united policyholders
EMPOWERING THE INSURED

March 26, 2007

Chief Justice and Associate Justices
Supreme Court of California_350 McAllister St.
San Francisco, CA. 94102-4797

Re: Request for Depublication – *First American Title Ins. Co. v. Superior Court* (2007) 146 Cal.App.4th 1564, 53 Cal.Rptr.3d 734
Court of Appeal, Second Appellate District, Case No. B194004

To the Chief Justice and Associate Justices:

This letter is submitted on behalf of United Policyholders pursuant to California Rules of Court, Rule 8.1125, to request depublication of the recent court of appeal decision in *First American Title Ins. Co. v. Superior Court* (2007) 146 Cal.App.4th 1564, 53 Cal.Rptr.3d 734 (filed on January 25, 2007).

Nature of Interest

United Policyholders, which was founded 15 years ago in 1991, is a non-profit organization dedicated to education and advocacy on insurance issues and consumer rights. United Policyholders advances and protects the interests of policyholders by filing *amicus curiae* briefs in cases involving important insurance principles, testifying at legislative and other public hearings, and participating in regulatory proceedings on policy issues. United Policyholders monitors legal and marketplace developments affecting the interests of all policyholders, and acts to protect those rights where appropriate. United Policyholders' interest in this case is an outgrowth of its mission to advocate and protect policyholder interests. United Policyholders has participated in title insurance regulatory proceedings conducted before the California Department of Insurance. Policyholders have a special interest in class action litigation because many insurance marketing and underwriting practices involve damages to policyholders that are too small to warrant individual action.

The court's decision in *First American Title Ins. Co.*, if it remains published, would have a significant, detrimental impact on policyholders and others involved in class action litigation by creating massive confusion in a heretofore clear area of law regarding trial court discretion to allow discovery to learn the identities of potential class representatives, where the original class representative lacked standing at the time the complaint was filed.

United Policyholders believes that the current state of the law is clear: A trial court has authority to allow a class representative to do discovery to obtain a new class representative even where the original representative was not a member of the class, and in exercising that discretion must look at the facts and circumstances involved. In some situations, a trial court will determine the discovery is appropriate; in some circumstances, the trial court will determine that it is not. The court of appeal created a conflicting rule, for the first time causing confusion and conflict in the law in this area.

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Why the Opinion Warrants Depublication

First American Title Ins. Co. v. Superior Court should be decertified for publication because it is an unwarranted statement of the law inconsistent with established precedent. It misinterprets and misapplies long-standing authority established by this Court and will likely cause confusion. It also substantially undermines trial courts' ability and discretion to manage class actions.

A. Summary Of Case And The Second A.D. Opinion In *First American Title Ins. Co.*

First American Title Ins. Co. is a class action that arose out of the sale of a title insurance policy by First American Title Insurance Company ("First American") to plaintiff Jeffrey Sjobring in connection with Mr. Sjobring's purchase of a home. (*Id*. at 1566.) Mr. Sjobring brought a class action against various First American entities alleging, among other things, that he was directed to purchase a First American title insurance policy because of inducements, *i.e*., kickbacks, First American provided to lenders and others, identified by Sjobring as Does 250 through 500. (*Id*. at 1567-1570, 1574.) Specifically, Sjobring alleged that the illegal inducements were "received by Wilmington Finance, Inc., and/or Does 250 through 500." (*Id*. at 1568.)

The class action alleges that the unlawful inducements violated Insurance Code section 12404. Some of First American's illegal inducement practices were the subject of a California Department of Insurance investigation which resulted in a $37.8 million dollar settlement with First American and other title insurance companies. (*Id*. at 1568.)

