B199364
(Consolidated with B200267)

IN THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION SIX

SAFECO INSURANCE COMPANY OF AMERICA,
a Washington corporation,

Appellant and Cross-Respondent

vs.

JAMEY LYNN PARKS,

Respondent and Cross-Appellant.

Appeal from a Judgment of the Santa Barbara County
Superior Court, the Hon. Thomas P. Anderle, Judge Presiding

AMICUS BRIEF OF UNITED POLICYHOLDERS IN SUPPORT OF RESPONDENT AND CROSS-APPELLANT JAMEY LYNN PARKS

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CERTIFICATE OF INTERESTED PARTIES

Pursuant to California Rule of Court 8.208, *amicus* and its counsel certify that *amicus* and its counsel know of no other person or entity that has a financial or other interest in the outcome of the proceeding that the *amicus* or its counsel reasonably believe the justices of this Court should consider in determining whether to disqualify themselves under canon 3E of the Code of Judicial Ethics.

Dated: June 3, 2008

By:_____

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STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

The financial security that insurance policies provide is critical to consumers and is an integral part of the fabric of our economy and our society. United Policyholders, ("UP") is a non-profit charitable organization founded in 1991that is helping preserve the integrity of the insurance system by serving as an information resource on policyholders' interests, rights and duties. Donations, grants and volunteer labor support the organization's work.

UP monitors the national insurance marketplace with a particular focus on California. The organization's staff and volunteers participate in public policy forums, disseminate information about the claim process, and file *amicus* briefs in cases involving coverage and claim disputes. UP serves as a clearinghouse on consumer issues related to commercial and personal lines insurance products. See, www.unitedpolicyholders.org.

The issue in this case - the duty of an insurance company to disclose to a claimant other policies issued by it that may potentially provide coverage for the claim - is an issue of extreme importance to California consumers. If insurers, who have the information readily available, are not required to disclose to their insureds and claimants the existence of other

policies issued by them that potentially provide coverage when a claim is made, they obtain an unreasonable advantage over their insureds and their insureds are unable to avail themselves of the coverage they have paid for. UP has a compelling interest in assuring that both the letter and the spirit of the insurance regulations in this state are honored.

LEGAL ARGUMENT

1.

INTRODUCTION

One of several issues raised in this appeal deals with the effect of a Department of Insurance regulation mandating that when a claim is made to the insurer, the insurer must "disclose . . . all benefits, coverage, time limits or other provisions ***of any insurance policy issued by that insurer that may apply to the claim presented*** by the claimant." (10 Cal. Code Regs. Section 2695.4(a); emphasis added.) That regulation, on its face, is clear and unambiguous: Even if the claim is tendered under one policy, the insurer has a duty to disclose potential coverage under **any** policy issued by it that may apply to the claim.

As the evidence in this case demonstrates, requiring an insurer to locate any policy issued by it that may potentially provide coverage for a claim is already standard in the industry. Moreover, it is eminently feasible. For example, in this case Safeco actually maintained its policyholder database in such a way as to locate policies not only by policy number and policyholder name, but by address or phone number. As such, it not only had a duty to comply with the regulation, it had the means to do so.

Third-party claimants under liability insurance policies have no way to discover the existence of potential coverage. Even insureds, such as Michelle Miller in this case, often have no idea of what policies exist or whether they may potentially provide coverage. The only entity in the tripartite relationship among a liability claimant, an insured and the insurer who has the expertise and the information to locate any and all policies potentially applicable to the loss is the insurer. Given that imbalance in the available knowledge, it is not unreasonable that the Insurance Commissioner, through the promulgation of regulations, imposes that duty of disclosure on insurers.

Section 2695.4(a) should be applied as written. In this case, that means that Safeco had a duty to disclose the existence and potential for coverage under the Evelyn Miller policy when Jamey Lynn Parks' liability

claim against Michelle Miller was initially tendered.[1]

2.

THE COMMISSIONER'S REGULATIONS ESTABLISH A DUTY TO DISCLOSE THAT CAN BE ENFORCED IN A CIVIL ACTION

As a preliminary matter, in examining the application of section 2695.4(a), it may seem anomalous that an insurer should be required to disclose to its own insured that the insured is, in fact, insured under a policy or that a particular policy may provide coverage for a claim. But the reality is that most policyholders are not sophisticated in insurance coverage analysis and often do not understand the meaning or effect of the coverage

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[1] For purposes of this brief and the public policy discussions set forth, it will be presumed that Michelle Miller was an insured under the Evelyn Miller policy, that Michelle Miller was liable to Jamey Lynn Parks, and that Michelle Miller's negligence in abandoning Jamey Lynn Parks in a place of danger is not subject to the auto exclusion of the Evelyn Miller policy.

they buy. (See Alan I. Widiss, *Obligating Insurers to Inform Insureds About the Existence of Rights and Duties Regarding Coverage for Losses*, 1 Conn. Ins. L.J. 67, 67-68 (Spring 1995).)

