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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

JOHN LINSAO et al., Plaintiffs and Appellants, v. FIRST AMERICAN PROPERTY & CASUALTY INSURANCE COMPANY, Defendant and Respondent.	B340746 (Los Angeles County Super. Ct. Nos. 20STCV47368, 22STCV03541)

APPEAL from a judgment of the Superior Court of Los Angeles County, Wendy Chang, Judge. Affirmed.

Niddrie | Addams | Fuller | Singh, Victoria E. Fuller, Catherine M. Asuncion; Herzog Yuhas Fournier & Ardell, Ian Herzog and Kali Fournier for Plaintiffs and Appellants.

Manteau Downes, Patrick N. Downes and Ben A. Machida for Defendant and Respondent.

Appellants James Linsao, Brian Walters, John Linsao, and Maura Linsao, challenge a summary judgment in favor of respondent First American Property & Casualty Insurance Company (First American) in appellants' lawsuit against First American. That lawsuit asserts breach of contract, breach of the implied covenant of good faith and fair dealing, intentional infliction of emotional distress (IIED) and fraud claims based primarily on First American's investigation and ultimate denial of a claim appellants John Linsao (Linsao)[1] and Brian Walters (collectively, the homeowners) made under their homeowner's insurance policy. We find no error and affirm.

FACTUAL BACKGROUND

Our factual summary accepts as true appellants' evidence in opposition to summary judgment and any reasonable inferences that can be drawn from it. (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 805.)

A. The First American Policy

The homeowners jointly own a single-family residence in Sherman Oaks (the insured property). They purchased a "comprehensive, all risk homeowners policy" for the insured property from First American.

The policy "insure[s] against direct physical loss [caused] to" the insured property, subject to numerous exclusions. Most relevant here, the policy excludes from coverage "loss to property . . . caused by" "[w]eather conditions" (the weather exclusion), "[a]cts or decisions, including the failure to act or decide,

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[1] Because we do not have occasion to discuss any other appellants or individuals with the surname Linsao, we use it to refer to appellant John Linsao only.

of any person, group, organization or government body" (the acts and decisions exclusion) and "[f]aulty, inadequate or defective . . . [p]lanning, zoning, development, surveying, . . . [d]esign, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction . . . or [m]aintenance . . . of part or all of any property whether on or off the 'residence premises' " (the inadequate construction exclusion). It also excludes loss caused by earth movement, such as mudslides (the earth movement exclusion).

The homeowners also purchased a "flood and water/mud intrusion/damage policy" covering the insured property from Hiscox U.S. Flood Consortium 9762 and Wright National Flood Insurance Services, LLC (collectively, Hiscox), not parties to this appeal.

B. Damage to Property

1. *Interrupted Construction on Nearby Property*

The insured property is situated at the bottom of a ravine on a steep hillside slope that rises behind it. In 2019, Melt Construction (Melt) was building a large residence on an undeveloped residential lot located upslope from the insured property (the Hopevale property). The City of Los Angeles (the City) approved plans for the construction that required Melt to widen the road, build a retaining wall on its downslope edge, and change the existing street grade.

A neighbor complained to the City about the aesthetic impact of the wall on his property. As a result, the City asked Melt to stop work on the wall to accommodate potential design changes. The City did not, however, issue a formal "stop order" requiring Melt to do so. Melt paused construction, at which point Melt had not

constructed approximately 15 feet of the wall, meaning the wall stopped approximately 15 feet before the property line for the insured property. Melt had "drilled the caisson holes" for this 15-foot portion and "had put rebar in the holes." Melt also had improved, but not yet paved, the dirt roadway.

2. *December 2019 Storm*

In December 2019, weather forecasts predicted a rainstorm in the area of the insured property. Construction on the Hopevale property retaining wall was still paused. In preparation for the storm, Melt installed about 75 sandbags at the end of the unfinished wall.

During the storm, water streamed along the wall toward the unfinished end, then formed a gully leading directly to the rear of the insured property. Normally, rain runoff from above the construction site would continue evenly down the hillside, but the incomplete retaining wall disrupted that natural flow. The runoff inundated the drainage system on the insured property, causing the rear retaining wall on the insured property to crack and lean away from the hillside. Water, mud, and debris flowed over the wall, filling the back patio of the insured property and seeping into the house. This resulted in extensive water damage within the walls of the insured property and permanent damage to the floors. The damage rendered the home uninhabitable.

C. Investigation and Resolution of First American Insurance Claim

1. *Claim*

On January 16, 2020, Walters reported the incident and resulting loss to First American and made a claim under the

homeowners' First American policy. Walters also made a claim under their Hiscox flood insurance policy.