After filing the class action, Sjobring learned that one of the potential recipients of the illegal inducements/kickbacks, Mr Sjobring's lender, Wilmington Finance, may not have received an inducement. (*Id*. at 1569.) As a result, Wilmington Finance was dismissed without prejudice, but the class allegations regarding the unlawful inducements remained as to Does 250-500. (*Id*. at 1568-1569)

First American meanwhile brought motions for summary judgment seeking to have the entire action dismissed on the ground that *no one* involved in Mr. Sjobring's real estate transaction received any unlawful inducement, or "kickback." (*Id*. at 1570 ("[t]he motions were based on the facts that… defendants had not done *any* improper acts") (italics added).) Pursuant to *Best Buy Stores, L.P. v. Superior Court* (2006) 137 Cal.App.4th 772, Mr. Sjobring brought a pre-certification discovery motion asking that court-approved letters be sent to those persons identified by the California Department of Insurance as having been victimized by First American's unlawful inducements, to inform them of the action and potentially identify a more suitable class representative. (*First American Title Ins. Co*., *supra*, at 1570-1571, 1575-1576.) The trial court exercised its discretion and granted Mr. Sjobring's motion, ordering that First American provide the names of the person identified by the Department of Insurance to a third-party administrator, who would send court-approved letters to the individuals asking if they wished to be contacted by plaintiff's counsel regarding the matter. (*Id*. at 1571-1572.) Only those persons who "sen[t] an authorization form back to the third-party administrator granting permission to be contacted by class counsel" would be identified. (*Id*. at 1571.)

First American sought appellate review of the trial court's discovery order through a petition for writ of mandate, which the Second A.D. granted. (*Id*. at 1573.) On January 25, 2007, the Second A.D. issued a published opinion, which is the subject of this request for depublication, reversing the trial court's discovery order, and preventing the third-party administrator from contacting the identified victims of First American's unlawful inducement scheme. (*Id*.) The Second A.D. held that the trial court abused its discretion in allowing pre-certification discovery of the identity of those individuals who volunteered, through the third-party administrator, to be contacted by class counsel. (*Id*. at 1573, 1577 ("[p]re-certification discovery under these circumstances would be an abuse of discretion").) In so holding, the Second A.D. explicitly questioned "the current validity"

of *Budget Finance Plan v. Superior Court* (1973) 34 Cal.App.3d 794, a case which had permitted pre-certification discovery of potential class members. (*Id.* at 1578.)

The Second A.D. reasoned that Mr. Sjobring was "not – and never was – a member of the class he purports to represent." (*Id.* at 1566.) Put another way, the Second A.D. found that Mr. Sjobring was "a stranger to the action." (*Id.*) These factual findings were made by the Second A.D. although the trial court had made no such factual conclusions in connection with its discovery order, or any other proceeding below. The main holding of the Second A.D. was that "a plaintiff who purports to bring a cause of action on behalf of a class of which he was never a member [can never] obtain pre-certification discovery to find a new class representative." (*Id.* at 1573.)

B. The Second A.D.'s Opinion Conflicts With Black Letter Law And, If It Remains Published, Will Cause Massive Confusion Regarding When A Trial Court May Order Pre-Certification Discovery Of The Identity Of Putative Class Members

This Court has long held that, in class actions, pre-certification discovery regarding potential class members is permissible, and within the trial court's discretion. In *La Sala v. American Savings & Loan Association* (1971) 5 Cal.3d 864, this Court held:

> "If, however, the court concludes that the named plaintiffs can no longer suitably represent the class, it should at least afford plaintiffs the opportunity to amend their complaint, to redefine the class, ***or to add new additional plaintiffs***, or both, in order to establish a suitable representative." (*Id.* at 872 (emphasis added).)

In reversing the dismissal of the class action, *La Sala* rejected the argument advanced by defendants – similar to First American's argument and the Second A.D.'s reasoning in this case – "that plaintiffs never were members of the class defined in the complaint and thus cannot maintain this suit as a class action." (*Id.* at 874.)

Since *La Sala* was decided over 35 years ago, this Court and California appellate courts have repeatedly confirmed the right to pre-certification discovery in order to establish an adequate class representative.

In *Budget Finance Plan v. Superior Court* (1973) 34 Cal.App.3d 794, a class action was brought against several financing companies. (*Id.* at 798-799.) The trial court ordered defendants to answer interrogatories aimed at discovering substitute class representatives. (*Id.* at 796-797.) The defendants sought appellate review through a writ of mandate, arguing that "***plaintiffs cannot represent a class of adversaries to petitioners of which they are not members***." (*Id.* at 799 (emphasis added).) The *Budget Finance* court rejected this argument, holding that "plaintiffs are entitled to have discovery directed towards appropriate parties in order to learn the names of other proper plaintiffs who may be of assistance in the presentation of the case and who may share the burdens of its prosecution." (*Id.*) In response to defendants' attempt to distinguish *La Sala* on the grounds that "in *La Sala*, there were at the commencement of the lawsuit, parties plaintiff who were truly members of the alleged class," *Budget Finance* responded that "the distinction is not persuasive." (*Id.* at 800.)

