

***Homeowners' Insurance Valuation:
What Agents and Brokers Need to Know***

Statutes and Regulations

West's Ann.Cal.Ins.Code § 1749.31

§ 1749.31. Personal lines broker-agent; individuals also licensed as life-only agent or accident and health agent

Effective: January 1, 2010

(a) An individual licensed as a personal lines broker-agent shall complete required continuing education courses, programs of instruction, or seminars approved by the commissioner. The personal lines broker-agent shall complete 24 hours during each two-year license term as defined in subdivision (d) of Section 1625.5.

(b) An individual licensed as a personal lines broker-agent and as a life-only agent or accident and health agent shall satisfy the requirements of this section by satisfactorily completing 24 hours of instruction prior to renewal of the license.

Credits

(Added by Stats.2000, c. 321 (A.B.393), § 5.3, operative Jan. 1, 2002. Amended by Stats.2007, c. 270 (A.B.720), § 12; Stats.2008, c. 300 (A.B.2044), § 12; Stats.2009, c. 254 (A.B.800), § 12.)

West's Ann.Cal.Ins.Code § 2051.5

§ 2051.5. Measure of indemnity under an open policy

Effective: January 1, 2006

(a) Under an open policy that requires payment of the replacement cost for a loss, the measure of indemnity is the amount that it would cost the insured to repair, rebuild, or replace the thing lost or injured, without a deduction for physical depreciation, or the policy limit, whichever is less.

If the policy requires the insured to repair, rebuild, or replace the damaged property in order to collect the full replacement cost, the insurer shall pay the actual cash value of the damaged property, as defined in Section 2051, until the damaged property is repaired, rebuilt, or replaced. Once the property is repaired, rebuilt, or replaced, the insurer shall pay the difference between the actual cash value payment made and the full replacement cost reasonably paid to replace the damaged property, up to the limits stated in the policy.

(b)(1) Except as provided in paragraph (2), no time limit of less than 12 months from the date that the first payment toward the actual cash value is made shall be placed upon an insured in order to collect the full replacement cost of the loss, subject to the policy limit. Additional extensions of six months shall be provided to policyholders for good cause. In the event of a loss relating to a "state of emergency," as defined in Section 8558 of the Government Code, no time limit of less than 24 months from the date that the first payment toward the actual cash value is made shall be placed upon the insured in order to collect the full replacement cost of the loss, subject to the policy limit. Nothing in this section shall prohibit the insurer from allowing the insured additional time to collect the full replacement cost.

(2) In the event of a covered loss relating to a state of emergency, as defined in Section 8558 of the Government Code, coverage for additional living expenses shall be for a period of 24 months, but shall be subject to other policy provisions, provided that any extension of time required by this paragraph beyond the period provided in the policy shall not act to increase the additional living expense policy limit in force at the time of the loss. This paragraph shall become operative on January 1, 2007.

(c) In the event of a total loss of the insured structure, no policy issued or delivered in this state may contain a provision that limits or denies payment of the replacement cost in the event the insured decides to rebuild or replace the property at a location other than the insured premises. However, the measure of indemnity shall be based upon the replacement cost of the insured property and shall not be based upon the cost to repair, rebuild, or replace at a location other than the insured premises.

(d) Nothing in this section shall prohibit an insurer from restricting payment in cases of suspected fraud.

(e) The changes made to this section by the act¹ that added this subdivision shall be

implemented by an insurer on and after the effective date of that act, except that an insurer shall not be required to modify policy forms to be consistent with those changes until July 1, 2005. On and after July 1, 2005, all policy forms used by an insurer shall reflect those changes.

Credits

(Added by Stats.2004, c. 311 (A.B.2199), § 1, eff. Aug. 25, 2004. Amended by Stats.2005, c. 447 (S.B.2), § 3; Stats.2005, c. 448 (S.B.518), § 2.)

West's Ann.Cal.Ins.Code § 2057

§ 2057. Time of payment; interest; costs of collection; attorney fees

Under a contract of fire insurance, payment to the insured shall be made within 30 days after the amount of the loss and the liability of the company have been agreed upon or settled by the insured and the company in writing.

If the company fails to pay within the 30 days, the payment shall bear interest, beginning the 31st day, at the prevailing legal rate. The company also shall be liable for all costs of collection, including reasonable attorneys' fees, if legal action is necessary to obtain payment after the company has willfully failed to pay within the 30 days.

Credits

(Added by Stats.1979, c. 1165, p. 4389, § 1.)

Current with urgency legislation through Ch. 20 of 2011 Reg.Sess.

West's Ann.Cal.Ins.Code § 2070

§ 2070. Standard form; additions and omissions

All fire policies on subject matter in California shall be on the standard form, and, except as provided by this article shall not contain additions thereto. No part of the standard form shall be omitted therefrom except that any policy providing coverage against the peril of fire only, or in combination with coverage against other perils, need not comply with the provisions of the standard form of fire insurance policy or Section 2080; provided, that coverage with respect to the peril of fire, when viewed in its entirety, is substantially equivalent to or more favorable to the insured than that contained in such standard form fire insurance policy.

Credits

(Stats.1935, c. 145, p. 596. Amended by Stats.1951, c. 1489, p. 3468, § 1; Stats.1978, c. 765, p. 2392, § 1; Stats.1982, c. 124, p. 388, § 1.)

West's Ann.Cal.Ins.Code § 10081

§ 10081. Residential property insurance; necessity of offer of earthquake peril coverage

No policy of residential property insurance may be issued or delivered or, with respect to policies in effect on the effective date of this chapter, initially renewed in this state by any insurer unless the named insured is offered coverage for loss or damage caused by the peril of earthquake as provided in this chapter. That coverage may be provided in the policy of residential property insurance itself, either by specific policy provision or endorsement, or in a separate policy or certificate of insurance which specifically provides coverage for loss or damage caused by the peril of earthquake alone or in combination with other perils.

Credits

(Added by Stats.1984, c. 916, § 1.)

West's Ann.Cal.Ins.Code § 10090

§ 10090. Purposes

The purposes of this chapter are to do all of the following:

- (a) To assure stability in the property insurance market for property located in the State of California.
- (b) To assure the availability of basic property insurance as defined by this chapter.
- (c) To encourage maximum use, in obtaining basic property insurance, of the normal insurance market provided by admitted insurers and licensed surplus line brokers.
- (d) To provide for the equitable distribution among admitted insurers of the responsibility for insuring qualified property for which basic property insurance cannot be obtained through the normal insurance market by the establishment of a FAIR Plan (fair access to insurance requirements), an industry placement facility and a joint reinsurance association.

Credits

(Added by Stats.1968, c. 574, p. 1239, § 1, eff. July 15, 1968. Amended by Stats.1969, c. 649, p. 1301, § 1, eff. July 31, 1969.)

West's Ann.Cal.Ins.Code § 10101

§ 10101. Delivery of disclosure statement to named insured required upon issuance or renewal of policy

On and after July 1, 1993, no policy of residential property insurance may be first issued or, with respect to policies already in effect on January 1, 1994, initially renewed in this state by any insurer unless the named insured is provided a copy of the California Residential Property Insurance disclosure statement as contained in Section 10102.

Credits

(Added by Stats.1992, c. 1089 (S.B.1854), § 1, operative July 1, 1993. Amended by Stats.1993, c. 11 (S.B.52), § 1, eff. May 5, 1993.)

West's Ann.Cal.Ins.Code § 10102

§ 10102. Form of disclosure; delivery; contents; prohibitions on issuance of policy renewals as guaranteed replacement cost coverage containing maximum coverage limitations; building code upgrades; forced placed insurance

Effective: July 1, 2011

(a) The disclosure required by Section 10101 shall be in no less than 10-point typeface and shall be provided prior to or concurrent with, the application for a policy of residential property insurance. In the event that an application is made by telephone, an insurer that mails a copy of the disclosure within three business days shall be in compliance with this section. For policies issued on or after July 1, 1993, the agent or insurer shall obtain the applicant's signature acknowledging receipt of the disclosure form within 60 days of the date of the application. When the insurer or agent establishes delivery of the disclosure form by obtaining the signature of the applicant or insured, or when an insurer or agent provides the applicant with the disclosure form and the applicant does not return a signed acknowledgment of receipt within 60 days of the date it was provided, there shall be a conclusive presumption that the insurer or agent has complied with the disclosure requirement of this chapter. The insurer or agent shall have the burden of demonstrating in accordance with California Rules of Evidence that the disclosure was provided to the applicant or insured. A signature shall not be required at the time of renewal.

If the disclosure is mailed to the named insured or applicant, it shall be mailed to the mailing address shown on the policy of residential property insurance or to the address requested by the applicant. First-class mail shall be deemed adequate for proof of mailing. The insurer shall have the burden of demonstrating in accordance with California Rules of Evidence that the disclosure was mailed to the applicant or insured.

The disclosure shall contain the following language:

"NOTICE TO CONSUMERS --CALIFORNIA RESIDENTIAL INSURANCE DISCLOSURE

This disclosure is required by Section 10102 of the California Insurance Code. This form provides general information related to residential property insurance and is not part of your residential property insurance policy. Only the specific provisions of your policy will determine whether a particular loss is covered and the amount payable. The information provided does not preempt existing California law.

PRIMARY FORMS OF RESIDENTIAL DWELLING COVERAGE

___(6)d

You have purchased the coverage(s) checked below. NOTE: Actual Cash Value Coverage is the most limited level of coverage listed. Guaranteed Replacement Cost is the broadest level of coverage.

___ (6)d

___ **ACTUAL CASH VALUE COVERAGE** pays the costs to repair the damaged dwelling minus a deduction for physical depreciation. If the dwelling is completely destroyed, this coverage pays the fair market value of the dwelling at time of loss. In either case, coverage only pays for costs up to the limits specified in your policy.

___ **REPLACEMENT COST COVERAGE** is intended to provide for the cost to repair or replace the damaged or destroyed dwelling, without a deduction for physical depreciation. Many policies pay only the dwelling's actual cash value until the insured has actually begun or completed repairs or reconstruction on the dwelling. Coverage only pays for replacement costs up to the limits specified in your policy.

___ **EXTENDED REPLACEMENT COST COVERAGE** is intended to provide for the cost to repair or replace the damaged or destroyed dwelling without a deduction for physical depreciation. Many policies pay only the dwelling's actual cash value until the insured has actually begun or completed repairs or reconstruction on the dwelling. Extended Replacement Cost provides additional coverage above the dwelling limits up to a stated percentage or specific dollar amount. See your policy for the additional coverage that applies.

___ **GUARANTEED REPLACEMENT COST COVERAGE** covers the full cost to repair or replace the damaged or destroyed dwelling for a covered peril regardless of the dwelling limits shown on the policy declarations page.

___ **BUILDING CODE UPGRADE COVERAGE**, also called Ordinance and Law coverage, is an important option that covers additional costs to repair or replace a dwelling to comply with the building codes and zoning laws in effect at the time of loss or rebuilding. These costs may otherwise be excluded by your policy. Meeting current building code requirements can add significant costs to rebuilding your home. Refer to your policy or endorsement for the specific coverage provided and coverage limits that apply.

READ YOUR POLICY AND POLICY DECLARATIONS PAGE CAREFULLY: The policy declarations page shows the specific coverage limits you have purchased for your dwelling, personal property, separate structures such as detached garages, and additional living expenses. The actual policy and endorsements provide the details on extensions of coverage, limitations of coverage, and coverage conditions and exclusions. The amount of any claim payment made to you will be reduced by any applicable deductibles shown on your policy declarations page. It is important to take the time to consider whether the limits and limitations of your policy meet your needs. Contact your agent, broker, or insurance company if you have questions about what is covered or if you want to discuss your coverage options.

INFORMATION YOU SHOULD KNOW ABOUT RESIDENTIAL DWELLING INSURANCE

AVOID BEING UNDERINSURED: Insuring your home for less than its replacement cost may result in your having to pay thousands of dollars out of your own pocket to rebuild your home if it is completely destroyed. Contact your agent, broker, or insurance company immediately if you believe your policy limits may be inadequate.

THE RESIDENTIAL DWELLING COVERAGE LIMIT: The coverage limit on the dwelling structure should be high enough so you can rebuild your home if it is completely destroyed. Please note:

- The cost to rebuild your home is almost always different from the market value.
- Dwelling coverage limits do not cover the value of your land.
- The estimate to rebuild your home should be based on construction costs in your area and should be adjusted to account for the features of your home. These features include but are not limited to the square footage, type of foundation, number of stories, and the quality of the materials used for items such as flooring, countertops, windows, cabinetry, lighting and

plumbing.

- The cost to rebuild your home should be adjusted each year to account for inflation.
- Coverage limits for contents, separate structures, additional living expenses and debris removal are usually based on a percentage of the limit for the dwelling. If your dwelling limit is too low, these coverage limits may also be too low.

You are encouraged to obtain a current estimate of the cost to rebuild your home from your insurance agent, broker, or insurance company or an independent appraisal from a local contractor, architect, or real estate appraiser. If you do obtain an estimate of replacement value, and wish to change your policy limits, contact your insurance company. While not a guarantee, a current estimate can help protect you against being underinsured.

DEMAND SURGE: After a widespread disaster, the cost of construction can increase dramatically as a result of the unusually high demand for contractors, building supplies and construction labor. This effect is known as demand surge. Demand surge can increase the cost of rebuilding your home. Consider increasing your coverage limits or purchasing Extended Replacement Cost coverage to prepare for this possibility.

CHANGES TO PROPERTY: Changes to your property may increase its replacement cost. These changes may include the building of additions, customizing your kitchen or bathrooms, or otherwise remodeling your home. Failure to advise your insurance company of any significant changes to your property may result in your home being underinsured.

EXCLUSIONS: Not all causes of damage are covered by common homeowners or residential fire policies. You need to read your policy to see what causes of loss or perils are not covered. Coverage for landslide is typically excluded. Some excluded perils such as earthquake or flood can be purchased as an endorsement to your policy or as a separate policy. Contact your agent, broker, or insurance company if you have a concern about any of the exclusions in your policy.

CONTENTS (PERSONAL PROPERTY) COVERAGE DISCLOSURE:

This disclosure form does not explain the types of contents coverage provided by your policy for items such as your furniture or clothing. Contents may be covered on either an actual cash value or replacement cost basis depending on the contract. Almost all policies include specific dollar limitations on certain property that is particularly valuable, such as jewelry, art, or silverware. Contact your agent, broker or insurance company if you have any questions about your contents coverage. You should create a list of all personal property in and around your home. Pictures and video recordings also help you document your property. The list, photos, and video should be stored away from your home.

CONSUMER ASSISTANCE

If you have any concerns or questions, contact your agent, broker, or insurance company. You are also encouraged to contact the California Department of Insurance consumer information line at (800) 927-HELP (4357) or at www.insurance.ca.gov for free insurance assistance.”

(b) The agent or insurer shall indicate on the disclosure form which coverages the applicant or insured has selected or purchased.

(c) The disclosure statement may contain additional provisions not conflicting with, annulling, or

detracting from the foregoing.

(d) Following the issuance of the policy of residential property insurance, the insurer shall provide the disclosure statement to the insured on an every-other-year basis at the time of renewal. The disclosure required by this section may be transmitted with the material required by Section 10086.1.

(e) No policy of residential property insurance may be initially issued on and after January 1, 1993, as guaranteed replacement cost coverage if it contains any maximum limitation of coverage based on any set dollar limits, percentage amounts, construction cost limits, indexing, or any other preset maximum limitation for covered damage to the insured dwelling. The limitations referred to in this section are solely applicable to dwelling structure coverages. Endorsements covering additional risks to the insurer's dwelling structure coverage may have internal limits as long as those endorsements are not called guaranteed replacement cost coverage.

(f) On and after July 1, 1993, no policy of residential property insurance may be renewed as guaranteed replacement cost coverage if it contains any maximum limitation of coverage based on any set dollar limits, percentage amounts, construction cost limits, indexing, or any other preset maximum limitation for covered damage to the insured dwelling. The limitations referred to in this section are solely applicable to dwelling structure coverages. Endorsements covering additional risks to the insurer's dwelling structure coverage may have internal limits as long as those endorsements are not called guaranteed replacement cost coverage.

(g) Coverage provided for building code upgrades by a policy of residential property insurance shall be applicable to building codes, ordinances, standards, or laws only to the extent that those codes, ordinances, standards, or laws do not impose stricter standards on the property on the basis of the level of insurance coverage applicable to the property.

(h) The disclosure required by Section 10101 shall also be provided to the mortgagor in the event that a policy is forced placed by an insurer at the request of a mortgagee. In those cases, neither the insurer nor the mortgagee shall be required to obtain a signature from the mortgagor. No disclosure shall be required to be provided with respect to blanket policies issued to a mortgagee, and designed to provide interim coverage for losses occurring prior to the mortgagee obtaining knowledge of the lapse of the policy and prior to placement of a policy on behalf of the mortgagor.

(i) This section shall become operative on July 1, 2011.

Credits

(Added by Stats.2010, c. 589 (A.B.2022), § 2, operative July 1, 2011.)

10 CCR § 2188.65

§ 2188.65. Broker-Agent Training on Estimating Replacement Value.

(a) As used in this section 2188.65 and in Insurance Code section 1749.85 the following terms have the following meanings:

(1) "Homeowners' insurance policy" shall have the same meaning as "policy of residential property insurance" as defined in subdivision (a) of Insurance Code section 10104. A "homeowners' insurance policy" does not include:

(A) a tenant's policy;

(B) a policy covering an individually owned mobilehome and its contents;

(C) a policy covering an individually owned manufactured home and its contents;

(D) a renter's policy; or

(E) a policy insuring an individually owned condominium unit that does not provide dwelling structure coverage.

(2) "Replacement value" shall have the same meaning as "replacement cost" and is defined as the amount it would cost to repair, construct, rebuild or replace a damaged or destroyed structure.

(3) "Fire and casualty broker-agent" and "personal lines broker-agent" mean holders of the licenses defined in Insurance Code sections 1625 and 1625.5, respectively. Fire and casualty broker-agents and personal lines broker-agents are also referred to as "broker-agents" in this section.

(b) On or after June 27, 2011, every California resident fire and casualty broker-agent and personal lines broker-agent who has not already taken a homeowners' insurance valuation training course must satisfactorily complete one three-hour training course on homeowners' insurance valuation meeting the requirements of this section prior to estimating the replacement value of structures in connection with, or explaining the various levels of coverage under, a homeowners' insurance policy. For resident broker-agents, this requirement shall be part of, and not in addition to, the continuing education requirements of Insurance Code section 1749.3. The homeowners' insurance valuation training course needs to be taken only once in order to satisfy the requirements of this subdivision (b).

(c) The training required by this section must be approved by the commissioner and shall consist of topics related to dwelling, fire, and homeowners' insurance. Any course taken to satisfy the requirements stated in Section 1749.85 of the Insurance Code shall use subject matter described in this article.

(d) The broker-agent shall be trained on the differences between homeowners' insurance coverage and other Fire, and Dwelling Property policies, which differences may necessitate differences in coverage or coverage levels. The broker-agent shall also be trained on the basic concepts of property insurance and estimating replacement value, which includes:

(1) How loss settlement provisions in an insurance policy apply to major claims, the potential causes of underinsurance and the potential effects that underinsurance may have on settlement;

(2) The differences in the measure of indemnity between actual cash value coverage and replacement cost coverage, as summarized in Insurance Code sections 2051, 2051.5, and 10102, including:

(A) California Residential Property Insurance Disclosure, as described in Insurance Code section 10102; and

(B) Depreciation and how it is applied under a homeowners' insurance policy;

(3) The several components and features of a structure necessary to estimate replacement cost, as well as the other costs incident to reconstruction, including at least the following:

(A) Type of foundation;

(B) Type of frame;

(C) Roofing materials and type of roof;

(D) Siding materials and type of siding;

(E) Whether the structure is located on a slope;

(F) Size of the entire structure and, separately, the square footage of the living space;

(G) Geographic location of property;

(H) Number of stories and any nonstandard interior wall heights;

(I) Materials used in, and generic types of, interior features and finishes, such as, where applicable, the type of heating and air conditioning system, walls, flooring, ceiling, fireplaces, kitchen and bath(s);

(J) Cost of demolition and debris removal;

(K) Cost of permits and architect's plans;

(L) Age of the structure or the year it was built; and

(M) Size and type of attached garage; and

(N) Additional costs associated with building a single or custom home.

(4) The effects of catastrophes on replacement cost. This includes how shortages of construction labor, building supplies, fuel, transportation issues, and permit restrictions can result in increased costs, sometimes referred to as demand surge, and delays in rebuilding.

(5) Review of the significant enhancements and endorsements to the homeowners' insurance policy, and identification of coverages that help protect against underinsurance. The review is to include:

(A) what is included and excluded in Building Code Upgrade (Ordinance and Law) Coverage, as defined in California Insurance Code section 10102; and

(B) the various types and levels of replacement cost, as defined in California Insurance Code section 10102;

(6) Review of the California Standard Form Fire Policy and FAIR (Fair Access to Insurance Requirements) Plan coverages, as described in California Insurance Code sections 2071 and 10090, respectively; review of earthquake insurance coverages as described in Insurance Code section 10081 et seq., including coverage offered by the CEA (California Earthquake Authority).

(7) Review of the types of basic building construction, including tilt-up, cinderblock, wood frame, brick and masonry, and metal frame.

(8) Review of the various methodologies of estimating replacement cost including:

(A) Proprietary replacement cost valuation tools;

(B) Real estate appraisals;

(C) Insurance company's valuation software;

(D) Contractor's and architect's estimates or opinions;

(E) Cost per square footage estimates; and

(F) Insured's opinion.

(9) Review of fire mitigation and how it affects insurance costs, to include:

(A) Define, recognize, and describe the fire problem in the wildland urban interface;

(B) Discuss the areas that affect the risk and hazard such as topography, fuel types and locations, weather, and construction; and

(C) Discuss current statutes and regulations that address efforts to mitigate and indicate that local codes may also apply. These statutes, regulations and codes include requirements for defensible space and fire-resistant building construction.

(e) The training required by this section 2188.65 shall ensure that the broker-agent is aware of the provisions of sections 2695.182 and 2695.183.

(f) Any course or seminar that is disapproved for the reason that it fails to comply with this section shall be presumed invalid for credit towards the continuing education requirement of this section unless the course or seminar is later approved in writing by the commissioner.

Note: Authority cited: Sections 790.04, 790.10, 1749.7, 1749.85 and 2051.5, Insurance Code. Reference: Sections 790.03, 790.04, 1625, 1625.5, 1749.1, 1749.3, 1749.31, 1749.85, 2051.5, 10087 and 10104, Insurance Code.

