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EDMUND G. BROWN JR.
Attorney General

State of California
DEPARTMENT OF JUSTICE

1515 CLAY STREET, 20TH FLOOR
P.O. BOX 70550
OAKLAND, CA 94612-0550

Public: (510) 622-2100
Telephone: (510) 622-2253
Facsimile: (510) 622-2270
E-Mail: Paul.Gifford@doj.ca.gov

June 25, 2008

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

RE: Request of California Insurance Commissioner Steve Poizner for Depublication of *Everett v. State Farm General Ins.Co.* (2008) 162 Cal.App.4th 649

Dear Chief Justice George and Associate Justices:

Under Rule 8.1125(a) of the California Rules of Court, Steve Poizner, Insurance Commissioner of the State of California, respectfully requests depublication of the court of appeal's decision in *Everett v. State Farm General Ins. Co.* (2008) 162 Cal.App.4th 649. The decision was filed on April 29, 2008.

The Commissioner is responsible for regulating the business of insurance in California and enforcing all laws related to it. (Ins. Code, § 12921 subd.(a).) First and foremost, the Commissioner seeks to protect the interests of consumers in purchasing and obtaining the benefits of insurance, including homeowners' insurance.

The court of appeal's decision in *Everett* contains passages that could be interpreted to immunize insurers from responsibility when they or their agents provide assurances to a homeowner that the homeowner will have full coverage to replace a home in the event of a loss, but the limit in the policy turns out to be deficient. If *Everett* remains on the books, it would undermine the ability of the Commissioner to pursue administrative enforcement actions against insurers and agents who lead homeowners to believe they have full replacement cost coverage, but learn when their home is destroyed that the limits recommended by the agent or insurer and accepted by the homeowner are inadequate.

I. The Commissioner's Interest

The Commissioner plays a leading role in addressing homeowners' insurance issues in California. Wild fires in California in 2003 and subsequent years have affected thousands of homeowners and brought homeowners' insurance issues to the fore. In the past twelve months alone, fires in Southern California and the Lake Tahoe area destroyed large numbers of homes. The state faces major fire threats as it enters an unusually vulnerable summer season stemming in part from severe statewide drought.

The Commissioner plays an active role in assisting victims of fires in obtaining insurance recoveries. The Commissioner has appeared at town hall meetings and listened to and addressed the concerns of individuals who lost their homes. He has worked with insurers to resolve claims. He also collects data on claims and claims handling patterns. With respect to fires in 2007, it appears that most homeowners satisfactorily resolved their claims. But a significant number of homeowners have not reached closure with their insurers. Some consumers have complained to the Commissioner that insurers or their agents led them to believe they had adequate coverage to replace their homes in the event of a loss, only to learn that coverage was being limited at the time of claim.

A number of circumstances can lead a homeowner to be "underinsured" at the time of loss. One reason is that an insurer or its agent led the homeowner reasonably to believe that a recommended limit would be adequate to replace a home fully. Existing case law affords homeowners remedies against insurers in this situation. The Commissioner is committed to assisting homeowners to pursue these rights.

II. The Court Of Appeal's Decision

The court in *Everett* held that a homeowner whose policy had been changed from "guaranteed replacement cost" insurance (a form of insurance that *guarantees* payment of all amounts necessary to replace a home) to "replacement cost coverage" (a form of insurance that pays to replace a home *only up to a specified limit*), was not entitled to coverage above the amount specified in her policy. The court held that State Farm adequately notified Ms. Everett of the reduction in coverage and was entitled to enforce the limit specified in the policy. (*Everett v. State Farm General Ins. Co., supra*, 162 Cal.App.4th at pp. 663, 658.) The court also noted that Ms. Everett did not request any increase in limits over the twelve-year period she owned the policy. (*Id.* at p. 652.)

The Commissioner does not challenge the court of appeal's determination that, *on the facts of that case*, the insurer was permitted to enforce the limit in its policy. The Commissioner urges this Court to depublish the decision because it contains two passages extending beyond the specific facts that could cause significant harm to consumers in the State of California, particularly in the face of wildfires and property loss that may occur in the coming dangerously dry summer season.

III. Reasons Why The Court Of Appeal's Decision Should Be Depublished

A. The Decision Improperly Treats Consumers As Responsible In All Circumstances For Inadequate Limits.

First, the decision rests on a simplistic assumption that consumers are fully in control of the process of determining replacement cost limits and that any underinsurance at the time of claim is solely the homeowners' responsibility. Succinctly put, the court held: "It is up to the insured to determine whether he or she has sufficient coverage for his or her needs." (*Everett v. State Farm General Ins. Co.*, *supra*, 162 Cal.App.4th at p. 660.) This assertion ignores the reality of how homeowners' insurance actually is sold and replacement cost limits actually are set. And it ignores that homeowners have little choice but to rely on what their insurers or agents tell them and that insurers and agents sometimes lead homeowners to believe they are "fully covered" when in fact they are not.

In virtually all cases, the insurer or its agent provides the homeowner with an estimate of what it would cost fully to replace the home. The insurer bases the estimate on an array of factors, including costs to replace the specific type of roofing, siding and other construction materials in a home, contractor costs in the area where the home is located, and many other considerations. Insurers use sophisticated "replacement cost calculators" and other computerized tools, as well as large information databases and substantive expertise, to develop these estimates. The insurer or its agent then recommends the estimate as the replacement cost limit and in most cases the homeowner accepts the recommendation.

