

1
2
3 **CONFORMED COPY**
4 **ORIGINAL FILED**
5 Superior Court of California
6 County of Los Angeles

7 **NOV 19 2015**

8 Sherri R. Carter, Executive Officer/Clerk

9 By: Nancy Navarro, Deputy

10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

11 **FOR THE COUNTY OF LOS ANGELES**

12 ASTOLFO GOMEZ,

13 Plaintiff,

14 vs.

15 AUTOMOBILE CLUB OF SOUTHERN
16 CALIFORNIA et. al,

17 Defendants

) Case No. BC564641

) ~~RENEGATIVE~~ ORDER OVERRULING
DEMURRER

) Hearing Date: November, 19 2015

) Time: 10:00 a.m.

) Dept.: 307

18 In this putative class action, Plaintiff Astolfo Gomez alleges breach of contract, bad faith
19 and unfair business practices causes of action against his insurer, Automobile Club of Southern
20 California ("AAA"). According to the Complaint, Gomez was insured under an AAA
21 homeowner's insurance policy when his Azusa home was damaged by smoke generated by the
22 January 2014 Colby fire, a large wildfire that burned over 1900 acres of land. (¶15.)
23 Approximately six months before Gomez suffered smoke damage, AAA sent him a renewal
24 notice indicating, on the sixth page, that "Provision 15 has been added under OTHER
25 COVERAGES," and stating in Provision 15 that coverage for wildfire smoke damage is limited
26 to \$5,000 "if the loss occurs or is reported to us more than 90 calendar days after the start of the
27 wildfire." (¶14.) In alleged breach of the insuring agreement, AAA limited its payment to
28

1 Gomez to \$5,000 even though it acknowledged that Gomez' smoke damage losses amounted to
2 \$5,240.87. (¶¶17, 18, 34.) Plaintiff also alleges that AAA's \$5,000 sublimit is unenforceable
3 because AAA failed to give plain, clear and conspicuous notice of this reduction in coverage.
4 (¶¶19, 41(b), 48-51.) Based on these ultimate facts, Plaintiff asserts claims for (1) breach of
5 contract (breach of the insuring agreement), (2) tortious breach of the implied covenant of good
6 faith and fair dealing, and (3) unfair business practices under Business and Professions Code
7 Section 17200 (based on alleged violations of Insurance Code 2071 (standard form for fire
8 insurance); violation of Insurance Code Section 790.03(b) (requiring conspicuous notifications);
9 and allegedly misleading him and others about the extent of coverage. AAA demurs to all three
10 causes of action.

11 I. The Demurrer Fails to Identify any Element of any Cause of Action that Plaintiff has
12 Failed to Plead

13
14 AAA's Notice of Demurrer asserts that the allegations in the Complaint fail to state
15 viable causes of action under Code of Civil Procedure § 430.10(e). However, all that Plaintiff
16 has to do to state viable claims in this case is to plead an ultimate fact for each element of each
17 claim. Plaintiff's Complaint does that. It alleges all elements necessary for a breach of contract
18 and breach of implied covenant claim: the existence of the insuring agreement, and AAA's (bad
19 faith) breach by failing to pay out on a covered claim. (¶¶13-24, 44, 46.) It also alleges all
20 elements necessary for his unfair business practices claim. (¶¶13-20, 49-51.) The Complaint
21 describes the allegedly misleading communication (the August renewal letter) and alleges that it
22 was an unfair practice because it violated Insurance Code Section 2071, or Insurance Code
23 Section 790.03(b)¹ or the decision in *Haynes v. Farmers Insurance Exchange* (2004) 32 Cal.4th
24 1198². (Id.)

25
26
27 ¹ Section 790.03(b) prohibits the "[m]aking or disseminating . . . before the public . . . in [any] manner or means
28 whatsoever, any statement containing any assertion, representation, or statement with respect to the business of

1
2 Defendant's first ground for demurrer – that its \$5,000 limit does not violate Insurance
3 Code Section 2071 – is not an issue presented in or necessary to the pleading of Plaintiff's first
4 or second causes of action. Even if the Court agreed that AAA's \$5000 sublimit is perfectly
5 lawful, that determination would not address Plaintiff's claim that AAA's underpayment
6 breached the contract because AAA's failure to give adequate notice makes the sublimit
7 unenforceable. A determination that Section 2071 excludes coverage for smoke damage would
8 also fail to dispose of Plaintiff's unfair business practices claim because that cause of action rests
9 on two additional and alternative grounds: alleged violations of Section 790.03(b) and the rule
10 articulated in the *Haynes* decision. Defendants apparently presume that the Court can sustain a
11 demurrer to a portion of a cause of action, which it cannot.

12
13 Defendant's second ground for demurrer – the argument that AAA's disclosures about
14 the \$5,000 sublimit were adequate – raises triable issues of fact that this Court cannot reach on
15 demurrer. Defendant incorrectly cites *Dominguez v. Finan. Indem. Co.* 2010) 183 Cal.App.4th
16 388, 399 for the proposition that the Court can reach the adequacy of an insurer's notice of
17 policy change on demurrer, as a matter of law. (Dem. p. 9-10) The *Dominguez* case did not
18 involve a challenge to the pleadings. It addressed a trial court's adjudication of a declaratory
19 relief cause of action after a full hearing based on stipulated facts.

20 Plaintiff has not pled declaratory relief. He has demanded a jury trial. The adequacy of
21 AAA's notice is therefore a question of fact for the jury, inappropriate for determination on
22 demurrer.

