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June 3, 2008

Via Federal Express

JUN 05 2008

Honorable Ronald M. George, Chief Justice
Honorable Associate Justices
CALIFORNIA SUPREME COURT
350 McAllister Street
San Francisco, CA 94102

Re: Request for Depublication Pursuant to Rule 8.1125
Agnes H. Everett v. State Farm General Insurance Company
Decided April 29, 2008
Appellate No. E041807
Superior Court of San Bernardino County, No. SCVSS124763

Dear Chief Justice and Associate Justices:

We write this letter on behalf of multiple fire victims and litigants[1] who we represent in pending matters, and on behalf of many others who are similarly situated and who have an interest in the captioned decision. We request depublication of the Court of Appeal's decision in this matter. We have no quarrel with the ultimate outcome of the action; the facts were weak and the arguments were presented in a manner that supported the outcome. The problem with the opinion is its sweeping overbreadth and potential

[1] *See* San Diego Superior Court Case Nos. GIC837491, GIC837503, GIC837524, GIC844058, GIC837474, GIC844059, GIC844056, GIC843285, GIC837525, GIC837594, GIC837517, GIC837455, GIC837456, GIC837461, GIC837538, GIC837549, GIC837472, GIC837541, GIC837521, GIC837547, GIC844057, and GIC837659.

impact on many meritorious cases with distinguishable facts and different legal theories.

The genesis of this outcome is the manner in which the underlying case was presented by plaintiff/appellant – a classic case of throwing spaghetti on the wall and hoping something would stick, with little or no regard for the merits of the arguments presented relative to the facts at hand. The Court of Appeal reacted by issuing an opinion that is unnecessarily overbroad in a case that could have been affirmed on much narrower grounds.

Everett's Arguments on Appeal

Everett's boilerplate arguments were fundamentally *ex contractu* in nature, though they blurred the line between contract and tort resulting in a confused case and opinion. Everett argued that the terms of her policy were "unclear" (§A, p. 8). [*A copy of the Opinion is attached hereto as Exhibit "A" for ease of reference*] That argument was summarily rejected by the Court of Appeal by simply referencing the language of the policy. This portion of the decision is understandable and is not objected to.

Everett's alternative argument was that State Farm committed a "breach of contract" by paying only $5,696 in "Code Upgrade" benefits when Everett contended that $9,230 was owed. (§B1, p. 12-13) The adjudication of this $3,000 controversy should have been the beginning and the end of the Everett opinion. In support of her cause, Everett submitted a contractor estimate which by its own terms was incomplete and included no supporting documentation. (p. 13) The trial court quite understandably refused to accept this unreliable evidence. The Breach of Contract claim was unsupported and the affirmance was appropriate. This should have ended the inquiry as everything else was moot, with the exception of the "Reduction of Coverage" argument which is discussed below. Instead, the Court of Appeal instituted a beat-down which was undoubtedly motivated by the frivolous and haphazard manner in which this case was presented by the plaintiff/appellant.

The remaining "Breach of Contract" arguments centered on the contention that the policy contract included promissory language conferring full indemnity for the loss irrespective of the stated limits of the policy.

Value Protection/Automatic Protection
(Section 2, p. 14)

Everett argued that 100% replacement was owed per *Desai v. Farmers* (1996) 47 Cal.App.4th 1110 because the State Farm policy included a provision similar to the "Value Protection" provision in *Desai*. The Court of Appeal found that the State Farm policy "does not make any promises of automatic protection". No explanation follows nor is there any reference to any policy provision. This portion of the decision will lead to confusion as it is both unclear and contradicted by subsequent portions of the decision itself. Section 4 clearly references an "Inflation Coverage Index" which "increases" the policy limits. (p. 17)

The undersigned is not here to re-argue the *Everett* case in a letter brief. This portion of the decision impacts an issue that is important to many other fire victims and litigants (for reasons not framed in *Everett*) and the basis for the decision is hopelessly unclear. Its value as precedent is therefore adversely impacted and this portion of the decision should be decertified.

Statutory Disclosure Statement
(pp. 15-16, heading 3)

Everett argued that the *Insurance Code* §10102 Disclosure Statement contractually obligated State Farm to set the policy limits equal to the cost to replace the property. This argument was summarily rejected based on the language of the disclosure statement which clearly indicates "You" (the insured) (are responsible for insuring the dwelling to its "full replacement cost at the time the policy is issued.") The Court of Appeal never noted the fact that the disclosure statement is <u>not</u> a part of the policy contract. As such, the entire "Breach of Contract" analysis was misplaced and moot. This portion of the decision should therefore be decertified. We agree that the Disclosure Statement's reference to "You" references the insured. Again, the contractual issue is moot, but assuming this were a contractual provision nothing in the Disclosure Statement states that the stated duty "to maintain policy limits" necessarily means that such maintenance will in fact be orchestrated by the insured. In fact, in practice, the scenario with State Farm and most other carriers is such that the insured must accept and submit to the minimum replacement cost estimates as determined <u>by the insurer</u> in order to qualify

for the Extended Replacement Cost coverage referenced in the Disclosure Statement.

The more glaring error in this portion of the decision is the conclusion that the language "at the time the policy is issued" means that the insured only has to insure the dwelling to its full replacement cost in the first policy year of a policy that would typically renew for many subsequent years. "Nothing in the record suggests that the original policy limits were insufficient to replace her home in 1991." (p. 16) The insurance industry will agree on this point – the insured must submit to full replacement cost coverage in each and every policy year, not just the original inception year. The Court of Appeal reads language into the Disclosure Statement that simply is not there - "at the time the policy is *(FIRST)* issued". The Court of Appeal's focus on year #1 was misplaced.[2] We have no quarrel with the award for State Farm on the Breach of Contract cause of action on other grounds but this portion of the opinion is flawed, unnecessary and misleading and should be decertified.

Annual Policy Limits Adjustments
(Section 4, p. 17)

Everett claimed that the inflation coverage provision (which the Court of Appeal held did not exist in Section 2 of the opinion) supports a finding that the policy provides for 100% Replacement Cost. The Court then found that the Disclosure Statement places the burden of determining the higher limit of liability needed (in subsequent years) on the insured. But the *Everett* Court had already concluded in Section 2 that only the first policy year was relevant. The opinion is inconsistent in this regard and should be decertified.

The balance of the opinion concerns tort obligations and this is the primary area of concern and focus of this request for decertification. The Court's sweeping conclusions on *ex contractu* arguments seem to cross over and address independent tort duties. The

[2] The genesis of the error was State Farm's argument that any misrepresentations that were made were only in reference to the original policy thus rendering them irrelevant to subsequent policy years. While this related to the tort claims, it misdirected the Court's attention to only year #1 of the policy.

genesis of the problem is plaintiff/appellant's commingling and overlapping of tort and contract. In a nutshell, Everett argued that the insurer promised her a rose garden (tort/misrepresentation) and that as a result her contract benefits should be something different than as specified in the contract (contractual remedy). The law doesn't work that way and the opinion's attempt to track this erroneous argument resulted in a similarly flawed decision. The tort causes of action in *Everett* should have been dismissed, not because of an "integration clause" in the contract, but because noone at State Farm ever had a conversation with Everett that could support a misrepresentation claim. This should have ended the tort analysis and the opinion's divergence into the machinations of the contract were unnecessary and misplaced. Conversely, if misrepresentations had occurred, they would clearly be actionable *in tort*, not in contract, and nothing in the contract would affect that tort analysis, particularly not the integration clause. Tort claims do not include modifying the terms of a written contract. This is where *Everett* got sideways in her presentation and the Court of Appeals got sucked into an analysis that was flawed from the outset. The opinion, though reaching the correct result, is inherently flawed.

Duty to Maintain Sufficient Limits
(p. 16)

The following language is highly objectionable and will lead to mass confusion: "It is up to the insured to determine whether he or she has sufficient coverage for his or her needs". This language is found in Section B3 of the opinion and was in response to Everett's contention that the Disclosure Statement contractually obligated State Farm to maintain sufficient coverage for its insured (discussed *supra*). But the language goes further in seemingly negating duty in any and all scenarios, including tort. This is erroneous and renders the decision misleading. This statement is easily taken out of context and improperly applied to a *tort* setting.

If an insurance carrier holds itself out as knowledgeable in the area of replacement cost estimating and advises the policyholder that their coverage is adequate to replace their home, that carrier has assumed the duty to provide sufficient coverage to its policyholder. If the insurance carrier breaches this self-imposed duty, a policyholder who is harmed as a result therefrom should be able to pursue the carrier in tort. This principle has been applied to insurance agents in prior published authority:

> "The general rule in cases of this sort is still that articulated by now-Justice Kennard in *Jones*. It is that, as a general proposition, an insurance agent does not have a duty to volunteer to an insured that the latter should procure additional or different coverage. This rule is well summarized by the part II caption from *Nacsa* quoted above. The rule changes, however, when – but only when – one of the following three things happens: (a) the agent misrepresents the nature, extent or scope of the coverage being offered or provided (as in *Free, Desai and Nacsa*), (b) there is a request or inquiry by the insured for a particular type or extent of coverage (as in *Westrick*), or (c) the agent assumes an additional duty by either express agreement or by 'holding himself out' as having expertise in a given field of insurance being sought by the insured (as in *Kurtz*)." *Fitzpatrick v Hayes* (1997) 57 Cal. App.4th 916, 927.

There is no reason why these same principles of law should not apply to insurance carriers as well as their agents in cases with supporting factual circumstances. This opinion is overbroad and impinges on valid tort causes of action.

Misrepresentation Claims

Section C of the opinion addresses Everett's tort claims. On pages 19 and 20 of the published opinion, the Court of Appeal states that, due to the presence of an integration clause, that no alleged oral representations by appellant's insurance agent could have been effective to change the terms of the fully integrated insurance policy. Again, this is another instance where the Court of Appeal understandably ruled in Respondent State Farm's favor *in this case* but made a sweeping over generalization in a published opinion which will undoubtedly create problems for plaintiffs with meritorious tort claims and for the trial courts that hear such claims. Our pending cases do not involve insureds who seek to alter the terms of their contracts by arguing that the agent promised them a rose garden. This parochial argument was aggressively refuted by the Court of Appeal in *Everett*. The problem with the *Everett* opinion is that the tort of misrepresentation is completely independent of the terms of the contract and is conduct-based. The Court erred in applying contract law principles to a tort issue. Again, the genesis is Everett's failure to distinguish between *ex contractu* and *ex delicto* claims in her smorgasbord presentation of the case.