HISTORY

1. New section filed 12-29-2010; operative 6-27-2011 pursuant to Government Code section 11343.4(b) (Register 2010, No. 53).
2. Change without regulatory effect amending subsection (a)(1) and adding subsections (a)(1)(A)-(E) filed 4-18-2011 pursuant to section 100, title 1, California Code of Regulations (Register 2011, No. 16).

This database is current through 5/6/11 Register 2011, No. 18
10 CCR § 2188.65, 10 CA ADC § 2188.65

10 CCR § 2190.2

§ 2190.2. Required Records.

Wherever applicable, the following records shall be maintained by every agent or broker or surplus lines broker or special lines' surplus lines broker with respect to each and every insurance transaction for at least five years after expiration or cancellation date of the policy to which the records pertain:

(a) Name of insured,

(b) Name of insurer,

(c) Policy number,

(d) Effective date, termination date and mid-term cancellation date of coverage,

(e) Amount of gross premium,

(f) Amount of net premium,

(g) Amount of commission and basis on which computed,

(h) Names of persons who receive, or are promised, any commissions or other valuable consideration related to the transaction,

(i) Amount of premium received including itemization of any partial payments or additional premium,

(j) Date premium received by agent or broker,

(k) Date deposited in bank account or bank depository into which premiums are deposited or maintained in accord with Section 1733 of the Insurance Code, including but not limited to trustee accounts maintained pursuant to Section 1734 of the Insurance Code,

(l) Name and address of bank and number of account in which premium is deposited or maintained in accord with Section 1733 of the Insurance Code, including but not limited to trustee accounts maintained pursuant to Section 1734 of the Insurance Code,

(m) Date premium paid by agent or broker to the person entitled thereto and identification of the means of transmittal,

(n) Amount of net and gross return premium,

(o) Date return premium is received from insurer by agent or broker which may be the date the credit is taken from the insurer or the date the check or draft is received,

(p) Date gross return premium is remitted to person entitled thereto by agent or broker and identification of means of transmittal, and

(q) Any documents required to be maintained pursuant to Section 2695.182 or subdivision (i) of Section 2695.183.

Note: Authority cited: Sections 1727, 1763 and 1768, Insurance Code. Reference: Sections 1727, 1733, 1734, 1763 and 1768, Insurance Code.

HISTORY

1. Amendment filed 6-27-78; designated effective 9-1-78 (Register 78, No. 26).

2. Amendment of first paragraph, amendment of subsections (k) and (l) and new Note filed 8-28-98; operative 9-27-98 (Register 98, No. 35).

3. Amendment of subsections (o) and (p) and new subsection (q) filed 12-29-2010; operative 6-27-2011 pursuant to Government Code section 11343.4(b) (Register 2010, No. 53).

This database is current through 5/6/11 Register 2011, No. 18
10 CCR § 2190.2, 10 CA ADC § 2190.2

10 CCR § 2190.3

§ 2190.3. Records by File.

(a) Wherever applicable, the following records shall be maintained by every agent or broker and surplus lines broker and special lines' surplus lines broker in a file pertaining to a particular insured for a period of eighteen months after the transaction described by such records:

(1) Identity of each person who transacted the insurance, renewals and any change in coverage,

(2) Records of all binders, whether written or oral, showing the names of insured and insurer, nature of coverage, effective and termination dates and premium for binder or policy to be issued,

(3) Copy of application or memorandum of request for insurance,

(4) Correspondence received, copies of correspondence sent, memoranda, notes of conversation, or any other record necessary to describe the transaction.

(b) The following records of surplus line transactions shall be maintained by every agent and broker and surplus lines broker and special lines' surplus lines broker for a period of at least five years after expiration or cancellation date of the policy to which the records pertain: forms, reports or statements required to be maintained or filed under Sections 1763 and 1764.1 of the Insurance Code.

(c) The agent, broker, surplus line broker or special lines' surplus lines broker who signs the form, report or statement under Insurance Code Section 1763 shall maintain the original. The agent, broker, surplus lines broker or special lines' surplus lines broker who receives the originally signed disclosure statement under Insurance Code Section 1764.1 shall maintain the original.

(d) The agent, broker, surplus line broker or special lines' surplus lines broker who signs the diligent search form under Insurance Code Section 1763 or receives the originally signed disclosure statement under Insurance Code Section 1764.1 shall send copies to all other agents, brokers, surplus lines brokers or special lines' surplus lines brokers involved in the transaction.

(e) The agent, broker, surplus line broker or special lines' surplus lines broker who receives copies of documents pursuant to 2190.3(d), shall maintain the copies which show the signature of the agent, broker, surplus lines broker, special lines' surplus lines broker or applicant who signed it.

(f) An agent or broker who provides an estimate of replacement cost to an applicant or insured with respect to a policy of homeowner's insurance shall maintain records and copies as mandated by Section 2695.182 and subdivision (i) of Section 2695.183.

Note: Authority cited: Sections 1727, 1763 and 1768, Insurance Code. Reference: Sections 1760.5(b), 1763 and 1764.1, Insurance Code.

HISTORY

1. Amendment of subsection (a) filed 6-27-78; designated effective 9-1-78(Register 78, No. 26).
2. Amendment of section and new Note filed 8-28-98; operative 9-27-98 (Register 98, No. 35).
3. New subsection (f) filed 12-29-2010; operative 6-27-2011 pursuant to Government Code section 11343.4(b) (Register 2010, No. 53).

This database is current through 5/6/11 Register 2011, No. 18
10 CCR § 2190.3, 10 CA ADC § 2190.3

10 CCR §2695.180

§ 2695.180. Definitions.

As used in this article and in California Insurance Code section 1749.85 the following terms have the following meanings:

(a) "Homeowners' insurance policy" shall have the same meaning as a "policy of residential property insurance" as defined in subdivision (a) of Insurance Code section 10104. A "homeowners' insurance policy" does not include:

(A) a tenant's policy;

(B) a policy covering an individually owned mobilehome and its contents;

(C) a policy covering an individually owned manufactured home and its contents;

(D) a renter's policy; or

(E) a policy insuring an individually owned condominium unit that does not provide dwelling structure coverage.

(b) "Replacement value" shall have the same meaning as "replacement cost" and is defined as the amount it would cost to repair, construct, rebuild or replace a damaged or destroyed structure.

(c) "Fire and casualty broker-agent" and "personal lines broker-agent" mean holders of the licenses defined in Insurance Code sections 1625 and 1625.5, respectively. Fire and casualty broker-agents and personal lines broker-agents are also referred to as "broker-agent" in this article.

(d) "Licensee" means

(1) any person or entity that holds a license or certificate of authority issued by the Department of Insurance;

(2) a broker-agent; or

(3) any other entity for whom the Insurance Commissioner's consent is required before transacting business in the State of California or with California residents.

(e) "Estimate of replacement value" shall have the same meaning as "estimate of replacement cost" and means any estimate, statement, calculation, approximation or opinion, whether expressed orally or in writing, regarding the projected replacement value of a particular structure or structures.

Note: Authority cited: Sections 790.10, 1749.7, 1749.85 and 2051.5, Insurance Code.
Reference: Sections 790.03, 1625, 1625.5, 1749.85, 2051.5, 10087 and 10104, Insurance Code.

HISTORY

1. New article 1.3 (sections 2695.180-2695.183) and section filed 12-29-2010; operative 6-27-2011 pursuant to Government Code section 11343.4(b) (Register 2010, No. 53).

2. Change without regulatory effect amending subsection (a) and adding subsections (a)(A)-(E) filed 4-18-2011 pursuant to section 100, title 1, California Code of Regulations (Register 2011, No. 16).

This database is current through 5/6/11 Register 2011, No. 18
10 CCR 2695.180, 10 CA ADC § 2695.180

10 CCR § 2695.182

§ 2695.182. Documentation of Person Making Estimate.

(a) In the event an estimate of replacement cost is provided or communicated by a licensee to an applicant or insured in connection with an application for or renewal of a homeowners' insurance policy that provides coverage on a replacement cost basis, the licensee shall document and maintain in the applicant's or insured's file the following information:

(1) The status of the person preparing the estimate of replacement value, as the insurer underwriter or actuary or other person identified by the insurer, a broker-agent, a contractor, an architect, a real estate appraiser, or other person or entity permitted to make such an estimate by Insurance Code section 1749.85;

(2) The name, job title, address, telephone number, and license number, if applicable, of the person preparing the estimate of replacement value;

(3) The source from which or method by which the estimate of replacement cost was prepared, to include any replacement cost calculator, contractor's estimate, architectural report, real estate appraisal, or other source or method; and

(4) A copy of any reports, inspection reports, contractor's estimates, or other documents used to prepare the estimate of replacement value.

(b) In the event the estimate of replacement cost is provided by a licensee to an applicant or insured in connection with an application for or renewal of a homeowners' insurance policy that provides coverage on a replacement cost basis, the licensee shall maintain in the insured's file the records specified in subdivision (a) of this Section 2695.182 for the entire term of the insurance policy or the duration of coverage, whichever terminates later in time, and for five years thereafter. In the event the estimate of replacement cost is provided by a licensee to an applicant to whom an insurance policy is never issued, subdivision (a) of this Section 2695.182 shall not apply.

(c) Notwithstanding any other provision of this Section 2695.182, this section shall impose no duty upon a broker-agent to obtain from the insurer and maintain any information or document that in the absence of this section would not come into the possession of the broker-agent in the ordinary course of business.

Note: Authority cited: Sections 730, 790.04, 790.10, 1727, 1749.7 and 1749.85, Insurance Code. Reference: Sections 730, 790.03, 790.04 and 1749.85, Insurance Code.

HISTORY

1. New section filed 12-29-2010; operative 6-27-2011 pursuant to Government Code section 11343.4(b) (Register 2010, No. 53).

10 CCR §2695.183

§ 2695.183. Standards for Estimates of Replacement Value.

No licensee shall communicate an estimate of replacement cost to an applicant or insured in connection with an application for or renewal of a homeowners' insurance policy that provides coverage on a replacement cost basis, unless the requirements and standards set forth in subdivisions (a) through (e) below are met:

(a) The estimate of replacement cost shall include the expenses that would reasonably be incurred to rebuild the insured structure(s) in its entirety, including at least the following:

(1) Cost of labor, building materials and supplies;

(2) Overhead and profit;

(3) Cost of demolition and debris removal;

(4) Cost of permits and architect's plans; and

(5) Consideration of components and features of the insured structure, including at least the following:

(A) Type of foundation;

(B) Type of frame;

(C) Roofing materials and type of roof;

(D) Siding materials and type of siding;

(E) Whether the structure is located on a slope;

(F) The square footage of the living space;

(G) Geographic location of property;

(H) Number of stories and any nonstandard wall heights;

(I) Materials used in, and generic types of, interior features and finishes, such as, where applicable, the type of heating and air conditioning system, walls, flooring, ceiling, fireplaces, kitchen, and bath(s);

(J) Age of the structure or the year it was built; and

(K) Size and type of attached garage.

(b) The estimate of replacement cost shall be based on an estimate of the cost to rebuild or replace the structure taking into account the cost to reconstruct the single property being evaluated, as compared to the cost to build multiple, or tract, dwellings.

(c) The estimate of replacement cost shall not be based upon the resale value of the land, or upon the amount or outstanding balance of any loan.

(d) The estimate of replacement cost shall not include a deduction for physical depreciation.

(e) The licensee shall no less frequently than annually take reasonable steps to verify that the sources and methods used to generate the estimate of replacement cost are kept current to reflect changes in the costs of reconstruction and rebuilding, including changes in labor, building materials, and supplies, based upon the geographic location of the insured structure. The estimate of replacement cost shall be created using such reasonably current sources and methods.

(f) Except as provided in subdivision (k) of this Section 2695.183, the provisions of this article are binding upon licensees, notwithstanding the fact that information, data or statistical methods used or relied upon by a licensee to estimate replacement cost may be obtained through a third party source. Any and all information received by the Department pursuant to this article shall be accorded the degree of confidential treatment required by section 735.5 of the Insurance Code or Chapter 2 of Part 1 of Division 3 of Title 2 of the Government Code, commencing at section 11180.

(g)(1) If a licensee communicates an estimate of replacement cost to an applicant or insured in connection with an application for or renewal of a homeowners' insurance policy that provides coverage on a replacement cost basis, the licensee must provide a copy of the estimate of replacement cost to the applicant or insured at the time the estimate is communicated. However, in the event the estimate of replacement cost is communicated by a licensee to an applicant to whom the licensee determines an insurance policy shall not be issued, then the licensee is not required pursuant to the preceding sentence to provide a copy of the estimate of replacement cost. In the event the estimate of replacement cost is communicated by telephone to an insured, the copy of the estimate shall be mailed to the insured no later than three business days after the time of the telephone conversation. In the event the estimate of replacement cost is communicated by telephone to an applicant, the copy of the estimate shall be mailed to the applicant no later than three business days after the applicant agrees to

purchase the coverage.

(2) An estimate of replacement cost provided in connection with an application for or renewal of a homeowners' insurance policy that provides coverage on a replacement cost basis must itemize the projected cost for each element specified in paragraphs (a)(1) through (a)(4), and shall identify the assumptions made for each of the components and features listed in paragraph (a)(5), of this Section 2695.183.

(h) If an estimate of replacement cost is updated or revised by, or on behalf of, the licensee and the revised estimate of replacement cost is communicated to the applicant or insured in connection with an application for or renewal of a homeowners' insurance policy that provides coverage on a replacement cost basis, the licensee shall provide a copy of the revised or updated estimate of replacement cost to the applicant as provided in paragraph (g)(1) of this Section 2695.183, or to the insured simultaneously with the renewal offer, as the case may be. This subdivision (h) shall not apply when the update or revision to the estimate of replacement cost or the policy limit results solely from the application of an inflationary provision in a policy or an inflation factor. This subdivision (h) shall not obligate a licensee to recalculate an estimate of replacement cost on an annual basis.

(i) Licensees shall maintain (1) a record of the information supplied by the applicant or insured that is used by the licensee to generate the estimate of replacement cost, and (2) a copy of any estimate of replacement cost supplied to the applicant or insured pursuant to paragraph (g)(1), or subdivision (h), of this Section 2695.183. If a policy is issued, these records and copies shall be maintained for the entire term of the insurance policy or the duration of coverage, whichever terminates later in time, and for five years thereafter. However, if the estimate of replacement cost is provided to an applicant to whom an insurance policy is never issued, the records and copies referred to in the first sentence of this subdivision (i) shall be maintained for the period of time the licensee ordinarily maintains applicant files in the normal course of business, provided that such period of time shall be at least sufficient to ensure that the licensee is able to comply with the provisions of this subdivision in the event the policy is issued to the applicant.

(j) To communicate an estimate of replacement value not comporting with subdivisions (a) through (e) of this Section 2695.183 to an applicant or insured in connection with an application for or renewal of a homeowners' insurance policy that provides coverage on a replacement cost basis constitutes making a statement with respect to the business of insurance which is misleading and which by the exercise of reasonable care should be known to be misleading, pursuant to Insurance Code section 790.03.

(k) When an insurer identifies one or more specific sources or tools that a broker-agent must use to create an estimate of replacement cost,

(1) the insurer shall prescribe complete written procedures to be followed by broker-agents when they use the sources or tools,

(2) the insurer shall provide the broker-agent with the training and written training materials

necessary to properly utilize the sources or tools according to the insurer's prescribed procedures, and

(3) the insurer, and not the broker-agent, shall be responsible for any noncompliance with this Section 2695.183 that results from the failure of the estimate to satisfy the requirements of subdivisions (a) through (e), unless that noncompliance results from failure by the broker-agent to follow the insurer's prescribed written procedures when using the source or tool.

(l) This Section 2695.183 applies to all communications by a licensee, verbal or written, with the sole exception of internal communications within an insurer, or confidential communications between an insurer and its contractor, that concern the insurer's underwriting decisions and that never come to the attention of an applicant or insured.

(m) No provision of this article shall be construed as requiring a licensee to estimate replacement cost or to set or recommend a policy limit to an applicant or insured. No provision of this article shall be construed as requiring a licensee to advise the applicant or insured as to the sufficiency of an estimate of replacement cost.

(n) No provision of this article shall limit or preclude a licensee from providing and explaining the California Residential Property Insurance Disclosure, as cited in Insurance Code section 10102, explaining the various forms of replacement cost coverage available to an applicant or insured, or explaining how replacement cost basis policies operate to pay claims.

(o) No provision of this article shall limit or preclude an applicant or insured from obtaining his or her own estimate of replacement cost from an entity permitted to make such an estimate by Insurance Code section 1749.85.

(p) For purposes of this subdivision (p), "minimum amount of insurance" shall mean the lowest amount of insurance that an insurer requires to be purchased in order for the insurer to underwrite the coverage on a particular property, based upon an insurer's eligibility guidelines, underwriting practices and/or actuarial analysis. An insurer may communicate to an applicant or insured that an applicant or insured must purchase a minimum amount of insurance that does not comport with subdivisions (a) through (e) of this Section 2695.183; however, if the minimum amount of insurance that is communicated is based in whole or in part on an estimate of replacement value, the estimate of replacement value shall also be provided to the applicant or insured and shall comply with all applicable provisions of this article. Nothing in this article shall limit or preclude an insurer from agreeing to provide coverage for a policy limit that is greater than or less than an estimate of replacement cost provided pursuant to this article.

(q) This article shall apply only to estimates of replacement value that are prepared, communicated or used by a licensee on or after June 27, 2011.

Note: Authority cited: Sections 730, 790.03, 790.04, 790.10, 1749.7, 1749.85, 1861.05 and 2051.5, Insurance Code. Reference: Sections 730, 790.03, 790.04, 735.5 and 1749.85, Insurance Code.

HISTORY

1. New section filed 12-29-2010; operative 6-27-2011 pursuant to Government Code section 11343.4(b) (Register 2010, No. 53).

***Homeowners' Insurance Valuation:
What Agents and Brokers Need to Know***

Court Cases

View National Reporter System version
47 Cal.App.4th 1110, 55 Cal.Rptr.2d 276, 96
Cal. Daily Op. Serv. 5556, 96 Daily Journal
D.A.R. 9067

NARENDRA DESAI, Plaintiff and
Appellant,
v.
FARMERS INSURANCE EXCHANGE et
al., Defendants and Respondents.

No. B093653.
Court of Appeal, Second District, Division 2,
California.
Jul 26, 1996.

SUMMARY

An insured sued his real property insurer and insurance agent for breach of contract and negligence based on respondeat superior liability, asserting that defendants failed and refused to provide him with the 100 percent replacement cost coverage he had requested and which the agent assured him he was receiving. The trial court sustained the insurer's demurrers without leave to amend, finding that the insured could not state a cause of action against the insurer because the policy limits were less than the cost of replacing structures destroyed by an earthquake and fire. The court also entered an order of dismissal in favor of the insurer. (Superior Court of Los Angeles County, No. SC034765, Alan B. Haber, Judge.)

The Court of Appeal reversed the order of dismissal. On the breach of contract claim, the court held that the trial court erred in construing the policy in favor of the insurer and in sustaining the insurer's demurrer. The policy contained a value protection clause, in which the insurer guaranteed to meet replacement cost requirements and promised automatic protection by increasing coverage levels as the cost of replacing the insured property increased, and

this clause was completely incompatible with a purported \$150,000 liability cap. An objectively reasonable insured layperson would believe that the policy guaranteed replacement coverage, regardless of what the insurer's purported policy limits were. The court further held that on the negligence claim based on respondeat superior liability, the trial court erred in finding that the insured had no actionable claim against the insurer for the agent's negligence and in sustaining the insurer's demurrer. A broker's failure to obtain the type of insurance requested by an insured may constitute actionable negligence and the proximate cause of injury. Moreover, if the agent fails to exercise reasonable care in procuring the type of insurance that the insured demanded and bargained for, the insurer may be liable under theories of ratification and ostensible authority. (Opinion by Boren, P. J., with Fukuto and Zebrowski, JJ., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Appellate Review § 23--Decisions Appealable--Orders on Demurrer.

An order sustaining a demurrer without leave to amend is nonappealable. However, an order of dismissal under Code Civ. Proc., § 581, subd. (f)(1), operates as a final judgment as to those parties in whose favor the cause was dismissed and is separately appealable.

(2) Appellate Review § 128--Scope of Review--Function of Appellate Court--Rulings on Demurrers--Independent Judgment of Reviewing Court.

An appellate court reviews a ruling sustaining a demurrer without leave to amend de novo, exercising independent judgment on whether a

cause of action has been stated as a matter of law. All facts properly pleaded are deemed admitted, and the reviewing court is not concerned with a plaintiff's possible inability to prove the claims made in the complaint at trial.

(3a, 3b) Insurance Contracts and Coverage § 15--Rules in Aid of Interpretation of Contracts--Interpretation Against Insurer--Ambiguous Policy Provision.

In an action for breach of contract brought by an insured against his real property insurer on the ground that, after three structures on the insured's property were destroyed by fire and an earthquake, defendant failed and refused to provide him with the 100 percent replacement cost coverage he had requested and which his insurance agent assured him he was receiving, the trial court erred in construing the policy in favor of the insurer and in sustaining the insurer's demurrer. The policy should have been interpreted in favor of the insured, since the policy contained a patent ambiguity. The policy contained a value protection clause, in which the insurer guaranteed to meet replacement cost requirements and promised automatic protection by increasing coverage levels as the cost of replacing the insured property increased, and this clause was completely incompatible with the purported \$150,000 liability cap. An objectively reasonable insured layperson would believe that the policy guaranteed replacement coverage, regardless of what the insurer's purported policy limits were. The insured asserted that he paid an extra \$108 annually in premiums for this guaranty and extended coverage. The guaranty was worthless, however, if the estimated cost of replacement stated in the policy was wrong, either because the insurance agent who inspected the property miscalculated what it would cost to rebuild, or because the insurer neglected to increase automatically the policy limits each year to keep up with inflation. The reasonable expectation of the insured was not to pay \$108 per year extra for a worthless guaranty.

(4) Insurance Contracts and Coverage § 15--Rules in Aid of Interpretation of Contracts--Interpretation Against Insurer--Reasonable and Ordinary Meaning of Words.

Words used in an insurance policy are to be interpreted according to the plain meaning that a layman would ordinarily attach to them. Courts will not adopt a strained or absurd interpretation in order to create an ambiguity where none exists. On the other hand, any ambiguity or uncertainty in an insurance policy is to be resolved against the insurer, and if semantically permissible, the contract will be given such construction as will fairly achieve its objective of providing indemnity for the loss to which the insurance relates. The purpose of this canon of construction is to protect the insured's reasonable expectation of coverage in a situation in which the insurer-draftsman controls the language of the policy. The insurer-draftsman will not be rescued from the consequences of the imprecise terminology used in the insurance contract, especially where it would defeat the reasonable expectations of the insured.