In *Best Buy Stores, L.P. v. Superior Court* (2006) 137 Cal.App.4th 772, the Fourth A.D. recently addressed pre-certification discovery designed to identify a suitable class representative in a class action alleging the defendant "charged an illegal 'restocking fee' for returned merchandise." (*Id.* at 774.) The original plaintiff was not a proper class representative. (*Id.*) Noting that "*Budget Finance* held that the court did not abuse its discretion in issuing a precertification discovery order designed to identify other class members" (*Id.*), the Fourth A.D. affirmed the trial court's order permitting a third-party administrator to contact *Best Buy* customers for the purpose of identifying

a new class representative. (*Id*. at 774-775.) In doing so, *Best Buy* held that "***[d]iscovery to ascertain a suitable class representative is proper***." (*Id*. at 779 (emphasis added).)

In *Branick v. Downey Savings & Loan Assn*. (2006) 39 Cal.4th 235, decided shortly after *Best Buy*, this Court addressed a case where the plaintiff, who originally had standing to bring a representative action under Business and Professions Code sections 17200 and 17500, lost that standing after passage of Proposition 64. (*Id*. at 240-241.) This Court stated that the issue addressed, in part, was whether a plaintiff may "amend his or her complaint to substitute in or add a party that satisfies [the] standing requirements of Business and Professions Code section 17204, as amended… " (*Id*. at 240 (brackets in original).) *Branick* concluded "that Proposition 64 does not expressly or implicitly forbid amendment of complaints to substitute new plaintiffs.…" (*Id*. at 242.) In response to defendants' argument that substitution should not be allowed because the "failure to name the new plaintiff in their original complaint was not a mistake," this Court stated "[n]o such rule exists," and expounded as follows:

> "To the contrary, courts have permitted plaintiffs who have been determined to lack standing, or who have lost standing after the complaint was filed, to substitute as plaintiffs the true real parties in interest… Amendments for this purpose are liberally allowed." (*Id*. at 243 (internal citations omitted).)

In response to defendant's argument "that plaintiffs who never had standing may not substitute plaintiffs with standing," *Branick* held that "***California courts have not followed [that] rule***." (*Id*. at 244 (emphasis added).)

Finally, in *Pioneer Electronics v. Superior Court* (2007) 40 Cal.4th 360, a case decided on the *same day* the Second A.D. issued its opinion in this case, this Court again reaffirmed the principle that "[c]ontact information regarding the identity of potential class members is generally discoverable, so that the lead plaintiff may learn the names of other persons who might assist in prosecuting the case." (*Id*. at 373.) In so holding, *Pioneer Electronics* cited with approval to *Budget Finance* (*id*.), the same case which the Second A.D. questioned "the current validity" of in the opinion at issue. (*First American Title Ins. Co*., *supra*, at 1578.) That the Second A.D. cast doubt on "the current validity" of *Budget Finance* on the same day this Court cited it with approval, in and of itself, creates serious confusion in the state of the law.

This long-line of consistent cases – *La Sala*, *Budget Finance*, *Best Buy*, *Branick*, and *Pioneer Electronics* – created black letter in California regarding the discoverability of potential class representatives, including for the purposes of substituting a new, adequate class representative for one that lacks standing or has otherwise been compromised. This black letter law is well-established by precedent, and is understood as such by leading authorities and resources regularly referred to by California legal practitioners. Thus, one of the primary legal resources for California practitioners, the Rutter Group, citing *Budget Finance*, states as follows:

> "Plaintiffs are entitled to have discovery directed towards appropriate parties in order to learn the names of other proper plaintiffs who may be of assistance in the presentation of the case and who may share the burdens of its prosecution… ***If the trial court determines plaintiffs do not adequately represent the class, it should afford them the opportunity to redefine the class or to add new individual plaintiffs. If discovery is necessary in order to do this, it should be made available***." (California Practice Guide, Civil Procedure Before Trial, The Rutter Group, section 14:135.2 - 14:135.2a.)

