JAMES R. ROBIE
EDITH R. MATTHAI
MICHAEL J. O'NEILL
KYLE KVETON
BERNADINE J. STOLAR
CRAIG W. BRUNET
NATALIE A. KOUYOUMDJIAN*
GABRIELLE M. JACKSON
IVAN MNATZAGANIAN
RONALD P. FUNNELL
STEVEN S. FLEISCHMAN*
SANDRA L. BLOCK
DAVID J. WEINMAN
DIANA K. RODGERS
CHRISTY GARGALIS
WILLIAM L. DANZIGER
KAREN K. COFFIN-BRENT
LEAH K. BOLEA

ROBIE & MATTHAI
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
BILTMORE TOWER
500 SOUTH GRAND AVENUE, 15TH FLOOR
LOS ANGELES, CALIFORNIA 90071-2609
TELEPHONE (213) 706-8000
FAX (213) 706-9913

June 24, 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 Pursuant to Rule 8.1125
*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:

The requests to depublish the Court of Appeal's opinion should be denied. The opinion reaches the correct conclusion on important, often litigated and sometimes misunderstood issues of insurance law. It does so in a clear, concise, thorough and understandable manner. The opinion will assist other courts and litigants in evaluating similar issues and reaching the correct result.

Engstrom, Lipscomb & Lack (ELL) and United Policyholders (UP) ask this Court to depublish the opinion in order to achieve a tactical advantage in other litigation with admittedly "distinguishable facts and different legal theories." (ELL letter, p. 2.) They support their request with contrived assertions designed to create confusion when none exists. For example, ELL and UP argue that despite reaching the "correct result, [the opinion] is inherently flawed" (*id.*, at p. 5), and portions of the opinion could be "easily taken out of context[.]" (*Ibid.*) As demonstrated below, the opinion is not flawed. Its language can only be taken out of context by those who seek to confuse.

Agnes Everett claimed State Farm's notice of changes to her insurance policy was allegedly insufficient under Insurance Code section 678 -- a statutory notice provision.[1] The

---

[1] Section 678 requires an insurer, within 45 days prior to expiration of the policy, to provide notice to its insureds of "[a]ny reduction of limits or elimination of coverage."

*CERTIFIED SPECIALIST, APPELLATE LAW
*THE STATE BAR OF CALIFORNIA BOARD OF LEGAL SPECIALIZATION

Court of Appeal addressed this claim directly, concluding State Farm's notice satisfied the requirements of section 678 and "more than sufficient[ly]" informed insureds of the elimination of coverage. (Typed Opn., at pp. 20-21.) The opinion discusses in useful detail the contents of State Farm's notice to its insureds, including the manner in which the information was imparted: "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.**" (*Id.* at p. 2.)[2]

The opinion sheds significant light on this narrow, yet important legal question -- one which will be (and has been) raised in other cases against State Farm. Indeed, the benefit of the opinion reaches beyond the specific notice of elimination of "guaranteed replacement cost" coverage in the State Farm policy and extends to all cases in which the sufficiency of an insurer's notice of "reduction of limits or elimination of coverage" is at issue.[3]

The opinion also reaffirms an important principle of law respecting an insured's duty to maintain policy limits sufficient to meet his or her individual needs. Ms. Everett argued State Farm was obligated to set policy limits equal to the cost to replace her property in the event of a loss, relying on the statutorily mandated California Residential Property Insurance Disclosure Statement. (Ins. Code secs. 10101 and 10102.) The Court of Appeal rejected this claim, holding nothing in the Disclosure Statement imposed upon State Farm such a duty. (Typed Opn., at p. 16.)

The Court of Appeal held the Disclosure Statement confirmed it is the insured's responsibility to select the policy limit. The Disclosure Statement requires that "you [the insured] 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 [.]" (*Id.* at

---

(Ins. Code sec. 678, subd. (a)(1)(A).)

[2] The Notice is attached as an Appendix to the Court's opinion, so that it may be used as a comparative tool for future cases. (See Appendix A to opinion.)