2. *First American Communications with the Homeowners During the Investigation*

a. *Initial denial and reopening of the homeowners' claim*

First American obtained a third-party inspector's report and concluded that the cause of the homeowners' claimed loss was "a mudslide from a construction site" on the Hopevale property. In a January 28, 2020 letter, First American informed appellants it was denying the claim under the earth movement exclusion.

On May 30, 2020, Linsao wrote to First American disputing the application of the earth movement exclusion. Linsao, a lawyer with substantial experience in the insurance industry, contended that, for purposes of assessing coverage, "the cause of the loss was the negligence of a third party, i.e., Melt." On June 3, 2020, First American reopened the claim to "ensure [First American] [has] all the facts before making a final coverage decision."

b. *Communications and investigation after claim reopened*

On June 9, 2020, First American sent third-party engineer Alex Zaretskiy to inspect the insured property.

On June 22, 2020, First American manager David Douillette called Linsao and "told [him] [Douillette] had reviewed the matter with his management, they had agreed there was coverage under the policy, and First American would be sending [the homeowners a] written confirmation." (Underscoring

omitted.) Douillette further "advised the matter was being transferred to Antonio Esquivel, a large loss adjuster who would be handling the claim settlement going forward." "Later that day, [Linsao] received a telephone call from . . . Esquivel, who also confirmed that First American had determined that there was coverage for the loss, and . . . explained that he was just waiting until he had the written [Zaretskiy] report . . . in his file before he could begin making payments." (Underscoring omitted.) Esquivel further "confirmed that he had damage estimates for approximately $386,000 in his file."

On June 25, 2020, Esquivel emailed Linsao that he "[was] still pending [*sic*] the engineer's report to conclude the coverage determination." Linsao called Zaretskiy that same day to inquire about the report. Zaretskiy told Linsao that on June 16, 2020, Zaretskiy "had participated in a conference call with [claims adjuster] Bianca Orozco, David Douillette, and two [others]" and "First American's representatives [on the call] agreed that the loss was covered." Linsao immediately called Orozco, who also told him she and Douillette had determined there was coverage during the June 16 call, and the matter was " 'a done deal.' "

On June 26, Linsao spoke to Esquivel and the vice president of claims, Valerie Peterson, and reiterated that Esquivel and Douillette had repeatedly told him the loss would be covered.

On June 29, Esquivel gave Linsao a $20,000 check as partial payment for living expenses.

Also on June 29, Peterson informed Linsao via email that First American was "unable to affirm coverage [at this time]" because the investigation was still ongoing. First American

counsel Garey Selvin emailed Linsao later that day. Selvin wrote it was "important for us to reduce everything to writing . . . [to] avoid any misunderstandings . . . . For example, you have attributed statements regarding coverage to various First American employees, who say they were misquoted. Neither I nor anyone else has said that there is coverage for the claim."

3. *Linsao's Loan*

Around July 7, 2020, Linsao obtained a $200,000 loan to pay for repairs and living expenses resulting from the loss and the insured property remaining uninhabitable.

4. *Final Denial of Appellants' Claim*

In a July 24, 2020 letter from Esquivel, First American informed the homeowners it had completed its investigation and was denying coverage for their claim. First American explained it "disagree[d] with [the homeowners'] assessment that a third party's negligence is an insured peril." First American had instead concluded "four excluded perils combined to cause the loss[:] . . . earth movement, water, third party negligence, and weather." Zaretskiy had concluded the downslope flow was caused by Melt's " 'inadequate construction wet-weather management of construction activities' " and "[a]ll such activities are excluded because they are faulty planning, faulty development of the hillside, and faulty construction of the retaining wall, as well as the project in general, which combined with excluded surface water, weather and rain to produce an excluded landslide."

Linsao disputed the denial, arguing that the neighbor's complaints were the predominate cause of the loss, not Melt's decisions. On October 2, Selvin responded that even if this

were the case, the acts and decisions exclusion would apply and prevent coverage.

D. Appellants' Lawsuit and Summary Judgment

1. *Complaint*

Appellants filed a complaint against First American, Hiscox, and others.[2] Appellants sued First American for breach of the insurance contract, alleging that no policy exclusion applied and the policy covered the loss. Appellants alleged First American also breached the implied covenant of good faith and fair dealing, both by leading the homeowners to believe First American would cover the loss, and by conducting an inadequate investigation in bad faith. They asserted an IIED claim against First American based on this same conduct. Finally, appellants asserted a fraud claim based on purported misrepresentations on the First American website regarding the extent of coverage for "water intrusion" loss.[3]

2. *Summary Judgment*

On September 25, 2023, First American filed its motion for summary judgment arguing that as a matter of law, the policy did not cover the homeowners' loss. It argued that, regardless which of the multiple factors contributing to the loss constituted the "efficient proximate cause," one or more policy exclusions

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[2] In April 2024, appellants filed notice that they had settled their claims against all insurer defendants except First American.

