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November 4, 2013

VIA HAND DELIVERY TO THE COURT AND U.S. MAIL
Honorable Tani Gorre Cantil-Sakauye
California Supreme Court
Office of the Clerk
350 McAllister Street, Room 1295
San Francisco, CA 94102

Re: Request for Granting of a Petition for Review, or in the Alternative, for Depublication of *Federal Insurance Company v. MBL, Inc.*, Court of Appeal, Sixth District, Case No. H036296 & H036578 (August 25, 2013). (Currently published at 219 CalApp. 4th 29.)

Dear Chief Justice Cantil-Sakauye and Honorable Associate Justices of the California Supreme Court:

United Policyholders ("UP") hereby request that this Court grant the pending petition for review or, alternatively, depublish the *Federal Insurance Company v. MBL, Inc.* decision ("*MBL*"). This request is made pursuant to California Rule of Court 8.1125.

I. STATEMENT OF INTEREST

UP is a non-profit 501(c) (3) organization founded in California in 1991 that has become a respected voice and a trusted information resource for insurance consumers in all 50 states. Donations, foundation grants and volunteer labor support the organization's work. UP does not accept funding from insurance companies. Its goal is to preserve balance and integrity in the insurance marketplace.

UP is divided into three program areas: *Roadmap to Recovery*™ (disaster recovery and claim help), *Roadmap to Preparedness* (insurance and financial literacy and disaster preparedness), and *Advocacy and Action* (advancing pro-consumer laws and public policy). UP hosts a library of tips, sample forms and articles on commercial and personal lines insurance products, coverage and the claims process at www.uphelp.org.

UP serves individual and commercial policyholders throughout California. A main focus of its work is providing long term recovery support services to disaster victims. Since the 1991 Oakland/Berkeley firestorm it has been serving communities devastated by wildfires, floods, earthquakes and other disasters throughout the state. It served Southern California after the

1994 Northridge Earthquake, the San Bruno area after the 2010 gas pipeline explosion, and many regions in between. UP's Roadmap to Recovery program has proven so effective in educating consumers and resolving insurance disputes that the California Department of Insurance has incorporated elements of its approach in their consumer outreach and education, and engaged in coordinated activities with its organization.

Another main focus of its work is monitoring and informing the public and lawmakers about trends, issues and problems related to insurance policy forms and claim handling practices. State insurance regulators, academics and journalists throughout the U.S. routinely seek United Policyholders' input on insurance and legal matters. It has been appointed for six consecutive years as an official consumer representative to the National Association of Insurance Commissioners. Its Executive Director served for over five years as Chair of a Consumer Advisory Task Force established by former California Insurance Commissioner Steve Poizner.

It strives to assist courts throughout the United States in resolving insurance disputes by filing "friend of the court" briefs in important matters such as the case at bar. United Policyholders' amicus briefs have been cited in published decisions by the U.S. Supreme Court and numerous state and federal appellate courts. (See *e.g. Humana, Inc. v. Forsyth* (1999) 525 U.S. 299, 314; *Watts Industries, Inc. v. Zurich American Insurance Co.* (2004) 121 Cal.App.4th 1029, *Nickerson v. Stonebridge Life Insurance Company* (2013) 219 Cal.App.4th 188, 215 and other briefs cited at www.uphelp.org/library/amicus).

II. MBL'S HOLDING THAT ONLY "ACTUAL" CONFLICTS OF INTEREST CREATE A RIGHT TO INDEPENDENT COUNSEL IS CONTRARY TO THE CALIFORNIA RULE OF PROFESSIONAL CONDUCT 3-310, AND THE *CUMIS* DECISION.

In *MBL*, the court held that only "actual" conflicts entitle a policyholder to independent counsel, while "potential" conflicts do not.[1] California Rule of Professional Conduct 3-310 is directly to the contrary. It makes no distinction between actual and potential conflicts of interest.

[1]In so ruling, *MBL* cites *dicta* from some intermediate appellate decisions that embrace this distinction without proper analysis. See *Dynamic Concepts, Inc. v. Truck Insurance Exchange* (1998) 61 CalApp. 4th 999, 1007; *James No. 3 Corp. v. Truck Insurance Exchange* (2001) 91 Cal.App. 4th 1093, 1101. Like *MBL*, these decisions ignore the Rules of Professional Conduct, and the statement in *San Diego Navy Federal Credit Union v. Cumis Ins. Society* (1984) 162 Cal.App. 3d. 358 ("*Cumis*") that any distinction between "potential" and "actual" conflicts of interest is improper. *Id. at 371 n. 7.*

Rule 3-310 (c)(1)-(2) states that potential conflicts are treated the same as actual conflicts. Under that Rule, both types of conflict prohibit an attorney from jointly representing two clients without informed, written consent.

Treating potential conflicts the same as actual conflicts only makes sense because, as the *Cumis* court explained:

> "[The insurer] makes a distinction between "potential" and "actual" conflicts of interest which is invalid and unworkable. Recognition of a conflict cannot wait until the moment a tactical decision must be made during trial. It would be unfair to the insured and generally unworkable to bring in counsel midstream during the course of trial expecting the new counsel to control the litigation. Contrary to *Cumis*' argument, the existence of conflicting of interest should be identified early in the proceedings so that it can be treated effectively before prejudice has occurred to either party." *Cumis, supra* at 162 CalApp. 3d 371 n. 7.

Waiting until an "actual" conflict has developed to provide independent counsel is the quintessential "Closing the barn door after the horse has escaped". It may well be impossible for an insured to recover from the damage done by having to wait until there is an "actual" conflict of interest before getting an unconflicted lawyer. This Court should not countenance such a rule.

