LHB PACIFIC LAW PARTNERS LLP

August 22, 2008

Susan M. Popik, Esq.
Chapman, Popik & White LLP
650 California Street, 19th Floor
San Francisco, CA 94108

RE: Village Northridge Homeowners Association

Dear Ms. Popik:

Enclosed for your review please find a copy of the following documents:

- ***Amicus Curiae Brief of the Civil Justice Association of California in Support of Defendant and Respondent***; and
- ***Application of the Association of Southern California Defense Counsel to File Amicus Curiae Brief in Support of State Farm Fire and Casualty Company.***

Please do not hesitate to call with any questions you may have.

Very truly yours,

LHB PACIFIC LAW PARTNERS, LLP

Madonna Haughian, Assistant to
CLARKE HOLLAND

Enclosures

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Case No. S161008

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

VILLAGE NORTHRIDGE HOMEOWNERS ASSOCIATION,

Plaintiff and Appellant,

vs.

STATE FARM FIRE AND CASUALTY COMPANY,

Defendant and Respondent.

After a Decision of the Court of Appeal
Second Appellate District, Division Eight, 2nd Civil No. B188718
Los Angeles County Superior Court, Case No. BC265328
Honorable Wendell Mortimer, Jr., Judge

APPLICATION OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL TO FILE AMICUS CURIAE BRIEF; PROPOSED AMICUS CURIAE BRIEF IN SUPPORT OF STATE FARM FIRE AND CASUALTY COMPANY

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APPLICATION OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF STATE FARM FIRE AND CASUALTY COMPANY

Pursuant to California Rules of Court, rule 8.200(c)(1), the Association of Southern California Defense Counsel (ASCDC) respectfully requests leave to file an amicus brief supporting the position of petitioner State Farm Fire and Casualty Company.

ASCDC is the nation's largest and most preeminent regional organization of lawyers who specialize in defending civil actions. Comprised of approximately 1,600 attorneys in Southern and Central California, ASCDC is actively involved in assisting courts on issues of interest to its members. It has appeared as amicus curiae in numerous appellate cases, including most recently before this Court in *Reid v. Google Inc.* (S158965, review pending); *Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503; *Oakland Raiders v. National Football League* (2007) 41 Cal.4th 624; and *Kibler v. Northern Inyo County Local Hosp. Dist.* (2006) 39 Cal.4th 192.

In addition to representation in appellate matters and comment on proposed court rules, ASCDC provides its members with professional fellowship, specialized continuing legal education, representation in legislative matters, and multifaceted support, including a forum for the exchange of information and ideas.

ASCDC members act as counsel in a whole range of civil tort and other cases, including first-party insurance claims, the vast majority of which are resolved by settlement.

Counsel for ASCDC has reviewed the briefing in this matter and believes that ASCDC can provide an important broader perspective that goes beyond the facts of this particular case.

For all of these reasons, ASCDC respectfully requests that it be granted leave to file the accompanying Amicus Brief of the Association of Southern California Defense Counsel In Support Of State Farm Fire and Casualty Company.

Dated: July 30, 2008

Respectfully submitted,

GREINES, MARTIN, STEIN & RICHLAND LLP
Robert A. Olson
Alana H. Rotter

By
Robert A. Olson

Attorneys for Amicus Curiae ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL

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INTRODUCTION

The common law is the expression of generally held norms of the community. Every child on the playground knows that a deal's a deal and that if it's not a deal you have to give back what you got. Civil Code section 1691 codifies this rule. The common law should recognize it as well.

The plaintiff in this case, Village Northridge Homeowners Association ("Village Northridge"), seeks to overthrow this fundamental rule. It made a deal with defendant State Farm Fire and Casualty Company ("State Farm") to settle and release its insurance claim against State Farm in exchange for a cash payment. Now it seeks to undo the release but not the payment. It wants to keep what it received in consideration of foregoing further litigation and yet continue to litigate a claim that it was entitled to more. This it cannot do. The deal was to settle Village Northridge's claims. If Village Northridge nonetheless wants to sue State Farm, it must return the settlement payment.

Any other rule would dramatically undermine the strong public policy favoring settlements and certainty in contracting. Settlements would no longer be an end to litigation. Instead, they would merely bind defendants to pay at least a certain amount, which plaintiffs could try to increase through further litigation. A rational defendant would be hard-pressed to settle on such terms. Defense counsel, such as amicus curiae's members, could not in good faith recommend otherwise. What is the point of settling to buy peace if the peace is only fleeting?

Village Northridge's proposed rule would result in fewer settlements. And because there is no principled reason to limit the proposed rule to the facts of this case, adopting the rule that plaintiffs can challenge a

settlement for fraud without returning the settlement payment would have sweeping consequences – not just for insurers in first-party cases, but for virtually all defendants. This Court should affirm that a settlement is a settlement, and that if it's not, the plaintiff must return the settlement payment.

ARGUMENT

I. A RULE ALLOWING SETTLING PARTIES TO KEEP A SETTLEMENT PAYMENT WHILE CHALLENGING THE SETTLEMENT FOR FRAUD IS BAD PUBLIC POLICY.

The parties dispute how to read legal doctrine and what is or is not the majority rule in this country regarding whether a party who desires to avoid the terms of a release in a settlement agreement based on alleged fraud first has to rescind and return the consideration. While these disputes are important, they tend to obscure an important issue: The determination as to what claims may be pursued by a settling party, and how, rests fundamentally on public policy considerations.

Public policy concerns are often the backbone of the common law. (See, e.g., *Calatayud v. State of California* (1998) 18 Cal.4th 1057, 1061 [common law rule that person who creates a hazard requiring response by firefighter or police officer owes no duty to the responder is "grounded in considerations of public policy"]; *People v. Engelbrecht* (2001) 88 Cal.App.4th 1236, 1255-1257 [common law burdens of proof dictated in part by "general public policy considerations"].) So should it be here.

"[T]he strong public policy of this state promot[es] settlements of civil disputes . . . . thereby discouraging needless litigation and its attendant expense." (*Joel v. Valley Surgical Center* (1998) 68 Cal.App.4th 360, 369,

citations omitted; see also *Bush v. Superior Court* (1992) 10 Cal.App.4th 1374, 1385 [recognizing "fundamental policy that the law favors settlements"].) Any rule that allows a party to settle a case, retain the proceeds of that settlement, and then sue based upon the value of the underlying settled claim will have disastrous implications for this public policy. That is true regardless of whether the post-settlement suit is couched as a fraudulent deprivation of a greater settlement, as Village Northridge posits here, or in some other terms.

