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EMPOWERING THE INSURED

August 18, 2008

**VIA HAND DELIVERY AND OVERNIGHT MAIL**

The Honorable Chief Justice Ronald M. George
And The Honorable Associate Justices
Of The California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: *Medina v. Safe-Guard Products International, Inc.*, Fourth District Division Three, Case No. G038816

Dear Honorable Chief Justice Ronald M. George and the Associate Justices of the California Supreme Court:

United Policyholders respectfully submits this letter under Rule 8.1125(a) of the California Rules of Court requesting depublication by the California Supreme Court of *Medina v. Safe-Guard Products International, Inc.*, Fourth District Division Three, Case No. G038816. This letter is timely. The opinion was filed on June 19, 2008. The 30th day following June 19, 2008 was July 19, 2008 which is a Saturday. Therefore the opinion became final on July 21, 2008 pursuant to California Rule of Court 8.264(c) (1).

**Statement of Interest and Reasons Why Publication Should Not Be Granted**

United Policyholders is a non profit organization dedicated to integrity in the insurance system, educating the public on insurance issues, and protecting policyholder's rights. Founded in 1991, the organization is tax exempt under §501(c) (3) of the Internal Revenue Code. Foundation grants and donations support UP's work.

United Policyholders has a vital interest in ensuring that insurance laws, including licensing requirements, are enforced so that policyholders are protected. Insurance licensing requirements provide assurance to the public that they are purchasing insurance from companies that are



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solvent and subject to regulation.

The decision in *Medina v. Safe-Guard* threatens to undermine the enforcement of California's insurance licensing laws in two ways:

First, because the decision holds that purchasing unlicensed insurance does not in and of itself constitute "injury in fact", it will be much more difficult for private plaintiffs to bring actions under California's Unfair Competition Law against unlicensed insurers. The very consumers who are affected by the practice will be unable to bring suit, unless they can show an injury which is distinct from the purchase of the unlicensed insurance. Consumers will need to show an additional injury despite the fact that the Legislature, in enacting Insurance Code section 700, has already decided that the sale of unlicensed insurance is harmful.

Second, because the decision suggests in dictum that restitution is not available as a remedy for the unlicensed sale of insurance (but instead only rescission which requires that the unlicensed insurer get an offset for value provided), even public enforcement of insurance licensing laws could be severely undermined. According to the dictum in *Medina*, consumers will be entitled to *at most*, the difference in value between insurance from an unlicensed insurer and from a licensed one. Unlicensed insurers will be able to use *Medina* to argue that they should get to keep most of their illegally obtained premium revenue.

In *Californians for Disability Rights v. Mervyns LLC*, (2006) 39 Cal.4th 223, 232 this Court held that Proposition 64 could be applied retroactively because it did not change substantive law: "Nothing a business might lawfully do before Proposition 64 is unlawful now, and nothing earlier forbidden is now permitted. ***Nor does the measure eliminate any right to recover.*** ." (Emphasis added). *Medina* is completely contrary to this. It does eliminate a right to recover. An insured who has purchased unlicensed insurance may not sue based merely on that, but must show some other injury. Prior to *Medina*, it was the law in California that consumers who purchased unlicensed insurance could bring a UCL claim for restitution. *Stevens v. Superior Court*, (1999) 75 Cal.App.4th 594. That right to restitution is called into question, and instead insureds are limited to the remedy of recession. *Medina* therefore is contrary to *Mervyns'* holding about the scope of Proposition 64 and should be depublished.

**Facts and Procedural History**

Medina filed a lawsuit under Business & Professions Code section 17200 against Safe-Guard Products arising out of his purchase of a vehicle service contract from Safe-Guard. *Medina v. Safe-Guard Prods. Intl. Inc.*, (2008) 164 Cal.App.4th 105, 108. Medina argued that a vehicle service contract is an insurance contract and that therefore Safe-Guard had violated Insurance Code section 700 by selling insurance without a license. Medina argued that he had been injured by this because the contract was void under California law, and therefore worthless. *Id.*

The trial court dismissed the action after a demurrer to the Second Amended Complaint, holding that the plaintiff had not suffered "injury in fact" or "lost money or property" as required by Business & Professions Code section 17204. *Id.*

Medina appealed. The Court of Appeal affirmed. *Id.* at 116. The Court of Appeal discussed standing under Proposition 64, and held that Medina was not injured simply by virtue of purchasing unlicensed insurance, and instead would have needed to allege that he had been injured in some other way. *Id.* at 115. The Court of Appeal rejected Medina's argument that the contract was not enforceable, holding that the policyholder would be able to enforce that contract despite the insurer's unlicensed status. *Id.* at 112. The Court of Appeal suggested that while the contract may be voidable by the insured, the insurer would be entitled to payment for the value of the contract. Therefore, Medina would have needed to plead a cause of action for rescission, offering to restore the value provided by the unlicensed insurer, which he did not do. *Id.* at 112 n8.

