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Request To Publish Opinion
Cal. Rules of Court, rule 8.1120

April 15, 2013

Hon. Dennis M. Perluss, Presiding Justice
Hon. Frank Y. Jackson, Associate Justice
Hon. John Segal, Associate Justice Pro-Tem
California Court of Appeal
Second Appellate District, Division 7
300 S. Spring Street, 2nd Floor, North Tower
Los Angeles, California 90013

RE: ***Brown et al. v. Mid-Century Insurance Company*,**
Case No. B238357

Dear Honorable Justices:

We represent respondent Mid-Century Insurance Company. We respectfully request, under California Rules of Court, rule 8.1120, that this Court order published its recent unpublished opinion in this case.

The Court's opinion holds that an insurance policy only covering "sudden and accidental" discharges of water doesn't cover damage caused by a household water pipe that corroded over decades and eventually developed a slow, continuous water leak through two tiny holes. (Opn. at pp. 10-14.) The opinion properly interprets "sudden" in its ordinary, contextual meaning, rejecting the so-called "metaphysical moment" theory, which posits that a "nanosecond" transition from a watertight condition to a slow leak constitutes a "sudden" event. (*Ibid.*) In doing so, it applies the sudden and accidental criteria to a new circumstance—household water pipe leaks—which no prior published California opinion appears to address. It does so by adopting the reasoning of a line of out-of-state cases rejecting the "metaphysical moment" argument, reasoning which, although undoubtedly correct, has not previously appeared in California published case law.

An opinion "should be certified for publication in the Official Reports" if it meets *any* of the nine separately listed criteria in California Rules of Court, rule 8.1105(c). The opinion here squarely meets at least *three* such criteria:

(1) It "[i]nvolves a legal issue of continuing public interest";

(2) It "[a]pplies an existing rule of law to a set of facts significantly different from those stated in published opinions"; and

(3) It "explains . . . an existing rule of law."

(Cal. Rules of Court, rule 8.1105(c)(2)-(3), (6).)

The Opinion involves a legal issue of continuing public interest (rule 8.1105(c)(6)). The facts in this case recur: The homeowners discovered a slow water leak underneath their house that had continued over a lengthy period of time and sought insurance coverage under their homeowners' policy. This will not be the last time something like this happens. The legal issue is whether an insurance policy only covering water damage caused by a "sudden and accidental" discharge, covers slow water leaks persisting over several weeks or months. The policy at issue here is a standard Next Generation policy used by Mid-Century and other affiliated insurance companies. Many other homeowners' policies include similar language, either, as here, in the grant of coverage, or by way of exclusions or exceptions to exclusions. The opinion definitely answers a coverage issue that is likely to come up again, and absent published authority, to be litigated again, wasting judicial resources and creating uncertainly in the law.

Having a published decision that comprehensively analyzes coverage under a standard "sudden and accidental" water discharge provision, as here, will provide helpful guidance to homeowners and carriers alike and will promote certainty and consistency in the law. Absent publication, homeowners and carriers are likely to re-litigate the same slow-leak water-pipe coverage issues, unnecessarily burdening the courts and parties. Publication will put this issue of continuing public interest to rest.

The Opinion applies an existing rule of law to a significantly different set of facts (rule 8.1105(c)(2)). In reaching its conclusions, the opinion applied existing law regarding "sudden" discharges in the pollution leak context to a new context—water pipe leaks. As the opinion notes, in the pollution exclusion context, "sudden" has a temporal element. (Opn. at pp. 11-12, quoting *Standun, Inc. v. Fireman's Fund Ins. Co.* (1998) 62 Cal.App.4th 882, 889; see *Travelers Casualty & Surety Co. v. Superior Court* (1998) 63 Cal.App.4th 1440, 1455; *Shell Oil Co. v. Winterthur Swiss Ins. Co.* (1993) 12 Cal.App.4th 715, 754.) But no reported decision has addressed this existing rule of law—i.e., that "sudden" must be interpreted in relation to time—in the water leak context or as regards a homeowner policy.

The California cases that the opinion relies on interpreted "sudden" in the context of the analogous "sudden and accidental" exception to the standard *pollution* exclusion. Although the facts here are significantly different than in the pollution leak cases (water versus toxic pollution damage), the conclusions logically are and should be the same: "'[W]hatever "sudden" means, it does not mean gradual. The ordinary person would never think that something which happened gradually also happened suddenly.'" (Opn. at p. 12, quoting *ACL Technologies, Inc. v. Northbrook Property & Casualty Ins. Co.* (1993) 17 Cal.App.4th 1773, 1788.) And a process that occurs "slowly and incrementally over a relatively long time" cannot reasonably be called "sudden"—whether a pollution leak or water leak. (Opn. at p. 12, additional quotation marks and internal citation omitted.)

Publishing this sudden-does-not-mean-gradual holding in the homeowner/water pipe context is equally important because it will help both homeowners and carriers know what is and is not covered. For example, the opinion notes that the sudden water discharge coverage, far from being illusory, would afford coverage to a "dishwasher hose breaking in mid-cycle, a water heater giving out and flooding a room, or an overflowing toilet." (Opn. at p. 12.) On the other hand, it clearly expresses what is *not* covered: "A spray/stream/leak of water over several months is not [covered]." (*Ibid.*) Publication will advance certainty and consistency in the law, not only in judicial decision, but in the practical application of policy interpretation outside the litigation context.

The Opinion explains an existing rule of law (rule 8.1105(c)(3)). The opinion also does a thorough job in explaining what "sudden" means and what it doesn't mean in the context of the "sudden and accidental" water discharge provision.

Plaintiffs' overarching theory, rejected by the opinion, was that an expert's declaration created a triable issue by asserting that in one microscopic moment in time—a "nanosecond"—the pipe was water-tight and in the next moment it was not. The opinion describes this theory as "metaphysical moment" logic (relying on several well-reasoned out-of-state cases rejecting that logic), and aptly explains why the theory fails under rules requiring that insurance policy language be construed reasonably and in the context of common human experience. Under the "metaphysical moment" theory, every event or condition not existing from the dawn of time could be considered "sudden" in some sense. That would impermissibly "'read the temporal component of the term "sudden" out of the Policy.'" (Opn. at p. 13, citation omitted.) No other California case has explained why this so-called "metaphysical moment" logic cannot withstand scrutiny. For this reason, too, publication should be ordered.

* * * * *

In short, publication would afford substantial benefits by creating certainty and consistency in the law, avoiding future disputes, and preventing repeated litigation of the identical issue. Whether standard homeowners' policies cover slow water leaks under limited coverage for "sudden and accidental" discharges remains current and important. It will affect numerous circumstances beyond this particular case. This opinion's comprehensive and thoughtful treatment of the subject and the clear rule it applies will afford substantial guidance if published, especially as the circumstances here, or closely analogous ones, are likely to recur and there is no on-point published authority in this context. If published, the opinion will help flush many cases out of the system sooner rather than later, thereby lessening unnecessary litigation burdens on the courts and containing litigants' legal expenses. And, it will help parties understand their rights before they even cross the judicial threshold.

Accordingly, Mid-Century respectfully urges this Court to publish its opinion in this matter.

Respectfully submitted,

GREINES, MARTIN, STEIN & RICHLAND LLP

By _____
Gary J. Wax

Attorneys for Defendant and Respondent MID-CENTURY INSURANCE COMPANY

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On April 15, 2013, I served the foregoing document described as: **LETTER TO COURT OF APPEAL** on the parties in this action by serving:

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Executed on April 15, 2013, at Los Angeles, California.

(X) (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Anita F. Cole