November 19, 2013

PIFC

STATE FARM

FARMERS

LIBERTY MUTUAL INSURANCE

PROGRESSIVE

ALLSTATE

MERCURY

NATIONWIDE

Chief Justice Tani Gorre Cantil-Sakauye
And Honorable Chief Justice and Associate Justices
of the California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797 *Via Courier*

Re: Letter of Amici Curiae in Support of Petition for Review:
Alexander v. Farmers Insurance Co., 219 Cal. App. 4th 1183 (2013)
Case No. B239840

Dear Honorable Justices:

Pursuant to Rule of Court 8.500(g), the Personal Insurance Federation of California (PIFC), the Property Casualty Insurers Association of America doing business in California as ACIC (ACIC), National Association of Mutual Insurance Companies (NAMIC), and Pacific Association of Domestic Insurance Companies (PADIC) respectfully ask that the Court grant the petition for review of Farmers Insurance Company, Inc. regarding the opinion of the Court of Appeal in *Alexander v. Farmers Insurance Co.*, 219 Cal. App. 4th 1183 (2013).

PIFC, ACIC, NAMIC, and PADIC together represent a significant portion of the insurance industry in California and nationwide:

PIFC is a trade organization existing to promote the interests of insurance companies doing business in California. Its membership is comprised of insurance companies that collectively underwrite the majority of personal lines auto and property insurance in California.

ACIC is the California voice of the Property Casualty Insurers Association of America (PCI), a national trade association which does business in California as ACIC. PCI is composed of more than 1,000 member companies, representing the broadest cross section of insurers of any national trade association. PCI members write nearly 40 percent of the property/casualty business in the United States and 32.4 percent of the property/casualty business in California.

NAMIC is the largest and most diverse property/casualty insurance trade association with 1,400 property/casualty insurance

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companies serving more than 135 million auto, home, and business policyholders writing more than $196 billion in premiums. NAMIC member companies have 50 percent of the automobile/homeowners market and 31 percent of the business insurance market.

PADIC member companies write approximately $1 billion in property and casualty premium almost exclusively in California. Because the vast majority of PADIC insurance business is written in California, insurance law, regulation and legislation have a much greater impact on its members, and, more importantly, its policyholders, than companies who write insurance throughout the country. Approximately one half of the premium written by PADIC is in personal lines.

The issues addressed by the Court of Appeal in its decision regarding the statutorily mandated appraisal provisions in fire insurance policies issued in the State of California are of special concern to PIFC, ACIC, NAMIC, PADIC, and their member companies. If permitted to stand, the Court of Appeal's decision in *Alexander*, as well as the Court of Appeal's earlier decisions in similar cases, will severely and improperly limit the operation of Insurance Code section 2071, which requires that all disputes regarding the amount of an insured's loss be resolved by appraisal. It will also frustrate the important public policies that prompted the California Legislature to require appraisals. Appraisals have long been used in the State of California not only to mitigate the burden on the courts of having to try such issues, but also to provide policyholders and insurance companies with an economical, fair and speedy means of resolving disputes as to the amount of an insured's loss short of litigation, while ensuring that the expertise of experienced appraisers is brought to bear on such disputes in the first instance. Under section 2071, both parties to the insurance contract – insureds and insurers – have the right to demand an appraisal. For insurance companies, that right will be seriously eroded if the decision of the Court of Appeal is allowed to stand.

The issues and policy concerns raised by the Court of Appeal's decision are of paramount importance to California property insurers and merit immediate review by this Court.

I. WHY REVIEW SHOULD BE GRANTED

The decision of the Court of Appeal in *Alexander*, which followed recent decisions by the Court of Appeal in *Kirkwood v. California State Automobile Association Inter-Insurance Bureau*, 193 Cal. App. 4th 49 (2011), and *Doan v. State Farm General Insurance Co.*, 195 Cal. App. 4th 1082 (2011), opens an enormous loophole to the requirement that disputes between an insured and an insurer as to the value of insured property be resolved through appraisal. The decision is

contrary to the Court of Appeal's earlier decision in *Community Assisting Recovery, Inc. v. Aegis Security Insurance Co.*, 92 Cal. App. 4th 886 (2001), which set forth the settled principles governing the appraisal requirement, holding that "notwithstanding how the insurer approaches valuation of the damaged property during adjustment of the claim, the Legislature has provided the remedy to which the parties must resort for determination of the amount of the loss." *Id.* at 893. The decision in *Alexander* is also contrary to the California statutes governing appraisal and arbitration and frustrates the important public policy concerns that prompted the enactment of those statutes. *Amici* respectfully submit that *Doan* and *Kirkwood* were wrongly decided and that the Court of Appeal's decision in this case further compounds and extends the errors in those decisions. The issues raised by the Court of Appeal's decision in *Alexander* have not been addressed by this Court. This Court should grant review to provide definitive guidance on these unsettled issues and to secure uniformity of decision in the California courts.

