

## Insurance News You Can Use

# what's UP

## UP draws media attention to post-disaster insurance woes

An independent online survey conducted last spring by United Policyholders and two partner organizations received widespread media coverage. The front page of the Los Angeles Times Business section, newspapers and television stations throughout California and as far as Ohio reported on the fact that homeowners hit by the 2007 wildfires in San Diego have come up woefully short on insurance funds and are still awaiting settlement offers eight months after losing their homes. Two hundred and seventy four wildfire survivors participated in the survey. Survey questions elicited information on the status of insurance claims, the adequacy of policy benefits and related topics.

In their zeal to gain and keep customers, insurers focus on competitive pricing, rather than properly insuring homes. They gamble on the fact that few homeowners will ever suffer a total loss in their lifetime. This works out fine for most people, but with increasing numbers of Americans suffering a serious or total loss, inadequate coverage is a national crisis.

In analyzing the survey results, UP identified the fact that insurance salespeople often assure homeowners they are adequately covered when



*CA Ins. Comm'r Steve Poizner, Amy Bach and San Diego City Councilman Brian Maienschein at a CDI press conference announcing a legal strategy to assist fire survivors.*

in fact they are not. Insurance agents from several states contacted UP after reading articles about the survey. Much to our surprise, many of them thanked us for educating the public about the importance of buying sufficient coverage. They told us that it is hard to convince customers to buy the right amount of coverage when their competitors are recommending up to 20% less.

It is our hope that the media coverage of the survey results will spur lawmakers and property owners to take action.

To read the survey questions and responses and the media coverage, visit [www.uphelp.org](http://www.uphelp.org)



*With help from UP, the Cader Family broke ground to rebuild after a 2007 wildfire.*



*Outreach Coordinator Karen Reimus was on hand to help the Cadars celebrate.*

## Five steps to take today to protect your home

Every part of the U.S. is vulnerable to some kind of natural disasters: Hurricanes, earthquakes, wildfires, hailstorms, floods... Here's a reminder: If you haven't already done it, take steps to protect your home and mitigate the damage.

Executive Director **Amy Bach** and Homeowner Advisor **Ken Klein** recently participated in a Mitigation Roundtable convened by CA Insurance Commissioner **Steve Poizner**. Poizner brought together insurance and firefighting experts to explore how insurers can offer more incentives for property owners to reduce the risk of damage from fires and other natural disasters. Current discounts and programs are far from what they should be.

### Basic steps

- 1. Know your risks.** To find out if you're in a flood zone, go to: [www.floodsmart.gov](http://www.floodsmart.gov)  
To find out the earthquake risks in your area go to: [www.abag.ca.gov/bayareal\\_eqmaps/pickcity.html](http://www.abag.ca.gov/bayareal_eqmaps/pickcity.html)
- 2. Be Proactive.** Don't do *nothing* just because you can't do *everything*. If you're in a wildfire risk area, know that firefighters say they're best able to save homes with "defensible space" (brush-free zones around your dwelling), boxed eaves and screened vents. Shutters can be effective against high winds. Seismic shut-off valves are an inexpensive way of preventing a gas explosion during an earthquake.
- 3. Use the Internet to find out what's most effective.** The Institute for Home and Business Safety is a good resource. [www.ibhs.org](http://www.ibhs.org)
- 4. Contact your insurance agent and ask about all mitigation/prevention discounts.**
- 5. Make sure your dwelling is properly insured.** Use our buying tips; [www.unitedpolicyholders.org/claimtips/tip\\_do\\_donor.html](http://www.unitedpolicyholders.org/claimtips/tip_do_donor.html)

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# U.S. Supreme Court rules on conflicts of interest in health/disability benefit determinations

The following is an excerpt from an article by **Mark DeBofsky**, a disability insurance litigation expert, partner in the Chicago firm of Daley, DeBofsky Bryant and a valued member of United Policyholders' Amicus Project Advisory Board.

