

ANDERSON KILL & OLICK, P.C.

September 25, 2000

To Honorable Ronald M. George, Chief Justice
and the Associate Justices
California Supreme Court
350 McAllister Street, Rm. 1295
San Francisco, CA 94102

Re: *Peerless Lighting Corp. v. American Motorists Ins. Co.*
First Appellate District, Case Nos. AO 82975, AO 83487, AO 84373
Alameda County Superior Court Case No. 762388-A

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

We are writing pursuant to California Rules of Court rule 14(b) to request that the Court grant Peerless Lighting Corporation's Petition for Review.

INTRODUCTION

This letter is submitted by United Policyholders.

United Policyholders is a non-profit corporation dedicated to educating policyholders about their rights and duties under their insurance policies. United Policyholders engages in charitable and educational activities by promoting greater public understanding of insurance issues and policyholder rights. United Policyholders' activities include organizing meetings, distributing written materials, and responding to requests for information from individuals, elected officials, and governmental entities. These activities are limited only to the extent that United Policyholders exists exclusively on donated labor and contributions of services and funds.

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Which of these is advertising?

Perfume – n. 1 A fragrant liquid, as one distilled from flowers or prepared by synthetic means.

2. A pleasing scent or odor.

Pheromone – n. 1. A chemical secreted by an animal that serves to communicate to another of the same species and elicit a specific behavioral response.

THE DUTY TO DEFEND HAS BEEN EMASCULATED?

This case is another example of the epidemic of cases pending in the California courts today in which insurance companies are refusing to defend their policyholders claiming that there is no coverage. Overwhelmingly, when insurance companies say “No” they win. Whether right or wrong a denial of the duty to defend is usually the final and conclusive answer. The phenomenon is known as “Insurance Nullification by Litigation”. Small claims, in particular, are forfeited. Most policyholders are unable or unwilling to become involved in a second bout of litigation. Policyholders are shy of litigation because it is expensive, uncertain, foreign and daunting. Insurance companies in this state have effectively overruled *Gray v. Zurich Ins. Co.*, (1966) 65 Cal.2d 263.

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BRANDEIS BRIEF

This letter is submitted in part in the form of a Brandeis brief. "Brandeis brief" comes from Louis D. Brandeis (1856-1941), who introduced evidence of social and economic factors in his arguments before the Supreme Court of the United States in the case *Muller v. Oregon*; it is a brief containing information and statistics relevant to social and economic problems in addition to arguments of law and fact. See, Merriam-Webster's Dictionary of Law (1996).

PREVIOUS INSURANCE INDUSTRY LITIGATION POSITION

Enclosed are certified copies of briefs filed by prominent insurance companies and their equally prominent counsel in California courts with respect to the duty to defend. Each one of these briefs indicates that the duty to defend attaches if there is a "possibility" that the allegations of the complaint fall within the coverage of the policy. This Court can take judicial notice of briefs filed in California.

These briefs show that insurance companies have told the courts of the state that there is a duty to defend if there is a possibility of coverage. Possibility of coverage is a less onerous test than potential for coverage. Without getting into the intent of this Court in the Gray case the language change from "possible" to "potential" reflects a hardening of the attitude of insurance company claims handlers.

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1. See Respondent's [Maryland Casualty Company] Brief in Maryland Casualty Company v. National American Insurance Company of California, No. D020940 (Cal. Ct. App.) dated October 10, 1994. At pp. 4-7 the insurance company states:

V.

**SUMMARY JUDGMENT WAS PROPERLY
GRANTED AND SHOULD BE AFFIRMED**

**A. NAICC'S POLICY DEFENSES DID NOT
PRECLUDE SUMMARY JUDGMENT**

Underlying its opposition to MARYLAND's motion is NAICC's argument that it may avoid the duty to defend its insured because its policy contains certain exclusions and/or defenses. The mere existence of policy exclusions or defenses does not negate the duty to defend. The California Supreme Court has recently addressed this issue in *Montrose Chemical Corporation v. Superior Court* (1993) 6 Cal.4th 287, 24 Cal.Rptr.2d 467. The Montrose Court specifically found that where the possibility of coverage under the policy exists, summary judgment on the issue of duty to defend is appropriate. The court noted that to defeat the duty to defend, extrinsic evidence submitted by the insurer must eliminate the possibility of coverage, not merely place in dispute whether there would eventually be a determination of coverage under the policy. *Id.*, p. 304." (underscoring supplied)

2. In a Reply to Plaintiffs' Opposition to Motion for Summary Judgment dated December 21, 1998 filed in Freedom Trust, Federated Holdings Limited v. Chubb Group of Ins. Co., et al., No. 97-1501-DDP (SHx). (United States District Court, CA), at pp. 6-7 see the statements referring to the "possibility of duty to indemnify".