[3] Aside from the opinion here, State Farm has identified only one other published California case involving Insurance Code section 678 -- one filed over twenty years ago. (See *Shade v. Canadian Indemnity Co.* (1983) 147 Cal.App.3d 43, 47, fn 2.) Even there, the Court of Appeal declined to address the application of section 678, as it reversed the judgment on other grounds. (*Ibid.*)

p. 16.) ELL argues the Court of Appeal erred when it "read language into the Disclosure Statement that simply is not there." (ELL letter, p. 4.) Not so. The Court of Appeal correctly read the language of section 10102; its conclusion is not, as ELL claims, "flawed, unnecessary and misleading [.]" (*Ibid.*)

In concluding the insured -- not State Farm -- is responsible for selecting the appropriate amount of policy limits for his or her individual needs, the Court of Appeal also relied upon the renewal certificates State Farm provided to its insureds. In those renewal certificates, State Farm informed insureds that the replacement cost figure identified by State Farm was merely an estimate. It reminded insureds it was their responsibility to obtain limits sufficient to meet their unique needs. Because, as the Court of Appeal noted, Ms. Everett did not show that her original policy limits were insufficient when first set, or that she had ever requested her limits be increased, her claim against State Farm based upon insufficient policy limits lacked merit. (Typed Opn., at p. 16.)

This holding is consistent with existing law. The insured -- not the insurer -- has the particular knowledge of his or her individual insurance needs; the insured -- not the insurer -- can best determine the policy limits sufficient to meet those needs; and the insured -- not the insurer -- can best decide if the economic cost of increased policy limits is commensurate with the increased amount of coverage. These questions will vary dramatically from one insured to the next. It would be impossible for an insurer to compel each of its insureds to respond to these questions every policy period, and then to accurately assess the infinitely varying answers. The Court of Appeal correctly concluded the insurer should not bear legal responsibility for that which it cannot accomplish.

This conclusion does not impact an insured's right to maintain a tort claim based on misrepresentations by the agent regarding the sufficiency of policy limits or coverage. (See generally *Free v. Republic Ins. Co.* (1992) 8 Cal.App.4th 1726, 1729-1730 [holding insurer and agent have no general duty to advise insured regarding sufficiency of liability limits, but once they respond to inquiries, a special duty arises requiring reasonable care]; *Fitzpatrick v. Hayes* (1997) 57 Cal.App.4th 916, 927 [holding agent has no general duty to advise insured of sufficiency of coverage, unless agent "misrepresents the nature, extent or scope of the coverage being offered or provided . . ."]; *Clement v. Smith* (1993) 16 Cal.App.4th 39, 45 [holding agent may be liable to insured for misrepresentations regarding amount of limits and coverage on new or existing insurance policy]; *Paper Savers, Inc. v. Nacsa* (1996) 51 Cal.App.4th 1090, 1104-1105 [holding triable issues of material fact regarding representations, if any, made by agent regarding scope of coverage prevent summary judgment].) To the extent

an insured can establish any such alleged misrepresentation, the opinion in no way prevents an insured from pursuing a claim based on that theory. (See Typed Opn., at pp. 21-22.)

Here, however, the Court of Appeal correctly held there were no alleged misrepresentations regarding the scope of the insured's coverage and the sufficiency of her policy limits. (*Ibid.*) Because there were no misrepresentations regarding coverage or the sufficiency of limits, nor were there any requests for increased coverage or limits that were not honored, the opinion does not eliminate an insured's right to pursue a misrepresentation claim, to the extent the facts of a particular case warrant it.

The requests for depublication submitted by ELL and UP dismiss the Court of Appeal's well-reasoned opinion, and the existing legal authority supporting it.[4] Instead, they rely on a piecemeal and flawed analysis of the opinion, one taken entirely out of its correct legal and factual context. ELL's and UP's approach runs afoul of this Court's settled precedent requiring each case to be evaluated based upon the legal issues presented and in light of the case's particular facts. As this Court has explained, "[l]anguage used in any opinion is of course to be understood in the light of the facts and the issues then before the court, and an opinion is not authority for a proposition not therein considered." (*Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2.)