Requiring the insurer to disclose to the insured all potential coverages when it receives notice of a loss is justified on several grounds: It fulfills the insurer's contractual promise to provide coverage, it fulfills the insurer's duty of good faith and fair dealing and it fulfills the insured's reasonable expectations. (Widiss, at 70-83.) Imposing a duty on the insurer to disclose information it knows - or has ready access to - and which the insured may not understand or realize, restores the balance of power in the relationship and puts all the parties on a level playing field.

This general duty of disclosure has been recognized not only in California, but elsewhere as well. (See, e.g. *Darlow v. Farmers Ins. Exch.* (Wyo. 1991) 822 P.2d 820, 828; *Gatlin v. Tennessee Farmers Mut. Ins. Co.* (Tenn. 1987) 741 S.W.2d 324, 326; *Dercoli v. Pennsylvania Nat'l Mutual Ins. Co.* (Pa. 1989) 554 A.2d 906, 909; *Bowler v. Fidelity & Casualty Co. of N.Y.* (N.J. 1969) 250 A.2d 580, 588; *Ramirez v. USAA Casualty Ins. Co.* (1991) 234 Cal.App. 3d 391.)

In addition to this general duty of disclosure, California's Insurance Commissioner has established a regulatory disclosure requirement which

imposes an express duty on insurers to make specified disclosures. The administrative regulation at issue here requires that an insurer who receives notice of a claim must disclose to its insured any policy that may provide coverage. By its terms, that regulation precludes an insurer from looking only to the policy the ***insured*** thinks might provide coverage and disposing of the claim on the basis of that policy alone. Rather, the insurer has a duty to locate other policies issued by it that may provide coverage and disclose the potential benefits under those policies to the insured. This is a reasonable and rational requirement because it permits both parties to operate from the same universe of information in determining their respective rights and duties with regard to the insured's loss.

In concluding that Safeco had a duty to disclose the existence of potential coverage under the Evelyn Miller policy to Michelle, this Court would not be plowing new ground. Indeed, other courts in this State - and another division of this same Court - have already concluded that the administrative regulation at issue here creates an express and enforceable duty of disclosure on insurers.

A. Insurers operating in California have an enforceable duty under the Insurance Commissioner's regulations to disclose the existence of any policy that may cover a claim.

Division Three of this Court has concluded that the very regulation at issue in this action, 10 Cal. Code Regs. § 2695.4(a), establishes an affirmative duty of disclosure on the part of insurers operating in California. (*Spray, Gould & Bowers v. Associated International Ins. Co.* (1999) 71 Cal.App.4th 1260; see, also, *Neufeld v. Balboa Ins. Co.* (2000) 84 Cal.App.4th 759.) In *Spray, Gould*, a law firm made a claim under its insurance policy for losses resulting from the Northridge Earthquake. The insurer denied the claims and when the law firm sued, the insurer asserted the statute of limitations as a defense. In opposing the insurer's summary judgment on that basis, the law firm asserted that the insurer's failure to notify it of the relevant time limits under section 2695.4(a), including the statute of limitations, estopped the insurer from asserting the statute of limitations.

The trial court granted the summary judgment, and Division Three reversed, holding that the regulation imposes "a duty to speak" on the part of an insurer. (*Spray, Gould*, at 1269.) As the court explained, section 2695.4(a) "imposes on insurers an unmistakable duty to advise its claimant

insureds of applicable claim time limits" and its purpose "is salutary," and intended "to foster equity, fairness, and plain-dealing in claims handling." (*Id.*)

The insurer in *Spray, Gould* asserted several grounds for rejecting the imposition of civil liability on an insurer for violation of that administrative regulation.[2] The *Spray, Gould* court, however, systematically addressed each of those arguments and rejected them. For example, the insurer asserted that only the Commissioner has the authority to enforce the regulation by way of administrative action. (*Id.*, at 1269-1270.) As the Court explained in rejecting that argument, "the limits of the Commissioner's power are not inconsistent with giving extra-administrative effect to the Insurance Regulations in first party claims disputes" because the "*Commissioner's regulatory power is punitive, not remedial.*" (*Id.*, at 1270; emphasis in original.) The court noted that imposition of regulatory sanctions "may or may not induce *future* compliance," but refusing to give

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[2] These arguments, which will not be individually addressed here because they are so thoroughly addressed and rejected in *Spray, Gould*, included: (1) That the decision in *Moradi-Shalal v. Firemens' Fund Ins. Cos.* (1988) 46 Cal.3d 287 (*Spray, Gould*, at 1271-1272); (2) That estoppel is inconsistent with the decision in *Waller v. Truck Ins. Exch., Inc.* (1995) 11 Cal.4th 1, 34 (*Spray, Gould*, at 1272); (3) That estoppel is precluded by the insured's constructive knowledge of the time limit (*Spray, Gould*, at 1272-1273); and (4) That application of estoppel principles is not supported by any prior precedent (*Spray, Gould*, at 1273-1274.)

it extra-regulatory effect would only result in "encouraging the insurer to regard the question of regulatory compliance as a day-to-day business decision unrelated to the consequences of violation which might flow in a judicial proceeding to resolve a particular claim." (*Id.*, at 1271; emphasis in original.) "Such a result," the court went on, "will not necessarily cause insurers to adopt and implement a practice of compliance. In short, it is simply unacceptable for an insurer to take advantage of its own misconduct and thereby succeed in defeating an otherwise legitimate claim." (*Id.*) As the court concluded: "The Commissioner's 'Fair Claims Settlement Practices Regulations' ***state a considered public policy, and deserve to be given practical and equitable effect***." (*Id.*; emphasis added.)