The United States Supreme Court recently issued a decision in an important case in which United Policyholders and others, (including the National Association of Insurance Commissioners) weighed in as friends of the court (*amicus curiae*). The case relates to fairness in proceedings to review health and disability insurance claim disputes. **Mark DeBofsky** and **Ron Dean** authored United Policyholders' amicus brief. It impacts everyone in the country who gets disability or health insurance through their place of employment. The full article can be read online at: [www.uphelp.org](http://www.uphelp.org)

*Metropolitan Life Ins.Co. v. Glenn, No. 06-293, 2008 U.S.LEXIS 5030 (U.S.Sup.Ct. June*

19, 2008). Glenn involved a very typical claim – Wanda Glenn, an employee of Sears, suffered from severe cardiac disease. When her medical condition rendered her unable to continue working, she applied to MetLife, which insured Sears employees against disability, seeking payment of long-term disability benefits. Her claim was approved, and Ms. Glenn began receiving benefits in 2000 under a definition of disability that entitled her to disability insurance payments if she could not perform the material duties of her regular occupation due to her medical condition. Then, in 2002, utilizing the assistance of a law firm to which MetLife steered her to receive representation, Glenn was also approved to receive Social Security disability payments under a much more stringent definition of disability which required that she not only be incapable of performing her regular job duties; she also had to prove her inability to work at any occupation.

The award of Social Security enabled MetLife to recoup monies it had already paid

out based on policy provisions allowing the insurer to offset Social Security disability payments against the long-term disability benefits. Despite the Social Security approval, though, MetLife terminated Ms. Glenn's payments, asserting she failed to continue to qualify for benefits based on a change of definition of disability from an "own occupation" standard to one that required her to prove her inability to work at "any occupation." The latter is essentially the standard for eligibility for Social Security disability.

The underlying issue in *Glenn* was: How should courts review claim determinations made by insurers that both administer the claims and pay the benefits? The recently issued ruling in *Metropolitan Life Ins.Co. v. Glenn* represents the Supreme Court's effort to answer that question, resolve a circuit split and offer a measure of guidance to lower courts.

United Policyholders took the position that an easy and workable universal solution

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## Medicare Advantage—Whose Advantage?

By, Alice J. Wolfson, J.D., Chair, UP Board of Directors, Co-Founder, National Women's Health Network

On July 9th Senator **Ted Kennedy** flew directly from Boston following his chemotherapy treatment for his malignant brain tumor to cast a decisive vote in favor of proceeding to final passage of a Medicare bill. His vote silenced attempts to cut Medicare payments to doctors by over 10% a move which would have benefited the private alternative to Medicare, known as Medicare Advantage. Sick as he was, Senator Kennedy felt that standing up for senior citizens against what he saw as a profit grab by insurance companies was worth the effort. The public and Congressional debates over this bill, however, revealed that few people actually know the difference between Medicare and a Medicare Advantage plan.

For many people turning 65, the question of the difference between a traditional Medicare part B plan supplemented by a private "medigap" plan and the insurance company sponsored program known as Medicare Advantage poses a nearly insolvable problem. The purpose of this article is to shed some light on the mysteries that surround this choice.

The Medicare program is structured as a uniform national benefit on the social insurance model. Medicare Advantage plans, or private "Medicare" are the successors to the now failed "Medicare+ choice program." The idea

behind these programs was that managed care, or the HMO (health maintenance organization) model would reduce Medicare costs and care through better management. But that's not what happened. Nearly 44 million Americans are now Medicare beneficiaries.<sup>1</sup> 80% of these Americans get their health care services through the traditional Medicare program—a government sponsored entitlement program and many say, the best thing about turning 65.

About 8.7 million people currently receive medical care through "private" Medicare Advantage (MA) plans. The basic cost of these private plans is borne by the federal government. The government typically pays providers an average of 12% more under MA plans than it would pay for the same services under traditional Medicare plans. These overpayments can exceed 50% and cost each Medicare part B recipient a minimum of \$2 more each month whether they are enrolled in the advantage plan or not.

We have all heard lots about Medicare's fiscal problems. But few people know that many economists place much of the blame for these woes squarely on the shoulders of MA plans. According to the Congressional Budget Office, increased payments to MA plans are a threat to Medicare's financial future, accelerating the depletion of the Medicare Trust Fund.

If you are or about to be a Medicare beneficiary and you are considering joining a MA plan, you should consider the following:

- MA could cost you more than traditional Medicare. MA plans are required to provide a benefit package that is as good as Medicare but, and this is a big but, the plans do not have to cover every benefit in the same way. Some plans may require a higher co-payment or could place limits on the frequency of services;
- MA plans may advertise increased benefits but there is no guarantee that the plan actually offers more than Medicare offers;
- You may be denied reimbursement if you are traveling in an area out of your network and need emergency care. You may also find that your access to specialists and hospitals out of the network will be restricted or you will have to pay large co-pay for such treatment;
- You may be forced to change your current health care provider if he/she is not in your plan's "network."
- You have little protection from fraudulent marketing. Nearly 80% of states report complaints of deceptive or high-pressure sales techniques surrounding the sale of

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*Amy Bach, Executive Director*

No rest for first responders. The wildfire season roared in early July with 800 fires burning simultaneously in hot, drought-struck California. I witnessed one up close and personal and have a renewed reverence for the firefighters who somehow manage to put out every one of them – brutal terrain and conditions notwithstanding. Tropical storm Fay, hurricanes Gustav and Ike have hit the Gulf Coast states hard, and Wall Street’s woes will be impacting us all.

