LUCE FORWARD
ATTORNEYS AT LAW • FOUNDED 1873
LUCE, FORWARD, HAMILTON & SCRIPPS LLP

600 West Broadway
Suite 2600
San Diego, CA 92101
619.236.1414
619.232.8311 fax
www.luce.com

PETER H. KLEE, PARTNER
DIRECT DIAL NUMBER 619.699.2412
DIRECT FAX NUMBER 619.699.2412
EMAIL ADDRESS PKLEE@LUCE.COM

June 25, 2008

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

Re: Opposition to Request for Depublication
Agnes H. Everett v. State Farm General Insurance Company
Appellate Case No. E041807
Superior Court of San Bernardino County, No. SCVSS124763

Dear Chief Justice and Associate Justices:

On behalf of the Association of California Insurance Companies ("ACIC") and the Personal Insurance Federation of California ("PIFC"), we write in opposition to the requests to depublish the Court of Appeal's decision in *Everett v. State Farm General Ins. Co.* (2008) 162 Cal. App. 4th 649. The opinion is well reasoned, reaches the correct result, and provides important guidance on issues of insurance law for pending and future cases. The requests to depublish should be denied.

Nature of the Parties' Interest

The Association of California Insurance Companies (ACIC) is an affiliate of the Property Casualty Insurers Association of America (PCI) and represents more than 300 property/casualty insurance companies doing business in California. ACIC member companies write 41.8 percent of the property/casualty insurance in California, including 40 percent of homeowners insurance. PCI is composed of more than 1,000 member companies, representing the broadest cross-section of insurers of any national trade association.

PIFC is a nonprofit insurance trade association dedicated to representing its member companies' interests before governmental bodies, including the California legislature, the California Department of Insurance, and the courts. PIFC's members are insurers specializing in personal lines of insurances, primarily automobile and homeowner's insurance, in California and other states. PIFC's members account for more than 50% of

all personal lines of insurance sold in California. Therefore, both ACIC and PIFC have an interest in the issues raised by the Court of Appeal's decision.

The Decision Is Correct

The Court of Appeal's decision employs sound legal analysis and reaches the correct conclusion. The requests to depublish do not argue otherwise. Indeed, Engstrom Lipscomb & Lack ("ELL") has "no quarrel with the ultimate outcome of the action" and concedes that "the arguments were presented in a manner that supported the outcome." (ELL letter, p. 1.) United Policyholders' ("UP") letter is largely a political polemic and points out no flaw in the court's reasoning. That is because none exists; the decision is correct.

Ms. Everett argued that her insurance contract provided unlimited coverage – either explicitly or due to ambiguities in the policy language. The Court of Appeal analyzed the policy in great detail and explained how, in several places, the policy stated that the most State Farm would pay was the "applicable limit of liability shown in the Declarations." *Everett*, 162 Cal. App. 4th at 657-658. The court further explained that Everett could not manufacture an ambiguity by taking one word, "replacement," out of context. *Id.* Because State Farm did pay the policy limit, the court ruled that Everett could not state a claim for breach of contract. This analysis was sound; neither UP nor ELL argues otherwise.

The Court of Appeal also correctly distinguished Everett's policy from the insured's policy in *Desai v. Farmer's Ins. Exchange* (1996) 47 Cal.App.4th 1110. In *Desai*, the insurance policy stated that "we guarantee that the limits of insurance meet the replacement cost requirements." *Id.* at 1116. The Farmers language was arguably misleading, which is why insured in *Desai* was able to state a claim for guaranteed replacement cost. Everett's policy, however, contained no "guarantee," and its language was neither misleading nor ambiguous. *Everett*, 162 Cal. App. 4th at 659-660. That is why Everett was not entitled to benefits beyond the express policy limit. The court's differentiation between Everett's policy and the one at issue is *Desai* was not only correct, it also provides guidance to consumers and insurers on how different policy language will yield different results.

The court's analysis and application of Insurance Code section 678 was likewise straightforward and on the mark. The court examined the statute's requirements for notices of reduction or elimination of coverage. It then examined State Farm's letter in detail and explained that the letter met all of the statutory requirements for plain and conspicuous notice. *Everett*, 162 Cal. App. 4th at 663. ELL and UP do not dispute the court's conclusion.