The Court of Appeal's decision was filed on June 19, 2008. The decision became final on July 21, 2008, because the 30th day after the filing of the decision fell on a Saturday, July 19, 2008. A Petition for Review is pending before this Court.

**Medina's Holding That The Plaintiff Needed To Show Economic Injury Which Was Separate And Distinct From The Payment Of Money To An Unlicensed Insurer Is Inconsistent With Section 17200's Status As A "Borrowing" Statute And With Other California And Federal Cases On Injury And Causation**

In *Medina*, the Court of Appeal extensively discussed the injury in fact and causation requirements of Proposition 64. That discussion threatens to introduce confusion into the law, and therefore warrants depublication of the opinion. The Court of Appeal interpreted the injury and causation requirements of Proposition 64 and held that the fact that the plaintiff had paid money to an unlicensed insurer was not sufficient injury by itself to confer standing to sue. Instead, the Court of Appeal decision requires that a

plaintiff show some injury which is separate and distinct from the unlicensed sale of insurance.

This interpretation is troubling because it threatens to essentially abrogate the "unlawful" prong of Business & Professions Code section 17200. By virtue of the "unlawful" prong, section 17200 is a borrowing statute and is violated when other laws are violated. As this Court has said: "Section 17200 'borrows' violations from other laws by making them independently actionable as unfair competition violations." *Korea Supply Co. v. Lockheed Martin Corp.*, (1999) 29 Cal.4th 1134, 1143.

Courts interpreting Proposition 64 have recognized that the type of injury required must be analyzed with reference to the nature of the underlying statutory violation alleged. The California Court of Appeal recently held that violation of the Automobile Sales Finance Act (which requires written disclosure of automobile loan terms) can be the predicate for a section 17200 claim, even for customers who were given the required disclosures orally. *Lewis v. Robinson Ford Sales, Inc.*, (2007) 156 Cal.App.4th 359, 370-371. By clear implication *Lewis* held that the violation of the ASFA established injury, without anything more being necessary. Similarly, in *In re Diptotran XL Antitrust Litig.*, (N.D. Cal. 2007) 529 F.Supp.2d 1098, 1106 the court declined to impose a reliance requirement under Proposition 64, where the claims were brought under the "unlawful" prong of section 17200. By contrast, *Medina* suggests that there must be an injury which is separate from the violation of law which serves as the predicate for a UCL claim.

Federal courts, including the United States Supreme Court have long recognized that the "injury in fact" requirement of the United States Constitution can be met simply by showing that the defendant violated the plaintiff's legal rights, even if there was no injury other than the violation of those rights. *E,g., Warth v. Seldin,* (1970) 422 U.S. 490, 500: "The actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing."

Indeed, the only published federal appeals court decision to address the issue held that the unlicensed sale of insurance is by itself sufficient to confer injury in fact, as long as the underlying state law allows for restitution under such circumstances. *London v. Wal-Mart Stores, Inc.*, (11th Cir. 2003) 340 F.3d 1246, 1251-1252. In that case, the Eleventh Circuit held that where the defendant had sold insurance, but had failed to file the policy forms with the Florida Department of Insurance, the injury in fact requirement of Article III was met:

> Florida courts recognize paying consideration for an illegal contract as an injury per se. (citations omitted) Thus, by asserting that he was an innocent

> party to an illegal contract, London asserts the invasion of an interest legally protected by Florida's common law of contracts, and thereby obtains standing.

California law requires restitution to consumers who have purchased insurance from unlicensed insurers. Therefore, under *London*, there is injury in fact, because a consumer who has purchased unlicensed insurance has suffered the invasion of a legally protected right.

Even if it is argued that Proposition 64 imposes an economic injury requirement that goes beyond the requirements of Article III, that requirement ought to be met by alleging that the defendant has obtained money from the plaintiff unlawfully (such as through the unlicensed sale of insurance), and that therefore the plaintiff has a legal right to get that money back. If, as *Medina* apparently requires, the plaintiff must show an injury which is separate and distinct from the statutory violation, the unlawful prong of section 17200 will become meaningless.

**Medina's Discussion About The Available Remedies For The Unlicensed Sale of Insurance Creates Confusion And Interprets Proposition 64 In A Manner That Changes Substantive Law**

In *Medina*, the plaintiff's theory of standing was that an unlicensed insurance contract is void ab initio, and therefore, he had paid for insurance without receiving any actual coverage. The plaintiff did not allege that unlicensed insurance is worth less than licensed insurance. Instead, plaintiff's "injury in fact" under Proposition 64 was premised entirely upon the assumption that if he made a claim under the insurance, the defendant would not have to pay it.