(5) Insurance Contracts and Coverage § 10--Rules in Aid of Interpretation of Contracts--General Principles.

In interpreting an insurance policy, each clause of the contract must be considered with reference to every other relevant clause and the clauses construed together in order to ascertain the intent of the parties. Similarly, in construing the meaning of a specific policy provision, the court does not view the provision in isolation but in the context of other relevant policy provisions. If the policy language is clear and explicit, it governs. If, on the other hand, the provision is susceptible to two or more reasonable constructions, it must be construed in accordance with the objectively reasonable expectations of the insured. Finally, if applying the foregoing rules does not eliminate or resolve any alleged ambiguity, the ambiguity is resolved against the insurer in favor of liability under the policy.

(6a, 6b, 6c) Insurance Companies § 9--Agents and Brokers for Insurer--Liability of Insurer to Insured for Negligence--Duty to Deliver Agreed-upon Coverage--Breach:Agency § 31--Rights, Duties, and Liabilities-- Liability of Principal for Torts of Agent--Insurer's Liability to Insured for Agent's Negligence.

In an action for negligence based on respondeat superior liability brought by an insured against his real property insurer on the ground that, after three structures on the insured's property were destroyed by fire and an earthquake, defendant failed and refused to provide him with the 100 percent replacement cost coverage he had requested and which his insurance agent assured him he was receiving, the trial court erred in finding that the insured had no actionable claim against the insurer for the agent's negligence and in sustaining the insurer's demurrer. An insurer, as a principal, may be vicariously liable for the torts of its agent if the insurer directed or authorized the agent to perform the tortious acts, or if it ratifies acts it did not originally authorize. In this case, the insured requested at the outset coverage adequate to rebuild his home in the event of a loss, before he agreed to purchase a policy. He was informed by the insurer's agent that the policy would cover reconstruction, and only after his home sustained significant loss did he discover that the coverage he purchased was not what he had demanded nor what the insurer and its agent warranted it was. Thus, the assurances by the insurer-through its agent-that the insured's coverage was sufficient to protect him against the destruction of his home created a viable claim of negligence when it later became evident that the policy limit was less than it would cost to rebuild.

[See 2 **Witkin**, Summary of Cal. Law (9th ed. 1987) Agency and Employment, § 288. See also Liability of insurance agent or broker on ground of inadequacy of liability insurance coverage procured, note, 72 **A.L.R.3d** 704.]

(7a, 7b) Insurance Companies § 9--Agents and

Brokers for Insurer-- Liability of Insurer to Insured for Agent's Torts.

An insurer, as a principal, may be vicariously liable for the torts of its agent if the insurer directed or authorized the agent to perform the tortious acts, or if it ratifies acts it did not originally authorize. Layered atop the principal/agent relationship of the insurer to its agent is the insurer's fiduciary duty to conduct itself with the utmost good faith for the benefit of its insured. Further, an insurance agent has an obligation to use reasonable care, diligence, and judgment in procuring insurance requested by an insured. A broker's failure to obtain the type of insurance requested by an insured may constitute actionable negligence and the proximate cause of injury. Moreover, if the agent fails to exercise reasonable care in procuring the type of insurance that the insured demanded and bargained for, the insurer may be liable under theories of ratification and ostensible authority.

COUNSEL

Harold E. Griffin for Plaintiff and Appellant.
Cooper, Kardaras & Scharf, Gerald G. Knapton and Linda Chalison for Defendants and Respondents.

BOREN, P. J.

An insured sued his real property insurer and insurance agent for breach of contract and negligence, claiming that the defendants failed and refused to provide him with the 100 percent replacement cost coverage he had requested and which the agent assured him he was receiving. On demurrer, the trial court concluded that the insured could not state a cause of action against his insurer because the policy limits were less than the cost of replacing structures destroyed by an earthquake and fire. We conclude that the reasonable expectations of the insured would be that he was completely covered for the replacement cost of the structures, regardless of the policy limits. Accordingly, we reverse the

court's order of dismissal in favor of the insurer.

Allegations

Narendra Desai purchased real property in Santa Monica in 1991. To safeguard his investment, Desai sought to purchase earthquake, fire and hazard insurance. Desai informed an insurance vendor, Carol Sacramone Insurance Agency, that he wanted 100 percent coverage for the cost of repairing or replacing improvements to the property, including any increases for inflation. Sacramone told Desai that Farmers Insurance Group offered the type of insurance Desai wanted, and orally represented that the policy provided "100% coverage for the costs of repairs and/or replacement of the improvements to the property including any and all increases in costs of repair or rebuilding in the event of a loss."

In reliance upon the representations of Sacramone and based on the understanding that the policy provided 100 percent replacement coverage in the event of a loss, Desai purchased a Farmers insurance policy through Sacramone, effective November 4, 1991. Before the policy issued, Sacramone personally inspected the property to determine the amount of coverage needed to meet and fulfill Desai's stated requirements. The policy was renewed annually through February 22, 1994. *1115

On January 17, 1994, two of the structures on Desai's land were completely destroyed by an earthquake. On February 22, 1994, a third structure damaged in the earthquake was destroyed by fire. The total loss sustained by Desai was \$546,757. Desai made a claim of loss on his policy with Farmers. Farmers agreed to pay Desai \$158,734 on the grounds that this sum was the limit of its liability for the loss.

Desai instituted this lawsuit on January 17, 1995. In his first amended complaint, he asserts a cause of action for negligence against Sacramone for advising him to purchase insurance from Farmers when the coverage for

which he paid was not what he told Sacramone he needed. As a consequence of this negligence, Desai was unable to rebuild the structures which were destroyed. Desai also makes a respondeat superior claim against Farmers for Sacramone's negligence. Finally, Desai alleges a cause of action against Farmers for breach of contract.

Discussion

1. Appealability

(1) Desai has appealed from the trial court's April 13, 1995, order sustaining Farmers' demurrers without leave to amend. The order sustaining the demurrers is not an appealable order. (*Lavine v. Jessup* (1957) 48 Cal.2d 611, 614 [311 P.2d 8].)

The record on appeal also contains an order of dismissal as to Farmers pursuant to Code of Civil Procedure section 581, subdivision (f)(1). The dismissal operates as a final judgment with respect to Farmers, and is separately appealable. (*Seidner v. 1551 Greenfield Owners Assn.* (1980) 108 Cal.App.3d 895, 901 [166 Cal.Rptr. 803].) In the interests of justice and economy, we shall treat the notice of appeal as incorporating the order of dismissal.

2. Standard of Review

(2) An appellate court reviews a ruling sustaining a demurrer without leave to amend de novo, exercising independent judgment on whether a cause of action has been stated as a matter of law. (*Hoffman v. State Farm Fire & Casualty Co.* (1993) 16 Cal.App.4th 184, 189 [19 Cal.Rptr.2d 809].) All facts properly pleaded are deemed admitted, and we are not concerned with a plaintiff's possible inability to prove the claims made in the complaint at trial. (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125 [271 Cal.Rptr. 146, 793 P.2d 479]; *Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 572 [108 Cal.Rptr. 480,

3. Breach of Contract Claim

In 1994, the year Desai sustained his insured loss, his annual statement from Farmers showed that the "Amount of Insurance" was \$150,000 for loss or damage to structures (from fire, for example) and \$150,000 for earthquake loss or damage to structures. Farmers relies on general policy conditions stating that it is only responsible for (1) "the replacement cost of ... the building," or (2) "the amount actually and necessarily spent to repair or replace the damaged building," or (3) "the limit of liability" under the policy, *whichever is smaller*. The smallest amount was the \$150,000 policy limit, which is what Farmers paid.

(3a) Desai contends that the policy is not nearly so clear-cut as Farmers suggests. In support of his contention, Desai points to a policy provision guaranteeing payment of replacement costs. The policy contains a "Value Protection Clause" which provides: "We [Farmers] may increase the limits of insurance to reflect changes in costs of construction and personal property values. Any such increase will be made on the renewal date of this policy or on the anniversary date of 3-year policies paid annually. If a Replacement Cost provision forms a part of this policy, we guarantee that the limits of insurance meet the replacement cost requirements."

Elsewhere within the policy or accompanying literature, Farmers announces the following to its policyholders: "Your policy contains a very important feature called Value Protection. Value Protection provides *automatic protection against inflation* so that the coverage amounts are increased as the costs of replacing your home or Personal Property increase. Value Protection *guarantees to meet all minimum insurance-to-replacement cost requirements* if any are present in your policy. Subject to the amount of your policy limits and all policy

provisions, depreciation will not be applied to most building losses The enclosed premium notice includes the increased amounts of insurance and premium, based on the applicable indexes for your property and your area. If there has been no increase in amounts of insurance this is because the applicable indexes did not show an upward adjustment for this period." (Italics added.)

For the reassuring guarantees and "extended coverage" of the Value Protection plan, Desai alleges that he paid an extra \$108 annually in premiums.

(4) "We begin with established principles applicable to the interpretation of insurance policies. Words used in an insurance policy are to be interpreted according to the plain meaning which a layman would ordinarily attach to *1117 them. Courts will not adopt a strained or absurd interpretation in order to create an ambiguity where none exists. [Citations.] [¶] On the other hand, 'any ambiguity or uncertainty in an insurance policy is to be resolved against the insurer and ... if semantically permissible, the contract will be given such construction as will fairly achieve its object of providing indemnity for the loss to which the insurance relates.' [Citations.] The purpose of this canon of construction is to protect the insured's reasonable expectation of coverage in a situation in which the insurer-draftsman controls the language of the policy." (*Reserve Insurance Co. v. Pisciotto* (1982) 30 Cal.3d 800, 807-808 [180 Cal.Rptr. 628, 640 P.2d 764].) The insurer-draftsman will not be rescued from the consequences of the imprecise terminology used in the insurance contract, especially where it would defeat the reasonable expectations of the insured. (*Id.* at p. 811.)

Farmers would like for the policy limits language of the contract to be read in isolation, without reference to other provisions. This is not the correct way to construe insurance policies, however. (5) "The principles governing interpretation of insurance contracts are familiar and well settled.... Each clause of the contract

must be considered with reference to every other relevant clause and the clauses construed together in order to ascertain the intent of the parties. Similarly, in construing the meaning of a specific policy provision we do not view the provision in isolation but in the context of other relevant policy provisions. If the policy language is clear and explicit, it governs. If, on the other hand, the provision is susceptible to two or more reasonable constructions, it must be construed in accordance with the objectively reasonable expectations of the insured. Finally, if applying the foregoing rules does not eliminate or resolve any alleged ambiguity, the ambiguity is resolved against the insurer in favor of liability under the policy.” (*A.B.S. Clothing Collection, Inc. v. Home Ins. Co.* (1995) 34 Cal.App.4th 1470, 1478-1479 [41 Cal.Rptr.2d 166].)

(3b) The “Value Protection Clause” in Desai’s policy seriously undermines the purported liability cap stated elsewhere in the policy. Farmers *guarantees* to meet replacement cost requirements, and promises *automatic protection* by increasing coverage levels as the cost of replacing the insured property increases.¹ A reasonable policyholder could readily construe that to mean that he or she need not demand increased coverage each year because Farmers would “automatically” take increased costs into account in fixing **1118* the coverage and premium. Increased coverage is hardly “automatic” if the insured has to research the matter himself, then demand changes in the policy. Moreover, the “guarantee” to meet replacement cost requirements makes it appear that Farmers is willing to gamble that it correctly fixed the cost of replacing the property when it drew up the contract and set the premium amount. Desai alleges that he paid over \$100 per year for this guarantee. The guarantee is worthless, however, if it turns out that the estimated cost of replacement stated in the policy is dead wrong, either because the insurance agent who inspected the property miscalculated what it would cost to rebuild, or

because the insurer neglected to increase automatically the policy limits each year to keep up with inflation. We doubt that the reasonable expectation of the insured was to pay over \$100 per year extra for a worthless guarantee. Rather, the insured would expect to pay one premium for a policy that merely had a \$150,000 policy limit, and a higher premium for a policy that *guaranteed* the policy limit would cover the insured’s replacement cost.

In short, the \$150,000 coverage amount is completely incompatible with other policy language guaranteeing replacement cost and providing automatic protection with increased coverage. If Farmers wished to pay only \$150,000, it should not have promised automatic inflation protection or guaranteed replacement coverage. It is plain that Farmers grossly underestimated the replacement cost of Desai’s property, but that is Farmer’s problem, not Desai’s. Reading the policy language as a whole, and interpreting it in favor of the insured as we must where there is a patent ambiguity of this sort, we conclude that an objectively reasonable insured layperson would believe the policy guaranteed replacement coverage, regardless of what the purported policy limits were. Accordingly, the trial court erred in construing the policy in favor of the insurer and in sustaining the demurrer to this cause of action.

4. *Respondeat Superior Liability*

(6a) Desai alleges that Sacramone is an agent for Farmers and acted within the course and scope of that agency and with the permission and consent of Farmers when negligently selling inadequate insurance to him. Desai argues that Farmers is vicariously liable for Sacramone’s negligence because of their agency relationship. (7a) An insurer, as a principal, may be vicariously liable for the torts of its agent if the insurer directed or authorized the agent to perform the tortious acts, or if it ratifies acts it did not originally authorize. (*Shultz Steel *1119*

Co. v. Hartford Accident Indemnity Co. (1986) 187 Cal.App.3d 513, 518-519 [231 Cal.Rptr. 715].) Layered atop the principal/agent relationship of the insurer to its agent is the insurer's fiduciary duty to conduct itself with the utmost good faith for the benefit of its insured. (*Id.* at p. 519.)

Farmers relies on four cases which it claims establish that it cannot be held liable for Sacramone's negligence: *Ahern v. Dillenback* (1991) 1 Cal.App.4th 36, 42-43 [1 Cal.Rptr.2d 339]; *Schultz Steel Co. v. Hartford Accident Indemnity Co.*, *supra*, 187 Cal.App.3d 513, 522-523 (public policy militates against imposing duty on insurer to advise of availability of coverage *beyond* what was requested by insured); *Gibson v. Government Employees Ins. Co.* (1984) 162 Cal.App.3d 441, 448, 452 [208 Cal.Rptr. 511] (insurer who made no representation, promise, guarantee or warranty regarding the nature and extent of the coverage it offered was not liable for failing to advise insured to purchase uninsured motorist coverage which the insured never requested); and *Jones v. Grewe* (1987) 189 Cal.App.3d 950, 956 [234 Cal.Rptr. 717].

(6b) None of the cited cases is on point. In each instance, the insured was suing its insurer for failing to (1) *recommend additional* coverage or (2) *spontaneously procure* unrequested additional coverage for its insured or (3) *advise* that additional coverage was *available*. That is not the case here. Desai is suing because the insurer (through its agent) negligently represented that the policy in fact provided the 100 percent replacement cost coverage that Desai demanded from his insurance before he ever purchased the policy from Farmers.

This is not a situation wherein an insured belatedly realized-after an accident occurred and a claim was made and denied-that he or she should have had more or different coverage. Rather, Desai demanded a particular level of coverage at the outset, before he agreed to purchase a policy. It was then represented to

him that he was receiving the demanded level of coverage from Farmers, and only afterwards did he discover the coverage he purchased was not what he had demanded nor what the insurer and its agent warranted it was. This is not a "failure to recommend more coverage" case; it is a "failure to deliver the agreed-upon coverage" case.

(7b) A "failure to deliver the agreed-upon coverage" case is actionable, unlike the "failure to recommend" cases cited by Farmers. An insurance agent has an "obligation to use reasonable care, diligence, and judgment in procuring insurance requested by an insured." (*Jones v. Grewe, supra*, 189 Cal.App.3d at p. 954; *Kurtz, Richards, Wilson & Co. v. Insurance Communicators Marketing Corp.* (1993) 12 Cal.App.4th 1249, 1257 [*1120 16 Cal.Rptr.2d 259].) A broker's failure to obtain the type of insurance requested by an insured may constitute actionable negligence and the proximate cause of injury. (*Nowlon v. Koram Ins. Center, Inc.* (1991) 1 Cal.App.4th 1437, 1447 [2 Cal.Rptr.2d 683].) Moreover, if the agent fails to exercise reasonable care in procuring the type of insurance that the insured demanded and bargained for, the cases hold that the insurer may be liable under theories of ratification and ostensible authority.

(6c) For example, where an insurance agent negligently failed to name the insured's lessor as an additional insured on the policy, so that the lessor was exposed to liability when someone was injured on the insured premises, a claim which survived demurrer was stated against the insurance carrier based on the negligence of its agent. (*Jackson v. Aetna Life & Casualty Co.* (1979) 93 Cal.App.3d 838, 840, 848 [155 Cal.Rptr. 905].) The court observed that the insurance carrier-as a "quasi-public" entity-may be held vicariously liable for failing to fulfill its basic obligation to provide the insurance required by the policy's intended beneficiary and demanded from the agent. (*Id.* at pp. 846-847.)

As a further example, an insured instructed an

authorized agent of Fireman's Fund Insurance Company to procure \$15,000 in personal property insurance in *Lippert v. Bailey* (1966) 241 Cal.App.2d 376 [50 Cal.Rptr. 478]. After a fire on the insured premises, the insured discovered that the agent had obtained only \$5,000 in insurance. The insurance carrier maintained that it was only liable for the face amount of the policy as written for \$5,000, and the insured sued. (*Id.* at p. 379.) The appellate court disagreed with the insurer, noting that "... the plaintiffs bargained for and entered into a contract of fire insurance for an adequate consideration with Fireman's Fund Insurance Company in exchange for certain guaranties of insurance protection in specified amounts. The defendants herein have failed to obtain the specified amounts of insurance protection from the company which had been bargained for. These factors would indicate a primary right of the plaintiffs in the insurance contract and a breach of duty pertaining to that right in failing to provide the bargained for coverage." (*Id.* at p. 381.) Though the carrier settled with the plaintiffs prior to trial, the court stated that the negligence of the agent was attributable to the insurer and that a legal remedy could have been properly pursued against the insurer. (*Id.* at pp. 382-384.)

In a case from this division reciting facts remarkably similar to those alleged here, this court concluded that the insured's lawsuit survived demurrer where it was claimed that the insurer-through its agent-failed to insure *1121 adequately the insured's house against loss. (*Free v. Republic Ins. Co.* (1992) 8 Cal.App.4th

1726 [11 Cal.Rptr.2d 296].) The insured requested coverage adequate to rebuild his home. He was informed by the defendant insurance company's agent that the policy would cover reconstruction. The insured's home was destroyed by fire, at which point he discovered that the policy limit was less than it would cost to replace his home. (*Id.* at p. 1729.) This court observed that the insured sought to be protected against a very specific eventuality: the destruction of his home. The defendants assured him that his coverage was sufficient for this purpose, which created a viable claim of negligence when it later became evident that the policy limit was less than it would cost to rebuild. (*Id.* at p. 1730.) That is precisely what is alleged in the case at bar.

In light of the authorities we have cited, the trial court erred in finding that Desai had no actionable claim against Farmers for Sacramone's negligence.

Disposition

The judgment (order of dismissal) in favor of Farmers Insurance Company is reversed. Desai is entitled to recover his costs on appeal from Farmers.

Fukuto, J., and Zebrowski, J., concurred.

Respondents' petition for review by the Supreme Court was denied November 20, 1996.

Footnotes

- 1 To the extent that some of this language is contained in a premium renewal notice sent to Desai by Farmers, to induce policyholders like Desai to renew their policies, we shall treat it as an affirmative representation by the insurer to its insured regarding the scope and meaning of the policy.

75 Cal.Rptr.3d 812
Court of Appeal, Fourth District, Division 2,
California.

Agnes H. EVERETT, Plaintiff and
Appellant,

v.

STATE FARM GENERAL INSURANCE
COMPANY, Defendant and Respondent.

No. E041807. April 29, 2008. As Modified
May 15, 2008.

Synopsis

Background: Owner of home destroyed by fire brought action against property insurer for breach of contract, breach of implied covenant of good faith and fair dealing, negligence, reformation, and fraud based on insurer's failure to pay full cost of replacement. The Superior Court, San Bernardino County, No. SCVSS124763, John P. Wade, J., granted insurer's motion for summary adjudication, and homeowner appealed.

Holdings: The Court of Appeal, Hollenhorst, Acting P.J., held that:

- 1 insurance policy did not entitle homeowner the total cost to replace her home irrespective of the policy limits;
- 2 homeowner failed to show that she either incurred, or would incur, the cost for code upgrades up to policy limits as required to support breach of contract claim;
- 3 homeowner, rather than insurer, had duty to maintain insurance policy limits equal to replacement costs;
- 4 policy's inflation coverage provision did not ensure that policy continued to insure home to 100 percent of its replacement cost;
- 5 any oral representations by insurance agents were ineffective to change terms of the policy;
- 6 notice of changes in policy from guaranteed

replacement cost coverage to limited coverage was sufficient to comply with statute; and 7 insurer did not misrepresent nature of coverage to homeowner.

Affirmed.

West Headnotes (20)

1 **Appeal and Error**—Motions
Appeal and Error—Burden of showing grounds for review

While a plaintiff need not request leave to amend in order to preserve on appeal the issue of whether the court abused its discretion in sustaining a demurrer without leave to amend, on appeal the plaintiff does bear the burden of proving there is a reasonable possibility the defect in the pleading can be cured by amendment; plaintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading. West's Ann.Cal.C.C.P. § 472c.

6 Cases that cite this headnote

2 **Insurance**—Replacement

Property insurance policy did not entitle homeowner to the total cost to replace her fire-destroyed property irrespective of the policy limits, although declarations page included both a stated dollar amount and a statement for the loss settlement provision that the policy included replacement cost with similar construction; loss settlement endorsement clearly provided that insurer would pay up to the applicable

limit of liability shown in the declarations, and “replacement cost” coverage was intended to compensate for any shortfall in coverage that could result from rebuilding under a policy that paid only for actual cash value.

See 2 Witkin, Summary of Cal. Law (10th ed. 2005) Insurance, § 131; Cal. Jur. 3d, Insurance Contracts, §§ 399, 411; Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2007) ¶ 6:284 (CAINSL Ch. 6B-D); Annot., Construction and effect of property insurance provision permitting recovery of replacement cost of property (1992) 1 A.L.R.5th 817.

2 Cases that cite this headnote

3 Insurance—Application of rules of contract construction

While insurance contracts have special features, they are still contracts to which the ordinary rules of contractual interpretation apply.

