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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

OCIE E. HENDERSON et al., Plaintiffs and Appellants, v. FARMERS GROUP, INC., et al., Defendants and Respondents.	B236259 (Los Angeles County Super. Ct. No. BC443849)

APPEAL from judgments of the Superior Court of Los Angeles County, William F. Highberger, Judge. Affirmed in part, reversed in part.

Kabateck Brown Kellner, Brian S. Kabateck, Richard L. Kellner, and Joshua H. Haffner, for Plaintiffs and Appellants.

Tharpe & Howell, Christopher S. Maile, and Johnna J. Hansen; Greines, Martin, Stein & Richland, Robert A. Olson and Gary J. Wax, for Defendants and Respondents.

In this action arising out of insurance contracts, Ocie E. Henderson, Anthony Wallace, Roscoe and Edna M. Allen, and John and Sharon Billingslea appeal from judgments entered after the court granted motions for summary adjudication in favor of Fire Insurance Exchange (FIE), which disposed of all appellants' causes of action.[1]

Besides FIE, appellants sued Farmers Group, Inc. (Farmers Group); Farmers Insurance Exchange; Fire Underwriters Association (FUA); Mid-Century Insurance Company; Truck Insurance Exchange; and Truck Underwriters Association alleging that these entities collectively denied or underpaid valid claims for property damage sustained in the 2009 Southern California wildfires (Station Fire). Appellants brought causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing (bad faith), and unfair business practices under Business and Professions Code section 17200 et seq.

FIE moved for summary adjudication of breach of contract and bad faith claims by Henderson, Wallace and the Allens on the grounds that their failure to submit sworn proofs of loss, as required under their respective insurance policies, constituted a complete defense to these claims. The court granted the motions on this ground. Because Henderson and the Allens dismissed their claims for unfair business practices, the court entered a judgment. On appeal, they contend that the summary adjudication against them was erroneous because FIE cannot rely on the failure to submit a proof of loss as a defense absent a showing of substantial prejudice. We agree and reverse since FIE does not make the requisite showing.

FIE moved for summary adjudication of the Billingsleas' claims for breach of contract and bad faith because the nine month delay by the parties in providing notice of the loss, combined with evidence that they had remodeled their home, caused substantial prejudice to FIE. The Billingsleas opposed the motion, asserting they had not remodeled

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[1] Appellants represent that summary judgment was issued in favor of "Farmers," while respondents state that "Farmer's Group, Inc." moved for summary adjudication of Wallace's vicarious liability claim against it. Our review of the record on appeal shows that all relevant motions were made by FIE and all judgments appealed from were issued in FIE's favor alone.

the home and that FIE waived the defense since it did not object to the delayed notice of loss. The court granted the motion and entered a judgment after the Billingsleas dismissed their unfair business practices cause of action. On appeal, the Billingsleas argue that FIE cannot show prejudice from their submission of untimely notice of the claim. We reverse the judgment because FIE forfeited the defense by not specifically objecting to the untimely notice of loss.

Summary adjudication was granted on Wallace's unfair business practices cause of action on the ground that it is barred by *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287 (*Moradi-Shalal*). We reverse because this cause of action is not barred by *Moradi-Shalal*.

FIE separately moved for summary adjudication of Wallace's claims based on theories of joint venture and alter ego liability. The court granted the motion and entered a judgment. We agree with the trial court that Wallace failed to show the existence of a triable issue of material fact as to an inequitable result from treating the corporations as separate entities, as required for this cause of action. We therefore affirm the trial court's ruling in this respect.

FACTUAL AND PROCEDURAL SUMMARY

In August 2009, the Station Fire destroyed 250 square miles of forest and 89 homes in Southern California. Appellants owned homes located near the fire line. While none of their homes was burned by the fire, they claimed their homes sustained damage from smoke, soot, and ash from the fire, requiring remediation.

Appellants were insured against first-party property loss by FIE. The policies issued to appellants provided that as a condition to coverage, appellants had to provide timely notice of loss to FIE. Henderson's policy required "immediate notice," while the policies of the other appellants required written notice "without unreasonable delay."

The policies also required appellants to provide a signed, sworn proof-of-loss notice within 60 days of a request by FIE. The policies provide that the insured cannot bring an action against FIE unless he or she has fully complied with all policy terms and conditions.