The "potential/actual" distinction presents many problems. When does the potential conflict change into an actual one, after the insured has been injured by the attorney's actions favoring one insured over another? Does the injury have to be irreversible? Who is responsible for revealing the existence of an actual conflict/injury? Is the insurance company supposed to tell the insured that her counsel has violated his ethical duties? Is the insurance defense counsel supposed to do that? How likely is it that the carrier or the insurance defense counsel are going to acknowledge such an actual conflict? Not very. *MBL* court should not be permitted to essentially re-write the Rules of Professional Conduct for insurance companies and their chosen insurance defense counsel. The ethical rules contain no such exception. This Court should correct *MBL's* attempt to create one.

MBL (and the cases it cites) compound this unworkable approach by also requiring that the conflict be "significant", not merely "theoretical". *MBL, supra* 219 CalApp.4th, 42, 46. What does this mean? Does the insured already have to have suffered damage in order for the conflict to exist? Does the attorney have to already favored one client over another (such as

admitting that the insured acted intentionally in order to destroy coverage)? Is "significant" meant to refer to the amount of damage done? If the attorney's breach of ethical duties results in "only" an additional $5000 or $25,000 of damages, is that significant? The Rules of Professional Conduct make no qualitative or quantitative distinction between the types of conflict. If the attorney might favor one client, to the detriment of another client, (no matter how small the detriment), that is a conflict which requires the attorney to decline the dual representation or obtain a knowing, signed waiver. *MBL* ignores these considerations and turns the basic Rules of Professional Conduct on their head.

III. MBL MISTAKENLY HOLDS THAT A GENERAL RESERVATION OF RIGHTS CAN NEVER REQUIRE THAT THE INSURER PAY FOR INDEPENDENT COUNSEL.

The court in *MBL* takes the extraordinary position that a "general reservation of rights" is insufficient to trigger the need for independent counsel. Such a ruling gives insurers *carte blanche* to ignore their obligations to provide independent counsel, while at the same time preserving the carriers' rights to deny coverage at the end of the case. It is essentially an "escape hatch" for carriers to avoid their obligations under *Cumis* and Civil Code §2860: a carrier does not identify a specific portion of the policy as to which it is reserving rights, so it does not have to pay for independent counsel, and then, when the case is over, it can pick and choose among <u>all</u> of the policy provisions to try to avoid paying for the judgment. If such a reservation is good enough to allow it to deny coverage at the end, it is enough to trigger the obligation to provide independent counsel at the beginning.

Furthermore, this approach violates the California Fair Claims Practice Regulations. Section 10 C.C.R. 2695.4(a) provides:

> "Every insurer shall disclose to a first party claimant or beneficiary, 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. When additional benefits might reasonably be payable under an insured's policy upon a receipt of additional proofs of claim, the insurer shall immediately communicate this fact to the insured and cooperate with assisting the insured in determining the extent of the insurer's additional liability."

Section 2695.7(b)(1) provides:

> "Where an insurer denies or rejects a first party claim, in whole or in part, it shall do so in writing and shall provide to the claimant a statement listing all bases for such rejection or denial and the factual and legal bases for each reason given for such rejection or denial which is then within the insurer's knowledge. Where an insurer's denial of a first party claim, in whole or in part, is based on a specific statute, applicable law or policy provision, condition or exclusion, the written denial shall include reference thereto and provide the explanation of the application of the statute, applicable law or policy provision, condition or exclusion to the claim. ..."

In addition to the requirements of the Fair Claim Practice Regulations "... an insurer bears a common law obligation to assist the insured to recover bargained-for policy benefits." *City of Hollister v. Monterey Insurance Co.* (2008) 165 Cal.App. 4th. 455, 490. Thus, carriers cannot present a nebulous, general reservation of rights when there are matters about which they know or suspect they may want to reserve rights. They are obligated by law to present specific reasons for such a reservation as soon as possible.

Insureds, particularly ordinary consumers, should not have to be forced to pour over an insured's policy, or hire their own insurance coverage counsel, to see which of the policy provisions the "blanket reservation" might apply to. It is the carrier's legal obligation to assist the insured in identifying those provisions so that the insured knows what her rights are under the policy. The *MBL* decision ignores this fundamental obligation on the part of the carrier.

IV. GRANTING THE PETITION FOR REVIEW IS PREFERABLE.

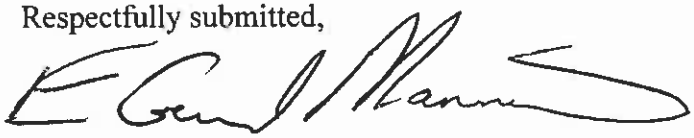
As noted above, the *MBL* court's assertion that there must be an "actual" rather than "potential" conflict, and the conflict has to be "significant" is based, in part, on earlier decisions. *MBL*, and the earlier decisions, are in conflict with the *Cumis* decision, and California Rule of Professional Conduct 3-310. This Court has the opportunity to eliminate that conflict and state that the Rules of Professional Conduct mean what they say: "potential" conflicts are legally the same as "actual" conflicts and have to be treated the same. This Court should also do away with the artificial "significant conflict" standard. It is unworkable, and unwise.

Likewise, this Court can make clear that blanket reservations of rights are impermissible. The Fair Claims Practice Regulations require that the insurer provide specifics as to why its

reserving its rights, if at all possible. However, if the insurer wants to assert a blanket reservation of rights as to each and every exclusion and provision of the insurance policy, then it should be automatically required to provide independent counsel.

In the event the Court does not grant review, it should order depublication for the reasons expressed above.

Respectfully submitted,



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