In *Everett*, the representations upon which appellant's misrepresentation causes of action were based were *true* at the time they were made (representations of sufficient coverage were made at a time when appellant had *guaranteed* replacement cost coverage which would pay to replace appellant's home regardless of limits). As such, there is no question these causes of action were rightfully dismissed by the trial court. Instead of simply addressing the representations at issue in this case, however, the Court of Appeal went further and made statements which could easily be construed as indicating that misrepresentations about contracts with integration clauses are not actionable. Again, appellant inappropriately couched this as a *breach of contract* case and as a result the Court of Appeal was understandably analyzing the case as such. We are in no way arguing that the policy terms of a contract with an integration clause can be modified by prior inconsistent statements. What we *are* arguing is that the Court of Appeal went too far in this published opinion by implying that misrepresentations by insurance companies about their policy contracts containing integration clauses are not actionable. Just because the terms of a policy cannot be modified by a misrepresentation does not mean that a plaintiff cannot seek tort damages resulting from that misrepresentation. This in no way violates a contract's integration clause. The contract analysis in response to the tort claim was misplaced. The opinion should therefore be decertified.

Insurance Code section 678/Reduction of Limits (Section D, p. 20)

This section of the opinion is highly objectionable and critical to multiple fire victims. Concurrent briefing is pending before the underlying Appellate Court impacting ten of the cases referenced in footnote 1 herein. The published opinion says, "Everett alleges that State Farm failed to provide adequate notice of REDUCTION in her insurance coverage". The Court of Appeal responded and addressed this argument shortly thereafter by noting, "Here, State Farm provided Everett with more than sufficient notice of the CHANGES in her policy. According to the record, State Farm mailed its insureds, including Everett, a notice informing them of the REDUCTION in coverage. Specifically, the notice informed Everett that the 'Guaranteed Replacement Cost Coverage' was being ELIMINATED." The wording of the Court of Appeal's opinion will undoubtedly lead to confusion in other pending cases in that it commingles the terms "REDUCTION" and "ELIMINATION" as if they were synonymous, which they are not. If the Court of Appeal intended to hold that the words "REDUCTION" and "ELIMINATION" are synonymous (an interpretation which we would strongly disagree

with) it is respectfully suggested that the opinion should so reflect this finding. The more likely scenario is that the Court of Appeal inadvertently commingled these two terms as does State Farm.

California *Insurance Code* section 678 contains a dual disclosure obligation to provide notice of both ELIMINATIONS of coverage and/or REDUCTIONS of limits. We agree with the Court of Appeal's observation that an ELIMINATION of coverage is clearly disclosed. Appellant Everett unclearly framed the issue and purported to address the separate disclosure obligation of REDUCTION of limits, as noted by the Court's opinion. The Court of Appeal did not address the presence/absence of a notice of REDUCTION of limits and instead asserted that the notice of "ELIMINATION" of coverage was sufficient. This does not squarely address the question as framed and is very misleading to other pending cases.

The wording of the Court's opinion – "According to the record, State Farm mailed to its insureds, including Everett, a notice informing them of the REDUCTION of coverage" – is not in fact supported by the record which is cited in the Court's opinion. It is helpful and instructive that the Court included a copy of State Farm's "Important Notice" in Appendix A of the opinion itself at pages 24 through 27. Though the document very clearly provides notice of an ELIMINATION of coverage, it *does not* provide "notice informing them of the REDUCTION in coverage." (*See* p. 24) Though these two types of coverage changes may seem as though they are one and the same, they are not. This is exactly why *Insurance Code* section 678 has a dual disclosure requirement.

What the facts and record of *Everett v. State Farm* do not include – and which other pending cases *do* include – is the fact that State Farm knew its replacement cost estimating software was producing grossly low estimates when it implemented this coverage switch and intentionally concealed this information from its policyholders. It is one thing for an insurance company to provide a replacement cost estimate to its policyholders and tell them "this is only an estimate" in order to shift the risk of underinsurance to the policyholder. If the policyholder is uncomfortable, they can get an estimate from another source (e.g. appraiser, contractor) upon which to base their policy limits. It is something else entirely when an insurance company shifts the risk of underinsurance to the policyholder while acutely knowing that the software it uses to

estimate the replacement cost of their home – and which the insureds are *required* to use – is completely deficient. Had the deficiency of State Farm's replacement cost estimating software been disclosed, the insureds would have constructive notice that the limits of their new "Extended Replacement Cost" policies were far less the limits of their "Guaranteed Replacement Cost" policies and that as such, a "reduction of limits" was being effectuated by the ELIMINATION of the Guaranteed Replacement Cost benefit. The "Important Notice" provided no notice of REDUCTION of limits as required by *Insurance Code* section 678; it only informed insureds that the Guaranteed Replacement Cost coverage was being ELIMINATED. By couching the coverage change as merely an elimination, concurrent with the substitution of another seemingly congruent coverage product, the policyholder was never told what the statute mandates he be told: YOUR LIMITS ARE BEING REDUCED.

Conclusion

Everett completely missed the boat on the Reduction of Limits argument and thereby impacted pending cases with a different and more refined point. Everett's argument that the policy was "unclear" was thoughtlessly framed and it is obvious why the Court of Appeal attached the "Important Notice" to the opinion itself. We do not quarrel with the Court's conclusion that as a matter of *contract law* that the Disclosure Statement does not saddle State Farm with a contractual "duty to maintain policy limits equal to replacement cost". (p. 16) The tort causes of action were unsupported by the evidence – no misrepresentations were offered. The integration clause is irrelevant to this analysis. However, as a matter of *tort law*, as discussed *supra*, if State Farm provided estimated replacement costs to its insureds without concurrently disclosing that its own management knew those estimates were grossly deficient, such facts could be actionable on a tort basis, i.e. fraudulent concealment and negligence. The way the opinion is phrased is (a) inaccurate in relation to the record – the "Important Notice" is *silent* relative to REDUCTION OF LIMITS vis a vis the ELIMINATION of the Guaranteed Replacement Cost benefit and is (b) overreaching in that it implies, at least to some readers, that no remedy at all lies for State Farm's failure to disclose the known fact that its Replacement Cost estimator generated grossly low numbers across the board. It could also adversely impact valid misrepresentation claims in tort in cases with supporting facts.

We respectfully suggest that this case should be decertified in that its holding is

relevant only to the peculiar and particularly weak fact pattern presented – a $3,000 discrepancy over allegedly unpaid Code Upgrade coverage that was horrendously presented with no supporting evidence. This petty dispute will have far reaching implications for other fire victim litigants with disputes involving multiple six figure shortfalls on their Coverage A Dwelling limits. While the Court's general conclusion is understandable in light of the facts and circumstances presented, the opinion has the potential to impact disputes and issues not before the Court. [*See* Exhibit "B" attached hereto] A Writ on the "ELIMINATION -vs- REDUCTION" issue has been filed with the 4th District. [4th Civil No. D052954; *See* Exhibit "C" attached hereto] The issue was seemingly raised by Appellant Everett but it was not briefed and was not addressed by the Court's published opinion. The Court's opinion treats the words ELIMINATION and REDUCTION as redundancies which violates the specific language of the statute and completely abrogates the intent of the legislature to implement a dual disclosure obligation.

This letter brief does not do service to this important issue of statutory interpretation and application. The pending Writ should be reviewed if further analysis of this issue is desired. The bottom line is that multiple litigants with compelling cases are being short-changed by an opinion which should have been limited to the facts and legal arguments asserted in this particular case. As such, we respectfully urge depublication of this opinion or, in the alternative, that it be modified so as to limit the impact of its aforementioned objectionable portions and to reflect the fact that State Farm's "Important Notice", though it clearly disclosed the ELIMINATION of coverage, did not address the REDUCTION of limits. We do not disagree with the result of this particular case but simply request that this opinion, which is flawed and misleading, be depublished.

Sincerely,

Brian J. Heffernan

BRIAN J. HEFFERNAN

Encl: Exh. "A" - *Everett v. State Farm* decision
Exh. "B" - O'Neill letter encl. Everett decision
Exh. "C" - *Flahive v. State Farm* Petition for Writ Review (without exhibits)

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EXHIBIT A

Filed 4/29/08

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

AGNES H. EVERETT, Plaintiff and Appellant, v. STATE FARM GENERAL INSURANCE COMPANY, Defendant and Respondent.	E041807 (Super.Ct.No. SCVSS124763) OPINION

APPEAL from the Superior Court of San Bernardino County. John P. Wade, Judge. Affirmed.

Law Offices of Christian J. Garris and Christian J. Garris for Plaintiff and Appellant.

Robie & Matthai, James R. Robie, Michael J. O'Neill and Natalie A. Kouyoumdjian; Hughes & Nunn and Randall M. Nunn for Defendant and Respondent.

Agnes H. Everett (Everett) appeals after summary adjudication of issues and motion for judgment on the pleadings were granted in favor of defendant State Farm General Insurance Company (State Farm) in Everett's action, which alleged breach of

contract, breach of the duty of good faith and fair dealing, promissory fraud, fraudulent misrepresentation, negligent misrepresentation, and reformation. We affirm.

I. FACTS AND PROCEDURAL HISTORY

In October 1991, Everett purchased a home for approximately $99,000 located on Chiquita Lane in San Bernardino, California. At the same time, she purchased a homeowner's policy from State Farm through agent Bryan Hendry (Hendry). The policy number was 75-BJ-7254-8. It was renewed annually on September 25. The policy included an endorsement for guaranteed replacement cost coverage, which provided that State Farm would pay the full amount needed to repair the damaged or destroyed dwelling with like or equivalent construction, without regard to the policy limits.

In August 1993, service of Everett's policy was transferred to agent Desiree Sarnowski (Sarnowski). Sarnowski did not inspect the property, nor did Everett request Sarnowski to inspect the property. Everett also never asked Sarnowski to review her policy or increase the limits.