[3] On January 20, 2021, appellants filed a separate lawsuit against the City, Melt and other parties allegedly associated with the construction work on the Hopevale property.

applied and prevented coverage. It further argued the evidence did not create a triable question as to multiple elements of a fraud claim.

Appellants countered that a jury could reasonably conclude from the evidence that no exclusion applied, and that certain exclusions First American relied on were unenforceable. Appellants further argued First American's representations to Linsao during the investigation, on which the homeowners had relied, estopped First American from denying coverage.

The court rejected appellants' estoppel argument and considered the coverage issue. The court concluded "[t]he undisputed facts show that [the homeowners'] claim falls within one or more coverage exclusions in their [p]olicy," entitling First American to summary judgment on the breach of contract and implied covenant causes of action. Because appellants "appear[ed] to concede" in their statements of undisputed fact that Melt's construction on the Hopevale property was the efficient proximate cause of the loss, the court focused on the inadequate construction exception. The court rejected appellants' arguments that, because the evidence did not conclusively establish Melt had been negligent, this exception did not necessarily apply. It also rejected appellants' "pivot" to the argument that, because Melt would not have halted construction absent the neighbor's complaint, the neighbor's conduct was the efficient proximate cause of the loss.

The court further concluded that, "assuming[,] arguendo only, that the efficient proximate cause of this loss was . . . the actual movement of the earth or the storms that caused the rain, that then caused the flood," the undisputed facts established applicability of other policy exceptions.

Absent policy coverage, the court went on, the breach of contract, implied covenant, and IIED claims fail as a matter of law. Finally, the court concluded the evidence did not support several elements of appellants' fraud claim. Accordingly, the court granted the summary judgment motion.

This appeal followed.

DISCUSSION

A defendant moving for summary judgment has the initial burden of showing "one or more elements of the cause of action . . . cannot be established." (Code Civ. Proc., § 437c, subd. (p)(2).) Upon such a showing, the burden shifts to the plaintiff to establish a triable issue of material fact. (*Ibid.*; *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849-850.) "There is a triable issue of material fact if, and only if, [admissible] evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar, supra,* at p. 850; *LaChapelle v. Toyota Motor Credit Corp.* (2002) 102 Cal.App.4th 977, 981.)

We review a trial court's decision to grant a motion for summary judgment de novo, "considering all of the evidence offered in connection with the motion—except that which the court properly excluded—and the uncontradicted inferences the evidence reasonably supports." (*DiCola v. White Brothers Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 674.)

A. Summary Adjudications Based on Lack of Coverage

Appellants argue the court erred in summarily adjudicating any claim based on noncoverage because (1) triable issues

remained as to what the predominate cause of the loss was; (2) the evidence and terms of the policy create triable issues as to coverage; (3) First American is estopped from asserting a noncoverage defense; and (4) First American investigated the claim in bad faith, which supports an implied covenant claim and/or an IIED claim, even in the absence of policy coverage.

1. *A Triable Question as to Which Event Predominately Caused the Loss Does Not Preclude Summary Judgment Here*

Appellants' policy is an all-risk policy, meaning it " 'covers all risks save for those risks specifically excluded.' " (*Vardanyan v. AMCO Ins. Co.* (2015) 243 Cal.App.4th 779, 797-798 (*Vardanyan*), italics omitted.) In a coverage dispute involving such a policy, the burden is on the insurer denying liability to " 'prove the policy's noncoverage of the insured's loss—that is, that the insured's loss was proximately caused by a peril specifically excluded from the coverage of the policy.' " (*Ibid.*)

When there are multiple possible causes of a loss, only some of which are excluded from coverage, the insurer's burden of proving noncoverage includes both identifying which was the "efficient proximate cause" and establishing it is excluded. (*State Farm Fire & Casualty Co. v. Von Der Lieth* (1991) 54 Cal.3d 1123, 1131–1132 (*Von Der Lieth*) ["[w]hen a loss is caused by a combination of a covered and specifically excluded risks, the loss is covered if the covered risk was the efficient proximate cause of the loss"].) Appellants argue that the court erred in granting summary judgment because a triable question remained as to which of several events was the efficient proximate cause of the homeowners' loss. But an insurer can also meet its burden of proving noncoverage by establishing *all* possible efficient

proximate causes are excluded. (*Brodkin v. State Farm Fire & Casualty Co.* (1989) 217 Cal.App.3d 210, 217 (*Brodkin*).) The authority appellants cite to support their argument is not to the contrary. (See *Vardanyan, supra*, 243 Cal.App.4th at p. 796; *Garvey v. State Farm Fire & Casualty Co.* (1989) 48 Cal.3d 395, 413.) This authority addresses situations in which only some of the possible efficient proximate causes were excluded under the policy. (See *Vardanyan, supra*, at p. 796 [insurance agreement improperly excluded any loss caused by a combination of covered and excluded causes, regardless of which was the predominate cause]; *Garvey, supra*, at p. 413 [whether negligence or earth movement was the cause of the loss presented "jury questions because sufficient evidence was introduced to support both possibilities" but only one was covered under the policy].) As we conclude below, this is not the case here; First American established the policy excludes from coverage all possible efficient proximate causes. (See Discussion *post*, part A.2.) Thus, First American has met its burden of establishing noncoverage warranting summary adjudication, even if a triable question remains as to efficient proximate cause. (*Brodkin, supra,* 217 Cal.App.3d at p. 217 ["summary judgment is still proper if all of the alleged causes of the loss are excluded under the policy," even if there remains a dispute as to which was the efficient proximate cause].)