4 Contracts—Language of contract

Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs its interpretation; such intent is to be inferred, if possible, solely from the written provisions of the contract.

5 Insurance—Construction as a whole

To yield their meaning, the provisions of an insurance policy must be considered in their full context.

6 Insurance—Rules of Construction

Where it is clear, the language in an insurance policy must be read accordingly.

7 Insurance—Ambiguity in general
Insurance—Reasonable expectations

Where the language in an insurance policy is not clear, it must be read in conformity with what the insurer believed the insured understood thereby at the time of formation and, if it remains problematic, in the sense that satisfies the insured’s objectively reasonable expectations.

8 Insurance—Exclusions and limitations in general

An insurer has a right to limit the policy coverage in plain and understandable language, and is at liberty to limit the character and extent of the risk it undertakes to assume.

1 Cases that cite this headnote

9 Insurance—Policies considered as contracts

Insurance—Construction or enforcement as written

An insurance policy is but a contract and like all other contracts, it must be construed from the language used; where its terms are plain and unambiguous, the courts have a duty to enforce the contract as agreed upon by the parties.

10 Insurance—Function of, and limitations on, courts, in general

Courts may not rewrite the insurance contract or force a conclusion to exact liability where none was contemplated.

11 Insurance—Ambiguity in general
Insurance—Construction as a whole

Ambiguity in an insurance policy is not necessarily to be found in the fact that a word or phrase isolated from its context is susceptible of more than one meaning; an insurance policy must be interpreted as a whole and in context.

12 Insurance—Exclusions and limitations in general

Express coverage limitations in an insurance policy must be respected.

13 Judgment—Matters of fact or conclusions

Judgment—Defects and objections

Insured owner of home destroyed by fire failed to show, on insurer's motion for summary judgment, that she either incurred, or would incur, the cost for code upgrades up to limits of her property insurance policy as required to support claim against homeowner's insurer for breach of contract in connection with insurer's alleged failure to pay policy limits; court sustained insurer's objection to declaration, which homeowner submitted in opposition to insurer's motion for summary judgment, in which contractor estimated that the cost of code upgrades exceeded the policy limits but offered no explanation as to how and why he reached that conclusion and did not provide any documentation to support it.

2 Cases that cite this headnote

14 Insurance—Replacement

Homeowner, rather than homeowner's property insurer, had duty to maintain insurance policy limits equal to replacement costs; original policy limits were sufficient to replace home when policy was first issued, and homeowner never requested an increase in her policy limits despite the increase in the value of her home and despite statements on annual renewal certificates which reminded homeowner that the replacement cost figure identified by insurer was merely an estimate, and that it was her responsibility to determine whether her property was adequately insured. West's Ann.Cal.Ins.Code §§

15 Insurance—Of insureds

It is up to the insured to determine whether he or she has sufficient coverage for his or her needs.

16 Insurance—Replacement

Inflation coverage provision in homeowner's property insurance policy did not ensure that policy continued to insure home to 100 percent of its replacement cost; policy recognized that an insured may request a higher limit of liability, and residential property insurance disclosure statement placed the burden of determining the higher limit of liability needed on homeowner.

17 Insurance—Oral modifications

Any oral representations by insurance agents that homeowner's property insurer would replace home in the event of a total loss were ineffective to change terms of fully integrated homeowner's insurance policy; homeowner had initially guaranteed replacement cost coverage, but insurer later eliminated such coverage and notified homeowner that her policy had a stated limit of liability which reflected the maximum that would be paid in case of loss, homeowner accepted the change by paying her premium for the policy

18 Insurance—Notice

Insurer's notice of changes in property insurance policy from guaranteed replacement cost coverage to limited coverage was sufficient to comply with statute; insurer mailed notice informing insured homeowner of the reduction in coverage, notice informed homeowner that the "Guaranteed Replacement Cost Coverage" was being eliminated, and notice stated "Your policy now has a stated limit of liability under Coverage A that reflects the maximum that will be paid in case of loss." West's Ann.Cal.Ins.Code § 678(a)(1)(A).

1 Cases that cite this headnote

19 Insurance—Fraud or misrepresentation; concealment

Homeowner's property insurer did not misrepresent nature of coverage to homeowner, who was told that she had full replacement cost when she purchased initial policy but who was not compensated for her entire loss after her home burned down; insurer later eliminated full replacement coverage and replaced it with coverage up to policy limits, insurer adequately notified homeowner of the change in coverage, and insurer never represented to homeowner that she had full

replacement coverage following the elimination of full replacement coverage.

1 Cases that cite this headnote

**20 Insurance—Fraud or Misrepresentation
Insurance—Mistake**

There was no mistake or misrepresentation as to coverage under homeowner's insurance policy that entitled homeowner to reformation of the policy, even if homeowner did not understand notice which informed her that replacement cost coverage was being eliminated and replaced by coverage up to policy limits. West's Ann.Cal.Civ.Code § 3399.

Attorneys and Law Firms

****814** Law Offices of Christian J. Garris and Christian J. Garris for Plaintiff and Appellant. Robie & Matthai, James R. Robie, Michael J. O'Neill and Natalie A. Kouyoumdjian, Los Angeles; Hughes & Nunn and Randall M. Nunn, San Diego, for Defendant and Respondent.

Opinion

***652 OPINION**

HOLLENHORST, Acting P.J.

Agnes H. Everett (Everett) appeals after summary adjudication of issues and ****815** motion for judgment on the pleadings were

granted in favor of defendant State Farm General Insurance Company (State Farm) in Everett's action, which alleged breach of contract, breach of the duty of good faith and fair dealing, promissory fraud, fraudulent misrepresentation, negligent misrepresentation, and reformation. We affirm.

I. FACTS AND PROCEDURAL HISTORY

In October 1991, Everett purchased a home for approximately \$99,000 located on Chiquita Lane in San Bernardino, California. At the same time, she purchased a homeowner's policy from State Farm through agent Bryan Hendry (Hendry). The policy number was 75-BJ-7254-8. It was renewed annually on September 25. The policy included an endorsement for guaranteed replacement cost coverage, which provided that State Farm would pay the full amount needed to repair the damaged or destroyed dwelling with like or equivalent construction, without regard to the policy limits.

In August 1993, service of Everett's policy was transferred to agent Desiree Sarnowski (Sarnowski). Sarnowski did not inspect the property, nor did Everett request Sarnowski to inspect the property. Everett also never asked Sarnowski to review her policy or increase the limits.

In 1997, State Farm eliminated the guaranteed replacement cost coverage in its homeowner policies. To provide its insureds with ample warning, State Farm sent each policyholder a notice of the change in coverage. State Farm made certain its notice complied with applicable law. In the notice, State Farm informed its insureds that if they chose to renew their homeowners policies with State Farm, guaranteed replacement cost coverage would no longer be available. Portions of the notice contained red or boldfaced, large capital letters and informed insureds that the document was an **"IMPORTANT NOTICE ... about changes to your policy."**¹ The notice further specified the

changes to the policy in a second boldfaced, capitalized heading entitled, **"I. REDUCTIONS OR ELIMINATIONS OF COVERAGE."**

The insureds were notified that **"GUARANTEED EXTRA COVERAGE (Current Homeowners Extra Form 5) and GUARANTEED REPLACEMENT COST COVERAGE (Current Endorsement to Homeowners Special Form 3)"** were eliminated and that their policy "now has a stated limit of liability *653 under Coverage A that reflects the maximum that will be paid in case of loss. If Option ID—Increased Dwelling Limit is shown in the Declarations of your new policy, it may provide an additional limit for damaged building structures. However, the most State Farm will pay for loss to property under Coverage A is the stated limit of liability, plus any additional limit provided by Option ID, if shown in the Declarations. The policy no longer provides a guarantee to replace your home regardless of the cost."²

Everett does not deny that she received this notice. Attached to the notice sent to her was a declarations page identifying the stated policy limits for the policy period 1997 through 1998. At the bottom of the declarations page was a bill for the premium for that policy period. On September 29, 1997, Everett accepted the homeowner's policy with State Farm (under the new terms providing for a stated policy limit) when her premium for the policy period 1997 through 1998 was paid via a check from her impound account.

Each year from 2000 to 2003, State Farm sent a renewal certificate to Everett. The renewal certificate provided Everett **816 with a yearly reminder that it was her responsibility to insure her home with adequate coverage. Thus, while State Farm provided Everett and other insureds with a replacement cost estimate, State Farm's renewal certificate was clear to explain that the amount of the estimate was just that—merely an estimate. The renewal certificate included the following: "The State Farm replacement cost is an estimated replacement cost based on general

information about your home. It is developed from models that use cost of construction materials and labor rates for like homes in the area. The actual cost to replace your home may be significantly different. State Farm does not guarantee that this figure will represent the actual cost to replace your home. You are responsible for selecting the appropriate amount of coverage and you may obtain an appraisal or contractor estimate which State Farm will consider and accept, if reasonable. Higher coverage amounts may be selected and will result in higher premiums."

In addition to the annual renewal certificate, every two years State Farm mailed to its California insureds, including Everett, a "California Residential Property Insurance Disclosure." The disclosure was provided in compliance with Insurance Code section 10102. It explained the terms "replacement cost" and "extended replacement cost," as written by the Legislature. Extended replacement cost coverage was defined as the amount of replacement cost up to a specified amount above the policy limit.

On October 25, 2003, Everett's home was destroyed by fire. She submitted a claim to State Farm under her homeowner's policy. One of the first tasks *654 undertaken was to determine the scope of Everett's coverage. Her declarations page for the policy period of September 25, 2003, through September 24, 2004, provided that State Farm insured Everett's home under a homeowner's policy, FP-7955-CA, with dwelling limits in the amount of \$92,300, a dwelling extension limit in the amount of \$9,230, and a personal property limit in the amount of \$69,225. Her dwelling coverage was subject to a 20 percent (or \$18,460) increase in contract limits under "Option ID"; it also provided "Ordinance/Law" coverage in the amount of \$9,230.

The "Coverage A Loss Settlement Endorsement" incorporated into Everett's policy provided that State Farm "will pay up to the

applicable limit of liability shown in the Declarations, the reasonable and necessary cost to repair or replace with similar construction ... the damaged part of the property covered under **SECTION I—COVERAGES, COVERAGE A—DWELLING.**” State Farm adjusted Everett’s claim and paid her \$138,654.48 for her structural loss and \$76,620 for her personal property. This amount took into account the increased sum under Everett’s “Option ID” provision and the increase for inflation and “Ordinance/Law” coverage.

On March 25, 2005, Everett initiated this action against State Farm and its agent, Desiree Sarnowski,³ asserting claims for breach of contract, breach of implied covenant of good faith and fair dealing, negligence, reformation, and fraud. Everett’s contract claims were based on two theories. First, she alleged that the policy in effect at the time of her loss provided guaranteed replacement cost coverage such that she was entitled to full payment to replace her property without regard to policy limits. Alternatively, she alleged ****817** that State Farm failed to provide her with sufficient notice of the changes in her policy and thus her prior policy containing guaranteed replacement cost coverage should remain in effect.

On April 21, 2006, State Farm filed a motion for summary adjudication on the ground that Everett’s policy, which was in effect at the time of her loss, did not include guaranteed replacement cost coverage. State Farm argued that Everett received sufficient notice about the change in her coverage with her 1997 renewal notice. Regarding her claim of bad faith, State Farm claimed there was no breach and thus no bad faith. Finally, State Farm argued that Everett’s fraud-based claims were invalid because it never represented to her that her home was covered for up to 100 percent of the amount to replace her property.

On July 6, 2006, the trial court granted State Farm’s motion for summary adjudication. Twenty days later, State Farm filed a motion for

judgment on ***655** the pleadings as to Everett’s remaining claim for reformation. The motion was granted and judgment was entered in favor of State Farm on August 17.

On appeal, Everett contends the judgment must be reversed because (1) State Farm did not pay the policy limits on the code upgrade coverage, and (2) the policy, which promises to replace her home while stating a limit, is unclear.

II. STANDARD OF REVIEW

A. Motion for Summary Adjudication.

On appeal from a motion for summary judgment or summary adjudication of issues we conduct a de novo review of the record. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142, 12 Cal.Rptr.3d 615, 88 P.3d 517; *Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1601, 50 Cal.Rptr.2d 431.)

B. Motion for Judgment on the Pleadings.

“The standard of review for a motion for judgment on the pleadings is the same as that for a general demurrer.” (*Dunn v. County of Santa Barbara* (2006) 135 Cal.App.4th 1281, 1298, 38 Cal.Rptr.3d 316.) “On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, we give the complaint a reasonable interpretation, and treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions or conclusions of law. A trial court errs in sustaining a demurrer when the plaintiff has stated a cause of action under any possible legal theory, and abuses its discretion in sustaining a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment. [Citation.]” (*Palm Springs Tennis Club v. Rangel* (1999) 73 Cal.App.4th 1, 4–5, 86

Cal.Rptr.2d 73 (*Palm Springs Tennis Club*).) Still, the burden is on the appellant to demonstrate the existence of reversible error. (*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1996) 42 Cal.App.4th 608, 626, 49 Cal.Rptr.2d 494.) Therefore we need only discuss whether a cause of action was stated under the theories raised on appeal. (*Ibid.*)

1 Further, “[w]hile a plaintiff need not request leave to amend in order to preserve on appeal the issue of whether the court abused its discretion in sustaining a demurrer without leave to amend (Code Civ. Proc., § 472c), on appeal the plaintiff does bear the burden of proving there is a reasonable possibility the defect in the pleading can be cured by amendment. [Citation.] ‘... Plaintiff must show in what manner he can amend his complaint and *656 how that amendment will **818 change the legal effect of his pleading....’ [Citation.]’ [Citation.]” (*Palm Springs Tennis Club, supra*, 73 Cal.App.4th at pp. 7–8, 86 Cal.Rptr.2d 73.)

III. MOTION FOR SUMMARY ADJUDICATION

A. Interpretation of Everett’s Policy.

2 According to Everett, either her policy covered her loss in its entirety, or the policy was unclear. We begin our analysis by looking at the language in the policy.

3 4 5 6 7 “While insurance contracts have special features, they are still contracts to which the ordinary rules of contractual interpretation apply.” (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264, 10 Cal.Rptr.2d 538, 833 P.2d 545.) “ ‘Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs its interpretation. [Citation.] Such intent is to be inferred, if possible, solely from the written provisions of the contract. [Citation.]’ ” (*Community Redevelopment Agency v. Aetna*

Casualty & Surety Co. (1996) 50 Cal.App.4th 329, 338, 57 Cal.Rptr.2d 755 (*Community Redevelopment*), quoting *Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, 666–667, 42 Cal.Rptr.2d 324, 913 P.2d 878.) “To yield their meaning, the provisions of a policy must be considered in their full context. [Citations.] Where it is clear, the language must be read accordingly. [Citations.] Where it is not, it must be read in conformity with what the insurer believed the insured understood thereby at the time of formation [citations] and, if it remains problematic, in the sense that satisfies the insured’s objectively reasonable expectations [citations].” (*Buss v. Superior Court* (1997) 16 Cal.4th 35, 45, 65 Cal.Rptr.2d 366, 939 P.2d 766.)

8 9 10 “ ‘It is, of course, well established that an insurer has a right to limit the policy coverage in plain and understandable language, and is at liberty to limit the character and extent of the risk it undertakes to assume [citations].’ [Citations.] It is likewise axiomatic that an insurance policy is but a contract and that like all other contracts, it must be construed from the language used; where, as here, its terms are plain and unambiguous, the courts have a duty to enforce the contract as agreed upon by the parties. [Citations.] [¶] Thus, courts may not rewrite the insurance contract or force a conclusion to exact liability where none was contemplated. [Citations.]” (*Hackethal v. National Casualty Co.* (1987) 189 Cal.App.3d 1102, 1109, 234 Cal.Rptr. 853.)

Here, State Farm’s policy in effect at the time of Everett’s loss provided for “Replacement Cost—Similar Construction” for her dwelling. More specifically, in the “COVERAGE A LOSS SETTLEMENT ENDORSEMENT,” *657 the policy provides that State Farm “will pay up to the applicable limit of liability shown in the Declarations, the reasonable and necessary cost to repair or replace with similar construction and for the same use on the premises shown in the Declarations, the damaged part of the property covered under

SECTION I—COVERAGES, COVERAGE A—DWELLING. (Italics added.) The declarations page shows a limit of \$92,300, plus “Option ID” or “Increase Dwlg Up to \$18,460.”

Everett acknowledges that the “Loss Settlement” section of the policy and the “FE-5363” endorsement state that the amount payable on a claim for the dwelling is determined solely by looking at the declarations page. However, she contends that the declarations page is inconsistent. She notes that the declarations page includes both a stated dollar amount of \$92,300 and a statement for the loss settlement provision that the policy includes replacement ****819** cost with “Similar Construction.” She argues, “In such a situation, it is quite reasonable for an insured to believe that State Farm would replace Everett’s home with similar construction—something that State Farm has refused to do.”

Moreover, Everett focuses on the policy’s use of the word “replace” and argues, “ ‘Replace’ means to restore to the state the property was in just prior to the fire. By no interpretation or reasoning can replace ever mean: ‘We will pay you some money that may or may not be enough to rebuild your home.’ ” Everett contends that State Farm used the word “replace” to deceive its customers into thinking that they have one thing when in reality they have something else. More specifically, Everett argues, “The policy provides replacement cost coverage—i.e., the policy promised to replace Everett’s home in the event of a total loss. Otherwise, the word ‘replacement,’ which appears in the policy would constitute a deceptive inducement to insureds.” We disagree.

11 To accept Everett’s argument is to value one word over all of the others used in the policy. However, “[i]n construing the policy before us, it is not our function to select a particular definition of a single word and apply it without regard to other language in the policy. [Citation.] ‘Ambiguity is not necessarily to be found in the fact that a word or phrase isolated

from its context is susceptible of more than one meaning.’ [Citation.] [Citation.] An insurance policy must be interpreted as a whole and in context. [Citation.]” (*Fire Ins. Exchange v. Superior Court* (2004) 116 Cal.App.4th 446, 454, 10 Cal.Rptr.3d 617.)

12 Thus, moving beyond the single word “replace,” we find the following language in the “LOSS SETTLEMENT” section under “A1—Replacement Cost Loss Settlement” dispositive. The language states: “Similar ***658** Construction is replaced with the following: [¶] We will pay up to the applicable limit of liability shown in the Declarations, the reasonable and necessary cost to repair or replace with similar construction and for the same use on the premises shown in the Declarations, the damaged part of the property covered under **SECTION I—COVERAGES, COVERAGE A—DWELLING.**” (Italics added.) Even if the word “replace” is interpreted as restoring the property to its similar state prior to the fire, regardless of its use, the “COVERAGE A LOSS SETTLEMENT ENDORSEMENT” clearly and unequivocally limits payment to the amount stated in the declarations page. There is no ambiguity. Express coverage limitations must be respected. (*Fidelity & Deposit Co. v. Charter Oak Fire Ins. Co.* (1998) 66 Cal.App.4th 1080, 1086, 78 Cal.Rptr.2d 429.) Accordingly, contrary to Everett’s claim, her policy does not entitle her to the total cost to replace her property irrespective of her policy limits.

Notwithstanding the above, State Farm explains the use of the term “replacement cost” is intended “to account for the shortfall in coverage that may result from rebuilding under a policy that only pays for ‘actual cash value.’ ” According to State Farm, a general fire insurance policy provides for “actual cash value” coverage. (Ins.Code, § 2071.) However, the amount of “actual cash value” is based on “the fair market value [of the damaged property] at the time of destruction” (*Fire Ins. Exchange v. Superior Court, supra*, 116 Cal.App.4th at p. 462, 10 Cal.Rptr.3d 617) which oftentimes is

insufficient to repair or replace the property. (*Conway v. Farmers Home Mut. Ins. Co.* (1994) 26 Cal.App.4th 1185, 1189, 31 Cal.Rptr.2d 883.) Thus, “ ‘replacement cost’ coverage ... is intended to compensate the insured for the *shortfall* in coverage that results from ****820** rebuilding under a policy that pays only for actual cash value.’ [Citations.]”

Based on the above, we find that Everett’s policy was not unclear, nor did it guarantee to cover her loss in its entirety.

B. Breach of Contract.

1. Payment of code upgrades.

13 Everett contends that, even if we reject her first argument and find that the declarations page sets the dollar limit on the amount State Farm must pay, we should still reverse the judgment because State Farm “did not actually pay the amount that even it contends are the policy limits.” According to Everett, the “Option OL” code upgrade coverage stated an amount of \$9,230. She claims that the cost of code upgrades for rebuilding her home exceeded \$9,396; however, State Farm paid only \$5,696. In response, State Farm acknowledges the “Option OL” code upgrade coverage but argues that Everett is “not ***659 automatically** entitled to the full policy limits” unless she establishes that “she has incurred (or will incur) the cost for code upgrades” up to the policy limits for that coverage.

Here, State Farm notes that Everett has failed to offer any admissible evidence to support her claim that the cost of code upgrades to replace her home exceeded policy limits. Everett cites the declaration of Rob Rettig that was submitted in opposition to State Farm’s motion for summary judgment, to which declaration State Farm objected. State Farm’s objection was sustained.⁴ Mr. Rettig is a general contractor, who opined that the cost of code upgrades for

Everett’s home “exceeds \$9,396.” However, Mr. Rettig offered no explanation as to how and why he reached this conclusion. Nor did he provide any documentation to support it. Rather, his opinion amounted to merely an estimate. As he noted, “There are several items which remain open at this time. They need to be addressed before final pricing for this residence can be completed: [¶] ... [¶] Code Upgrades unless specifically noted herein.”

Because Everett failed to show that she either incurred, or would incur, the cost for code upgrades up to the policy limits, this assertion does not support a claim for breach of contract.

2. Payment to replace Everett’s home.

Citing *Desai v. Farmers Ins. Exchange* (1996) 47 Cal.App.4th 1110, 55 Cal.Rptr.2d 276 (*Desai*), Everett contends that State Farm breached the contract of insurance by not paying to replace her home.