Finally, the court's disposition of the misrepresentation claims was simple and sound. It explained that if Everett's first agent told her that the policy would provide full replacement cost coverage, that statement was correct because Everett had guaranteed replacement cost in 1991. But after State Farm eliminated that coverage in 1997 and informed Everett of this change, she had no contact with her agent, so she could not state a misrepresentation claim based on a conversation with the agent. *Everett*, 162 Cal. App. 4th at 664.

The Decision Provides Important Guidance For Courts, Policyholders and Insurers

The *Everett* decision is not only correct, it also is important because it provides guidance to insurers and insureds on several important issues involving homeowner's insurance. The decision applies "an existing rule to a set of facts significantly different from those stated in published opinions" and also "involves a legal issue of continuing public interest." (Cal. Rules of Court, Rule 976, subd. (b)(1) and (3).)

The 2003 wildfires spawned scores of lawsuits. The recent 2007 wildfires will likely do the same. Many, if not the majority, of the 2003 wildfire suits contained claims similar to Everett's. Plaintiffs asserted that: (i) policies with express coverage limits actually had no limits; (ii) explicit policy language was somehow ambiguous; (iii) insurers forfeited the right to enforce policy limits because they did not comply with Insurance Code section 678; and (iv) alleged misrepresentations by insurance agents, as well as those "embedded" in the policies themselves, entitled insureds to benefits beyond what the policy provided. *Everett* addressed all of these claims clearly, directly, and in detail. The decision will provide guidance for courts and litigants not only in pending and future wildfire litigation, but also in all cases involving total losses and claims of underinsurance.

Most insurers now have policies similar to State Farm's. They provide replacement cost coverage only up to a certain limit, plus a specified percentage of extended coverage. *Everett* was the first case to analyze these policy provisions and affirm that they are clear and enforceable. The decision will prevent future spurious claims that such policy language means the opposite of what it says, or that it is somehow ambiguous.

Everett was also the first decision to address the application of Insurance Code section 678 to a homeowner's policy. Like State Farm, many insurers sold guaranteed replacement cost in the past, but eliminated that coverage in the mid-to-late 1990's. *Everett* makes clear that where insurers sent notices like State Farm's, the new insurance policies are valid and policyholders are not entitled to continuing unlimited coverage based on claims of lack of notice. This aspect of the decision will also filter unmeritorious claims from future lawsuits, stemming not only from wildfires but from other total losses as well.

The decision also instructs courts and litigants in other ways on how to distinguish meritorious claims from those that lack merit. It explains that where, as in *Desai*, a policy provides a "guarantee" that the limits will replace a house, a policyholder can rely on such a statement. But if the policy does not provide such a guarantee, insureds cannot stretch *Desai* to impose obligations on the insurer where none exist. *Everett*, 162 Cal. App. 4th at 659-660. Similarly, while policyholders can state tort claims based on an insurance agent's affirmative misrepresentations or failure to provide coverage in response to a specific request,[1] policyholders cannot foist responsibility on agents or insurers for simply "getting the amount of coverage wrong."

Finally, on a broader level, the decision clarifies the division of responsibility between insurer and policyholder. Insurers must provide the coverage specified in the policy. But it is up to insureds to select the amount of coverage that they deem appropriate – particularly where the policy states that it is the insured's responsibility to make that determination. This is an important statement, especially given the lobbying efforts of UP and others, which – despite the lack of legal support – seek to impose on insurers a legal duty to determine the "right" amount of coverage for every policyholder.

---

[1] See *Fitzpatrick v. Hayes* (1997) 57 Cal.App.4th 916, 927; *Free v. Republic Ins. Co.* (1992) 8 Cal.App.4th 1726, 1729-1730.

Natural disasters are a fact of life in California, and ensuing litigation is virtually just as certain. *Everett* is the first and only case to address important issues of contract interpretation and insurer/policyholder relationships in the context of wildfires and total losses. *Everett* provides guidance that will help courts address future cases. The decision protects insurance companies that use clear and non-misleading policy language. And, just as important, it provides instruction to policyholders so that they can obtain proper insurance and avoid litigation in the first place.