In 1997, State Farm eliminated the guaranteed replacement cost coverage in its homeowner policies. To provide its insureds with ample warning, State Farm sent each policyholder a notice of the change in coverage. State Farm made certain its notice complied with applicable law. In the notice, State Farm informed its insureds that if they chose to renew their homeowners policies with State Farm, guaranteed replacement cost coverage would no longer be available. 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."[1] The notice further specified the changes to the policy in a second boldfaced, capitalized heading entitled, "**I. REDUCTIONS OR ELIMINATIONS OF COVERAGE**." The insureds were notified that "**GUARANTEED EXTRA COVERAGE** (Current Homeowners Extra Form 5) and **GUARANTEED REPLACEMENT COST COVERAGE** (Current Endorsement to Homeowners Special Form 3)" were eliminated and that their policy "now has a stated limit of liability under Coverage A that reflects the maximum that will be paid in case of loss." Unless "Increased Dwelling Limit" is shown in the declarations, the "policy no longer provides a guarantee to replace your home regardless of the cost."[2]

Everett does not deny that she received this notice. Attached to the notice sent to her was a declarations page identifying the stated policy limits for the policy period 1997 through 1998. At the bottom of the declarations page was a bill for the premium for that policy period. On September 29, 1997, Everett accepted the homeowner's policy with State Farm (under the new terms providing for a stated policy limit) when her premium for the policy period 1997 through 1998 was paid via a check from her impound account.

Each year from 2000 to 2003, State Farm sent a renewal certificate to Everett. The renewal certificate provided Everett with a yearly reminder that it was her

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[1] All boldface material and words that are in capital letters quoted in this opinion were in boldface or capital letters in the original notice. The words which are also underlined are the portions that were printed in red.

[2] See appendix A, *post*, page 24, for the notice. The portions showing underline are those which were printed in red.

responsibility to insure her home with adequate coverage. Thus, while State Farm provided Everett and other insureds with a replacement cost estimate, State Farm's renewal certificate was clear to explain that the amount of the estimate was just that — merely an estimate. The renewal certificate included the following: "The State Farm replacement cost is an estimated replacement cost based on general information about your home. It is developed from models that use cost of construction materials and labor rates for like homes in the area. The actual cost to replace your home may be significantly different. State Farm does not guarantee that this figure will represent the actual cost to replace your home. You are responsible for selecting the appropriate amount of coverage and you may obtain an appraisal or contractor estimate which State Farm will consider and accept, if reasonable. Higher coverage amounts may be selected and will result in higher premiums."

In addition to the annual renewal certificate, every two years State Farm mailed to its California insureds, including Everett, a "California Residential Property Insurance Disclosure." The disclosure was provided in compliance with Insurance Code section 10102. It explained the terms "replacement cost" and "extended replacement cost," as written by the Legislature. Extended replacement cost coverage was defined as the amount of replacement cost up to a specified amount above the policy limit.

On October 25, 2003, Everett's home was destroyed by fire. She submitted a claim to State Farm under her homeowner's policy. One of the first tasks undertaken was to determine the scope of Everett's coverage. Her declarations page for the policy period

of September 25, 2003, through September 24, 2004, provided that State Farm insured Everett's home under a homeowner's policy, FP-7955-CA, with dwelling limits in the amount of $92,300, a dwelling extension limit in the amount of $9,230, and a personal property limit in the amount of $69,225. Her dwelling coverage was subject to a 20 percent (or $18,460) increase in contract limits under "Option ID"; it also provided "Ordinance/Law" coverage in the amount of $9,230.

The "Coverage A Loss Settlement Endorsement" incorporated into Everett's policy provided that State Farm "will pay up to the applicable limit of liability shown in the Declarations, the reasonable and necessary cost to repair or replace with similar construction . . . the damaged part of the property covered under **SECTION I — COVERAGES, COVERAGE A — DWELLING.**" State Farm adjusted Everett's claim and paid her $138,654.48 for her structural loss and $76,620 for her personal property. This amount took into account the increased sum under Everett's "Option ID" provision and the increase for inflation and "Ordinance/Law" coverage.

On March 25, 2005, Everett initiated this action against State Farm and its agent, Desiree Sarnowski,[3] asserting claims for breach of contract, breach of implied covenant of good faith and fair dealing, negligence, reformation, and fraud. Everett's contract claims were based on two theories. First, she alleged that the policy in effect at the time of her loss provided guaranteed replacement cost coverage such that she was entitled to

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[3] Everett dismissed the action, specifically the claim for professional negligence, as to Sarnowski on September 27, 2005.

full payment to replace her property without regard to policy limits. Alternatively, she alleged that State Farm failed to provide her with sufficient notice of the changes in her policy and thus her prior policy containing guaranteed replacement cost coverage should remain in effect.

On April 21, 2006, State Farm filed a motion for summary adjudication on the ground that Everett's policy, which was in effect at the time of her loss, did not include guaranteed replacement cost coverage. State Farm argued that Everett received sufficient notice about the change in her coverage with her 1997 renewal notice. Regarding her claim of bad faith, State Farm claimed there was no breach and thus no bad faith. Finally, State Farm argued that Everett's fraud-based claims were invalid because it never represented to her that her home was covered for up to 100 percent of the amount to replace her property.

On July 6, 2006, the trial court granted State Farm's motion for summary adjudication. Twenty days later, State Farm filed a motion for judgment on the pleadings as to Everett's remaining claim for reformation. The motion was granted and judgment was entered in favor of State Farm on August 17.

On appeal, Everett contends the judgment must be reversed because (1) State Farm did not pay the policy limits on the code upgrade coverage, and (2) the policy, which promises to replace her home while stating a limit, is unclear.

II. STANDARD OF REVIEW

A. Motion for Summary Adjudication.

On appeal from a motion for summary judgment or summary adjudication of issues we conduct a de novo review of the record. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142; *Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1601.)

B. Motion for Judgment on the Pleadings.

"The standard of review for a motion for judgment on the pleadings is the same as that for a general demurrer." (*Dunn v. County of Santa Barbara* (2006) 135 Cal.App.4th 1281, 1298.) "On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, we give the complaint a reasonable interpretation, and treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions or conclusions of law. A trial court errs in sustaining a demurrer when the plaintiff has stated a cause of action under any possible legal theory, and abuses its discretion in sustaining a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment. [Citation.]" (*Palm Springs Tennis Club v. Rangel* (1999) 73 Cal.App.4th 1, 4-5 (*Palm Springs Tennis Club*).) Still, the burden is on the appellant to demonstrate the existence of reversible error. (*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1996) 42 Cal.App.4th 608, 626.) Therefore we need only discuss whether a cause of action was stated under the theories raised on appeal. (*Ibid.*)

Further, "[w]hile a plaintiff need not request leave to amend in order to preserve on appeal the issue of whether the court abused its discretion in sustaining a demurrer without leave to amend (Code Civ. Proc., § 472c), on appeal the plaintiff does bear the burden of proving there is a reasonable possibility the defect in the pleading can be cured by amendment. [Citation.] '". . . Plaintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading. . . ." [Citation.]' [Citation.]" (*Palm Springs Tennis Club, supra*, 73 Cal.App.4th at pp. 7-8.)

III. MOTION FOR SUMMARY ADJUDICATION

A. Interpretation of Everett's Policy.

According to Everett, either her policy covered her loss in its entirety, or the policy was unclear. We begin our analysis by looking at the language in the policy.

"While insurance contracts have special features, they are still contracts to which the ordinary rules of contractual interpretation apply." (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264.) "'Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs its interpretation. [Citation.] Such intent is to be inferred, if possible, solely from the written provisions of the contract. [Citation.]'" (*Community Redevelopment Agency v. Aetna Casualty & Surety Co.* (1996) 50 Cal.App.4th 329, 338 (*Community Redevelopment*), quoting *Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, 666-667.) "To yield their meaning, the provisions of a policy must be considered in their full context. [Citations.] Where it is clear, the language must be read accordingly.

[Citations.] Where it is not, it must be read in conformity with what the insurer believed the insured understood thereby at the time of formation [citations] and, if it remains problematic, in the sense that satisfies the insured's objectively reasonable expectations [citations]." (*Buss v. Superior Court* (1997) 16 Cal.4th 35, 45.)

"'It is, of course, well established that an insurer has a right to limit the policy coverage in plain and understandable language, and is at liberty to limit the character and extent of the risk it undertakes to assume [citations].' [Citations.] It is likewise axiomatic that an insurance policy is but a contract and that like all other contracts, it must be construed from the language used; where, as here, its terms are plain and unambiguous, the courts have a duty to enforce the contract as agreed upon by the parties. [Citations.] [¶] Thus, courts may not rewrite the insurance contract or force a conclusion to exact liability where none was contemplated. [Citations.]" (*Hackethal v. National Casualty Co.* (1987) 189 Cal.App.3d 1102, 1109.)

Here, State Farm's policy in effect at the time of Everett's loss provided for "Replacement Cost — Similar Construction" for her dwelling. More specifically, in the "COVERAGE A LOSS SETTLEMENT ENDORSEMENT," the policy provides that State Farm "will pay *up to the applicable limit of liability shown in the Declarations*, the reasonable and necessary cost to repair or replace with similar construction and for the same use on the premises shown in the Declarations, the damaged part of the property covered under **SECTION I — COVERAGES, COVEREAGE A — DWELLING.**"

(Italics added.) The declarations page shows a limit of $92,300, plus "Option ID" or "Increase Dwlg Up to $18,460."

Everett acknowledges that the "Loss Settlement" section of the policy and the "FE-5363" endorsement state that the amount payable on a claim for the dwelling is determined solely by looking at the declarations page. However, she contends that the declarations page is inconsistent. She notes that the declarations page includes both a stated dollar amount of $92,300 and a statement for the loss settlement provision that the policy includes replacement cost with "Similar Construction." She argues, "In such a situation, it is quite reasonable for an insured to believe that State Farm would replace Everett's home with similar construction — something that State Farm has refused to do."

Moreover, Everett focuses on the policy's use of the word "replace" and argues, "'Replace' means to restore to the state the property was in just prior to the fire. By no interpretation or reasoning can replace ever mean: 'We will pay you some money that may or may not be enough to rebuild your home.'" Everett contends that State Farm used the word "replace" to deceive its customers into thinking that they have one thing when in reality they have something else. More specifically, Everett argues, "The policy provides replacement cost coverage — i.e., the policy promised to replace Everett's home in the event of a total loss. Otherwise, the word 'replacement,' which appears in the policy would constitute a deceptive inducement to insureds." We disagree.

To accept Everett's argument is to value one word over all of the others used in the policy. However, "[i]n construing the policy before us, it is not our function to select a particular definition of a single word and apply it without regard to other language in the policy. [Citation.] '"Ambiguity is not necessarily to be found in the fact that a word or phrase isolated from its context is susceptible of more than one meaning." [Citation.]' [Citation.] An insurance policy must be interpreted as a whole and in context. [Citation.]" (*Fire Ins. Exchange v. Superior Court* (2004) 116 Cal.App.4th 446, 454.)