Appellant Ocie Henderson

On February 9, 2010, Henderson contacted FIE and informed a company representative that his house sustained damage from smoke, ash, and soot from the Station Fire. On January 30, 2010, Henderson retained Advantage Loss Group, Inc. (ALG), a public adjuster, to manage his claim.

On February 11, FIE wrote ALG that it had received Henderson's claim and needed to conduct an inspection. It requested that Henderson "submit a proof of loss in accordance with the policy conditions" and included the relevant policy language detailing the 60-day requirement. FIE also attached a proof of loss form to the letter.

On February 24, an FIE hygienist inspected Henderson's property for evidence of damage. Samples taken from the residence were tested with the result that char was present in an amount exceeding one percent, the threshold level FIE and the hygienists used to determine whether a property required remediation.[2] The hygienist recommended that the home be cleaned.

On March 12, FIE sent a second reminder about the proof of loss requirement. On April 9, it sent a third request.

On April 13, 61 days after its first letter requesting a proof of loss, FIE sent ALG a letter denying Henderson's claim. The letter stated: "Under the express policy conditions and Insurance Code § 2071, you/your client had sixty days within which to return the signed and sworn proof of loss. More than sixty days have passed, and your client [is] therefore in breach of the insurance policy conditions. [¶] Based on the foregoing, [FIE] is denying the above-referenced claim and is closing its file." FIE did not inform Henderson that it had detected char in his home nor did it send him a copy of the hygienist's report.

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[2] Appellants claim this one percent threshold is arbitrary and was used to deny claims in bad faith. This factual dispute is not dispositive to our resolution of the appeal and we do not address it further.

Appellant Anthony Wallace

On March 28, 2010, Wallace contacted FIE, claiming damage to his house from smoke, ash, and soot. Wallace retained ALG to manage his claim.

On March 30, FIE wrote ALG that it had received notice of Wallace's claim and asked to inspect the property. FIE also asked that Wallace submit a proof of loss on the form attached to its letter.

ALG contacted FIE and set up a time for FIE to inspect Wallace's property. In advance of the inspection, FIE reminded ALG that it needed Wallace's signed and sworn proof of loss within 60 days of its first request.

FIE inspected Wallace's house on May 6. The hygienist who inspected the property found: (1) less than one percent char, with no ash or soot, on interior windowsills; (2) no detectable char, soot, or ash on interior finishes and contents; (3) no detectable char, soot, or ash in the attic; and (4) less than one percent char, with no ash or soot, on the exterior. The hygienist did not recommend that the property be cleaned.

On May 24 and June 18, FIE sent ALG letters stating that it needed additional time to make a final determination because it was awaiting test results from the inspection and it needed Wallace's proof of loss form.

On June 23, FIE notified ALG that it had denied Wallace's claim on the ground that "there were insufficient levels of smoke, ash and/or soot related to the August 2009 wildfires to require any remediation." FIE also stated it was "not waiving any of the terms or conditions of the applicable insurance policy, or any defenses now or hereafter available under the policy or at law, all of which are being expressly reserved and retained."

Appellants Roscoe and Edna Allen

On January 6, 2010, the Allens submitted a claim for smoke, ash, and soot damage to their house. The Allens also retained ALG to manage their claim. In a letter dated January 12, FIE wrote to the Allens that it had received notice of their claim and needed to inspect the property. It requested that the Allens submit a proof of loss form, which was attached to the letter.

On February 1, a hygienist retained by FIE inspected the Allens' property. The hygienist found trace levels of soot, ash, and char, but none exceeding one percent. Cleaning of the property was not recommended.

On February 9 and March 10, FIE stated it needed additional time to reach a determination on the Allens' claim because FIE was waiting for the expert to submit a final report and for the Allens to submit a proof of loss form.

On March 15, FIE denied the Allens' claim on the ground that there were insufficient levels of smoke, ash, and/or soot. FIE also stated it was "not waiving any of the terms or conditions of the applicable insurance policy, or any defenses now or hereafter available under the policy or at law, all of which are being expressly reserved and retained."

Appellants John and Sharon Billingslea

On June 2, 2010, the Billingsleas, through their agent ALG, submitted a claim for smoke, ash, and soot damage to their house. The next day, FIE wrote that it had received the notice and needed to inspect the property. It also requested that the Billingsleas submit a proof of loss form, which FIE attached to the letter.