In *Desai*, an insured sued his real property insurer, Farmers Insurance Exchange (Farmers) and the agent for, inter alia, breach of contract. The insured claimed that the defendants failed and refused to provide him with the 100 percent replacement cost coverage which he had requested and which the agent had assured him he was getting. (*Desai, supra*, 47 Cal.App.4th at pp. 1114–1115, 55 Cal.Rptr.2d 276.) The policy contained a “Value Protection Clause,” which provided: “ ‘We [Farmers] may increase the limits of insurance to reflect changes in costs of construction and personal property values. Any such increase will be made on the renewal date of this policy or on the anniversary date of 3–year policies paid annually. If a Replacement Cost provision forms a part of this policy, we guarantee that the limits of insurance meet the replacement ****821** cost requirements.’ ” (*Id.* at p. 1116, 55 Cal.Rptr.2d 276.) Additionally, Farmers ***660** informed its policyholders: “ ‘Your policy contains a very important feature called Value Protection. Value Protection

provides *automatic protection against inflation* so that the coverage amounts are increased as the costs of replacing your home or Personal Property increase. Value Protection *guarantees to meet all minimum insurance-to-replacement cost requirements* if any are present in your policy. Subject to the amount of your policy limits and all policy provisions, depreciation will not be applied to most building losses.... The enclosed premium notice includes the increased amounts of insurance and premium, based on the applicable indexes for your property and your area. If there has been no increase in amounts of insurance this is because the applicable indexes did not show an upward adjustment for this period.’ (Italics added.)” (*Ibid.*) Although the Farmers policy also provided for a \$150,000 liability cap, our colleagues in the Second District found that the inclusion of the value protection clause would lead an objectively reasonable insured layperson to believe that the policy guaranteed replacement coverage, regardless of the insurer’s purported policy limits. (*Id.* at pp. 1117–1118, 55 Cal.Rptr.2d 276.)

Here, unlike the policy in *Desai, supra*, 47 Cal.App.4th at page 1117, 55 Cal.Rptr.2d 276, Everett’s policy does not include any language guaranteeing replacement cost coverage, nor does it make any “promises of automatic protection.” Instead, Everett’s policy expressly provides that State Farm will pay the reasonable cost to replace the damaged property up to the stated policy limits. Because State Farm did just that, Everett’s assertion that State Farm failed to pay to replace her home does not support a claim for breach of contract.

3. Failure to maintain policy limits equal to replacement costs.

14 Referring to the statutorily mandated California Residential Property Insurance disclosure statement (Ins.Code, §§ 10101 & 10102), Everett claims that State Farm is liable

for its failure to maintain her policy limits equal to replacement costs. We disagree.

15 Insurance Code sections 10101 and 10102 do not require State Farm to set policy limits that equal the cost to replace the property. Nor is State Farm duty bound to set policy limits for insureds. It is up to the insured to determine whether he or she has sufficient coverage for his or her needs. In fact, the California Residential Property Insurance Disclosure statement provides that it is the insured’s burden to obtain sufficient coverage: “To be eligible to recover extended replacement cost coverage, you must insure the dwelling to its full replacement cost at the time the policy is issued, with possible periodic increases in the amount of coverage to adjust for inflation....” Additionally, the insured “must notify the insurance company about any alterations that increase the value of the insured dwelling by a certain amount....”

661** Each year that Everett had her insurance with State Farm, State Farm sent renewal certificates. These certificates reminded Everett that the replacement cost figure identified by State Farm was merely an estimate, and that it was her responsibility to determine whether her property was adequately insured. Thus, contrary to Everett’s contention that it was State Farm’s duty to maintain policy limits equal to replacement cost, Everett bore such duty. Nothing in the record suggests that the original policy limits were insufficient to replace her home in 1991. Moreover, there is nothing in the record that shows Everett requested her policy limits to be *822** increased since they were set in 1991. Accordingly, Everett’s assertion that State Farm failed to maintain limits equal to replacement cost fails, and as such, does not support a claim for breach of contract.

4. Failure to annually adjust the policy limits to keep up with inflation.

16 Everett contends that because her policy includes the inflation coverage provision, she

was led to believe that State Farm was ensuring that the policy continued to insure the home to 100 percent of its replacement cost. (*Desai, supra*, 47 Cal.App.4th at pp. 1117–1118, 55 Cal.Rptr.2d 276.)

According to Everett’s policy, the inflation coverage provision states: “The limits of liability shown in the declarations for Coverage A, Coverage B and, when applicable, Option ID will be increased at the same rate as the increase in the Inflation Coverage Index shown in the Declarations. [¶] To find the limits on a given date: [¶] 1. divide the Index on that date by the Index as of the effective date of this Inflation Coverage provision; then [¶] 2. multiply the resulting factor by the limits of liability for Coverage A, Coverage B and Option ID separately. [¶] The limits of liability will not be reduced to less than the amounts shown in the Declarations. [¶] If during the term of this policy the Coverage A limit of liability is changed at your request, the effective date of this Inflation Coverage provision is changed to coincide with the effective date of such change.”

Contrary to Everett’s claim, there is nothing in the above language, or her policy taken as a whole, that supports a finding that the inflation coverage provision leads an insured to believe that the policy provides for 100 percent replacement cost. Moreover, the facts that the policy recognizes an insured may request a higher limit of liability, and that the California Residential Property Insurance Disclosure statement places the burden of determining the higher limit of liability needed on the insured, Everett’s assertion that State Farm failed to annually adjust the policy limits to keep up with inflation does not support a claim for breach of contract.

***662 C. Acts of State Farm’s Agents.**

17 Everett contends that State Farm agent Hendry, who sold the insurance policy to her, and State Farm agent Sarnowski, who later was

responsible for maintaining the coverage, negligently represented that “State Farm would replace Everett’s home in the event of a total loss, which is consistent with the policy language that the limit for the dwelling is ‘Replacement Cost—Similar Construction.’ ”

When Everett first applied for insurance with State Farm, in October 1991, she did have guaranteed replacement cost coverage. However, in 1997, State Farm eliminated guaranteed replacement cost coverage. At that time, Everett was sent notice. Specifically, the notice stated: “**IMPORTANT NOTICE ... about changes to your policy.**” It further informed her that the guaranteed replacement cost coverage was being eliminated and that her policy “now has a stated limit of liability under Coverage A that reflects the maximum that will be paid in case of loss... The policy no longer provides a guarantee to replace your home regardless of the cost.” Thus, beginning with the policy period that started in September 1997, Everett’s policy no longer provided guaranteed replacement cost coverage.

Nonetheless, Everett claims that both agents misrepresented the extent of her coverage. In August 1993, service of Everett’s policy was transferred to Sarnowski. Sarnowski did not inspect the property, nor did Everett request Sarnowski to ~~**823~~ inspect the property. Everett also never asked Sarnowski to review her policy or increase the limits. By 1997, when State Farm eliminated guaranteed replacement cost coverage, the only State Farm agent assigned to service Everett’s policy was Sarnowski. Upon receiving notice of the change in coverage, Everett did not contact Sarnowski to inquire as to whether or not her policy still provided sufficient coverage. Instead, she accepted the change when her premium for the policy period 1997 through 1998 was paid via a check from her impound account.

Even if we were to assume there was some type of communication between Everett and Sarnowski, as State Farm points out, Everett’s

policy included an integration clause that provided the policy “contains all of the agreements between you and us and any of our agents.” (*Alling v. Universal Manufacturing Corp.* (1992) 5 Cal.App.4th 1412, 1433–1434, 7 Cal.Rptr.2d 718 [oral agreement that predates integrated written agreement is merged into written agreement].) The policy stated that its terms could not be modified by any oral agreement. Also, the policy stated that any “waiver or change of any provision of [the] policy must be in writing by [State Farm] to be valid.” (*EPA Real Estate Partnership v. Kang* (1992) 12 Cal.App.4th 171, 175, 15 Cal.Rptr.2d 209 [“when the parties intend a written agreement to be *663 the final and complete expression of their understanding, that writing becomes the final contract between the parties”].) Accordingly, no alleged oral representation could have been effective to change the terms of the fully integrated policy.

D. Insurance Code Section 678.

18 As another basis for her claim for breach of contract, Everett alleges that State Farm failed to provide adequate notice of the reduction in her insurance coverage pursuant to Insurance Code section 678. She argues that “since [she] was not adequately advised of any reduction in coverage, the original language remains in effect.”

Insurance Code section 678, subdivision (a)(1)(A), provides: “At least 45 days prior to policy expiration, an insurer shall deliver to the named insured or mail to the named insured at the address shown in the policy, ... [¶] ... (1) An offer of renewal of the policy ... stating ... [¶] ... (A) Any reduction of limits or elimination of coverage.” This section requires that the insurer’s notice on renewal of changes in coverage or limits be provided in a “plain, clear and conspicuous writing.” (*Fields v. Blue Shield of California* (1985) 163 Cal.App.3d 570, 583, 209 Cal.Rptr. 781.)

Here, State Farm provided Everett with more than sufficient notice of the changes in her policy. According to the record, State Farm mailed to its insureds, including Everett, a notice informing them of the reduction in coverage. Specifically, the notice informed Everett that the “Guaranteed Replacement Cost Coverage” was being eliminated. Nonetheless, Everett maintains that the notice failed to “clearly explain” that there was a limit on the amount of coverage. We disagree. The notice stated: “Your policy now has a stated limit of liability under Coverage A that reflects the maximum that will be paid in case of loss.” If Everett did not understand what was being changed with respect to her coverage, she could have called her agent, or State Farm directly, for clarification. She did not do so. Based on the above, Everett’s assertion that she did not get sufficient notification of the changes in her policy fails.

E. Breach of Implied Covenant of Good Faith and Fair Dealing.

Everett claims that “State Farm acted in bad faith by unreasonably withholding benefits.” However, we have found that **824 State Farm paid all benefits to which Everett was entitled under her policy. Because there was no breach of contract, there was no breach of the implied covenant. (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 36, 44 Cal.Rptr.2d 370, 900 P.2d 619 [without coverage there can be no liability for bad faith on the part of the insurer].) Accordingly, summary judgment as to this cause of action was proper.

*664 F. Fraud and Negligent Misrepresentation.

19 According to Everett, State Farm “deceived her into thinking that she had one thing, and now State Farm argues that she had something else.” As with her previous claims, Everett

argues that when she first purchased her insurance policy, she was told that she had full replacement cost. However, when her home burned down, she was not compensated for her entire loss. Thus, she maintains that whether State Farm's initial statements that she had full replacement cost amount to fraud is an issue for the trier of fact.

As we have already stated, regardless of what State Farm told Everett in 1991, the fact remains that in 1997 the type of insurance that was purchased was eliminated. Thus, while Everett was within her right to rely on her agent's representation of full replacement coverage in the years preceding 1997, such was not the case after she was notified of a change in her coverage. Upon receipt of such notice, there is no evidence in the record that anyone from State Farm represented to Everett that she had full replacement coverage. Instead, from 1997 to the date of her loss, the record is devoid of any evidence of any contact between Everett and State Farm (or its agent) other than notice of the annual renewal and cost of Everett's insurance policy, and the receipt of Everett's annual premium payments. In short, there was no misrepresentation, negligent or intentional, and thus, summary judgment was proper at to these causes of action.

she would have sufficient limits to replace her property. However, her contract does not reflect this representation.

According to Civil Code section 3399, a contract may be reformed when, due to "mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties." Contrary to Everett's claim, here there was no mistake or misrepresentation. The fact that Everett did not understand the 1997 notice informing her that her guaranteed replacement cost coverage was being eliminated is her fault. State Farm did not misrepresent anything regarding Everett's insurance policy. Thus, Everett is unable to show how the defect in her pleadings can be cured by amendment. As such, we find no abuse of discretion in the trial court's decision to grant State Farm's motion for judgment on the pleadings as to Everett's claim for reformation.

***665 V. DISPOSITION**

The judgment is affirmed. State Farm is to recover its costs on appeal.

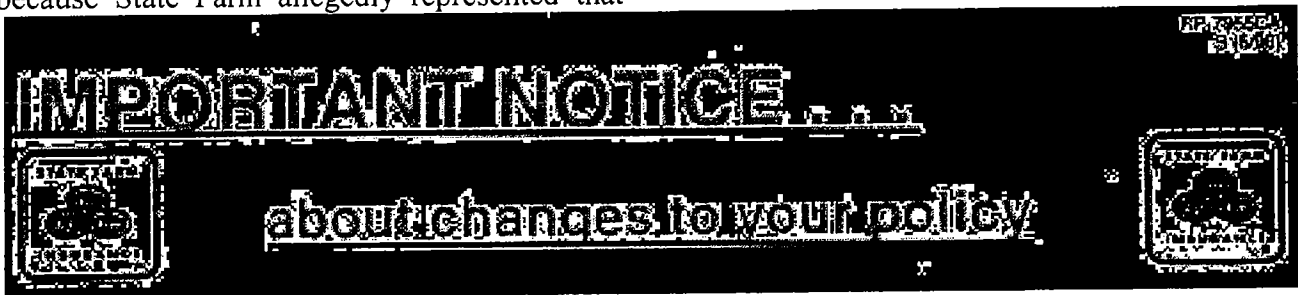
We concur: KING and MILLER, JJ.

IV. MOTION FOR JUDGMENT ON THE PLEADINGS

***666 Appendix A**

****825**

20 In her final claim, Everett contends she is entitled to reformation of her insurance contract because State Farm allegedly represented that



Enclosed with this message is your new State Farm Homeowners Policy which replaces your current policy. In an effort to provide protection for policyholders at an affordable price, we periodically make changes to your policy. Some of these changes broaden or add coverage. Some reduce or eliminate coverage. Others, although not intended to change coverage, could potentially reduce or eliminate coverage depending on court interpretations, and should, in that sense, be viewed as either actual or potential reductions in or eliminations of coverage. One very important change in your policy is the elimination of Guaranteed Replacement Cost and Guaranteed Extra Coverage.

We want to point out that every policy contains limitations and exclusions. We encourage you to read your entire policy, and note the following changes:

I. REDUCTIONS OR ELIMINATIONS OF COVERAGE

GUARANTEED EXTRA COVERAGE
(*Current Homeowners Extra Form 5*) and

GUARANTEED REPLACEMENT COST COVERAGE (*Current Endorsement to Homeowners Special Form 3*)

- These coverages are eliminated. Your policy now has a stated limit of liability under Coverage A that reflects the maximum that will be paid in case of loss. If Option ID—Increased Dwelling Limit is shown in the Declarations of your new policy, it may provide an additional limit for damaged building structures. However, the most State Farm will pay for loss to property under Coverage A is the stated limit of liability, plus any additional limit provided by Option ID, if

shown in the Declarations. The policy no longer provides a guarantee to replace your home regardless of the cost.

SECTION 1—COVERAGES, COVERAGE B—PERSONAL PROPERTY, Special Limits of Liability

- Negotiable instruments, including checks, cashier’s checks, traveler’s checks, and money orders, are subject to a \$1,000 limit.
- A \$2,500 limit now applies to trading cards and comic books, including those in a collection.

SECTION I—COVERAGES, COVERAGE B—PERSONAL PROPERTY, Property Not Covered

- Cellular phones, CB radios, radar and laser detectors, and other similar equipment, and devices or instruments for the recording or reproduction of sound permanently attached to a vehicle are not covered.

***667 SECTION I—ADDITIONAL COVERAGES**

- Under Debris Removal, coverage for tree debris removal is now limited to \$500.
- Land coverage is eliminated.
- One or more volcanic eruptions that occur within a 360-hour period will be considered one volcanic eruption.
- ****826** • Collapse is revised to provide coverage only for direct physical loss to covered property involving the sudden, entire collapse of a building or part of a building.
 - A definition of collapse is added. Collapse means fallen down or fallen

into pieces. Sagging and bowing are added to the events that are not included under the definition of collapse.

- The collapse must be caused by one of the perils described under item 11. Collapse.
- Language is added stating that hidden decay must be to a supporting or weight bearing structural member of the building. Hidden insect or vermin damage must be to a structural member of the building.
- The \$2,000 Temporary Living Expense Allowance coverage is eliminated.

SECTION I—LOSSES INSURED, COVERAGE B—PERSONAL PROPERTY

- Vehicles, item 6., is revised to state that loss by a vehicle means impact by a vehicle.

SECTION I—LOSSES NOT INSURED

- Hot tubs and spas are no longer covered for loss consisting of or caused by freezing, thawing, pressure or weight of water or ice. Language is added to exclude the filtration and circulation systems of hot tubs, spas and swimming pools for these perils.
- Losses consisting of or caused by continuous or repeated seepage or leakage of water or steam over a period of time are now excluded, without regard to whether there is any resulting deterioration, corrosion, rust, mold, or wet or dry rot.
- Losses consisting of or caused by fungus are not covered.
- Losses consisting of or caused by pressure from or presence of tree, shrub or

plant roots are not covered.

- Language has been added to state that losses caused by or consisting of weaker conditions are not covered unless the resulting loss itself is covered.
- The definition of Water Damage is revised to eliminate loss caused by ail water below the surface of the ground.

SECTION I—LOSS SETTLEMENT, COVERAGE A—DWELLING, A1—Replacement Cost Loss Settlement—Similar Construction (if shown in the Declarations)

- The basis for repair or replacement of damage to property will be similar construction rather than equivalent construction.
- Wood fences are no longer covered for replacement cost. Payment is limited to the actual cash value of the damage to the fence at the time of the loss. (*Applies only to current Homeowners Extra Form 5.*)
- You are now required to complete the actual repair or replacement within two years after the date of loss and notify us within 30 days after the work has been completed in order to receive any additional payments on a replacement cost basis.

***668 SECTION 1—LOSS SETTLEMENT, COVERAGE A—DWELLING, A2—Replacement Cost Loss Settlement—Common Construction (it shown in the Declarations)**

- Wood fences are no longer covered for replacement cost. Payment is limited to the actual cash value of the damage to the fence at the time of the loss. (*Applies only to current Homeowners Extra Form 5.*)
- You are now required to complete the

actual repair or replacement within two years after the date of loss and **827 notify us within 30 days after the work has been completed in order to receive any additional payments on a replacement cost basis.

SECTION 1—LOSS SETTLEMENT, COVERAGE B—PERSONAL PROPERTY, B1—Limited Replacement Cost Loss Settlement (if shown in the Declarations)

- Language is revised to indicate that we will not pay more than our cost to replace an item.

SECTION I—CONDITIONS

- Our Option is revised to state that we may, at our option, repair or replace the damaged or stolen property with similar property, rather than equivalent property.

OPTIONAL POLICY PROVISIONS (if shown in the Declarations)

- Under Option BU—Business Pursuits, computer programming is added to the professional services for which there is no bodily injury or property damage coverage.
- Under Option OL—Building Ordinance or Law, there is no longer any Building Ordinance or Law coverage for any structure not attached to the dwelling.

II. POTENTIAL REDUCTIONS OR ELIMINATIONS OF COVERAGE

Occasionally courts Interpret your policy differently than we intended or anticipated, in order to preserve what we intended the former language to provide and to keep the policy affordable, we have made the changes indicated below. Accordingly, you should

view these changes as either actual or potential reductions in or eliminations of coverage.

SECTION I—COVERAGES, COVERAGE A—DWELLING, Property Not Covered

- Language is added to emphasize that we do not cover the costs of repair techniques designed to compensate for or prevent land instability to any property, whether or not insured under Coverage A.

SECTION I—COVERAGES, COVERAGE B—PERSONAL LIABILITY, Special Limits of Liability

- Language is revised to emphasize that the \$200 aggregate limit also applies to all collections of money, coins and medals.
- Language is revised to emphasize that the \$2,500 aggregate limit also applies to all stamp collections.
- Language is added to emphasize that all electronic data processing equipment that is part of a system is included in the \$5,000 limit.

SECTION I—COVERAGES, coverage C—loss of use

- Additional Living Expense language has been reworded to emphasize that expenses must be incurred by the insured for coverage to apply.

SECTION I—LOSSES INSURED, COVERAGE B—PERSONAL PROPERTY

- Language is added to emphasize that under the peril of sudden and accidental discharge or overflow, coverage is not provided for the back-up of sewage from outside the residence premises plumbing system.

***669 SECTION 1—LOSSES NOT INSURED**

• Language is added to emphasize that mudslide and any earth movement resulting from improper compaction, site selection or any other external forces are included in the definition of Earth Movement and therefore are excluded from coverage.

****828** • The definition of Water Damage is revised to emphasize that loss caused by or consisting of the following are not covered:

- tsunami and seiche;
- water or sewage from outside the residence premises plumbing system that enters through sewers or drains.

SECTION I—LOSS SETTLEMENT, COVERAGE B—PERSONAL PROPERTY, B2—Depreciated Loss Settlement (if shown in the Declarations)

• The basis for repair or replacement of damaged property will be the cost to repair or replace less depreciation.

OPTIONAL POLICY PROVISIONS (if shown in the Declarations)

• Under Option 10—Incidental Business., language is added to emphasize that there is no coverage for electronic data processing system equipment.

III. BROADENINGS OR ADDITIONS OF COVERAGE

SECTION I—COVERAGES, COVERAGE 6—PERSONAL PROPERTY, Special Limits of Liability

• The limit on stamps is increased from \$1,000 to \$2,500. (However, see Potential

Reductions or Eliminations regarding collection of stamps.)

SECTION I—LOSS SETTLEMENT, B1—Limited Replacement Cost Loss Settlement (if shown in the Declarations)

• You now have up to two years, instead of one year, from the date of the loss to repair or replace personal property in order to obtain replacement cost benefits.

OPTIONAL POLICY PROVISIONS (if shown in the Declarations)

• Option 10—Incidental Business is revised to include coverage for those detached structures which contain the business for which we are providing coverage.

The preceding items make up the changes in your Homeowners Policy. Please read your entire new policy carefully, and place it with your other important papers. If you have any questions about your new policy, contact your State Farm agent.

Policyholder Information Service

THIS MESSAGE DOES NOT CHANGE, MODIFY OR INVALIDATE ANY OF THE PROVISIONS, TERMS OR CONDITIONS OF YOUR POLICY AND APPLICABLE ENDORSEMENTS.

THIS MESSAGE IS A GENERAL DESCRIPTION OF COVERAGE AND/OR COVERAGE CHANGES AND IS NOT A STATEMENT OF CONTRACT,

Parallel Citations

162 Cal.App.4th 649, 08 Cal. Daily Op. Serv. 5181, 2008 Daily Journal D.A.R. 6307

Footnotes

- 1 All boldface material and words that are in capital letters quoted in this opinion were in boldface or capital letters in the original notice. The words which are also underlined are the portions that were printed in red.
- 2 See appendix A, *post*, page 825, for the notice. The portions showing underline are those which were printed in red.
- 3 Everett dismissed the action, specifically the claim for professional negligence, as to Sarnowski on September 27, 2005.
- 4 Everett has not challenged the trial court's ruling in this appeal. (*City of Ripon v. Sweetin* (2002) 100 Cal.App.4th 887, 900–901, 122 Cal.Rptr.2d 802 [appellant bears the burden of establishing that the trial court abused its discretion in its ruling on admissibility of evidence.])