Thus, moving beyond the single word "replace," we find the following language in the "LOSS SETTLEMENT" section under "A1 — Replacement Cost Loss Settlement" dispositive. The language states: "Similar Construction is replaced with the following: [¶] We will pay *up to the applicable limit of liability shown in the Declarations*, the reasonable and necessary cost to repair or replace with similar construction and for the same use on the premises shown in the Declarations, the damaged part of the property covered under **SECTION I — COVERAGES, COVERAGE A — DWELLING.**" (Italics added.) Even if the word "replace" is interpreted as restoring the property to its similar state prior to the fire, regardless of its use, the "COVERAGE A LOSS SETTLEMENT ENDORSEMENT" clearly and unequivocally limits payment to the amount stated in the declarations page. There is no ambiguity. Express coverage limitations must be respected. (*Fidelity & Deposit Co. v. Charter Oak Fire Ins. Co.* (1998) 66 Cal.App.4th 1080, 1086.) Accordingly, contrary to Everett's claim, her policy

does not entitle her to the total cost to replace her property irrespective of her policy limits.

Notwithstanding the above, State Farm explains the use of 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.'" According to State Farm, a general fire insurance policy provides for "actual cash value" coverage. (Ins. Code, § 2071.) However, the amount of "actual cash value" is based on "the fair market value [of the damaged property] at the time of destruction" (*Fire Ins. Exchange v. Superior Court*, *supra*, 116 Cal.App.4th at p. 462) which oftentimes is insufficient to repair or replace the property. (*Conway v. Farmers Home Mut. Ins. Co.* (1994) 26 Cal.App.4th 1185, 1189.) 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.' [Citations.]"

Based on the above, we find that Everett's policy was not unclear, nor did it guarantee to cover her loss in its entirety.

B. Breach of Contract.

1. Payment of code upgrades.

Everett contends that, even if we reject her first argument and find that the declarations page sets the dollar limit on the amount State Farm must pay, we should still reverse the judgment because State Farm "did not actually pay the amount that even it contends are the policy limits." According to Everett, the "Option OL" code upgrade

coverage stated an amount of $9,230. She claims that the cost of code upgrades for rebuilding her home exceeded $9,396; however, State Farm paid only $5,696. In response, State Farm acknowledges the "Option OL" code upgrade coverage but argues that Everett is "not ***automatically*** entitled to the full policy limits" unless she establishes that "she has incurred (or will incur) the cost for code upgrades up to the policy limits for that coverage.

Here, State Farm notes that Everett has failed to offer any admissible evidence to support her claim that the cost of code upgrades to replace her home exceeded policy limits. Everett cites the declaration of Rob Rettig that was submitted in opposition to State Farm's motion for summary judgment, to which declaration State Farm objected. State Farm's objection was sustained.[4] Mr. Rettig is a general contractor, who opined that the cost of code upgrades for Everett's home "exceeds $9,396." However, Mr. Rettig offered no explanation as to how and why he reached this conclusion. Nor did he provide any documentation to support it. Rather, his opinion amounted to merely an estimate. As he noted, "There are several items which remain open at this time. They need to be addressed before final pricing for this residence can be completed: [¶] . . . [¶] Code Upgrades unless specifically noted herein."

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[4] Everett has not challenged the trial court's ruling in this appeal. (*City of Ripon v. Sweetin* (2002) 100 Cal.App.4th 887, 900-901 [appellant bears the burden of establishing that the trial court abused its discretion in its ruling on admissibility of evidence.].)

Because Everett failed to show that she either incurred, or would incur, the cost for code upgrades up to the policy limits, this assertion does not support a claim for breach of contract.

2. Payment to replace Everett's home.

Citing *Desai v. Farmers Ins. Exchange* (1996) 47 Cal.App.4th 1110 (*Desai*), Everett contends that State Farm breached the contract of insurance by not paying to replace her home.

In *Desai*, an insured sued his real property insurer, Farmers Insurance Exchange (Farmers) and the agent for, inter alia, breach of contract. The insured claimed that the defendants failed and refused to provide him with the 100 percent replacement cost coverage which he had requested and which the agent had assured him he was getting. (*Desai, supra*, 47 Cal.App.4th at pp. 1114-1115.) The policy contained a "Value Protection Clause," which provided: "'We [Farmers] may increase the limits of insurance to reflect changes in costs of construction and personal property values. Any such increase will be made on the renewal date of this policy or on the anniversary date of 3-year policies paid annually. If a Replacement Cost provision forms a part of this policy, we guarantee that the limits of insurance meet the replacement cost requirements.'" (*Id.* at p. 1116.) Additionally, Farmers informed its policyholders: "'Your policy contains a very important feature called Value Protection. Value Protection provides *automatic protection against inflation* so that the coverage amounts are increased as the costs of replacing your home or Personal Property increase. Value

Protection *guarantees to meet all minimum insurance-to-replacement cost requirements* if any are present in your policy. Subject to the amount of your policy limits and all policy provisions, depreciation will not be applied to most building losses . . . . The enclosed premium notice includes the increased amounts of insurance and premium, based on the applicable indexes for your property and your area. If there has been no increase in amounts of insurance this is because the applicable indexes did not show an upward adjustment for this period.' (Italics added.)" (*Ibid.*) Although the Farmers policy also provided for a $150,000 liability cap, our colleagues in the Second District found that the inclusion of the value protection clause would lead an objectively reasonable insured layperson to believe that the policy guaranteed replacement coverage, regardless of the insurer's purported policy limits. (*Id.* at pp. 1117-1118.)

Here, unlike the policy in *Desai, supra*, 47 Cal.App.4th at page 1117, Everett's policy does not include any language guaranteeing replacement cost coverage, nor does it make any "promises of automatic protection." Instead, Everett's policy expressly provides that State Farm will pay the reasonable cost to replace the damaged property up to the stated policy limits. Because State Farm did just that, Everett's assertion that State Farm failed to pay to replace her home does not support a claim for breach of contract.

3. Failure to maintain policy limits equal to replacement costs.

Referring to the statutorily mandated California Residential Property Insurance disclosure statement (Ins. Code, §§ 10101 & 10102), Everett claims that State Farm is

liable for its failure to maintain her policy limits equal to replacement costs. We disagree.

Insurance Code sections 10101 and 10102 do not require State Farm to set policy limits that equal the cost to replace the property. Nor is State Farm duty bound to set policy limits for insureds. It is up to the insured to determine whether he or she has sufficient coverage for his or her needs. In fact, the California Residential Property Insurance Disclosure statement provides that it is the insured's burden to obtain sufficient coverage: "To be eligible to recover extended replacement cost coverage, you 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 . . . ." Additionally, the insured "must notify the insurance company about any alterations that increase the value of the insured dwelling by a certain amount . . . ."

Each year that Everett had her insurance with State Farm, State Farm sent renewal certificates. These certificates reminded Everett that the replacement cost figure identified by State Farm was merely an estimate, and that it was her responsibility to determine whether her property was adequately insured. Thus, contrary to Everett's contention that it was State Farm's duty to maintain policy limits equal to replacement cost, Everett bore such duty. Nothing in the record suggests that the original policy limits were insufficient to replace her home in 1991. Moreover, there is nothing in the record that shows Everett requested her policy limits to be increased since they were set in 1991.

Accordingly, Everett's assertion that State Farm failed to maintain limits equal to replacement cost fails, and as such, does not support a claim for breach of contract.

4. Failure to annually adjust the policy limits to keep up with inflation.

Everett contends that because her policy includes the inflation coverage provision, she was led to believe that State Farm was ensuring that the policy continued to insure the home to 100 percent of its replacement cost. (*Desai, supra*, 47 Cal.App.4th at pp. 1117-1118.)

According to Everett's policy, the inflation coverage provision provides: "The limits of liability shown in the declarations for Coverage A, Coverage B and, when applicable, Option ID will be increased at the same rate as the increase in the Inflation Coverage Index shown in the Declarations. [¶] To find the limits on a given date: [¶] 1. divide the Index on that date by the Index as of the effective date of this Inflation Coverage provision; then [¶] 2. multiply the resulting factor by the limits of liability for Coverage A, Coverage B and Option ID separately. [¶] The limits of liability will not be reduced to less than the amounts shown in the Declarations. [¶] If during the term of this policy the Coverage A limit of liability is changed at your request, the effective date of this Inflation Coverage provision is changed to coincide with the effective date of such change."

Contrary to Everett's claim, there is nothing in the above language, or her policy taken as a whole, that supports a finding that the inflation coverage provision leads an insured to believe that the policy provides for 100 percent replacement cost. Moreover,

the facts that the policy recognizes an insured may request a higher limit of liability, and that the California Residential Property Insurance Disclosure statement places the burden of determining the higher limit of liability needed on the insured, Everett's assertion that State Farm's failure to annually adjust the policy limits to keep up with inflation does not support a claim for breach of contract.

C. Acts of State Farm's Agents.

Everett contends that State Farm agent Hendry, who sold the insurance policy to her, and State Farm agent Sarnowski, who later was responsible for maintaining the coverage, negligently represented that "State Farm would replace Everett's home in the event of a total loss, which is consistent with the policy language that the limit for the dwelling is 'Replacement Cost—Similar Construction.'"

When Everett first applied for insurance with State Farm, in October 1991, she did have guaranteed replacement cost coverage. However, in 1997, State Farm eliminated guaranteed replacement cost coverage. At that time, Everett was sent notice. Specifically, the notice stated: "**IMPORTANT NOTICE . . . about changes to your policy.**" It further informed her that the guaranteed replacement cost coverage was being eliminated and that her policy "now has a stated limit of liability under Coverage A that reflects the maximum that will be paid in case of loss. . . . The policy no longer provides a guarantee to replace your home regardless of the cost." Thus, beginning with the policy period that started in September 1997, Everett's policy no longer provided guaranteed replacement cost coverage.

Nonetheless, Everett claims that both agents misrepresented the extent of her coverage. In August 1993, service of Everett's policy was transferred to Sarnowski. Sarnowski did not inspect the property, nor did Everett request Sarnowski to inspect the property. Everett also never asked Sarnowski to review her policy or increase the limits. By 1997, when State Farm eliminated guaranteed replacement cost coverage, the only State Farm agent assigned to service Everett's policy was Sarnowski. Upon receiving notice of the change in coverage, Everett did not contact Sarnowski to inquire as to whether or not her policy still provided sufficient coverage. Instead, she accepted it when her premium for the policy period 1997 through 1998 was paid via a check from her impound account.

