

August 4, 2016

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

Re: *Gordon Blackwell v. Foremost Ins. Co.*, H042263 (Cal. Ct. App., Jun 27, 2016, Elia, J.)

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

Pursuant to California Rule of Court 8.500(g), United Policyholders (“UP”), respectfully requests that the Court grant review in the above captioned case. The opinion of the appellate court, which upheld the trial court’s dismissal of Mr. Blackwell’s bad faith claim, lies in stark contrast to settled California law on pre-litigation dispute resolution and will result in a lack of justice for Mr. Blackwell and for all insureds who come after him.

Why granting review is preferable

Under California law, insurers owe a duty of good faith and fair dealing to their insureds. *Egan v. Mut. of Omaha Ins. Co.* (1979) 24 Cal.3d 809. When insurers breach this duty, they may be liable for tortious bad faith. An insured has the right to pursue damages in the civil justice system. Property insurance contracts, however, often contain an “appraisal” provision and compliance is a pre-requisite to a suit for bad faith. Insurers and insureds alike can invoke appraisal. Mr. Blackwell’s insurance policy was no different.

However, it is important to point out that insurance appraisers can determine only the actual cash value of items claimed. *Lee v. California Capital Ins. Co.* (2015) 237 Cal.App.4th 1154. Appraisers cannot make legal determinations about causation or coverage. *Id.* Mr. Blackwell’s suit alleged that his insurer acted with malice and fraudulent intent for refusing to pay for, *inter alia*, emergency repairs when a windstorm damaged his Santa Cruz home. Whether these repairs were necessary and covered under the policy would not have been the province of an insurance appraiser, thus Mr. Blackwell, nor the insurer invoked appraisal. Instead, the insurer litigated the case for two years and then, before the trial occurred, asked the court to dismiss the case because no appraisal had occurred.

Where a contract contains a pre-litigation dispute resolution clause (arbitration, appraisal, or otherwise) that is breached by the plaintiff, the defendant who insists the dispute is subject to arbitration (or appraisal) may move for summary judgment, move to compel, or submit to the court’s jurisdiction. *Charles J. Rounds Co. v. Joint Council of Teamsters No. 42* (1971) 4 Cal.3d 888. But once the defendant submits to a court’s jurisdiction, as the insurer did here, it forfeits its right to insist on the condition precedent. Otherwise, the result is that the judicial system and the parties waste time, money, and resources litigating a case only to be dismissed on a technicality. Thus, the result is Mr. Blackwell’s case is draconian.

Board of Directors

Amy Bach
Executive Director

E. Gerard Mannion
Board Chair
Mannion and Lowe

David Baria
Mississippi State Representative

Christine Davis
DZH Phillips

Larry P. Ginsburg, CFP
Ginsburg Financial Advisors, Inc.

William H. Hedden
Consolidated Adjusting, Inc.

Jim Jones
Industry Ventures

Brian S. Kabateck
Kabateck Brown Kellner LLP

Susan Piper
Disaster Survivor

John Sullivan
Corporate Financial Management

Alice J. Wolfson
DL Law Group

Ex Officio

Hon. Stanley G. Feldman
Chief Justice (RET)
AZ Supreme Court

Deborah Senn
Insurance Commissioner (1993 -2001)
Washington State

William M. Shernoff
Shernoff Bidart Echeverria Bentley LLP

Programs

Advocacy and Action
Roadmap to Preparedness™
Roadmap to Recovery™

August 4, 2016

Page 2 of 2

This Court should grant review to prevent confusion in the Courts of Appeal on what a defendant's remedies are when a plaintiff sues before complying with a pre-litigation dispute resolution clause. In the property insurance context, this is especially important because, as here, the pre-litigation dispute resolution clause called for appraisal, which could not have addressed many of the issues central to the insured's bad faith claim (e.g., whether Mr. Blackwell was entitled to additional living expenses and whether the insurer conducted a reasonable investigation as required under the California Fair Claims Settlement Practices Regulations – Cal. Code Regs. 2695.5(e)(3) and 2695.7(d)). Regardless, the mere fact that the insurer invoked appraisal only after two years of litigation is a ridiculous notion.

From a public policy standpoint, this case presents many issues worthy of this Court's consideration, chief among them that because insurance is a unique product that is designed to indemnify the insured in case of loss, disputes under insurance policies must be treated with care. Insureds do not expect that they will have to litigate to collect their policy benefits. When they do, they should not have their claim dismissed after expending years of time and resources when, as discussed above, the condition precedent to suit bears little or no relation to the substance suit and could not have resolved the claim dispute anyway.

Interest of the *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 400 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 was cited with approval by the California Supreme Court in *Vandenburg v. Superior Court*, 21 Cal. 4th 815 (1999) and numerous other appellate decisions.

Respectfully submitted,

Dated: August 4, 2016

Daniel Wade, Esq., Staff Attorney (296958)
Amy Bach, Esq., Executive Director (142029)

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: *Gordon Blackwell v. Foremost Ins. Co.*, H042263 (Cal. Ct. App., Jun 27, 2016, Elia, J.)

Case No: Supreme Court of California, No. _____.

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 August 4, 2016, I served the attached letter supporting the petition for review 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:

**California Court of Appeal
Sixth Appellate District
333 West Santa Clara Street, Suite 1060
San Jose, CA 95113**

**Dylan Schaffer, Esq.
J. Edward Kerley, Esq.
Kerley Schaffer LLP
1939 Harrison Street, Suite 500
Oakland, California 94612
*Counsel for Plaintiff/Appellant***

**Jeffrey M. Vucinich, Esq.
Clapp, Moroney, Bellagambra, Vucinich, Beeman and Scheley
1111 Bayhill Drive, Suite 300
San Bruno, CA 94066
*Counsel for Defendant/Respondent***

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

Executed: August 4, 2016 at San Francisco _____.