

DEPARTMENT OF INSURANCE

Legal Division, Compliance Bureau - San Francisco
45 Fremont Street, 21st Floor
San Francisco, CA 94105



Jerry L. Whitfield
Assistant Chief Counsel
TEL: 415-538-4231
FAX: 415-904-5490
E-Mail: whitfieldj@insurance.ca.gov
www.insurance.ca.gov

April 8, 2004

Presiding Justice
Court of Appeal of California
First Appellate District
Division Three
350 McAllister Street
San Francisco, California 94102-3600

Re: *Anne Marselis v. Allstate Insurance Company*
Civil No. A100860

**APPLICATION FOR LEAVE TO JOIN, IN PART, IN THE AMICUS CURIAE BRIEF
OF UNITED POLICYHOLDERS AND LETTER ON BEHALF
OF APPELLANT ANNE MARSELIS**

John Garamendi, the duly elected California Insurance Commissioner,¹ requests to join in the amicus brief of United Policyholders to the extent that it discusses the application of the decisions in *Prudential-LMI v. Superior Court* (1990) 51 Cal.3d 674, and *Aliberti v. Allstate Insurance Co* (1999) 74Cal.App.4th 138.

However, in discussing *Aliberti*, the amicus brief of United Policyholders may misstate the record with regard to the timing of an actual dispute between the insured and insurer in this case. The Commissioner does not join in the statement of the facts in that regard.

It appears from the record that the insured, her contractor and a company adjuster negotiated the payment of a sum certain on the claim, and that this amount was paid. The insurer was "silent" thereafter. More than a year after the claim payment was made the insured re-contacted the company regarding her related losses. There is no issue of delayed discovery.

¹The Insurance Commissioner's legislative mandate is to protect the public and to maintain a financially-sound insurance marketplace fair to both policyholders and insurers (Ins. Code sections 790 et seq and 12919 et seq.).

On this record, it is the Commissioner's position that a continuing dispute is not a prerequisite to the application of the holding in *Prudential-LMI*. What the parties may have thought, said, done or not done after the payment was made on the claim is irrelevant to a determination of the issue. The objectification of the subjective conduct or non-conduct of the parties serves no purpose. What is needed to end the period of equitable tolling, and to resume the running of the suit limitation period of the policy, is the insurer's unequivocal written notice to the insured that it has paid all that it is going to pay and that the company considers the claim closed.

In considering and applying the holding of *Prudential-LMI* there is no reasonable basis for distinguishing a situation where an insurer pays something, from one where an insurer pays nothing. The goal in each instance is finality, and that goal may easily be achieved by the service of an unequivocal written notification that the insurer will do nothing, or do nothing more. "Doing so places little or no burden on the insurer, which obtains in return the certainty that the equitably tolled period has ended." 74 Cal.App.4th at 149.

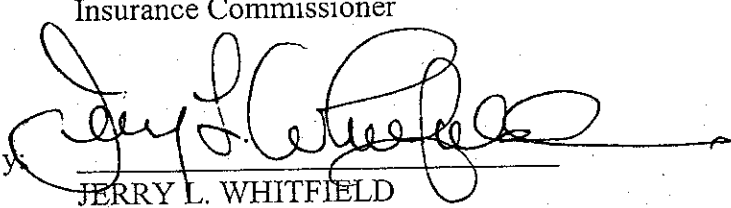
In addition to providing certainty to the parties, a written notification requirement would promote judicial economy. As both the facts of this case and *Aliberti* make clear, the time of both trial and appellate courts could be used to better purposes than divining the conduct of insurers and insureds.

The Insurance Commissioner respectfully requests that the court allow the Insurance Commissioner to join as requested, and that the court accept this correspondence for filing in this matter.

Respectfully submitted,

JOHN GARAMENDI
Insurance Commissioner

By:


JERRY L. WHITFIELD
Assistant Chief Counsel
California Department of Insurance

PROOF OF SERVICE
Anne Marselis v. Allstate Insurance Company
Civil No. A100860

I am over the age of eighteen years and am not a party to the within action. I am an employee of the Department of Insurance, State of California, employed at 45 Fremont Street, 19th Floor, San Francisco, California 94105. On April 8, 2004, I served the following document(s):

**APPLICATION FOR LEAVE TO JOIN, IN PART, IN THE AMICUS CURIAE BRIEF
OF UNITED POLICYHOLDERS AND LETTER ON BEHALF
OF APPELLANT ANNE MARSELIS**

on all persons named on the attached Service List, by the method of service indicated, as follows:

If **U.S. MAIL** is indicated, by placing on this date, true copies in sealed envelopes, addressed to each person indicated, in this office's facility for collection of outgoing items to be sent by mail, pursuant to Code of Civil Procedure Section 1013. I am familiar with this office's practice of collecting and processing documents placed for mailing by U.S. Mail. Under that practice, outgoing items are deposited, in the ordinary course of business, with the U.S. Postal Service on that same day, with postage fully prepaid, in the city and county of San Francisco, California.

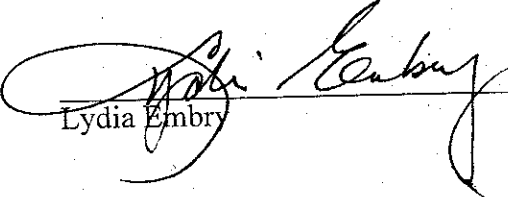
If **OVERNIGHT SERVICE** is indicated, by placing on this date, true copies in sealed envelopes, addressed to each person indicated, in this office's facility for collection of outgoing items for overnight delivery, pursuant to Code of Civil Procedure Section 1013. I am familiar with this office's practice of collecting and processing documents placed for overnight delivery. Under that practice, outgoing items are deposited, in the ordinary course of business, with an authorized courier or a facility regularly maintained by one of the following overnight services in the city and county of San Francisco, California: Express Mail, UPS, Federal Express, or Golden State overnight service, with an active account number shown for payment.

If **FAX SERVICE** is indicated, by facsimile transmission this date to fax number stated for the person(s) so marked.

If **PERSONAL SERVICE** is indicated, by hand delivery this date.

If **INTRA-AGENCY MAIL** is indicated, by placing this date in a place designated for collection for delivery by Department of Insurance intra-agency mail.

Executed this 8th day of April 2004, at San Francisco, California. I declare under penalty of perjury under the laws of the State of California that the above is true and correct.


Lydia Embry

SERVICE LIST
Anne Marselis v. Allstate Insurance Company
Insurance Company
Civil No. A100860

<u>Name/Address</u>	<u>Method of Service</u>
Clerk California Supreme Court 350 McAllister Street, Room 1295 San Francisco, CA 94102 (5 copies)	U.S. Mail
The Honorable Henry Needham, Jr. Department 30 Alameda County Superior Court U.S. Post Office Building 201 13th Street Oakland, CA 94612	U.S. Mail
William Green, Esq. Delfino Green & Green 1010 B Street, Suite 320 San Rafael, CA 94901	U.S. Mail
Michael Barnes Jeffrey Butler Jonathan Eldan Sonnenschein Nath & Rosenthal LLP 685 Market Street, Sixth Floor San Francisco, CA 94105	U.S. Mail
Amy Bach, Esq. Executive Director, United Policyholders 42 Miller Avenue Mill Valley, CA 94941	U.S. Mail