Settlements overwhelmingly are made for one fundamental reason: to end a dispute. That reason disappears if the settled dispute can reemerge through nothing more than an allegation of fraud. Defendants will understandably be exceedingly reluctant to settle knowing that the plaintiff can simply keep the money, come up with some allegation of fraud in the settlement process, and continue to pursue effectively the same claims.

It is no answer to say that defendants have nothing to worry about if they have not, in fact, committed fraud. Under Village Northridge's proposed rule, a party who has settled its claims can keep the settlement proceeds and launch a new round of litigation based merely on an *allegation* of fraud. That is a very low threshold. A settling defendant can be dragged into court regardless of whether it *actually* committed fraud in the course of settling. Even if the defendant ultimately prevails, it will have incurred the heavy burden, financial and otherwise, of litigation – the very burden that it had already paid to avoid.

Nor is it an answer to say that post-settlement litigation of the underlying claim would be limited because experts could predict what the settlement amount might have been had the parties known the true facts. Such predictions are not a basis for legal liability; a plaintiff must prove its case. (E.g., *Viner v. Sweet* (2003) 30 Cal.4th 1232, 1240, fn. 4, 1244

[transactional legal malpractice claims require "case within a case" proof]; *Hamilton v. Maryland Casualty Co.* (2002) 27 Cal.4th 718, 726 [where carrier refuses settlement within policy limits, insured may not use fact of a settlement for amount beyond limit to establish amount of its damages resulting from carrier's breach].)

The speculative nature of the damages claim in this context is also another public policy reason not to permit plaintiffs to challenge a settlement for fraud without returning the settlement payment. If the law were otherwise, no plaintiff seeking to rescind a settlement agreement for fraud would ever have to return the consideration received: A plaintiff could always argue, based on conjecture, that it would have received a better deal if both parties had known the truth. There would be no downside risk to doing so. If the factfinder agreed, the plaintiff would get additional money. If the factfinder disagreed, the plaintiff would get to keep the original sum for which it bargained. It is just such a heads-I-win-tails-you-lose approach that Village Northridge advocates.

Village Northridge's proposed rule is asymmetrical in another way as well. It benefits only plaintiffs and disadvantages only defendants. A plaintiff can take back its part of the settlement agreement – the release of claims – if it alleges that the defendant committed fraud. But a defendant cannot similarly take back its part of the settlement agreement – the payment – merely because it alleges that the plaintiff committed fraud. Rather, in that situation, the plaintiff gets to keep the full amount paid to it until there is a determination of fraud, not just an allegation. Under the proffered rule, a fraud allegation is enough to deprive a defendant of the release for which it bargained but not to deprive a plaintiff of the consideration for which it bargained. That's inherently one-sided.

In short, the public policy favoring settlements cuts dramatically in favor of rejecting Village Northridge's proposed rule. There is no countervailing public policy that favors the rule.

Village Northridge argues that its rule will actually further the public policy favoring settlements by ensuring a remedy for plaintiffs who believe that they have been defrauded. That claim misframes the issue. The question is not whether a plaintiff who believes that it was fraudulently induced to settle should have a legal remedy in the courts. It unquestionably does. (See Civ. Code, §§ 1688-1693 [permitting rescission of contracts].) The question is whether plaintiffs should be able to keep the proceeds of a settled release while challenging the settlement in court. They should not. That rule is not necessary to give plaintiffs a remedy, and it would have the drastic effect of depriving defendants of the very benefit – litigation peace – obtained in the settlement. Defendants would be left with little incentive to settle.

Village Northridge also asserts that its proposed rule is necessary to deter fraud. Not so. There are already multiple mechanisms in place to deter insurers from misrepresenting policy limits. As discussed above, any plaintiff that believes it has been defrauded is free to rescind its settlement agreement and sue the insurer. Insurers know that such suits may result in punitive damages. (2 Witkin, Summary of Cal. Law (10th ed. 2005) Insurance, § 242, pp. 357-359 [punitive damages available in insurance bad faith suits]; *Ferguson v. Lieff, Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037, 1046 [punitive damages generally have deterrence function].) In addition, any insurer with a pattern of misrepresenting policy limits faces severe regulatory sanctions. (E.g., Ins. Code, §§ 790.03, subd. (h)(1) [repeatedly misrepresenting policy terms to claimant is an unfair and deceptive practice], 790.035 et seq. [penalties for unfair and

deceptive practices]; *Moradi-Shalal v. Fireman's Fund Ins. Cos.* (1988) 46 Cal.3d 287, 304 [insurers engaged in unfair and deceptive practices are subject to "substantial administrative sanctions"].) Given these existing consequences for insurers, there is no need to adopt the change that Village Northridge proposes. It would dramatically reduce the number of settlements without an offsetting public benefit. That, in and of itself, is a valid reason to reject the rule.

II. THERE SHOULD BE A SINGLE RULE FOR SUITS ASSERTING FRAUD IN OBTAINING A SETTLEMENT, NOT A SPECIAL RULE FOR THE FIRST-PARTY INSURANCE CONTEXT.

A decision permitting plaintiffs to retain settlement proceeds while escaping the settled release would undermine the certainty of settlements in the insurance context and across the board. At the least, the Court of Appeal's opinion allows an insured to sue its insurer for fraud regarding policy limits. But if there is an exception for fraudulently misrepresenting policy limits, why not an exception for any other kind of fraudulent statement? Policy limits are not necessarily an easily determined fact. For example, they can be a matter of great dispute if there may be multiple occurrences or claims or aggregate limits or limits that erode with defense costs incurred. Other claims of fraud in negotiating a settlement can, and will, be made. There is no rational limitation to policy limits.

Likewise, there is no rational limitation to insurers. Other settling defendants make representations concerning available insurance policy limits. (See, e.g., Code Civ. Proc., § 2017.210 [permitting "discovery of the existence and contents of any agreement under which any insurance carrier may be liable to satisfy in whole or in part a judgment"].) And non-insurer

defendants (employers, for example) may also owe contract or other obligations to plaintiffs. Any decision allowing Village Northridge to keep a settlement payment while challenging the settlement for fraud inevitably will be read to permit plaintiffs in innumerable contexts to keep settlement proceeds and sue. First-party insurance settlements will not be the only agreements rendered uncertain: Agreements to resolve employment and business torts stemming from a contractual relationship, for example, will become gambles as well.

