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August 29, 2008

The Honorable Chief Justice and Associate Justices
Supreme Court of the State of California
350 McAllister Street
San Francisco, California 94102

Re: **Response to Request for Depublication** (Rule 8.1125(b))
Medina v. Safe-Guard Products Int'l, Inc., 4th Dist., Div. 3, Case no. G038816

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

Pursuant to California Rule of Court 8.1125(b), Defendant Safe-Guard Products International, Inc. ("Safe-Guard") submits this response to the Requests for Depublication filed by United Policyholders ("UP") and the Consumer Watchdog ("CW"), both of which are dated August 18, 2008 and received by the California Supreme Court on August 19, 2008.

I. Statement of Interest and Grounds for Denying Request for Depublication

Safe-Guard is a party to the matters at issue in the Medina action and is interested in ensuring that it or affiliated companies are not sued for future claims made under California's Unfair Competition Law (the "UCL") that may be premised on alleged violations of regulatory law, which is enforced by the California Department of Insurance and other governmental entities, where the plaintiff has not suffered an injury in fact or lost money or property.

Neither the CW or the UP set forth any reasons why this opinion should be depublished. While both organizations argue that Medina was incorrectly decided (though they do not submit an amicus brief in support of the petition for review) and that Medina changes the substantive law or creates confusion, in truth, this case clarifies the law by making clear that plaintiffs cannot simply rely upon an alleged violation of insurance licensing laws to maintain a claim under the UCL without meeting the harm-standing requirements of the UCL. Because Medina provides clarification to existing development of the law, it should remain published.

II. Facts and Procedural History

Medina alleged that Safe-Guard sold various finance and insurance products ("F&I contracts") in California, which he contended were either vehicle service contracts or other forms of insurance subject to licensing and regulation by the California Insurance Commissioner. While Medina purported to bring class claims on behalf of all purchasers of each F&I product sold by Safe-Guard, Medina himself had only purchased a tire and wheel service agreement.

As grounds for his claims, Medina contended that Safe-Guard allegedly failed to comply with the licensing and pre-approval statutes set forth under the Insurance Code, generally, and the Vehicle Service Contract statutes, Cal. Ins. Code § 12800 et seq., specifically. Based upon this contention, Medina brought a single class claim under the UCL.

Critically, in bring his class claims, Medina did not allege any facts demonstrating that Safe-Guard's alleged failure to comply with these licensing and approval statutes caused him injury-in-fact or caused him to lose money or property. It is based upon the failure to allege facts demonstrating these base harm-standing requirements of the UCL, Safe-Guard demurred.

The trial court sustained Safe-Guard's demurrer on this ground. In sustaining Safe-Guard's demurrer, the trial court rejected Medina's argument that unlicensed sale of insurance satisfied the harm-standing requirements of the UCL because it resulted in harm *per se*. In granting Medina leave to amend the complaint, the trial court specifically advised plaintiff that he would need to allege facts demonstrating how Safe-Guard's alleged non-compliance with these licensing and approval statutes caused harm to him and the putative class.

Medina filed an amended complaint, but did not add any further allegations of fact demonstrating injury in fact or the loss of money or property. The operative complaint contained absolutely no allegations of fact demonstrating these harm-standing requirements. By way of example, Medina did not allege that he could not obtain the benefits she was owed under the tire and wheel agreement. Further, Medina did not allege that he was misled into purchasing the tire and wheel agreement. Finally, Medina did not allege that the agreement did not provide the benefits that he thought he would receive. Because the amended complaint was devoid of any allegations of fact demonstrating UCL's harm-standing requirements, the trial court sustained Safe-Guard's demurrer without leave to amend.

The Fourth District Court of Appeal, Division Three, affirmed this ruling on June 19, 2008. See Medina Safe-Guard Products International, Inc., 164 Cal. App. 4th 105 (20008). Medina has submitted with this Court a petition to review that decision on July 29, 2008.

