

September 29, 2004

VIA FEDERAL EXPRESS

Chief Justice Ronald M. George
and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4783

Re: *Marselis v. Allstate Insurance*
California Supreme Court Case no. S127652
Amicus Letter in Support of Petition for Review

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

United Policyholders hereby submits this letter in support of the Petition for
Review in the above-entitled case for lodging with this Court.

INTEREST OF AMICUS CURIAE

United Policyholders, founded in 1991, is a national 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 on insurance claims for individual and commercial insureds, and UP actively monitors legal and marketplace developments affecting the interests of all policyholders. UP aids disaster victims by conducting educational programs in affected communities in coordination with the California Department of Insurance. In that context UP staff reviews claim-related documentation including denial letters and letters accompanying claim payments.

UP submits *amicus curiae* briefs in cases involving important insurance

principles that are likely to impact large segments of the public. Because a diverse range of policyholders throughout the United States communicate on a regular basis with UP, UP can provide current information on insurance matters to courts throughout the country.

NECESSITY OF REVIEW

This Court held in *Prudential-LMI v. Superior Court* (1990) 51 Cal.3d 674, that the one year limitation period for bringing an action on an insurance claim under Insurance Code section 2071 is equitably tolled from the time the insured gives timely notice of the claim until “the time the insurer formally denies the claim in writing.” 51 Cal.3d at 389. The question here is whether a similarly unequivocal statement in writing is necessary to end the period of equitable tolling when a claim is *paid*.

The Court of Appeal in *Aliberti v. Allstate Insurance Co.* (1999) 74 Cal.App.4th 138, applied *Prudential-LMI* in the context of a claim on which a number of substantial payments were made over time, but one aspect of which remained pending, according to the carrier, until the carrier orally denied it. The *Aliberti* court found that the oral denial was ineffective to end the period of equitable tolling, reasoning that this Court “meant what it said” in *Prudential-LMI*: only a written denial will do the job. 74 Cal.App.4th at 146.

The *Aliberti* court a policy reason for that requirement: an insurance company’s response to a claim may be ambiguous, and where that is so, the uncertainty can be dispelled

by requiring the insurer to deny a claim clearly and unequivocally in writing. Doing so places little or no burden on the insurer, which obtains in return the certainty of knowing that the equitably tolled period has ended.

That reasoning is equally whether the insurer's response claim includes payment or not. The facts of *Aliberti* and the instant case show that ambiguities may be created either way. Both here and in *Aliberti*, the insurer made payments to the insured while continuing to contest aspects of the claim, showing that no clear line can be drawn between denial and payment. In the course of the post-disaster insurance-claim education programs UP sponsors, the organization's staff has reviewed untold numbers of claim documents, including letters from carriers to insureds about their claims. In many such letters, the carriers leave it unclear whether the claim has been closed or remains open, apparently out of a concern to avoid the bad faith exposure that could result from definitively closing a claim.

The policy goals enunciated in *Aliberti* will be best served by a general rule holding that the period of equitable tolling remains open until the insurer informs the insured in writing and unequivocally that the insurer regards it as closed, whether by definitive denial or payment in full. Otherwise, "evidentiary conflicts" will not be "entirely eliminated" even in denial cases, because the parties may continue to contest whether the insurer's disposition of the claim in a particular case was a denial or a payment, or, as was arguably the case here and in *Aliberti*, something of each. That potential source of uncertainty can readily be eliminated only by extending the rule across the board.

The Court of Appeal in the instant case rejected the adoption of such a rule, and thereby interrupted the development of the law based on *Prudential-LMI*. This Court should grant review in order to complete the work it started in *Prudential-LMI*.

Respectfully submitted,

AMY BACH
ROBERT S. GERSTEIN

By: _____
ROBERT S. GERSTEIN

Chief Justice Ronald M. George
and Associate Justices
September 29, 2004
Page 4

Attorneys for Amicus Curiae
UNITED POLICYHOLDERS

PROOF OF SERVICE

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) ss.

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen (18) years and not a party to the within action; my business address is: 1717 Fourth Street #300, Santa Monica, CA 90401.

On September 29, 2004, I served the following described as: Amicus Letter in Support of Petition for Review on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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I am "readily familiar" with the firm's practice of collection and processing correspondence 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 Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.

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

Executed on September 29, 2004, at Santa Monica, California.

Christina Larson