The fact is that Village Northridge's proposal will open a Pandora's Box. It means that no settlement in an insurance coverage or bad faith case will be certain or secure. And, it is likely that even settlements in other types of cases will now be subject to attack. However Village Northridge's proposed rule is framed, it could easily be expanded to call into question the finality and certainty of virtually any settlement of a non-personal injury claim – and that limit is only because of this Court's express precedent on point. (See *Garcia v. California Truck Co.* (1920) 183 Cal. 767 (*Garcia*); *Taylor v. Hopper* (1929) 207 Cal. 102 (*Taylor*).)

Garcia establishes that a personal injury plaintiff cannot challenge a release agreement for fraud without rescinding the agreement and "restoring the money paid as a consideration." (*Garcia, supra,* 183 Cal. at p. 773.) *Taylor* establishes that *Garcia* cannot be circumvented through the mere artifice of "affirming" a settlement agreement. (*Taylor, supra,* 207 Cal. at pp. 103-105.) The Court of Appeal concluded that *Garcia* and *Taylor* apply only in the personal injury context. But even Village Northridge agrees that this distinction is not tenable, conceding that it "does not see a reason for limiting the applicability of [*Garcia and Taylor*] to personal injury claims to the exclusion of all other types of legal disputes." (Answer Brief on the

Merits 5.) In fact, there is no reason for limiting *Garcia* and *Taylor* to *any* particular class of settlement fraud claims. It should apply across the board.

Not surprisingly, Village Northridge disagrees. In place of the concededly "artificial" distinction between personal injury cases and all others, it suggests another distinction: *Garcia* and *Taylor* should not apply to first-party insurance disputes involving an alleged misrepresentation of policy limits. (Answer Brief on the Merits 5, 33-35.) There is nothing inherent in that type of dispute, however, to justify singling it out from all other relationships. Why not also include settlements of third-party insurance disputes? Policy limits are just as critical, if not more critical, in that context, where plaintiffs typically must rely upon the defendants' representations regarding the limit. Why not also include any settlement arising out of a contract dispute, given the duties that contracting parties owe to each other? Indeed, why wouldn't the same principle apply to any of the numerous disputes in which the parties may owe each other contractual or even fiduciary obligations – e.g., trustee-beneficiary, partnership, employment, corporate, franchise, or principal-agent disputes? Counsel advising their clients regarding settlements would have to warn them of the potential, indeed likely, expansion of any decision purportedly limited to first-party insurance cases, necessarily deterring settlement in all kinds of cases.

The reality is that if Village Northridge's proposed exception were expanded to include these types of settlements, the exception would quickly swallow the rule. For all practical purposes, *Garcia* and *Taylor* would in fact only apply in the personal injury context. There is no principled basis for limiting any exception to first-party insurance dispute settlements. As a result, any such attempted limitation will inevitably create more confusion than it possibly could resolve. Settling parties, and the lawyers who advise

them, must know up front the terms on which the settlement may be set aside or challenged. That certainty will not exist if the general *Garcia/Taylor* rule is riddled with exceptions and carve-outs for particular classes of plaintiffs or types of suits.

Again, what Village Northridge seeks is to limit its proposed rule to benefit only plaintiff insureds while affording no equivalent benefit to defendant carriers or other litigants. This Court should be suspect of any rule that is not evenly applied to all parties, for such rules generate undue advantage and injustice. The inevitable result of any decision adopting Village Northridge's proposed rule will be that a broad swath of settlements will be called into question and subject to re-litigation.

Under these circumstances, counsel will be forced to advise their clients that a settlement may not finally resolve the controversy. Counsel will have to tell their clients that paying a settlement on a disputed claim will not necessarily avoid or end litigation, but rather may just open the door to more litigation. The result will be fewer settlements. Just how many fewer is anyone's guess. The impact will not be limited, however, just to first-party insurance cases like this one.

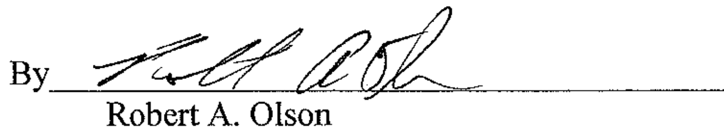
CONCLUSION

This Court's precedent recognizes that in the context of settlement releases, as elsewhere, a deal's a deal, and if it's not a deal, you have to give back what you got. Village Northridge's contradictory rule would effectively allow plaintiffs to call off a deal (i.e., a settled release) without giving back what they got (i.e., the settlement payment). Under that rule, defense counsel would have to advise their clients that a settlement no longer necessarily means avoiding or ending litigation, but may only open the door to further litigation. The result would be fewer settlements. Because public policy calls for encouraging, rather than discouraging, settlements, this Court should reject Village Northridge's proposed rule.

Dated: July 30, 2008

Respectfully submitted,

GREINES, MARTIN, STEIN & RICHLAND LLP
Robert A. Olson
Alana H. Rotter

By 
Robert A. Olson

Attorneys for Amicus Curiae ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL

CERTIFICATION

Pursuant to California Rules of Court, Rule 8.204(c), I certify that this **Proposed Amicus Curiae Brief in Support of Petitioner State Farm Fire and Casualty Company** contains 2,653 words, not including the caption page, the application for leave to file Amicus Curiae Brief, the tables of contents and authorities, and this Certification page.

Dated: July 30, 2008

Robert A. Olson

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES:

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 5700 Wilshire Boulevard, Suite 375, Los Angeles, California 90036-3626.

On **July 30, 2008**, I served the foregoing document described as **Application Of The Association Of Southern California Defense Counsel To File Amicus Curiae Brief; Proposed Amicus Curiae Brief In Support Of State Farm Fire And Casualty Company** on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes as stated below.

XX **BY MAIL** I caused such envelope to be deposited in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid as follows:

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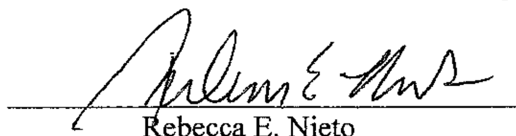
I am "readily familiar" with firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on **July 30, 2008**, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.



