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Via Hand Delivery

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

Re: RESPONSE TO REQUEST OF UNITED POLICYHOLDERS FOR DEPUBLICATION OF *Morris v. Paul Revere Life Ins. Co.*, (4th Appellate District, Division Three, June 12, 2003), Case No. G030567

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

1. INTRODUCTION

We are writing on behalf of The Paul Revere Life Insurance Company to respond to United Policyholders' request for depublication of the Court of Appeal's opinion in *Morris v. Paul Revere Life Ins. Co.* ("the *Morris* opinion").[1] The request should be denied. The Court of Appeal's analysis of the bad faith issue in this case and its conclusions about the uncertainties in the controlling case law prior to this Court's opinion in *Galanty v. The Paul Revere Life Insurance Co., 23 Cal.4th 368 (2000)*, are thoughtful, logical, and totally consistent with a long line of California case authority. Moreover, United Policyholders' request for

[1] Attached, for the convenience of the Court, is a copy of the *Morris* opinion, and all page cites to that decision are to the attached copy.

depublication mischaracterizes the Court of Appeal's rationale in this case, particularly that court's reference to the now unpublished California appellate decisions which supported Paul Revere's position. Essentially, United Policyholders attacks the *Morris* court for allegedly violating Rule 977 of the Rules of Court when all it did was simply reference this Court's own review, in *Galanty, supra* at 377, of the developing case law and the various California court decisions that had addressed the central coverage issue in this case. The *Morris* court did not, as United Policyholders suggests, rely upon these new unpublished decisions as precedent. Again, the *Morris* opinion contains an instructive and intelligent discourse on the "reasonableness" standard governing the conduct of insurers in this state and should remain published.

2. THE COURT OF APPEAL'S ANALYSIS OF THE "REASONABLENESS" OF PAUL REVERE'S COVERAGE POSITION IS ENTIRELY CONSISTENT WITH CALIFORNIA AUTHORITY

Numerous courts in California have held that bad faith liability cannot be imposed upon an insurer, as a matter of law, where there are uncertainties in controlling case law, and where that insurer's conclusions about the still developing case law are reasonable, though ultimately wrong. *E.g., Dalrymple v. United Services Auto. Ass'n*, 40 Cal. App. 4th 497, 520 (1995); *Opsal v. United Services Automobile Ass'n*, 2 Cal. App. 4th 1197, 1206 (1991). Consistent with this principle, the Court of Appeal in *Morris* began its analysis of Paul Revere's coverage position by first looking at whether there was any controlling California precedent prior to the *Galanty* opinion. The only published opinion, however, which even touched upon the key issue was a 1971 decision, *McMackin v. Great American Reserve Ins. Co.*, 22 Cal. App. 3d 428. While United Policyholders touts *McMackin* as the final word on the coverage issue in dispute, *i.e.*, whether the "prior manifestation" defense remains viable outside the two-year incontestability period proscribed by Insurance Code section 10350.2, even this Court reasoned that the *McMackin* court reached its conclusion "without useful discussion." *Galanty, supra* at 377. Further, as the *Morris* court acknowledged, "someone reading *McMackin* might well have considered" that court's holding on the incontestability issue *dicta* as it was "unnecessary to the decision." *Morris* opinion, p. 9.

In *McMackin*, the issue before the Court of Appeal was "whether substantial evidence supported the trial court's determination that plaintiff's disability stemmed from a particular work-related injury", *id.*, not whether, for purposes of applying the incontestability clause, there is a legitimate distinction between a disease which "existed" and one which had already "manifested" – the issue confronting Paul Revere and the trial court in *Morris*.

Given the "dearth" of California authority on the coverage issue and in order to place Paul Revere's conduct in context, the *Morris* court quite reasonably explored how other jurisdictions had dealt with the same issue and how other appellate courts in California had analyzed the issue during the relevant time frame, pre-*Galanty*. In doing so, the *Morris* court did not, as United Policyholders contends, violate Rule 977. Indeed, as noted in the Introduction, the Court of Appeal's references, at pages 4 and 9 of its opinion, to those now unpublished appellate decisions, were directly drawn from this Court's own discussion of those opinions in *Galanty, supra* at 377. As the *Morris* court accurately noted ***"according to the opinion in Galanty***,[2] the *McMackin dicta* had been disagreed with by at least two other Court of Appeals, including the lower court in *Galanty* itself." *Morris* opinion, p. 9. (*Emphasis added.*) And, the *Morris* court's reasoning that this split of opinion among the California Courts of Appeal, even if all were not published, serves as evidence that "the [coverage] issue was far from settled in our courts [pre-*Galanty*]", is simple common sense.

Of note, the Supreme Court has, in the past, cited to depublished opinions in discussing the historical development of the law at issue. Specifically, in *People v. Turner*, 50 Cal.3d 668, 703 n. 17 (1990), the Court cited to numerous (originally) published Court of Appeal decisions which addressed the use of prior felonies for impeachment at trial in the course of evaluating whether a "reasonable

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[2] The specific wording referenced from the *Galanty* case, *supra* at 377, is as follows:

> "[T]he court in *McMackin v. Great American Reserve Ins. Co.* (1971) 22 Cal.App.3d 428, 439-440 (99 Cal.Rptr. 227] decided the issue in the insured's favor, although without useful discussion. Conversely, courts have decided the issue in the insurer's favor in the case before us and in a case granted and held for this case (*Callahan v. Mutual Life Ins. Co.*)"

and competent" trial attorney reviewing those decisions would have moved to exclude "impeachment" priors at the time of the defendant's trial.

The *Morris* court's approach here was not materially different from that of the *Turner* Court. The only difference is that, in this case, the Court of Appeal referenced (originally) published Court of Appeal decisions in exploring whether the case law was settled at the time, or still evolving, and whether an insurer that took a coverage position endorsed by the panels of California appellate justices involved in those opinions acted "reasonably" in doing so.

In sum, the *Morris* opinion is not contrary to established California case law, and there is nothing in Justice Bedsworth's opinion that will lead to confusion on the part of policyholders, insurers or the lower courts..

For these reasons, the *Morris* opinion should remain published.

Respectfully submitted,

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For the Firm

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Enclosure

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