The public policy of this State strongly favors the enforcement of arbitration agreements, including in the insurance context. *See Boghos v. Certain Underwriters at Lloyd's of London*, 36 Cal. 4th 495, 502 (2005). Appraisal, as this Court has recognized, "is a form of arbitration expressly subject by statute to California arbitration law." *Id.*; *see also Mahnke v. Superior Court*, 180 Cal. App. 4th 565, 573 (2009). Furthermore, the appraisal provision in the plaintiffs' policies and other California fire insurance policies is specifically mandated by the Legislature for resolution of disputes as to the valuation of insured property. *See* Cal. Ins. Code § 2071.

Disputes over valuation are central to the plaintiffs' claims in this case and to the plaintiffs' claims in *Doan* and *Kirkwood*. Nevertheless, the Court of Appeal has ruled that trial courts have discretion to postpone appraisal in order to provide declaratory relief as to issues regarding the required methodology for valuing property under Insurance Code section 2051 and Code of Regulations section 2695.9(f). The Court of Appeal has based these rulings on the erroneous proposition that resolution of these issues might render appraisal unnecessary, thus permitting a postponement of appraisal under California Code of Civil Procedure section 1281.2. *Alexander*, 219 Cal. App. 4th at 1196-97; *Doan*, 195 Cal. App. 4th at 1104; *Kirkwood*, 193 Cal. App. 4th at 63. Contrary to these decisions, a judicial declaration that an insurer's methodology for valuing destroyed or damaged property did not violate section 2051(b) or section 2695.9(f) would certainly remove the basis for the plaintiffs' bad faith and UCL claims, but it would *not* automatically be "'the end of the line'" for the plaintiffs' claims that they were underpaid and would not automatically render appraisal unnecessary. *See Alexander*, 219 Cal. App. 4th at 1196 (quoting *Kirkwood*, 193 Cal. App. 4th at 63). Disputes as to the amount of loss are not simply disputes as to methodology. They generally are based on *factual* disputes as to condition, age and fair market value,

etc. Thus, as Justice Grimes opined in her dissent in this case, the exception to immediate appraisal under section 1281.2 is not applicable. *See id.* at 1199-1201 (Grimes, J., dissenting).

In *Doan* and *Kirkwood*, the pre-appraisal declaratory relief approved by the Court of Appeal was strictly limited to legal issues of statutory construction. *See, e.g.*, *Doan*, 195 Cal. App. 4th at 1098 ("[t]he trial court's discretion to consider declaratory relief extends to cases like this, where a statutory construction question lies at the heart of the parties' dispute"); *id.* at 1099 (concluding that "the trial court has discretion to stay the appraisal proceeding pending resolution of the legal questions"); *id.* at 1102 (identifying the issue before the court as "Must a party submit to an appraisal under section 2071 prior to obtaining a judicial determination of the meaning of section 2051?"); *Kirkwood*, 193 Cal. App. 4th at 57 ("the agreement to arbitrate did not include the threshold contract and statutory interpretation issues"); *id.* at 60 ("staying appraisal in order to resolve "the interpretation issues" first "does not run afoul of section 2071 or the arbitration statutes"). Indeed, the Court in *Kirkwood* approvingly quoted the trial court's statement: "'I don't see how the plaintiff gets out of an appraisal later." *Kirkwood*, 193 Cal. App. 4th at 57; *see also Doan*, 195 Cal. App. 4th at 1102.