Rebecca E. Nieto

Case No. **S161008**

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Case No. S161008

VILLAGE NORTHRIDGE HOMEOWNERS ASSOCIATION,

Plaintiff and Appellant,

vs.

STATE FARM FIRE AND CASUALTY COMPANY,

Defendant and Respondent.

AFTER A DECISION BY THE CALIFORNIA COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIV. 8, NO. B188718.
LOS ANGELES COUNTY SUPERIOR COURT NO. BC265328.

AMICUS CURIAE BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF DEFENDANT AND RESPONDENT

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

VILLAGE NORTHRIDGE HOMEOWNERS ASSOCIATION,

Plaintiff and Appellant,

vs.

STATE FARM FIRE AND CASUALTY COMPANY,

Defendant and Respondent.

INTRODUCTION: IMPORTANCE OF ISSUE AND INTEREST OF AMICUS

The Civil Justice Association of California (CJAC) welcomes the opportunity to address the important issue this case presents[1] – *viz.*, whether, after settling a first party claim by accepting money from and executing a release of the insurer, the insured may then turn around and sue the insurer for fraud in inducing settlement but keep the settlement money and avoid the release of liability. Phrased more simply, does (or should) the law permit the plaintiff in this situation to "eat his [settlement] cake and have it too," to take the benefits of the settlement without the burdens of the accompanying liability release?

This issue goes to the heart of CJAC's purpose, which is to educate the public about ways to make our civil liability laws more fair, efficient, economical and certain.

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[1] CJAC previously sought and obtained an extension of time from the Court to file this brief (Order filed August 1); and is lodging a separate application concurrent with this brief asking that it be accepted for filing.

Our hundreds of members who are businesses, professional associations and local government organizations are frequently involved in litigation that ends in settlement with accompanying releases. They have long understood that settlements are meant to dispose of all claims between the parties arising from the facts and issues alleged in the governing complaints.

CJAC further recognizes and appreciates that tort settlements are meant to be final, and if one wishes in hindsight to repudiate or have such a settlement set aside, it is first necessary to rescind the agreement and return the consideration paid. (Cal. Civ. C. § 1691.) One cannot, in other words, avoid the obligation to give back the payment received by affirming the settlement and prosecuting the settling party for fraud unless, of course, the fraud concerns a contract for the sale of property. The reason for allowing one to affirm and sue for fraud when the settlement involves real or personal property, but not when, as here, it concerns the amount of a disputed tort claim, is that the former situation involves the exchange of "equivalents" – money for property. The defrauded party is allowed to keep either the property or the money ("equivalents") and sue for the difference in value between the two. When it comes to a disputed tort claim like the one involved in this case, however, there are no "equivalents" involved; the releasing party has simply agreed for consideration not to enforce his tort claim and the other party pays the releasor money to buy its peace and end the litigation. If the releasor is allowed to keep the consideration and still sue the settling party who paid it money in exchange for the release, the one-sided and unfair nature of such a result rends our civil justice system.

Yet this unfairness is precisely what plaintiff seeks and, unless the appellate

opinion is repudiated, is what it and future plaintiffs will get at the expense of defendants and the public good. This will deter future tort settlements and place those that are made in jeopardy. If plaintiff's arguments prevail in this case, all a subsequently dissatisfied plaintiff to a settlement agreement need do to "eat his cake and have it too" is allege fraud in the inducement of the settlement, affirm it, keep the money received therefrom, and sue for more. "Certainty" in the law of settlement will be out the window and all but plaintiffs will be sorrier for it.

SUMMARY OF SALIENT FACTS AND PROCEEDINGS BELOW[2]

The Village Northridge Homeowner's Association (plaintiff or insured) filed a claim with its insurer, State Farm Fire & Casualty Company (State Farm), in January 1994 for damage caused to its condominiums from the Northridge earthquake. State Farm determined the earthquake damage was $2,558,081.97, and paid its insured $2,060,591.97, accounting for the deductible, in July 1995.[3]

In April 1996, plaintiff asked State Farm to reopen the claim, which it did, making an additional payment of $7,466.34 for a unit that had been inaccessible during the earlier investigation.[4]

In 1998, plaintiff sought additional policy benefits. State Farm reinspected the property and determined that a portion of the claimed additional damage might be

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[2] These facts, excepted from the appellate opinion and briefs of the parties, are set forth for the purpose of animating and informing the legal analysis.

[3] *Village Northridge Homeowners Ass'n v. State Farm Fire & Cas. Co.*, 2005 WL 583333 (Cal.App. 2 Dist.), p. 3. (*Village Northridge*).

[4] *Id.*

earthquake related and that a portion was not. The parties negotiated a compromise of this claim, agreeing to State Farm's payment of another $1.5 million. After that settlement figure was reached, a "Settlement Agreement and Release of Claims" was drafted, with plaintiff represented by counsel. A release was executed in 1999 by which the plaintiff unconditionally released State Farm from all claims, known or unknown, in any way related to its earthquake claim, including a waiver of section 1542 of the Civil Code.[5]

In late 2000, plaintiff contacted State Farm to reopen its claim again, but State Farm declined to do so. Plaintiff sued State Farm on December 28, 2001, alleging breach of contract and breach of the implied covenant of good faith and fair dealing. The complaint alleged State Farm insured plaintiff under a comprehensive condominium policy including earthquake coverage, and improperly undervalued plaintiff's loss, inducing it to forego proper repairs and payment of amounts properly owed under the policy.

State Farm responded with a motion for summary judgment, asserting that the release executed by plaintiff barred its lawsuit. In support of its motion, State Farm asserted the aforementioned facts, supported by declarations from a State Farm claim team manager and its attorney. According to the manager, the policy limits for earthquake damage were $4,974,900, with a deductible of ten percent or $497,490. The manager stated his declaration was based upon his review of State Farm's files

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[5] This section reads: "A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor."

and records. No documentary confirmation of the policy limits was submitted.[6]

Plaintiff's opposition to State Farm's motion disputed several facts asserted by State Farm. Specifically, plaintiff asserted that State Farm misrepresented its policy limits to plaintiff in the course of adjusting the claim and inducing the execution of the release. According to plaintiff, State Farm represented that the policy limits were $4,974,900, while the insurance contract actually provided a limit of $11,905,500, a fact plaintiff belatedly discovered when its property manager found the policy declaration in storage.

