Amy - FYI Best Jim

JAMES T. LINFORD
ATTORNEY AT LAW
POST OFFICE BOX 210 598
SAN FRANCISCO, CA 94121

TELEPHONE (415) 831-8761
FACSIMILE (415) 831-8762

COPY

January 29, 2001

SUPREME COURT
FILED

JAN 2 9 2001

Frederick K. Ohlrich Clerk

DEPUTY

Chief Justice Ronald M. George
and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-3600

Re: Amicus letter brief: Vu v. Prudential Prop. & Cas. Ins., S078271

Dear Chief Justice George and Associate Justices:

By letter of January 16, 2001, this court indicated that it would accept amicus letter briefs addressing

- whether CCP § 340.9 settles the Ninth Circuit certification questions (Vu v. Prudential Prop. & Cas. Ins. (1999) 172 F.3d 725, 727) and
- whether § 340.09[1] makes this particular cause moot.

Section 340.9 is irrelevant to the certification questions. If valid, § 340.9 would revive Mr. Vu's causes of action that are time-barred by the one-year limitation of actions from Ins. C. § 2071.

The January 16th letter also suggests comment on whether there should be supplemental briefing on § 340.9's interpretation, applicability, and validity. Since § 340.9 is vague and ambiguous on its face, it can be neither understood nor applied without judicial interpretation. There also may be a validity issue, whether the statute unconstitutionally impairs contract.

This letter brief will first address § 340.9's interpretation and application, followed by a discussion of an insurance issue that might bear on the statute's constitutionality. It will then address how § 340.9 might affect this cause, and whether § 340.9 is irrelevant to the questions certified by the Ninth Circuit.

The following discussion is condensed and often omits citation to relevant legal authority. The interest of amicus is solely that of an insurance law practitioner who is concerned about the development of California insurance law, especially the development of insurance law theory.

---

1 All references to § 430.9 below are to the new CCP statute.

CCP § 340.9 is vague and ambiguous on its face.

The purpose of § 340.9 is evidently to revive stale Northridge earthquake claims. By its terms, § 340.9 appears to relate to a single, unspecified limitation of actions:

> (a) Notwithstanding any other **provision of law or contract**, any insurance claim for damages arising out of the Northridge earthquake of 1994 which is barred as of the effective date of this section solely because **the** applicable statute of limitations has or had expired is hereby revived … .
>
> (b) Any action pursuant to this section commenced prior to, or within one year from the effective date of this section shall not be barred based upon **this** limitations period.

(CCP § 340.9(a) & (b); emphasis supplied.) Section 340.9 nowhere specifies **the** particular limitation it evokes despite the fact that there are several that relate to insurance claims litigation

Several insurance claims litigation limitations of actions

Statutes of limitation relevant to insurance claims litigation include

1. CCP § 340(3), a 1-year limitation on tort and personal injury actions, such as intentional infliction of emotional distress.
2. CCP § 339(1), a 2-year limitation on actions for breach of an unwritten contract or contract term, such as the implied covenant of good faith and fair dealing.
3. CCP § 338(d), a 3-year limitation on actions for fraud.
4. CCP § 337(1), a 4-year limitation on actions for beach of a written contract or contract term.

(See, for example, Love v. FIE (1990) 221 Cal.App.3d 1136, 1144, fn. 4.)

The California Standard Form Fire Insurance Policy, Ins. C. § 2071, also provides for a 1-year limitation on actions brought on certain property policies, such as Mr. Vu's policy.

Which of these limitations of action does § 340.9 refer to? CCP § 340 is a general, one-year statute of limitations. All the current § 340.*n* statutes enacted before § 340.9 involve exceptions to the one-year limitation of § 340(3), the general tort and personal injury statute. However, viable causes of action for general tort damages are rare in insurance claims complaints. They always sound in breach of contract, both written and unwritten. Although, breach of the implied covenant -- insurance bad faith –is a breach of contract that (in insurance law only) gives rise to tort remedies, it is subject to the two-year limitation on unwritten contract causes (Id.).