The issues that the Court of Appeal in *Alexander* has ruled appropriate for declaratory relief go far beyond interpretation of the relevant statutory and contractual language and far beyond what the Court of Appeal approved in *Doan* and *Kirkwood*. The Court of Appeal has now stated that declaratory relief could be issued declaring that Farmers' valuation practices were illegal, together with an order that Farmers readjust the claims in conformity with section 2051. *Alexander*, 219 Cal. App. 4th at 1197. The Court of Appeal applauds this solution as potentially obviating any dispute about the amount of the loss such that "no appraisal would be necessary." *Id.*[1]

The proposal by the Court of Appeal to issue declaratory relief on the issue of whether Farmers failed to comply with section 2051 of the Insurance Code and section 2695.9(f), and, if so, to order Farmers to readjust the claims at issue is a pure and simple end-run around the appraisal requirement of section 2071. Under

[1] The trial court in *Doan* has indicated that it is considering a similar declaratory relief phase. *See Doan v. State Farm Gen. Ins. Co.*, No. 1-08-CV-129264, Order Re: Motion to Establish a Trial Plan and to Set a Trial Date at 7 n.12 (Super. Ct. Santa Clara Cnty. Sept. 30, 2013) (stating that in addition to statutory and contractual interpretation, "the initial phase may also involve a class-wide determination of liability . . . as well as an order for appropriate injunctive relief" and that "[r]etrospective relief for certain class members in the form of an order requiring a new offer to be made does not seem to invade the ambit of appraisal since it would pertain to pre-appraisal conduct").

the statutory policy language, an injunction requiring readjustment to resolve disputes regarding the value of damaged property is not a permitted alternative to appraisal. Making such a remedy available would eviscerate the appraisal requirement, allowing plaintiffs to plead around it in virtually every case.

As Justice Grimes stated in her dissent in *Alexander*, the plain language of the appraisal provision does not permit "sequencing" of appraisal. The policy language mandated by section 2071 requires appraisal on the request of the insured or the insurer, whenever "the insured and [the insurer] shall fail to agree as to the actual cash value or the amount of loss." Cal. Ins. Code § 2071. The mandated policy language further provides that "[n]o suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with . . . ." *Id.* There is no exception for instances where the insured's quarrel with the amount he has been paid for his claim includes a disagreement with the methodology allegedly used by the insurance company. As Justice Grimes pointed out, requiring an appraisal first would not bar plaintiffs from pursuing claims after appraisal, including claims based on the assertion that the insurer failed to use the legally required standard in adjusting the claims. *See Alexander*, 219 Cal. App. 4th at 1199 (Grimes, J., dissenting).

The Court of Appeal's decision in *Alexander* raises other important substantive legal issues, including regarding the Court's assertion that the trial court may award the plaintiffs retrospective injunctive relief as part of the contemplated declaratory relief. The proposed injunctive relief, which would require Farmers to re-perform its adjustment of losses under its insurance contracts, would be an extremely lengthy and expensive undertaking if ordered on a class basis as sought by the plaintiffs. Under traditional contract law, such injunctive relief is not available where, as here, (1) contract damages would be an adequate remedy and (2) the plaintiffs have not yet proven all the elements of *any* of their substantive causes of action, namely, breach of contract, bad faith, and violation of the Unfair Competition Law ("UCL").

In particular, the Court of Appeal's decision in *Alexander* could be construed to allow the plaintiffs to escape the requirement that that they show injury and damages, which is an element of their claims for breach of contract and breach of the duty of good faith and is required for standing under the UCL. The Court's ruling could also be construed to improperly permit private plaintiffs to bring suit to enforce the Insurance Code and regulations. The Court of Appeal's decision has thus not only done away with appraisal, but suggests novel remedies and novel and expansive theories of liability as a means of evading the statutory appraisal requirement.

The issues regarding insurance appraisal raised by the Court of Appeal's decision in this purported class action and by the similar decisions issued in *Doan* and *Kirkwood* affect every fire policy issued in the State of California and every insurance company that issues such policies. Review by this Court is warranted to clarify the application of the appraisal provision mandated by section 2071.