Even if we were to assume there was some type of communication between Everett and Sarnowski, as State Farm points out, Everett's policy included an integration clause that provided the policy "contains all of the agreements between you and us and any of our agents." (*Alling v. Universal Manufacturing Corp.* (1992) 5 Cal.App.4th 1412, 1433-1434 [oral agreement that predates integrated written agreement is merged into written agreement].) 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." (*EPA Real Estate Partnership v. Kang* (1992) 12 Cal.App.4th 171, 175 ["when the parties intend a written agreement to be the final and complete expression of their understanding, that writing becomes the final contract between the parties"].) Accordingly, no alleged oral

representation could have been effective to change the terms of the fully integrated policy.

D. Insurance Code Section 678.

As another basis for her claim for breach of contract, Everett alleges that State Farm failed to provide adequate notice of the reduction in her insurance coverage pursuant to Insurance Code section 678. She argues that "since [she] was not adequately advised of any reduction in coverage, the original language remains in effect."

Insurance Code section 678, subdivision (a)(1)(A), provides: "At least 45 days prior to policy expiration, an insurer shall deliver to the named insured or mail to the named insured at the address shown in the policy, . . . [¶] . . . (1) An offer of renewal of the policy . . . stating . . . [¶] . . . (A) Any reduction of limits or elimination of coverage." This section requires that the insurer's notice on renewal of changes in coverage or limits be provided in a "plain, clear and conspicuous writing." (*Fields v. Blue Shield of California* (1985) 163 Cal.App.3d 570, 583.)

Here, State Farm provided Everett with more than sufficient notice of the changes in her policy. According to the record, State Farm mailed to its insureds, including Everett, a notice informing them of the reduction in coverage. Specifically, the notice informed Everett that the "Guaranteed Replacement Cost Coverage" was being eliminated. Nonetheless, Everett maintains that the notice failed to "clearly explain" that there was a limit on the amount of coverage. We disagree. The notice stated: "Your policy now has a stated limit of liability under Coverage A that reflects the maximum that

will be paid in case of loss." If Everett did not understand what was being changed with respect to her coverage, she could have called her agent, or State Farm directly, for clarification. She did not do so. Based on the above, Everett's assertion that she did not get sufficient notification of the changes in her policy fails.

E. Breach of Implied Covenant of Good Faith and Fair Dealing.

Everett claims that "State Farm acted in bad faith by unreasonably withholding benefits." However, we have found that State Farm paid all benefits to which Everett was entitled under her policy. Because there was no breach of contract, there was no breach of the implied covenant. (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 36 [without coverage there can be no liability for bad faith on the part of the insurer].) Accordingly, summary judgment as to this cause of action was proper.

F. Fraud and Negligent Misrepresentation.

According to Everett, State Farm "deceived her into thinking that she had one thing, and now State Farm argues that she had something else." As with her previous claims, Everett argues that when she first purchased her insurance policy, she was told that she had full replacement cost. However, when her home burned down, she was not compensated for her entire loss. Thus, she maintains that whether State Farm's initial statements that she had full replacement cost amount to fraud is an issue for the trier of fact.

As we have already stated, regardless of what State Farm told Everett in 1991, the fact remains that in 1997 the type of insurance that was purchased was eliminated. Thus,

while Everett was within her right to rely on her agent's representation of full replacement coverage in the years preceding 1997, such was not the case after she was notified of a change in her coverage. Upon receipt of such notice, there is no evidence in the record that anyone from State Farm represented to Everett that she had full replacement coverage. Instead, from 1997 to the date of her loss, the record is void of any evidence of any contact between Everett and State Farm (or its agent) other than notice of the annual renewal and cost of Everett's insurance policy, and the receipt of Everett's annual premium payments. In short, there was no misrepresentation, negligent or intentional, and thus, summary judgment was proper at to these causes of action.

IV. MOTION FOR JUDGMENT ON THE PLEADINGS

In her final claim, Everett contends she is entitled to reformation of her insurance contract because State Farm allegedly represented that she would have sufficient limits to replace her property. However, her contract does not reflect this representation.

According to Civil Code section 3399, a contract may be reformed when, due to "mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties." Contrary to Everett's claim, here there was no mistake or misrepresentation. The fact that Everett did not understand the 1997 notice informing her that her guaranteed replacement cost coverage was being eliminated is her fault. State Farm did not misrepresent anything regarding Everett's insurance policy. Thus, Everett is unable to show how the defect in her pleadings can be cured by amendment. As such, we find no abuse of discretion in the trial court's decision

to grant State Farm's motion for judgment on the pleadings as to Everett's claim for reformation.

V. DISPOSITION

The judgment is affirmed. State Farm is to recover its costs on appeal.

CERTIFIED FOR PUBLICATION

HOLLENHORST
Acting P. J.

We concur:

KING
J.

MILLER
J.

FP-7055CA
S (6/98)

IMPORTANT NOTICE . . .

about changes to your policy

Enclosed with this message is your new State Farm Homeowners Policy which replaces your current policy. In an effort to provide protection for policyholders at an affordable price, we periodically make changes to your policy. Some of these changes broaden or add coverage. Some reduce or eliminate coverage. Others, although not intended to change coverage, could potentially reduce or eliminate coverage depending on court interpretations, and should, in that sense, be viewed as either actual or potential reductions in or eliminations of coverage. One very important change in your policy is the elimination of Guaranteed Replacement Cost and Guaranteed Extra Coverage.

We want to point out that every policy contains limitations and exclusions. We encourage you to read your entire policy, and note the following changes:

1. REDUCTIONS OR ELIMINATIONS OF COVERAGE

GUARANTEED EXTRA COVERAGE *(Current Homeowners Extra Form 5)* and
GUARANTEED REPLACEMENT COST COVERAGE *(Current Endorsement to Homeowners Special Form 3)*

- These coverages are eliminated. Your policy now has a stated limit of liability under Coverage A that reflects the maximum that will be paid in case of loss. If Option ID - Increased Dwelling Limit is shown in the Declarations of your new policy, it may provide an additional limit for damaged building structures. However, the most State Farm will pay for loss to property under Coverage A is the stated limit of liability, plus any additional limit provided by Option ID, if shown in the Declarations. The policy no longer provides a guarantee to replace your home regardless of the cost.

SECTION I - COVERAGES, COVERAGE B - PERSONAL PROPERTY, Special Limits of Liability

- Negotiable instruments, including checks, cashier's checks, traveler's checks, and money orders, are subject to a $1,000 limit.
- A $2,500 limit now applies to trading cards and comic books, including those in a collection.

SECTION I - COVERAGES, COVERAGE B - PERSONAL PROPERTY, Property Not Covered

- Cellular phones, CB radios, radar and laser detectors, and other similar equipment, and devices or instruments for the recording or reproduction of sound permanently attached to a vehicle are not covered.

(CONTINUED INSIDE)

Printed in U.S.A.

Appendix A

SECTION I - ADDITIONAL COVERAGES

- Under Debris Removal, coverage for tree debris removal is now limited to $500.
- Land coverage is eliminated.
- One or more volcanic eruptions that occur within a 360-hour period will be considered one volcanic eruption.
- Collapse is revised to provide coverage only for direct physical loss to covered property involving the sudden, entire collapse of a building or part of a building.
  - A definition of collapse is added. Collapse means fallen down or fallen into pieces. Sagging and bowing are added to the events that are not included under the definition of collapse.
  - The collapse must be caused by one of the perils described under item 11. Collapse.
  - Language is added stating that hidden decay must be to a supporting or weight bearing structural member of the building. Hidden insect or vermin damage must be to a structural member of the building.
- The $2,000 Temporary Living Expense Allowance coverage is eliminated.

SECTION I - LOSSES INSURED, COVERAGE B - PERSONAL PROPERTY

- Vehicles, item 6., is revised to state that loss by a vehicle means impact by a vehicle.

SECTION I - LOSSES NOT INSURED

- Hot tubs and spas are no longer covered for loss consisting of or caused by freezing, thawing, pressure or weight of water or ice. Language is added to exclude the filtration and circulation systems of hot tubs, spas and swimming pools for these perils.
- Losses consisting of or caused by continuous or repeated seepage or leakage of water or steam over a period of time are now excluded, without regard to whether there is any resulting deterioration, corrosion, rust, mold, or wet or dry rot.
- Losses consisting of or caused by fungus are not covered.
- Losses consisting of or caused by pressure from or presence of tree, shrub or plant roots are not covered.
- Language has been added to state that losses caused by or consisting of weather conditions are not covered unless the resulting loss itself is covered.
- The definition of Water Damage is revised to eliminate loss caused by all water below the surface of the ground.

SECTION I - LOSS SETTLEMENT, COVERAGE A - DWELLING, A1 - Replacement Cost Loss Settlement - Similar Construction (if shown in the Declarations)

- The basis for repair or replacement of damage to property will be similar construction rather than equivalent construction.
- Wood fences are no longer covered for replacement cost. Payment is limited to the actual cash value of the damage to the fence at the time of the loss. *(Applies only to current Homeowners Extra Form 5.)*
- You are now required to complete the actual repair or replacement within two years after the date of loss and notify us within 30 days after the work has been completed in order to receive any additional payments on a replacement cost basis.

(CONTINUED ON INSIDE BACK COVER)

SECTION I - LOSS SETTLEMENT, COVERAGE A - DWELLING, A2 - Replacement Cost Loss Settlement - Common Construction (if shown in the Declarations)

- Wood fences are no longer covered for replacement cost. Payment is limited to the actual cash value of the damage to the fence at the time of the loss. *(Applies only to current Homeowners Extra Form 5.)*
- You are now required to complete the actual repair or replacement within two years after the date of loss and notify us within 30 days after the work has been completed in order to receive any additional payments on a replacement cost basis.

SECTION I - LOSS SETTLEMENT, COVERAGE B - PERSONAL PROPERTY, B1 - Limited Replacement Cost Loss Settlement (if shown in the Declarations)

- Language is revised to indicate that we will not pay more than our cost to replace an item.

SECTION I - CONDITIONS

- Our Option is revised to state that we may, at our option, repair or replace the damaged or stolen property with similar property, rather than equivalent property.

OPTIONAL POLICY PROVISIONS (if shown in the Declarations)

- Under Option BU - Business Pursuits, computer programming is added to the professional services for which there is no bodily injury or property damage coverage.
- Under Option OL - Building Ordinance or Law, there is no longer any Building Ordinance or Law coverage for any structure not attached to the dwelling.

