate her claim. Yet, the homeowner had provided a notarized proof of loss form, repair estimates, a loss inventory, tax returns, and bank and cell phone records *and* been examined under oath by the insurer's attorney. While the inadequacy of this documentation might have been proven in a trial on the merits, allowing her claim to be forfeited via summary adjudication on these facts sets a dangerous precedent. The opinion should be depublished.

In the aftermath of a total loss fire, property owners always struggle to gather records to substantiate their losses and meet insurance company proof requirements. The California legislature has recognized this fact by enacting statutes that extend proof deadlines after catastrophic events. (E.g. CA. Insurance Code section 2051.5). Because policyholders' duties of cooperation must be kept in balance with their reasonable expectations of coverage and with insurers' obligations to investigate claims reasonably and in good faith, United Policyholders has a strong interest in this case.

Interest of the Person Requesting Depublication

United Policyholders, ("UP") is a non-profit 501(c) (3) organization founded in 1991 that has nineteen years of experience helping solve insurance problems and advocating for consumer rights. Its first major project was aiding over a thousand victims of an October 1991 firestorm in the hills of Oakland and Berkeley, California.[1] United Policyholders helped the victims understand their policies and receive prompt, fair insurance settlements. United Policyholders has expanded on its tradition and mission by providing consumer-oriented insurance advocacy and education across America.[2] Donations, foundation grants and volunteer labor fuel the organization. UP's Board of Directors includes the former Chief Justice of the Arizona Supreme Court and the former Washington State Insurance Commissioner.

United Policyholders' work is divided into three program areas: *Roadmap to Recovery* provides tools and resources that help individuals and businesses solve insurance problems that can arise after an accident, illness, disaster, or other adverse event. The *Roadmap to Preparedness* program promotes insurance and financial literacy as well as disaster preparedness. The *Advocacy and Action* program advances policyholders' interests in courts of law, legislative and public policy forums, and in the media. United Policyholders participates in the proceedings of the National Association of Insurance Commissioners as an official consumer representative, and chairs a Consumer Advisory Task Force convened by California Insurance Commissioner Poizner. UP offers an extensive library of publications, legal briefs, sample policies, forms and articles on commercial and personal lines insurance products, coverage and the claims process at www.unitedpolicyholders.org.

United Policyholders has appeared as *amicus curiae* in over two hundred and eighty cases throughout the United States. Arguments from our *amicus curiae* brief were cited with approval in *TRB Investments, Inc. v. Fireman's Fund Ins. Co.,* 145 P.3d 472 (Cal. 2006) *Vandenberg v. Superior Court*, 982 P.2d 229 (Cal. 1999), *Watts Industries, Inc. v. Zurich American Insurance Co.*, (2004) 18 Cal. Rptr.3d 61, and *Julian v. Hartford,* (2005) 35 Cal.4th 747. United Policyholders has appeared as *amicus curiae* in the United States Supreme Court. *See e.g. Metlife v. Glenn, Campbell v. State Farm, FL Aerospace v. Aetna Casualty and Surety Co.*, and *Humana, Inc. v. Forsyth* in which United Policyholders' brief was cited in the published opinion at 525 U.S. 299 (1999).

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[1] *See, e.g.*, Kenneth Reich, *Under Covered Insurance Advocacy Group Aids Victims of Oakland Fire*, LOS ANGELES TIMES 3 (March 1, 1992) ("Because of some well-placed pressure by a nonprofit organization called United Policyholders, many insurers have retroactively upgraded their customers' policies, agreeing to pay higher settlements without filing lawsuits.").

[2] *See, e.g.*, Angela Lau, *Poizner Hails Recovery from Fires, Says Most Claims Are Resolved*, SAN DIEGO UNION-TRIBUNE B-3 (Nov. 10, 2009) (Karen Reimus, disaster recovery coordinator for the nonprofit United Policyholders, which educates consumers about their insurance rights, said [California Insurance Commissioner Steve] Poizner still has not fulfilled his promise to audit 2007 wildfire insurance claims so that his department could make it easier for future victims.").

Why this Court Should Order Depublication

This Court should order depublication of the *Abdelhamid* opinion because it gives too much leeway to insurance companies in cancelling coverage for alleged failures to provide supporting documents and to participate in interviews following a fire loss. Here, the insured timely provided documents and information. Where the insured is trying to provide documents and facts, the insurance company should "work with the insured in good faith to find some reasonable accommodation" for facts and documents that the insured did not have and could not readily obtain.[3]

The ruling in question does not comport with case law holding that "the mere inability to investigate a claim thoroughly . . . does *not* satisfy the prejudice element."[4] Prior case law had stated a far more consumer-friendly standard:

An insurance company has a duty to pay a claim when it has acquired, through one means or another, sufficient evidence to establish the validity of that claim. It does not have the right to insist the claim be proved only through certain types of evidence. Nor does it exhibit good faith in denying a claim merely because an insured failed to dot the i's or cross the t's on a claim form or other submission. The issue is not whether the insurance company has received every item of information it requested from an insured. The question is not even whether the insurance company appears to have in its hands the exact type of information it prefers when deciding on a claim. Rather the real question is whether there was enough evidence of whatever form and however acquired that it would be unreasonable for the insurance company to refuse to pay the claim.[5]

The insurer in this case justified its total refusal to pay by saying that the fire was arson—and by then implying that the insured was the arsonist. But the insurer did not deny coverage on the basis that the insured had committed arson. Instead, the insurer denied all coverage. It got some documents, but not all of the documents that it sought. It had some statements under oath, but not all of the statements that it wanted. If the insured was the arsonist, then the insurer should have denied coverage on that basis—and proved the charge against the insured.

