April 2, 2008

The Honorable Chief Justice Ronald M. George
And the Honorable Associate Justices
Of the California Supreme Court
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Re: Petition for Review of De Bruyn v. Superior Court (Farmers Group, Inc.) Supreme Court Case No. S161000

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

We write on behalf of United Policyholders (UP), in support of Petitioner Rudolf Andre De Bruyn's Petition for Review.

UP is a national, non-profit organization dedicated to educating the public on insurance issues and the interests of both business and individual policyholders. UP has submitted numerous amicus curiae briefs to this Court and was actively involved as amicus curiae in the recent case of Julian v. Hartford Underwriters Insurance Company (2005) 35 Cal.4th 747, which is at issue in De Bruyn.

UP believes De Bruyn presents a critical issue regarding the rule of efficient proximate cause and Insurance Code §530 in the aftermath of this Court's opinion in Julian. It is important for this Court to grant petition for review to affirm that an insurer cannot contract around Insurance Code §530 and to clarify confusion in the lower courts about the narrow application of this Court's holding in Julian.

If petition for review is not granted and the Appellate Court's decision in De Bruyn stands, California policyholders will suffer unfairly. Farmers will be able to use its absolute mold exclusion to bar coverage regardless of the primary cause of loss. As a result, many thousands of insureds could be deprived of coverage they reasonably believed they were getting when they purchased their policies.

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For example, numerous insureds recently had their homes damaged by wildfires in Southern California. One of the most expensive repair items for many of these insureds is the cost to remediate mold, which resulted from water used by firefighters to combat the fires. Insurance Code §2071 mandates that the homeowners policies purchased by these insureds cover losses caused by fire or fire prevention.

As a consequence of the De Bruyn decision, however, insurers could deny all coverage for mold remediation, even though mold was either a direct or ensuing result of fire prevention, a covered cause. This would have a catastrophic effect on many insureds' ability to rebuild their homes.

The Appellate Court in the De Bruyn case addressed a policy provision which attempted to circumvent Insurance Code §530 by stating that mold, however caused, was never covered. (Slip opn., 10-11). Such a provision would obviously exclude coverage even when the primary cause of the damage was covered. For all-risk policies, this is the result long barred by Insurance Code §530 and the efficient proximate cause doctrine.

Nonetheless, the Appellate Court found no coverage, believing that the policy excluded coverage for mold resulting from the sudden release of water, even though sudden release of water was covered. (Slip opn., at 14). In reaching this holding, the Appellate Court relied upon this Court's holding in Julian. (Id.).

The Appellate Court interpreted Julian to hold that policy language does not violate Insurance Code §530, even if it purports to exclude loss primarily caused by a covered peril, as long as the policy plainly communicates the excluded risk. (Slip opn., at 13). This, according to the Appellate Court, comports with the reasonable expectation of the insured. (Id.).

A careful reading of the Julian case, however, reveals that this Court did not and will not permit an insurer to contract away its responsibilities under Insurance Code §530 regardless of policy language.

In California, coverage is determined by the cause of loss or damage; Insurance Code §530 mandates that a loss is covered when primarily caused by a covered a risk. (Julian, supra, 35 Cal.4th at 750; citing State Farm and Casualty Company v. Von Der Lieth (1991) 54 Cal.3d 1123, 1131-1132). Policy exclusions are unenforceable to the extent they conflict with Insurance Code §530 and the efficient proximate cause doctrine. (Julian, supra, 35 Cal.4th at 754).

As a result, whether the loss in the De Bruyn case is covered or not must depend on whether the primary cause of loss is covered. To the extent that Farmers' absolute mold exclusion states otherwise, it must be deemed unenforceable.

In its analysis of the weather conditions exclusion at issue, Julian states:

> "Amicus curiae United Policyholders argues that as written, the weather conditions clause allows Hartford to deny coverage when a loss is caused 99% by weather conditions (covered) and 1% by earth movement (excluded) . . .
>
> We agree with United Policyholders that application of the policy language in situations described above would raise troubling questions regarding the clause's consistency with the efficient proximate cause doctrine
> . . .
> Indeed, the phrase "contribute in any way with" that links weather conditions with earth movement seems particularly designed to circumvent the efficient proximate cause doctrine . . ."

(Julian, supra, 35 Cal.4th at 760).

In reaching the conclusion that it did in Julian, this Court emphasized that it was not condoning such an illegal construction. Rather its holding was limited to its acceptance of a rain- induced landslide as an appropriate exclusion.

Thus, unlike the Appellate Court, before it began its analysis of the policy language, Julian first analyzed the nature of the peril itself, a rain-induced landslide, to determine the reasonable expectations of the insured. (Id., at 760).

Julian concluded that a rain-induced landslide is a "commonly understood risk of loss and the frequent and direct causal relationship between rain and landslide is widely and easily understood," and that the "landslide here was not an independent causal agent." (Id.). As a result, a reasonable insured would readily understand that a rain-induced landslide was a "specific" peril that the insurer intended to exclude. (Id).
induced landslide as an appropriate exclusion.

It was only after determining that a rain-induced landslide was a "specific" peril that this Court turned to the policy language itself to determine whether that "specific" peril was plainly excluded. (Id., at 760-761). In keeping with this analysis, this Court expressly stated that its reasoning solely applied to rain-induced landslides. (Id., at 760).

Therefore, the Julian case does not support the De Bruyn conclusion that a policy may violate the rule of efficient proximate cause as long as it clearly states the exclusion. Julian stands for the opposite. Julian only reached the result it did because of the unique peril at issue in that case, a rain-induced landslide.

Because it purports to exclude coverage even when the primary cause of loss is covered, the absolute mold exclusion in the Farmer's policy violates Insurance Code §530 and the analysis found in efficient proximate cause cases such as Howell v. State Farm Fire and Casualty Co. (1990) 218 Cal.App.3d 1446 and State Farm and Casualty Company v. Von Der Lieth (1991) 54 Cal.3d 1123, 1131-1132).

For the reasons stated above, UP submits that that the Appellate Court's interpretation of the Farmers' absolute mold exclusion raises the same "troubling questions" noted by this Court in Julian. Petition for review should be granted.

Respectfully submitted,

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