2. *All Possible Efficient Proximate Causes of the Loss Trigger an Exclusion and Prevent Coverage*

The possible causes of the loss presented on summary judgment are: the rainstorm, the mudslide, the actions of Melt construction, and the neighbor's complaint about the retaining

wall. Appellants do not argue on appeal that if the storm or the mudslide is the efficient proximate cause, the policy covers the loss. Rather, they argue (1) a jury could have found the neighbor's complaint was the efficient proximate cause of the loss, in which case no enforceable exclusion would apply, and (2) there remained a triable question of whether the inadequate construction exclusion applies to Melt's actions.

a. *Neighbor's complaint not a possible efficient proximate cause*

Appellants argue a reasonable jury could have found that the neighbor's complaint was the efficient proximate cause of the loss. "The efficient proximate cause of a loss is the 'predominant' or 'most important' cause of the loss." (*Coast Restaurant Group, Inc. v. Amguard Ins. Co.* (2023) 90 Cal.App.5th 332, 345 (*Coast Restaurant Group, Inc.*), quoting *Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 754.) Nothing in the evidence appellants identify supports that the neighbor's complaint was the "predominate" cause of the loss—only that the neighbor set a series of events in motion, and that these events may not have otherwise occurred. This is alone insufficient to establish efficient proximate cause. (See *Sabella v. Wisler* (1963) 59 Cal.2d 21, 33–34 ["but for" cause alone insufficient]; see also *Von Der Lieth, supra*, 54 Cal.3d at pp. 1131–1132 ["the loss is not covered if the covered risk was only a remote cause of the loss"].) An efficient proximate cause must be capable, "under some circumstances" of "occurr[ing] independently of the other [potential causes] and [independently] caus[ing] [the] damage." (*Finn v. Continental Ins. Co.* (1990) 218 Cal.App.3d 69, 72; accord, *Pieper v. Commercial Underwriters Ins. Co.* (1997) 59 Cal.App.4th 1008, 1020–1021.) A jury could

not have found that the neighbor's complaint was alone capable of causing the damage to the insured property under any circumstances. Appellants' argument merely "characterizes" Melt's conduct in a different manner; it does not identify an efficient proximate cause independent of Melt's conduct. (See *Pieper*, *supra*, at p. 1021 [" '[i]f every possible characterization of an action or event were counted an additional peril, the exclusions in all-risk insurance contracts would be largely meaningless' "].)

Because we agree with the court that the evidence did not create a triable question of whether the neighbor's complaint was the efficient proximate cause, we need not address appellants' arguments that such a cause would trigger the acts and decisions exclusion and/or the enforceability of the exclusion.

b. *No triable question as to inadequate construction exclusion*

Appellants argue the evidence permits a reasonable jury to find that Melt's actions on the Hopevale property did not constitute "inadequate construction" under the policy. They argue a "reasonable juror could conclude the unfinished retaining wall itself was not faulty, inadequate, or defective where construction was still in progress," and "Melt did not simply fail to complete the wall pursuant to the approved plans or abandon the project. . . . It was for the jury to decide whether pausing construction under the circumstances rendered the wall faulty, inadequate, or defective."

In assessing this argument, we must first interpret the policy's "inadequate construction" language. "The 'clear and explicit' meaning of [insurance policy] provisions, interpreted in their 'ordinary and popular sense,' . . . [citation] . . . controls

judicial interpretation. ([Civ. Code,] § 1638.) Thus, if the meaning a layperson would ascribe to contract language is not ambiguous, we apply that meaning." (*AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 822; see *ibid.* [setting forth "principles of [insurance policy] interpretation"]; *Miller v. Elite Ins. Co.* (1980) 100 Cal.App.3d 739, 751–752 (*Miller*) [applying this to interpretation of insurance exclusions].)

