united policyholders

AN INSURANCE CONSUMER EDUCATION ORGANIZATION

September 12, 2002

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

Re: *E.M.M.I Inc. v. Zurich American Insurance Company* (2002) ____ Cal.App.4th ——, Court of Appeal No. B152740
Request for Depublication (Cal. Rules of Court, rule 979 (a).)

To the Chief Justice and the Associate Justices of the California Supreme Court:

On behalf of United Policyholders ("UP"), we respectfully request depublication of *E.M.M.I. Inc. v. Zurich American Insurance Company* (July 22, 2002, B152740) ___ Cal.App.4th ___.

I. The Nature of United Policyholders' Interest.

UP was founded in 1991 as a non-profit organization dedicated to educating the public on insurance issues and consumer rights. It is tax-exempt under Internal Revenue Code section 501, subdivision (c) (3). UP is funded by donations and grants from individuals, businesses, and foundations.

UP serves as a consumer resource on insurance claims and actively monitors legal and marketplace developments affecting the interests of all policyholders. UP receives frequent invitations to testify at legislative and other public hearings, and to participate in regulatory proceedings on rate and policy issues.

A diverse range of policyholders throughout the United States communicate on a regular basis with UP, which allows it to provide important and topical information to courts throughout the country via the submission of *amicus curiae* briefs in cases involving insurance principles that are likely to impact large segments of the public. UP's *amicus* brief was cited by the U. S. Supreme Court in *Humana v.*

PMB 262 ❖ 110 Pacific Avenue ❖ San Francisco, CA 94111-1900 ❖ (510) 763-9740

Forsyth (1999) 525 U.S. 299, and its arguments were adopted by this Court in *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815. UP has filed *amicus* briefs on behalf of policyholders in over one hundred cases throughout the United States.

E.M.M.I. Inc. v. Zurich American Insurance Company rejects principles of insurance contact interpretation that are well established in California. UP is requesting that this Court depublish *E.M.M.I. Inc. v. Zurich American Insurance Company* in order to avoid confusion and inconsistency in the area of insurance contract interpretation.

II. Why *E.M.M.I. Inc. v. Zurich American Insurance Company* Should Not Remain Published.

In *E.M.M.I. Inc. v. Zurich American Insurance Company* the Court of Appeal affirmed the trial court's ruling granting summary judgment for the insurer on the ground that no coverage existed under a jeweler's block insurance policy for a theft of jewelry from the insured's representative's car. The court held, among other things, that an exclusion for loss resulting from theft applied because at the time of the theft the insured's representative was not "actually in or upon" the vehicle. In so holding, the court found that the term "actually in or upon" was not ambiguous and was synonymous with the term "actually in or on." (Slip Opinion at 15-18.)

The Court of Appeal's interpretation conflicts with established precedent for insurance contract construction. If insurance policy language is plain and unambiguous, the language will be applied in accordance with its ordinary and popular sense. "Thus, if the meaning a layperson would ascribe to [insurance] contract language is not ambiguous, we apply that meaning." (*AIU Insurance Co. v. Superior Court* (1990) 51 Cal.3d 807, 822.)

In determining whether policy language is ambiguous, courts look at the language in context with the claim at issue, with regard to its intended function in the policy. As this Court has stated, language in a contract "must be construed in the context of that instrument as a whole, and in the circumstances of that case, and cannot be found to be ambiguous in the abstract." (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1265, citing *Producers Dairy Delivery Co., Inc. v. Sentry Insurance Co.* (1986) 41 Cal.3d 903, 916-917 & fn. 7; Civ. Code § 1641 (emphasis omitted).)

When policy language is ambiguous, courts generally resolve coverage in favor of the insured. (*State Farm Mutual Auto Insurance Co. v. Jacober* (1973) 10 Cal.3d 193, 197.) In addition, when, as here, the policy language is contained in an exclusion to coverage, the language is broadly construed in favor of the insured. (*Meraz v. Farmers Ins. Exchange* (2001) 92 Cal.App.4th 321, 324; *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 16.)

A reasonable construction of the phrase "actually in or upon" would necessarily include the policyholder's location in this case. Given that drivers do not ride "upon" their cars, that phrase is not meant to be strictly construed. If the insurer had wanted to condition coverage on the requirement that the insured be "actually in" the vehicle, it could have easily drafted the exception to achieve this result.

Nevertheless, the Court of Appeal relied on authority from other jurisdictions in holding that the term "actually in or upon" was not ambiguous. (See Slip Opinion at 12-13.) In all of the cases cited by the court, the insured had temporarily abandoned, walked away from or diverted his attention from the vehicle containing the insured property when the loss occurred. In this case, the policyholder was bending down to inspect his car's tail pipe when the theft occurred. He neither walked away from nor in any way abandoned his car. Since under California law insurance provisions must be construed in the context of the circumstances of each case, and cannot be found to be ambiguous in the abstract, those authorities are not conclusive on the issue of whether the policy language was ambiguous in the context of the case at hand.