III. Medina Was Correctly Decided and Should Not Be Depublished as it Clarifies Existing Law and its Applicability to the Insurance Industry

a. Medina Was Correctly Decided in Accordance with Proposition 64

The holding by the trial court and the decision by the California Court of Appeal logically follow from Proposition 64's imposition of new harm-standing requirements to bring a UCL claim. Now, in order to maintain a claim under the UCL, a plaintiff must have suffered an "injury-in-fact" and "lost money or property" as a result of the alleged unfair competition. Cal. Bus. & Prof. Code § 17204; see Branick v. Downey S&L Assn., 39 Cal. 4th 235, 240 (2006).

Based upon these new harm-standing requirements, Medina correctly stands for the proposition that a plaintiff cannot bring a UCL claim against a company that allegedly violates the licensing laws of California unless the plaintiff alleges facts meeting these requirements.

The CW argues that Medina was wrongly decided. In making this contention, however, the CW sets forth no legal or factual argument. Instead, it engages in hyperbole and merely contends that the Medina opinion "***suggests*** that there can never be real injury or harm from the unlicensed sale of insurance, *in itself*, and that it essentially a "no harm, no foul" practice." [CW, p. 3 (initial emph. added).] The CW mischaracterizes the import of this case.

Medina does not stand for this proposition that a plaintiff **can never** possibly allege any facts demonstrating "injury in fact" or "lost money or property" arising from a company's alleged unlicensed sale of insurance. Instead, it held that the plaintiff in this particular case **did not** in fact allege any facts demonstrating those harm-standing requirements. The Appellate Court in Medina did not foreclose the possibility that a plaintiff under different factual circumstances could meet the UCL's harm-standing requirements. As noted in Medina:

> "Medina has not alleged that he didn't want wheel and tire coverage in the first place, or that he was given unsatisfactory service or has had a claim denied, or that he paid more for the coverage than what it was worth because of the unlicensed status of Safe-Guard."
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> * * *
>
> "Here, there is no allegation that Medina *relied* on Safe-Guard's having a license as required by the vehicle service contract statutes, or that Safe-Guard's unlicensed status *caused* him to part with the money he paid for the tire and wheel contract."
>
> Medina, supra at 114-115.

It was because Medina did not allege facts demonstrating "injury in fact" or "lost money or property" that the trial court sustained Safe-Guard's demurrer to his complaint, not that

he or another plaintiff could not have alleged those facts under any circumstance. It is for the same reason that the Court of Appeal affirmed that decision. See Medina, supra at 114-115. This decision is in accordance with the express terms of the UCL and intent behind Proposition 64 to do away with private attorney general actions in which there is no injured plaintiff.

b. Medina Clarifies Existing Law

In attempting to show why Medina should be depublished, both the CW and UP highlight the very reasons why this decision must be published and citable as law.

Specifically, as pointed out by the CW and UP, the California Court of Appeal had issued two decisions in the last ten years that addressed a private plaintiff's ability to bring a UCL claim based upon a company's alleged unlicensed sale of insurance. [See CW, p. 3; UP, p. 7 (both citing Wayne v. Staples, 135 Cal. App. 4th 466 (2nd Dist. Div. 7 2006); Stevens v. Superior Court, 75 Cal. App. 4th 594 (2nd Dist. Div. 3 1999).] Both argue in their letters that the opinion in Medina affects a substantive change in the law set forth by these cases.

For instance, the CW argues that while "[p]rior case law firmly establishes that the sale of insurance without a license constitutes an unlawful business practice," Medina somehow disrupts these holdings because it "suggests (quite wrongly) that there is no 'injury in fact' "*because* of" the *unlicensed* status of the insurance company" and, therefore, would eliminate the ability enjoin such action pursuant to these cases. [CW, pp. 3-4.]

The UP, on the other hand, argues that Medina changes the "substantive law under the UCL," because the courts in Stevens and Wayne "have permitted claims under the UCL for restitution based on the unlicensed sale of insurance" and now, Medina purportedly eliminates the ability to obtain this relief in those types of cases. [UP, p. 7.]