UP is stepping up outreach and education to help people make the right insurance choices and get claim support when they need it. Visit the “In the News” at our website to read about mitigation efforts and the importance of buying enough and the right kind of coverage.

Finding and affording insurance continues to be a serious problem in coastal areas along the Eastern seaboard and the Gulf Coast, but Louisiana Commissioner **James Donelon** told me at the last NAIC meeting that the situation is improving in his state. New York Commissioner **Eric Dinallo** is keeping things stable in my birth state, and Florida Commissioner **Kevin McCarty** is truly *the* industry cop on the beat these days.

## Bach Talk

Other than the simmering beltway debates over trashing our relatively highly evolved state insurance regulatory system in favor of a new Federal bureaucracy (too bad **Jack Abrahamoff** won’t be around to help design it), and debates over expanding the **National Flood Insurance Program**, the post-Katrina focus on the need for better oversight of disaster insurance claims seems to have died down. An easy fix would be a return to all-perils policies and a ban in every state on the “anti-concurrent causation” policy exclusions that are 90% responsible for the crazy low claim payouts after Katrina and Rita and the 20,000 + lawsuits that resulted.

For the many who love New Orleans, (myself included), Gustav’s relatively light impact was a huge relief. Tropical storm Fay was no slouch. The good news for Floridians, (per Mighty **Mary Kestenbaum** of **The Merlin Law Group**) is that it wasn’t classified as a hurricane so homeowners’ insurance coverage may kick in with good old fashioned flat dollar – not percentage deductibles.

Percentage deductibles and separate home, windstorm and flood policies will mean more hassles and less payouts overall for those impacted by Gustav... and Ike, and whatever other storms hit by press time. Read the August 30, 2008 article; “Insurance Covers Less This Time” by Times-Picayune uber-reporter **Becky Mowbray** for the full scoop. I’m quoted in the article advocating for a return to the simpler world of “all perils” policies.

I’m so proud of how many loss survivors are getting help via our **Roadmap to Recovery™** program in Southern California and our amazing mentor/volunteers, but really – how many non-profits can say this about their Outreach Coordinator: October 14th will officially be declared **Karen Reimus Day** in the City of San Diego. How about that? 🏠

## Inadequate Home Coverage and UP featured on CBS Nightly News

On July 14th 2008, CBS’s Nightly News with **Katie Couric** ran a hard-hitting piece that raised awareness nationwide that homeowners, particularly those insured with Allstate, may not have the full protection they think they have. The piece featured UP’s Executive Director and two couples whose homes were destroyed in 2007 San Diego wildfires. Both couples found themselves more than \$100,000 short on insurance funds to cover rebuilding expenses. UP works particularly hard to help Allstate policyholders in the aftermath of natural disasters because it is the only large insurer that has steadfastly refused to retroactively increase the policy limits of customers who relied to their detriment on incorrect rebuilding/dwelling limit calculations by Allstate personnel. 🏠



*Farmers Group Mentor Jack Mueller receiving an award from Outreach Coordinator Karen Reimus.*



*UP Recognition Award recipients Marsha Linehan, Jan Rasmussen and Valerie Brown with Layne Rasmussen at the Volunteer Recognition Party, July 2008.*

## New York News

**The good news:** New York’s highest court denied an insurer’s request to re-argue a landmark case that was decided in favor of policyholders earlier this year. The case, *Bi-Economy Market, Inc., v. Harleysville Insurance Co. Of New York*, (2007) Case No. SC06-1303, made new law that gives victims of unfair claim practices an important remedy. To read the amicus brief United Policyholders filed in the case, or the final opinion, click on this link: <http://www.unitedpolicyholders.org/pdfs/Bi-EconvsHarleyAmicusBrief.pdf>

**The bad news:** Property owners on Long Island and lower Westchester now have something in common with Gulf Coast residents... their insurers are raising premiums, excluding windstorm damage from homeowners policies and imposing percentage instead of fixed dollar deductibles for wind damage. Pay more get less... 🏠

# Car Insurance for Teens

Your baby is learning to drive. One of you is going to pay hefty premiums for insurance. With the help of a teenage volunteer, United Policyholders has published a new brochure that educates young drivers on keeping their rates as low as possible. Here are some of the main tips that parents and their teenage drivers should consider:

1. Don't buy a new car for a young driver.
2. Teenagers need to be specifically named on the family auto policy in order to be covered by that policy. Choose an insurance company that will let you assign a specific car to a specific driver and assign the least valuable car to the teenage driver. If your teenager is a permit driver, check with your insurance company to make sure your policy covers him or her.
3. Raise your deductible to the highest amount you'll feel comfortable paying out of pocket in the event of an accident.
4. Don't put in claims for minor accidents

or damages unless someone has been injured in which case you must report it promptly.