II. POTENTIAL REDUCTIONS OR ELIMINATIONS OF COVERAGE

Occasionally courts interpret your policy differently than we intended or anticipated. In order to preserve what we intended the former language to provide and to keep the policy affordable, we have made the changes indicated below. Accordingly, you should view these changes as either actual or potential reductions in or eliminations of coverage.

SECTION I - COVERAGES, COVERAGE A - DWELLING, Property Not Covered

- Language is added to emphasize that we do not cover the costs of repair techniques designed to compensate for or prevent land instability to any property, whether or not insured under Coverage A.

SECTION I - COVERAGES, COVERAGE B - PERSONAL PROPERTY, Special Limits of Liability

- Language is revised to emphasize that the $200 aggregate limit also applies to all collections of money, coins and medals.
- Language is revised to emphasize that the $2,500 aggregate limit also applies to all stamp collections.
- Language is added to emphasize that all electronic data processing equipment that is part of a system is included in the $5,000 limit.

SECTION I - COVERAGES, COVERAGE C - LOSS OF USE

- Additional Living Expense language has been reworded to emphasize that expenses must be incurred by the insured for coverage to apply.

SECTION I - LOSSES INSURED, COVERAGE B - PERSONAL PROPERTY

- Language is added to emphasize that under the peril of sudden and accidental discharge or overflow, coverage is not provided for the back-up of sewage from outside the residence premises plumbing system.

(CONTINUED ON REVERSE)

SECTION I - LOSSES NOT INSURED

- Language is added to emphasize that mudslide and any earth movement resulting from improper compaction, site selection or any other external forces are included in the definition of Earth Movement and therefore are excluded from coverage.
- The definition of Water Damage is revised to emphasize that loss caused by or consisting of the following are not covered:
  - tsunami and seiche;
  - water or sewage from outside the residence premises plumbing system that enters through sewers or drains.

SECTION I - LOSS SETTLEMENT, COVERAGE B - PERSONAL PROPERTY, B2 - Depreciated Loss Settlement (if shown in the Declarations)

- The basis for repair or replacement of damaged property will be the cost to repair or replace less depreciation.

OPTIONAL POLICY PROVISIONS (if shown in the Declarations)

- Under Option IO - Incidental Business, language is added to emphasize that there is no coverage for electronic data processing system equipment.

III. BROADENINGS OR ADDITIONS OF COVERAGE

SECTION I - COVERAGES, COVERAGE B - PERSONAL PROPERTY, Special Limits of Liability

- The limit on stamps is increased from $1,000 to $2,500. *(However, see Potential Reductions or Eliminations regarding collection of stamps.)*

SECTION I - LOSS SETTLEMENT, B1 - Limited Replacement Cost Loss Settlement (if shown in the Declarations)

- You now have up to two years, instead of one year, from the date of the loss to repair or replace personal property in order to obtain replacement cost benefits.

OPTIONAL POLICY PROVISIONS (if shown in the Declarations)

- Option IO - Incidental Business is revised to include coverage for those detached structures which contain the business for which we are providing coverage.

The preceding items make up the changes in your Homeowners Policy. Please read your entire new policy carefully, and place it with your other important papers. If you have any questions about your new policy, contact your State Farm agent.

Policyholder Information Service

THIS MESSAGE DOES NOT CHANGE, MODIFY OR INVALIDATE ANY OF THE PROVISIONS, TERMS OR CONDITIONS OF YOUR POLICY AND APPLICABLE ENDORSEMENTS.

THIS MESSAGE IS A GENERAL DESCRIPTION OF COVERAGE AND/OR COVERAGE CHANGES AND IS NOT A STATEMENT OF CONTRACT.

EXHIBIT B

JMK [illegible]
38000/2895

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
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April 29, 2008

Brian J. Heffernan, Esq.
ENGSTROM, LIPSCOMB & LACK
10100 Santa Monica Blvd., 16th Floor
Los Angeles, CA 90067-4107

Re: *Appleby and Heraty v. State Farm*
SF File 2004-13947
R&M File 046-4002

Dear Mr. Heffernan:

You indicated at the hearing on the motion in limine on the accuracy of the notice that your office intended to seek appellate review. I am enclosing the very recent decision from the Fourth District Court of Appeal, Division Two, in the matter of *Everett v. State Farm General Insurance Company*. I believe the Opinion is self-explanatory. I draw your attention to pages 20-21 of the Opinion.

Naturally, if you have any questions or concerns, please do not hesitate to contact me.

Very truly yours,

ROBIE & MATTHAI
A Professional Corporation

MICHAEL J. O'NEILL

MJO:wdv
Enclosure

Heffeman.019

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

EXHIBIT C

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

RALPH FLAHIVE and CAROLYN FLAHIVE
Petitioners,

VS.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF SAN DIEGO
Respondent,

STATE FARM GENERAL INSURANCE COMPANY
Real Party in Interest.

FROM THE SUPERIOR COURT FOR SAN DIEGO COUNTY,
HONORABLE RONALD L. STYN
SDSC Case No. GIC837524

PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION OR OTHER APPROPRIATE RELIEF; MEMORANDUM; SUPPORTING EXHIBITS

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IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

RALPH FLAHIVE and CAROLYN FLAHIVE
Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF SAN DIEGO
Respondent,

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PETITION FOR WRIT OF MANDATE, PROHIBITION OR OTHER APPROPRIATE RELIEF; MEMORANDUM; SUPPORTING EXHIBITS

INTRODUCTION

In 1970, our legislature unanimously enacted *Insurance Code* section 678, an important statute[1] which requires insurers to perform two very basic

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[1] Legislative History of *Insurance Code* section 678 discussed in ¶3 of Petition, *infra*. *See* complete legislative history report and analysis at EXH 0218-0278.

yet very important duties: (1) to inform policyholders if an *elimination* of coverage is being effectuated, and (2) to inform policyholders if a *reduction* of limits is being effectuated. This case presents an important issue of statutory interpretation regarding this dual disclosure requirement. Respondent Superior Court found that in this case, despite a change in petitioners' coverage which effectuated *both* an elimination of coverage *and* a reduction of limits, State Farm was under no obligation to inform policyholders of the reduction of limits because, in the Court's opinion, the reduction of limits could be *inferred* from State Farm's notice of elimination of coverage. Respondent Superior Court, though recognizing that this case presents a "very significant issue" which "affects a lot of cases" and "affects a lot of people", ironically found petitioners' argument – that *Insurance Code* section 678 required an independent notice of reduction of limits – to be "form over substance". [EXH 0469] Though this finding is a far cry from Respondent Superior Court's initial impression of petitioners' argument as "just silly" [EXH 464], the Court's recognition of the import of this case does not negate the fact that its granting of the underlying motion at issue in this Petition constituted a total disregard of *Insurance Code* section 678's explicit statutory obligation to disclose *both* eliminations of coverage *or* reductions in limits. As State Farm's

"Important Notice"[2] illustrates, the only party partaking in "form over substance" is State Farm.

Insurance Code section 678 requires that, at least 45 days prior to policy expiration, an insurer shall notify the named insured when an offer of renewal of a policy is contingent upon payment as stated in the offer, stating any reduction of limits ***or*** elimination of coverage, if any. Long before wildfire destroyed their home in October 2003, petitioners purchased the best policy State Farm had to offer. At the time, that product was denominated as a "Guaranteed Replacement Cost" (GRC) policy which would pay the full amount needed to repair or replace their dwelling without regard to policy limits. In or around 1997, State Farm discontinued selling these policies and replaced them with a coverage product commonly referred to as "Extended Replacement Cost" (ERC). ERC policies pay the amount needed to repair or replace an insured dwelling only up to a certain percentage over the stated policy limits[3]. Though ERC policies are more limited than GRC policies, both are premised on the concept of "replacement cost" and both require the policyholder to insure their home at

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[2] See "Important Notice" at EXH 0133.

[3] The percentage amount varies depending on the insurance company. State Farm's ERC policies pay 20% over the stated limits.

100% of its full replacement cost.[4] So long as the limits were set correctly, both policies would provide 100% replacement cost coverage. Absent a disclosure that the limits were anything less than 100% replacement cost, there is no indication that either policy provides anything less than the other. In the instant case, though unknown to petitioners at the time it occurred, it is undisputed that the switch from GRC to ERC effectuated not only an elimination of coverage but a reduction of policy limits as well. [EXH 0006, 0011, 0464-0465, 0467-0468]

Concurrent with State Farm's switch from GRC to ERC coverage, State Farm sent petitioners an "Important Notice" which disclosed the *elimination* of coverage but made no mention of the *reduction* of limits which would transpire as a result of this change. State Farm's Notice vaguely indicated the presence of a Reduction *or* Elimination of Coverage but the word "reduction" is only referenced in the abstract along with other opposite terms.

> "Some of these changes broaden or add coverage. Some reduce or eliminate coverage. Others, although not intended to change coverage, could potentially reduce or eliminate

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[4] See California Residential Property Insurance Disclosure Form at EXH 0170-0171.

coverage depending on court interpretations, and should, in that sense, be viewed as either actual or potential reductions or eliminations of coverage. One very important change in your policy is the elimination of Guaranteed Replacement Cost and Guaranteed Extra Coverage." [EXH 0133]

Though petitioners were informed of a definitive *elimination* in coverage, they were never informed of a *reduction* of coverage. Instead, they were told that some of these (unspecified) changes broaden or add or reduce or eliminate coverage, "depending on court interpretations", whatever that means. If this isn't form over function, we don't know what is.[5]

"It is a long-standing general principle applicable to insurance policies that an insurance company is bound by a greater coverage in an earlier policy when a renewal policy is issued but the insured is not notified of the *specific reduction in coverage*." *Fields v. Blue Shield of California* (1985) 163 Cal.App.3d 570, 579 (*emphasis added*). In an attempt to eradicate any potential for liability to petitioners under the terms of the prior GRC policy, State Farm filed an early "Motion in Limine" to preclude

---

[5] Exacerbating the confusion with the switch from GRC to ERC coverage was the concurrent switch of coverage provider from "State Farm Fire & Casualty Company" to "State Farm General Insurance Company". [EXH 0131]

plaintiffs from asserting that its "Important Notice" failed to provide adequate notice of elimination of GRC coverage.[6] Respondent Superior Court ruled that *Insurance Code* section 678 required an offer of renewal to contain the requisite information regarding reduction of limits or elimination of coverage in instances where either a reduction of limits, or an elimination of coverage, or both, were to take place. [EXH 0487] Respondent Superior Court further ruled that State Farm's Notice *implicitly* provided adequate notice of reduction in coverage caused by the elimination of GRC by *explicitly* providing a notice of *elimination* of GRC coverage. [EXH 0488] In other words, in Respondent Superior Court's view, the acknowledged lack of notice of reduction of limits did not constitute a statutory violation despite the fact that the statute specifically mandates such notice.

