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July 2, 2008

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

**RECEIVED**

**JUL 02 2008**

**CLERK SUPREME COURT**

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 request by the Insurance Commissioner for the State of California (the “Commissioner”) to depublish the Court of Appeal’s decision in *Everett v. State Farm General Ins. Co.* (2008) 162 Cal. App. 4<sup>th</sup> 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 request to depublish should be denied.

## **I. 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 homeowners insurance, in California and other states. PIFC’s members account for more than 50% of

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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.

## II. The Decision Is Correct

The Court of Appeal's decision employs sound legal analysis and reaches the correct conclusion. 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." (Commissioner's letter, p. 1, italics original.)

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. 4<sup>th</sup> 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; the Commissioner does not argue 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. 4<sup>th</sup> 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 in *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 reviewed the statute's requirements for notices of reduction or elimination of coverage. It then examined State Farm's letter in

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detail and explained that the letter met all of the statutory requirements for plain and conspicuous notice that State Farm was eliminating Everett's guaranteed replacement cost coverage. *Everett*, 162 Cal. App. 4<sup>th</sup> at 663. The Commissioner does 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. 4<sup>th</sup> at 664.

### **III. 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 homeowners 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.

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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 homeowners 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. 4<sup>th</sup> 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,<sup>1</sup> 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 lobbying efforts that – despite the lack of legal support – seek to impose on insurers a legal duty to determine the "right" amount of coverage for every policyholder.

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

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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 only those 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.

#### IV. The Request for Depublication Lacks Merit

The Commissioner's request for depublication demonstrates no flaw in the decision. Instead, the Commissioner misreads the decision, proceeds from a misleading premise, and thus reaches false conclusions.

Without any citation to the decision, the Commissioner asserts that *Everett* "could be interpreted to immunize insurers from responsibility when they or their agent 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." (Commissioner's letter, p. 1.) The decision does no such thing.

In *Everett*, it was undisputed that the insurance agent made no misrepresentation at all. For this simple reason, *Everett* could not state a tort claim. The decision does not change or depart from the rule that when an agent makes affirmative misrepresentations 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. Because *Everett*'s agent made no misrepresentation, the court did not need to discuss this rule. But the decision certainly did not abrogate it.

Thus, the Commissioner's assertion that if *Everett* remains published, homeowners "with legitimate claims based on agents' misrepresentations could be harmed" is false hyperbole. The decision is consistent with existing law and does not deprive victims of true misrepresentations of any remedy whatsoever.

As for what the opinion actually says, the Commissioner takes issue with only two portions. Neither criticism has merit.

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A. **Everett correctly held that policyholders are responsible for choosing their own limits.**

The Commissioner claims that *Everett* unfairly makes policyholders responsible for choosing their own limits. The Commissioner is wrong for several reasons.

First, 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 of law. *Id.* at 660.

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. Conversely, no case has ever held that, absent an express promise or undertaking to do so, an insurance company has an inherent duty to make sure a policyholder has the "right" amount of coverage.

Second, the Court of Appeal properly enforced the plain language of *Everett*'s insurance documents – including her policy, renewal certificates and insurance disclosure statements – all of which clearly stated that it was her responsibility to select the amount of coverage that she felt comfortable with. *See Everett*, 162 Cal.App 4<sup>th</sup> at 653 (quoting the renewal certificate, which stated, "You are responsible for selecting the appropriate amount of coverage. . .").

Third, contrary to the Commissioner's assertion, policyholders are in a better position than insurers 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.<sup>2</sup> Policyholders also control access to their houses. If they have questions about an insurer's replacement 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. Indeed that is exactly what the State Farm renewal certificate in *Everett* stated. *Everett*, 162 Cal. App. 4<sup>th</sup> at 653. In any event, regardless of who may have greater knowledge of a home's

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<sup>2</sup> For example, a policyholder who remodeled a kitchen or bathroom would know exactly how much it cost.

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characteristics and related construction costs, there is no basis to impose on insurers a legal duty that does not exist under the insurance contract or law.

