**VIA FACSIMILE & U.S. MAIL**

Associate Justice J. Gary Hastings
Associate Justice Norman L. Epstein
Associate Justice Daniel A. Curry
Court of Appeal, Division 4
300 South Spring Street
Los Angeles, California 90013

Re: *Request for Publication – Greene v. Century National Ins. Co.*
Court of Appeal, Second Appellate District, Case No.: B144789

Dear Justices Hastings, Epstein, and Curry:

We are writing pursuant to California Rules of Court, Rule 978, to request publication of this court's recent decision in *Greene v. Century National Ins. Co.*, Appellate Court Case No. B144789.

### *Nature of Interest*

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

UP serves as a resource for insurance claimants and actively monitors legal and marketplace developments affecting the interests of all policyholders. Insured homeowners throughout California communicate on a regular basis with UP, which allows us to provide important and topical information to our state's appellate courts via the submission of *amicus curiae* briefs in cases involving insurance principles that are likely to impact large segments of the public and business community.

### *Why the Greene Opinion Warrants Publication*

Publication of *Greene* is warranted under California Rules of Court, Rule 976, for several reasons.

## 1. *Greene* Establishes or Modifies New Rules of Law and Applies Existing Rules to New Facts

The *Greene* opinion establishes new rules of law on recurring issues of significant importance in the insurance industry and in relation to insurance litigation.

### A. Public Adjusting Fees as an Element of Bad Faith Damages

One issue which has not been previously addressed in a published California opinion, but which *Greene* addresses and resolves, is the ability of a policyholder to claim public adjuster fees as an item of damage where retention of the public adjuster was necessitated by the insurer's bad faith conduct.

In *Brandt*, the California Supreme Court held that, where an insurer acts in bad faith and as a result the insured is required to retain the services of an attorney to secure policy benefits, the insurer is liable for the insured's attorney's fees to the extent they were necessary to secure the contract benefits. (*Brandt v. Superior Court* (1985) 37 Cal.3d 813, 817.)

Left open after *Brandt* was the question of whether public adjuster fees, necessarily incurred to obtain policy benefits because of an insurer's breach of the implied covenant of good faith and fair dealing, are a recoverable item of damage. The *Greene* decision holds that such fees, if necessitated by the insurer's tortious conduct, are recoverable:

> "We see no distinction between fees necessarily incurred by an insured who retains an attorney to obtain payment of policy benefits and fees incurred by an insured for an independent adjuster when the actions of the adjuster result in payment of policy benefits after they have initially been denied by the carrier, as here.
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> * * *
>
> We conclude that appellant was entitled to the fees as part of her damages in her successful bad faith action."(*Greene*, *supra*, at 8-9.)

There currently exists no published California authority providing guidance on whether public adjuster fees, incurred to obtain policy benefits, can be included as an item of damage for breach of the implied covenant of good faith and fair dealing. The availability of such damages is

an issue likely to recur in insurance-related litigation. The *Greene* opinion provides needed guidance on this important issue.

**B. Admissibility of Reserve Information**

Another new rule *Greene* addressed and clarified pertains to the admissibility, at trial, of reserve information.

Upon receiving an insurance claim, an insurer is required by statute to set a reserve for that claim, consisting of the insurer's reasonable estimate of the value of the claim. Prior case law has held that reserve information is discoverable in an insurance action for breach of the implied covenant of good faith and fair dealing. (*Lipton v. Superior Court* (1996) 48 Cal.App.4th 1599, 1616 ("the conclusion that the requested loss reserve information might reasonably lead to the discovery of evidence admissible. . . seems inescapable").) Although the *Lipton* court held that reserve information is discoverable, it left open "questions of relevancy which are related to the trial and the *admissibility* of evidence." (*Id.* at 1614 (italics in original).)

In *Greene*, the court answered the question of the relevancy and admissibility of reserve information, holding that the trial court properly admitted reserve information:

> "While the setting of reserves is statutorily mandated, the existence of reserves may be relevant to the issue of whether an insurer acts in bad faith by not investigating a claim reasonably and in good faith. Here, the setting of the several hundred thousand dollars in reserves did bear on the issue of whether [the insurer] acted reasonably when it initially closed its file and later when negotiating with appellant's representatives." (*Greene*, *supra*, at 20.)

*Greene*'s statement of the law regarding the admissibility of reserve information in an action for breach of the implied covenant of good faith and fair dealing is a significant development which will assist litigants in the future when faced with this issue.

**C. Evidence Required to Establish Damage from Asbestos**

The *Greene* opinion is also significant because it addresses the quantum of proof required

to make a claim for damage for asbestos abatement.

In *Greene*, the insurer argued, and the trial court agreed, that the insured could not recover as damages the cost for asbestos abatement because "none of plaintiff's witnesses were 'Certified Asbestos Consultants' as defined in Title 8 Cal. Code Regs. Sect. 341.15(a)." (*Greene*, *supra*, at 9 (underline in original).) The court of appeal, however, held as follows:

> "It is clear that the section is meant to regulate parties who actually do the work involved in asbestos abatement. It does not prohibit someone from giving an opinion in court as to how much asbestos remediation and repair may cost. Assuming the experts otherwise qualify to provide an opinion on the subject, the mere fact the experts were not certified goes to the weight of their opinion, not admissibility of their opinion" (*Greene*, *supra*, at 9.)

The rule established in *Greene*, that designation as a "Certified Asbestos Consultant" under section 341.15(a) is not a pre-requisite to testifying regarding the cost of asbestos abatement, is a new rule which may have important implications for any cases involving asbestos abatement.

## II. *Greene* Involves Issues of Continued Public Importance

The *Greene* opinion also involves several issues of continuing public interest.

The services of public adjusters to facilitate and assist the public with insurance claims is prevalent and is regulated by California Insurance Code section 15000, *et seq*. The issue of whether public adjuster fees in securing policy benefits are recoverable, where the public adjuster services were necessitated because of an insurer's bad faith conduct, is an issue of public importance that is likely to recur. Publication of *Greene* will assist greatly in resolving future conflicts relating to this issue without extensive litigation.

Similarly, whether reserve information is admissible an insurance action for breach of the implied covenant of good faith and fair dealing is an issue of public importance. The insurance consuming public is often required to litigate insurance claims against insurers, and an issue that frequently arises is whether reserve information can be used to establish the insurer's failure to

act in good faith. Extensive litigation regarding the admissibility of reserve information often results. Published precedent establishing that, at least in some circumstances, reserve information is relevant and admissible in an insurance bad faith action will benefit the public by reducing the need for repeated litigation over this issue.

The guidance *Greene* provides regarding the admissibility of reserve information in an insurance action for breach of the implied covenant of good faith and fair dealing would benefit the public.

Finally, clarification regarding the evidence necessary to establish the cost of asbestos abatement is also an issue of public importance. Injury from asbestos, and the importance of limiting a person's harmful exposure to asbestos, are issues of paramount importance to the public. The undersigned in aware of no California case which establishes the guidelines for proving the cost to abate asbestos. Nor is there any published opinion which states whether an expert must be a "Certified Asbestos Consultant" in order to give an opinion regarding the cost to remediate asbestos. Because asbestos abatement, and its associated costs, are important issues, publication of *Greene* will greatly assist litigants and the public facing this issue in the future.

Accordingly, because *Greene* establishes or modifies new rules of law, and because the issues it addresses have widespread importance to the public at large, the undersigned respectfully requests that this court order the *Greene* to be published.

Respectfully,

Amy Bach, Esq.
United Policyholders