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57 Cal.App.4th 916, 67 Cal.Rptr.2d 445, 97
Cal. Daily Op. Serv. 7416, 97 Daily Journal
D.A.R. 11,963

NEIL FITZPATRICK et al., Plaintiffs and
Appellants,

v.

TED HAYES et al., Defendants and
Respondents.

No. A073106.

Court of Appeal, First District, Division 2,
California.

Sep 16, 1997.

SUMMARY

Insureds brought an action against their automobile insurer and their agent, alleging that defendants were negligent in not advising them of the availability of personal umbrella coverage which, if in effect at the pertinent point in time, would have resulted in their being more adequately compensated for the injuries they suffered as a result of an accident with an uninsured motorist. The trial court granted summary judgment for defendants. (Superior Court of the City and County of San Francisco, No. 967716, David A. Garcia, Judge.)

The Court of Appeal affirmed. The court held that generally, an insurance agent does not have a duty to volunteer to an insured that the insured should procure additional or different insurance coverage. There were numerous admissions by plaintiffs that they never raised the subject of either personal umbrella coverage or additional underinsured motorist coverage with the agent at any time, nor did the agent give them advice regarding higher or additional underinsured motorist coverage. A brochure promoting a family insurance checkup did not constitute a "holding out" that would create in the insurer an additional duty toward plaintiffs, and such a

duty was not established by the testimony of a former agent of the insurer. No expanded duty was justified on public policy grounds arising from, e.g., the longtime relationship between plaintiffs and their agent, the agent's generally superior knowledge regarding coverages, or the agent's review of the policies issued. (Opinion by Haerle, Acting P. J., with Lambden and Ruvolo, JJ., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Negligence § 9--Duty of Care--Question of Law--Public Policy.

Whether a duty of care exists is a question of law for the court. Also, whether, and the extent to which, a new duty is recognized is ultimately a question of public policy.

(2) Insurance Companies § 9--Agents and Brokers for Insurer--Duty to Volunteer Advice as to Coverage.

As a general proposition, an insurance agent does not have a duty to volunteer to an insured that the insured should procure additional or different insurance coverage. The rule changes, however, when-but only when-one of the following three things happens: (a) the agent misrepresents the nature, extent, or scope of the coverage being offered or provided, (b) there is a request or inquiry by the insured for a particular type or extent of coverage, or (c) the agent assumes an additional duty by either express agreement or by holding himself or herself out as having expertise in a given field of insurance being sought by the insured.

(3) Insurance Companies § 9--Agents and Brokers for Insurer--Duty to Volunteer Advice as to Coverage--Increased Uninsured Motorist

Coverage.

In an action by insureds against their automobile insurer and their agent, in which plaintiffs alleged that defendants were negligent in not advising them of the availability of personal umbrella coverage which, if in effect at the pertinent point in time, would have resulted in their being more adequately compensated for the injuries they suffered as a result of an accident with an uninsured motorist, the trial court properly granted summary judgment for defendants. Generally, an insurance agent does not have a duty to volunteer to an insured that the insured should procure additional or different insurance coverage. There were numerous admissions by plaintiffs that they never raised the subject of either personal umbrella coverage or additional underinsured motorist coverage with the agent at any time, nor did the agent give them advice regarding higher or additional underinsured motorist coverage. A brochure promoting a family insurance checkup did not constitute a "holding out" that would create in the insurer an additional duty toward plaintiffs, and such a duty was not established by the testimony of a former agent of the insurer. No expanded duty was justified on public policy grounds arising from, e.g., the longtime relationship between plaintiffs and their agent, the agent's generally superior knowledge regarding coverages, or the agent's review of the policies issued.

[See 2 Witkin, Summary of Cal. Law (9th ed. 1987) Agency and Employment, § 288.]

COUNSEL

DeGoff & Sherman, Victoria J. DeGoff, Richard Sherman, Walkup, Melodia, Kelly & Echeverria and Paul V. Melodia for Plaintiffs and Appellants.

McDowall, Cotter Dunn, Vale & Bracco and William D. McDowall for Defendants and Respondents.

HAERLE, Acting P. J.

I. Introduction

This is an appeal from a summary judgment entered by the trial court on the motion of the respondents, a well-known national insurance company and one of its agents. The appellants are a woman who was badly injured in a 1994 automobile accident caused by an underinsured motorist, and her husband. In a San Francisco Superior Court action brought the following year, they alleged, inter alia, that respondents were negligent in not advising them of the availability of personal umbrella coverage which, if in effect at the pertinent point in time, would have resulted in their being more adequately compensated for the injuries they suffered as a result of the accident. The trial court ruled that, under existing law, the respondents did not have a duty to advise appellants of the availability of, or procure, such coverage.

We affirm.

II. Factual and Procedural Background

On October 13, 1994, appellant Judith Fitzpatrick was struck by a car while standing near her Lexus automobile on a street in San Rafael. She suffered substantial brain damage. Her husband, appellant Neil Fitzpatrick, witnessed the accident and allegedly suffered resulting emotional distress as well as loss of consortium. Their claimed damages exceeded \$1 million.

The driver who injured Judith Fitzpatrick had insurance coverage that would pay only \$15,000 damages as a result of the accident, with a maximum of \$30,000 per accident. As a consequence, that insurer paid Judith Fitzpatrick \$15,000 and Neil Fitzpatrick another \$15,000. Under their automobile insurance policy with respondent State Farm, the Fitzpatricks' uninsured/underinsured coverage was \$100,000 per person. As a consequence, State Farm paid Judith only \$85,000 under that policy. *919

The Fitzpatricks had been insured by State Farm

through co-respondent Ted Hayes Insurance Agency for more than 20 years. The Fitzpatricks used State Farm, via the Hayes Agency, for both personal insurance and insurance covering Neil Fitzpatrick's construction business. The latter requested insurance on the Lexus from Hayes when the car was first purchased in 1990. When originally purchased, the Lexus was insured through Neil Fitzpatrick's business; its liability "limits" were \$500,000 and its uninsured/underinsured motor vehicle insurance limits were \$100,000 per person and \$300,000 per accident. On the advice of the Fitzpatricks' accountant, the insurance was changed to personal coverage the following year, although the coverage limits remained as before. Appellants examined this policy upon receiving it.

On no occasion did either appellant ask Hayes, or anyone else connected with State Farm, any questions about any of the coverages on the Lexus. Specifically, neither appellant ever asked Hayes, or anyone else connected with State Farm, any questions about higher uninsured/underinsured motor vehicle coverage.

The maximum uninsured/underinsured coverage State Farm offered in an automobile policy was, as with the policy applicable to the Lexus, \$100,000 per person and \$300,000 per accident. However, State Farm also offered another kind of insurance called a "personal umbrella" policy which, had it been in effect, would have provided \$1 million in coverage to the Fitzpatricks for both automobile liability, homeowners liability, and uninsured/underinsured motorists coverage. In order to purchase this policy, an insured had to be a "good driver," but the Fitzpatricks so qualified at all pertinent times. The personal umbrella coverage would not have resulted in a substantial additional premium cost to the Fitzpatricks.

In opposition to the motion for summary judgment, appellants presented evidence that, if they had been informed of the opportunity to

purchase such coverage for substantially the same premium cost, they would have done so. Indeed, after the accident, the Fitzpatricks inquired of Hayes regarding the availability of uninsured/underinsured coverage under a personal umbrella policy and did purchase such a policy through him.

By way of further opposition to respondents' summary judgment motion, appellants adduced evidence that State Farm instructs its agents to review their clients insurance needs and to make recommendations regarding coverage. It also established that State Farm had a nationally advertised "Family Insurance Checkup" program.

Finally, appellants adduced evidence that Hayes did not recommend that the Fitzpatricks obtain additional uninsured/underinsured motor vehicle coverage at the time they purchased the Lexus nor, at a 1991 meeting between *920 the Fitzpatricks and Hayes to discuss insurance coverage on the Fitzpatricks' investment real estate, did he mention the availability or advantages of a personal umbrella policy.

On October 4, 1995, respondents moved for summary judgment arguing that, based on the undisputed facts, as a matter of law they had no duty to advise the Fitzpatricks about the availability of a personal umbrella policy. The Fitzpatricks opposed the motion. In so doing, and in addition to presenting some of the evidence noted above, they also filed a declaration by a former State Farm agent who opined with respect to the standard of care applicable to State Farm agents such as Hayes.

The trial court heard the summary judgment motion in November 1995 and took the matter under submission. On December 1, 1995, it entered judgment in favor of all the respondents. As noted, the judgment specifically stated that it was granted on the ground that "none of the defendants had a duty to advise plaintiffs of the availability of, and to procure, excess underinsured motor vehicle coverage, and none

Appellants filed a timely notice of appeal the following month.

III. Discussion

The trial court’s summary judgment ruling is, of course, subject to de novo review. (*580 Folsom Associates v. Prometheus Development Co.* (1990) 223 Cal.App.3d 1, 13-14 [272 Cal.Rptr. 227].)

The parties agree that the issue, indeed the only issue, in this appeal is whether respondents in general, and Hayes and his State Farm agency in particular, had a legal duty to respondents to advise them as to the availability of personal umbrella coverage. (1) And, of course, “[w]hether a duty of care exists is a question of law for the court. (*Wilson v. All Service Ins. Corp.* (1979) 91 Cal.App.3d 793, 796 [153 Cal.Rptr. 121]; *Raymond v. Paradise Unified School Dist.* (1963) 218 Cal.App.2d 1, 8-9 [31 Cal.Rptr. 847].) Also, whether, and the extent to which, a new duty is recognized is ultimately a question of public policy. (*Raymond v. Paradise Unified School Dist., supra.*)” (*Jones v. Grewe* (1987) 189 Cal.App.3d 950, 954 [234 Cal.Rptr. 717] (*Jones*)). The parties even substantially agree as to the identity of the pertinent authorities in this state defining when and under what circumstances such a duty may arise. They disagree only as to the application of those authorities to the facts of this case. To resolve this disagreement, we shall briefly review the California cases which we and the parties agree collectively provide the answer to the issue at hand. *921

A. The Authority Principally Relied Upon by Respondents

Respondents rely principally on four relatively recent Court of Appeal decisions. The first chronologically is *Gibson v. Government Employees Ins. Co.* (1984) 162 Cal.App.3d 441, 444-453 [208 Cal.Rptr. 511] (*Gibson*). In that

case, the court upheld a trial court order sustaining a demurrer to a complaint brought (as here) by a married couple against their insurer for alleged “breach of fiduciary duty” in not advising them of “the availability and potential need for ‘underinsured motorist’ coverage, as well as the inadequacy of [their] ... medical payments benefit.” (*Id.* at p. 443.) The court commenced its analysis by assuming, in view of certain language in the then viable precedent¹ of *Seaman’s Direct Buying Service, Inc. v. Standard Oil Co.* (1984) 36 Cal.3d 752, 768 [206 Cal.Rptr. 354, 686 P.2d 1158], that such a fiduciary duty existed between insureds and their insurer. But then it went on to discuss “how far the umbrella of fiduciary protection is to extend.” (*Gibson, supra*, 162 Cal.App.3d at p. 446.) It concluded that it extended to dealings between an insured and insurer “under the contract” of insurance (*id.* at p. 447) but not outside of it. As applied to the facts before it, therefore, the court held that the insurer had no fiduciary duty to advise its insured of the availability of additional or extended coverage. It stated: “Plaintiffs have not cited, and we have not found, any case which extends either a fiduciary duty or a covenant of good faith and fair dealing owed by an insurer or insurance company to its insured beyond the terms of the insurance contract in force between them.” (*Id.* at p. 448.) “Thus, it seems clear that any fiduciary duty existing between an insurer and its insured is governed by the terms of the insurance contract in effect between them; to the extent there is no contract, i.e., because the insurer has not extended coverage for the risk by which the insured has suffered a loss, the relationship between the parties is not controlled by principles of strict fiduciary responsibility.” (*Id.* at pp. 449-450.) “Therefore, we conclude that defendant did not, as a matter of law, owe a fiduciary duty to plaintiffs to (1) make available to them a particular kind of insurance, (2) advise them of the availability of such coverage elsewhere in the industry, or (3) advise them of inadequacies in coverage of which plaintiffs should, as reasonable persons, have themselves

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been aware.” (*Id.* at p. 452.)

The next case to consider this general proposition was the extremely brief decision of the court of appeal in *Pabitzky v. Frager* (1985) 164 Cal.App.3d 401 [210 Cal.Rptr. 426]. Here, again, the trial court had sustained (six times, indeed) a demurrer to a cause of action against both State Farm and one of its agents for failing to advise the plaintiff “to carry uninsured motorist *922 insurance in an amount greater than the statutory minimum.” (*Id.* at pp. 402-403.) The court summarily affirmed the subsequent judgment of dismissal, stating: “We know of no duty on the part of an insurance broker to do more than to call the attention of his customer to the availability of the statutory provision and, unless expressly told to omit it, to see that the policy complies with the statute.” (*Id.* at p. 403.)

The next and perhaps most significant case in this line is *Jones*, a 1987 opinion authored by then Judge (later Justice) Kennard and concurred in by then appellate court Justice Arabian. It also affirmed the action of the trial court in sustaining a demurrer to a cross-complaint brought by the owners of an apartment building against their long-time insurance broker. The building owners had settled a liability action by tenants for injuries caused to their minor daughter for \$1.5 million and claimed, in their cross-complaint, that the broker was negligent in not advising them to have more than \$300,000 in liability insurance coverage. In rejecting the contention that the broker owed the building owners a “duty” in such a circumstance, the court noted that, although an insurance agent or broker has a general duty “to use reasonable care, diligence, and judgment in procuring the insurance requested by an insured,” generally this does not entail any obligation to “ ‘point out to [the insured] the advantages of additional coverage ...’ ” (*Jones, supra*, 189 Cal.App.3d at p. 954.) It went on to note, however, that an insurer or broker may “assume additional duties by an express agreement or a holding out.” (*Ibid.*)

The *Jones* court concluded that the “general duty” it first identified “does not include the obligation to procure a policy affording the client complete liability protection, as appellants seek to impose here.” (*Jones, supra*, 189 Cal.App.3d at p. 956.) It then addressed itself to the more difficult issue of whether, on the facts as alleged in the building owners’ cross-complaint, it could be said that the broker had assumed any additional duty to the insureds. It concluded to the contrary, saying: “The mere allegation in a complaint, as in this case, that an insured has purchased insurance from an insurance agent for several years and followed his advice on certain insurance matters is insufficient to imply the existence of a greater duty. Such reliance is not at all uncommon when an insured has done business with an insurance agency over a period of time. [Citations.] Nor can the existence of a broader agency relationship warranting the imposition of a greater duty be reasonably inferred from the complaint’s allegation that respondents had assured appellants of the adequacy of their liability coverage.... [¶] ... [¶] We conclude that appellants’ ... cross-complaint has not alleged facts from which it could reasonably be inferred that respondents were under a duty to procure complete liability protection for appellants. To hold otherwise would, on the vague and conclusionary allegations contained in the *923 complaint, drastically and unilaterally expand the principal-agent relationship. [Citations.] Neither an insurance agent nor anyone else has the ability to accurately forecast the upper limit of any damage award in a negligence action against the insured by a third party. To impose such a duty based on the pleadings in this case would in effect make the agent a blanket insurer for his principal. We fail to see where sound public policy would require the imposition of such a duty upon the agent, unless the latter has by an express agreement or a holding out undertaken that obligation.” (*Id.* at pp. 956-957.) The final case in the foursome relied on by the respondents is *Ahern v. Dillenback* (1991) 1 Cal.App.4th 36 [1 Cal.Rptr.2d 339], a case

which returns our focus to uninsured motorist coverage-or the lack thereof. That opinion affirmed the grant of summary judgment to an insurance agency and insurer in a suit brought for injuries sustained in an automobile accident in France with "an unidentified and uninsured motorist." The plaintiffs, husband and wife, alleged that the defendants breached a duty to them by not including various available coverages in a special foreign-driver insurance policy the couple purchased nor advising concerning their availability. Citing and quoting from both *Gibson* and *Jones*, the court concluded to the contrary: "Nothing in the record indicates that the Aherns had a special relation with any of the defendants. Hence, as a matter of law, the defendants did not owe the requisite duty to the Aherns to sustain their cause of action for negligent procurement of insurance." (*Id.* at p. 43.)

B. The Authority Principally Relied Upon by Appellants

Appellants do not dispute the viability of any of these four cases; what they dispute is the applicability of any of them to the facts of this case. They rely principally on three other cases, which they claim establish, at the minimum, exceptions to the "no duty" principle or, at the maximum, an affirmative rule that such a duty can and should be found to exist in these circumstances.

The first such case, again chronologically, is *Westrick v. State Farm Insurance* (1982) 137 Cal.App.3d 685 [187 Cal.Rptr. 214] (*Westrick*). There, the appellate court reversed a trial court order directing a verdict for the insurer and one of its agents. The plaintiff, the insureds, had long been a client of both State Farm and the defendant agent. In May 1977, when he was contemplating buying a jeep-type of vehicle, he was informed by the agent that, if he did, he would be automatically covered for 30 days under a standard clause in the policy, and that this was true even though the vehicle was a 4-

wheel drive pickup truck. The insured did not, in fact, purchase that vehicle but, two months later, bought a welding business for his son, a *924 business which included several vehicles including a half-ton welding truck. Based in part on the May conversation with the agent and in part on a confused and confusing July conversation with the agent's father, another State Farm agent (his principal agent being temporarily unavailable), the insured told his son that the latter could drive the welding truck the next day, as it was insured. It wasn't, an accident occurred, and the litigation followed.

The *Westrick* court reversed the trial court's grant of a directed verdict in favor of the insurer and the agent, noting its obligation to make all reasonable inferences from the evidence in the light most favorable to the appellants. It flatly rejected the defendants' contention that the directed verdict could be sustained because the plaintiff had never requested insurance or had never requested it of the second agent (the father) observing that, from the evidence of the May and July conversations, a jury could reasonably find to the contrary.

The defendants also argued that "an insurance agent cannot be liable for an insured's lack of coverage unless the agent has first expressly promised to procure the coverage." (*Westrick, supra*, 137 Cal.App.3d at p. 690.) The court disagreed, stating: "... while an insurance agent who promises to procure insurance will indeed be liable for his negligent failure to do so [citations], it does not follow that he can avoid liability for foreseeable harm caused by his silence or inaction merely because he has not expressly promised to assume responsibility. [¶] A long line of California cases has recognized that a disparity of knowledge may impose an affirmative duty of disclosure. [Citations.] In the insurance field, the quasi-public nature of the insurer's obligation imposes upon him a duty of good faith and fair dealing, which requires the insurer to "give at least as much consideration to the [insured's] interests as it does to its own." ' [Citations.] Since ' "[i]t is a matter almost of

common knowledge that a very small percentage of policy-holders are actually cognizant of the provisions of their policies ... [and t]he insured usually confides implicitly in the agent securing the insurance ...' "[citations], the insurer's duty includes the duty 'reasonably to inform an insured of the insured's rights and obligations under the insurance policy.' [Citation.] ... [¶] In the instant case, assuming appellant's testimony to be true, Westrick's request for insurance, his previous questions and long relationship with the agency, and the foreseeability of harm, obligated Jim Crawford to respond to the request with further inquiries." (*Id.* at pp. 691-692, fn. omitted.)

Appellants also rely on *Free v. Republic Ins. Co.* (1992) 8 Cal.App.4th 1726 [11 Cal.Rptr.2d 296] (*Free*), where the appellate court reversed an order of dismissal on the grant of a demurrer to a complaint which alleged, *925 inter alia, that a homeowner had specifically inquired—several times allegedly—of his broker as to whether “the coverage limits of his policy were adequate to rebuild his home” in the event of its destruction by fire. The complaint further alleged that, on each such occasion, “he was informed that they were,” advice which he alleged was repeated to him early in the year his home was destroyed by fire. (*Id.* at p. 1729.) The court reversed, holding that the principle of *Jones* was not applicable to the facts alleged because “once [the broker] elected to respond to his inquiries, a special duty arose requiring them to use reasonable care. [¶] *Jones v. Grewe*, *supra*, does not compel a contrary conclusion. The court in that case was unwilling to impose upon the defendants, based upon allegations of the parties' long-term relationship, plaintiffs' past reliance on defendants' advice and an assurance on defendants' part of the adequacy of plaintiffs' coverage, a legal duty to provide plaintiffs with a policy of liability insurance sufficient to protect their personal assets and satisfy any judgment against plaintiffs arising out of a negligence action by a third party. [¶] ... [¶] This case does not involve the same sorts of uncertainties. Here plaintiff sought to be

protected against a very specific eventuality—the destruction of his home. It appears from the record before us that there were at least two methods by which he could have achieved his goal: (1) he could have requested a guaranteed replacement endorsement as part of his homeowners policy; or (2) he could have had the value of the building determined and a specific valuation named in the policy as provided by Insurance Code section 2052. Defendants apprised him of neither option. Nor did they decline to offer an opinion. Rather, they assured plaintiff his coverage was sufficient. Under the circumstances, defendants must be deemed to have assumed additional duties, which, if breached, could subject them to liability.” (*Free, supra*, 8 Cal.App.4th at p. 1730.)

Finally, appellants rely on *Kurtz, Richards, Wilson & Co. v. Insurance Communications Marketing Corp.* (1993) 12 Cal.App.4th 1249 [16 Cal.Rptr.2d 259] (*Kurtz*). In that case, the court also overruled an order sustaining a demurrer without leave to amend in a case in which the complaint alleged that the plaintiff, in its quest for group medical, life and accident insurance for its employees, had relied on the defendant broker “who held themselves out as expert brokers and agents in the field.” (*Id.* at p. 1255.) As part of the process of securing policies, the broker's representative allegedly urged the insured's treasurer to sign a “TEFRA certificate” representing that the group plan was not subject to Medicare. In fact, the insured was subject to Medicare, and when the insurer sought to rescind the policy due to alleged misrepresentations by the broker on behalf of the insured, the latter cross-complained against the broker, alleging reliance on the latter's expertise in signing the offending certificate. Citing *Jones*, the court that “[a]n agent may assume additional duties by ... holding himself ... out as having specific *926 expertise” and noted that the cross-complaint alleged facts “that if true would establish that they entered into a relationship with [the plaintiff] ... including a special duty assumed when they

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held themselves out as experts on TEFRA.” (*Id.*
at p. 1257.)

