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

FRED J. HIESTAND
State Bar No. 44241
The Senator Office Bldg.
1121 L Street, Suite 404
Sacramento, CA 95814
FHiestand@aol.com
(916) 448-5100

Attorney for *Amicus Curiae*
The Civil Justice Association
of California (CJAC)

Cutting Edge Press * Sacramento, California

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Codes

Texts, Articles and Miscellaneous

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. Our hundreds of members who are businesses, professional associations and local

[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.

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 earthquake related and that a portion was not. The parties negotiated a compromise

---

[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.*

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

[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. The trial

---

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

[7] *Id.*

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

---

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

[9] 10 Cal. Code Regs. § 2695.4.

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]

---

[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.)

---

[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.

---

[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

[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"

[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.)

[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 decline in the financial markets which adversely affected the value of his structured

---

[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.

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 should apply here, that creation of a new action for misrepresenting insurance policy

---

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

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.

---

[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,

_____

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

_____

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:

Jerry A. Ramsey
Brian J. Heffernan
Engstrom, Lipscomb & Lack
10100 Santa Monica Blvd., 16th Floor
Los Angeles, CA 90067
Attorneys for Plaintiff/Appellant

Hon. Wendell Mortimer, Jr.
Los Angeles County Superior Court
Central Civil West Courthouse
Department 307
600 S. Commonwealth Ave.
Los Angeles, CA 90005

James R. Robie
Steven S. Fleischman
Robie & Matthai
500 South Grand Ave., 15th Floor
Los Angeles, CA 90071
Attorneys for Defendant/Respondent

Clerk, Court of Appeal
Second Appellate District, Div. 8
300 S. Spring Street
Los Angeles, CA 90012

Clarke B. Holland
Sandra E. Stone
5858 Horton Street, Suite 370
Emeryville, CA 94608
Attorneys for Defendant/Respondent

[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