A layman would ascribe the same unambiguous meaning to the term "inadequate" as appears in its simple dictionary definition: "not enough or good enough[;] insufficient[;] [¶] . . . not capable." (Merriam-Webster Dict. (2026) <https://www.merriam-webster.com/dictionary/inadequate.htm> [as of Aug. 2026].) Thus, an inadequately constructed structure is one constructed in a manner "insufficient" to, "incapable" of, or "not enough" to serve its intended purpose. In *Wilson v. Farmers Ins. Exchange* (2002) 102 Cal.App.4th 1171 (*Wilson*), for example, the Court of Appeal concluded an incomplete home renovation that left "most of the exterior walls of the house . . . stripped down to the studs" (*id.* at p. 1173) reflected "plainly" "inadequate . . . construction" (*id.* at p. 1174). The court in *Wilson* interpreted "inadequate construction" as having a plain meaning that obviously applied to such an incomplete construction project. (See *ibid.* ["[a]n unfinished renovation or remodeling project that leaves the house in disrepair is plainly 'inadequate' " and triggers an exclusion for "loss caused by inadequate repair, construction, renovation, or remodeling" in all risk policy].) The court did not rely on any evidence beyond the structure's incompletely renovated state in reaching this conclusion.

Just as a house without complete walls cannot function as a house, an incompletely constructed retaining wall—so incomplete that 15 feet thereof consists solely of "caisson holes" and "rebar"—cannot function as a retaining wall. (See *Wilson, supra*, 102 Cal.App.4th at pp. 1173–1174.) It is thus "plainly" inadequately constructed in the same way a house that lacks complete walls is inadequately constructed. The undisputed evidence establishing that Melt constructed only a portion of the retaining wall therefore also establishes the inadequate construction exclusion applies to Melt's conduct.[4]

Appellants attempt to distinguish *Wilson* by arguing "Melt did not simply fail to complete the wall pursuant to the approved plans or abandon the project [as occurred in *Wilson*]," but rather "the City requested that Melt temporarily stop construction." (Capitalization added.) The fundamental assumption driving this argument is that the policy use of the term "inadequate" incorporates negligence or some level of fault. We are not persuaded. The policy exclusion here—like that at issue in *Wilson*—does not require negligence or inadequacy for a certain reason; only inadequacy. (See

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[4] Appellants also point to "evidence that Melt installed sandbags" and "that the City inspected and approved Melt's flood prevention measures before the rainstorm." (Capitalization added.) But this evidence supports a triable question as to whether Melt's *flood prevention measures* were inadequate. These plainly were not the " 'predominant' or 'most important' cause of the loss" (*Coast Restaurant Group, Inc., supra*, 90 Cal.App.5th at p. 345) and thus not the efficient proximate cause. Thus, whether there is a triable question as to the inadequacy of these efforts is not the applicable inquiry in assessing whether the inadequate construction exception might apply.

Wilson, *supra*, 102 Cal.App.4th at p. 1174 [excluding " 'loss to property . . . caused by . . . [¶] . . . [¶] [f]aulty, [i]nadequate or [d]efective; [¶] . . . workmanship, repair, construction, renovation, [or] remodeling' "].) We may not and do not read these additional concepts into the policy language.

Appellants argue we must interpret insurance exclusions in favor of finding coverage. But it is only when an exclusion is ambiguous that courts must interpret it narrowly and against the insurer. (See *State Farm Mutual Auto Ins. Co. v. Jacober* (1973) 10 Cal.3d 193, 201 ["an insurer cannot escape its basic duty to insure by means of an exclusionary clause that is unclear"]; *Miller, supra*, 100 Cal.App.3d at p. 751 ["any ambiguity is to be interpreted against the insurer and reasonable doubts as to uncertain language should be resolved against the insurer"].)

Appellants further argue the court employed " 'a strict, literal interpretation of [the] clause [that] unreasonably restrict[s] the coverage of the policy' " and thus cannot stand. (Quoting *Miller, supra*, 100 Cal.App.3d at pp. 751–752.) But we do not rely on the court's reasoning in applying the "inadequate construction" exception.[5] Moreover, the authority appellants cite rejects only literal interpretations that "foist[ ] onto a layman [here, the homeowners]" an unexpected interpretation that cannot "be defended in terms of the risks which the layman

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[5] The court reasoned that because the incomplete retaining wall did not stop the mudslide, the wall was necessarily inadequately constructed. That analysis speaks to whether Melt's conduct—however characterized—contributed to the loss, which is a separate issue. In assessing the applicability of the inadequate construction exception, we consider whether the incompleteness of the wall rendered it incapable of functioning at all—not whether, in the storm, the wall *did* function properly.

[insured] sought to insure against." (*Miller, supra,* 100 Cal.App.3d at pp. 751–752.) Appellants do not identify what unexpected meaning the dictionary definition and commonsense meaning of the term "inadequate" lead to here, nor what *other* plain, popular meaning they expected this term to have. Nor do they explain why the plain meaning of the term " 'does not make any sense in terms of the risks insured' in a homeowners policy. (*Schilk v. Benefit Trust Life Ins. Co.* (1969) 273 Cal.App.2d 302, 308.)" We perceive no reason why the risks insured against in a homeowner's policy must necessarily include an incomplete construction project on a neighboring property, such that the court's interpretation of the exclusion would "result in unreasonable and unjust forfeitures or an absurd result." (*Id.* at p. 307.) Indeed, the homeowners' policy excluded numerous types of risk from its coverage with no apparent common theme.