It is not surprising that the homeowner does so. Unlike the insurer, the homeowner generally does not have the expertise to make a determination about replacement cost. It would be the rare homeowner who could independently ascertain building material costs, construction labor costs in her geographic area, and the like. It would be both unreasonable and infeasible to impose a burden on homeowners to undertake this kind of investigation or to retain experts or consultants to do so. Inevitably, homeowners must rely on the superior resources and expertise of insurers for replacement cost estimates.

The setting of replacement cost limits is an example of the disparate bargaining power between individual consumers and insurance companies. This Court has long recognized these disparities. In the seminal insurance case of *Gray v. Zurich* (1966) 65 Cal.2d 263, 269, the Court explained: "[A] contract entered into between two parties of unequal bargaining strength, expressed in the language of a standardized contract, written by the more powerful bargainer to meet its own needs, and offered to the weaker party on a 'take it or leave it' basis carries some consequences that extend beyond orthodox implications". More recently, the Court reiterated that insurance is "a relationship often characterized by unequal bargaining power in which the insured must depend on the good faith and performance of the insurer." (*Vu v. Prudential Prop. & Cas. Ins. Co.* (2001) 26 Cal.4th 1142, 1151 [citations omitted]; see also *Cates Constr., Inc. v. Talbot Partners* (1999) 21 Cal.4th 28, 52 [insurance contracts "are characterized by elements of adhesion and unequal bargaining power, public interest and fiduciary responsibility"].)

The unequal bargaining power between consumer and insurer applies with added force in the context of homeowners' insurance. A key component of homeowners' insurance is the replacement cost limit. But the homeowner is severely disadvantaged in determining that limit and must, instead, rely on the insurer. That reliance makes it incumbent on the insurer or agent fully and accurately to describe to the homeowner what she is *and is not* getting from the coverage. If the agent or insurer overstates what the homeowner will receive in an effort to make a sale, the law does not saddle the homeowner with responsibility for the deficiency in coverage.

Everett should be depublished because its broad assertion that "[i]t is up to the insured to determine whether he or she has sufficient coverage for his or her needs" overlooks these principles. If left to stand, *Everett* could prejudice homeowners in pursuing legitimate claims based on agent or insurer assurances as to the scope of promised coverage.

B. The Decision Incorrectly Holds That Agents Cannot Bind Insurers If There Is An "Integration Clause" In The Policy

The court also held that an agent cannot bind an insurer to pay any amount above the stated limit *even if the agent represented to the homeowner that there was additional coverage* so long as there is an "integration clause" in the policy. (*Everett v. State Farm General Ins. Co.,supra,* 162 Cal.App.4th at pp. 662-663.) The clause provided that no changes to the terms of coverage were permitted unless made in writing. (*Ibid.*)

The court erred. Contrary to the court's assertion, insurers *can* be liable to provide coverage beyond what is specified in a policy based on representations the insurer's agent makes to the consumer. (See, e.g., *Lippert v. Bailey* (1966) 241 Cal.App.2d 373, 382; *Beach v. U. S. Fidelity & Guar. Co.* (1962) 205 Cal.App.2d 409, 416.) The Commissioner is unaware of any California case other than the court of appeal's decision here that relies on an "integration clause" to override that principle. The two cases cited by the court below – *Alling v. Universal Mfg. Corp.* (1992) 5 Cal.App.4th 1412, and *EPA Real Estate Partnership v. Kang* (1992) 12 Cal.App.4th 171 – are not insurance cases.

The court of appeal's decision could undermine the resolution of fire loss claims in California. As discussed above, in the 2007 Southern California and Lake Tahoe fires, the Commissioner received complaints from many homeowners that insurance agents had represented at the time of sale that the homeowner would be "fully covered," or words to that effect, but that when the home was destroyed the insurer refused to pay any amount above the stated limit. If the court of appeal's decision remains on the books, a potentially large number of homeowners from the 2007 fires and future fires with legitimate claims to full coverage based on agents' representations could be harmed.

IV. Conclusion

For the foregoing reasons, the Commissioner requests that the court of appeal's decision be depublished.

Respectfully submitted,

Paul D. Gifford
Senior Assistant Attorney General

For EDMUND G. BROWN JR..
Attorney General

PROOF OF SERVICE

CASE NAME: *Agnes H. Everett v. State Farm General Insurance Company*
CASE NO.: E041807 California Appellate Courts 4th Appellate District Division 2

I am employed in the County of Alameda, California. I am over the age of 18 years and not a party to the within entitled cause; my business address is P. O. Box 70550; 1515 Clay Street, 20th Floor, Oakland, California 94612-0550. On **June 25, 2008**, I served the following document(s):

REQUEST OF CALIFORNIA INSURANCE COMMISSIONER STEVE POIZNER FOR DEPUBLICATION OF *EVERRETT v. STATE FARM GENERAL INS. CO.* (2008) 162 Cal.App.4th 649

on the parties through their attorneys of record, by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

(A) **By First Class Mail:** I caused each such envelope to be placed in the internal mail collection system at the Office of the Attorney General with first-class postage thereon fully prepaid in a sealed envelope, for deposit in the United States Postal Service that same day in the ordinary course of business.

TYPE OF SERVICE	ADDRESSEE
A	Christian J.Garris Law Offices of Christian Garris 633 West Fifth Street, 28th Floor Los Angeles, California 90017
A	Randall M. Nunn Hughes & Nunn 401 "B Street, Suite 1250 San Diego, California 92101
A	James R. Robie Robie & Matthai 500 S. Grand Avenue, Suite 1500 Los Angeles, CA 90071-2609
A	California Appellate Courts 4th Appellate District Division 2 Symphony Towers 750 B Street, Suite 300 San Diego, California 92101

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on **June 25, 2008**, at Oakland, California.

R. Owens