Further, Witkin on California Procedure, another leading authority and resource for California practitioners, states similarly:

> ***A suit is sometimes brought by a plaintiff without the right or authority to sue, and the amendment seeks to substitute the real party in interest. Although the original complaint does not state a cause of action in the plaintiff***, the amended complaint by the right party restates the identical cause of action, and ***amendment is freely allowed***. (5 Witkin, California Procedure (4th ed. 1997) Pleadings, section 1155, page 614, emphasis added.)

First American Title Ins. Co.'s holding, if allowed to remain published, will cause massive confusion in what had otherwise been a clear and well established area of law relating to pre-certification discovery of potential class representatives. To prevent this unwarranted confusion, *First American Title Ins. Co.* should be depublished.

Moreover, *First American Title Ins. Co.* will create confusion in California law in another respect. In concluding that Sjobring was "not a member of the class and never has been. . ." (*id.* at 1577), the Second A.D. unjustifiably ignored Sjobring's Doe allegations, *i.e.*, that the unlawful inducements provided by First American for the referral of Sjobring's business were also "received by…Does 250 through 500." (*First American Title Ins. Co.*, *supra*, at 1568.) The alleged receipt of inducements/kickbacks by these Does from First American in connection with Sjobring's transaction makes Sjobring a member the class he seeks to represent. The Second A.D.'s wholesale dismissal of Sjobring's Doe allegations, without articulating a reason for doing so, also conflicts with black letter California law, and creates further confusion regarding pleading in general, and class actions in particular. (*See* Code of Civil Procedure Section 474; and *Barnes v. Wilson* (1974) 40 Cal.App.3d 199, 203 (Section 474 "should be liberally construed to accomplish [its] purpose").)

C. *First American Title Ins. Co. v. Superior Court* Should Also Be Depublished Because It Strips Trial Courts' Discretion Regarding Pre-Certification Discovery To Substitute Or Add Class Representatives As Plaintiffs

California courts have uniformly held that discovery decisions, including decisions regarding pre-certification discovery of potential class members, are within the discretion of trial courts.

> "[T]he trial court has wide discretion to order discovery and broad powers to enforce those orders." (*Hartbrodt v. Burke* (1996) 42 Cal.App.4th 168, 175.)

First American Title Ins. Co. eliminates a trial court's discretion because of its categorical holding that "a plaintiff who purports to bring a cause of action on behalf of a class of which he was never a member [can never] obtain pre-certification discovery to find a new class representative." (*First American Title Ins. Co.*, *supra*, at 1573.) This holding creates a new bright-line rule that prevents a trial court from exercising *any* discretion to grant pre-certification discovery if the initial class representative is found – during any stage of the litigation – not be a member of the class he seeks to represent. This extreme limitation on the trial court's discretion is unwarranted, and is an additional reason *First American Title Ins. Co.* should not remain published precedent.

It is important to note that the trial courts' discretion to manage cases, including discovery, is a significant safeguard against abuse of the class action process – which appeared to be a primary concern of the Second A.D. in issuing the *First American Title Ins. Co.* opinion. The first area that the trial court exercises its discretion, under current law, is in determining whether to grant or deny pre-certification discovery of potential class members. At this stage, the trial court can evaluate numerous factors, including who the plaintiff is, why he is not a member of the class he seeks to represent, whether the plaintiff was acting in good faith in believing himself to be a class member, whether the plaintiff was misled by the defendants regarding his class membership status, and whether the plaintiff was a good faith purchaser of the product at issue.

Indeed, in *First American Title Ins. Co.*, the trial court's decision to exercise his discretion to grant pre-certification discovery was not groundless. It is undisputed that Sjobring did, in fact, purchase a First American title insurance policy (*id.* at 1566), that he bought the product at the exact time the California Department of Insurance determined there was an unlawful scheme occurring as to those products (*id.* at 1567-1568), that Sjobring had been advised by a real estate professional that "the escrow costs…seemed suspiciously high" (*id.* at 1566-1567), and that Sjobring testified in deposition to his belief that there was "a kickback from First American" in connection with his transaction (*id.* at 1572, n.12).

> "To exercise its discretion, 'the trial court must ... expressly identify any potential abuses of the class action procedure that may be created if the discovery is permitted, and weigh the danger of such abuses against the rights of the parties under the circumstances.'" (*Best Buy*, *supra*, 137 Cal.App.4th at 779.)