5. Have your teenager take a safe driving class.
6. Be diligent about reminding your teenage driver that:
  - a. No one under the age of 18 can drive and use a cell phone in CA and many other states.
  - b. No one can drive and use a cell phone without a hands-free device in CA and many states.
  - c. A DUI citation or conviction will raise your rates and may result in losing insurance coverage. Drive sober.
  - d. Don't leave valuables, GPS devices or face plates visible in the car.
  - e. Don't speed: tickets can trigger big rate increases.
  - f. A 3.0 or higher GPA will discount your auto premium.Check with your insurance company to



Volunteer Luke Barnsmoore developed UP's Car Insurance Tips for Teens.

see if it is cheaper to have a separate policy for your teenager or to add him or her to your policy and ask if they offer any other discounts or incentives.

Remember: there are big fines for driving without insurance, so make sure your teenager is covered.

You can request a copy of United Policyholders' Teen Car Insurance Tips brochure by emailing [Emily@unitedpolicyholders.org](mailto:Emily@unitedpolicyholders.org). These tips were developed for United Policyholders by **Luke Barnesmoore**. ❧

## Are you getting the E-version of "What's UP"?

In 2008 UP launched an electronic newsletter to supplement our print newsletters. Subscribers will be emailed four issues a year, free of charge. Email Emily Cabral at [Emily@unitedpolicyholders.org](mailto:Emily@unitedpolicyholders.org) to sign up today, and make sure to add [news@unitedpolicyholders.org](mailto:news@unitedpolicyholders.org) to your "safe senders" list.

## Complete Your Survey

Our Readers Surveys are how we stay connected with you and your needs. Please complete the enclosed Readers Survey and return it with or without a donation in the envelope provided.

## Know thy adjuster – Know thy rights



**Gordon Scott of Greenspan/A.I. wants to strengthen disclosures to homeowners.**

"My first adjuster was so helpful and prompt in returning my calls. Her replacement is a nightmare," a 2007 fire survivor recently emailed UP.

The adjuster assigned to your claim makes a huge difference in how much and how quickly you recover from a loss. But you have options. **Did you know?**

- There are three types of adjusters; Company, "Independent" and Public. Some are licensed, some are not.
- On a large loss you may have to deal with a succession of different claim adjusters over time.
- Some insurers will assign you a "dwelling adjuster" and a "contents adjuster."
- You can (and should) insist on a new adjuster if the one assigned to you is incompetent, unprofessional or

The luck of the draw. That's what determines whether the adjuster assigned to your claim is ethical and experienced or green and/or under pressure from superiors to underpay and close the file.

"After Katrina, insurers were hiring anyone who could walk", an industry insider told UP.

obstructionist. Don't take no for an answer, even if it means filing a formal complaint with your state insurance regulator. Visit [www.uphelp.org](http://www.uphelp.org) to find out how.

- In most states you can hire a professional "public" adjuster to negotiate a claim settlement on your behalf.
- So-called "independent" adjusters won't work for policyholders. They only work for insurers who outsource claim handling services.
- Although it is generally illegal to do so, insurance company reps often discourage claimants from hiring professional help.

### What is UP doing?

- Educating the public on their rights through our website, programs, materials and the media.
- Advocating for a mandatory nationwide disclosure that would let every claimant know about the three different types of adjusters. UP formally submitted a proposal to the National Association of Insurance Commissioners and argued in favor of its adoption during the summer 2008 meeting in San Francisco. The proposal originated from **Gordon Scott** of Greenspan/AI in Northern CA. (See the "Find Help" section of [www.uphelp.org](http://www.uphelp.org) for more info). ❧

## BOOK REVIEW

# “From Good Hands to Boxing Gloves, The Dark Side of Insurance”

by David Berardinelli, Trial Guides Press, 2008.