II. LEGAL DISCUSSION

A. The Decision in *Alexander* Threatens the Contractual and Statutory Right of Insurers to Have Disputes Concerning the Amount of an Insured's Loss Decided Through Appraisal

Section 2070 of the Insurance Code requires that "[a]ll 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." Cal. Ins. Code § 2070. The Standard Form that must be used is set forth in Section 2071. In the event of a loss, the Standard Form requires, *inter alia*, that the insured "furnish a complete inventory of the destroyed, damaged and undamaged property, showing in detail quantities, costs, actual cash value and amount of loss claimed." Cal. Ins. Code § 2071. The Standard Form contains a section captioned "Appraisal," which provides:

In case the insured and this company shall fail to agree as to the actual cash value or the amount of loss, then, on the written request of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within 20 days of the request. Where the request is accepted, the appraisers shall first select a competent and disinterested umpire; and failing for 15 days to agree upon the umpire, then, on request of the insured or this company, the umpire shall be selected by a judge of a court of record in the state in which the property covered is located. Appraisal proceedings are informal unless the insured and this company mutually agree otherwise. For purposes of this section, "informal" means that no formal discovery shall be conducted, including depositions, interrogatories, requests for admission, or other forms of formal civil discovery, no formal rules of evidence shall be applied, and no court reporter shall be used for the proceedings. The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and, failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two when filed with this company shall determine the amount of actual cash value and loss. Each appraiser shall be paid by the party selecting him or her and the expenses of appraisal and umpire shall be paid by the parties equally."

Id. The standard policy set forth in section 2071 also contains a section captioned "Suit" which provides: "[n]o suit or action on this policy for the recovery of any claim

shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with . . . ." *Id.*

The plaintiffs in this case do not agree with Farmers as to the actual cash value of their losses. Consistent with the statutory policy language, those disputes must be resolved through appraisals, and no suit or action can be sustained unless and until appraisals are conducted. As the Court of Appeal held in *Community Assisting Recovery, Inc. v. Aegis Security Ins. Co.*, 92 Cal. App. 4th 886 (2001), under section 2071, "notwithstanding how the insurer approaches valuation of the damaged property during adjustment of the claim, the Legislature has provided the remedy to which the parties must resort for determination of the amount of the loss." *Id.* at 893; *see also Enger v. Allstate Ins. Co.*, 407 F. App'x 191, 193 (9th Cir. 2010) ("The contract makes no exception where the source of the dispute is the valuation method used: so long as the parties 'fail to agree as to the actual cash value or amount of loss,' the appraisal remedy is triggered at the request of either party." (citation omitted)). Furthermore, as the Court of Appeal noted in *Community Assisting*, "[t]he standard form policy imposes on the insured claimant an obligation to provide 'a complete inventory of the destroyed, damaged and undamaged property, showing in detail quantities, costs, actual cash value and amount of loss claimed.'" 92 Cal. App. 4th at 893-94 (quoting Cal. Ins. Code. § 2071). "Thus, the *insured* carries the initial responsibility to determine the 'actual cash value,' or the fair market value of the property at the time of the loss." *Id.* at 894 (emphasis in original).

In a case like *Alexander*, in which every claim for damages is premised on a dispute regarding actual cash value, section 2071 requires that the dispute be submitted to appraisal. The Legislature included the appraisal provision in section 2071 to address these very circumstances and to avoid the need for litigation solely to address disputes as to actual cash value. Permitting declaratory relief in a dispute over the amount of the insured's loss frustrates this statutory provision and its purpose. Section 2071 is clear: appraisal is the mandatory method of resolving disputes as to the amount of an insured's loss.[2]

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[2] It is also unclear what sequencing a declaratory judgment phase before appraisal would accomplish. As Justice Grimes stated, "there is no reason to think a judicial declaration that Farmers does not, in fact, follow the statute, will somehow 'inform the appraisal in this case,' thereby justifying delay of the appraisal." *Alexander*, 219 Cal. App. 4th at 1204. Rather, "appraisers are required to follow the statute, and if they make an award based on a misconception of the law, the award may be vacated." *Id.* (citing *Jefferson Ins. Co. v. Superior Court*, 3 Cal. 3d 398, 403 (1970)). "[T]here is no reason to believe the appraisers will misconceive the law," and "the declaratory relief plaintiffs seek – in substance, a declaration that Farmers does not use the condition of the item to determine physical depreciation in violation of section 2051, subdivision (b)(2) – will do nothing at all to affect or 'inform' the

B. Code of Civil Procedure Section 1281.2 Does Not Permit Delaying Appraisal in This Case

Contrary to the decision of the Court of Appeal, immediate appraisal is also mandated by Code of Civil Procedure section 1281.2. An insurance appraisal required by section 2071 is considered an arbitration and is subject to the California rules and statutes governing arbitration. *See Boghos*, 36 Cal. 4th at 502; *see also Mahnke*, 180 Cal. App. 4th at 573. Thus, appraisal is subject to Code of Civil Procedure section 1281.2. Section 1281.2 provides that where a party to an arbitration agreement petitions the court alleging an agreement to arbitrate a controversy and another party refuses to arbitrate, "the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists . . . ."[3] None of the statutory exceptions contained in section 1281.2 apply to permit a delay of appraisal in this case.

