

January 21, 2014

Honorable Tani Gorre Cantil-Sakauye
Chief Justice and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

**Re: Request for Depublication of *Stephens & Stephens XII, LLC v. Fireman's Fund Ins. Co.*
A135938; A136740, Certified for Partial Publication November 24, 2014
231 Cal.App.4th 1131, modified at 231 Cal.App.4th 1437d.**

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

Persuant to California Rule of Court 8.1125, United Policyholders ("UP"), respectfully requests that the Court depublish the decision in *Stephens & Stephens XII, LLC v. Fireman's Fund Insurance Co.*, A135938; A136740, Certified for Partial Publication November 24, 2014 (hereinafter "*Stephens*"). As a non-profit public interest advocacy organization dedicated to protecting the rights of insurance consumers in the state of California, UP strongly believes that the decision in *Stephens* contains legal errors under California law with respect to the distinction between contract and tort damages. If left published in its current form, the decision will likely have an adverse impact on California insurance consumers.

Why *Stephens* should be Depublished

The issue in *Stephens* is whether an insurer's improper conduct during claim the process, that causes a delay or makes an insured's compliance with certain policy requirements difficult or impossible, excuses an insured from a time requirement imposed in the policy to repair or replace damaged or stolen property. The Court of Appeal answered this question in the affirmative, yet improperly awarded conditional contract remedies in a tort case.

Procedural History

In *Stephens*, the insured submitted a claim to its insurer, Fireman's Fund, for damage and loss sustained due to burglary of the insured's commercial property. Due to a disagreement about whether the damage and loss occurred during the policy period, Fireman's Fund ultimately denied the claim after five years of delay. The insured, Stephens, sued to recover replacement cost value (the price it would need to pay to repair or replace damaged or stolen property). Stephens never sought depreciated (actual cash) value. (See Opn. at 1-2)

At a jury trial, Stephens established that after "ultimately fruitless discussions about reimbursement for the damage" no repairs or payment were made (See Opn. at 8). In a special verdict, the jury found that Fireman's Fund failed to make payments owed under the policy. Despite the fact that Stephens had not made the repairs, the jury found that Stephens had performed its material obligations under the policy and awarded \$2,100,293 in replacement cost. Fireman's Fund moved successfully for JNOV. (See Opn. at 4).

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Stephens brought the appeal on the theory that the JNOV could not stand due to the substantial evidence supporting the jury's verdict. See *Taylor v. Nabors Drilling USA LP* (2014) 222 Cal.App.4th 1228, 1237; Opn. At 12). UP filed an *amicus curiae* brief that discussed the public policy reasons for allowing insureds to recoup replacement cost after the policy deadline (in this case and many others, 180-days) when the insurer's conduct contributes to or results in a delay. (See <http://uphelp.org/stephens-v-firemans-fund-insurance-company>). The Court of Appeal agreed and awarded a conditional judgment against Fireman's Fund for the replacement cost value only if Stephens conducts the repairs.

With respect to the issue of whether the doctrine of prevention excuses Stephens' failure to repair the insured property within the period required under the policy, the *Stephens* decision is legally sound. Relying largely on black-letter contract law, the Court of Appeal held that Stephens' performance or lack thereof was "materially excused" by Fireman's Fund's "delayed resolution and denial of the claim." (See Opn. At 16; see also *Jacobs v. Tenneco West, Inc.* (1986) 186 Cal.App.3d 1413, 1417 ("Where a party's breach by non-performance contributes materially to the non-occurrence of a condition of one of his duties, the non-occurrence is excused) (citing the Restatement (Second) of Contracts, section 245).

Additionally, the Court of Appeal devoted considerable discussion to the doctrine of estoppel, relying on *City of Hollister v. Monterey Ins. Co.* (2008) 165 Cal.App.4th 455, to find that Fireman's Fund's conduct was akin to a breach by non-performance, thereby excusing Stephens' failure to repair within the 180-day deadline. The Court of Appeal also discussed a line of out-of-state cases that reached a similar result and were cited in UP's *amicus curiae* brief. See, e.g., *Pollock v. Fire Ins. Exchange* (1988) 167 Mich.App 415 [423 N.W. 2d 591]; *Bailey v. Farmer's Union Co-op Ins. Co.* (Neb.App. 1992) [498 N.W.2d 591]; *Ward v. Merrimack Mut. Fire Ins. Co.* (2000) 332 N.J. Super 515, 753 A.2d 1214; *Rockford Mut. Ins. Co. v. Pirtle* (Ind.App. 2009) 911 N.E.2d 60; and *D&S Realty v. Markel Ins. Co.* (2012) 284 Neb. 1 [816 N.W. 2d 1].