The Court of Appeal disagreed, holding that under California law, an insurer who sells unlicensed insurance may not use that as a basis for voiding the insurance contract. That holding is not objectionable, and indeed is helpful to consumers who have been sold insurance by an unlicensed insurer.[1] However, the discussion of the Court of Appeal went much further, and called into question whether such consumers are entitled to restitution of premiums. The decision suggests that restitution is not available and the only potential remedy would be rescission with the insurer receiving an offset for the

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[1]Of course, if it turns out that an unlicensed insurer does not have sufficient reserves to pay claims, the theoretical enforceability of the contract will be cold comfort to the policyholder.

value provided by the insurance:

> Medina's complaint seeks restitution of money paid for his tire and wheel contract based on the idea that, as an insurance contract, the tire and wheel contract he purchased was ipso facto *void*. He did not request of the trial court, nor has requested of this court on appeal, leave to amend his complaint to allege that his contract was merely *voidable*, and thus he could seek rescission (as distinct from restitution). The idea of a rescission cause of action, of course, presents a number of thorny issues. Rescission requires an offer to *restore* benefits already received under the contract. (E.g., *Resure, Inc. v. Superior Court (1996) 42 Cal.App.4th 156, 167 [49 Cal. Rptr. 2d 354]*; *Civ. Code, § 1691* ["... to effect a rescission a party to the contract must, promptly upon discovering the facts which entitle him to rescind ... [¶] ... [¶] (b) Restore to the other party everything of value which he has received from him under the contract or offer to restore the same upon condition that the other party do likewise, unless the latter is unable or positively refuses to do so."].) In the context of an insurance contract, for example, how would an offer to restore benefits already received play out? Would it be a wash? Medina has already enjoyed a certain amount of *time* in which his tires and wheels were covered, and in which he had a thoroughly enforceable contract. He could only fully restore by paying the value of the coverage already received, which is either equal to the value of the premium paid, or, *at most*, arguably might be an amount discounted by the difference in the market value of coverage received from an unlicensed insurer and the value of the same coverage from a licensed insurer. And even if he did amend his complaint to allege just such a loss of value, what would be the impact of the amendment on his complaint as a class action, since any complaint for rescission as such might implicate more individual considerations not otherwise presented by a complaint for restitution for having received a void contract?
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> *Medina*, 164 Cal.App.4th 105,112 n8.

As the Court of Appeal acknowledges, limiting the remedy to rescission arguably requires that the unlicensed insurer get an offset for the value provided. There are a number of practical problems in terms of estimating that value. For example, the value provided might depend upon whether or not the insurer had sufficient reserves to pay potential claims. Insurance from an unlicensed insurer with sufficient reserves would arguably be worth more than insurance from an unlicensed insurer without sufficient reserves, and therefore the insurer would be entitled to a greater offset. By contrast, a licensed insurer

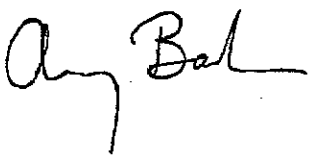
has been vetted by the California Department of Insurance to ensure that they have sufficient reserves, and meet other requirements. Under *Medina*'s proposed rescission remedy, a trial court would have to do the vetting that would have been done by the CDI had the unlicensed insurer complied with applicable law.

Before the passage of Proposition 64 and after the passage of Proposition 64, California courts have permitted claims under the UCL for restitution based on the unlicensed sale of insurance. *Stevens v. Superior Court*, (1999) 75 Cal.App.4th 594; *Wayne v. Staples, Inc.*, (2 Dist. 2006) 135 Cal.App.4th 466.

As this Court has held, Proposition 64 did not change the substantive law under the UCL, instead only imposing requirements for who may serve as a class representative. *Mervyns*, 39 Cal.4th at 232. However, if the above discussion in *Medina* is followed, it will work a substantive change in applicable law by requiring that both the named representative and the class are limited to the remedy of rescission under Civil Code section 1691. The discussion in *Medina*, which is unnecessary dicta, will be used by unlicensed insurers to argue that the remedy must be rescission, and that consumers cannot obtain rescission without offering to return the value which was allegedly conferred. Contrary to *Mervyns*, a right to recover will be eliminated.

Because *Medina* misconstrues the injury in fact and causation requirements of Proposition 64, and will unnecessarily impair the enforcement of insurance licensing laws, it should be depublished.

Respectfully Submitted,



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On Behalf Of United Policyholders