united policyholders
AN INSURANCE CONSUMER EDUCATION ORGANIZATION

December 10, 1999

The Honorable Chief Justice and
Honorable Associate Justices
Supreme Court of California
350 McAllister Street, Room 1295
San Francisco, CA 94102-3600



Re: Kuwahara v. 20th Century Insurance, S083217
Amicus letter lodged in support of review.

Dear Chief Justice George and Associate Justices:

United Policyholders, a nonprofit corporation dedicated to educating bench, bar, and public-at-large about the policyholder perspective on important insurance issues, respectfully requests that this Court grant the Petition for Review of Kuwahara v. 20th Century Insurance ["Kuwahara"].

Kuwahara raises two issues about the timeliness of a suit brought against a property insurer by a homeowner who was one of the many covered victims of the Northridge earthquake. Ms. Kuwahara's causes of action for breaches of contract and implied covenant were dismissed on a technical, limitation of action ground, despite the fact that any purported want of timeliness was caused by the insurer's inadequate investigation and misrepresentations to her about her claim. The issues presented here need to be addressed by this Court because there are many policyholders like Ms. Kuwahara who, through no fault of their own, are denied indemnification for covered claims on just such technical grounds. United Policyholders feels strongly that both issues presented by Ms. Kuwahara justify granting review.

The first issue is already under review in Vu v. Prudential Property & Casualty Ins., S078271 ["Vu"] [(9th Cir. 1999) 172 F.3d 725]; and the second issue needs this Court's attention because it concerns the conflicts between Kuwahara and another opinion from the Courts of Appeal, Spray, Gould & Bowers v. Associated International Ins. ["Spray, Gould"] (1999) 71 Cal.App.4th 1260.

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

**First issue: the Vu issue currently on review**

Vu's issue turns on the applicability of a key holding in Neff v. New York Life Ins. ["Neff"] (1947) 30 Cal.2d 165, that an insurer is not estopped from invoking a *statute of limitation* as an affirmative defense even where the insured relied to her detriment on the insurer's inadequate investigation and misleading misrepresentations of non-coverage. In Kuwahara, 20th Century invoked a *contractual limitation* of action to deny Ms. Kuwahara her policy benefits.

**Second issue: conflicts between Kuwahara and Spray, Gould**

The second issue arises from conflicts between Kuwahara and last spring's Spray, Gould opinion. Spray, Gould held that an insurer's failure to follow the Insurance Commissioner's regulations that require "the insurer to inform a claimant insured on time limits pertaining to the claim, may provide the basis of an estoppel against the insurer's assertion of a *contract limitations* defense." (Spray, Gould, supra, 71 Cal.App.4th at p. 1263; emphasis supplied.)

The conflicts between Kuwahara and Spray, Gould include Kuwahara's disregard of Spray, Gould's holding on estoppel, and Kuwahara's characterization of the contractual limitations defense as a statute of limitations defense. Kuwahara did not completely ignore Spray, Gould, citing it to invoke the "appreciable damage" rule in determining "inception of the loss." (Kuwahara, Slip Opinion, at pp. 8-9.) Unfortunately, this cite to Spray, Gould, Kuwahara's only one, does not discuss Kuwahara's conflicts with Spray, Gould.

Ms Kuwahara's second issue takes an overview of the conflict on estoppel by asking what the insurer must do to make any denial effective. If 20th Century's failure to comply with the Insurance Commissioner's regulations invalidates the insurer's purported denials, the limitation of action remained tolled under Prudential-LMI Commercial Ins. v. Superior Court ["Prudential-LMI"] (1990) 51 Cal.3d 674, and Ms. Kuwahara's suit was timely.

**Ins.C.§2071's contractual limitation of action is optional**

The Vu issue can be seen as part of an on-going tension between Neff and Bollinger v. National Fire Ins. ["Bollinger"] (1944) 25 Cal.2d 399. Although Neff tightly circumscribed Bollinger's reach (Neff, supra, 30 Cal.2d at p. 174), Bollinger seems to have fared better than Neff in more recent insurance law decisions.

One distinction between Neff and Bollinger is that they address different limitations of action. The limitation of action in Neff is the 4-year *statute of*

*limitation* on a written contract, CCP § 337(1). (Neff, supra, 30 Cal.2d at p. 169.) The limitation of action in Bollinger is the *contractual limitation of action* authorized by Ins.C.§2071, the standard form fire insurance policy. (Bollinger, supra, 25 Cal.2d at pp. 401, 407.) However, the greatly shortened limitation permitted by Ins.C.§2071 is not mandatory -- that is, statutory -- because Ins.C.§2070 allows policy terms more favorable to the insured than those set forth in Ins.C.§2071.

When Kuwahara supports its denial of estoppel with a cite to Neff, it also cites to Love v. FIE (1990) 221 Cal.App.3d 1136. (Kuwahara, Slip Op. at p. 14.) Love, like Neff, is a statute of limitations case, not a contractual limitation of action case. (Love, supra, 221 Cal.App.3d at pp. 1143-1144, fn. 4.)

It may well be, as United Policyholders believes, that Neff and Love are wrong to preclude estoppel to assert a statute of limitations defense when the insurer has misinformed the insured about benefits under the policy. However, Kuwahara (and Vu) might possibly be resolved without addressing this issue if there is a meaningful difference between contractual and statutory limitations of action.