"Accordingly,

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[A]ny favorable ruling obtained by the insureds may be "ephemeral" because the insurer can later "at any time" demonstrate that no duty to defend exists because there is no possible duty to indemnify. An insurer's duty to defend continues only so long as the possibility of duty to indemnify remains alive. Once that possibility is extinguished by court order, the duty to defend ceases. Whenever the insurer can demonstrate no possibility of a duty to indemnify, the insurer is entitled to terminate of its duty to defend under the "substantive law" of insurance applied to the standard CGL language. Liberty Mutual Ins. Co. v. Superior Court, supra, at p. 623. (Underscoring supplied)

3. Again, in Reply to Plaintiffs' Opposition to Motion for Summary Judgment dated December 1, 1997, filed in Freedom Trust, Federated Holdings Limited v. Chubb Group of Ins. Co., et al., No. 97-1501-DDP (SHx). (Dist. Ct. CA), at p. 3. The insurance company states:

Plaintiffs erroneously construe Home Indemnity Co. v. Leo L. Davis, Inc., 79 Cal.App.3d 863, 869 (1978). Instead, the Court in Home Indemnity Co., held that a policy should be constructed to provide coverage only when reasonably possible." Id. at 869. (Underscoring supplied)

Also enclosed is a letter from Crosby, Heafey, Roach & May [Pacific Indemnity Company] to The Honorable Malcolm M. Lucas and The Honorable Associate Justices of the California Supreme Court. Montrose Chemical Corporation v. Admiral Insurance Company, No. BO-48757 (Cal. App. Ct.) dated April 21, 1992 stating to this Court:

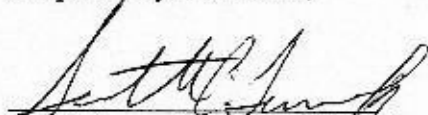
As California law has long provided, if there is a reasonable possibility that the allegations of the complaint fall within the coverage of the policy, a duty to defend is owed. (Underscoring supplied)

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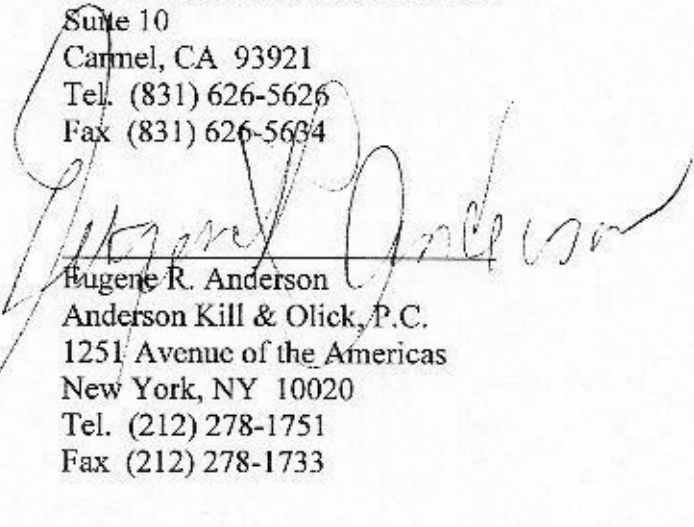
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The focus of insurance coverage disputes in California has changed from "coverage" to "duty to defend". When an insurance company says "No" that is the final and conclusive answer for nearly all policyholders because litigation is too expensive, too uncertain, and too daunting.

Respectfully submitted,



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Of Counsel
Amy Bach

PROOF OF SERVICE

The undersigned declares:

I am a citizen of the United States. I am over the age of eighteen years and not a party to the within above-entitled action; my mailing business address is 1251 Avenue of the Americas, New York, NY 10020.

I am familiar with this office's practice whereby mail is deposited in the United States post office in the City and State of New York.

On September 25, 2000, I served the within letter

on the parties in said action by placing a true copy thereof enclosed in a sealed envelope in the designated area for outgoing mail addressed as follows:

SUPREME COURT OF CALIFORNIA
Room 100, Library & Courts Building
Sacramento, CA 95814
(ORIG. + 1)

COURT OF APPEAL (1 copy)
First Appellate District, Division Three
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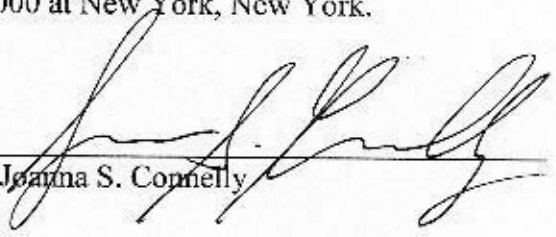
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42 Miller Avenue
Mill Valley, CA 94941

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

Executed on September 25, 2000 at New York, New York.


Joanna S. Connelly

Sworn to before me on this
25th day of September, 2000


NOTARY PUBLIC

MARIE ZITO
Notary Public, State of New York
No. 60-4749793
Qualified in Westchester County
Term Expires January 31, 2002