CALIFORNIA ACADEMY OF APPELLATE LAWYERS

May 21, 2007

Frederich Ohlrich, Clerk
Supreme Court of California
350 McAllister Street
San Francisco, California 94102-4797

Re: S151856, *Watts Indus., Inc. v. Zurich Am. Ins. Co.*

Dear Mr. Ohlrich:

Please convey this letter to the court pursuant to rule 8.500(g) of the California Rules of Court. The California Academy of Appellate Lawyers (Academy) supports grant of review in No. S151856. This letter will briefly explain the identity and interest of the Academy and then explain why the Academy urges review.

Identity and Interest of the Academy

The Academy is a statewide organization of experienced appellate practitioners. The Academy members' common goals include promoting and encouraging sound appellate procedures designed to ensure proper and effective representation of appellate litigants, efficient administration of justice at the appellate level, and improvements in the law affecting appellate litigation.

The Academy itself has no interest in or connection with any of the parties in this case. Several of the Academy's members are partners in law firms that represent parties to this case, although not necessarily in this case. All Academy members who have any connection with parties to this case have been excluded from the decision to file this amicus letter.

Position of the Academy

The Academy is familiar with the petition, answers, and replies. The petition and replies, in particular, present scholarly analyses of the relevant law, and the Academy will not repeat the content of those documents. Instead, the Academy approaches this case from

the perspective of practitioners who are not steeped in insurance litigation but face concerns about appealability in all genres of civil litigation.

The decision of the Court of Appeal appears to conflict with, or at least create great tension with, virtually all previous authority defining final collateral orders. The order that the trial court purported to certify as immediately enforceable was one granting summary adjudication. The pleadings delimit the scope of a court's summary adjudication analysis and order. (See, e.g., *Zimmerman, Rosenfeld, Gersh & Leeds LLP v. Larson* (2005) 131 Cal.App.4th 1466, 1489; *Couch v. San Juan Unified School District* (1995) 33 Cal.App.4th 1491, 1499; *FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 381-382.) Inherently, an order granting summary adjudication establishes some cause of action, defense, or issue that will be incorporated in a final judgment (Code Civ. Proc., § 437c, subd. (n)(1)) and that will be reviewable upon appeal from the future final judgment (Code Civ. Proc., § 906). In contrast, the various formulations of the concept "collateral" in the collateral final order doctrine all connote an order for payment of money that is outside the scope of the pleadings and not embraced within the remedies available through a final judgment. (See, e.g., *In re Marriage of Skelley* (1976) 18 Cal.3d 365, 368; *Steen v. Fremont Cemetery Corp.* (1992) 9 Cal.App.4th 1221, 1226-1227.) Most importantly to the uniformity and fairness the Academy supports, the leading practice guide tells practitioners that the *Steen* formulation is definitive: "The judgment or order is not 'collateral' if it is a 'necessary step' to correct determination of the main issue in the case." (Eisenberg, et al., Cal. Practice Guide, Civil Appeals & Writs (Rutter 2005) ¶ 2:77.2 at p. 2-45 [citing *Steen*].)

The superior court's order and the Court of Appeal's decision appear to frame a clear and precise issue for review. The superior court summarily adjudicated both the obligation of an insurer to indemnify its insured and an amount of indemnity due. Plainly, both of those adjudications were within the relief sought and opposed under the pleadings; just as plainly, those adjudications are appropriate to include in the action's final judgment. While the matters summarily adjudicated may be "distinct and severable" from other causes of action in the case, they are *not* severable from the overall relief demanded in the operative complaint.

The unpublished status of the Court of Appeal's decision should not deter review. The entire process of determining appealability of interlocutory orders in this case has occurred in the shadows of unpublished dispositions. The first *Watts* opinion states only this: "We denied Watts's motion to dismiss the appeal. We held that although the summary adjudication order

on duty to defend normally would not be appealable by itself, the payment order is appealable." (*Watts Industries, Inc. v. Zurich American Ins. Co.* (2004) 121 Cal.App.4th 1029, 1038.) The published opinion offers no clue why the court found the payment order to be appealable. (*Ibid.*) Without a clear, published rationale, this case can only cause confusion to practitioners, trap the unwary, and become the source of professional liability claims.

In effect, the Court of Appeal appears to have invented a trial court power to sever claims and then to certify certain orders for immediate appeal by deeming them enforceable before entry of final judgment. California courts previously refused this invention. (See *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 743-744.) Rule 54(b) of the Federal Rules of Civil Procedure grants such a power to trial courts, but efforts to import that power to California law have repeatedly failed in the Legislature. If a need for such a process exists in California, the Academy urges that it should be adopted in a way that gives practitioners explicit and easily accessible notice of its existence. Further, its content should embrace fair procedures and an appellate check against an excessive volume of certifications.

To promote uniformity of decision and to settle an area of law made unsettled and dangerous by the two opinions in this case, the Academy urges a grant of review.

Very truly yours,

Charles A. Bird
President