C. Recent Authority Cited by Both Parties

Both parties cite, and to some degree rely upon, two relatively recent cases in this area, *Desai v. Farmers Ins. Exchange* (1996) 47 Cal.App.4th 1110 [55 Cal.Rptr.2d 276] (*Desai*) and *Paper Savers, Inc. v. Nacsa* (1996) 51 Cal.App.4th 1090 [59 Cal.Rptr.2d 547] (*Nacsa*). Indeed, in supplemental briefs and at oral argument, both parties relied heavily on favorable-to them-aspects of the latter case.

In the former, the trial court sustained a demurrer (without leave to amend) as to a complaint alleging that Farmers was liable for not living up to the representations allegedly made to the plaintiff-insured by its agent that he was getting 100 percent replacement cost coverage in his real property insurance. (*Desai, supra*, 47 Cal.App.4th at p. 1114.) Farmers, relying on the authority cited in part A, *ante*, argued that it could not be held liable for its agent’s alleged negligence. The appellate court disagreed, opining that “[n]one of the cited cases is on point.” (*Id.*, at p. 1119.) It summarized the holdings of these cases as follows: “In each instance, the insured was suing its insurer for failing to (1) *recommend additional coverage* or (2) *spontaneously procure* unrequested additional coverage for its insured or (3) *advise* that additional coverage was *available*. That is not the case here. [The insured] is suing because the insurer (through its agent) negligently represented that the policy in fact provided the 100 percent replacement cost coverage that [he] demanded [¶] ... This is not a ‘failure to recommend more coverage’ case; it is a ‘failure to deliver the agreed-upon coverage’ case.” (*Ibid.*)

In the more recent *Nacsa* case, the trial court had granted summary judgment against a plaintiff who had alleged that his insurance agent had represented to him that the insurance

policy he was buying included sufficient “replacement cost coverage” to “provide full coverage to replace all business personal property in case of a total loss, regardless of the policy limit.” (*Nacsa, supra*, 51 Cal.App.4th at p. 1093.) In reversing the summary judgment, the appellate court held that there were triable issues of fact as to whether the agent had “negligently represented the meaning and effect of the ‘replacement cost coverage’ endorsement ... and thereby assumed a special duty to [the insured] to ensure it had the coverage it thought it had purchased.” (*Id.* at p. 1095.) In so doing, the court rather helpfully organized *927 much of the authority discussed above into two parts, one (pt. II) being entitled “*An Agent’s General Duty of Care Does Not Include Responsibility for Ensuring the Insured Has Adequate Coverage to Protect Against all Eventualities.*” (*ibid.*) and the other (pt. III) being entitled “*An Insurance Agent Can Assume a Special Duty Toward His Insured by Misrepresenting Policy Terms.*” (*Id.* at p. 1096.) Because what was involved was allegedly an affirmative misrepresentation concerning the quality and scope of the insurance being provided, the court had no difficulty in holding that that case came within the authority summarized in its part III.

D. Our Resolution of the Case

The general rule in cases of this sort is still that articulated by now-Justice Kennard in *Jones*. (2) It is that, as a general proposition, an insurance agent does not have a duty to volunteer to an insured that the latter should procure additional or different insurance coverage.² This rule is well summarized by the part II caption from *Nacsa* quoted above. (*Nacsa, supra*, 51 Cal.App.4th at p. 1095.) The rule changes, however, when-but only when-one of the following three things happens: (a) the agent misrepresents the nature, extent or scope of the coverage being offered or provided (as in *Free, Desai* and *Nacsa*), (b) there is a request or inquiry by the insured for a particular type or extent of coverage (as in *Westrick*), or (c) the

agent assumes an additional duty by either express agreement or by "holding himself out" as having expertise in a given field of insurance being sought by the insured (as in *Kurtz*).

(3) Appellants urge, *inter alia*, that both exceptions (b) and (c) above apply in this case. They argue that the record would support findings that Hayes specifically represented that the Fitzpatricks, automobile insurance was adequate and that he "assumed" a duty to advise them of the availability of personal umbrella coverage. Alternatively, they argue that, in any event, we should impose such a duty "as a matter of public policy."

Appellants rely principally upon the following two contentions they maintain are supported by the record:

(1) Despite knowing that the Fitzpatricks generally wanted the upper limits of coverage, and despite the fact that "he alone" was aware that State Farm offered a \$1 million personal umbrella policy at no substantial additional cost, Hayes (appellants' source of insurance for 20 years) reviewed the *928 Fitzpatricks' "insurance coverage several times and told them it was adequate."

(2) State Farm held its agents out as experts in giving advice to clients regarding coverage and advertised that those agents performed a formal "Family Insurance Checkup" and, although Hayes never in fact did so with them, he did "basically the same thing" at a May 9, 1991, meeting with them concerning the insurance in effect on their (then) four pieces of investment real estate.³

Contention (1) above overstates the record considerably. Neil Fitzpatrick's declaration, submitted in opposition to respondents' motion for summary judgment, states only that he "relied on Ted Hayes to advise me concerning adequate coverage, and he led me to believe that the automobile coverage that was previously carried was fine." Notably lacking from this conclusory statement is any allegation

concerning any sort of specific inquiry from him to Hayes much less specific advice in the opposite direction.

In his deposition, Neil Fitzpatrick added very little to this. Regarding any conversation with Hayes at the time the insurance on the Lexus was shifted to a personal account, he could recall only that Hayes said that the \$500,000 liability limits "should be about right. And then I recall him checking things off. And he said, everything else, the summation was everything else seemed fine. And that was about it."

For his part, Hayes testified that he never discussed uninsured or underinsured motor vehicle coverage with either Fitzpatrick and that the reason he recommended keeping the liability limit on the Lexus at \$500,000 was because that had been the previous policy's limits.

More critical to the answer to this contention, however, are the numerous admissions of appellants that they *never* raised the subject of either personal umbrella coverage or additional underinsured motorist coverage with Hayes at any time nor did Hayes give them advice regarding higher or additional underinsured motorist coverage. In our view, the combination of the conclusory and nonspecific evidence proffered by appellants as to what Hayes had *929 in fact advised them and these very clear denials of both any sort of targeted inquiry by them or advice by Hayes defeats appellants' claim that Hayes knew or should have known that they wanted a personal umbrella policy.⁴

As noted, appellants' second contention is that State Farm "held out" Hayes (and its other agents) as having special expertise in the area of personal insurance needs and hence "assumed" an additional duty to appellants. In support of this contention, they rely most strongly on (a) a short State Farm brochure promoting the desirability of insureds asking for a "Family Insurance Checkup" and (b) a declaration of a former State Farm agent to the general effect that, if Hayes had not alerted the Fitzpatricks to their need for a personal umbrella policy, he

was not “acting within the standards of care applicable to State Farm agents”

Neither of these items of evidence is at all persuasive. In the first place, there is no evidence that the Fitzpatricks ever saw much less relied upon the brochure. Second, even a cursory reading of that brochure makes clear that it is far from a “holding out” of special expertise; rather, and in very bland terms, it suggests that the insured ask himself or herself—and perhaps then the agent—about additional insurance needs. And, finally, the declaration from the former State Farm agent is being utilized by appellants to attempt to define the duty of a State Farm agent, whereas its language (“not have been acting within the standard of care”) is language of breach. As we noted at the outset, the responsibility of defining duty in a tort case reposes with the court (see also *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 397 [11 Cal.Rptr.2d 51, 834 P.2d 745, 48 A.L.R.5th 835]) and we neither know of nor have been cited to any authority permitting us to rely on such a document to redefine an insurance agent’s duty of care.

Similarly, we reject appellants’ alternative invitation to effectively expand the duties of insurance agents, brokers and insurers by imposing, on the basis of “public policy” and the facts of this case, a duty on Hayes to

affirmatively volunteer advice to the Fitzpatricks regarding not just additional underinsured motorist coverage, but indeed the availability of a new and separate policy to effectuate that additional coverage. The factors cited by appellants in favor of such an expanded duty, e.g., the longtime relationship between them and their agent, the generally superior knowledge of the agent regarding coverages, the agent’s review of the policies issued, etc., were almost all present in the authorities discussed above in which the courts have steadfastly refused to find any such enlarged duty. Even if we were disposed to *930 expand the scope of tort duties generally, which we are not, this record simply does not present an appropriate basis upon which to do so.

IV. Disposition

The judgment is affirmed.

Lambden, J., and Ruvolo, J., concurred.

A petition for a rehearing was denied October 8, 1997, and appellants’ petition for review by the Supreme Court was denied November 25, 1997.

*931

Footnotes

- 1 That precedent has been, of course, completely abrogated in the interim. (See *Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 Cal.4th 85 [44 Cal.Rptr.2d 420, 900 P.2d 669].)
- 2 At oral argument, appellants’ counsel suggested that *Jones* was a case involving essentially business or commercial insurance and that its rule should be so limited. We do not agree.
- 3 At that meeting, interestingly, Hayes did raise with the Fitzpatricks the possibility of an umbrella policy. Neil Fitzpatrick testified that the policy discussed “was really business oriented,” as the focus of the discussion was insurance on investment properties. In any event, the Fitzpatricks decided against buying such a policy because they were planning to sell some of those properties. However, in a June 12, 1991, letter attached to a declaration submitted by appellants’ counsel in the trial court, Hayes stated: “I have not heard from you [since that meeting] regarding the earthquake coverage on your home *and the umbrella policy*[. *A] re you interested in either of these coverages at this time?”* (Italics added.)

- 4 If any additional support is needed in support of this conclusion, it is provided by the evidence cited in the immediately preceding footnote, especially Hayes's June 12, 1991, letter.

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8 Cal.App.4th 1726, 11 Cal.Rptr.2d 296

DONALD RAY FREE, Plaintiff and
Appellant,
v.
REPUBLIC INSURANCE COMPANY et
al., Defendants and Respondents.

No. B061864.
Court of Appeal, Second District, Division 2,
California.
Aug. 28, 1992.

SUMMARY

An insured brought an action alleging that defendant insurance agencies, acting on behalf of defendant insurance company, failed to inform him that the coverage limits under his homeowners policy were inadequate, with the result that the policy limit was insufficient to allow him to replace the home after it was destroyed by fire. The insured had specifically asked defendants whether the coverage limits were adequate, and had been informed that they were. The trial court sustained defendants' demurrers without leave to amend, and entered a judgment of dismissal. (Superior Court of Los Angeles County, No. VC001854, James W. Edson, Judge.)

The Court of Appeal reversed, holding that the trial court erred in sustaining defendants' demurrers without leave to amend. The court held that defendants were not required under the general duty of care they owed plaintiff to advise him regarding the sufficiency of his liability limits or the home's replacement value, but once they elected to respond to his inquiries, they had a special duty to use reasonable care. Plaintiff could have requested a guaranteed replacement endorsement as part of the policy, or he could have had the value of the building determined and a specific valuation named in

the policy. Defendants apprised him of neither option; rather they assured him the coverage was sufficient. Noting that plaintiff failed to allege that one of the defendants was acting within the scope of its authority as agent of defendant insurance company when it ventured an opinion regarding the replacement cost of plaintiff's home, and failed to allege that the policy limit was inadequate to rebuild the structure under the building codes in effect at the time of its original construction, the court held that these might be issues to be surmounted if plaintiff was to succeed at trial, but they were not allegations that were required to be made to set forth a cause of action for negligence. (Opinion by Gates, Acting P. J., with Fukuto, J., and Suzukawa, J.,* concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Appellate Review § 128--Scope of Review--Rulings on Demurrers.

On appeal from a judgment entered after the sustaining of a demurrer, the reviewing court must assume the truth of all properly pleaded material allegations of the complaint in evaluating the propriety of the trial court's action.

(2a, 2b) Insurance Companies § 9--Agents and Brokers for Insurer--Duty to Advise as to Adequacy of Policy Limits.

In an action by an insured alleging that defendant insurance agencies failed to inform him that the coverage limit under his homeowners policy was inadequate, with the result that the policy limit was insufficient to allow him to replace the home after it was destroyed by fire, the trial court erred in

sustaining defendants' demurrers without leave to amend. Defendants were not required under the general duty of care they owed plaintiff to advise him regarding the sufficiency of his liability limits or the home's replacement value, but once they elected to respond to his inquiries, they had a special duty to use reasonable care. Defendants failed to apprise plaintiff of possible options, such as requesting a guaranteed replacement endorsement as part of the policy or having the value of the building determined and a specific valuation named in the policy. Rather, they assured him the coverage was sufficient. While plaintiff failed to allege a cause of action for negligent misrepresentation, this was inconsequential, since his claim was for general negligence.

[Liability of insurance agent or broker on ground of inadequacy of liability insurance coverage procured, note, 72 A.L.R.3d 704. See also Cal.Jur.3d, Insurance Companies, § 146 et seq.]

(3) Negligence § 62--Actions--Pleading--Complaint.

A complaint in a negligence action must allege the defendant's legal duty of care towards the plaintiff, the defendant's breach of that duty, injury to the plaintiff as a proximate result of the breach, and damage to the plaintiff.

[See 6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 732.]

(4) Insurance Companies § 9--Agents and Brokers for Insurer--Duty to Advise as to Adequacy of Policy Limits--Breach--Adequacy of Pleadings.

In an action by an insured alleging that defendant insurance agencies failed to inform him that the coverage limit under his homeowners policy was inadequate, with the result that the policy limit was insufficient to allow him to replace the home after it was destroyed by fire, the trial court erred in sustaining defendants' demurrers without leave

to amend, even though plaintiff failed to allege that one of the defendants was acting within the scope of its authority as agent of defendant insurance company when it ventured an opinion regarding the replacement cost of plaintiff's home, and failed to allege that the policy limit was inadequate to rebuild the structure under the building codes in effect at the time of its original construction. These might be issues to be surmounted if plaintiff was to succeed at trial, but they were not allegations that were required to be made to set forth a cause of action for negligence. A complaint will withstand a general demurrer where the necessary facts are shown by the complaint to exist, although inaccurately or ambiguously stated, or appearing by necessary implication.

COUNSEL

Thomas Edward Wall for Plaintiff and Appellant.

Muegenburg, Norman & Dowler, Peter O. Israel, Krivis & Passovoy, Jeffrey L. Krivis, Grace, Skocypec, Cosgrove & Schirm, Ronald J. Skocypec, Catherine M. McEvilly and Esther P. Holm for Defendants and Respondents.

GATES, Acting P. J.

In the instant appeal plaintiff Donald R. Free challenges the orders of dismissal entered after the trial court sustained without leave to amend the demurrers of defendants Republic Insurance Company and Wilkinson Insurance Agency to plaintiff's second amended complaint.

(1) Because this appeal arises from a judgment entered after the sustaining of a demurrer, we must, under established principles, assume the truth of all properly pleaded material allegations of appellant's second amended complaint in evaluating the propriety of the trial court's action. (*Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 170 [164 Cal.Rptr. 839 [610 P.2d 1330, 9 A.L.R.4th 314]; *Jones v. Grewe* (1987) 189 Cal.App.3d 950, 954 [234 Cal.Rptr. 717].) *1729

According to the complaint, defendant Republic Insurance Company issued plaintiff a homeowners policy in 1979. That year and every succeeding year until April 1989, appellant contacted Green Leaf Insurance Agency and All Valley Insurance Agency through their representatives acting on behalf of defendant Republic Insurance Company to inquire whether the coverage limits of his policy were adequate to rebuild his home. On each occasion he was informed they were.

The complaint also alleges that beginning in April 1989, defendant Wilkinson Insurance Agency took over plaintiff's account from Green Leaf Insurance Agency and All Valley Insurance Agency. Sometime thereafter, but prior to October 26, 1989, when appellant's residence was completely destroyed by fire, representatives of the Wilkinson Insurance Agency, acting in their capacity as agents of defendant Republic Insurance Company, informed appellant in response to his query that the coverage limits on the property were adequate to reconstruct the house. Appellant later discovered, however, that property values had substantially increased in the 10 years since his original policy issued and that the \$141,000 policy limit was insufficient to replace his home.

The complaint further asserts that defendants were under a duty to provide plaintiff with accurate information,¹ that they breached this duty by advising him his coverage was satisfactory when they lacked a sufficient basis to make such representations, that plaintiff reasonably relied on defendants' statements and that he was damaged as a result.

(2a) Clearly defendants were not required under the general duty of care they owed plaintiff to advise him regarding the sufficiency of his liability limits or the replacement value of his residence. (*Jones v. Grewe, supra*, 189 Cal.App.3d at pp. 954, 956.) Nonetheless, once they elected to respond to his inquiries, a special duty arose requiring them to use reasonable care. *1730

Jones v. Grewe, supra, does not compel a contrary conclusion. The court in that case was unwilling to impose upon the defendants, based upon allegations of the parties' long-term relationship, plaintiffs' past reliance on defendants' advice and an assurance on defendants' part of the adequacy of plaintiffs' coverage, a legal duty to provide plaintiffs with a policy of liability insurance sufficient to protect their personal assets and satisfy any judgment against plaintiffs arising out of a negligence action by a third party.

The reason for the holding in *Jones v. Grewe* is manifest. As the court itself explained, "Neither an insurance agent nor anyone else has the ability to accurately forecast the upper limit of any damage award in a negligence action against the insured by a third party. To impose such a duty based on the pleadings in this case would in effect make the agent a blanket insurer for his principal. We fail to see where sound public policy would require the imposition of such a duty upon the agent, unless the latter has by an express agreement or a holding out undertaken that obligation." (189 Cal.App.3d at p. 957.)

This case does not involve the same sorts of uncertainties. Here plaintiff sought to be protected against a very specific eventuality—the destruction of his home. It appears from the record before us that there were at least two methods by which he could have achieved his goal: (1) he could have requested a guaranteed replacement endorsement as part of his homeowners policy; or (2) he could have had the value of the building determined and a specific valuation named in the policy as provided by Insurance Code section 2052. Defendants apprised him of neither option. Nor did they decline to offer an opinion. Rather, they assured plaintiff his coverage was sufficient. Under the circumstances, defendants must be deemed to have assumed additional duties, which, if breached, could subject them to liability.

Most of defendant Republic Insurance Company's brief is devoted to purported shortcomings in plaintiff's second amended complaint which were not urged below and are thus not addressed by our resolution of special duty issue. None of its arguments is persuasive.

First, defendant Republic Insurance Company expends much effort to demonstrate plaintiff failed to allege the elements necessary to plead a cause of action for negligent misrepresentation. (3) (See fn. 2.), (2b) While this is undoubtedly true, it is inconsequential, since plaintiff's claim is one for general negligence.²

(4) In addition, defendant Republic Insurance Company assails the complaint because plaintiff failed to allege (1) that defendant Wilkinson Insurance Agency was acting within the scope of its authority as Republic *1731 Insurance Company's agent when it ventured an opinion regarding the replacement cost of plaintiff's home, and (2) that \$141,000 was inadequate to rebuild the structure under the building codes in effect at the time of its original construction. These may well be issues that will have to be surmounted if plaintiff is to succeed at trial. However, they are not allegations that must be made to set forth a cause of action for negligence.

A complaint will withstand a general demurrer “

‘... where the necessary facts are shown by the complaint to exist, although inaccurately or ambiguously stated, or appearing by necessary implication ...’ [Citations.]” (*Allerton v. King* (1929) 96 Cal.App. 230, 235 [274 P. 90].) The facts contained in plaintiff's second amended complaint are sparse, and he may well be unable to prove his theory at trial. Despite this, the allegations relating to the existence of an expanded duty and the loss resulting from the breach thereof do suffice to defeat a demurrer.

The orders of dismissal are reversed. Plaintiff is entitled to his costs on appeal.
Fukuto, J., and Suzukawa, J.,* concurred. *1732

Pages 1318-1457:

(*In re Marriage of Hilke*¹; *People v. Thomas*²; *Smith v. Regents of University of California*³; *People v. Welch*⁴; *Title Ins. Co. v. State Bd. of Equalization*⁵; *Maehl v. O'Brien*⁶; *Rhiner v. Workers' Comp. Appeals Bd.*⁷; *Freedom Newspapers, Inc. v. Superior Court*⁸; *Szkorla v. Vecchione*⁹; and *People v. Diaz*¹⁰)

REVIEWS GRANTED

Footnotes

* Judge of the Municipal Court for the Compton Judicial District sitting under assignment by the Chairperson of the Judicial Council.

1 Plaintiff claimed defendants' "duty arose as a result of the following facts:
“(a) the defendants and each of them held themselves out as knowledgeable in the area and able to properly advise the plaintiff as to whether the coverage was adequate in that each time the plaintiff asked whether he had sufficient coverage to rebuild the property, the defendants answered in the affirmative instead of stating they did not know or were not qualified to give this information.
“(b) the defendants and each of them knew or should have known that the plaintiff was relying on the information they gave him regarding whether the limits were adequate and that the plaintiff did not know the information himself and was not going to ask other persons;
“(c) there was a long term relationship between the plaintiff and the defendants;
“(d) the defendants and each of them knew or should have known they were under a duty to correctly advise the plaintiff as to his insurance needs.

“(e) the information requested by the plaintiff as to the sufficiency of the insurance coverage was a subject which could have been ascertained by the defendants and each of them.”

2 A complaint in a negligence action must allege “(1) the defendant’s legal duty of care towards the plaintiff, (2) the defendant’s breach of that duty, (3) injury to the plaintiff as a proximate result of the breach, and (4) damage to the plaintiff. [Citation.]” (*Jones v. Grewe, supra*, 189 Cal.App.3d at p. 954.)

* Judge of the Municipal Court for the Compton Judicial District sitting under assignment by the Chairperson of the Judicial Council.

1 See 4 Cal.4th 215 for Supreme Court opinion.

2 See 4 Cal.4th 206 for Supreme Court opinion.

3 See 4 Cal.4th 843 for Supreme Court opinion.

4 Reprinted without change in 13 Cal.App.4th 1277, to permit tracking pending review by the Supreme Court.

5 See 4 Cal.4th 715 for Supreme Court opinion.

6 Reprinted without change in 13 Cal.App.4th 1290, to permit tracking pending review by the Supreme Court.

7 Reprinted without change in 13 Cal.App.4th 1307, to permit tracking pending review by the Supreme Court.

8 See 4 Cal.4th 652 for Supreme Court opinion.

9 On October 29, 1992, review dismissed and cause remanded to Court of Appeal, Fourth Appellate District, Division One.

10 Reprinted without change in 13 Cal.App.4th 1315, to permit tracking pending review by the Supreme Court.

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234 Cal.Rptr. 717
Court of Appeal, Second District, Division 3,
California.

Leonard P. **JONES**, et al., Cross-
Complainants and Appellants,
v.

Carl F. **GREWE**, et al., Cross-Defendants
and Respondents.