23
24
25 insurance . . . which is untrue deceptive, or misleading, and which is known, or which by the exercise of reasonable
26 care should be known, to be untrue, deceptive or misleading.”

27 ² In *Haynes*, the Supreme Court stated the rule that “any notice of non-coverage of the policy, in a situation where
28 the public may reasonably expect coverage, must be conspicuous, plain and clear,” citing *Steven v. Fidelity &
Casualty Co.* (1962) 58 Cal.2d 862, 878.

1 II. Even if the Court Could Reach the Issue, the Court Would Not Interpret Section 2071
2 to Exclude Coverage for Smoke Damage

3
4 Defendants argue that Plaintiff relies on the “false premise” that the “standard form” fire
5 insurance policy in Insurance Code Section 2071 covers smoke damage claim. According to
6 Defendants, Section 2071 “only applies to fire losses” and does not address “any peril other than
7 fire and lightning.”³ (Dem. pp. 4-5.) Plaintiffs meanwhile argue that it is well established that
8 the standard form covers smoke damage, citing two reported decisions reviewing trial court
9 orders compelling appraisals of property damaged by fire and smoke. *Kacha v. Allstate Ins. Co.*
10 (2006) 140 Cal.App.4th 1023; *Lee v. California Capital Insurance Company* (2015) 237
11 Cal.App.4th 1154, 1160.

12
13 Plaintiff’s cited cases are not particularly helpful because they do not address the
14 question whether the standard form in Section 2071 covers smoke damage. The language in the
15 Insurance Code provides better guidance and persuades this Court that it is not reasonable to
16 interpret the standard form in Section 2071 to exclude coverage for smoke damage. Section
17 2071 refers to fire as a covered “peril” when it provides coverage for “all LOSS BY FIRE,
18 LIGHTNING AND BY REMOVAL FROM PREMISES ENDANGERED BY THE **PERILS**
19 INSURED AGAINST IN THIS POLICY.” (Emphasis added.) Section 102(a) of the Insurance
20 Code similarly defines “Fire insurance” to include insurance against certain identified perils:
21 “fire, lightning, windstorm, tornado or earthquake.” As the Supreme Court explained in *Garvey*
22 *v. State Farm Fire & Casualty To.* (1989) 48 Cal.3d 395, 406, coverage in a first party property
23 insurance policy is commonly defined as a “loss caused by” certain enumerated *perils*, i.e.,
24 “active physical forces such as lightning, wind, explosion” etc. (Id.) See also *Doheny West*
25 *Homeowners’ Assn. v. American Guarantee & Liability Ins. Co.* (1997) 60 Cal. App. 4th 400, 405

26
27 ³ This argument is inconsistent with Section 102(a) of the Insurance Code which states: “Fire insurance includes: (a)
Insurance against loss by fire, lightning, windstorm, tornado or earthquake.”

1 fn. 4 (citing Krosky, Kaufman et al. Cal. Practice Guide: Insurance Litigation (Rutter 1995) §
2 6.275, p. 6B-20 [“the ‘perils’ or ‘risks’ insured against refer to ‘fortuitous, active, physical forces
3 . . . which bring about the loss’”]); *Fire Ins. Exchange v. Superior Court* (2004) 116 Cal.App.4th
4 446, 465 (upholding a plainly worded exclusion for expenses relating to soil restabilization for a
5 dwelling otherwise insured against the peril of earthquakes.)

6
7 Smoke is a by-product of fire rather than an independent “fortuitous, active physical
8 force” akin to lightning, wind, or explosion. (*Doheny*, 60 Cal.App. 4th at 405.) It is therefore
9 reasonable to interpret the standard form policy in Section 2071 as a policy covering *all loss*
10 caused by the peril of fire, including the loss of property damaged the smoke generated by a fire.
11 The Court therefore cannot find, as a matter of law, that the standard form in Section 2071 does
12 not cover smoke damage.

13
14 Defendants’ argument based on Section 9095 of the Insurance Code is not persuasive.
15 That provision is one of a series of statutes permitting certain religious organizations and certain
16 “secret fraternal societies, having lodges, councils or granges . . . and having ritualistic work and
17 ceremonies in their lodges” to form “an insurer by association of the members” to self-insure for
18 fire insurance, exempt from other provisions in the Insurance Code. Under Section 9095, these
19 organizations may endorse their fire insurance policies to add coverage for “loss or damage
20 caused by windstorm, cyclone, tornado and hail, explosion, riot, riot attending a strike, aircraft,
21 vehicles *and smoke*” and may also insure against (a) water damage from plumbing and heating
22 systems, (b) rupture or bursting of steam or hot water heating system, (c) vandalism or malicious
23 mischief, (d) vehicles owned or operated by the insured or by any tenant of the described
24 premises, (e) glass breakage, (f) ice, snow and freezing, (g) fall of trees, (h) collapse, (i) burglary
25 and theft, and (j) mysterious disappearance.

1 The reference in Section 9095 to coverage for “vehicles and smoke” is not relevant to the
2 question whether Section 2071’s coverage for fire includes coverage for smoke damage.
3 Defendant provides no legislative history suggesting any connection between Section 9095 and
4 Section 2071. The Section 9095 exemption for certain unique constituents does not, on its face,
5 reasonably suggest that the Legislature intended “smoke” to be a separate, uncovered peril in
6 Section 2071.

7
8 **III. Conclusion**

9 The Court overrules the demurrer and orders AAA to answer the Complaint within 30
10 days.

11 Dated: November 19, 2015

12
13 
14 AMY D. HOGUE

15
16
17
18
19
20
21
22
23
24
25
26
27
28

Judge Amy D. Hogue