Perhaps the legislature placed § 340.9 into the § 340.*n*'s simply because it had a one-year limitation in mind, namely the Ins. C. § 2071 limitation. But if so, why not place the new exception to Ins C. § 2071 next to Ins C. § 2071? Furthermore, since CCP § 340.9 involves a pure insurance law question, why is it in the Code of Civil Procedure instead of the Insurance Code?[2] Although the placement of the new exception weakens its connection to the Ins. C. § 2071 limitation, legislative history[3] strongly supports the view that § 340.9 refers to the Ins. C. § 2071 limitation.

The Ins. C. § 2071 limitation is both statutory and contractual

There is also a question whether § 340.9 has any impact on the characterization of the Ins. C. § 2071 limitation of action. It may well be unsettled whether this limitation provision is

- a statute of limitation or
- a statutory minimum for any contractual limitation shorter than the general statutory limitations.

Co-contractants may generally substitute reasonable, shorter contractual limitations for otherwise applicable statutes of limitations. Some courts have found 6-month insurance claim limitations to be reasonable. The Ins. C. § 2071 limitation may only be "mandatory" in the sense that it prohibits any contractual limitation of less than twelve months.

Ins. C. § 2070 apparently does not figure in § 340.9's legislative history. However, it requires property policies covering fire and other risks (see Ins. C. § 2079) to follow Ins. C. § 2071's California Standard Fire Insurance Form. The exception is that a policy may deviate from the Form where the non-standard policy provides the insured with equivalent or better fire "coverage." "Coverage" could be interpreted narrowly to include only substantive rights, or broadly, to include the availability of remedies to enforce those substantive rights, as well as the substantive rights themselves.

A broad interpretation would avoid forfeiture of substantive rights as opposed to "technical or procedural" rights. (Lackner v. LaCroix (1979) 25 Cal.3d 747, 751.) Forfeiture of substantive rights appears to be more

---

2 One wonders whether there might have been a legislative-process logistics concern, such as whether the measure would be better handled by the Senate Rules and Judiciary Committees than by the Insurance Committee.

3 All references to legislative history draw upon the Senate website page on SB1899, <http://info.sen.ca.gov/cgi-bin/postquery?bill_number=sb_1899&sess=PREV& house=B&site=sen>.

disfavored than forfeiture of technical rights. (See Civ. C. § 1442 and Prudential-LMI Commercial Insurance v. Superior Court (1990) 51 Cal.3d 674, 691.) Prudential-LMI is the leading case on the Ins. C. § 2071 limitation. It does not address whether the standard form limitation provides for an invariable "statutory" limitation, or merely sets a minimum for any contractual limitation.

CCP § 340.9 cannot be an unconstitutional interference with contract unless its effect is to abrogate a contractual provision.

CCP § 340.9's applicability to Mr. Vu's claim

Section 340.9 only applies to Mr. Vu's claim if the claim would otherwise be barred by the one-year limitation of actions. Mr. Vu filed suit July 29, 1996. If the one-year limitation began to run at the beginning of the earthquake, January 17, 1994, all actions on the policy would be time-barred by the one-year limitation.

Although § 340.9 revives actions barred by the one-year limitation, it does not appear to revive actions barred by other limitations. As seen above, there is a two-year statute of limitations on actions for breach of the implied covenant. Since approximately 2½ years elapsed between the earthquake's beginning and the lawsuit's filing, claims Mr. Vu might have for breach of the implied covenant would be time-barred. Mr. Vu's remaining remedies, even with § 340.9, could only be based on causes of action for fraud and breach of written contract. Losing the implied covenant would preclude recovering Brandt fees and would raise the standard of insurer misconduct Mr. Vu must show from "unreasonable denial of policy benefits" (breach of the implied covenant) to fraudulent denial. Mr. Vu's remedies would be truncated regardless of § 340.9.

If we assume that the damage Mr. Vu discovered in August 1995 gave rise to new causes of action, as the first certification question implies might have been the case (Vu, supra, at p. 727), then the one-year limitation could not apply to those new causes since Mr. Vu filed suit within a year of discovery.

It may be that all of the limitations of action were tolled until the insurer's written denial notice on September 15, 1995. (Spray, Gould & Bowers v. Associated International Ins. (1999) 71 Cal.App.4th 1260, 1271; Title 10 CCR §§ 2695.4(a) and 2695.7(b)(1) & (f).) If the limitations were tolled, § 340.9 would not affect Mr. Vu's claim because he filed the complaint (7/29/96) less that one year after the written denial (9/15/95).