FIE inspected the Billingsleas' property on June 22. The samples taken from the home were tested and found to have less than one percent char. The hygienist's report to FIE, dated July 14, did not recommend that the home be cleaned.

On June 24 and July 16, FIE sent letters to ALG advising that it needed additional time to make a determination on the claim because it was awaiting the inspector's report and the Billingsleas' proof of loss form.

On July 27, FIE sent a letter to ALG denying the Billingsleas' claim on the ground that there were insufficient levels of smoke, ash, and/or soot present in the home.

Appellants sued respondents for breach of contract, breach of the implied covenant of good faith and fair dealing, and unfair business practices (Bus. & Prof. Code, § 17200 et seq.). The operative complaint alleges that appellants suffered "damages stemming

from [defendant's] bad faith denial and/or underpayment of valid claims resulting from fire, soot, ash, char and wind damages sustained in the [Station Fire]."[3]

FIE moved for summary adjudication of the breach of contract and bad faith claims on the following grounds: 1) any measurable ash, soot, or char present on an insured property is not a loss covered under the policy; and 2) the failure by Henderson, Wallace, and the Allens to submit proofs of loss, and the Billingsleas' delayed notice of their claim excused FIE's performance.

The trial court issued a tentative ruling denying the motions. After a hearing on the motions, it granted them.

The court held that submission of a proof of loss is a condition precedent to coverage under the policies, and FIE did not need to show substantial prejudice to enforce a defense to appellants' breach of contract claims based on the lack of a proof of loss. Since it was undisputed that Henderson, Wallace, and the Allens did not submit proofs of loss, the court concluded they were barred from bringing suit against FIE.

As to the Billingsleas, the court found that their nine month delay in reporting their claimed loss breached the policy's requirement that they give written notice of loss to FIE "without unnecessary delay." It held that FIE was prejudiced by this delay because, according to the hygienist's declaration, the property was in a state of disorder, "with many rooms showing clear evidence of ongoing remodeling." "[T]he passage of time," the court noted "had confused, confounded and generally concealed any real

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[3] In addition to appellants, over 1,440 policyholders who had been denied coverage for similar claims of damage from the Station Fire sued FIE and Farmers Group. The action was consolidated with several other lawsuits, resulting in over 2,500 total plaintiffs.

FIE moved for summary adjudication of the claims brought by Henderson, Wallace, the Allens, and the Billingsleas since their claims, supporting facts, and FIE's defenses to those claims, were representative of the remaining plaintiffs. The parties agreed that the lawsuit would be stayed pending the trial court's decision and appellate review in this case.

attempt to obtain at that time an evaluation of the true conditions as they existed nine months earlier."

FIE moved for summary adjudication of Wallace's cause of action under Business and Professions Code section 17200 et seq. The court concluded that the claim could not be "predicated upon the allegations made by the plaintiff" and was barred by *Moradi-Shalal*.

FIE also moved for summary adjudication of Wallace's claims based on theories of alter ego and joint venture liability. The court found that the various Farmers Group entities, including FIE and FUA, "are legally separate from one another, and from their respective attorneys-in-fact."

After the court granted summary adjudication on the breach of contract and bad faith claims of Henderson, the Allens, and the Billingsleas, those appellants dismissed their remaining causes of action, and judgments were entered. After the court granted summary adjudication on Wallace's claims for breach of contract, bad faith, and unfair business practices, and his claims based on joint venture and alter ego liability, Wallace had no remaining causes of action and a judgment was entered.

This timely appeal followed.

DISCUSSION

"A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (Code Civ. Proc., § 437c, subd. (f)(1).) A moving defendant has met its burden of showing that "[a] cause of action has no merit" by establishing that one or more of the elements cannot be established, or that there is a complete defense. (Code Civ. Proc., § 437c, subd. (o).) "Once the [defendant] . . . has met that burden, the burden shifts to the [plaintiff] . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849 (*Aguilar*).)

We review the trial court's grant of summary adjudication de novo, considering all the evidence set forth in the moving and opposition papers. (*Aguilar, supra*, 25 Cal.4th at

p. 860.) "'[W]e strictly construe the moving party's evidence and liberally construe the opposing party's evidence.'" (*Abdelhamid v. Fire Ins. Exchange* (2010) 182 Cal.App.4th 990, 999 (*Abdelhamid*).)