State Farm countered by asserting that plaintiff's declaration that State Farm misrepresented its policy limits as $4,974,900 rather than $11,905,500 was irrelevant to the issue of the validity of the release, misstated the evidence, and lacked foundation. Specifically, State Farm asserted that plaintiff's declaration was based solely on the declarations page of the policy which, according to State Farm, only evidenced "the policy limit for loss other than loss caused by earthquake," and that the declarations page also stated that "other limits and exclusions may apply-refer to your policy." State Farm did not point out any other limits and exclusions.[7]

Plaintiff argued that actual fraud and materiality are questions of fact, and that it would have wanted to know it had $11.9 million rather than $4.9 million in coverage before agreeing to a settlement. Plaintiff also pointed out that State Farm submitted no documentary evidence that the earthquake limit was only $4.9 million.

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[6] *Village Northridge, supra*, 2005 WL 583333 at p. 3.

[7] *Id.*

The trial court granted State Farm's motion, ruling that the plaintiff had "not demonstrated that the Release Agreement was a product of undue influence or fraud," and that the release agreement was binding on the parties. As for the dispute over policy limits, the court stated: "Presumably, [plaintiff] had a copy of the policy also, and could read it, and I would think would know what the policy limits were, at least their version of what the policy limits were; [but] the case was not settled for policy limits, so how does that affect what we're doing here today?"[8]

Plaintiff responded by pointing out that California regulations[9] require insurance companies adjusting a claim "to lay out what the policy provisions are so we don't have these type of misunderstandings. That duty has been breached in this case. That's a material misrepresentation." The court later agreed with counsel that a misrepresentation as to coverage could be material and would be a fact question, but concluded, "Well, if [plaintiff] settled for what State Farm had told [it] were policy limits and that turned out to be wrong, I would agree with you, but here, [plaintiff] didn't settle for policy limits [but for significantly less than policy limits]."

The trial court granted summary judgment for State Farm and plaintiff appealed. In an unpublished decision, Division Eight of the Court of Appeals held that the settlement agreement was (1) not void under Code of Civ. Proc. § 340.9; (2) not void as illusory; and (3) the purported misrepresentation of policy limits created a triable issue of fact as to the materiality of the alleged misrepresentation. (Opening

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[8] *Id.* at p. 7.

[9] 10 Cal. Code Regs. § 2695.4.

Brief on the Merits (OBM), p. 9.)

After remand and other rulings on subsequent motions, State Farm eventually demurred to plaintiff's second amended complaint raising the failure of plaintiff to rescind and return the consideration; and plaintiff responded by admitting that it was not rescinding but instead seeking "damages for the fraud in the very same amount of policy benefits to which it was deprived, less a credit for amounts paid." Following hearing on the demurrer, the trial court ruled as follows:

> Demurrer sustained without leave to amend. . . . Plaintiff chooses to affirm the settlement agreement, keep the settlement money paid by State Farm for a release of all claims, but choose not to release the claims. They can't have it both ways.[10]

Judgment was entered for State Farm in January 2004 and plaintiff appealed. The court of appeal, per Justice Boland, reversed, stating, *inter alia*:

> The trial court apparently concluded that, because [plaintiff] settled its claim below the policy limits as State Farm represented them, the alleged misrepresentation was not material or caused no damage. Materiality and causation, however, are questions of fact. . . . We do not see how the court can determine, as a matter of law, that the existence of substantially higher policy limits would not have affected [plaintiff's] willingness to settle and release its claims for the amount offered.[11]

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[10] Petition for Review, p. 16-17.

[11] *Village Northridge*, *supra*, 2005 WL 583333 at p. 13.

SUMMARY OF ARGUMENT

There is no good reason to make an exception to the venerable statutes and judicial opinions governing rescission of settlement agreements when it comes to first party insurance claims involving alleged misrepresentation of policy limits. Simply put, a party seeking to avoid a settlement agreement on grounds of fraud must rescind that agreement and return the consideration paid. A party cannot avoid the obligation to return the consideration by "affirming" the settlement and seeking damages for fraud unless, which is not this case, the agreement involves the sale of property. To allow a plaintiff to do this in the case of a dispute over the amount of the settlement agreement, however, would jeopardize the consummation of future settlements and disturb the finality and certainty of those that do get made.

Not only is the "affirm and sue" remedy limited to agreements involving a *res*, or tangible property, but there can be no fact of damage when, as here, the settlement was for substantially less than the insurance policy limits the plaintiff mistakenly believed were in effect. No "fact of damage" means no fraud, as damage is an essential element of any fraud cause of action; hence, there is no viable fraud claim for plaintiff to assert.

LEGAL DISCUSSION

I. CALIFORNIA LAW AND SOUND PUBLIC POLICY REQUIRE A PARTY DISSATISFIED WITH THE SETTLEMENT AMOUNT OF A DISPUTED CLAIM AND A RELEASE OF LIABILITY THEREFROM TO RESCIND THE AGREEMENT AND RETURN THE CONSIDERATION PAID, NOT AFFIRM THE SETTLEMENT, KEEP THE CONSIDERATION AND SUE FOR FRAUD.

California law governing what a party who is dissatisfied with a contract, including a settlement agreement, can do for redress is the subject of comprehensive code provisions and judicial opinions.[12] Civil Code Section 1688 provides, for instance: "A contract is extinguished by its rescission."[13] " '[A] party to a contract cannot rescind at his pleasure, but only for one or more of the causes enumerated in section 1689 of the Civil Code.' "[14] (*McCall v. Superior Court* (1934) 1 Cal.2d 527, 538.)

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[12] See Civ. C. §§ 1688 - 1693; and, *e.g.*, *Garcia v. California Truck Co.* (1920) 183 Cal. 767 and *Taylor v. Hopper* (1929) 207 Cal. 102. State Farm has admirably explained the holdings and reasoning of *Garcia* and *Taylor* in its briefs, so amicus does not further discuss these opinions but notes its agreement with petitioner's description and analysis of them.

