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VIA PERSONAL DELIVERY
Chief Justice and Associate Justices
Supreme Court of California
300 South Spring Street, 2nd Floor
Los Angeles, California 90013

Re: *Davaloo v. State Farm Insurance Company* (2005) 37 Cal.Rptr.3d 528
Case No. B171352, 2nd Appellate District, Division 7 (December 30, 2005)
Request for Depublication (California Rule of Court 979(a))

To the Chief Justice and Associate Justices of the California Supreme Court:

In accordance with California Rule of Court 979, United Policyholders respectfully requests decertification for purposes of publication of the recent opinion of the Court of Appeal, Second Appellate District in *Davaloo v. State Farm Insurance Company* (2005) 2nd A.D. case no. B171352. (A copy of the slip opinion is attached hereto as Exhibit 1.)

The Interest of United Policyholders

United Policyholders, which was founded 15 years ago in 1991, is a non-profit organization dedicated to education and advocacy on insurance issues and consumer rights. United Policyholders advances and protects the interests of policyholders by filing *amicus curiae* briefs in cases involving important insurance principles, testifying at legislative and other public hearings, and participating in regulatory proceedings on policy issues. United Policyholders monitors legal and marketplace developments affecting the interests of all policyholders, and acts to protect those rights where appropriate. United Policyholders' interest in this case is an outgrowth of its mission to advocate and protect policyholder interests.

The court's decision in *Davaloo v. State Farm Insurance Company*, if it remains published, would have a significant, detrimental impact on policyholders by creating massive confusion in a heretofore clear area of law regarding the level of specificity required for pleading factual allegations in complaints.

Why the Davaloo Case Should Not Be Published

The *Davaloo* opinion is a pleadings case arising out of a property insurance dispute. The opinion concerns whether or not an original complaint contained sufficient factual allegations such that an amended complaint would timely relate back.

In *Davaloo*, the Court of Appeal affirmed the trial court's decision to sustain State Farm's demurrer to the first amended complaint on the ground that it was time-barred because it did not relate back to the filing of the original complaint, which concerned a Northridge earthquake claim.

1. *Davaloo* does not meet any of the requirements for publication and, instead, creates confusion in an area of otherwise clear, black letter law

California Rule of Court 976, subdivision (c), sets forth the standards for the publication of an appellate opinion, none of which the *Davaloo* opinion meets. The *Davaloo* opinion begins by restating the long-standing rule that a plaintiff must "allege ultimate facts that 'as a whole apprise[] the adversary of the factual basis of the claim. [Citations.]'" (*Davaloo* slip opinion, p. 7.) This is nothing new.

The opinion also acknowledges that the allegation of "ultimate facts forming the basis for the plaintiff's cause of action is central to the relation-back doctrine and the determination whether the amended complaint should be deemed filed as of the date of the original pleading." (*Id.*)

There is absolutely nothing new in this correct articulation of the existing rule that ultimate facts must be pled. (*See* Cal. Rules of Court, rule 976(c)(1).) The opinion does not purport to modify or criticize with reasons given that existing rule. (*Id.*) Nor does it resolve or acknowledge an apparent conflict in the law. (*See* Cal. Rules of Court, rule 976(c)(2).) Simply put, the opinion merely summarizes and restates existing, black letter law. (*See* Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2005) ¶ 6:127, p. 6-26 ["Failure to plead ultimate facts subjects the complaint to demurrer for 'failure to state facts constituting the cause of action'"].]

Because the Davaloo opinion merely restates existing black letter law, it also does not make a significant contribution to legal literature, nor does it involve a matter of continuing public interest. (*See* Cal. Rules of Court, rule 976(c)(3)-(4).)

As will be explained more fully, despite at the outset properly articulating these long-standing rules, the *Davaloo* court then conducted an analysis of the complaint which raises far more questions than it answers. For example, the opinion creates confusion by first setting forth the above pleadings rules, and then not mentioning the long-standing rule that evidentiary facts are distinguishable from ultimate facts and need not, indeed should not, be pled in a complaint. (*Careau & Co. v. Security Pac. Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1390 ["A complaint must allege the ultimate facts necessary to the statement of an actionable claim. It is both improper and insufficient for a plaintiff to simply plead the evidence by which he hopes to prove such ultimate facts"].)