The nature of earthquakes implies that limitations of actions on earthquake suits might best begin to run when the earthquake begins, but then be tolled until its aftershocks end. As set forth below, the USGS reports substantial

Northridge aftershocks through the spring of 1997. If the limitations were tolled until then, § 340.9 would be irrelevant to Mr. Vu's suit.

Earthquake losses are both catastrophic and continuous.

Property losses are generally classified as either catastrophic or continuous. For example, fire and landslide are catastrophic, while gradual soil settlement and pollutant seepage are continuous.

Earthquake losses are both catastrophic and continuous. An earthquake is a series of temblors that generally begins with a mainshock, a catastrophic shift at the epicenter, and continues with aftershocks that tend to diminish regularly in strength and frequency. Geologists consider the aftershock to be as much a part of an earthquake as the mainshock.[4]

Substantial aftershocks can continue for years after the mainshock. For example, a United States Geological Survey website[5] reports that although there were no M≥6 aftershocks after the January 17, 1994, M6.7 Northridge mainshock, and there were the following M5.0 to M5.9 aftershocks:

- January 17, 1994: 4
- January 18-31, 1994: 3
- Feb. - Dec. 1994: 1
- All of 1995: 1
- All of 1996: 0
- All of 1997: 1 [M5.1; 4/26/97]

Seventy per cent of the M≥5 aftershocks were in the half-month after the mainshock. However, even a single M≥5 temblor (as experts, and texts possibly subject to judicial notice, might well agree) can produce significant structural damage to buildings. Unfavorable soil conditions amplify a temblor's destructiveness. Temblors can also worsen latent damage to the point of structural failure. An example would be where a foundation, weakened by the mainshock and previous aftershocks, is pushed over the brink of structural failure by a given temblor.

---

4 Some earthquake policies, such as Mr. Vu's apparently, contain provisions that attempt to parse an earthquake into short, separate, and arbitrary time periods to justify multiple applications of policy deductibles. These provisions may well be unenforceable because by using an erroneous definition of "earthquake" they raise the effective deductible above the 15% statutory maximum. (Ins. C. § 10089(b).)

5 <http://pasadena.wr.usgs.gov/north/afterlist/html>

The importance of classifying property losses.

Whether a first party property loss is catastrophic or continuous determines several legal issues, including

- when actions accrue and limitations of action begin to run, and
- when, that is, during which policy period, insurer liability is triggered.

With a catastrophic loss, the causes of action accrue and the limitations of actions begin to run when the catastrophic loss occurs, that is upon exposure to the damaging causality. The insurer on the risk at the time of exposure is solely responsible for indemnification.

With a continuous first-party property loss, no action accrues and no limitation begins to run until the insured is on notice of the loss through actual or constructive discovery of damage, that is, upon manifestation of the loss. The first party property insurer on the risk at the time of manifestation is solely responsible for indemnification, even though some part of the loss may well have occurred during previous policy periods, when damage may have only been latent and other insurers might have been on the risk.

If earthquakes are catastrophic *and* continuous, there are unsettled, mixed questions of law-and-fact, regarding when causes accrue and limitations of actions begin to run, and which insurer's liability is triggered. It might make sense for causes of action to accrue and limitations of action begin to run at the beginning of the earthquake, but for all limitations to toll until the damaging event has ended. Also, it might well be healthier for the earthquake insurance market to apply the exposure trigger of coverage where the only insurer liability triggered is that of the insurer on the risk at the beginning of the earthquake. (See, e.g., Wolfe v. State Farm Fire & Cas. Ins. (1996) 46 Cal.App.4th 554.)

One possible objection to this approach would be that insurers might be required to repair the same structure more than once between the mainshock and the end of the earthquake. However, this possibility would greatly increase the insurer's incentive to inspect the loss more carefully, especially after the mainshock and early aftershocks have done their worst. Furthermore, as time goes on in the life of the earthquake, the insurer would have better and better Garvey arguments, that is factual issues whether the earthquake is the most important factor in causing the loss.