3. *First American's Conduct and Statements During the Investigation Do Not Estop It from Asserting Noncoverage as a Defense*

Appellants argue that, regardless of whether the policy covers the loss, First American is estopped from asserting noncoverage as a defense. They point to evidence suggesting that First American initially led the homeowners to believe the loss was covered. We agree with appellants that the evidence creates a triable question as to whether First American agents made such statements and whether the homeowners reasonably relied on them. But we disagree with appellants as to the legal effect of such statements on their claims.

"Estoppel cannot be used to create coverage under an insurance policy where such coverage did not originally exist." (*Miller, supra*, 100 Cal.App.3d at p. 755; accord, *Advanced*

Network, Inc. v. Peerless Ins. Co. (2010) 190 Cal.App.4th 1054, 1066.) " ' "The rule is well established that the doctrines of implied waiver and of estoppel, based upon the conduct or action of the insurer, are not available to bring within the coverage of a policy risks not covered by its terms, or risks expressly excluded therefrom." ' " (*Aetna Casualty & Surety Co. v. Richmond* (1977) 76 Cal.App.3d 645, 653; see *id.* at pp. 652–653 [estoppel " 'do[es] not operate to extend the coverage of an insurance policy after the liability has been incurred or the loss sustained' "]; accord, *Advanced Network, supra*, at p. 1066.) Because the policy here does not cover the claimed loss, estoppel cannot assist appellants in proving First American breached the policy agreement by denying coverage.

Further, "if the insurer is under no obligation to [provide coverage] . . . , it [also] cannot be found liable for . . . [citation] . . . breach of the implied covenant of good faith and fair dealing, for its denial of [coverage benefits]." (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 10 (*Waller*); *Benavides v. State Farm General Ins. Co.* (2006) 136 Cal.App.4th 1241, 1250 (*Benavides*) ["an insured cannot maintain a claim for tortious breach of the implied covenant of good faith and fair dealing absent a covered loss"].)

Thus, estoppel cannot assist appellants in countering First American's noncoverage defense to appellants' breach of contract claim or implied covenant claim.

In arguing to the contrary, appellants cite cases applying an exception to the general rule regarding estoppel and insurance coverage. (See *Miller, supra*, 100 Cal.App.3d 739; *Tomerlin v. Canadian Indemnity Co.* (1964) 61 Cal.2d 638 (*Tomerlin*).) These cases involve liability insurance, also referred to as

"third-party coverage"—that is, "coverage under which the insurer contracts to indemnify the insured against liability to third parties." *(Dollinger DeAnza Associates v. Chicago Title Ins. Co.* (2011) 199 Cal.App.4th 1132, 1154 (*Dollinger*).) Under this exception, " ' "if a liability insurer," ' " knows an action is not covered by the policy, yet " ' "assumes and conducts the defense of an action brought against the insured, without disclaiming liability and giving notice of its reservation of rights, [the insurer] is thereafter precluded in an action upon the policy from setting up such ground of forfeiture . . . . In other words, the insurer's unconditional defense of an action brought against its insured constitutes a waiver of the terms of the policy and an estoppel of the insurer to assert such grounds." [Citation.]' " (*Id.* at p. 1154, quoting *Miller, supra,* 100 Cal.App.3d at p. 755.) For example, *in Tomerlin, supra*, 61 Cal.2d 638, the insurer's attorney defended the insured throughout an entire trial and repeatedly told the insured his policy would cover any resulting judgment as well. (See *id.* at pp. 641–643.) At the conclusion of the trial, the insurer determined there was no coverage and refused to pay the judgment. (See *ibid.*) In "reliance upon [the insurer's] representations [of coverage,] [the insured] [had] permitted his personal counsel to withdraw from the [third party] suit." (*Id.* at p. 643.) Based on this reliance, and citing promissory estoppel concepts, the high court concluded the insurer was liable to pay the third-party judgment, even if the policy did not obligate the insurer to do so. (*Id.* at p. 649.)