On the other hand, if – contrary to existing law, and at the peril of virtual strict liability – insurers were responsible for making sure that replacement cost estimates were sufficient to rebuild total losses under every circumstance, the price of ordinary homeowners insurance would drastically increase. Insurers could be inclined to do one of two things. They could hire contractors to do estimates for every house, as is often done with extremely high value homes. Policyholders who had no desire for such individualized underwriting would bear the cost anyway. Or insurers could simply adjust their estimating programs to yield much higher replacement cost estimates to provide a large cushion. This would also result in higher premiums. Worse, the result would be rampant *over-insurance*. Alleged underinsurance affects only a fraction of the tiny percentage of policyholders who suffer total losses. A prophylactic practice of over-insurance, however, would affect all policyholders statewide. Thus, the Commissioner’s proposed cure for the rare ailment of underinsurance would be worse than the disease.

Finally, 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 Commissioner also claims that policyholders must accept insurers’ replacement cost estimates because insurance policies are contracts of adhesion. That is a complete fallacy. As a threshold matter, it is hard to conceive of homeowners policies as contracts of adhesion because they must follow the form prescribed by the Legislature in Insurance Code section 2071. Regardless, the very portions of a policy that insureds *can adjust* to meet their needs are the coverage limits. Thus, the Commissioner’s assertion that, when it comes to policy limits, policyholders face a “take it or leave it” proposition is utterly false.

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In sum, the *Everett* court's conclusion that it is up to policyholders to determine how much coverage 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. 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.

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.

**B. *Everett*'s discussion of the policy's "integration clause" does not deprive policyholders of tort remedies.**

The Commissioner also misreads the Court of Appeal's discussion of the insurance policy's integration clause. According to the Commissioner, *Everett* held that "an agent cannot bind an insurer to pay anything above the stated policy 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." (Commissioner's letter, p. 4) *Everett* did not hold that at all.

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The Court of Appeal addressed the integration clause in its analysis of Everett's *breach of contract* claim, not in its discussion of her tort claims for misrepresentation. The court explained that the policy's integration clause precluded oral modifications of the policy. Therefore, the agents' alleged oral representations could not alter the amount of coverage provided under the terms of the policy itself:

The policy stated that its terms could not be modified by any oral agreement. Also, the policy stated that any "waiver or change of any provision of [the] policy must be in writing by [State Farm] to be valid." Accordingly, *no alleged oral representation could have been effective to change the terms of the fully integrated policy.*

*Everett*, 162 Cal. App. 4<sup>th</sup> at 662-663 (citations omitted, emphasis added).

The court's holding was clearly limited to its analysis of what benefits were available under the terms of the policy. The court did *not* hold that the integration clause barred tort claims for misrepresentation based on misleading statements by insurance agents. In fact, in the section of the opinion dealing with Everett's claims for fraud and negligent misrepresentation, the Court of Appeal did not even mention the integration clause. It simply held that those claims failed because Everett had no evidence of misrepresentations. This distinction is critical. A misrepresentation cannot modify the terms of an integrated contract. But it can give rise to tort remedies that are separate from and do not depend upon the contract.

Thus, contrary to the Commissioner's assertion, *Everett* does not contradict *Lippert v. Bailey* (1966) 241 Cal. App. 2d 376 or *Beach v. U.S. Fidelity & Guar. Co.* (1962) 205 Cal. App. 2d 409. In *Lippert*, the court held that when an insurance agent acts in the course and scope of his authority, his negligence is attributable to the insurer. Therefore, the court affirmed the dismissal of the plaintiff's claims against the agent because the plaintiff had already executed a release in favor of the insurer. *Lippert v. Bailey* 241 Cal. App. 2d at 382-384. *Beach* held that when an insured specifically requests certain insurance coverage, but the agent fails to procure it, the insurer may be estopped to deny coverage. Neither *Lippert* nor *Beach* case even mentioned the effect of a policy's integration clause. And those cases certainly did not hold that, when a policy contains an integration clause, oral representations can modify the actual terms of the policy.

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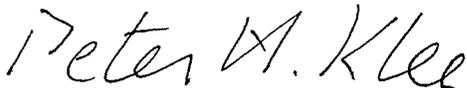
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In short, *Everett* does not deprive policyholders of tort remedies when an agent makes misrepresentations or fails to obtain coverage that the policyholder specifically requests. But the decision makes clear that insureds cannot manufacture *contract* claims based on alleged oral representations about coverage. This distinction is important. Policyholder attorneys often allege breach of contract in order to establish a foothold for bad faith claims, which they then use to threaten insurers with exposure for attorneys fees, emotional distress and punitive damages. *Everett* correctly instructs that, when a policy contains an integration clause, policyholders cannot obtain tactical litigation leverage by asserting breach of contract claims based on alleged oral statements.

V. 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

of

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