Any general rule regarding limitations of actions on property losses should also provide guidance on the applicable trigger of coverage. Section 340.9 only relates to a single limitation of actions, the one-year limitation. Indeed, it does not even relate to that rule in general, it only precludes the one-year limitation from time-barring Northridge claims made before the end of 1999.

CCP § 340.9 is irrelevant to the Ninth Circuit certification questions.

The certification questions are presented as alternative statements of the same issue. (Vu, supra, at p. 727.) It appears from the certification opinion that the issue might usefully be parsed into the following questions:

- If an insurer's investigation of an earthquake loss is inadequate, can it lose the benefit of otherwise applicable limitations of actions?
- How much of the cost of the investigation of an earthquake loss should the insured be expected to bear?
- Can an insurer ever be estopped from asserting a limitation of actions by whatever it has said to an insured about the invalidity of a particular claim or by whatever it has withheld from the insured about the claim's validity?

Section 340.9 is irrelevant to all these questions.

Conclusion

The major issues discussed above have in part been raised to demonstrate just how minimal CCP § 340.9's relevance is to the issues presented by Vu. However, they might also be useful in the elaboration of a simplifying response to the certified questions.

Supplemental briefing is necessary to determine the interpretation, applicability and validity of the new statute. This court is respectfully requested to consider whether any supplemental briefs might also address an issue that may well be fairly included within the issue presented by Vu:

> Would common law rules that increase predictability and fairness in earthquake claims-handling be fostered by classifying earthquake losses as both catastrophic and continuous? If so, should limitations of action be tolled until the earthquake ends, and should the exposure trigger of coverage apply?

Respectfully submitted,

James T. Linford
[SBN 104639]

PROOF OF SERVICE

I am an active member of the State Bar of California, SBN 104639, and I have today properly served by mail copies of the foregoing "Supplemental Letter Brief by Amicus", in *Vu v. Prudential Property & Casualty Insurance Company,* S078271, to the following addresses:

U. S. Court of Appeals
Clerk [98-55540]
U. S. Court of Appeals
for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Attorneys for Appellant Peter Vu
Glenn R. Kantor
Daniel S. Gruber
Lisa S. Kantor
Sara Smith Ray
GRUBER & KANTOR
15821 Ventura Blvd., Suite 600
Encino, CA 91436

U. S. District Court
Clerk [CV-96-5247 KMW (JGx)]
U. S. District Court for the
Central District of California
312 North Spring Street, #G3
Los Angeles, CA 90012-4793

Attorneys for Respondent/Appellee Prudential Property & Casualty Co.
Janice A. Ramsey
James F. Henshall, Jr.
BERGER KAHN SHAFTON MOSS
FIGLER SIMON & GLADSTONE
P.O. Box 650
Irvine, CA 92623-9694

San Francisco, California
January 29, 2001 James T. Linford

I have also mailed copies of the letter to the following counsel for amici:

Attorney General Bill Lockyer
Timothy G. Ladidsh
Randall P. Borcherding
455 Golden Gate Ave, Ste. 11000
San Francisco, CA 94102-3664

James C. Martin
CROSBY HEAFEY ROACH & MAY
700 South Flower Street, Suite 2200
Los Angeles, CA 90017

Ronald D. Kent
Susan M. Walker
SONNENSCHEIN NATH & ROSENTHAL
601 South Figueroa Street, Suite 1200
Los Angeles, CA 90017

Mitchell C. Tilner
Lisa Perrochet
Horvitz & Levy
15760 Ventura Blvd., 18th Flr.
Encino, CA 91436

Richard D. Martland
NIELSEN, MERKSAMER, PARRINELLO,
MUELLER & NAYLOR
770 L Street, Suite 800
Sacramento, CA 95814

Peter H. Klee
Marc J. Feldman
LUCE FORWARD HAMILTON & SCRIPPS
600 West Broadway, Suite 2600
San Diego, CA 92101

Raul L. Martinez
Richard B. Wolf
Elise D. Klein
LEWIS D'AMATO BRISBOIS &
BISGAARD
221 North Figueroa Street, Suite 1200
Los Angeles, CA 90012