For example, much of ELL's and UP's letters are largely driven by their claim that the opinion's general statement that an insured should determine whether he or she has sufficient coverage will negate any and all misrepresentation claims. (ELL Letter, at p. 5; UP Letter, at p. 4.) In other words, rather than read the opinion's language in its correct context (as the law requires) ELL and UP focus -- literally -- on a single sentence and strip it of its legal and factual context. This conclusion is not supported by the opinion and cannot be used as the impetus to depublish this well-reasoned decision. The opinion addresses the issues raised by the parties in the factual context of the case. It is properly limited in its scope by those issues and that context. As explained above, nothing in the opinion prevents a plaintiff from asserting a tort claim for misrepresentation, to the extent the particular facts warrant it. And no fair reading of the opinion suggests otherwise.

---

[4] The letter from UP is a compilation of arguments that are not supported by the record. It is an advocate's argument premised on the notion that insurance companies do not want to sell insurance and somehow profit from the lack of sales. The letter is an attack on the insurance industry that does not provide any legal basis for depublication of this well-reasoned decision.

In fact, ELL confirms as much when it distinguishes this case from other hypothetical cases. For example, a hypothetical case in which an agent allegedly misrepresents the scope and amount of coverage. (ELL Letter, at p. 5.) Based upon this hypothetical, ELL illogically concludes that the opinion invalidates all misrepresentation claims. (*Ibid.*) But courts and advocates alike are free to distinguish the opinion from their cases in precisely the same way ELL distinguishes it from its hypothetical case. An opinion is not inappropriate for publication merely because a court in a future case may conclude it is factually or legally distinguishable.[5]

Nor does the Court of Appeal blur the distinction between tort and contract claims. The Court of Appeal evaluated Ms. Everett's claims of misrepresentation in the context of both her contract and tort causes of action, because these were the theories she presented on appeal. To the extent Ms. Everett argued she was entitled to greater *contract* benefits because her State Farm agent allegedly misrepresented the scope of her coverage, the Court of Appeal correctly evaluated the claim under contract principles. (Typed Opn., at pp. 18-20.) To the extent Ms. Everett argued she was entitled to a tort remedy because of her State Farm agent's alleged misrepresentations, the Court of Appeal likewise correctly evaluated the claim under tort principles. (*Id.* at pp. 21-22.) There is nothing misleading or ambiguous about the manner in which the opinion addresses Ms. Everett's various theories of liability.

ELL and UP also pepper their depublication letters with several other perceived problems with the opinion, none of which has merit. For example, ELL claims the portion of the opinion in which the Court of Appeal distinguished *Desai v. Farmers Insurance Exchange* (1996) 47 Cal.App.4th 110, "will lead to confusion." (ELL Letter, at p. 3.) A review of the opinion demonstrates this is not so.

Ms. Everett relied on *Desai* to argue she was entitled to the full amount to replace her damaged property, without regard to the stated policy limits. (Typed Opn., at p. 14.) But the

---

[5] For this reason too, UP's claim that "regardless of any and all representations or assurances that have been made orally or in writing by an insurance agent, broker or company representative, it is a policyholder's legal duty to determine whether or not their property is adequately insured" is exaggerated and not supported by a fair reading of the opinion. (UP Letter, at p. 4.) To the extent an insured can establish a misrepresentation, nothing in the opinion precludes him or her from raising such a claim. It simply was not (and could not be) established that there was a misrepresentation in this case. (Typed Opn., at pp. 21-22.)

policy at issue in *Desai*, unlike the State Farm policy here, included express language stating that "[i]f a Replacement Cost provision forms a part of this policy, *we guarantee that the limits of insurance meet the replacement cost requirements.*'" (*Ibid*, emphasis added.) The policy in *Desai* also included a "Value Protection" provision, which expressly "*guarantees to meet all minimum insurance-to-replacement cost requirements if any present in your policy.*" (*Id.* at p. 15, emphasis added.) As the Court of Appeal explained, it was the use of this particular language in the Value Protection clause -- not the clause itself -- that lead the *Desai* court to conclude a lay insured could interpret the protection to include guaranteed replacement cost coverage without regard to the stated policy limits. (*Ibid.*)