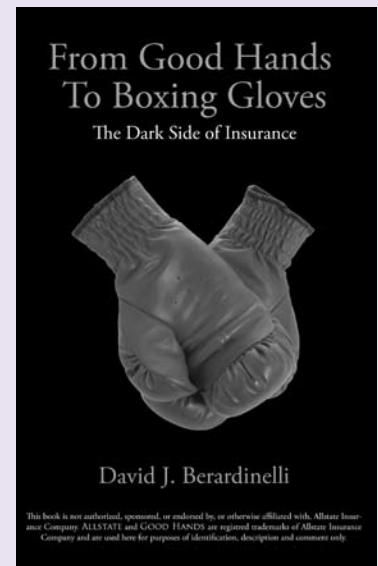
**Y**ou don't have to be a disaster victim, a trial lawyer or a regular visitor to “Allstatesucks.com” to enjoy this book. It's a good read for anyone interested in what happens when a corporate giant takes the advice of high priced consultants and starts throwing hardballs at its own customers to increase profits. In *From “Good Hands” to Boxing Gloves*, a well written narrative, New Mexico attorney **David Berardinelli** tells how he gained exclusive access to documents that exposed Allstate's unethical practices.

Berardinelli is one of the best known policyholder-side experts in the country on the Allstate group of companies. His name is often linked with “The McKinsey Documents.” These documents connect the dots on how Allstate implemented profit-driven strategies with the global business consulting firm of McKinsey & Associates. Allstate fought for


years to keep them secret, flaunting court orders, disobeying Florida's insurance regulator, running up millions of dollars in contempt fines and even temporarily losing their license to sell insurance in the state of Florida.

In 2006 Berardinelli and **Michael Freeman** published a book for plaintiff lawyers only titled: *From “Good Hands” to Boxing Gloves - How Allstate Changed Casualty Insurance in America: The Definitive Guide to Handling Allstate Claims*. It contains a foreword by UP Amicus Project founder **Eugene R. Anderson**, Esq. Lawyers around the country rely on the book when trying cases against the nation's largest property insurer.

This year Berardinelli published a public version and we highly recommend it to one and all. Highlights include how Allstate hired McKinsey and Company to



create the “Claims Core Process Redesign” that allowed Allstate to increase its profits at taxpayer and policyholders' expense and how Allstate fought Berardinelli and courts to avoid revealing the slides to the public.

To buy the public version of *From “Good Hands” to Boxing Gloves, The Dark Side of Insurance.* Visit [www.trialguides.com](http://www.trialguides.com) 

## October 17, 2008 Live Webcast: Good Hands to Boxing Gloves: Allstate on the hot seat

Hear attorney/author David Berardinelli and policyholder advocate Amy Bach discuss recent developments relating to Allstate, the McKinsey Documents and unfair claims handling practices during a live Webcast sponsored by Trial Guides. Lawyers can get CLE credit, the program is open to the public. 12-2pm EDT, 9-11am PDT. Register at <http://trialguides.com/webinars.htm>


### U.S. Supreme...continued from p2

would be to impose the *de novo* standard in all benefit claims adjudicated by insurers rather than the abuse of discretion standard that has become prevalent since a 1989 Supreme Court ruling that permitted insurers to effectively give themselves discretionary authority. Unfortunately, the Supreme Court refused to take that large a step; and for now the only way out is for Congress to step in.

Until that happens, the *Glenn* ruling leaves much uncertainty. For example, will discovery be expanded? It would be difficult for a plaintiff to convince a court the conflict was a factor sufficient to be the tiebreaker in a close case if the plaintiff is not given the opportunity to show whether a consultant hired by an insurer may be biased. Certainly, if the insurer is going to argue that it took steps to insulate itself from the conflict by hiring an independent consultant, the plaintiff should have the opportunity to investigate the consultant's independence. Likewise, if the insurer asserts that the claims personnel have been shielded from financial decision-making or that management controls have been

implemented, plaintiffs need to be able to investigate. An insurer's self-serving interpretation of a policy provision must also be subject to discovery as to consistency of application both historically and from claim to claim since the existence of a conflict would promote an interpretation more favorable to the employer/insurer than the claimant and a “reasonable” interpretation may no longer be sufficient to win the day.

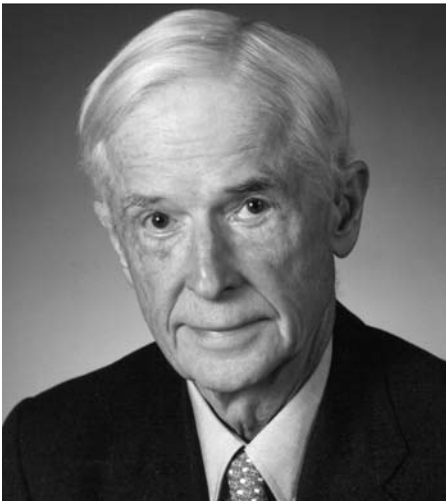
Undoubtedly, there will continue to be confusion in the wake of the *Glenn* ruling. It remains unclear how conflicts are to be assessed and how strongly or weakly they will be a factor in ensuing litigation. However, the Supreme Court have a clear signal “that courts must now assume more responsibility for ensuring the reasonableness and fairness of [ERISA plan fiduciary] decisions than some courts have shown in the past.” This means the current lenient regime of claim reviews is over.