The Court of Appeal specifically disagreed with California authority that has held that the term "actually in or upon" might require interpretation under some factual situations, and that the controlling factors in determining whether the exception applied was whether the insured intended to and actually did abandon his vehicle, not whether he was actually in it. (Slip Opinion at 10; citing *Revesz v. Excess Insurance Co.* (1973) 30 Cal.App.3d 125, 128.)

The Court of Appeal cited *Nissel v. Certain Underwriters at Lloyd's of London* (1998) 62 Cal.App.4th 1103 for the proposition that the "actually in or about" exclusion excludes coverage for a theft from an automobile with no person in it. (Slip Opinion at 10-11.) However, *Nissel v. Certain Underwriters* did not even address whether the insured was "actually on or about" the vehicle as this issue was conceded by the insured. (*Nissel v. Certain Underwriters, supra*, 62 Cal.App.4th at pp. 1108-1112 & fns. 7, 10.)

The Court of Appeal should have determined whether the policy language was ambiguous in the context of the case before it. The facts show that the theft occurred when the insured's representative stopped the vehicle at the side of the road to examine the source of a rattling noise that was coming from the rear. (Slip Opinion at 3.) Leaving the keys in the ignition, he got out to inspect the vehicle and bent down to look at the tail-pipe area. As he did so, an unidentified man brushed past him and drove the vehicle away. (*Ibid.*) Since the insured's representative did not evidence an intent to abandon the vehicle and was at all time in close proximity to it, he could reasonably have been said to have been "upon" the vehicle.

The Court of Appeal did reference a dictionary definition of "upon" that included "in or into close proximity or contact with . . .." (Slip Opinion at 15.) *Cocking v. State Farm Mutual Automobile Insurance Co.* (1970) 6 Cal.App.3d 965, 969 adopted a similar definition of the term "upon," defining it as including "in or into close proximity." However, the Court of Appeal in *E.M.M.I.* rejected these definitions of the term on the ground that no dictionary specifically referred to the words "on" or "upon" in connection with a car. (Slip Opinion at 15.)

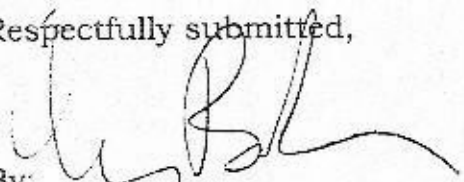
The Court of Appeal's analysis is contrary to established principles of insurance contract interpretation that provide that ambiguities in coverage must be resolved against the insurer and that exclusionary language must be construed broadly. (See *State Farm v. Jacober, supra,* 10 Cal.3d at p. 197; *Waller v. Truck Insurance, supra,* 11 Cal.4th at p. 16.)

The Court of Appeal's analysis is also contrary to principles of contractual interpretation that require insurance contracts to be construed so as to avoid rendering any word surplusage. (See *AIU Insurance v. Superior Court, supra,* 51 Cal.3d at p. 827; *ACL Technologies, Inc. v. Northbrook Property & Casualty Insurance Co.* (1993) 17 Cal.App.4th 1773, 1785.) Because the Court of Appeal's opinion is inconsistent with established principles of insurance contract interpretation in California, its opinion should be depublished.

II. Conclusion.

E.M.M.I. Inc. v. Zurich American Insurance Company rejects principles of insurance contact interpretation that are well established in California. If it remains published, it is likely to create confusion and inconsistent analysis in the area of insurance contact interpretation. For these reasons, this Court should depublish *E.M.M.I. Inc. v. Zurich American Insurance Company*.

Respectfully submitted,



By: _____
Amy Bach, Esq.
Lori A. Lee, Esq.
Counsel for United Policyholders

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I declare that I am a citizen of the United States; I am employed in the County Marin, where this mailing occurs; I am over the age of eighteen years and not a party to the within action. On the date set forth below I served the following document:

REQUEST FOR DEPUBLICATION

by placing a true and correct photocopy of said document in a sealed envelope with first-class postage fully prepaid, in the United States Postal Office mail at San Francisco, California for personal delivery upon the above-named individuals.

Court of Appeal, 2nd App. Dist., Div. 5
300 S.Spring 2nd Fl.
North Tower
Los Angeles, CA. 90013-1213

John N. Quisenberry
Quisenberry & Kabateck, LLP
2049 Century Park E #2200
Los Angeles, CA 90067

Mark A. Koop
Bishop, Barry, Howe, Haney & Ryder
2000 Powell Street #1425
Emeryville, CA 94608

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 11, 2002, at Mill Valley, California.