I

The primary issue in these cases is whether, in order to sustain a defense based upon the failure of Henderson, Wallace, and the Allens to submit a sworn proof of loss, FIE must show substantial prejudice. We conclude this showing is required.

The standard elements of a breach of contract claim are: (1) existence of a contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) resulting damage to the plaintiff. (*Abdelhamid, supra*, 182 Cal.App.4th at p. 1000.) FIE sought and obtained summary adjudication of the breach of contract claims by Henderson, Wallace, and the Allens on the ground that those plaintiffs could not prove the second element, i.e., that they had performed the conditions precedent for coverage under their insurance policies.

Under California law, all fire insurance policies must include the standard form provisions provided by Insurance Code section 2071[4] or provisions that are "substantially equivalent to or more favorable to the insured" than the standard form. (§ 2070.)

The standard form describes the insured's duties that are triggered when a loss occurs, including: "without unnecessary delay" that it give "written notice to [the insurer] of any loss . . . [and] furnish a complete inventory of the destroyed, damaged and undamaged property;" and "within 60 days after the loss, unless the time is extended in writing by [the insurer], the insured shall render to [the insurer] a proof of loss, signed and sworn by the insured." (§ 2071.) The policies at issue contain substantially similar provisions; they require the insured to provide notice and an inventory of the damaged property immediately or without unnecessary delay and to submit a signed and sworn proof of loss within 60 days of a request by FIE. The policies further provide "[n]o suit or action on this policy for the recovery of any claim shall be sustainable in any court of

[4] All further statutory references are to the Insurance Code, unless otherwise indicated.

law or equity unless all the requirements of this policy shall have been complied with." (§ 2071.)

Compliance with the notice and proof of loss provisions is stated as a condition precedent to the insurer's obligation to pay benefits. (*Abdelhamid, supra,* 182 Cal.App.4th at p. 1001.) But the condition is not absolute. In *Campbell v. Allstate Ins. Co.* (1963) 60 Cal.2d 303, 305, the California Supreme Court held that while "[a]n insurer may assert defenses based upon a breach of the insured of a condition of the policy . . . , the breach cannot be a valid defense unless the insurer was substantially prejudiced thereby." The court identified notice and cooperation clauses as examples of policy conditions as to which a defense based on a breach requires the insurer to show substantial prejudice. (*Ibid.*) While the court did not expressly name proof of loss conditions, there is nothing in the language or reasoning of the opinion that excludes them. This rule is known as the "notice-prejudice rule."[5] (See *UNUM Life Ins. Co. of America v. Ward* (1999) 526 U.S. 358, 368 [the "notice-prejudice rule . . . 'requir[es] the insurer to prove prejudice before enforcing proof-of-claim requirements'"].)

In *Hanover Insurance Co. v. Carroll* (1966) 241 Cal.App.2d 558 (*Hanover*), the court considered whether the notice-prejudice rule applies to an insured's failure to submit a statement under oath to the insurer within 30 days after an accident with an uninsured motorist. This statement was required under the terms of the policy and by section 11580.2. The court reasoned that because the requirement is intended to prevent fraud, there was "no reason to believe that investigation 29 days after the accident would be more productive . . . than would such investigation 31 days after the event." (*Id.* at

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[5] While FIE cites a number of cases that did not apply the notice-prejudice rule in the context of the insured's failure to submit a timely proof of loss, all of them predate *Campbell v. Allstate Ins. Co, supra,* 60 Cal.2d at page 305. It does not appear that the parties in these cases argued that the insurer had to show prejudice to enforce a breach of that condition. These cases are not persuasive on the issue before us.

p. 565.)[6] It thus concluded that the "30-day provision for filing a statement under oath cannot be asserted to defeat recovery under the policy unless there is prejudice to the insurer." (*Id.* at p. 566.)

The purpose of the proof of loss requirement is to give the insurer the necessary facts to facilitate its investigation of a claim of loss after it has received notice of the claim. (13 Couch on Insurance (3d ed. 2005) § 186:8, p. 186-23.) These facts help the insurer identify fraudulent claims. (See *Abdelhamid, supra*, 182 Cal.App.4th at p. 1007 [finding prejudice since information was central to investigation of insured's involvement in arson of home]; *Francis v. Iowa Nat'l. Fire Ins. Co.* (1931) 112 Cal.App. 565, 571 [purpose of requiring sworn proof of loss within a limited time after fire occurs is to protect insurer against fraudulent claims].) Since the proof of loss requirement in the policies at issue here serves the same purpose as the statement under oath requirement in the *Hanover* policy, we see no material difference between the facts of this case and those addressed in *Hanover*.