Similarly, in *Miller*, an insurer began defending the insured against third party claims and engaging in settlement negotiations on the insured's behalf. (*Miller, supra*, 100 Cal.App.3d at pp. 749–750.) Based on this conduct, the insured

reasonably believed his liability policy covered the dispute and that the insurer would pay any resulting judgment. (*Ibid.*) The insurer ultimately refused to pay the judgment, however, contending there was no coverage. When the insured sued the insurer for the amount of that judgment, the insurer was "estopped from asserting its coverage defenses" (*id.* at p. 756), because the insured had "relied to his detriment on [the insurer's] defense under the policy." (*Id.* at p. 755.) Specifically, he "fail[ed] to retain an attorney, . . . fail[ed] to negotiate with [other parties involved in the lawsuit], and . . . fail[ed] to deal directly with the [third party plaintiffs] or their attorney. Further, [the insured] was denied the possibility of choosing to settle the claim by compromise because" the insurer did not inform him of all relevant offers. (*Ibid.*)

At least one court has concluded the exception reflected in cases like *Miller* and *Tomerlin* applies only in the liability insurance context and does not apply to "first party coverage"[6] like the homeowners' First American policy. (See *Dollinger, supra*, 199 Cal.App.4th at p. 1154 [exception "does not apply here because [insurer] is . . . not a liability insurer; instead, it is a title

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[6] " 'First-party coverage refers to types of insurance under which the insurer contracts to pay benefits directly to the insured, as distinguished from liability or third-party coverage under which the insurer contracts to indemnify the insured against liability to third parties. First-party coverage includes life insurance, health and accident insurance, disability insurance, title insurance, property damage insurance, fire insurance, medical payments coverage and other types of policies providing for payments directly to the insured.' [Citation.]" (*McKinley v. XL Specialty Ins. Co.* (2005) 131 Cal.App.4th 1572, 1576, italics omitted.)

insurer that provides first party coverage"].) Appellants counter that, although "[the] cases [applying the exception] involve policies insuring against third-party claims, there is no defensible reason why the application of waiver and estoppel should be limited to liability insurers." Whether or not this is generally true, the logic of those cases does not apply here. They involve insureds relying on an insurer's representations in a particular way not present here. Namely, in those cases, the insureds' reliance caused them to irreparably forego alternatives to the coverage the insurer led them to believe existed—that is, alternative means of defending against or otherwise resolving the third-party lawsuit. Because these alternatives to coverage were no longer available when the insurer later changed course, the only means of making the insureds whole was to require the insurer to provide coverage—even if it did not exist under the terms of the policy. Here, appellants have not shown they forewent any alternative means of addressing the damage to the insured property. To the contrary, they pursued at least two other efforts: a flood insurance claim and a lawsuit against Melt and other third parties.

Appellants argue the homeowners obtained a loan in reliance on First American's representations. That is at best a basis for seeking, on a promissory estoppel theory appellants have disclaimed, the costs of that loan—not full coverage under the policy. Thus, even if appellants are correct that, under certain circumstances, a first party insurer may be estopped from denying coverage for a noncovered loss, no such circumstances are present here.

4. *"Bad Faith" Theories of Implied Covenant and IIED Claims*

Appellants argue that even if the policy does not cover the homeowners' claimed loss, First American's representations about coverage reflect separately actionable bad faith conduct in the investigation of that claim. They also point to evidence of what they describe as First American's unreasonable and inadequate investigation of the claim as further supporting such a bad faith theory of liability. On this basis, they contend the court erred in granting summary judgment on what they refer to as their "bad faith claims."[7] (Boldface & capitalization omitted.)

"[W]hen benefits are due an insured, 'delayed payment based on inadequate or tardy investigations, oppressive conduct by claims adjusters seeking to reduce the amounts legitimately payable and numerous other tactics may breach the implied covenant because' they frustrate the insured's right to receive the benefits of the contract in 'prompt compensation for losses.' " (*Waller, supra,* 11 Cal.4th at p. 36.) But our state Supreme Court has rejected such an implied covenant theory in the absence of coverage for the claim being investigated: "Absent that contractual right, however, the implied covenant has nothing upon which to act as a supplement, and 'should not be endowed with an existence independent of its contractual underpinnings.' " (*Ibid.*; accord, *Benavides, supra*, 136 Cal.App.4th at p. 1250 ["[i]f the insurer's investigation—adequate or not—results in a correct conclusion of no coverage,

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[7] Appellants do not allege a cause of action so captioned. From context, however, they appear instead to be referring to bad faith theories of their IIED and implied covenant of good faith and fair dealing claims.

no tort liability arises for breach of the implied covenant" (italics omitted)]; *Brodkin, supra,* 217 Cal.App.3d at p. 218.)

Appellants argue *Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713 (*21st Century*) is to the contrary. But *21st Century* permitted an implied covenant claim based on unreasonable delay in paying insurance benefits for injuries that *were* covered by the policy and that the insurer ultimately paid. Her implied covenant claim sought not payment under the policy, but damages resulting from the insurer's delay in paying under the policy. (See *id.* at p. 720 [permitting suit seeking "damages in the form of lost interest on the policy benefits, attorney fees and costs incurred to recover payment, and general damages including emotional distress"].) *21st Century* thus applies the rule *Waller* describes; it is not to the contrary.

