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FILED

APR 29 2010

Frederick K. Ohlrich Clerk

Deputy

April 28, 2010

Honorable Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-7303

Re: *Village Northridge HOA v. State Farm Fire & Casualty Co.*
S161008
Plaintiff/Appellant's Response to State Farm's Letter Brief in Opposition to Overruling *Garcia* and *Taylor*

Honorable Justices:

State Farm portrays the minority position upon which it relies in an "oldies but goodies" fashion in an attempt to tap into some sort of nostalgic element. There is a reason that State Farm's position is now the minority position, 90 years after the publication of the cases this Court asks us to examine for possible overruling. This position does not make sense in the context of our current tort system which recognizes affirm and sue in certain situations. In the end, what it comes down to is the facts and each case will live or die on its own merits. Frankly, the facts of *Garcia v. California Truck Company,* (1920) 183 Cal. 767, and *Taylor v. Hopper*, (1929) 207 Cal. 102, at least as recited in the opinions, wouldn't stand a chance under the prevailing standard of proof for fraud. There is a difference between two personal injury plaintiffs who suffered from buyer's remorse not attributable to the settling defendant and a policyholder who was owed a quasi-fiduciary duty by State Farm (*Love v. Fire Ins. Exchange* (1990) Cal.App.3d 1136, 1147) and who was patently misled as to the amount of his policy limits in the face of a statutory obligation to accurately and affirmatively disclose policy limits (California *Code of Regulations,* Title 10, §2695.4). The facts do matter.

Here, State Farm argues more on the issue of whether an election of remedies is appropriate as opposed to answering the Court's question - whether *Garcia* and *Taylor* should be overruled. The lion's share of State Farm's letter brief is devoted to defending the statutory scheme for *Rescission*. We have said this throughout our brief and will say it just one more time: Village Northridge is not suing for Rescission. As such, isn't State Farm's position here really that an election of remedies is not afforded? State Farm's real position flies in the face of the long line of majority rule cases in and out of California that run directly contra.

What We Agree On

A. Public Policy Favoring Settlement

State Farm continues to bang the public policy drum that California favors settlement as it has throughout this long appellate process. Village Northridge agrees. It is the strong public policy of this state to encourage the settlement process. The majority rule agrees and this very policy is referenced over and over in defending the majority rule. What we disagree on is State Farm's theory that an affirm and sue remedy offends the public policy favoring settlement. The majority rule holds – and Village Northridge agrees – that the rigid preclusion of the option of electing the remedy to affirm and sue, in instances such as this case, would undermine the public policy of encouraging settlement and cast a black cloud over the entire process, particularly in the context presented. If insurance companies are free to misrepresent their limits in the settlement or evaluative process, why wouldn't they then proceed with impunity if there is no practical remedy thereafter? The parties agree on the importance of the public policy at issue but State Farm glosses over the effect of denying a viable remedy in the circumstances of this case.

B. Rescission Requires Return of Consideration

Plaintiffs recognize that in a Rescission case, such as is *not* presented here, return of consideration is generally required, though not always. (*See* Answer Brief on the Merits at pp. 40-44) Even in Rescission cases, equity weighs in and sometimes permits a party to forego return of consideration. State Farm's lengthy letter brief on the law of rescission assumes there is no alternative remedy for affirm and sue. But the law is contra and even the trial judge here said in his own order, "plaintiffs need to either rescind the agreement <u>or</u> affirm the agreement and sue for damages". (*See* APP 0956)

Civil Fraud: The Facts Matter

State Farm pitches the case for respecting precedent, but the reality of the fraud cause of action is that each and every case pled lives or dies on its own facts. We see this throughout the pleading process from Demurrer to Summary Judgment and then at trial. There is a heightened burden of proof and for good reason. The system filters out the *Garcia* and *Taylor* cases, not because of any legal precedent but because they don't include facts that genuinely implicate fraud or anything proximately causing such plaintiffs to sign their settlement agreement under false pretenses. There were no facts indicating that the defendants misrepresented policy limits. There were no facts indicating that the defendants switched the X-Rays so as to mask or hide the plaintiffs' injuries. Instead, vague and unsupported allegations of duress were asserted in cases that were really just buyer's remorse at the end of the day.