Legal Error

However, the Court of Appeal's decision goes beyond *City of Hollister* and other well-reasoned decisions insofar as it applies procedural defenses from "good faith" cases, e.g., *D&S Realty v. Markel Ins. Co.*, *supra*, in one clearly involving "bad faith." The Court of Appeal did not clearly delineate where contract defenses and tort defenses are appropriate, resulting in confusion for future insurance disputes.

More specifically, in allowing the defendant insurer to assert a contract defense in a tort case, the Court of Appeal has misapplied California law. (See *Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566) (where this Court held that a breach of the duty of good faith and fair dealing lies in tort not contract). As such, the Court of Appeal should have awarded bad faith tort damages, rather than conditional contract damages, for Fireman's Fund's failure to pay Stephens. (See, e.g., *Frommoethelydo v. Fire Ins. Exchange* (1986) 42 Cal.3d 208) (when an insurer unreasonably withholds payment on benefits owing, it is liable in tort).

Save *D&S Realty v. Markel Ins. Co.*, *supra*, the out-of-state cases cited above and in UP's *amicus curiae* brief did not enforce the repair or replace requirement. (See *Pollock v. Fire Ins. Exchange*, *supra*; *Bailey v. Farmer's Union Co-op Ins. Co.*, *supra*; *Ward v. Merrimack Mut. Fire Ins. Co.*, *supra*; *Rockford Mut. Ins. Co. v. Pirtle*, *supra*). In other words, those courts, and California courts, have awarded damages for bad faith, without a conditional repair requirement, where the insurer has unreasonably withheld benefits owing.

The distinction between contract and tort damages should not be overlooked here. In cases where an insurer unreasonably withhold benefits, it may not escape liability for the injury caused simply by agreeing to pay contract benefits once the insured has been forced to litigate in order to recover. This is an issue established by this Court's precedent and also serves the interest of good public policy.

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United Policyholder's Interest as Amicus Curiae

United Policyholders ("UP") is a non-profit consumer advocacy organization dedicated to helping preserve the integrity of the insurance system. UP serves as a voice and an information resource for consumers in all 50 states and is based in San Francisco, California. UP's work is supported by donations, grants, and volunteer labor. UP does not sell insurance or accept funding from insurance companies.

While much of UP's work is aimed at helping individuals and businesses purchase appropriate insurance and repair, rebuild, and recover after disasters through its *Roadmap to Preparedness* and *Roadmap to Recovery Programs*, through its *Advocacy and Action Program*, UP engages with regulators, including the California Department of Insurance and Commissioner Dave Jones, other public officials, academics, and various stakeholders in connection with legal and marketplace developments relevant to all policyholders and all lines of insurance. UP's Executive Director is an official consumer representative to the National Association of Insurance Commissioners where claims handling and bad faith are routinely discussed.

A diverse range of individual and commercial policyholders throughout the U.S. regularly communicate their insurance concerns to UP which allows UP to submit *amicus curiae* briefs to assist state and federal courts decide cases involving important insurance principles. UP has filed *amicus curiae* briefs in more than 360 cases throughout the U.S. since the organization's founding in 1991. UP's *amicus curiae* brief was cited in the U.S. Supreme Court's opinion in *Humana, Inc. v. Forsyth*, 525 U.S. 299 (1999) and arguments from UP's *amicus curiae* brief were cited with approval by the California Supreme Court in *Vandenburg v. Superior Court*, 21 Cal. 4th 815 (1999). UP filed an *amicus curiae* brief in *Stephens*.

Accordingly, for the reasons set forth above, UP respectfully requests that the Court depublish *Stephens*.

Sincerely,

Dated: January 21, 2015

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: *Stephens & Stephens XII, LLC v. Fireman's Fund Insurance Co., A135938; A136740, Certified for Partial Publication November 24, 2014*

Case No: Supreme Court of California, No. _____.
Court of Appeal, First Appellate District, Division One, No. A135938; A136740
Superior Court, County of San Francisco, No. CGC-10-502891.

I, Daniel Wade, declare:

I am employed by United Policyholders, a 501(c)(3) non-profit consumer organization located in San Francisco, am a member of the State Bar of California, and service is made at my direction.

On January 21, 2015, I served the attached Letter Request for Depublication of *Stephens* by placing a true copy in a sealed envelope into the custody of the U.S. Postal Service at 150 Sutter Street, San Francisco, CA 94104, upon the parties listed below, addressed to each as follows:

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

Executed: January 21, 2015 at San Francisco _____.