This case deals with a different disclosure requirement in the very same regulation (i.e., notification of time limits in *Spray, Gould* versus notification of potential coverage under ***any*** policy issued by the insurer) but the effect and impact of that regulation has been established as a matter of law in *Spray, Gould*: The insurer must give the specified notice whenever a claim is made. That means, as the regulation unequivocally states, when Safeco received notice of the claim from Michelle Miller, it had an affirmative duty to locate and disclose to her "all benefits [or] coverage . . . of ***any*** insurance policy issued [by it] that ***may*** apply to the

claim presented." (Section 2695.4(a); emphasis added.)

B. Safeco had a duty to disclose the Evelyn Miller policy and Safeco is estopped from asserting the statute of limitations because of its failure to do so.

Safeco cannot successfully argue that, even under section 2695.4(a), it had no duty to disclose the Evelyn Miller policy because, given the auto exclusion, there was - to Safeco's way of thinking - no coverage for the claim under that policy and that the condo owners policy did not, therefore fall within the ambit of section 2695.4(a). What Safeco ignores in making that argument is that there ***is*** "coverage" in the first instance because the policy promises to indemnify the insureds (including Michelle) for liability for damages, including bodily injury (which is what Jamey Lynn Parks suffered), caused by the insured's negligence. Thus, the claim fell within the coverage provisions of the policy.

The question then arises whether the claim was excluded under the auto exclusion. But as the arbitrator determined, Michelle Miller's negligence in abandoning Jamey in a place of danger did not arise from the use of the automobile, but was independent of the vehicle. At the very least, even absent the arbitrator's determination, that analysis was one that

Safeco - an experienced insurer with access to extensive legal resources - could have, and should have, come up with in assessing its duties under section 2695.4(a). The problem for Safeco, of course, is that the evidence in this case made clear that Safeco did not even bother assessing its duties under that regulation in this case. As the *Spray, Gould* court emphasized, it is important to enforce violations of that regulation in judicial proceedings in order to effectuate the "considered public policy" encompassed in the regulations.

Nor would there be any burden on Safeco in complying with its duty in this case. As the evidence at trial established, Safeco had the capability within its own database of locating the Evelyn Miller policy by searching on Michelle Miller's address - the address, in fact, that Safeco successfully contended was Michelle Miller's residence.

And consider this: Even if Safeco believed there was no coverage under the Evelyn Miller policy, why ***not*** disclose it? Safeco could easily have disclosed to Michelle the existence of the policy and explained its position that there was no coverage under that policy for the loss. All that would have happened is that the very same issues this Court is faced with now would have been addressed years earlier.

That consideration raises yet another issue: Just as the court in

Spray, Gould held that the insurer was equitably estopped from asserting the statute of limitations in that case because of its failure to disclose that time limit. Safeco is equitably estopped from asserting the statute of limitations on the Evelyn Miller policy in this case for two reasons: (1) It violated the requirement that it disclose the existence of the policy; **and**, (2) Just like the insurer in *Spray, Gould*, it violated the requirement that it disclose any relevant time limitations, including the statute of limitations for bringing an action to enforce coverage under the policy.[3]

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[3] Even if raised as an issue for the first time on this appeal, this Court may properly address the issue of whether Safeco is estopped from asserting the statute of limitations in this case. First, as explained in *Spray, Gould*, pleading facts in the complaint to establish the basis for estoppel is unnecessary where the statute of limitations is asserted as a defense. (*Spray, Gould*, at 1266, fn 4.) Second, where, as here, there are undisputed facts (i.e., that Safeco did not disclose the existence of the Evelyn Miller policy at the time of the claim and did not disclose any time limitations applicable to that policy as required under section 2695.4), an issue may be addressed as a matter of law even if raised for the first time on appeal.

Thus, by failing to comply with section 2695.4(a), Safeco not only breached its duty to disclose the existence of the policy, it rendered its insured (and her injured victim) unable to even make a timely claim against the policy. As such, the trial court's determinations on these issues should be affirmed.

CONCLUSION

Because section 2695.4(a) is clear and unambiguous, because it imposes a duty, actionable in law, to disclose potential coverage in any insurance policy issued by that insurer, and because Safeco failed to do so, the judgment should be affirmed with respect to this issue.

Dated: June 3, 2008

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(*Ward v. Taggart* (1959) 51 Cal.2d 736, 742; *Yeap v. Leake* (1997) 60 Cal.App.4th 591, 599, fn. 6; *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 654.)

CERTIFICATION REGARDING LENGTH OF BRIEF

I hereby certify that this brief contains 2950 words, including footnotes, as established by the word count of the computer program utilized for the preparation of this brief.

I declare and certify under the laws of the State of California that the foregoing statement is true and correct and that this certification was executed on June 3, 2008 at Brookings, Oregon.

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