**The contractual limitation of action is just a policy term**

Although the equitable tolling doctrine of Prudential-LMI undeniably tolls both contractual and statutory limitations of action, the specific fact setting of Prudential-LMI involves only the contractual limitation of action authorized by Ins. C. § 2071. (Prudential-LMI, supra, 51 Cal.3d at p. 678.) Prudential-LMI does not mention Neff, but does rely on Bollinger:

> We emphasized in Bollinger that the purpose of a shortened limitation period was to obtain the advantage of an early trial of the matters in dispute and to make more certain and convenient the production of evidence on which the rights of the parties depended, and not to achieve a technical forfeiture of the insured's rights by enforcing the *limitation provision* when the insured has given timely notice of a claim to his insurer. ([Bollinger, supra, 25 Cal.2d] at. p. 407)

(Prudential-LMI, supra, 51 Cal.3d at p. 691; emphasis supplied.)

Bollinger has also been invoked as authority by the Arizona Supreme Court in holding that an insurer must show prejudice before invoking the contractual limitation of action, just as it must before denying policy benefits for late notice.:

> " ... The short statutory limitation period in the present case is the result of long insistence by insurance companies that they have additional protection

> against fraudulent proofs, which they could not meet if claims could be sued upon within four years as in the case of actions on other written instruments."
>
> Bollinger [supra, 25 Cal.2d at ... [p.] 407] ... . Thus it appears that by permitting insurance companies to shorten the limitation period, the legislature intended to allow them to protect themselves from fraudulent claims, not to relieve them from patently just ones.

(Zuckerman v. Transamerica Ins. ["Zuckerman"] (1982) 133 Ariz. 139, 650 P.2d 441, 445.) Windt writes that Zuckerman's holding, "being based upon the principle of adhesive contracts ..., has a great deal to be said for it." (Alan D. Windt, Insurance Claims & Disputes, 2nd Ed. (1996), § 9.03, Vol. II, p. 37.). Apparently, Zuckerman has never been raised or discussed in any citeable California case.

If this Court wants to harmonize Bollinger and Neff, it might consider giving distinct treatments to distinct statutory and contractual limitations of action.

## Conclusion

The Northridge earthquake generated so many claims in such a short period of time that it undoubtedly placed great demands on the insurers' claims-handling resources. But it is precisely because earthquake damage is often difficult to evaluate and remedy that insurers must be particularly diligent in their investigations and sensitive to the vulnerability of their insureds. Insurers should be ever-vigilant against misleading property-owners about the scope of loss and the availability of indemnification. It is conceivable that the shear volume of claims could contribute to an illusion of impunity for those insurers who might place their own interests above those of their insureds by, for example, conducting inadequate investigations (Prudential-LMI, supra, 51 Cal.3d at p. 692) and failing to look for grounds for coverage as well as denial (Mariscal v. Old Republic Life Ins. (1996) 42 Cal.App.4th 1617, 1624).

Policyholders who buy earthquake insurance pay a high, supplemental premium for that special coverage. It would be especially unjust to permit a technical and contractual policy provision to truncate the insureds' right to a trial on the merits of claims made under this expensive, special coverage. It would also tilt the playing field against conscientious insurers. The following Court of Appeal observation about obeying claims practices regulations applies generally to all claims practices:

> Like the commissioner's Fair Claims Settlement Practices Regulations, this decision will hopefully help to insure that valid claims will not be lost by an

> unusually short limitations period. The commissioner's regulations establish the standard of conduct for insurers in California. Insurers who flout the regulations have no right to gain a competitive edge on insurers who scrupulously follow the regulations and faithfully discharge their obligations to their insureds. Insurers who follow the law should not be put at a competitive disadvantage, particularly at the expense of insureds who may have valid claims.

(Spray, Gould, supra, 71 Cal.App.4th at p. 274.) Almost a half-century ago this Court observed that "the primary function of insurance is to insure." (Bollinger, supra, 25 Cal.2d at p. 405.) It would be peculiar indeed for California insurance law to discourage conscientious insurers from insuring, by providing an incentive to mishandle claims.

For the foregoing reasons, and such others as are set forth in the Petition and any other letters in support, United Policyholders respectfully requests that this Court grant review of Kuwahara v. 20th Century Insurance.

Respectfully submitted,

/s/

James T. Linford [SBN 104639]
Counsel for United Policyholders

Attached: Proof of Service
Enclosed: 13 copies

# *PROOF OF SERVICE*

I am an active member of the State Bar of California and have today properly served copies of the foregoing "Amicus letter lodged in support of review" of Kuwahara v. 20th Century Insurance Co., S083217, to the following:

**Court of Appeal**

Clerk [B122443]
California Court of Appeal
Second District, Division 5
300 South Spring Street
Second Floor, North Tower
Los Angeles, CA 90013

**Trial Court**

Clerk [BC162802] on behalf of
The Hon. J. Michael Byrne, Judge
Los Angeles Co. Superior Court
111 North Hill Street
Los Angeles, CA 90012-3117

**Attorneys for Petitioner Kuwahara**

Glen R. Kantor
Lisa S. Kantor
GRUBER & KANTOR
15821 Ventura Blvd, Suite 600
Encino, CA 91436

**Attorneys for 20th Century Insurance:**

Denis J. Moriarty
Thomas N. Charchut
HAIGHT BROWN & BONESTEEL
1620 - 26th Street, Suite 4000 North
Santa Monica, CA 90406-0680

San Francisco, California
December 10, 1999

/S/

James T. Linford
Attorney at Law
[SBN 104639]