In distinguishing *Desai*, the Court of Appeal did not simply state the policy here was different because it "does not make any promises of automatic protection," as ELL claims. (ELL Letter, at p. 3.) Rather, the Court of Appeal explained that unlike the policy in *Desai*, the State Farm policy "did not include any language guaranteeing replacement cost coverage," nor did it include a "promise of automatic protection" similar to the promise made in the *Desai* policy. (Typed Opn., at p. 15.) Thus, when read in its entirety and in the correct context, there is nothing misleading or inaccurate about the Court of Appeal's distinction of *Desai*.

The same is true of the Court of Appeal's discussion of the California Residential Property Insurance Disclosure Statement. ELL claims the discussion is "misleading and moot." (ELL Letter, at p. 3.) It is neither. As discussed above, the Court of Appeal addressed and correctly rejected Ms. Everett's claim that the statutorily mandated California Residential Property Insurance Disclosure Statement State Farm provided to its insureds imposed upon State Farm the burden of setting policy limits equal to the cost to replace her property. (Typed Opn. at pp. 15-17.) In doing so, the Court of Appeal was not required to explain that the Disclosure Statement was not part of the policy; this was not an issue in the case. (*Id.* at p. 16.)

In rejecting Ms. Everett's claim, the Court of Appeal relied on the language of Insurance Code section 10102, which provides in plain, conspicuous terms that "you" -- *the insured* -- "must insure the dwelling to its full replacement cost at the time the policy is issued . . ."[6] (*Ibid.*) It was based upon this statutory language that the Court of Appeal concluded the insured's claim lacked merit. There is nothing ambiguous or misleading about this

---

[6] Even ELL acknowledges the term "you" refers to the insured. (ELL Letter, at p. 3.)

conclusion, as it is entirely consistent with Insurance Code section 10102's disclosure requirement, and the burden imposed upon an insured under that section.

Nor did the Court of Appeal conclude that the language "at the time the policy is issued" means the insured is only obligated to insure a dwelling at full replacement cost in the *first* year. (ELL Letter, at p. 4.) The Court of Appeal made no such statement, nor can the opinion be fairly read to suggest it did. It is only in the context of quoting section 10102 that the Court of Appeal discusses this phrase, and then only to note that it is a part of the statutorily mandated Disclosure Statement. (Typed Opn. at p. 16.)

ELL's skewed reading of the opinion results from its incorporation of the Court of Appeal's comments on two separate, but related topics. The language from the Disclosure Statement, "at the time the policy is issued," is not discussed in the same paragraph as the Court's statement that "Nothing in the record suggests the original policy limits were insufficient to replace her home in 1991," as ELL's letter suggests. (Typed Opn., at p. 16.) The sufficiency of the policy limits in 1991 is only referenced in the context of the Court of Appeal's discussion of Ms. Everett's assertion that State Farm was responsible for establishing the policy limits when the policy was issued. The Court of Appeal's reference to the lack of evidence regarding insufficiency of policy limits only establishes Ms. Everett did not prove the limits were inadequate when the policy was issued. The Court of Appeal explained that by way of its renewal certificates, State Farm notified insureds it was their responsibility -- not State Farm's -- to determine whether their property was adequately insured. It is in conjunction with this discussion that the Court of Appeal makes reference to Ms. Everett's policy limits in 1991, and then only to point out there was no evidence to suggest is was too low, or that she requested it be increased in any subsequent year, as her renewal certificates explained she could do.[7] (*Ibid.*)