Both of these arguments are overstated. With respect to the CW's critique, the Medina court simply held that a plaintiff must allege facts showing that he meets the harm-standing requirements imposed by Proposition 64 to state a UCL claim. This holding would not have created a change in any rule of law set forth in Stevens since, as specifically pointed out by the court in Medina, Stevens is a pre-Proposition 64 case. See Medina, supra at 115 n. 10. It is also curious how Medina changed any rule of law set forth in Wayne, because the court in that opinion did not address whether the plaintiff in that case met the harm-standing requirements.

With respect to the UP's critique, the court in Stevens specifically held that the plaintiff in that case had not properly plead grounds for "restitution" (see Stevens, supra at 598). Further, the court in Wayne did not address the availability of restitution at all. Accordingly, it is uncertain how Medina changed any law that was set forth in those cases on this restitution.[1]

[1] The UP also focuses on a single footnote and contends that Medina "***suggests*** that restitution is

Regardless, even if the critiques set forth by the CW and UP are true – that is, Medina changes the "substantive" law – those critiques are not grounds for depublication. To the contrary, they are grounds for publication of this decision. See California Rule of Court Rule 8.1110(c). As provided by the rules of court, a decision should be certified for publication if it (1) "establishes a new rule of law;" (2) "applies an existing rule of law to a set of facts significantly different from those stated in published opinions;" (3) "modifies, explains, or criticize with reasons given, an existing rule of law; or (4) "creates an apparent conflict in the law." Each of these criteria, according to the CW's and UP's arguments, would be met.

At a minimum, as reflected by the arguments set forth by the CW and UP, these cases create an ambiguity in the law as to whether a private plaintiff may bring a UCL claim for the alleged unlicensed sale of insurance without showing that such conduct caused injury as is now required by Proposition 64. The decision in Medina dispels this ambiguity and makes clear that such a plaintiff must now meet the harm-standing requirements of the UCL. See Medina, supra at 114. Because Medina clarifies the law and it "involves a legal issue of continuing public interest," it should remain published. See California Rule of Court Rule 8.1110(c)(4,6).

c. Other Arguments Do Not Warrant Depublication

The CW and UP set forth a number of other arguments explaining why Medina should be depublished. None of these arguments mitigate any of the multiple grounds that exist that justify publication of this case and, instead, bolster the need for publication of this decision.

For instance, both the CW and UP suggest that companies who allegedly sell insurance without a license can act with impunity. [CW, p. 4; UP, p. 7.] This is not a basis for depublication of an opinion and, in any event, is untrue. As the court recognized in Medina, the California Department of Insurance has substantial tools at its disposal to regulate this type of misconduct. See Medina, supra at 109 n.4 (noting that Insurance Code imposes a substantial fine (up to $100,000) and imprisonment for transacting insurance without a certificate of authority); see also Cal. Ins. Code § 12845 (imposing a fine up to $500,000 and imprisonment for failing to comply with the licensing requirements to sell a vehicle service contract).

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not available and the only potential remedy would be rescission with the insurer receiving an offset for the value provided by insurance." [UP, pp. 5-6 (emphasis added).] In reading this footnote, the Medina court made no "suggestion" that "restitution" could not theoretically be available under the UCL, if a plaintiff in fact alleged facts that met the harm standing requirements of the UCL. The Medina court's discussion of "rescission" discussed a possible amendment that the plaintiff could have made to get the relief that he apparently desired. The Medina court, however, stated that this discussion is "we stress, academic to this particular appeal and therefore can await another day." See Medina, supra at 112 n.8. Further, the Medina court noted that while this option was available, but not sought by the plaintiff. See id.

The UP also argues that Medina must be depublished because under that case a plaintiff must now "show an injury which is separate and distinct from the statutory violation" to bring a claim under the UCL." [UP., p. 5.] The CW echoes this sentiment by arguing that plaintiffs will now have to engage in a complicated analysis into rating to show injury in fact and that this decision imposes an "unworkable causation requirement." [CW, p. 4.]