The Court of Appeal erroneously invoked the limited exception under section 1281.2 that permits a delay of arbitration "'[i]f the court determines that there are other issues between the petitioner and the respondent which are not subject to arbitration and which are the subject of a pending action or special proceeding between the petitioner and the respondent and that a determination of such issues may make the arbitration unnecessary . . . .'" *Alexander*, 219 Cal. App. 4th at 1195 (quoting Cal. Civ. Proc. Code § 1281.2). As Justice Grimes opined in her dissent, no finding "was made or could reasonably be made in this case" that a determination of issues regarding the propriety of Farmers' methods of valuation might make arbitration unnecessary. *Id.* at 1199 (Grimes, J., dissenting).

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appraisal process . . . ." *Id.* at 1204-05. As Justice Grimes states, "there is thus no purpose to be served by declaratory relief in advance of the appraisal." *Id.* at 1205.

[3] Mandating that the plaintiffs in this case submit to an appraisal comports with the strong federal policy in favor of arbitration, as is made clear by the Federal Arbitration Act ("FAA"). The FAA's core mandate is to require courts to enforce arbitration agreements "in accordance with the terms of the agreement." 9 U.S.C. § 4. As the Ninth Circuit recently held, "[t]hat statute reflects an 'emphatic federal policy' in favor of arbitration." *Ferguson v. Corinthian Colls., Inc.*, No. 11-56965, 2013 WL 5779514, at *2 (9th Cir. Oct. 28, 2013) (quoting *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203 (2012) (per curiam)). Pursuant to the FAA, "courts must 'rigorously enforce' arbitration agreements according to their terms, including terms that 'specify with whom [the parties] choose to arbitrate their disputes,' and 'the rules under which that arbitration will be conducted.'" *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) (citations and emphasis omitted.)

The majority in *Alexander* incorrectly concluded, however, that "'[a] judicial declaration that [the insurer's] interpretation of section 2051(b) and its policy *does not* violate the statute would be the end of the line: no appraisal would be necessary . . . .'" *Id.* at 1196 (emphasis in original; quoting *Kirkwood*, 193 Cal. App. 4th at 63). On the contrary, disputes necessitating appraisal are not ended simply because the insurer's valuation complies with statutory and contractual standards. Valuation also involves *factual* issues and judgments. For example, the insured and the insurer may disagree factually as to the condition of a particular item of property and the amount of wear and tear and the extent to which condition and wear and tear affect the item's value, as these judgments inescapably have a subjective component. There is room for disagreement as to value and the amount of loss even when there is no dispute as to the applicable standard. Indeed, most appraisals do not involve disputes as to the legal standards for evaluation.

Likewise, a declaration that the insurer did not comply with section 2051(b) would not equate with a finding that the actual cash value would have been greater than what the insurer determined. To the contrary, a calculation of actual cash value based on the methodology plaintiffs claim is required under section 2051(b) might well result in a lower valuation. Without separately evaluating each item of property, it is impossible to determine whether an insurer's purported improper valuation method resulted in a lower payment to the insured. Thus, appraisals would not be rendered unnecessary by trying the plaintiffs' claim for declaratory relief first – whether the plaintiffs win or lose.

The majority in *Alexander* also was manifestly incorrect in stating that the injunctive relief sought by the plaintiffs in conjunction with their claim for declaratory judgment might render appraisal unnecessary. The majority stated:

> Appraisal may also be averted if Respondents receive the declaratory judgment they seek. At oral argument, Respondents' counsel indicated they want a declaration that Farmers' practices are illegal as well as an order that Farmers readjust the claims in conformity with section 2051. If Farmers conducts a new adjustment conforming to the law, all parties may be satisfied. Then, there would be no dispute about the amount of the loss and no appraisal would be necessary.