The issue presented in this petition is whether State Farm's lack of

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[6] The "Motion in Limine" is really a Motion for Summary Adjudication in disguise. Moreover, Petitioners never argued that the "Important Notice" failed to provide adequate notice of elimination of GRC coverage and stated as much in their Opposition papers. Petitioners' argument is and always has been that a *reduction* in limits was not disclosed as statutorily required by *Insurance Code* section 678. [EXH 0103] The true purpose of this "Motion in Limine", which petitioners did not technically oppose as it was framed, was to elicit Respondent Superior Court's interpretation of *Insurance Code* section 678 and its application to State Farm's "Important Notice". This is exactly what Respondent Superior Court did in its Ruling. [EXH 0485-0489]

notice of reduction of limits was acceptable in light of (a) the explicit statutory requirement of such a notice and (b) the undisputed fact that a reduction of limits took place and was not disclosed. Respondent Superior Court found that petitioner's argument was "form over function" and that State Farm's notice of elimination of coverage was sufficient to inform petitioners about the extent of the changes in coverage resulting from the elimination of GRC policies. [EXH 0469] This analysis fails to address the fact that "elimination of coverage" and "reduction of limits" are two different types of changes to a policy which do not necessarily have the same impact on coverage. Petitioners contend that *State Farm's* Important Notice constitutes patent "form over function" – deliberately omitting the statutorily prescribed terminology – "reduction" – and instead removing and replacing seemingly congruent coverage products. Petitioners respectfully submit that an explicit statutory notice requirement was disregarded in the name of "form over function" when the *function* and intent of the statute is to inform consumers if they are getting less coverage than they had previously. State Farm violated both the letter and the spirit of the statute.[7]

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[7] State Farm also made a significant reduction of earthquake coverage in 1985 without adequate notice and is acutely aware of this statutory mandate. *See State Farm v. Superior Court (Allegro)* (1996) 45 Cal.App.4th 1093, 1099 (abrogated on separate point of law).

Authenticity of Exhibits

1. All exhibits accompanying this petition are true and correct copies of original documents on file with respondent Superior Court, except Exhibit G, which is a true and correct copy of the respondent Superior Court's tentative ruling on defendant's motion in limine, and Exhibit H, which is a true and correct copy of the original reporter's transcript of the hearing of February 15, 2008 on defendant's motion in limine. The exhibits are incorporated herein by reference as though fully set forth in this petition. The exhibits are paginated consecutively from page EXH0001 to page EXH0491. Page references in this petition are to the consecutive pagination.

Beneficial Interest of Petitioner; Capacities of Respondent and Real Party in Interest

2. Petitioners Ralph and Carolyn Flahive are the plaintiffs in an action now pending in respondent superior court entitled *Flahive v. State Farm General Insurance Company*, SDSC No. GIC837524. Defendant is named herein as the real party in interest.

Chronology of Pertinent Events

3. In or around 1970, *Insurance Code* 678 was enacted as the result of Assembly Bill 165. The bill, part of Governor Ronald Reagan's consumer protection program [EXH 0253], was specifically designed for homeowners in "urban or brush fire areas" to avoid the hardship that could follow cancellation or *reduction of coverage* to such homeowners [EXH 0247]. The legislation was remedial in nature and was enacted in the public interest and is therefore to be liberally construed. [EXH 0262]

4. State Farm used to sell Guaranteed Replacement Cost (GRC) policies to California homeowners through its subsidiary State Farm Fire and Casualty Company. In the event of a loss covered by a GRC policy, State Farm would pay the full amount needed to repair or replace the dwelling, regardless of policy limits.

5. In or around 1997, State Farm decided to discontinue the sale of GRC policies. Also in or around 1997, State Farm switched carriers from subsidiary State Farm Fire and Casualty Company to subsidiary State Farm General Insurance Company.

6. Upon the elimination of GRC policies, State Farm substituted Extended Replacement Cost (ERC) policies in their place. Both GRC and ERC policies require, as a condition of coverage, that the dwelling be insured to 100% of its full replacement cost. With proper Insurance to

Value (ITV), both GRC and ERC policy products provide the exact same level of protection – 100% replacement cost. [EXH 0343]

7. Cognizant that its customers expected and needed assistance in estimating the Replacement Cost of their homes in order to properly set their policy limits, State Farm determined the estimated Replacement Cost of their customers' homes via the use of its ITV Calculator. The ITV Calculator was used to determine the dwelling limits for both GRC *and* ERC policies. State Farm knew that its ITV Calculator was consistently producing low Replacement Cost estimates, uniquely so in California, yet failed to notify its customers of the deficiency of its ITV Calculator. As far as State Farm's customers knew, they were 100% Insured to Value, as they were contractually required to be, regardless of whether they had a GRC policy or an ERC policy. [EXH 0170-0171, 0355]

8. In or around May 1997, State Farm provided petitioners a Notice of *Elimination* of their GRC policy. [EXH 0133] Nowhere in this Notice did State Farm indicate that the elimination of GRC and substitution of ERC in its place constituted or effectuated a *reduction* of limits.

9. On October 26, 2003, petitioners' insured dwelling sustained a total loss as a result of wild fires, a covered event under the policy.

10. On October 20, 2004, petitioners filed a Complaint against State Farm, alleging, *inter alia*, Violation of *Insurance Code* §678.

11. On December 14, 2007, State Farm filed an early Motion in Limine to preclude petitioners from asserting that it did not provide adequate notice of the "elimination" of GRC coverage. Throughout its moving papers, State Farm used the words *reduction* and *elimination* interchangeably as though they were one and the same. [EXH 0006, 0007, 0010, 0011] State Farm does not dispute that a reduction of limits was effectuated by its elimination of GRC coverage. [EXH 0006, 0011, 0464-0465, 0467-0468] Petitioners do not dispute that *elimination* was sufficiently disclosed.

12. On February 15, 2008, the Superior Court granted State Farm's early Motion in Limine. The Court ruled that *Insurance Code* section 678 required an offer of renewal to contain the requisite information regarding reduction of limits or elimination of coverage in instances where either a reduction of limits, or an elimination of coverage, or both, were to take place. [EXH 0487]. The Court further ruled, regardless of the absence of an explicit notice of reduction, that State Farm implicitly provided adequate notice of reduction in coverage caused by the elimination of GRC by explicitly providing a notice of *elimination* of GRC coverage. [EXH 0468].

13. At Oral Argument, State Farm was requested to identify where in its Notice State Farm communicated a *reduction* of limits. In

response, State Farm identified the notice of *elimination*. A notice of *reduction* was never identified – because there was no such disclosure. [EXH 0464-0465] The Court, in oral remarks, stated that plaintiffs' position is "form over substance" and that the substance of the notice complied with the statute [*Insurance Code* section 678]. [EXH 0469]

Basis for Relief

14. The issue presented in this writ petition is whether State Farm's Notice document provided sufficient notice of reduction of limits in accordance with *Insurance Code* section 678. Respondent Superior Court found that State Farm's Notice met the disclosure requirements of *Insurance Code* 678 because, in the Court's opinion, the notice of elimination of GRC coverage effectuated a notice of reduction of limits. This is in direct contravention to the governing statute. As respondent Superior Court noted, *Insurance Code* section 678 required that an offer of renewal contain the requisite information regarding reduction of limits or elimination of coverage in instances where either a reduction of limits, or an elimination of coverage, *or both*, were to take place. [EXH 0487] Despite (a) the undisputed fact that *both* reduction and elimination were effectuated by the coverage modification (elimination of GRC coverage), and (b) the Court's recognition that the statute required notice of *both* reduction and

elimination when *both* reduction and elimination were present, respondent Superior Court held that State Farm's notice of elimination of coverage provided not only a notice of elimination of coverage but a notice of reduction of limits as well.

Absence of Other Remedies

15. The present order granting State Farm's Motion in Limine is not appealable. Moreover, delay of review until after final judgment would be an inadequate remedy and would result in irreparable harm to the parties and the judicial system. Writ relief is essential to avoid retrials in this and other cases currently being litigated against State Farm for over three years. Petitioners have no adequate remedy other than the relief sought in this petition.

PRAYER

Petitioners Ralph Flahive and Carolyn Flahive pray that this Court:

1. Issue an Alternative Writ directing Respondent Superior Court to set aside and vacate its Order of February 15, 2008, granting State Farm's Motion in Limine No. 1, or to show cause why it should not be

ordered to do so, and upon return of the Alternative Writ issue a Peremptory Writ of Mandate and/or Prohibition and/or other such extraordinary relief as is warranted, directing Respondent Superior Court to set aside and vacate its Order of February 15, 2008, granting State Farm's Motion in Limine No. 1, and to enter a new and different Order denying the Motion;

2. Award Petitioners their costs pursuant to Rule 8.490(m) of the California *Rules of Court*;

3. Grant such other relief as may be just and proper.

Dated: April 30, 2008

Respectfully Submitted,

By: Brian J. Heffernan

BRIAN J. HEFFERNAN
Attorneys for Petitioners
RALPH FLAHIVE and
CAROLYN FLAHIVE

VERIFICATION

I, Brian J. Heffernan, declare as follows:

I am one of the attorneys for the petitioners herein. I have read the foregoing Petition for Writ of Mandate/Prohibition or Other Extraordinary Relief and know its contents. The facts alleged in the petition are within my own knowledge and I know these facts to be true. Because of my familiarity with the relevant facts pertaining to the trial court proceedings, I, rather than petitioners, verify this petition.

I declare under penalty of perjury that the foregoing is true and correct and that this verification was executed on April 30, 2008, at Los Angeles, California.

Brian J. Heffernan

BRIAN J. HEFFERNAN

MEMORANDUM

I.