In this case, it appears that the trial court did weigh the rights of the parties against the potential abuse of the class action procedure in issuing its order. Thus, the trial court protected the privacy interests of the potential class members by requiring that they consent to contact by plaintiff's counsel through a third-party administrator. (*First American Title Ins. Co.*, *supra*, at 1572-1573.) Moreover, there was no harm to First American, as its customers had already received communications advising them of the alleged misconduct. (*Id.* at 1568, n.6.) After weighing the relative factors, the trial court concluded "that this case did not present" a situation where the plaintiff was attempting to abuse the class action procedure. (*Id.* at 1572.)

A second opportunity to safeguard against abuse of the class action procedure through the use of the trial court's discretion occurs when leave to amend a class action complaint to substitute a new class member is sought.

> "'Leave to amend a complaint is thus entrusted to the sound discretion of the trial court.…*[T]he discretion to be exercised is that of the trial court, not that of the reviewing court*. Thus, even if the reviewing court might have ruled otherwise in the first instance, the trial court's order will yet not be reversed unless, as a matter of law, it is not supported by the record.'" (*Branick*, *supra*, 39 Cal.4th at 242 (italics in original).)

When leave to amend to substitute or add a new class representative is sought, the trial court can *again* make a factual inquiry into whether the original plaintiff was a sham, it can evaluate the good faith of the new proposed class representative, and it can determine whether the discovery involved any impropriety. California courts have held that this discretion should be exercised by the trial court, and it should not be assumed that substitute plaintiffs will be used for abusive purposes.

> "At this time it is mere speculation to assume that, if substitute plaintiffs are found, they will necessarily be unqualified, unwilling, or unable to exercise their independent judgment for the benefit of the class. Should such a situation develop, it would be ***the responsibility of the trial court*** to take appropriate action. [It is] ***the duty of the trial court to supervise class actions***." (*Best Buy*, *supra*, 137 Cal.App.4th at 777-778 (emphasis added).)

A third safeguard that lies within the trial court's discretion is its ability to issue sanctions if it determines that abuse of the class action process or any other improper conduct has occurred. Thus, if the trial court finds at any stage that a litigant is abusing the class action process, it has discretion to issue appropriate sanctions. This is yet another check or safeguard against abuse of class action procedures by a litigant acting in bad faith.

These safegaurds against class action abuse, which lie within the trial courts' discretion, exist to ameliorate the concerns of the Second A.D. regarding potential abuse, and to weed out plaintiffs who are trying to manipulate or abuse the class action process. By creating a bright-line rule that a plaintiff who is not a member of the class he seeks to represent can *never* obtain pre-certification discovery of other potential class representatives, the Second A.D. unjustifiably stripped the trial court of its discretion. The Second A.D.'s usurpation of the trial court's discretion in all contexts where this issue arises is unjustified, and is an additional reason *First American Title Ins. Co.* should be depublished.

Conclusion

First American Title Ins. Co. conflicts with black letter law, and undermines trial courts' discretion to manage class actions and discovery proceedings. United Policyholders respectfully request that the decision be depublished to avoid serious confusion in an important area of law for insurance policyholders.

Respectfully,

United Policyholders
Amy R. Bach, Esq.

PROOF OF SERVICE
1013A(3) CCP Revised 5/1/88
STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is: 222 Columbus Ave., S.F., CA. 94133

On March 26, 2007 I served the foregoing document described as:

REQUEST FOR DEPUBLICATION

on interested parties in this action by placing ( ) the original (X) a true copy thereof enclosed in a sealed envelope addressed as follows:

See Attachment "A"

[X] **(BY MAIL)** I am "readily familiar" with the firm's practice of collection and processing correspondences for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at San Francisco, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

[ ] **(BY PERSONAL SERVICE)** I caused such document to be delivered by hand to the offices of the addressee as set forth on the attached service list.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 26, 2007 at San Francisco, California.

_____ _____
Print Name Signature

Attachment "A"

The Honorable Joan D. Klein, Presiding Justice Court of Appeal of the State of California Second Appellate District, Division Three 300 South Spring Street 2nd Floor, North Tower Los Angeles, California 90013-1213	via U.S. mail
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