BO12541.Feb. 24, 1987.Review Denied May
14, 1987.*

Following insureds' settlement of negligence action against them arising out of injuries child received when she fell into swimming pool of apartment complex owned by insureds, insureds filed cross complaint against insurance brokers who had sold insureds liability insurance for building. The Superior Court of Los Angeles County, Ralph A. Biggerstaff, J., sustained brokers' demurrer, and insureds appealed. The Court of Appeal, Kennard, J., assigned, held that insureds failed to establish that brokers owed them duty to provide policy of liability insurance sufficient to protect insureds' personal assets and satisfy any judgment against them arising out of their negligent acts.

Affirmed.

Lui, Acting P.J., dissented and filed opinion.

West Headnotes (7)

1 **Negligence**—Elements of Negligence

Complaint in action for negligence must allege defendant's legal duty of care towards plaintiff, defendant's breach of that duty, injury to plaintiff as proximate result of breach, and damage to plaintiff; complaint which lacks facts to show that

duty of care was owed is fatally defective.

11 Cases that cite this headnote

2 **Negligence**—Duty as Question of Fact or Law Generally

Whether duty of care exists is question of law for the court.

3 **Insurance**—Duties and Liabilities of Agents to Insureds

Insurance agent ordinarily assumes only those duties normally found in agency relationship, such as obligation to use reasonable care, diligence, and judgment in procuring insurance requested by insured; mere existence of such relationship imposes no duty on agent to advise insured on specific insurance matters.

44 Cases that cite this headnote

4 **Insurance**—Duties and Liabilities of Agents to Insureds

If insurance agent assumes additional duties by express agreement or a holding out, agent may be liable to insured for losses which result from breach of such special duty.

10 Cases that cite this headnote

5 **Insurance**—Actions

If insurance agent breaches special duty to insured which agent has assumed by express agreement or a holding out, insured may sue for breach of agreement or may sue in tort for negligent breach of duty imposed by agreement.

5 Cases that cite this headnote

6 Insurance - Failure to Procure Coverage

General duty of reasonable care which insurance agent owes his client does not include obligation to procure policy affording client complete liability protection.

35 Cases that cite this headnote

7 Insurance - Actions

Insureds' allegations that they had purchased insurance from insurance brokers for several years and had followed brokers' advice on insurance matters, and that brokers had assured insureds of adequacy of their liability coverage were insufficient to establish duty on part of brokers to procure complete liability protection sufficient to protect insureds' personal assets and satisfy any judgment against them arising out of their negligent acts.

25 Cases that cite this headnote

Attorneys and Law Firms

*952 **718 Girardi, Keese & Crane, James B. Kropff, Los Angeles, for cross-complainants

and appellants.

Stockdale, Peckham & Werner, Richard W. McLain, Los Angeles, for cross-defendants and respondents.

Opinion

KENNARD, Associate Justice.*

Cross-complainants Leonard and Mary Jones (appellants) appeal from an order of dismissal entered after the trial court sustained a demurrer of cross-defendants Carl F. Grewe, Grewe Agency, and Stelling and Grewe Insurance (respondents) to appellants' third amended cross-complaint. Affirmed.

***953 BACKGROUND**

On September 28, 1979, Linda Leriget, a minor, sustained serious injuries when she fell into the swimming pool of an apartment building in which her parents were tenants and which was owned by appellants. The Lerigets brought an action against appellants for negligence. Under a stipulated judgment entered on August 6, 1982, appellants agreed to settle the case for \$1.5 million. The Lerigets agreed not to record, enter, or execute on the \$1.5 million judgment provided appellants would (1) pay the Lerigets a total of \$200,000, and (2) transfer to the Lerigets any legal rights appellants had against respondents, who were the insurance brokers who had sold appellants \$300,000 in liability insurance for the apartment building in question.

Appellants filed a cross-complaint against respondents. In a cause of action for negligence, appellants' third amended cross-complaint alleged that respondents had a fiduciary duty towards appellants, and that respondents breached that duty when they failed to provide appellants with liability insurance sufficient to protect their **719 personal assets and satisfy the \$1.5 million judgment entered against them in August 1982. The complaint also alleged that

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respondents held themselves out as insurance consultants and experts; that respondents had taken care of appellants' insurance needs for ten years, during which time appellants relied on respondents' expertise; and that respondents "expressly and impliedly" represented to appellants that their insurance protection was adequate. The complaint further alleged that on November 28, 1977, appellants bought a liability insurance policy through respondents covering appellants' apartment building for an amount up to \$300,000. The policy was in effect on September 28, 1979, the date on which the young child of tenants in appellants' apartment building fell into the swimming pool.

Respondents demurred, arguing that they did not have a duty to provide appellants with liability insurance sufficient to "cover every conceivable eventuality," and therefore the complaint had failed to state a cause of action for negligence. The trial court agreed, and sustained the demurrer to the third-amended cross complaint without leave to amend. This appeal by appellants followed.

ISSUE

In a case of first impression we are asked to decide whether respondents owed appellants a legal duty of care to provide them with a policy of liability insurance sufficient to protect their personal assets and to satisfy any judgment against appellants arising out of the latter's negligent acts.

*954 DISCUSSION

Because this appeal arises from a judgment entered after the sustaining of a demurrer, we must assume the truth of all properly pleaded material allegations of the complaint in evaluating the propriety of the trial court's action. (*Tameny v. Atlantic Richfield Co.* (1980)

27 Cal.3d 167, 170, 164 Cal.Rptr. 839, 610 P.2d 1330; *Baldwin v. Zoradi* (1981) 123 Cal.App.3d 275, 278, 176 Cal.Rptr. 809.) A pleading must allege facts and not mere conclusions. (*Vilardo v. County of Sacramento* (1942) 54 Cal.App.2d 413, 418, 129 P.2d 165.) "The function of a demurrer is to test the legal sufficiency of the challenged pleading by raising questions of law." (*Baldwin v. Zoradi, supra.*)

1 A complaint in an action for negligence must allege (1) the defendant's legal duty of care towards the plaintiff, (2) the defendant's breach of that duty, (3) injury to the plaintiff as a proximate result of the breach, and (4) damage to the plaintiff. (4 Witkin, *Cal. Procedure* (3d ed. 1985) Pleading § 527, p. 558.) A complaint which lacks facts to show that a duty of care was owed is fatally defective. (*Peter W. v. San Francisco Unified Sch. Dist.* (1976) 60 Cal.App.3d 814, 820, 131 Cal.Rptr. 854.)

2 Whether a duty of care exists is a question of law for the court. (*Wilson v. All Service Ins. Corp.* (1979) 91 Cal.App.3d 793, 796, 153 Cal.Rptr. 121; *Raymond v. Paradise Unified School Dist.* (1963) 218 Cal.App.2d 1, 8-9, 31 Cal.Rptr. 847.) Also, whether, and the extent to which, a new duty is recognized is ultimately a question of public policy. (*Raymond v. Paradise Unified School Dist., supra.*)

3 Ordinarily, an insurance agent assumes only those duties normally found in any agency relationship. This includes the obligation to use reasonable care, diligence, and judgment in procuring the insurance requested by an insured. (3 Couch on Insurance (2d ed. 1984) Duties and Liabilities of Agent, § 25:37, p. 336.) The mere existence of such a relationship imposes no duty on the agent to advise the insured on specific insurance matters. (*Sandbulte v. Farm Bureau Mut. Ins. Co.* (Iowa 1984) 343 N.W.2d 457, 464; 16A Appleman, *Insurance Law and Practice*, § 8836, pp. 64-66.) "An agent may point out to [the insured] the advantages of additional coverage and may ferret out additional facts from the insured applicable to such coverage, but he is under no obligation to

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do so; nor is the insured under an obligation to **720 respond.” (*Hill v. Grandey* (1974) 132 Vt. 460, 321 A.2d 28, 34.)

4 5 An agent may, however, assume additional duties by an express agreement or a holding out. (*Sandbulte v. Farm Bureau Mut. Ins. Co.*, *supra*, 343 N.W.2d 457, 464; 16A Appleman, Insurance Law and Practice, *supra*, § 8836, pp. 65–66.) Accordingly, the agent may be liable to the insured for losses which resulted as a breach of that special duty. (*Sandbulte v. Farm Bureau Mut. Ins. Co.*, *supra*, at pp. 464–465; 16A Appleman, Insurance Law and Practice, *supra*, *955 § 8836, pp. 64–66.) The insured may sue for breach of the agreement, or he may sue in tort for negligent breach of the duty imposed by the agreement. (*Haurat v. Superior Court* (1966) 241 Cal.App.2d 330, 334, 50 Cal.Rptr. 520; 72 A.L.R.3d 747.)

In arguing that appellants breached their duty in not providing respondents with adequate liability coverage, respondents rely on *Greenfield v. Insurance Inc.* (1971) 19 Cal.App.3d 803, 97 Cal.Rptr. 164 and *Westrick v. State Farm Insurance* (1982) 137 Cal.App.3d 685, 187 Cal.Rptr. 214. Such reliance is misplaced. Neither case stands for the proposition that an insurance agent or broker has a duty to obtain liability coverage for an insured in an amount sufficient to satisfy any judgment arising out of an action for negligence brought against the insured by a third party.

Greenfield involved the negligent failure of an agent to obtain the coverage requested by his client. In the case before us, appellants sought liability insurance, and respondents did procure such coverage.

In *Westrick*, the insurance agent negligently failed to inform the insured that a welding truck which the insured sought to insure and which was later involved in an accident was not covered by the insured’s existing policy. Unlike the situation in *Westrick*, the present case does not involve a failure by respondents to explain any exclusions in the policy.

Both *Greenfield* and *Westrick* involved a breach of the general duty owed by the agent to the insured. In *Greenfield* the court observed that an insurer has a duty to exercise reasonable care in seeking coverage as requested by the insured, and violates that duty by not obtaining the coverage. (*Id.* 19 Cal.App.3d at p. 811, 97 Cal.Rptr. 164.) In *Westrick*, based on the insured’s prior inquiries regarding coverage of a welding truck under his existing policy and the agent’s superior knowledge of the scope of an automatic coverage clause under the policy, the court held the agent had a duty to explain the limiting provisions to the insured. (*Id.*, 137 Cal.App.3d at p. 692, 187 Cal.Rptr. 214.) *Westrick’s* holding reiterates what California courts have recognized for some time, namely, that it is an insurer’s duty to inform the insured of his rights and obligations under the policy, particularly when an insured’s apparent lack of knowledge may result in a loss of benefits or a forfeiture of rights. (See e.g. *Davis v. Blue Cross of Northern California* (1979) 25 Cal.3d 418, 428, 158 Cal.Rptr. 828, 600 P.2d 1060; *Walker v. Occidental Life Ins. Co.* (1967) 67 Cal.2d 518, 523–524, 63 Cal.Rptr. 45, 432 P.2d 741; *Hawkins v. Oakland Title Ins. & Guar. Co.* (1958) 165 Cal.App.2d 116, 125, 331 P.2d 742.) This *956 obligation is included in the implied duty of good faith and fair dealing which an insurer owes its insured. (*Davis v. Blue Cross of Northern California*, *supra*, 25 Cal.3d at pp. 427–428, 158 Cal.Rptr. 828, 600 P.2d 1060.)

6 The general duty of reasonable care which an insurance agent owes his client does not include the obligation to procure a policy affording the client complete liability protection, as appellants seek to impose here.

The issue we must resolve is whether the complaint has alleged facts from which a special or greater duty could reasonably be inferred. The complaint did not allege the existence of an express agreement creating a broader agency relationship in which respondents were to advise, suggest and procure for appellants liability insurance in an amount sufficient to

protect appellants' **721 personal assets and satisfy any judgment against appellants arising out of the latter's negligent acts.

7 The mere allegation in a complaint, as in this case, that an insured has purchased insurance from an insurance agent for several years and followed his advice on certain insurance matters is insufficient to imply the existence of a greater duty. Such reliance is not at all uncommon when an insured has done business with an insurance agency over a period of time. (*Sandbulte v. Farm Bureau Mut. Ins. Co.*, *supra*, 343 N.W.2d 457, 465; *Collegiate Mfg. Co. v. McDowell's Agency, Inc.* (Iowa 1972) 200 N.W.2d 854, 856, 858.) Nor can the existence of a broader agency relationship warranting the imposition of a greater duty be reasonably inferred from the complaint's allegation that respondents had assured appellants of the adequacy of their liability coverage. As the court noted in *Sandbulte v. Farm Bureau Mut. Ins. Co.*, *supra*, an insured's request for "sufficient coverage" and an agent's assurance that the policy provided "adequate" coverage do not, in and by themselves, imply an "expanded principal-agent relationship." Such an exchange usually occurs within the context of the general principal-agent relationship. "Purchasers of insurance generally seek 'sufficient coverage.'" (*Ibid.*) To imply the existence of a broader agency agreement from such an exchange, the *Sandbulte* court said, would in effect make the agent "a blanket insurer for his principal." (*Ibid.*)

An insurance policy arises out of the insured's desire to be protected in a particular manner against a specific kind of obligation. It is the insured's responsibility to advise the agent of the insurance he wants, including the limits of the policy to be issued. (*Manzer v. Pentico* (1981) 209 Neb. 364, 307 N.W.2d 812, 813; *Hill v. Grandey*, *supra*, 321 A.2d 28, 34.) Ordinarily, the person seeking liability insurance knows better than the insurance agent the extent of his personal assets, and the premium he can afford or is willing to pay.

Here, the complaint did not allege that respondents knew the extent *957 of appellants' personal assets. All we have is a vague and conclusionary allegation that "financial information" regarding appellants was made available to respondents. No facts were alleged from which it could be reasonably inferred that such information accurately reflected the extent of appellants' personal assets, and that respondents failed to consider the information in procuring a liability insurance policy with a \$300,000 limit. Also, the complaint did not allege that liability coverage for \$1.5 million (the amount of the judgment in the underlying negligence action) was available for the property in question, and if so, whether appellants would have been willing to pay the premium therefor. Nor did the complaint allege that appellants had delegated to respondents the burden of determining liability coverage in an amount which would have afforded appellants complete protection from any judgment arising out of a negligence action brought against appellants by a third party. Absent such allegations, appellants retained the responsibility of deciding how much liability insurance to carry and how much premium to pay.

CONCLUSION

We conclude that appellants' third-amended cross-complaint has not alleged facts from which it could reasonably be inferred that respondents were under a duty to procure complete liability protection for appellants. To hold otherwise would, on the vague and conclusionary allegations contained in the complaint, drastically and unilaterally expand the principal-agent relationship. (See *Sandbulte v. Farm Bureau Mut. Ins. Co.*, *supra*, 343 N.W.2d 457, 465; *Collegiate Mfg. Co. v. McDowell's Agency, Inc.*, *supra*, 200 N.W.2d 854, 858.) Neither an insurance agent nor anyone else has the ability to accurately forecast

the upper limit of any damage award in a negligence action against the insured by a third party. To impose such a duty based on the pleadings in this case would in effect make the agent a blanket insurer for his principal. We fail **722 to see where sound public policy would require the imposition of such a duty upon the agent, unless the latter has by an express agreement or a holding out undertaken that obligation.

Accordingly, we find that appellants' third-amended cross-complaint has failed to state a cause of action for negligence, and the trial court therefore properly sustained respondents' demurrer to the cross-complaint.

DISPOSITION

The judgment (order of dismissal) is affirmed.

ARABIAN, J., concurs.

*958 LUI, Acting Presiding Justice, dissenting.

I respectfully dissent.

The majority is correct when it states that the general duty of reasonable care owed by insurance agents to their clients does not include the obligation to procure a policy affording complete liability protection. I also agree with the majority that the existence of a duty of care is a question of law that is based on considerations of public policy. (*Raymond v. Paradise Unified School Dist.* (1963) 218 Cal.App.2d 1, 8-9, 31 Cal.Rptr. 847.) "An affirmative declaration of duty simply amounts to a statement that two parties stand in such relationship that the law will impose on one a responsibility for the exercise of care toward the other." (*Ibid.*)

I differ with the majority, however, as I

conclude that the particular allegations of this cross-complaint state facts from which a special or greater duty could reasonably be inferred.

The third amended cross-complaint alleged that appellants and respondents had a 10-year relationship wherein respondents encouraged appellants to depend and rely upon their advice, service and expertise regarding the handling of their insurance needs and protection, and appellants did so rely. Respondents, who represented themselves to appellants as "financial planners, insurance professionals and as specialists in the area of evaluating their clients' insurance needs and protection and procuring appropriate liability insurance," knew of appellants' assets and wealth and throughout the period of their relationship expressly and impliedly represented to appellants that *959 their insurance protection was adequate and that their insurance needs were taken care of. It was further alleged that respondents "indicated and represented to [appellants] that the amount of insurance provided was sufficient to cover [any] claim which might be [brought] against [appellants]" although respondents either knew **723 or should have known that such a limited amount of liability coverage as the \$300,000 involved herein "could not adequately protect [appellants] against [reasonable] and foreseeable loss in light of nature of the property insured, the risks involved and the extent of [appellants'] wealth, income and financial worth."

Respondents represented themselves to be experts at procuring appropriate liability insurance and encouraged appellants to depend and rely on their advice, service, and expertise; they also expressly and impliedly represented that the insurance protection obtained by them was "adequate."

The court in *Sandbulte v. Farm Bureau Mut. Ins. Co.* (Iowa 1984) 343 N.W.2d 457, 465, relied upon by the majority, decided that summary judgment was appropriate where the facts most favorable to the insured showed he had purchased insurance from defendants "for

several years” and asked for and was assured he had “sufficient coverage.” The court declined to find this was an expanded agency agreement but noted situations where a special duty might arise, for example, when “there is a long-established relationship of entrustment between insurance counselor or agent and client from which it clearly appears that the counselor appreciated that there was a duty to take the initiative in giving comprehensive advice to [the] client on insurance matters...” (*Id.* at p. 464.) The *Sandbulte* court, *supra*, 343 N.W.2d at pages 464–465, further quoted 16A Appleman, *Insurance Law & Practice* section 8836, at 64–66 (1981) as follows: “Ordinarily, of course, an insurance agent assumes only duties normally found in an agency relationship ... and he assumes no duty to advise the insured merely by such relationship. However, where an agent holds himself out as a consultant and counselor, he does have a duty to advise the insured as to his insurance needs, particularly where such needs have been brought to the agent’s attention. And in so doing, he may be held to a higher standard of care than that required of the ordinary agent since he is acting as a specialist. Accordingly, the agent may be liable to an insured for the damage suffered by his failing to inform him as to a potential source of loss and by his failing to recommend insurance therefor.”

In essence, the cross-complaint herein alleges that appellants reposed trust and confidence in respondents to obtain their announced goal of adequate and sufficient insurance protection and that respondents (who held themselves out as specialists in the area) in turn represented to appellants, following a 10-year relationship between the parties, that the insurance *960 protection was adequate and that appellants’ insurance needs were taken care of. If appellants can prove what they have alleged,² they can

establish a duty and a cause of action.

Insurance brokers do not need to represent that coverage will be adequate in all circumstances; they can be candid with their clients about the uncertainty of how much insurance is sufficient coverage. They can inform clients as to judgments that have been rendered imposing liability and indicate that future judgments may require even greater coverage. They can tell the clients that each person must decide, given their own circumstances, what amount of coverage is “adequate” and how much they can afford to purchase. They do not need to hold themselves out as experts **724 in the area of evaluating insurance needs and in procuring adequate liability insurance. None of those routes was taken by respondents, at least according to the allegations of the cross-complaint. Rather, respondents “expressly and impliedly represented ... that their insurance protection was adequate and that the [appellants’] insurance needs were taken care of.” Appellants, as clients relying on the expertise of respondents, a reliance encouraged by respondents, should be able to assume respondents were exercising due care for their clients’ benefits in making their representations.

I find that, liberally construing the pleadings and drawing all reasonable inferences that can be drawn therefrom, the third amended cross-complaint does state a cause of action. Therefore, I would reverse the order of dismissal and remand the matter to the trial court for further proceedings.

Parallel Citations

189 Cal.App.3d 950

Footnotes

* Mosk and Arguelles, JJ., are of the opinion the petition should be granted.

* Assigned by the Chairperson of the Judicial Council.

- 1 I agree with the majority that neither *Westrick v. State Farm, Ins.* (1982) 137 Cal.App.3d 685, 187 Cal.Rptr. 214, nor *Greenfield v. Insurance Inc.* (1971) 19 Cal.App.3d 803, 97 Cal.Rptr. 164, imposes a duty to obtain coverage that will protect an insured's personal assets. However, they are both instructive as to duty.

The court in *Westrick, supra*, in an appeal from a directed verdict, emphasized the disparity of knowledge between insureds and insurance agents. The court found that an agent who previously told the insured a commercial jeep pick-up truck would be covered for 30 days under his current policy could be liable though he had not expressly promised to assume responsibility to procure the insurance for a new commercial vehicle when his co-agent and father, when asked about general coverage, did not inform the insured that a new six-wheel vehicle was excluded from the policy's automatic 30-day coverage.

In *Greenfield, supra*, 19 Cal.App.3d 803, 97 Cal.Rptr. 164, the insurance agent obtained a policy for business interruption that excluded loss caused by mechanical breakdown, the specific type of coverage requested by the insured, and represented that the requested coverage had been obtained. (*Id.*, at p. 810, 97 Cal.Rptr. 164.) Judgments of negligence and fraud were affirmed. The court found a duty "to exercise reasonable care in seeking coverage as requested..." (*Ibid.*)

Our Supreme Court in *Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal.3d 800, 180 Cal.Rptr. 628, 640 P.2d 764, upheld the liability of a broker who obtained a replacement policy with a \$100,000 policy limit, thereby leaving a \$200,000 gap in coverage and not complying with the excess policy's requirement that the insured maintain underlying coverage of \$300,000. The situation in *Reserve* is close to the case at bench since primary insurance was actually obtained by the broker, but in an inadequate amount.

- 2 "In reviewing a judgment of dismissal entered upon the sustaining of a demurrer without leave to amend, we must treat the demurrer as admitting all material facts properly pleaded and all reasonable inferences which can be drawn therefrom. [Citations.] We must liberally construe the allegations of the complaint with a view to attaining substantial justice among the parties.... It is error to sustain a demurrer where a plaintiff [or cross-complainant] has stated a cause of action under any possible legal theory. [Citations.]" (*Service Employees International Union v. Hollywood Park, Inc.* (1983) 149 Cal.App.3d 745, 757, 197 Cal.Rptr. 316.) As our Supreme Court stated in *Buckaloo v. Johnson* (1975) 14 Cal.3d 815, 828, 122 Cal.Rptr. 745, 537 P.2d 865, "even if we were to entertain doubts that plaintiff could factually support his allegations at trial we are nevertheless obliged to give them deference for purposes of this review."

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