To read the full article online go to [www.uphelp.org](http://www.uphelp.org). To read more of Mark's articles, subscribe to his monthly **Disability E-News Alert** by emailing him at [mdebosky@ddbchicago.com](mailto:mdebosky@ddbchicago.com). 

## Help Us Help You

We're working hard to make sure that insurance companies live up to the sales promises they make to the public. Please support our unique and important work. Make a tax deductible contribution today via credit card at [www.uphelp.org](http://www.uphelp.org) or by sending a check in the enclosed envelope.

**Please Note:** United Policyholders neither sells nor profits from the sale of insurance. The information provided in this newsletter is a public service to our readers. We do not warrant the quality of any product or vendor identified in this newsletter.



Gene Anderson, Esq., the moving force behind UP's Amicus Project.

One of the many ways United Policyholders promotes policyholders' interests is by standing up for insureds in court. We do this by filing "friend of the court" briefs in cases all over the United States. Our goal is to support laws that protect those who pay for insurance protection. Laws are critically important because they force insurers to keep policyholders' interests in balance with their profit goals.

All of United Policyholders' *amicus curiae* briefs are prepared and filed by experienced attorneys who specialize in insurance and/or appellate law. Most of the organization's briefs are prepared and filed *pro bono* – without charge by volunteers. We are honored and fortunate to have an ever-growing team of Amicus Project brief writers and we are deeply grateful for the contributions they make to our organization's work.

Below is a short synopsis of cases where United Policyholders has appeared as an amicus (friend of the court) thus far in 2008. To read the briefs online, visit the **Lawyer/Advocate Resources** section at [www.uphelp.org](http://www.uphelp.org).

## CALIFORNIA

DeBruyn v. Superior Court (Farmers Group, Inc.) (2008) Supreme Court of California, Case No. S161000.

**Issue: Coverage for property damage that is caused by more than one event.**

Please support UP's Amicus Project with a financial contribution today via the enclosed envelope or online at: [www.uphelp.com](http://www.uphelp.com). We need money to continue this important work and continue our very efficient balance of donated labor and funded expenses.

# Amicus Project Update

This case examines the **efficient proximate cause doctrine and Insurance Code section 530** in the aftermath of CA. Supreme Court's opinion in Julien v. Hartford Underwriters Insurance Company (2005) 35 Cal.4th 747. UP's brief was written *pro bono* by **Denise Jarman** of The Law Office of Denise Jarman in Davis, CA and **Chipman Miles** and **Joel M. Westbrook** of the law firm Miles, Miles & Westbrook in Walnut Creek, CA.

Everett v. State Farm General Insurance Company, (2008), Fourth Division 2, Case No. E41807, 08 C.D.O.S. 5181.

**Issue: Insurer and agent/broker liability for failing to procure adequate property insurance policy limits.** UP worked hard to convince the CA. Supreme Court to depublish an appeal court decision that puts the onus for setting policy limits on people who are not trained or competent to do so. Amicus briefs on the policyholder side were also filed by the **CA. Department of Insurance, San Diego City Councilman Brian Maisenschein, RB United, Rebuilding Mountain Hearts and Lives and Case Western Law Professor Ken Klein**. UP's amicus brief was written by UP's Executive Director **Amy Bach** with input from **Denise Jarman, Gerry Mannion** and **Alice Wolfson**.

Fairbanks v. Superior Court of California, Farmers New World Life Insurance Co., et al, real parties in interest, (2008) Case No. S157001, In the Supreme Court of California.

**Issue: Scope of the CLRA.** Whether the provisions of the Consumers Legal Remedies Act, Civil Code Section 1750, et seq. ("CLRA") which prohibit "unfair methods of competition and unfair or deceptive acts or practices" in the sale or lease of "goods or services" to consumers should apply to the sale of insurance. UP's amicus brief was written *pro bono* by **Kim E. Card** of The Law Office of Kim E. Card in Berkeley, CA.

Medina v. Safe-Guard Products International, Inc., (2008) Fourth District Court of Appeal, Division Three, Case No. G038816.