Alexander, 219 Cal. App. 4th at 1197. This analysis is flawed for multiple reasons. First, the injunctive relief sought by the plaintiffs, namely, ordering Farmers to readjust plaintiffs' and presumably the putative class members' claims, is simply an alternative and impermissible means to resolve the plaintiffs' disputes as to the valuation of their losses. The statutorily mandated policy language requires appraisal in the event of such a dispute, not readjustment. Second, as discussed in more detail below, the injunctive relief sought by the plaintiffs is not available as a matter of law. It is hornbook law that an injunction "'is merely a remedy for

a proven cause of action'" and "'may not be issued if the underlying cause of action is not established.'" 9 Witkin, Cal. Proc. (5th ed. 2008) Appeal, § 176, at 252 (quoting *Art Movers, Inc. v. Ni West, Inc.*, 3 Cal. App. 4th 640, 646 (1992)). Here, the plaintiffs ask for injunctive relief prior to proving fact of damage and damages, which are required elements of their claims for breach of contract and breach of the duty of good faith and fair dealing and a necessary element of standing under the UCL. Given these legal infirmities, the plaintiffs' proposed injunctive relief does not meet the statutory standard permitting appraisal to be delayed pending resolution of other issues that may render appraisal unnecessary. Cal. Civ. Proc. Code § 1281.2.

The effect of the Court of Appeal's decision is to permit an end-run around section 2071's appraisal requirement by strategic pleading. Relying on the Court of Appeal's decision, an insured can side-step the mandatory appraisal process by simply including an allegation that the insurer's valuation methodology somehow did not conform with the statutory requirements – even if the insured's complaint otherwise seeks damages based entirely on a dispute as to the amount of the loss. Further, by permitting declaratory relief to precede an appraisal when all of the insured's claimed damages are rooted in a dispute over the amount of the loss, the Court of Appeal's ruling puts the proverbial cart before the horse: It compels an insurer to defend its method of calculation before there is ever a determination that the insured was paid less than he was entitled to under his policy.

C. The Declaratory and Injunctive Relief Approved by the Court of Appeal Is Improper and Does Not Provide a Basis for Delaying Appraisal

Relying on *Doan*, the Court of Appeal in this case held that the plaintiffs could proceed with their claim for declaratory and injunctive relief because "'there is no need to demonstrate damages in order to qualify for declaratory relief.'" *Alexander*, 219 Cal. App. 4th at 1196 (quoting *Doan*, 195 Cal. App. 4th at 1104). The Court cited section 1060 of the Code of Civil Procedure, which provides that a declaration "may be had before there has been any breach of the obligation in respect to which said declaration is sought." *Id.*

The Court of Appeal's reasoning in *Doan*, however, was premised on the prospective nature of declaratory relief. As the Court stated in *Doan*, "'[d]eclaratory relief operates prospectively, serving to set controversies at rest before obligations are repudiated, rights are invaded or wrongs are committed.'" *Doan*, 195 Cal. App. 4th at 1096 (quoting *Kirkwood*, 193 Cal. App. 4th at 59). Accordingly, the Court in *Doan* opined, "[g]iven its prospective nature, a declaratory relief award need not include damages." *Id.*

However, neither the declaratory relief sought in *Doan* nor the declaratory relief sought in the present case is prospective. Just as in *Doan*, here Farmers completed its adjustment of the plaintiffs' insurance claims and paid the amount it determined to be owing, before the plaintiffs filed this suit. The conduct to be addressed by the declaratory relief in this case is over and past. While declaratory relief may in some instances address past conduct, the Court of Appeal's opinion here would improperly transform declaratory relief in insurance cases into an all-purpose substitute for substantive causes of action and permit plaintiffs to obtain relief without establishing injury and damages, which are a required element of plaintiffs' claims for breach of contract and bad faith. *See Careau & Co. v. Sec. Pac. Bus. Credit, Inc.*, 222 Cal. App. 3d 1371, 1388 (1990) (elements of contract claim include resulting damages); *Love v. Fire Ins. Exch.*, 221 Cal. App. 3d 1136, 1151 (1990) (in insurance context, requirements for claim of breach of implied covenant include proof that benefits due under the policy were withheld). Likewise, to have standing to bring a claim under the UCL, a plaintiff must prove at trial that he has sustained injury-in-fact in the form of a loss of money or property. *See Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 327 (2011) ("each element of standing" under the UCL "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof").