The Requests for Depublication Lack Merit

The requests for depublication demonstrate no flaw in the decision. They rely on distortions of the opinion in order to advance an anti-insurer agenda.

UP's Request

UP's request for depublication contains no legal analysis. It is an inaccurate diatribe about the perils of underinsurance and how it is "unfair" to have policyholders be responsible for selecting their own coverage limits. UP's request proceeds from a misleading premise and thus reaches false conclusions.

Without providing any legal analysis, UP argues that it is "unfair" to make insureds responsible for selecting their own insurance because they are not construction experts. As a matter of law, however, courts have long recognized that it is not the insurer's responsibility to select the amount of coverage that would be appropriate for a policyholder. *See Jones v. Grewe* (1987) 189 Cal. App. 3d 950, 956; *Gibson v. GEICO* (1984) 162 Cal. App. 3d 441, 451-52; *Roberts v. Assurance Co. of America* (2008) 2008 Cal. App. LEXIS 917 at * 7-8. And as a practical matter, policyholders are in a better position to assess their own needs. Insurers can only estimate replacement cost based on data provided by the policyholder, such as square footage, age, type of construction, etc. But policyholders live in their homes. They know exactly what unique features a home has and, in many cases, what it costs to construct those features.[2] Policyholders also control access to their houses. If they have questions about an insurer's replacement cost

[2] For example, a policyholder who remodeled a kitchen or bathroom would know exactly how much it cost.

estimate, they can have a contractor review it and provide a different estimate. Or, they can simply request more coverage as a cushion. Insurers would not be reluctant to sell more coverage at a greater price.

On the other hand, if insurers were to hire contractors to do estimates for every house (as is sometimes done with extremely high value homes), it would drastically increase the price of ordinary homeowner's insurance. Policyholders who had no desire for such individualized underwriting would bear the cost anyway. There has been no demand in the marketplace for such a system. Rather, it is only after total losses that a small minority of policyholders seek to shift this responsibility to insurers, who never received a premium to account for such a costly underwriting process.

Moreover, if – contrary to the insurance contract – courts were to impose on insurers the duty to determine the "right" amount of dwelling coverage, where would that duty stop? There is no basis in the insurance contract or the law to distinguish dwelling coverage from personal property coverage or liability coverage. But how would an insurer know the details about a policyholder's personal effects – everything ranging from furniture to artwork to clothing. Clearly, only policyholders are in a position to evaluate what their personal property is worth. Similarly, how can an insurer know what level of liability coverage would be "appropriate" for any given insured? Must insurers do asset searches and risk tolerance analyses?

The *Everett* court's conclusion that it is up to policyholders to determine how much insurance they want is consistent with California law, the express policy language, and common sense. And there is nothing insidious or unfair about this result. It simply means that policyholders must take an active role in their insurance purchase. They cannot simply hope for the best and then, if an unlikely total loss occurs, seek to avoid the consequences of their own neglect by blaming insurers and demanding additional coverage that they never paid for.

Indeed, *Everett* should remain published precisely because it is the first case to expressly state that policyholders are responsible for selecting their own dwelling coverage limits. Admittedly, in the past, California trial courts have consistently come to the same conclusion as does *Everett*. But without a published decision on the issue, there will continue to be needless litigation fomented by the theory that property insurance should

be treated differently from every other type of insurance. The publication of *Everett* will minimize this ill-conceived litigation. Policyholders can respond by taking steps to insure they have coverage limits that they deem appropriate. This will help prevent, rather than foster, future disputes about underinsurance.

Without any citation to the decision, UP also claims that *Everett* shields insurers and their agents from all liability "regardless of any and all representations or assurances that have been made orally or in writing by an insurance agent." The decision does no such thing. In *Everett,* it was undisputed that the insurance agent made no misrepresentation at all. Therefore, Everett could not state a tort claim. The decision does not change or depart from the rule that when an agent makes affirmative representations about coverage, or fails to procure the coverage requested by the policyholder, the agent and the insurance company can be liable in tort. *See Fitzpatrick*, 57 Cal.App.4th at 927. Thus, UP's assertion that insurers are "waiving the *Everett* decision around as a shield that is going to absolve them of any liability for deceiving their customers," is nothing more than false hyperbole. The decision is consistent with existing law and does not deprive victims of true misrepresentations of any remedy whatsoever.

