

July 18, 2017

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

Re: Fair Plan of California v. Garnes., A143190, May 26, 2016, Stewart, J. (S242965)

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 uphold the Court of Appeal’s opinion and deny the Petition for Review in the above-captioned case. The Court correctly found Fair Plan of California to be in violation of the California Insurance Code in its handling of Mrs. Garnes’ claim.

The Court Should Deny Fair Plan’s Petition for Review

In *Fair Plan of California v. Garnes*, the Court of Appeal reversed a decision of the Contra Costa Superior Court (C1102417) and held that Cal. Ins. Code sec. §§ 2051, 2070-2071 sets a minimum standard of coverage that required Fair Plan to indemnify Garnes for the actual cost of the repair to her home, minus depreciation, even if this amount exceeded the fair market value of her home. Fair Plan had argued that it was only obligated to pay Garnes less than one quarter of the cost of repairing her home. It contended that because her home was only partially destroyed by a fire, it had the option of paying her whichever was less: The fair market value of her home in a depressed real estate market, or the actual cost to repair. The Court of Appeal appropriately rejected this contention.

In analyzing §§ 2051, 2070-2071, the Court of Appeal reasoned that under a policy that pays actual cash value (“ACV”), the measure of recovery for a partial loss is “the amount it would cost the insured to repair, rebuild, or replace the thing lost or injured less a fair and reasonable deduction for physical depreciation” or “the policy limit, whichever is less.” (§ 2051, subd. (b)(2).) (Opn. at p.2, 9-11). Central to this determination was the Court’s analysis of the Legislative history of § 2051. In doing so, the Court rejected Fair Plan’s argument that a house could suffer a constructive total loss akin to an automobile that’s damaged to the point where it’s not worth repairing.

The Court recognized that this was a faulty analogy and that the true measure of recovery under applicable California law is the actual cost of repairs, less depreciation (*i.e.*, ACV) (Opn. at 10-11). This holding is particularly important because it recognizes that if Fair Plan was allowed to pay only fair market value, Mrs. Garnes would have only collected \$75,000 in policy benefits, instead of the nearly \$400,000 needed to repair her fire-damaged Richmond home.

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July 18, 2017

Page 2 of 2

The Court of Appeal recognized that the changes made in 2004 to Cal. Ins. Code § 2051 mooted *Jefferson Ins. Co. v. Superior Court*, 3 Cal.3d 398 (1970) with respect to loss settlement standards in partial losses. Jefferson was the principal case upon which Fair Plan relied to support its argument that ACV means fair market value. UP was involved in the drafting the 2004 amendments and understood, as did the Insurance Commissioner, that the ambiguity in § 2051 was causing disputes between insurers and their policyholders.

The Court of Appeal also recognized the harm the Fair Plan's contention and the Superior Court's ruling would have had on insured homeowners in economically distressed areas. Had Ms. Garnes recovered only \$75,000, her only choice would have been to demolish her family's home and sell the empty lot at a loss.

Of note, Fair Plan, under the direction of the Department of Insurance, who also appeared as *amicus curiae* has since instructed its claims adjusters to cease using the fair market value when adjusting partial losses. Thus, any assertion by Fair Plan that the instant case presents an issue worthy of this Court's review is unfounded. (California Rule of Court 8.500(b)(1) provides that review is necessary where it "requires to secure uniformity of decision or to settle an important question of law.").

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, who appeared as *amicus curiae* in the instant case, 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.

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 curie* briefs in more than 450 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. UP filed an *amicus curiae* brief in support of Appellant/Respondent Marlene Garnes in the Court of Appeal.

Respectfully submitted,



Amy Bach, Esq., Executive Director (142029)

Dated: July 18, 2017

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: Fair Plan of California v. Garnes (A143190, May 26, 2016, Stewart, J.)

Case No: Supreme Court of California, No. S242965.

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 July 18, 2017, I served the attached letter opposing 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
1st District Court of Appeal
350 McAllister Street
San Francisco, CA 94102**

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Los Angeles, CA 90071
*Counsel for Appellee/Petitioner***

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

Executed: July 18, 2016 at San Francisco ___/s/_____.