Additional authority suggests an insured also may not rely on a noncontractual theory of liability—for example, IIED or negligence—to recover for a first party insurer's bad faith investigation of a loss the policy does not cover. In *Benavides*, for example, the court concluded: "[A]bsent coverage, there is no tort liability for improperly investigating a first-party insurance claim whether the insurer's conduct is characterized as an implied covenant breach or negligence. The same logic that precludes imposition of damages for breach of the implied covenant in the absence of coverage . . . also rules out recovery for negligence. The relationship between the parties is contractual. The insured's primary right is to receive compensation for covered losses. The insurer's duty is not to unreasonably withhold the payment of benefits due. When, as here, no benefits are due, a negligent investigation does not frustrate the insured's right to the benefits of the contract. The insured who is not entitled

to insurance proceeds has suffered no injury as a result of the manner in which the insurer's investigation was conducted." (*Benavides, supra*, 136 Cal.App.4th at pp. 1250-1251; see *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 880; *Brodkin, supra*, 217 Cal.App.3d at p. 218.)

"Some authorities have suggested"—in dictum—"hypothetical circumstances in which an insurance company might be liable for bad faith despite the insured's lack of a contract right to benefits under the insurance policy." (*Brizuela v. CalFarm Ins. Co.* (2004) 116 Cal.App.4th 578, 594; see *Murray v. State Farm Fire & Casualty Co.* (1990) 219 Cal.App.3d 58, 65-66 (*Murray*) ["[w]hile there may be unusual circumstances in which an insurance company could be liable to its insured for tortious bad faith despite the fact that the insurance contract did not provide for coverage, no such circumstances are presented here"] (fn. omitted).) The circumstances this dictum hypothesizes involve the insured suffering—and recovering the value of—a loss distinct from the ultimate denial of benefits; a "consequential loss" solely from the insurer's delay or bad faith. (*Murray*, *supra*, at p. 66, fn. 5; *ibid.* ["[f]or instance, the insurance company might be liable if it unreasonably delayed in performing an investigation of a claim before concluding there was no coverage and the insured suffered consequential loss as a result of the delay"].) Thus, even if we were to agree with this dictum, it would not provide a basis for appellants to recover the value of the coverage they were correctly denied.

In any event, we decline to follow these suggestions in dicta. We agree with and elect to follow *Benavides* on this point. Bad faith or delay in First American's insurance investigation of

a claim the policy does not cover is not a cognizable basis for an IIED or implied covenant claim.

B. Summarily Adjudication of Fraud Claim

A fraud cause of action requires proof of the following elements: (1) a misrepresentation, (2) knowledge of the falsity or scienter, (3) intent to defraud—that is, induce reliance, (4) justifiable reliance, and (5) resulting damages. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) Appellants' theory of fraud is that First American's website, by marketing its policy as comprehensive and recommending separate flood insurance, implied that the policy covered all water damage events besides flooding. The court found as a matter of law that First American made no misrepresentation on their website. We agree. Appellants point to no evidence suggesting the website incorrectly described the scope of coverage First American generally offers. Nor does the website make any representations as to the coverage the homeowners contracted to receive by purchasing their specific policy. To the contrary, the website discusses different levels of coverage one can purchase from First American and makes clear the coverage each individual consumer purchases will vary, stating: "You can customize your policy to fit your needs, and we have many coverage options available from basic homeowners coverage to guaranteed replacement cost for high value homes." The website's true statements about the coverage First American generally offers cannot, as a matter of law, be fairly understood as affirmative statements of fact about the scope of a particular policy that particular consumers purchase.

Moreover, we agree with the trial court that the evidence does not support the justifiable reliance element

either. Appellants argue the website's truthful but selective representations were so misleading that appellants believed their insurance contract covered non-flood water damage—even though the contract itself expressly states it does not cover such damage. If there are circumstances under which a reasonable person could have relied on a website's general representations in lieu of the terms of the contract he signs in assessing the terms of that contract, they are not supported by the evidence here. For these and other reasons we need not reach, we agree with the trial court that there was no triable question as to appellants' fraud claim.

DISPOSITION

The judgment is affirmed. Respondent shall recover its costs on appeal.

ROTHSCHILD, P. J.

We concur:

WEINGART, J.

M. KIM, J.

Filed 9/23/26

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

JOHN LINSAO et al., Plaintiffs and Appellants, v. FIRST AMERICAN PROPERTY & CASUALTY INSURANCE COMPANY, Defendant and Respondent.	B340746 (Los Angeles County Super. Ct. Nos. 20STCV47368, 22STCV03541)

THE COURT:

The opinion in the above-entitled matter filed on August 27, 2026 was not certified for publication in the Official Reports. For good cause, it now appears that the opinion should be published in the Official Reports and it is so ordered.

ROTHSCHILD, P. J. WEINGART, J. M. KIM, J.