Finally, UP's assertion that insurers profit from underinsuring homes is absurd. The greater the amount of coverage, the higher the premium that the insurer receives. Of all the homes that are insured, only a minute fraction ever experience total losses. Thus, insurers have every incentive to insure homes to their full value. On the other hand, policyholders may decide to keep limits and premiums low because the odds of a total loss are remote. In any event, UP's unsupported and illogical assertion about profits has nothing to do with the legal soundness of the *Everett* opinion or the fact that it provides important guidance to both courts and the public.

Underinsurance may indeed be a problem. But *Everett* was correctly decided, and depublishing the opinion will not solve that problem. If anything, *Everett*'s publication calls more attention to the issue and will result in productive dialogues between policyholders and insurers to ensure that consumers obtain exactly the protection they desire.

ELL's Request

Because ELL concedes that the decision is correct, its only basis for requesting depublication is the unsupported assertion that the opinion is overbroad and unclear. It is neither. The opinion carefully addressed each of the arguments that Everett raised, nothing more. The decision is straightforward and leaves no room for uncertainty.

- The Court of Appeal analyzed the contract language in detail because Everett asserted that the language was ambiguous. The court rightly found that the policy provisions were clear. *Everett*, 162 Cal. App. 4th at 657-658.

- The court's discussion of *Desai* is completely clear. The Farmers policy in *Desai* "guaranteed" that the policy limits would be sufficient to replace the policyholder's home. The State Farm policy in *Everett* contained no such guarantee. The court's comparison of the two situations leaves no room for confusion. *Id.* at 659-660.

- The court analyzed the disclosure statements required by Insurance Code sections 10101 and 10102 because Everett contended that these disclosure statements required State Farm to maintain coverage sufficient to replace the house. The court correctly noted that the disclosure statements indicated that this was the policyholder's responsibility. *Id.* at 660-661. That the disclosure forms are not part of the insurance policy itself is of no moment. The court analyzed them under the breach of contract claim because that was how Everett presented the issue.

- The Court of Appeal did not confuse contract and tort claims. Rather, it simply addressed each of Everett's arguments as she presented them. As ELL concedes, there was no basis for a tort claim because Everett had no evidence of a misrepresentation. There is nothing unclear about the court's analysis.

- The court's statement that it is "up to the insured to determine whether he or she has sufficient coverage for his or her needs" was a correct statement based upon the insurance policy and the disclosure statement. *Id.* at 660. Contrary to ELL's assertion, the decision does *not* negate tort liability for insurers that make affirmative misrepresentations.

- ELL asserts that, in its analysis of Insurance Code section 678, the Court of Appeal improperly confused the terms "reduction of coverage" and "elimination of coverage." ELL is wrong. The Court of Appeal reviewed State Farm's notice to Everett and correctly concluded that it clearly apprised her that State Farm was eliminating her guaranteed replacement cost coverage. *Id.* at 663. That the court used the term reduction versus elimination does not undermine the correctness of its analysis. The court's discussion will not create any confusion.

- Finally, ELL's accusation that State Farm intentionally uses estimating software that produces inadequate replacement cost estimates has nothing to do with the opinion or the record on appeal. Unsupported conspiracy theories are no basis to request depublication.

Conclusion

Everett is the first published decision to address important issues of contract interpretation and allegations of underinsurance arising from a total property loss. The decision is consistent with existing law and does not eliminate any traditional remedies that policyholders have for misrepresentations or malfeasance by insurance companies or their agents. But the opinion does make clear that contrived claims for unlimited insurance benefits – whether based on clear policy language, Insurance Code disclosure statements, or Insurance Code section 678 – cannot succeed. Thus, *Everett* provides important guidance for courts addressing such claims in pending cases and ensures that only claims with real merit are filed in the future. The Court of Appeal's analysis was careful, thorough, and correct. The request for de-publication should be denied.

Very truly yours,

Peter H. Klee

Peter H. Klee
of
LUCE, FORWARD, HAMILTON & SCRIPPS LLP

101101992.1