These arguments are unavailing. While the UP takes issues with the fact that a plaintiff must now show injury that is separate from the alleged unlawful conduct, **that is precisely the point of the harm-standing requirements imposed by Proposition 64**. It is not sufficient to simply allege that a defendant has engaged in unlawful conduct. A plaintiff must have actually suffered an "injury in fact" and "lost money or property" because of that conduct. Alleging facts to support such harm is not (and should not be) a complicated analysis.

Further, Medina only imposes an "unworkable causation requirement" where the plaintiff attempts to bring a UCL claim where there is no harm or the harm is unrelated to the alleged misconduct. For instance, the CW suggests that is unfair or wrong that a plaintiff who received "unsatisfactory service," had "a claim denied," or "paid more than the coverage was worth" must now show that such conduct was the result of a defendant's unlicensed status to get relief. [CW, p. 4.] The CW even posits the question "Many *licensed* companies provide 'unsatisfactory service;' how could a consumer prove that such poor service was the direct result of an unlicensed status?" [CW, p. 4.]

These hypothetical arguments, on their face, are pure sophistry. If a person received "unsatisfactory service," had "a claim denied," or "paid more than the coverage was worth," that person's claim would not be based on the unlicensed status of a company. It would be based on the alleged misconduct and relief could be obtained on contract and tort principles and, if true, a plaintiff would have grounds for obtaining a remedy, even potentially under a UCL claim.

Further, the CW's contention that Medina distorts Proposition 64 standing requirements is incorrect. [CW, pp. 5-8.] Medina is consistent with the intent and purpose of Proposition 64.

Contrary to the CW's narrow characterization, Proposition 64 did not only intend to prevent actions by representative persons with no business dealings with defendant. Under the carefully crafted language of Proposition 64, a lawsuit based on an unlawful practice could not be initiated by a private individual unless the individual was actually injured and lost money or property. Unlawful practices that cause no injury or lost money or property are reserved for public prosecutors. This is confirmed by the ballot measure, in which it states that "This measure prohibits **any person**, other than the Attorney General and local public prosecutors, from bringing a lawsuit for unfair competition **unless the person has suffered injury and lost money or property**." [See Proposition 64, Official Title and Summary, as prepared by Legislative Analyst Office.] Medina merely confirms the intent and spirit of Proposition 64 by

refusing to allow plaintiff's claim of alleged illegality under the UCL since the alleged illegality (i.e. Safe-Guard's license status) did not cause him harm.

Finally, the CW's contention that Medina should be depublished because "it is very likely that confusion will result when this Court issues its own opinion(s)" in other matters pending before this Court that deal with Proposition 64 issues. [CW, pp. 9-10.] The prospect of "confusion" is not a basis for depublication. To the contrary, as noted above, the California Rules of Court recognize a need to have differing and potentially confliction opinions to assist in the development of the law. See California Rules of Court Rule 8.1110 (c)(1-5).

In any event, it is difficult to discern the significance of any "confusion" that may arise when this Court issues an opinion. None of the cases cited by CW apparently deal with the circumstances set forth in Medina or concern the ability to bring a claim based on the insurance licensing laws. Further, to the extent that there is any pronouncement by this Court affecting the broader standing principles of the UCL, that pronouncement would presumably dispel, not create, confusion that might exist in "conflicts" that may exist between appellate court decisions.

IV. Conclusion

For the reasons above, Safe-Guard respectfully requests that the requests for depublication submitted by the Consumer Watchdog and United Policyholders be denied.

Very truly yours,

SPENCER Y. KOOK
For the Firm

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: Barger & Wolen LLP, 633 West Fifth Street, 47th Floor, Los Angeles, California 90071-2043.

On **August 29, 2008**, I served the foregoing document(s) described as **RESPONSE TO REQUEST FOR DEPUBLICATION** on the interested parties in this action by placing [ ] the original [X] a true copy thereof enclosed in sealed envelope addressed as stated in the attached mailing list.

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[X] **BY MAIL**

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[X] **(STATE)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed at Los Angeles, California on **August 29, 2008**. .

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