---

[7] The Court of Appeal's reference to 1991, which ELL calls "Year #1" of the policy, is merely to point out that Everett failed to meet her threshold burden of demonstrating her policy limits were insufficient to replace her home in "Year #1" -- "at the time the policy is issued" -- much less that she ever made any request to increase her limits between "Year #1" and the date of her loss over ten years later, as the Disclosure Statements and renewal certificates provided she was obligated to do. (Typed Opn., at pp. 16-17.) The opinion makes clear what the Disclosure Statements and renewal certificates provide: it is the insured's responsibility to insure his or her property for full replacement value, and to notify the insurer to the extent his or her needs have changed. (*Ibid.*)

Further, the Court of Appeal did not conclude in Section 2 of its opinion that the inflation coverage provision of the State Farm policy "did not exist." (Letter, at p. 4.) Section 2 of the opinion dealt with the Ms. Everett's reliance on *Desai, supra,* 47 Cal.App.4th at p. 1110. While the Court of Appeal explained the State Farm policy did not include the same language as the Value Protection Clause in *Desai*, and thus could not be read to include a promise to provide guaranteed replacement cost coverage, it did not even remotely suggest the State Farm policy did not include an inflation coverage provision. (Typed Opn., at pp. 14, 17.) What it did conclude is that the language of State Farm's inflation coverage provision could not have reasonably led Ms. Everett to believe her policy limits necessarily would be sufficient to replace her property, nor was it State Farm's obligation to ensure such. There is nothing inconsistent with these separate, but related portions of the opinion.

ELL also claims the Court of Appeal's use of the term "reduction of coverage" to denote "elimination of coverage" renders its evaluation of Insurance Code section 678 erroneous. But its myopic focus on the terms "reduce" versus "elimination" to suggest the Court of Appeal's analysis of Insurance Code section 678 is anything short of correct should be rejected as semantic gamesmanship. (ELL Letter, at pp. 7-8.) In fact, this error stems from ELL's confusion regarding two *distinct* provisions of Insurance Code section 678. Section 678 requires that an insurer provide a single offer of renewal that includes notice to its insured of (1) a reduction of limits, ***or*** (2) elimination of coverage. (Ins. Code sec. 678, subd. (a)(1)(A).) Thus, when an insurer reduces the amount of the stated policy limits, notice of that reduction is required under section 678. (*Ibid.*) Likewise, when an insurer eliminates coverage in a policy, notice of that elimination is required under 678. (*Ibid.*) What is not required, however, is that an insurer notify its insureds that there has been a reduction of the stated policy limits when the insurer has eliminated *coverage*, but has not reduced the stated *policy limits*, as was the case here.

Under Insurance Code section 678, State Farm was required to (and did) notify its insureds of the elimination of "Guaranteed Replacement Cost" *coverage*. State Farm was not required to independently notify insureds of any so-called reduction of *limits*. This is because State Farm did not reduce the stated policy limits in addition to eliminating "Guaranteed Replacement Cost" coverage, nor did Ms. Everett argue that such a decrease occurred. The sum of her claim was that State Farm's notice eliminating Guaranteed Replacement Cost *"coverage"* was insufficient under section 678. The Court of Appeal addressed and correctly rejected this claim. (Typed Opn., at pp. 20-21.) Thus, that the opinion referenced a "reduction" of coverage versus an "elimination" of coverage does not change the conclusion

that State Farm clearly and adequately notified its insureds they would no longer have Guaranteed Replacement Cost *coverage* -- the only claim asserted in this case.[8]

Nor does UP's discussion of "replacement cost" policies and other extended coverages change the conclusion that the replacement policy here (the only policy evaluated by the Court of Appeal) provided protection, but only up to the stated policy limits. (UP Letter, at p. 2.) Whether or not replacement cost policies are "standard," as UP claims, does not change the conclusion that in *this case* the insured was provided "more than sufficient notice" that her policy would no longer provide *guaranteed* replacement cost coverage irrespective of her stated limits. The notice informed the insured she no longer had "*guaranteed* replacement cost" coverage, and that her new policy (while perhaps a "replacement cost" policy rather than an "actual cash value" policy) would be governed by a *stated policy limit*.[9] (Typed Opn., at p. 3.) As such, UP's claim that a "replacement cost" policy *with a stated policy limit* somehow "unjustly enriche[s]" the insurer by purportedly allowing it to pay less than the full amount to replace the property irrespective of policy limits is at odds with the plain and unambiguous terms of the policy, as well as case law interpreting such terms. (UP Letter, at p. 3.) The Court of Appeal understood the distinction between the various forms of coverage -- guaranteed replacement cost, replacement cost, and actual cash value -- and reached its