The distinction between ultimate and evidentiary facts was discussed at length in an earlier, published opinion, *Doheny Park Terrace Homeowners Association, Inc. v. Truck Insurance Exchange* (2005) 132 Cal.App.4th 1076. There, the court avoided the confusion inherent in the *Davaloo* analysis and went to great lengths to explain that

> '[t]he distinction between conclusions of law and ultimate facts is not at all clear and involves at most a matter of degree. [Citations.] For example, the courts have permitted allegations which obviously included conclusions of law and have termed them "ultimate facts" or "conclusions of fact."'[Citations.] *What is important is that the complaint as a whole contain sufficient facts to apprise the defendant of the basis upon which the plaintiff is seeking relief.*

(*Id.* at 1099.)

The Second Appellate District in *Doheny Park* continued by stating that

> It has been consistently held that "'a plaintiff is required only to set forth the essential facts of his case with reasonable precision and with particularity sufficient to acquaint a defendant with the nature, source and extent of his cause of action. [Citation.] If there is any reasonable possibility that the plaintiff can state a good cause of action, it is error to sustain a demurrer without leave to amend. [Citations.]'

(*Id.* at 1099.)

Nowhere did the *Davaloo* court explain the difference between evidentiary and ultimate facts. In failing to explain this distinction, the *Davaloo* opinion creates the mistaken impression that certain evidentiary facts, such as property addresses and policy numbers, must be pled in order for a complaint to be deemed factually sufficient.

2. The Davaloo opinion can easily be misread and misapplied by litigants or courts seeking a bright-line rule regarding pleading requirements when there is none

The *Davaloo* court itself pointed out that "there can be no bright-line rule as to when a complaint is so deficient to preclude relation back (any more than there is a bright-line rule when an amended set of facts is too dissimilar to the originally pleaded set) . . . ." (*Davaloo* slip opinion, pp. 10-11.) The *Davaloo* court is absolutely correct, but the problem is that the opinion, because of its analytical structure, can easily be misread and misapplied by litigants or trial courts searching for a bright-line rule as to when complaints are or are not sufficient. This confusion is likely to occur because the *Davaloo* opinion is entirely dependent on a fact-intensive analysis of the *Davaloo* complaint *which, unfortunately, is not written into the opinion*. In other words, the court apparently read, analyzed and considered all of the allegations in the complaint, but set forth almost none of that language, leaving subsequent litigants and trial courts with no choice but to guess at what those allegations were or were not.

Without access to the original complaint in *Davaloo*, there is a great risk that trial courts and litigants will attempt to apply the case-specific analysis in *Davaloo* to other complaints which have been pled wholly differently. Already, defendants in property insurance lawsuits are arguing to trial courts that the absence of a property address and/or a policy number is sufficient to make the complaint void for lack of specificity and to prohibit relation back through amendment, i.e., that this omission is a non-curable defect. This was of course not the holding of the *Davaloo* court (which acknowledged that there is no bright-line rule), but the ambiguous analytical framework in the written opinion, caused in some part by the lack of direct quotations from the language of the complaint, leaves much room for this type of confusion.

What the *Davaloo* court did was to pick out a few examples of factual allegations which it found too generic, without quoting them, describe them very generally, while pointing out the absence of a couple of specific allegations (i.e., the absence of the property address and the absence of the insurance policy number). (*See Davaloo* slip opinion, p. 9-10.)

Defendants in property insurance lawsuits have seized on these examples in an attempt to throw out meritorious complaints because they do not identify a property address or policy number. Litigants and trial courts have both hands tied behind their backs in attempting to weigh the use of the *Davaloo* opinion in this fashion, since there is no access to the specifics of the *Davaloo* complaint's allegations. As a result, litigants and trial courts are simply unable to properly compare or distinguish the complaints at issue from the *Davaloo* pleading which the court found so insufficient.

Because the *Davaloo* opinion only highlights the absence of a few specific facts

from the original complaint (i.e., the property address and policy number), its publication would provide little guidance to litigants in other situations.

The ambiguity and confusion arising from the analytical framework of *Davaloo* is most apparent when comparing the structure of that decision to another recent published pleadings case which also analyzed the specificity of the allegations in a property insurance case. That opinion, also from the Second Appellate District, is *Doheny Park Terrace Homeowners Association, Inc. v. Truck Insurance Exchange* (2005) 132 Cal.App.4th 1076.

The *Dohney Park* opinion provides a much more useful frame of reference for analyzing the sufficiency of pleadings. In that case, the Court of Appeal cited and quoted at length large sections of the complaint, providing trial courts and litigants with a fuller picture of the factual allegations at issue. (*See Doheny Park*, *supra*, 132 Cal.App.4th at 1096-1098.)