**Issue: Sale of insurance by unlicensed agents**

Qualcomm, Inc. v. Certain Underwriters at Lloyd's, London (2008) CA Supreme Court Case No. S163293 (Fourth App. Dist. Div. One, No. D050433) **Issue: Primary versus excess.** UP took the position where a policyholder settles with a primary insurance for less than the full amount of the policy, the

policyholder may still collect from its excess insurance company if a judgment is rendered or a settlement reached for more than the limit of the primary policy. This brief was written for United Policyholders *pro bono* by **William G. Passannante** of Anderson, Kill & Olick P.C. in New York, NY.

Safeco Insurance Company vs. Parks, (2008) Court of Appeal, Second Appellate District, California. Case No. B199364 (consolidated with B200267).

**Issue: Insurers' duty to disclose all applicable benefits coverages, deadlines etc.** under 10 Cal. Code Regs. Section 2695.4(a). This brief was filed *pro bono* by **Sharon J. Arkin** of The Arkin Law Firm in Los Angeles, CA.

Watanabe v. Blue Shield, (2008), State Court of Appeal, 2nd Appellate District, 2nd Civ No. B 195725 BC (324008)

**Issue: Bad faith – health ins.** Blue Shield of California tried to shield itself from bad faith liability by claiming that Maria Watanabe's benefits were denied by a medical group which had a contract with Blue Shield. But California law is clear: an insurer cannot delegate its implied covenant duties. The Know-Keene Act does not immunize insurance companies from bad faith liability. To allow an insurer to delegate its implied covenant obligations would effectively allow insurers to eliminate its bad faith liability. Absent the threat of bad faith liability, an insurer has little incentive to afford policy benefits. This brief was written *pro bono* by **Daniel J. Koes** of The Law Offices of Daniel J. Koes in Los Angeles, CA.

## GEORGIA

Morrill and The Estate of John Prestiss v. Cotton States Mutual Insurance Company (2008) In the Court of Appeals, State of Georgia. Case No. A08A1391.

**Issue: Statute of limitations.** Insurer attempted to apply contractual one year statute of limitations in contravention of the public policy of Georgia, as established by statute and precedent allowing policyholders two years from the date of loss to file suit. The trial court erred by (1) applying the time limitation provision to a liability claim that is not subject to this provision, (2) ignoring current insurance laws, regulations, and public policy, and (3) refusing to let a jury decide whether estoppel and waiver apply in this case. UP's brief was written *pro bono* by **Tim Law**, formerly with AKO, Phila. now with Reed & Smith, Philadelphia, PA.

## LOUISIANA

Landry et al., v. Louisiana Citizens Property Insurance Corporation (2008), Supreme Court of Louisiana. Companion case to Williams. [Katrina case]

**Issue: Value Policy Law** requires the insurer to make full payment to the insureds regardless that the total loss was a result of a combination of covered and excluded perils under the insurance policy so long as the efficient proximate cause of the loss was a covered peril. UP's amicus brief was written *pro bono* by **John Ellison** formerly with AKO, now with Reed Smith L.P. in Philadelphia, PA and **Drew Ranier** of Ranier, Gayle & Elliot, L.L.C. in Lake Charles, LA.

## MISSISSIPPI

Corban v. United Services Automobile Association a/k/a USAA Insurance Agency (2008) Supreme court of Mississippi, Case No. 2008-M-645 [Katrina case]

**Issue: Wind vs. Water etc.** (1) In an "all risk" policy, once the insured proves that "a direct physical loss" was sustained, the insurer has the burden of proof to establish what portion of the "direct physical loss" was caused by a specifically excluded event or cause. (2) With a Katrina loss, which contains components of both wind and flood, the insurer should still have the burden of proving, through non-speculative evidence that personal property damage was caused by a specific exclusion. (3) If the court finds the anti-concurrent clause is not ambiguous, it should rule that wind and water damage are separate and only the "flood" damage is subject to the exclusion. (4) If the policy contains Additional Coverage for "collapse" the policy's exclusion for "water damage" should be inapplicable. UP's amicus brief was filed *pro bono* by **William F. Merlin, Jr.** and **Mary E. Kestenbaum** of the Merlin Law Group, P.A. in Tampa, FL.

## PENNSYLVANIA

AstenJohnson Inc., v. Columbia Casualty Co. and Fireman's Fund Insurance Companies, (2008) Case No. 07-2305, United States Court of Appeals for the Third Circuit, On Appeal from the United States District Court for the Eastern District of Pennsylvania.