[13] "As has been pointed out, the 'revocation of a contract' . . . is something of a misnomer. 'Offers are "revoked." . . . Contracts are extinguished by rescission.' "(*Engalla v. Permanente Medical Group* (1997) 15 Cal.4th 951, 973.)

[14] Section 1689 states:

"(a) A contract may be rescinded if all the parties thereto consent.

"(b) A party to a contract may rescind the contract in the following cases:

"(1) If the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party.

"(2) If the consideration for the obligation of the rescinding party fails, in whole or in part, through the fault of the party as to whom he rescinds.

"(3) If the consideration for the obligation of the rescinding party becomes entirely void from any cause.

"(4) If the consideration for the obligation of the rescinding party, before it (continued...)

The term "rescission" is not defined in the Civil Code, but it means to "restore the parties to their former position." (*Young v. Flickinger* (1925) 75 Cal.App. 171, 174; accord, *Sanborn v. Ballanfonte* (1929) 98 Cal.App. 482, 488.) "Rescission" is a "retroactive termination" of a contract, as compared to "cancellation," which is a "prospective termination." (*Barrera v. State Farm Mut.* (1969) 71 Cal.2d 659, 663, fn. 3.) "The consequence of rescission is not only the termination of further liability, but also the restoration of the parties to their former positions by requiring each to return whatever consideration has been received." (*Imperial Casualty & Indemnity Co. v. Sogomonian* (1988) 198 Cal.App.3d 169, 184.) Under California rescission law, a defrauded plaintiff can obtain "complete relief, including restitution of benefits . . . and any consequential damages to which he is entitled." (Civ. C. § 1692.)

To be sure, there is an alternative in certain situations to rescission of a contract: a party can stand on the contract and recover damages arising from fraud. (5 Witkin, *SUMMARY OF CAL. LAW* (10th ed. 2005) *Torts*, §§ 827-828, pp. 1200-1201.) But as mentioned previously[15], and as petitioner has explained at length[16], the rule permitting a party to affirm a contract and sue for damages sounding in fraud only applies to the sale of property – a *res* – and does not apply to settlement agreements over disputed liability and ensuing damage.

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[14](...continued)
is rendered to him, fails in a material respect from any cause.

"(5) If the contract is unlawful for causes which do not appear in its terms or conditions, and the parties are not equally at fault.

"(6) If the public interest will be prejudiced by permitting the contract to stand.

"(7) Under the circumstances provided for in Sections 39, 1533, 1566, 1785, 1789, 1930 and 2314 of this code, Section 2470 of the Corporations Code, Sections 331, 338, 359, 447, 1904 and 2030 of the Insurance Code or any other statute providing for rescission.

[15] See *ante* at p. 2.

[16] OBM, p. 27-31.

> In cases like [*Garcia*] . . . if the plaintiff desires to go back to his original cause of action for tort, it is essential that he effect a rescission of the contract which purports to bar his cause of action. In other words, if he wants to sue on the original tort, he can neither stand on the release agreement nor act in violation thereof, but must move to set it aside. But in . . . a case . . . involving fraud in the sale of real property, it is well settled that a plaintiff may either rescind or stand on his contract and sue for damage.

(*Montes v. Peck* (1931) 112 Cal.App. 333; *accord*: *Akin v. Certain Underwriters at Lloyd's London* (2006) 140 Cal.App.4th 291, 298.)

While there is good reason to distinguish between agreements involving the sale of property and settlement agreements over disputed liability or amounts to resolve same, there is, as plaintiff admits, no sound reason to distinguish between liability settlements in general and personal injury liability settlements,[17] one of the principal grounds given by the appellate opinion for not applying *Garcia* and *Taylor* to this case. Thus the appellate opinion's attempted distinction between these two kinds of settlements is no longer an issue of contention in this case; both parties agree there is no reason to create a personal injury settlement exception to the common law principle of contract law.

Nor is there any reason to treat first party insurance liability settlements differently from settlements in general, though plaintiff urges this Court to do so. After all, "[a]n insurer is not a fiduciary, and owes no obligation to consider the

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[17] Answering Brief on the Merits (ABM), p. 5.

interests of its insured above its own." (*Morris v. The Paul Revere Life Ins. Co.* (2003) 109 Cal.App.4th 966, 973.) Settlement agreements, whether between insurer and insured or other parties are "governed by the legal principles appliable to contracts generally." (*Folsom v. Butte County Assn. of Governments* (1982) 32 Cal.3d 668, 667.)

Neither does the existence of Insurance Code § 790.03 bolster plaintiff's position, since *Moradi-Shalal v. Fireman's Fund Ins. Co.* (1988) 46 Cal.3d 287, 305 held that this provision does not give rise to an implied private right of action; and later opinions foreclose plaintiffs from "pleading around" *Moradi-Shalal* by labeling their claims with a different name, whether that name be "unfair competition"[18] or, as plaintiff urges here, the new tort of misrepresented policy limits.

II. THERE IS NO FRAUD BECAUSE NO FACT OF DAMAGE CAN BE INFERRED FROM A SETTLEMENT FOR SUBSTANTIALLY LESS THAN WHAT THE PLAINTIFF MISTAKENLY BELIEVED THE INSURANCE POLICY LIMITS TO BE.

Plaintiff couches this case as presenting an election of remedies issue, and argues that it should be free to choose whether to rescind the settlement and return the $1.5 million to State Farm or affirm the settlement, keep the $1.5 million and sue for additional damages based on fraud. The nature of the"fraud" alleged is that State Farm misrepresented the policy limits, which supposedly induced plaintiff to settle for less than it otherwise would have. According to plaintiff, State Farm falsely represented that the policy limits were $5 million, while the insurance policy actually provided limits of more than twice that amount. Plaintiff, after taking several "bites"

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[18] *Manufacturer's Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 283.

to increase the total amount of the settlement apple to $3.5 million[19] – about $1.5 million below what plaintiff understood the policy limits to be – agreed to accept that figure and execute a release. After then discovering that the policy limits were supposedly higher than it believed, plaintiff elected to affirm the settlement and sue for damages based on fraud. But having settled for substantially less than what it understood the policy limits were, plaintiff cannot, as a matter of law, demonstrate any "fact of damage." He cannot, in other words, ratify the settlement and sue for damages caused by the fraud because there is no fact of damage attributable to fraud.