3. The *Davaloo* opinion creates confusion as to the level of particularity required in pleading facts where the defendant has equal access to the facts possessed by plaintiff

Under California's "code pleading" standard, the key test for factual sufficiency is fair notice, and thus the law has long allowed complaints to be pled with less factual specificity when the defendant has equal access to the facts:

> The particularity required in pleading facts depends on the extent to which the defendant in fairness needs detailed information that can be conveniently provided by the plaintiff; less particularity is required where the defendant may be assumed to have knowledge of the facts equal to that possessed by the plaintiff.

(*Doheny Park*, *supra*, 132 Cal.App.4th at 1099; *see also* Weil & Brown, *supra*, ¶ 6:128, p. 6-26 ["Our courts have become increasingly liberal in their attitude toward pleading–in some cases approximating the notice-pleading standards of federal courts"].)

On one hand, the *Davaloo* court did acknowledge the fair notice test, correctly setting forth the long-standing rule that "it is true the degree of specificity required in pleading can depend on the extent to which the defendant needs information". (*Davaloo* slip opinion, p. 12, citing *Semole v. Sansoucie* (1972) 28 Cal.App.3d 714, 719.) The problem with the *Davaloo* opinion is that it provides an incomplete analysis of the extent of information possessed by State Farm.

State Farm had notice through the *Davaloo* complaint, attached hereto as Exhibit

2, of a variety of facts (whether ultimate or evidentiary), including but not limited to the following:

1. The policyholder suing it was named "Homie Davaloo". (*See Davaloo* complaint, p. 1.)
2. The insured was a resident of Los Angeles County. (*Id.* at 1:26.)
3. The property had been insured by State Farm at all relevant times for the peril of earthquake. (*Id.* at 2:26-28, 3:14-16.)
4. The insured property was located in California. (*Id.* at 3:1-2.)
5. The cause of loss was the Northridge earthquake. (*Id.* at 3:8-11, 3:16-17.)
6. The date of loss was January 17, 1994. (*Id.* at 3:8-11, 3:14-16, 11:21-22.)
7. The gravamen of Homie Davaloo's dispute was that State Farm failed to pay Northridge earthquake benefits that were owed under the insurance policy. (*See id.* at 3:19-28.)
8. The policyholder does not have a copy of the policy. (*Id.* at 3:4-5.)

With this information alone (and there is more in the complaint), State Farm was sufficiently notified of the nature of the dispute to have easily found in its own files the information which the Court of Appeal complained was lacking in the *Davaloo* complaint (i.e., a property address and policy number). This is because property insurance companies are, by regulation, *required to maintain complete claims files regarding each and every claimant, as well as underwriting files and other records*. (*See* Cal. Code Regs., tit. 10, §§ 2695.3, subds. (a)–(c), 2360.6.) Thus, from the date of loss information, the policyholder's name, the cause of loss information, and the location of property set forth in the complaint, State Farm could easily have determined from its own files the information regarding Mr. Davaloo's property address and policy number, if it truly needed this information to respond to the complaint.

Given its files and computer records, which it is statutorily and by regulation required to keep, State Farm could easily "be assumed to have knowledge of the facts equal to that possessed by the plaintiff." (*Doheny Park*, *supra*, 132 Cal.App.4th at 1099.) State Farm certainly could have determined the policy number, claim number and anything else it needed to know, given that there assuredly were not two Northridge earthquake property insurance claims with a date of loss of January 17, 1994 for a single property owned by a Los Angeles policyholder named Homie Davaloo. And even if there were two, this could have easily been clarified by an interrogatory (see below).

4. The *Davaloo* opinion creates confusion as to the role of modern discovery procedures in litigation

Another source of confusion in the *Davaloo* opinion is the appellate court's puzzling failure to note the longstanding, black letter rule, acknowledged by many courts, including the same Second Appellate District in *Doheny Park*, that there is a diminished need to require specificity in the pleadings "because 'modern discovery procedures necessarily affect the amount of detail that should be required in a pleading.'" (*Doheny Park*, *supra*, 132 Cal.App.4th at 1099.)

Any information that State Farm could not have found in its own files, could have easily been obtained through the use of modern discovery procedures. It would have taken State Farm minimal effort to serve form interrogatories asking Mr. Davaloo to identify his property address and policy number. For example, Form Interrogatory 4.1(d), attached hereto as Exhibit 3, asks the answering party to identify the "policy number" for "any policy of insurance through which you were or might be insured in any manner. . . ." Also, Form Interrogatory 7.1(a) asks the answering party to "describe the property" which sustained "loss" or "damage". (*See* Exhibit 3.) By simply checking a few boxes, State Farm would have been apprised of the facts that the *Davaloo* court thought was essential for State Farm to have.

