United Policyholders

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April 14, 2016

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

Re: Letter supporting petition for review in Patriot Cleaning Services, Inc. v. Certain Underwriters at Lloyd's London (Case No. S233277, Fourth Appellate District, Division Three Case No. G050601, Superior Court Case No. 30-2013-0064526, Nakamura, J.)

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Pursuant to California Rule of Court 8.500(g), United Policyholders (hereinafter "UP") respectfully requests that this Court grant review in the above-captioned matter. The trial court committed and the appellate court sanctioned a legal error in granting summary judgment where a reasonable inference existed *and* applied the incorrect legal standard in evaluating an insurance coverage dispute involving ambigious policy terms. This case presents an oportunity for this Court to clarify these important legal rules.

I. STATEMENT OF INTEREST

UP is a non-profit public interest 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 was founded in 1991 after the Berkeley/Oakland Hills Firestorm to assist homeowners with coverage and claim problems. UP's work is supported by donations, grants, and volunteer labor. UP does not sell insurance or accept funding from insurance companies.

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*. UP engages with local governments, stakeholders, and other advocates to provide insurance claim and coverage guidance for victims of natural disasters, including the recent fires in northern California. UP hosts a library of publications for consumers on its website at www.uphelp.org.

Through its A*dvocacy and Action Program*, UP engages with regulators, including the California Department of Insurance and Commissioner Dave Jones, legislators, academics, and various stakeholders in connection with legal and marketplace developments relevant to all policyholders and all lines of insurance with a special emphasis on lessons learned in disaster areas. UP's Executive Director is an official consumer representative to the National Association of Insurance Commissioners and an Adviser to the American Law Institute's Restatement of the Law of Liability Insurance Project where the doctrines of *reasonable expectations* and *contra proferentem,* central to the outcome of this case, have been endorsed by academics, retired judges, and practicing lawyers.

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 approximately 400 cases throughout the U.S. since the organization's founding in 1991, the majority of which have been filed in California. 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 were cited with approval by the this Court in Vandenburg v. Superior Court (1991) 21 Cal. 4th 815 and numerous other cases.

II. REASONS WHY GRANTING REVIEW IS PREFERABLE

Under California Rule of Court 8.500(b)(1), this Court should accept review where there is an opportunity "to settle an important question of law." Id. Here, the Court has an opportunity to right a wrong with respect to the legal standards applicable to: (1) a motion for summary judgment; and (2) ambigious policy provisions in a contract for insurance.

A. Summary Judgment is inappropriate where a reasonable inference exists

On a motion for summary judgment, the court must consider what inferences favoring the opposing party, here plaintiff-appellant Patriot Cleaning Services (hereinafter "Patriot"), a factfinder could reasonably draw from the evidence. The court must bear in mind that its primary function is to *identify* issues rather than to *determine* issues. (*See* Weil & Brown, Civil Procedure Before Trial §10:270, p. 10-105; The Rutter Group 1999) (emphasis added). Only when the inferences are *indisputable* may the court decide the issues as a matter of law, thus granting a motion for summary judgment. Where the evidence is in conflict, the factual issues must be resolved by trial. "Any doubts about the propriety of summary judgment are generally resolved against granting the motion, because that allows the future development of the case and avoids errors." (*See* Henley, Action Guide: Making and Opposing a Summary Judgment Motion, p. 15 (Cont.Ed.Bar 1998) (*See also* Binder v. Aetna Ins. Co., Case No. No. B119881. Second Dist., Div. Two. Oct 14, 1999) (citing Rio Linda Unified School Dist. v. Superior Court (1997) 52 Cal. App. 4th 732, 739 ["Under the new method for establishing a *prima facie* entitlement to summary judgment, the moving party must demonstrate a negative, *i.e.*, that there is no evidence to support an element of the opponent's case."]

Here, Patriot submitted an insurance claim for theft of its business property from a busines vehicle that was locked parked outside the owner's home. The vehicle was found days later, in a neighboring city, with approximately $35,000 worth of equipment forcibly removed. This is not disputed. The policy under which Patriot sought coverage contained an exclusion which reads as follows: "*We will not pay for a 'loss' caused by or resulting from theft from any unattended vehicle unless at the time of theft its windows, doors and compartments were closed and locked and there are visible signs that the theft was the result of visible signs of forced entry."* Defendant-appellant Certain Underwriters at Lloyd's London (hereinafter "Lloyd's") interpreted the exclusion to mean that the windows and/doors must exhibit "visible signs of forced entry," *i.e.* broken locks or windows, which they were not. However, "visible signs of forced entry" is not defined anywhere in the policy or elsewhere.

Patriot submitted evidence that the doors may have been opened by use of a "slim jim" (a flexible metal strip with a hooked end that slides between a car window and the rubber seal to open a locked door, *see* Patriot's petition at p.5). Lloyd's presented no evidence that this had not occurred, but neverthless applied the exclusion. Patriot sued Lloyd's for breach of contract and tortious breach of the duty of good faith and fair dealing. Lloyd's moved for summary judgment. However, summary judgment was completely inappropriate. Under the touchstone case *Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826 and Cal. Code Civ. Proc. § 437c subd. (p)(2), a plaintiff can defeat a motion for summary judgement if it presents evidence or an inference that there exists a triable issue of material fact. Id. The court must view the evidence in the manner most favorabe to the non-moving party. Id; *See also* Saelzler v. Advanced Group 400 (2001) 25 Cal.4th 763, 768. The fact that Patriot argued, and Lloyd's denial letter stated, that a slim jim may have been used to enter the vehicle, presents a question of fact that could only be resolved by a jury and not as a matter of law.