FIE contends the notice-prejudice rule applies only to breaches of the notice or cooperation requirements. We do not agree. In *Overland Plumbing, Inc. v. Transamerica Ins. Co.* (1981) 119 Cal.App.3d 476, 482, the insurer claimed the insured failed to file its proof of loss before the expiration of 60 days, as required by the insurance policy. While the court rejected the insurer's claim because it was supported only by an inadmissible statement, it noted that "[e]ven if [the insured] had breached [the proof of loss] covenant, nothing in the record shows any resulting prejudice to [the insurer]." (*Id.* at p. 482; see also *Cisneros v. UNUM Life Ins. Co. of America* (9th Cir. 1998) 134 F.3d 939, 944 [proof of loss for ERISA claim]; *Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 881 [nontender of defense of wrongful death

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[6] "[A] late submission of the proof [of loss] does not deny the insurer an opportunity of determining the extent of its liability, nor does such late submission render impossible the detection of fraud. Consequently, it does not follow that a late submission of proof of loss should work to avoid the policy." (Note, *Insurance: Does the Failure to Submit Proof of Loss within a Specified Time Defeat Recovery Under the Terms of a Fire Insurance Policy* (1957) 8 Hastings L.J. 227, 228.)

action]; but see *Scottsdale Ins. Co. v. Essex Ins. Co.* (2002) 98 Cal.App.4th 86, 97 (*Scottsdale*) ["[insured] cites no case and we find none requiring a showing of prejudice outside the notice-cooperation clause context"].)

In *Scottsdale*, *supra*, 98 Cal.App.4th at pages 97-98, the court discussed whether the insurer had to show it was substantially prejudiced by the insured's failure to comply with a special endorsement condition in the commercial general liability policy between the parties. That provision required the insured, a building contractor, to obtain from its subcontractors hold harmless agreements and certificates of insurance with specified limits of liability. It also required the contractor to be named as an insured on all of the general liability policies held by the subcontractors. The contractor failed to meet these conditions. (*Id.* at pp. 93-94.) The court noted the insured "cites no case and we find none requiring a showing of prejudice outside the notice-cooperation clause context." (*Id.* at p. 97.) But since it found that the insurer demonstrated actual prejudice from the insured's failure to comply with the condition, the court declined to decide whether a showing of prejudice was required. (*Id.* at pp. 97-98.)

The special endorsement condition at issue in *Scottsdale* is materially different from a proof of loss condition. It required the insured to undertake certain acts *before* any liability accrued, including obtaining additional insurance. The insured's compliance with these requirements affected the insurer's risk. A proof of loss condition merely requires an act to be performed *after* the loss has accrued; the insured needs to submit a sworn statement to guide the insurer's investigative process after it has been notified of a potentially covered loss. It has no impact on the risk itself. (See *North American Capacity Ins. Co. v. Claremont Liability Ins. Co.* (2009) 177 Cal.App.4th 272, 289-290 ["'conditions neither confer nor exclude coverage for a particular risk . . . .'"].)

FIE also asserts that courts have not applied the rule outside of third party liability insurance policies. We disagree. (See, e.g., *Martinez v. Infinity Ins. Co.* (C.D. Cal. 2010) 714 F.Supp.2d 1057, 1061-1062 [first party automobile insurance policy; applying California law].)

While the notice-prejudice rule is not often invoked in first party cases, this is "because insurers seldom deny claims based on delays in notice and proof of loss." (Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2011) ¶ 6:37, p. 6A-6.) "[T]o show 'substantial prejudice,' the insurer would presumably have to show that the delayed notice and proof of loss *impaired its ability to investigate* and settle the claim. This is rarely encountered in first party cases." (*Ibid.*)

FIE quotes the following passage from *1231 Euclid Homeowners Assoc. v. State Farm Fire & Casualty Co.* (2006) 135 Cal.App.4th 1008, 1018 (*1231 Euclid*): "the total failure to comply with the notice and proof of loss conditions will excuse insurer liability due to the failure of a condition precedent." But FIE fails to provide the quote in full or the court's further statement,[7] "[w]hile the 'notice-prejudice' rule is applicable in California and requires that an insurer must demonstrate substantial prejudice arising from an insured's failure to provide a timely notice and proof of loss [citation], the undisputed record in this case establishes such prejudice to [the insurer]." (*Id.* at p. 1020.)