In the most basic hornbook law sense, there has been no injury here. It follows that there is and can be no liability. Fraud is not actionable unless it results in some injury. "[P]ut in another way, . . . neither fraud without damage nor damage without fraud is sufficient to support an action." (*Gaffney v. Graf* (1925) 73 Cal.App. 622, 626; *Star Pacific Investments, Inc. v. Oro Hills Ranch, Inc.* (1981) 121 Cal.App.3d 447, 457 [damages are an essential element of a tort cause of action for fraud].) Thus, injury or damages is an essential element of the fraud cause of action, and proof of each element of actionable fraud is essential. (See 5 Witkin, *CAL. PROCEDURE* (4th ed. 1997) *Pleading*, § 687, p. 147.) "In an action for [common law] fraud, damage is an essential element of the cause of action." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 219.) "Misrepresentation, even maliciously committed, does not support a cause of action unless the plaintiff suffered consequential damages." (*Conrad v. Bank of America* (1996) 45 Cal.App.4th 133, 159.)

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[19] $2,060,591.97, plus $7,466.34 and a final additional amount of $1,500,000 subject to a release executed by plaintiff.

"A 'complete causal relationship' between the fraud or deceit and the plaintiff's damages is required." (*Williams v. Wraxall* (1995) 33 Cal.App.4th 120, 132, quoting *Garcia v. Superior Court* (1990) 50 Cal.3d 728, 737.) At the pleading stage, the complaint "must show a cause and effect relationship between the fraud and damages sought; otherwise no cause of action is stated." (*Zumbrun v. University of Southern California* (1972) 25 Cal.App.3d 1, 12.)

Moreover, there is no tort liability except where damages are present as a matter of *legal certainty*. The *fact* of damage cannot be *uncertain*; if it is uncertain or speculative then, pursuant to the tradition of the common law, liability is precluded. A distinction has to be drawn and emphasized between two branches of the doctrine of uncertain damages. One branch, the garden variety, has to do with the *amount* of damages. Once the fact of damage is established, the measure of the amount is anything but precise. Drawing the line at that point where the character or amount of damages becomes "speculative," has generally been the focus of the doctrine of "uncertainty" in damages and has application in property devaluation and all emotional distress actions where damages are necessarily subjective.

By sharp contrast, the law concerning uncertainty or speculation as to the *fact* of damage, which is closely related to causation and is the principal deficiency here, is anything but imprecise. The law looks backward from the fact of damage to its causes and, therefore, the *fact of damage* is the one absolute and essential predicate to a cause of action. One may be in doubt as to the causes of damage. One may only have to establish by a probability that the defendant is responsible for those damages. But the fact of damage, itself, is not something that is open to probabilities or doubt

in any respect. If it is intelligible in any context to speak of causes without an effect, the law of tort is not one of those contexts. Uncertainty as to the "fact of damage . . . negates the existence of a cause of action . . .." (*Davies v. Krasna* (1975) 14 Cal.3d 502, 513-514.)

It is only when there has been an unmistakable and deleterious effect that one may even begin a process of proving that a defendant is responsible for it. Courts are not too often called upon to express the rule that the presence of damages to a legal certainty is essential to liability because the situations in which a plaintiff's damage is at all open to question are rare. But whenever the question does arise, the rule has been stated forcefully and emphatically: "Uncertainty as to the fact of damage, that is, *as to the nature, existence or cause of the damage, is fatal.*" (*Griffith Co. v San Diego College for Women* (1955) 45 Cal.2d 501, 516, *italics* added by the California Supreme Court when quoting from *Allen v. Gardner* (1954) 126 Cal.App.2d 335, 340.) Thus, "damage to be subject to a proper award must be such as follows the act complained of as a *legal certainty* . . .." (*Agnew v. Parks* (1959) 172 Cal.App.2d 756, 768; italics added.) This standard is *certainty* and not some other measure, even probability:

> It is clear the mere possibility, *or even probability*, that an event causing damage will result from a wrongful act does not render the act actionable [citations omitted]. Of course it is uncertainty as to the fact of damage, rather than its amount, which negatives the existence of a cause of action [citations omitted].

(*Walker v. Pacific Indemnity Co.* (1960) 183 Cal.App.2d 513, 517; italics added.)

A good illustration of the doctrine of the "fact of damage" is *In re Easterbrook*

(1988) 200 Cal.App.3d 1541, where a client in a criminal matter sued his attorney for malpractice with a complaint which recited instances of allegedly negligent conduct and then "summarily" concluded with a prayer for damages in the amount of $500,000. *Id.* at 1544. The court found the complaint facially infirm, holding:

> Damages may not be based upon sheer speculation or surmise, and the mere possibility that damage will result from wrongful conduct does not render it actionable. [citation] Here, there has been no verdict in the criminal case and [plaintiff] has, at most, suffered only speculative harm which does not suffice to create a cause of action for negligence. Accordingly, we hold that the civil complaint fails to state a cause of action for legal malpractice and order it stricken . . .. *Id.* at 1544.[20]

Thompson v. Halvonik (1995) 36 Cal.App.4th 657 further underscores why, as here, settlement of a claim negates the fact of damage in a subsequent lawsuit complaining that the difference between that settlement amount and the amount that possibly could have been obtained constitutes consequential damage. Plaintiff Thompson alleged that his former attorneys dawdled with his medical malpractice claim, necessitating retention of new counsel who then settled the case for less than what he could have gotten but for previous counsel's procrastination. He asserted that delay in prosecution of his case by his former lawyers resulted in lost evidence, deferred physical and speech therapy that caused his health to deteriorate, and a

[20] See also *Taylor v. Hopper, supra,* 207 Cal.102; *Troche v. Daley* (1990) 271 Cal.App.3d 403, 410-411; *Goebel v. Lauderdale* (1989) 214 Cal.App.3d 1502, 1507-1508; *Rubinstein v. Barnes* (1987) 195 Cal.App.3d 279, 281; *Ventura County Humane Soc. for Prevention of Cruelty to Children & Animals, Inc. v. Holloway* (1974) 40 Cal.App.3d 897.

decline in the financial markets which adversely affected the value of his structured settlement. The trial court disagreed with plaintiff and granted summary judgment for the former attorneys. On appeal, a unanimous court affirmed, explaining:

> None of this evidence does more than suggest speculative harm, because it does not demonstrate that but for respondents' delay, appellant's underlying case would have settled at all, let alone at an earlier date, for the same amount, or with the same structure. "Damage to be subject to a proper award must be such as follows the act complained of as a legal certainty. . . ." (*Agnew v. Parks, supra,* 172 Cal.App.2d 756, 768.) Even if [plaintiff] would have benefitted by receiving money for therapy and other care at an earlier date, absent evidence that [settling party] would have settled with [defendants] under exactly the same circumstances it settled with the [new lawyer], actual harm from [defendants'] conduct is only a subject of surmise, given the myriad of variables that affect settlements of medical malpractice actions. "[T]he mere probability that a certain event would have happened, upon which a claim for damages is predicated, will not support the claim or furnish the foundation of an action for such damages. [Citations.]"