Moreover, the retrospective injunctive relief authorized by the Court of Appeal is impermissible as a matter of California law. As noted above, it is well settled that "'[a] permanent injunction is merely a remedy for a proven cause of action'" and "'may not be issued if the underlying cause of action is not established.'" 9 Witkin, Cal. Proc. (5th ed. 2008) Appeal, § 176, at 252 (quoting *Art Movers,* 3 Cal. App. 4th at 646). Thus, to obtain injunctive relief, plaintiffs must prove "the elements of a cause of action involving the wrongful act sought to be enjoined . . . ." *City of S. Pasadena v. Dep't of Transp.*, 29 Cal. App. 4th 1280, 1293 (1994).

In addition, to obtain an injunction, plaintiffs must establish "the grounds for equitable relief, such as, inadequacy of the remedy at law." *Id.*; *see also Art Movers*, 3 Cal. App. 4th at 646 ("A permanent injunction is a determination on the merits that a plaintiff has prevailed on a cause of action for tort or other wrongful act against a defendant and that *equitable relief is appropriate*." (emphasis added)). Here, the plaintiffs' requested injunctive relief – readjustment of the plaintiffs' claims for losses under their insurance policies – would merely result in payment of sums allegedly due under the policies and (if ordered on a class-wide basis) under the putative class members' policies. Thus, the plaintiffs' claim for injunctive relief is quintessentially an action at law, for which equitable relief is not available. *See, e.g.*, *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210-11 (2002) ("[a] claim for money due and owing under a contract is 'quintessentially an action at law'" (citation omitted)); *Ratterree Land Co. v. Sec. First Nat'l Bank*, 26 Cal. App. 2d 652, 656 (1938) ("'[a]n action for unpaid purchase

money is an action *ex contractu* . . . , i.e., it is an action at law to recover money due under a contract, and *not a suit for specific performance*'" (citation omitted)).

In *Kartman v. State Farm Mutual Automobile Insurance Co.*, 634 F.3d 883 (7th Cir.), *cert. denied*, 132 S. Ct. 242 (2011), the federal appellate court rejected a similar attempt by the plaintiffs to transform a breach of contract action for damages into a claim for injunctive relief that would have required the insurer defendant to reinspect the class members' roofs and readjust their claims. The court held that the plaintiffs' claims of underpayment of their insurance claims for hail damage were "simply an action for damages" and concluded that the plaintiffs were not entitled to an injunction as a matter of law. 634 F.3d at 889-90. The court in *Kartman* also rejected the plaintiffs' contention that the insurer's allegedly improper method of handling the class members' claims in itself constituted a cognizable injury, under whatever legal theory. *See id.* at 890 (in the absence of damages, the "*method* [the insurer] uses to adjust claims is not independently actionable).

The injunctive relief authorized by the Court of Appeal also cannot be justified as a permissible remedy for Farmers' purported failure to comply with section 2051 or section 2695.9(f). "Neither the Insurance Code nor regulations adopted under its authority provide a private right of action." *Rattan v. United Servs. Auto. Ass'n*, 84 Cal. App. 4th 715, 724 (2000). Indeed, this Court recently reaffirmed the prohibition on causes of action under the UCL based solely on violations of the Insurance Code. *See Zhang v. Superior Court*, 57 Cal. 4th 364, 377, 384 (2013).

In short, the proposed declaratory judgment proceeding and the injunctive relief authorized by the Court of Appeal in this case have no basis in California law. Accordingly, as discussed above, the Court of Appeal committed manifest error in concluding that the proposed declaratory relief proceedings and requested injunctive relief could render appraisal unnecessary and justified postponing the appraisal under Code of Civil Procedure section 1281.2. Resolution by this Court of the important issues raised by the Court of Appeal's decision will provide guidance that is urgently needed in this case and in the other similar litigations that are now pending in the California courts, as well for future insurance litigations in which the valuation of insured property may be at issue.

Conclusion

For all of these reasons, the Court is respectfully asked to grant the petition for review of Farmers Insurance Company, Inc. regarding the opinion of the Court of Appeal in *Alexander v. Farmers Insurance Co.*, 219 Cal. App. 4th 1183 (2013).

Respectfully Submitted,

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