Even assuming for sake of argument that *1231 Euclid* stood for the proposition that the insurer need not show prejudice when no proof of loss is submitted, its facts are distinguishable. In that case the insured, a homeowners association, made a claim after its property sustained damage from the Northridge earthquake, but withdrew the claim after it determined the damage was largely cosmetic and well below the policy deductible. (*1231 Euclid, supra,* 135 Cal.App.4th at pp. 1010-1011.) Eight years later,

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[7] "While the submission of a proper and timely notice and proof of loss may be subject to a 'substantial compliance' standard [citation] and even a predicate requirement of insurer prejudice [citation], the total failure to comply with the notice and proof of loss conditions will excuse insurer liability due to the failure of a condition precedent. [Citations.] A fortiori, where an insured submits no claim at all or, as in this case, voluntarily withdraws the claim . . . , the insurer cannot be faulted for closing its file. The burden is on the insured to initiate and support the claim." (*1231 Euclid, supra,* 135 Cal.App.4th at p. 1018.)

after the passage of Code of Civil Procedure section 340.9,[8] the insured filed an action for breach of contract and breach of the implied covenant of good faith and fair dealing. (*1231 Euclid*, at p. 1011.) Since the insured had voluntarily withdrawn its claim eight years before, the court concluded it had failed to carry its burden of supporting a claim. Thus, since the association withdrew its claim and never reinitiated it, its failure to give timely notice *and* a proof of loss excused the insurer's liability and gave it a complete defense to the breach of contract and bad faith causes of action. (*Id.* at pp. 1018, 1020.)

The court then analyzed whether the insurer had demonstrated substantial prejudice. It found that it had since the association's "voluntary claim withdrawal terminated both [the insurer's] obligation and reason to conduct an appropriate investigation. Obviously, critical observations of the property, as it existed immediately after the earthquake, would be impossible nearly eight years after the fact." (*1231 Euclid, supra*, 135 Cal.App.4th at p. 1020.) The insurer was thus effectively prevented from investigating the claimed loss. (*Ibid*.)

Here, Henderson, Wallace, and the Allens did not withdraw their claims or fail to make a claim. They notified FIE of their claims and cooperated with it to allow testing at their properties to investigate and measure the extent of damage. Any language in *1231 Euclid* suggesting that an insurer need not show prejudice when the insured fails to submit any claim at all is not applicable to this case because of this difference. The *1231 Euclid* court evaluated whether the insurer showed substantial prejudice; we do not view the case as standing for the proposition that the failure to submit a proof of loss after giving notice of a claim and cooperating with the insurer's investigation, provides a complete defense to an insured's causes of action absent a showing of insurer prejudice.

There is ample reason to apply the "notice-prejudice" rule here. California has a strong public policy against "technical forfeitures." (*Bollinger v. National Fire Ins. Co.* (1944) 25 Cal.2d 399, 405.) Since forfeitures are not favored, "'conditions in a contract, will if possible be construed to avoid forfeiture. [Citations.] This is particularly true of

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[8] Code of Civil Procedure section 340.9, extended the applicable statute of limitations for insurance claims for damages arising out of the Northridge earthquake.

insurance contracts. [Citation.] [¶] And where . . . the condition is express and cannot be avoided by construction, the court may, in a proper case, excuse compliance with it or give equitable relief against its enforcement.'" (*Root v. American Equity Specialty Ins. Co.* (2005) 130 Cal.App.4th 926, 942, quoting *O'Morrow v. Borad* (1946) 27 Cal.2d 794, 800.) FIE's employees testified that they waited for the insured to submit a proof of loss only where FIE's hygienist recommended cleaning, i.e., when its investigation determined the insured had sustained a specific measure of damage and cleanup costs would be greater than the deductible. A reasonable trier of fact might infer that the insureds' failure to provide a sworn proof of loss in such cases was a technical forfeiture that FIE used to avoid paying for cleanup costs when its hygienists recommended that course of action after testing samples from the property.