Finally, *Cedars-Sinai Med. Ctr. v. Superior Court* (1998) 18 Cal.4th 1 (*Cedars-Sinai*) reinforces why the Court should reject a fraud claim based on a party's settlement of a underlying claim for substantially less than what it believed the insurance policy limits to be simply because that party later discovered those limits were higher than it formerly understood. In *Cedars-Sinai* the Court refused to recognize a tort action for spoliation – *i.e.*, destruction or suppression – of evidence despite previous

recognition of this cause of action by intermediate appellate courts. Justice Kennard, writing for the Court, explained why the "fact of damage" element negated the proposed tort:

> In the many spoliation cases in which the fact of harm is uncertain, a tort remedy for first party spoliation would not accurately compensate for losses caused by spoliation or correct errors in the determination of the issues in the underlying litigation. [¶] It is here that we part company with the court in *Smith v. Superior Court* (1984) 151 Cal.App.3d 491, the first California case to recognize the tort of spoliation. In concluding that the uncertainty of the spoliation victim's damages was no barrier to creating a tort remedy for spoliation, . . . *Smith* . . . failed to clearly distinguish between uncertainty as to the fact of harm and uncertainty as to the amount of damage. [Citation.] While courts in many contexts have upheld determinations of the amount of damages even where the evidence of the amount of damage is very thin, they have been careful to distinguish uncertainty in the amount of damage from uncertainty in the fact of harm. (See, *e.g.*, *Stott v. Johnston* (1951) 36 Cal.2d 864, 875; *Ventura County Humane Society v. Holloway, supra,* 40 Cal.App.3d 897, 907 ["As often emphasized, it is the uncertainty as to the fact of damage rather than its amount which negatives the existence of a cause of action . . . ."]; *Engle v. City of Oroville* (1965) 238 Cal.App.2d 266, 272-273.)[21]

Cedars-Sinai concluded, in language that eerily echoes why the same result

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[21] *Cedars-Sinai, supra,* 18 Cal.4th at 16.

should apply here, that creation of a new action for misrepresenting insurance policy limits for settlement substantially below what the plaintiff thought the policy limits to be, is as ill-advised as recognizing a new tort for spoliation of evidence:

> By opening up the decision on the merits of the underlying causes of action to speculative reconsideration regarding how the presence of the [larger policy limits] might have changed the outcome [of the settlement for less than what plaintiff believed the policy limits to be], a tort remedy would not only create a significant risk of erroneous findings of . . . liability but would impair the fundamental interest in the finality of adjudication and the stability of judgments.[22]

That plaintiff here settled for less than what it believed the policy limits to be gives the lie to its argument that if only it knew the limits were higher it would have sought, and obtained, more money from State Farm. Plaintiff's argument would perhaps be more persuasive had it obtained a settlement for the policy limits it thought were in effect; but when it settled for $1 million below those limits, only speculation underlies the contention that had the limits been twice that amount the settlement would have been greater.[23] There is, then, no "certainty" to the fact of damage" plaintiff alleges in this case and, *a fortiori*, no fraud. The judgment of the appellate court to the contrary should be reversed as a matter of law.

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[22] *Id.* at 19.

[23] This was the reasoning and conclusion of the trial court: "Well, if [plaintiff] settled for what State Farm [represented] were the policy limits and that turned out to be wrong, I would agree . . ., but here [plaintiff] didn't settle for policy limits." (ABM, p. 34.)

CONCLUSION

If an insured believes it was induced by insurer fraud through misrepresentation of the policy limits to enter into a settlement agreement and wants to avoid it, rescission is the solution. By affirming the settlement agreement as plaintiff has here, however, its right to rescission is waived. This does not permit plaintiff to affirm the agreement, keep the settlement money it receives and sue for damages based on fraud, because there is no fact of damage to support a fraud claim. Settlement for an amount considerably less than what plaintiff mistakenly believed the policy limits to be vitiated the fact of damage and extinguished the fraud claim.

For all these reasons, the Court should reverse the Court of Appeal's decision, reinstate the trial court's ruling, and reaffirm that Civil Code sections 1688 - 1693 and the well-reasoned and venerable opinions of *Garcia* and *Taylor* apply to this case and all settlements of disputed claims.

Dated: August 15, 2008

Respectfully submitted,

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Fred J. Hiestand
General Counsel
Civil Justice Association of California

CERTIFICATE OF WORD COUNT

I certify that the WordPerfect® software program used to compose and print this document contains, exclusive of the caption, tables, certificate and proof of service, approximately 5,750 words.

Date: August 15, 2008

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Fred J. Hiestand

PROOF OF SERVICE

I, David Cooper, am employed in the city of Sacramento, Sacramento County, State of California. I am over the age of 18 years and not a party to the within action. My business address is The Senator Office Building, 1121 L Street, Suite 404, Sacramento, CA 95814.

On August 15, 2008, I served the foregoing document(s) described as: Amicus Curiae Brief of the Civil Justice Association of California in Support of Defendant and Respondent in *Village Northridge Homeowners Association v. State Farm Fire and Casualty Company,* S161008 on all interested parties in this action by placing a true copy thereof in a sealed envelope(s) addressed as follows:

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[X](BY MAIL) I am readily familiar with the practice of the Senator Office Building for the collection and processing of correspondence for mailing with the United States Postal Service and such envelope(s) was placed for collection and mailing on the above date according to the ordinary practice of the law firm of Fred J. Hiestand, A.P.C.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed this 15th day of August 2008 at Sacramento, California.

David Cooper