The *Davaloo* opinion may lead to the harsh result that a potentially meritorious claim is thrown out despite the fact that a defendant could have, with practically no effort, obtained through discovery the information it needed to defend itself; at a minimum, the opinion will hopelessly confuse trial courts and litigants over the proper role of discovery in fleshing out the allegations in a complaint.

5. The *Davaloo* opinion creates confusion because it is internally inconsistent

The *Davaloo* opinion summarizes the deficiencies in the original complaint by emphatically making the following statement:

> Under the most liberal construction of the pleadings (§ 452), the body of each of the original complaints at bottom **alleges nothing more than the Northridge earthquake caused harm to a resident or residents of Los Angeles County**. Such an allegation falls far short of apprising State Farm of the factual basis of the claim.

(*Davaloo* slip opinion, p. 10, emphasis added.)

Yet, the very first sentence of the court's summary of the factual and procedural background states that Mr. Davaloo's *original* complaint:

> alleg[ed] **causes of action for breach of contract and bad faith** against State Farm for damage to [his property] caused by the Northridge earthquake.

(*Id.* at P. 3, emphasis added.)

It is not clear how the *Davaloo* court was able to summarize so succinctly the causes of action at issue in the *Davaloo* complaint in its summary of the case's procedural history, yet conclude that the *Davaloo* complaint only alleged that residents of Los Angeles county were harmed by the Northridge earthquake.

6. The *Davaloo* opinion creates confusion regarding the well-established doctrine that complaints may be amended to conform to proof at trial

It is well established that a "motion for leave to amend to conform to proof may be made at any time during trial, so long as a judgment has not yet been entered and the amendment would not prejudice another party." (Wegner, et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2005) ¶ 12:392.1, p. 12-78, citing *Union Bank v. Wendland* (1976) 54 Cal.App.3d 393, 400, fn. 3, *South Bay Bldg. Enterprises, Inc. v. Riviera Lend-Lease, Inc.* (1999) 72 Cal.App.4th 1111, 1124-1125.)

This is a longstanding doctrine which recognizes that facts and evidence may come up in trial which were not anticipated when the complaint was originally drafted. The purpose of allowing pleadings to be amended liberally, even at trial, is to ensure that "cases might be tried upon their merits . . . ." (*See* Wegner, et al, *supra*, ¶ 12:392.2, p. 12-78.)

The *Davaloo* opinion creates confusion as to the continuing viability of this doctrine because it undercuts the principle that facts and evidence are meant to be developed during the discovery process and at trial, not during the pleadings stage. The *Davaloo* opinion suggests that proof must be developed first, and inserted into the complaint, before a case may even be allowed to proceed – this stands the entire concept of discovery and trial on its head.

Conclusion

The implication of the *Davaloo* analysis for a trial court or litigant is that some longstanding rules regarding the specificity required in pleadings, the nature of ultimate versus evidentiary facts, the role of discovery (rules properly cited and carefully applied by the *Doheny Park* court), and the ability to amend complaints to conform to proof at trial, simply do not exist or are irrelevant. As a result, the *Davaloo* opinion is likely to raise more questions than answers.

In sum, the *Davaloo* opinion does not establish a new rule of law. It does not apply an existing rule of law to a set of facts significantly different from those stated in other published opinions, and it does not modify or criticize with reasons given an existing rule of law. In fact, the *Davaloo* opinion simply ignores important rules of law properly restated and reiterated by many courts, including the recent *Doheny Park* court, regarding the specificity required of complaints.

The *Davaloo* complaint does not resolve or create a conflict in the law, and does not involve a legal issue of continuing public interest, to the extent that the rules concerning the pleading of ultimate facts (versus evidentiary facts or conclusions of law) have been stated and restated many times by many courts and have been relegated to the status of horn book law.

Put another way, the *Davaloo* opinion is a bit like a bull in a china shop. It repeatedly bumps into, and damages, more than a few delicate, carefully crafted and long-established pleadings doctrines with little, if any, expressed awareness that it is doing so. It is a decision that may be correct as to Homie Davaloo and State Farm, but it is certainly one that should not become part of California's jurisprudence.

For these reasons, United Policyholders asks this Court to decertify for purposes of publication, the *Davaloo* opinion.

Respectfully,

United Policyholders
By its counsel: Bernie Bernheim, Esq.

Encl.
cc: See attached service list