Because of the type of loss—presence of particulate matter—it may be inferred that appellants would not have been able to provide much additional useful information in a proof of loss to enable FIE to conduct a more thorough investigation. The presence of soot, ash, or char is not easily measured or documented. Because of these challenges, FIE retained hygienists to serve as experts to collect samples from the properties to send to a laboratory to test and issue findings on the levels of matter contained in the samples. The findings were documented in a report and provided to FIE. Moreover, the person most knowledgeable testified that FIE relied upon the hygienist's conclusions, not the proof of loss, in preparing estimates.[9]

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[9] Farmers Group's person most knowledgeable described difficulties in determining the presence of wildfire particulate matter. He testified "we established an expert for the adjusters to utilize to help them evaluate the claim. And actually, there were multiple experts, but these were the hygienist firms that we had utilized." In making an estimate of the cost of cleanup, "the hygienist would advise [the adjuster] of what [his or her] findings were. They would generate a report . . . [¶] [a]nd then based upon the report, the adjuster would then prepare their estimate of what was believed to be necessary to correct the observed problems in the home, be it just residue or actual physical damage. [¶] [T]hat was provided to [the insured], along with a check because that would have been what we considered our undisputed findings." When the attorney then asked "in those situations, you relied upon your own investigation and not the proof of loss; correct?" The witness responded, yes.

Other jurisdictions require the insurer to show prejudice from an insured's failure to submit a proof of loss in order to avoid coverage on that ground. (See 13 Couch on Insurance (3d ed. 2011) § 193:66 [collecting cases].)

FIE contends the notice-prejudice rule, because it is judicially created, "cannot be applied to alter a statutory requirement."[10] While section 2071 contains the standard form, the conditions can be changed to make the contract more favorable to the insured. (§ 2070.) More fundamentally, "'[d]espite the significant statutory prescription of fire insurance policy terms, contracts of this kind are treated as voluntary contracts rather than legislative enactments, since they derive their force and efficacy from the consent of the parties.'" (*Mitchell v. United National Ins. Co.* (2005) 127 Cal.App.4th 457, 472.) Far from altering a "statutory requirement," the "notice-prejudice rule" merely guides courts in construing conditions in insurance contracts in order to prevent the insurer from "escap[ing] a liability which it ha[s] expressly undertaken." (*Hanover, supra*, 241 Cal.App.2d at p. 566.)[11] In other words, the notice-prejudice rule avoids an absurd result that would follow were courts to require absolute compliance with the proof of loss condition.

Accordingly, we conclude the notice-prejudice rule applies to this case. In order to enforce a defense based upon plaintiffs' failure to provide a timely proof of loss, FIE must show that it suffered substantial prejudice as a result.

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[10] FIE cites *Foxgate Homeowners' Assn. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, 14-15. In that case the California Supreme Court held that a judicially crafted exception to statutes mandating confidentiality in mediation was improper because the applicable statutes were clear and unambiguous, the legislative intent underlying these provisions was contrary to the exception, and the exception was not necessary to avoid an absurd result.

[11] FIE also asserts that the notice-prejudice rule cannot apply to fire insurance policies generally. It cites to section 550, which provides: "In case of loss upon an insurance against fire, an insurer is exonerated if notice thereof is not given to him without unnecessary delay by an insured or some person entitled to the benefit of the insurance." (§ 550.) This section deals exclusively with providing notice of a claim. We find no other statutes addressing other policy conditions, including furnishing a proof of loss and the duty to cooperate.

Because FIE was the moving party and asserted a defense based on the lack of a timely proof of loss, it had the burden to show prejudice. (*Campbell v. Allstate Ins. Co.*, *supra*, 60 Cal.2d 303.) While the trial court held in the alternative that FIE demonstrated that it had suffered substantial prejudice, FIE presented no legal argument or any evidence of prejudice as to Henderson, Wallace, and the Allens. Nor does it present argument of prejudice in its brief on appeal. It is not entitled to summary judgment on this issue.