WRIT RELIEF IS ESSENTIAL TO RESOLVE AN IMPORTANT ISSUE AND TO PREVENT BURDENSOME MULTIPLE RETRIALS

A. Procedural Background and Standard of Review

It is interesting to note that the underlying motion was couched as a "Motion in Limine" to preclude petitioners from asserting that its "Important Notice" did not provide adequate notice of elimination of GRC coverage when State Farm knew fully well petitioners never sought to make any such assertion. [EXH 0103, 0184-0185] Really, what State Farm filed here was a Motion for Summary Adjudication in disguise. Petitioners have no quarrel with the trial judge tackling a pivotal and outcome determinative legal issue head on. However, what needs to be appreciated is that this was not a traditional Motion in Limine involving the acceptance or rejection of evidence; this was clearly a legal interpretation involving the application of a consumer protection statute to the undisputed facts and circumstances of the cases affected. As such, the standard of review should be de novo. "A trial court's interpretation of a statute is reviewed de novo. The de novo standard of review also applies to mixed questions of law and fact when

legal issues predominate." *Bradley v. California Department of Corrections and Rehabilitation* (2008) 158 Cal.App.4th 1612, 1623-1624 (citations omitted). In the instant case, the trial court *agrees* with petitioners' interpretation of the statute, to wit, that a dual disclosure obligation exists to disclose both eliminations of coverage and reductions of limits. [EXH 0487] Similarly, the trial court does not dispute that a notice of reduction of limits was not provided. [EXH 0488] The disputed portion of the ruling concerns whether State Farm's compliance with only one of the two recognized disclosure obligations is sufficient as a matter of law. This is unquestionably a legal issue of statutory interpretation which should be reviewed under the de novo standard.

B. The Issue Presented is Whether State Farm's "Important Notice" Meets the Statutory Notice Requirements of *Insurance Code* section 678

The version of California *Insurance Code* section 678 which was in effect at the time State Farm sent its Notice document provided, in pertinent part, as follows:

> "(a) At least 45 days prior to policy expiration, an insurer shall deliver to the named insured or mail to the named insured at the address shown in the policy, either of the

following:

(1) An offer of renewal of the policy contingent upon payment as stated in the offer, stating any reduction of limits or elimination of coverage, if any.

(2) A notice of nonrenewal of the policy. . . ."

State Farm's Notice stated, in pertinent part, as follows:

"IMPORTANT NOTICE . . .

about changes to your policy

Enclosed with this message is your new State Farm Homeowners Policy which replaces your current policy. In an effort to provide protection for policyholders at an affordable price, we periodically make changes to your policy. Some of these changes broaden or add coverage. Some reduce or eliminate coverage. Others, although not intended to change coverage, could potentially reduce or eliminate coverage depending on court interpretations, and should, in that sense, be viewed as either actual or potential reductions in or eliminations of coverage. One very important change in your policy is the elimination of Guaranteed Replacement Cost and Guaranteed Extra Coverage. [¶] We want to point out that every policy contains limitations and exclusions. We

encourage you to read your entire policy, and note the following changes:

I. REDUCTIONS OR ELIMINATIONS OF COVERAGE

GUARANTEED EXTRA COVERAGE *(Current Homeowners Extra Form 5)* and

GUARANTEED REPLACEMENT COST COVERAGE *(Current Endorsement to Homeowners Special Form 3)*

1. These coverages are eliminated. . . ." [EXH 0133]

"[E]xceptions and limitations on coverage the insured could reasonably expect must be called to the subscriber's attention clearly and plainly before the exclusion will be interpreted to relieve the insurer of the liability for performance." *Davis v. United Services Auto. Assn.* (1990) 223 Cal.App.3d 1322, 1332. This means more than the traditional requirement that contract terms be "unambiguous." Precision is not enough. Understandability is also required. To be effective in this context, the terminology of the notice must be couched in words which are part of the working vocabulary of average lay persons. *See Ponder v. Blue Cross of Southern California* (1983) 145 Cal.App.3d 709, 723.[8] *Also, see Gefrich v.*

[8] Although *Ponder v. Blue Cross, supra,* dealt specifically with an *exclusion* of coverage, petitioners agree with Respondent Superior Court that the test

State Farm Mut. Auto. Ins. Co. (1980) 109 Cal.App.3d 500, 503 [reduction in coverage must be "in **plain and understandable** language"].

State Farm's Notice document contains a clear and plain notice of *elimination* of GRC coverage. So stipulated. What it does *not* contain is a clear and plain notice of *reduction* of limits. Nor is it obvious, given the circumstances, that a reduction of limits would result from the elimination of GRG coverage. State Farm *eliminated* one coverage product and *replaced* it with another functionally comparable coverage product. Both products are premised on a 100% indemnification model [EXH 0300-0310] and both products require as a condition of coverage that the dwelling be insured to 100% of its Replacement Cost [EXH 0170-0171]. Furthermore, petitioners had no idea that State Farm had been systematically underinsuring homes. 100% can never be greater than, nor less than, 100%. When measured by the controlling standard of the reasonable expectation of the insured which is that the entire "Dwelling" [EXH 0138] will be replaced in the event of a covered loss, it is anything but obvious that a *reduction* was being effectuated, particularly where a functionally comparable

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applied in *Ponder* (that the exclusion must be "conspicuous" as well as "plain and clear") is instructive with respect to the Notice at issue in this case. [EXH 0175] *See also Fields v. Blue Shield of California* (1985) 163 Cal.App.3d 570, 582-583 (Wherein the court found *Ponder* applicable to a case dealing with an insurance company's failure to notify its insured of a specific reduction in coverage.)

substitute product was inserted in place of the eliminated product.

Whether or not a reduction in limits was "obvious", *Insurance Code* section 678 mandates *independent notice* of both eliminations of coverage and reductions of limits when both occur as a result of a change in coverage. State Farm's "Important Notice" did not advise petitioners of a reduction of limits and therefore does not meet the disclosure requirements outlined in *Insurance Code* section 678. Respondent Superior Court's ruling is based on the erroneous belief that a notice of reduction of limits can be inferred or imputed from the notice of elimination of coverage which was provided. The legislature categorically specified otherwise. The fact that the legislature had the wisdom to specifically address this situation in specifically requiring disclosure of both elimination of coverage and reduction of limits only exacerbates the gravity of the omission. This is a perfect example of why the statute requires independent disclosure of these related yet very different changes to a policy which do not necessarily have the same impact on coverage. State Farm did not satisfy the disclosure requirements outlined in *Insurance Code* section 678.

C. Delayed Review by Appeal is an Inadequate Remedy and Would Result in Irreparable Harm to the Parties and the Judicial System

In cases involving two or more theories of liability, postjudgment appeal of an order granting summary judgment on a "pivotal" theory of liability[9] may be deemed "inadequate," thus permitting immediate review by writ, where (i) the issue presented is one of *first impression* (never-before addressed in a published opinion), (ii) the order would effectively bar a substantial portion of plaintiff-petitioner's case from being heard on its merits in the lower court, and/or (iii) reversal of the order on postjudgment appeal would require a second trial, "with the attendant waste of judicial resources." *Barrett v. Superior Court (Paul Hubbs Construction Co.)* (1990) 222 Cal.App.3d 1176, 1183.

As Respondent Superior Court stated on record, this petition presents a "very significant issue which affects a lot of cases and a lot of people". [EXH 0469]. There are nine cases pending before Respondent Superior Court the conclusion of which will be materially advanced by immediate appellate resolution. A reversal of this order on postjudgment appeal would

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[9] Effectively what occurred here; though this motion was framed as a Motion in Limine, it effectively disposes of plaintiffs' theories of liability based on *Insurance Code* section 678 while plaintiffs' theories of liability based on Misrepresentation, Concealment and Negligence remain intact.

require petitioners and potentially others to undergo two trials, irreparably harming the parties and undoubtedly wasting judicial resources. Furthermore, Respondent Superior Court granted petitioners' Request for Certification of Appellate Review in accordance with *Code of Civil Procedure* section 166.1.

CONCLUSION

For the reasons stated herein, Petitioners Ralph and Carolyn Flahive respectfully request this court to grant extraordinary writ relief as prayed and issue a decision determining that State Farm's "Important Notice" did not provide clear and understandable notice of reduction of limits as required by *Insurance Code* section 678.

Dated: April 30, 2008

Respectfully Submitted,

By: Brian J. Heffernan

BRIAN J. HEFFERNAN
Attorneys for Petitioners
RALPH FLAHIVE and
CAROLYN FLAHIVE

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rules 8.204, 8.490)

The text of this petition consists of 4,324 words as counted by the Corel WordPerfect version 12 word-processing program used to generate this petition.

Dated: April 30, 2008

Brian J. Heffernan

BRIAN J. HEFFERNAN
Attorneys for Petitioners
RALPH AND CAROLYN FLAHIVE

PROOF OF SERVICE BY MAIL

In Re: PETITION FOR WRIT OF MANDATE, ETC. AND EXHIBIT VOLUMES I-II; 4th Civil No. . . . .

Caption: Ralph and Carolyn Flahive vs. San Diego County Superior Court \ State Farm General Insurance Company

Filed: IN THE COURT OF APPEAL, Fourth Appellate District, Division 1 (Dispatched by overnight courier for filing on this date.)

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of or employed in the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 900 Wilshire Blvd., Suite 1530, Los Angeles, California 90017. On this date, I served the persons interested in said action by placing one copy of the above-entitled document in sealed envelopes with first-class postage fully prepaid in the United States post office mailbox at Los Angeles, California, addressed as follows:

MICHAEL J. O'NEILL, ESQ.
ROBIE & MATTHAI
500 South Grand Avenue, 15th Floor
Los Angeles, CA 90071-2609
(Attorneys for State Farm General Insurance Company)
(served by personal service)

CLERK,
San Diego County Superior Court
For: Hon. Ronald L. Styn, Dept. 62
330 West Broadway
San Diego, CA 92101
(served by overnight courier)

RANDALL M. NUNN, ESQ.
HUGHES & NUNN, LLP
401 B Street, Suite 1250
San Diego, CA 92101
(Co-Counsel for State Farm General Insurance Company)
(served by overnight courier)

I certify (or declare) under penalty of perjury that the foregoing is true and correct. Executed on May 2, 2008, at Los Angeles, California.

E. Gonzales

E. Gonzales

PROOF OF SERVICE

In Re: REQUEST FOR DEPUBLICATION PURSUANT TO RULE 8.1125
Caption: *Agnes H. Everett v. State Farm General Insurance Company*
Appellate No. E041807
Superior Court of San Bernardino County, No. SCVSS124763

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 10100 Santa Monica Boulevard, 16th Floor, Los Angeles, California 90067-4107. On June 3, 2007, I served the foregoing document described as **REQUEST FOR DEPUBLICATION PURSUANT TO RULE 8.1125** by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

** SEE ATTACHED SERVICE LIST **

__X__ (BY MAIL) I deposited such envelope in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. Postal Service on that same date in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on June 3, 2007 at Los Angeles, California.

YVONNE R. THOMPSON

SERVICE LIST

Appellate No. B188718
Los Angeles County Superior Court No. BC265382

Attorney		Party
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