---

[8] ELL and UP's reference to alleged facts outside the record on appeal is highly improper. There is no evidence in the record whatsoever to support the claim State Farm allegedly knew its replacement cost estimating software was purportedly producing low estimates, or that it allegedly "intentionally concealed" this information from its insureds. (ELL Letter, at p. 8; UP Letter, at p. 3.)

[9] 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' coverage. [Citation.] However, the amount of 'actual cash value' is based on 'the fair market value [of the damaged property] at the time of destruction" [citation] which oftentimes is insufficient to repair or replace the property. [Citation]. Thus, "'replacement cost' coverage . . . is intended to compensate the insured for the *shortfall* in coverage that results from rebuilding under a policy that pays only for actual cash value.'" [Citation.]'." (Typed Opn., at p. 12.)

conclusion based upon a correct interpretation of what those policies provided and, importantly, what they did not provide.[10]

In conclusion, the Court of Appeal's opinion offers much needed guidance on the sufficiency of an insurer's notice of the elimination of coverage, not only as it relates to the elimination of Guaranteed Replacement Cost coverage in the State Farm policy at issue here, but in all cases in which notice of the elimination of coverage is at issue. The opinion is well-reasoned, thorough and entirely consistent with existing law. State Farm General Insurance Company, therefore, respectfully urges this Court to deny the requests for depublication.

ROBIE & MATTHAI
A Professional Corporation
JAMES R. ROBIE
MICHAEL J. O'NEILL
NATALIE A. KOUYOUMDJIAN

By:
JAMES R. ROBIE

[10] Nor is it relevant that replacement cost policies purportedly come standard with inflation adjusters, extended replacement cost, and building code upgrade endorsements, as UP states. (UP Letter, at p. 2.) In fact, Ms. Everett had these coverages; and to the extent she established a right to the additional benefits, she was paid. (Typed Opn., at p. 5, 12-13.)

**PROOF OF SERVICE**

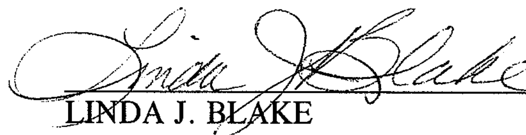
I declare that I am over the age of eighteen (18) and not a party to this action. My business address is 500 South Grand Avenue, Suite 1500, Los Angeles, CA 90071.

On June 24, 2008, I served the foregoing document on all interested parties in this action by placing a true copy of each document, enclosed in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

(X) BY MAIL: As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing with the United States Postal Service. I know that the correspondence was deposited with the United States Postal Service on the same day this declaration was executed in the ordinary course of business. I know that the envelope was sealed and, with postage thereon fully prepaid, placed for collection and mailing on this date in the United States mail at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this document is Executed on June 24, 2008, at Los Angeles, California.



LINDA J. BLAKE

**SERVICE LIST**

Christian J. Garris, Esq.
LAW OFFICES OF CHRISTIAN J. GARRIS
633 West Fifth Street, 28th Floor
Los Angeles, CA 90017

Attorneys for Plaintiff and Appellant
AGNES H. EVERETT

Randall M. Nunn
HUGHES & NUNN, LLP
401 B Street, Suite 1250
San Diego, CA 92101

Attorneys for Defendant and Respondent
STATE FARM GENERAL INSURANCE COMPANY

The Honorable John Wade
Superior Court of San Bernardino County
Dept. S-8
351 No. Arrowhead Avenue
San Bernardino, CA 92415-0240

Judge of the Superior Court
Case No. SCVSS124763

Clerk, California Court of Appeal
Fourth Appellate District, Division Two
3389 Twelfth Street
Riverside, California 92501

4th Civ. No. E041807