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June 30, 2008

The Honorable Chief Justice Ronald M. George
And the Honorable Associate Justices
Of the California Supreme Court
350 McAllister Street
San Francisco, CA 94102

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

Request For Depublication

To the Honorable Chief Justice Ronald M. George and the Honorable Associate Justices of the California Supreme Court:

I am writing pursuant to Rule of Court 8.1125 requesting depublication of the Opinion in *Agnes H. Everett v. State Farm General Insurance Company* (2008) Fourth District, Division 2, Case No E41807, 08 C.D.O.S. 5181 (hereinafter, "*Everett*"). The letters already submitted to the Court opposing depublication well-illustrate the problem – insurers will urge the Opinion is controlling authority, regardless of factual circumstances, for the position that a homeowner is always personally and solely responsible in the instance of inadequate insurance. Essentially, this is an argument for a rule of strict no-liability. That view does not comport with reality or equity.

My Interest In Depublication

My interest in the Opinion derives from my own experience as a lawyer, law school professor, and fire survivor. I presently am a full-time member of the faculty of California Western School of Law, and am researching how insurance responds to total loss in the wake of natural disaster (I disclose my affiliation with California Western for informational purposes; I am writing on my behalf, and not purporting to represent the law school in this letter). In the 2003 San Diego wildfires, my home was one of thousands lost. In the 2007 Tahoe and San Diego wildfires, I have counseled hundreds of fire survivors. I have taught CLE seminars on insurance issues, and participated in numerous forums (most recently one convened by Commissioner Poizner) exploring how

to better respond to future wildfires. I also am, and have been, a member in good-standing in the State Bar of California since 1987. For the majority of that time I have worked primarily as a trial lawyer defending companies, including insurance companies.

The Basis Of My Request For Depublication

One difficulty presented by *Everett* (I believe the primary difficulty, although certainly not the only one) is that if its holding is divorced from its facts, it presents an inaccurate understanding of how the amount of coverage is set in many residential insurance contracts. The most frequently recurring scenario I encounter in talking to hundreds of insureds is that a homeowner, at the time of purchasing a home or refinancing a home, presents the transaction documentation to an insurance agent, and asks for appropriate insurance; the agent asks some questions about the property, and perhaps inspects it; and the agent quotes insurance based upon a property value determined by the agent. While the exculpatory language (and boilerplate merger clause) central in *Everett* may be in a final, long form, insurance contract, **often the homeowner is not provided that document, if ever, until well after the contract already has been formed; indeed, many homeowners report that they did not receive that document until after the fire that destroyed their home**. I expect that if any sample population is polled (such as the Justices of the Court and its staff), the majority of that population will recognize this scenario as describing how the amount of their own property insurance was set.

Yet, in the face of this recurring scenario, it appears that the insurance industry already is arguing that *Everett* is **not** an Opinion grounded in its own unique facts, but rather stands for the proposition that the exculpatory and merger clauses of insurance contracts are *per se* controlling in all instances and no parol evidence ever can be considered to inform on the intent of the parties at the time of contract formation. That would be a dramatic departure from existing California law. California's regimen for determining the appropriateness of parol evidence is more liberal than most jurisdictions, even in arms length commercial contracts between sophisticated parties of equal bargaining strength. In consumer contracts, California, like many jurisdictions, often requires exculpatory clauses, such as disavowments of warranties, to be prominently displayed and in bold, large type. California, like many jurisdictions, recognizes a heightened duty of insurers to insureds, because that often is not an arms length commercial contracts between sophisticated parties of equal bargaining strength. As aptly demonstrated by the letters to this Court opposing depublication, insurers already are urging that *Everett* is controlling law departing from these rules in the context of a total loss to a homeowner, and inadequate insurance coverage. Apparently the industry argument is that even if an agent explicitly and adamantly represents to a homeowner that the amount of insurance is appropriate and adequate, nonetheless it is incumbent on the homeowner to read the fine print of the contract (language often only provided after the fact) and know that the homeowner actually is not entitled to rely on the agent's assurances. That would be an ironic, inappropriate, and inequitable context to stake out an exception to the otherwise longstanding California law on contractual duties, and in particular on the relationship between insurer and insured.

The letter to this Court by the "Civil Justice Association of California" bears special mention. It urges this Court to see *Everett* as a step toward increased "personal

responsibility." I feel comfortable in presuming that none of the CJAC membership with a hand in writing its letter is a person who lost their home and had inadequate insurance to rebuild. Anyone facing that situation would respond by asking why insurers and agents should be shielded from personal responsibility in setting the policy limits low, presumably in order to capture more business by having lower premiums; i.e. competing on the basis of price. Certainly it is the right of sellers in economic markets to choose to incur risk in order to compete on the basis of price. But it is a distortion of market theory to then shift the risk to the buyer without clearly informed consent.

I do not believe this Court needed or wanted yet another letter arguing the details of complex legal doctrine, peppered with citations, and so have not drafted one here. But I wish to close with two observations. The first is that it is notable that the California Department of Insurance, currently under the leadership of a Republican Commissioner, is also seeking depublication of *Everett*. Second, this is a chronic problem in California – the best data available suggests that over 75% of homeowners have inadequate insurance – and it is unrealistic to believe there is a one size fits all solution.

Respectfully submitted,

Kenneth S. Klein