Here, we have different situation. Just as a different situation was presented in *Matsuura v. Alston & Bird* (1999) 166 F.3d 1006 (9th Cir.) (misrepresentation of evidence during settlement negotiations), *DiSabatino v. USF&G* (1986) 635 F.Supp. 350 (misrepresentation of policy limits) and *Phipps v. Winnishiek County*, (1999) 593 N.W.2d 143 (Iowa) (false testimony / fraud on the court) The facts matter. State Farm misrepresented its policy limits by several *million* dollars despite its statutory duty to affirmatively disclose the same, accurately. Interestingly, State Farm cites to the recent case of *Myerchin v. Family Benefits, Inc.*, (2008) 162 Cal.App.4th 1526, which held that a party offered a monetary settlement of a lawsuit may accept the money or reject it, but may not take the money and continue the lawsuit. *Id.* at 1529. When that case was originally published[1], it included a key citation to *Village Northridge* which distinguished the facts of *Myerchin* to the facts of the instant case[2]. When Myerchin cited *Village Northridge* in support of his argument that he need not restore what he had received in settlement of a disputed claim before suing upon it,

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[1] Interestingly, the Robie and Matthai firm (State Farm's counsel in the instant case) is the one who submitted briefing requesting that the *Myerchin* Opinion be published despite having no apparent connection to the case.

[2] This is mentioned for historical and illustrative purposes as the reference to *Village Northridge* is no longer included in the published case.

the Court of Appeals distinguished *Village Northridge* on the basis that it involved a misrepresentation of policy limits by an insurance company which had a statutory obligation to disclose the policy limits at the outset of a claim.

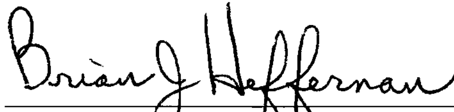
The bottom line is that in a fraud case, the facts matter. A personal injury defendant (*Garcia / Taylor*) owes no duty to treat his adversary with kid gloves and is free to try its hardest to pay as little as possible for the alleged injury in a settlement. We have no quarrel with this. What we do have a quarrel with is applying that same logic to this case which crosses the line and then some. There is a difference between aggressive negotiation and fraud. The Courts are capable of making this distinction and the prediction of a mass onslaught of affirm and sue cases is frankly hypothetical and misplaced. This is the rare case and it warrants an exception from otherwise recognized remedies. Affirm and sue is a viable alternative remedy, assuming one has the facts to support the cause. (i.e. *Persson v. Smart Inventions* (2005) 125 Cal. App. 4th 1141) State Farm's insistence that there is no election of remedies, that there is no affirm and sue cause of action, is patently inconsistent with well reasoned, recent cases which are all outlined in the prior briefing herein.

Conclusion

In closing, State Farm intimates that because this was only a demurrer it is saddled with defending a "baseless" charge of fraud and thus is deprived of the benefit of its Release. This is the second appeal. The first followed a Motion for Summary Judgment. State Farm has had ample opportunity to demonstrate on the record that its position is meritorious and conversely that Village Northridge's position is not. The Court of Appeal aptly described State Farm's failure to document its version of the policy limits as "the elephant in the room". State Farm's emotional appeal to this Court as a purported victim of the system ignores the long pleading history of this case. If State Farm truly had the mettle it contends to have in legal briefs, why not proceed to a (second) Motion for Summary Judgment and submit the evidence that demonstrates that Village Northridge is just "fabricating" this entire story? There is a reason State Farm clings to the Release that it procured through deception and misrepresentation. To deny Village Northridge a remedy in blind recognition of questionable precedent would only undermine the public policy that both parties recognize here. It would also place the Courts in the undesirable situation of having to turn a blind eye to factually supported scenarios wherein the facts and equity would warrant a remedy in the name of stare decisis and a minority rule.

At a minimum, an exception to *Garcia* and *Taylor* is mandated here in respect of the affirmative duty to disclose that State Farm breached (California *Code of Regulations,* Title 10, §2695.4) (*see* Answer Brief on the Merits at pp. 4, 45-46 and 52). The Court asked, generally, if *Garcia* and *Taylor* should be overruled. Village Northridge submits that the answer is clearly in the affirmative. The Courts are capable of evaluating cases on an individual basis to determine if they have the compelling facts required to sustain an affirm and sue cause of action. Our system of civil procedure is adequately equipped with the demurrer and summary judgment process to filter out imposters. It will be the rare but compelling case that survives the attendant scrutiny. To deny a plaintiff the opportunity to elect the remedy to affirm and sue will only serve to condone improper conduct, undermine the public policy favoring settlement and place the Court in the undesirable position of having to turn a blind eye to injustice to uphold a fraudulently procured release.

Sincerely,



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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 10100 Santa Monica Boulevard, 16th Floor, Los Angeles, California 90067-4107. On April 28, 2010, I served Plaintiff/Appellant's Response to State Farm's Letter Brief in Opposition to Overruling *Garcia* and *Taylor* by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

** SEE ATTACHED MAILING LIST **

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

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

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on April 28, 2010 at Los Angeles, California.

YVONNE R. THOMPSON

SERVICE LIST

Village Northridge HOA v. State Farm Fire, et al.
2nd Civil No. B188718

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