**Issue: Asbestos exclusion.** Policyholders should have the right to select the policies under which they seek coverage, without fear of prejudice to any Laches or Course of Performance Argument. Courts should not hamstring a policyholder's efforts to obtain evidence of custom and usage in the insurance industry, particularly where evidence regarding trade usage provides the basis for

interpreting the language in the policy. It is essential that policyholders have the opportunity to take broad discovery on matters relating to custom and usage in the insurance industry. Insurance companies should not be allowed to adopt an interpretation that renders a policy provision meaningless. UP amicus brief was written *pro bono* by **Andrew M. Roman** and **Richard A. Ejzak** of the law firm Cohan & Grigsby, P.C. in Pittsburgh.

## WISCONSIN

Plastics Engineering Company v. Liberty Mutual Insurance Company (2008) State of Wisconsin Supreme Court, Appeal No. 2008AP333.

**Issue: "Occurrence" and "allocation of risk."** Because the incident giving rise to liability was each individual plaintiff's continuous or repeated exposure to asbestos and not the business decision to manufacture asbestos or a failure to protect against their alleged hazards, the only plausible way to interpret "occurrence" is that it refers to the immediate proximate cause of each claimant's injuries. UP argued that the Court should conclude that each underlying claimant's exposure to asbestos constitutes a separate "occurrence." The Court should also hold that each CGL policy triggered by an asbestos claim must pay "all sums" up to its policy limits, subject to the insurer's right to seek contribution from other insurers whose policies are also triggered. This brief was written *pro bono* for United Policyholders by **Paul G. Kent** and **Alan G.B. Kim**, of Anderson & Kent.

## SUPREME COURT OF THE UNITED STATES

Jewell v. Life Insurance Company of America (2008) Supreme Court of the United States, Case No. 07-1121.

**Issue: Denial of disability benefits; ERISA** preemption and standard of review. UP's brief was written *pro bono* by **Eugene Anderson** of Anderson, Kill & Olick in New York, NY.

Met Life v. Glenn, (2008) U.S. Supreme Court, Case No. 06-923

**Issue: Conflict of interest by ERISA plan administrators** [See related article on page 2 of this issue] This brief was prepared *pro bono* by **Mark DeBofsky** of the Chicago firm of Daley, DeBofsky and Bryant. It was submitted jointly on behalf of the National Employment Lawyers Association (NELA). Pacific Palisades policyholder/ERISA attorney **Ron Dean** represented NELA and worked with Mark on the brief. ❖❖

## Medicare Advantage...continued from p2

Medicare Advantage plans, but there are few state regulations to protect you. Such techniques have led some Medicare beneficiaries to join a plan without fully understanding that they did not enroll, and thus left, traditional Medicare.

- Plans are not required to provide a prescription drug benefit
- Many plans do not limit the amount of out of pocket payments you may be required to make;
- Without a cap on out-of-pocket spending there is no protection against catastrophic medical expenses;
- The quality of care varies across plans. To date, there is no evidence that the care you receive with a Medicare Advantage will be better than the care you will get from traditional Medicare.

54% of 505 MA plans surveyed in 2004 by the nonpartisan Medicare Payment Advisory Commission charged 20% more for Part B drugs (which include chemotherapy).<sup>2</sup> 19% of MA's charged more than 20% or higher for radiation services with only 1/3 capping out-of-pocket spending. 50% of enrollees were in plans with no cap on out-of-pocket spending. 20% were in plans with a cap that applied only to inpatient hospital care.

So when Ted Kennedy left his sick bed to heroically vote for the Medicare Reform bill, he was not just voting against cuts in pay to doctors but he was also voting against Medicare continuing to pay private insurers 13-17% more than traditional Medicare would spend if it covered these services directly, a cost that would have been borne by all Medicare recipients across the board. His vote was also against the ongoing attempt to privatize Medicare which would have allowed private insurance company executives (rather than elected legislators) to make all future decisions about what Medicare covers, how much seniors have to pay in deductibles, co-pays, and all the other concerns listed above.

In the end President Bush vetoed the bill on the grounds that it took money away from private health insurers. Senator Kennedy's heroic vote provided a veto proof majority and marks only the third time that Congress has had the muscle to override a Bush veto. ❖❖

<sup>1</sup> Alliance for Retired Americans, Issue Brief, August 2007, with permission of the Alliance for Retired Americans Educational Fund

<sup>2</sup> California Health Advocates, Sept 2007. Informed Choice: The Case For Standardizing and Simplifying Medicare Private Health Plans. [www.calhealthadvocates.org/advocacy](http://www.calhealthadvocates.org/advocacy)

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