B. California law requires ambigious terms to be contstrued in favor of coverage

Notwithstanding the obvious error with respect to summary adjudication described above, this case implicates important questions of insurance law. Chiefly, that the trial and appellate courts allowed Lloyd's to broadly construe an exclusion in its insurance policy which was not supported by the policy itself or California law. The exclusion at issue ("*We will not pay for a 'loss' caused by or resulting from theft from any unattended vehicle unless at the time of theft its windows, doors and compartments were closed and locked and there are visible signs that the theft was the result of visible signs of forced entry.")* is ambiguous. It is not defined anywhere in the policy, nor is there a single reported decision in California or elsewhere which analyzes such an exclusion. In particular, the term "visible signs of forced entry" is open to multiple, competing, reasonable interpretations – the hallmark of ambiguity.

Under California law, coverage grants are to be construed broadly. *See, e.g.,* TRB Investments, Inc. v. Fireman's Fund Ins. Co. (2006) 40 Cal.4th 19 (…[a] coverage provision…will be construed broadly in favor of the insured. This broad construction will aid the insured in meeting its burden of proof, thereby ensuring that the end result (coverage or noncoverage) conforms to the insured's objectively reasonable expectations.") (citing Aydin Corp. v. First State Ins. Co. (1998) 18 Cal.4th 1183, 1192). Courts use the doctrine of *reasonable expectations* to enforce an insured's reasonable expectations of coverage under the language of an adhesion contract. *See* Samuel williston, A Treatise on the Law of Contracts § 900 (3d ed. 1963).

In contrast, exclusions to coverage are to be construed narrowly. *See, e.g.,* MacKinnon v. Truck Ins. Exch. (2003) 31 Cal.4th 635. In any case, ambiguities in a contract are to be resolved against the drafter, *i.e.,* the insurer. Courts and commentators refer to this doctrine as *contra proferentem.* See*, e.g.,* AIU Insurance Co. v. Superior Court (1990) 51 Cal. 3d 807, 822 ("In the insurance context, we generally resolve ambiguities in favor of coverage."). The reason for doing so is not hard to comprehend. Insurance policies are a unique species of contract. Insurance companies draft the policy forms with no input from the policyholder. They are contracts of adhesion. *See, e.g.,* Friedrich Kessler, Contracts of Adhesion, Some Thoughts About Freedom of Contract 43. Columb. L. Rev. 621 (1943). The insurance contract is also unqiue because one purchases insurance coverage for piece of mind and economic security. Absent fraud, an insured should be better off for purchasing insurance, not worse.

Professor Williston, principal drafter of the first Restatement on Contracts, provdes the most compelling justification for the application of *contra proferentem*:

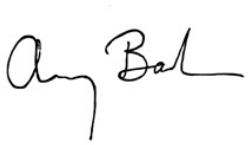
> "The fundamental reason which explains [*contra proferentem*] and other examples of judicial predisposition toward the insured is the deep-seated often unconscious but justified feeling or belief that the powerful underwriter, having drafted its several types of insurance contracts with the aid of skillful and highly paid legal talent, from which no deviation desired by an applicant will be permitted, is almost certain to overreach the other party to the contract. The established underwriter is magnificently qualified to understand and protect its own selfish interests. In contrast, the applicant is a shorn lamb driven to accept whatever contract may be offered on a 'take-it-or-leave-it' basis if he or she wishes insurance protection. In other words, insurance policies, while contractual in nature, are certainly not ordinary contracts, and should not be interpreted or construed as individually bargained for, fully negotiated agreements, but should be treated as contracts of adhesion between unequal parties. This is because… insurance contracts are generally not the result of the typical bargaining and negotiating processes between roughly equal parties that is the hallmark of freedom of contract." *See* 16 Richard A. Lord, Williston on Contracts 49:15 (4th Ed. 2014)

Patriot is surely the "shorn lamb" to which Williston refers. Patriot purchased an "all risk" policy to guard against exactly the peril to which it befell. However, when it submitted a claim it was wrongfully denied coverage on what amounts to a technicality; a semantic dispute over an ambigious term that, without a doubt, defeated its *reasonable expectations*. In fact, the coverage denial has prevented Patriot from resuming business operations. Surely this is not the result Patriot would have expected when it discovered it had suffered what it thought would be an insured loss; certainly not a judicially sanctioned coverage denial.

As discussed above, Lloyd's has interpreted the term "visible signs of forced entry" to require broken windows or doors, despite the fact that this is nowhere defined in the policy. The fact that a court would allow an insurer to define to, *ex post facto*, a term that is not defined in the policy and appears nowhere in California case law, statutes, or regulations, to the exclusion of coverage, resolving a factual dispute without a jury trial, is a miscarriage of justice and requires this Court's attention. Thus, this case presents a unique opportunity for this Court to clarify the legal rules for summary adjudication where a reasonable inference exists and insurance coverage disputes involving ambigious coverage terms.

For the reasons set forth above, UP supports review in this important matter.

Sincerely,



Amy Bach, Esq.
Executive Director

PROOF OF SERVICE

I declare under penalty of perjury I am 18 years old and not a party to this action. My business address is 381 Bush Street, 8th Floor, San Francisco, CA 9410. The foregoing letter was served on the parties below by U.S. Mail at 150 Sutter Street, San Francisco, CA 94104:

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Executed on April 14, 2016

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___s/_____

by Daniel Wade, Esq.