In fact, when an insurer confronts an insured accusing the insured of arson, the insured will naturally want to be cautious and have the assistance of legal counsel before consenting to interviews. That is just what this insured did. Courts should not penalize an individual insured for asking legal counsel to help them respond to a large insurance company and an experienced attorney like Linda Lynch. Ms. Lynch has been representing insurance companies in conducting EUOs for many years. A policyholder that submits to be examined by her under oath without

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[3] *Track Mortgage Group, Inc. v. Crusader Ins. Co.*, 98 Cal.App.4th 857, 869, 120 Cal.Rptr.2d 228, 236-37 (2002).

[4] *Belz v. Clarendon Am. Ins. Co.* (2007) 158 Cal.App.4th 615, 620, 69 Cal.Rptr.3d 844, 866 (emphasis added).

[5] *McCormick v. Sentinel Life Ins. Co.* (1984) 153 Cal.App.3d 1030, 1046, 200 Cal.Rptr. 732,741.

having their own counsel present is unlikely to fare well. And, where a policyholder is exposed to potential criminal liability, the right to seek counsel before an EUO should be absolute.

But here, the Court of Appeals allowed the insurance company to cancel all coverage based on a presumption of what it called "substantial" prejudice. Actually, all that occurred was that the insured provided less-than-complete documentation and participated in a less-than-complete interview process. The insurance company suffered no actual prejudice—which would be a more accurate standard in a case where *some* documents and *some* information came from the insured.[6] The lack of a showing of prejudice—much less substantial prejudice—is yet another reason why this opinion should not serve as precedent for California's lawyers and trial courts.

Finally, the facts in this appeal do not lend to using the opinion as precedent for other cases and appeals. The fire was arson, yet the carrier did not deny coverage on that basis. Instead, it made arson insinuations and then denied all coverage for another reason. The insurer did that, despite the fact that the insured admittedly supplied at least some of the requested documents and gave some statements under oath. This opinion makes muddled precedent. This Court should therefore order the opinion depublished.

Sincerely,

Amy Bach, Esq.
David L. Abney, Esq.
for United Policyholders

[6] *See, e.g., Pacific Employers Ins. Co. v. Superior Court* (1990) 221 Cal.App.3d 1348, 1357, 270 Cal.Rptr. 779, 783 ("California's 'notice-prejudice' rule operates to bar insurance companies from disavowing coverage on the basis of lack of timely notice unless the insurance company can show *actual prejudice* from the delay.") (emphasis added).

***Zary Amdelhamid v. Fire Insurance Exchange*,**
In the Court of Appeal of the State of California Third Appellate District Case No. C059098 (Super. Ct. Case No. 06AS02975)

Proof of Service by Mail

I declare that I am employed in the County of San Francisco, California. I am over the age of 18 years and am not a party to the within cause; my business address is 222 Columbus Ave., San Francisco, CA. 94133.

On April 8, 2010, I served the enclosed

Letter to Hon. Ronald M. George and Associate Justices

on the parties listed below by placing copies thereof in sealed envelopes with adequate postage for first class delivery and depositing each with the U.S. Postal Service:

Under California Rule of Court 8.1125(a) (5), copies of this letter were mailed on this same date to the following:

- Mitchell L. Abdallah, Esq., **ABDALLAH LAW GROUP**, 980 9th Street, 16th Floor, Sacramento, CA 95814-2736, (916) 520-3376, Fax: (916) 446-3371, mitch@abdallahlaw.net, Attorneys for Plaintiff-Appellant.
- John M. Latini, Esq., **LAW OFFICES OF JOHN M. LATINI**, 455 Capitol Mall, Suite 350, Sacramento, CA 95814-4714, (888) 408-9377, jlatini@latinilaw.com, Attorneys for Plaintiff-Appellant.
- Daniel V. Kohls, Esq., **HANSEN, KOHLS, JONES, SOMMER & JACOB, LLP**, 770 L Street, Suite 950, Sacramento, CA 95814, (916) 781-2550, Fax: (916) 781-5339, dkohls@hckjs.com, Attorneys for Defendant-Respondent.
- Clerk of the Court, Third Appellate District, **CALIFORNIA COURT OF APPEALS**, 621 Capitol Mall, 10th Floor, Sacramento, CA 95814-4719, (916) 654-0209.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on April 8, 2010 at San Francisco, California.

Emily Cabral