FIE contends in the alternative that the summary judgment is proper as to appellants' bad faith claims because it relied on an interpretation of the proof of loss condition that is subject to dispute. Any evidence that FIE relied on court authority in denying coverage has been severely undercut by testimony from its own employees that the company required a proof of loss only when its investigation concluded that the insured had a valid claim. Viewing this fact in the light most favorable to the appellants (*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 724), a jury could conclude that FIE acted unreasonably and used the failure to provide timely notice or proof of loss not because it believed these were required under California law, but as a shield to deny meritorious claims. In any event, FIE did not present this argument in its moving papers, and we need not decide it.

II

The Billingsleas contend there are triable issues of material fact as to whether FIE showed substantial prejudice from the delayed notice of loss. In the alternative, the Billingsleas argue that FIE forfeited its defense based on the delayed notice. While FIE did show prejudice from the delayed notice, it did not specifically object to the Billingsleas' delayed notice until the lawsuit, which constitutes a forfeiture of the defense under section 554.

FIE moved for summary adjudication of the Billingsleas' claim on the ground that they unreasonably delayed in giving notice of their loss. FIE alleged that the Billingsleas were in the middle of renovating their property during that time and the property appeared in a state of disarray when FIE attempted to inspect it. It contended that the

delayed notice caused substantial prejudice because the condition of the property was substantially different from its condition when the loss occurred. The court granted summary judgment on this ground.

While the Billingsleas did not brief the issue of FIE's forfeiture of the delayed notice in opposition to FIE's motion in the trial court, their attorney raised it in oral argument. He argued that because FIE did not object to the delayed notice and denied the claim on the ground that there were no measurable levels of soot, ash, or char, FIE waived its defense to the action based on the delayed notice. Counsel for FIE responded that in its letter FIE stated it was reserving any available defenses and this was sufficient for the court to find it did not waive its delayed notice defense. Appellants' opening brief asserts that because FIE denied coverage on another ground, "the trial court's determination disregarded evidence of [FIE's] waiver." This is sufficient to preserve the issue for review.

If the insurer fails to promptly *and specifically* object to a delay in the presentation of notice, any objections based on delay are waived. (§ 554; *Clemmer v. Hartford Ins. Co., supra,* 22 Cal.3d at p. 881; *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 34 (*Waller*).)

"The law is established that where an insurance company denies liability under a policy which it has issued, it waives any claim that the notice provisions of the policy have not been complied with." (*Comunale v. Traders & General Ins. Co.* (1953) 116 Cal.App.2d 198, 202-203.) The rationale for this rule is "that an insurer cannot deny all liability, and at the same time be permitted to stand on a provision inserted in the policy for its benefit. . . . [W]here the insurer denie[d] all liability under the policy, the insured is misled into believing it would be futile to perform any affirmative obligation under the policy. In other words, the insurer is deemed to have waived the insured's failure to perform because the nonperformance is attributable to the insurer's conduct. [Citation.] Thus, the cases in which a notice or proof of loss provision has been deemed waived by the insurer usually involve an insured lulled by the insurer's silence into believing it had complied with the policy notice and/or proof of loss provisions.

Consistent with this rule, section 554 operates to deem an insurer's belated objection to an untimely notice of claim or proof of loss waived if not promptly called to the attention of the insured. . . . [S]ection 554 prevents an insurer from lulling the insured into believing that notice and proof of loss are unnecessary." (*Insua v. Scottsdale Ins. Co.* (2002) 104 Cal.App.4th 737, 742–743, fns. omitted.)

If untimely notice is raised concurrently with other grounds for denial, it is preserved as a defense. (*Select Ins. Co. v. Superior Court* (1990) 226 Cal.App.3d 631, 637.)

FIE did not object to the Billingsleas' delayed notice. It sent a hygienist to test the property and, finding insufficient levels of ash, soot, and char, denied remediation under the policy. Its denial letter did not mention the delayed notice or any change in the condition of the house. Instead, FIE denied the claim on the ground that there were insufficient levels of smoke, ash, and/or soot present in the home. FIE did not object to the Billingsleas' delayed notice of loss until the commencement of this lawsuit, which constitutes a waiver of its defense based on that untimely notice.

FIE contends that because its denial letter contained a general reservation of rights clause, it cannot be held to have waived the Billingsleas' delayed notice. But section 554 requires a "specific" objection and the generic nonwaiver clause is not specific. (See *J. Frank & Co. v. New Amsterdam Casualty Co.* (1917) 175 Cal. 293, 299 ["prohibition in a policy against waiver . . . does not apply to . . . giving notice"].) While the statute does not define the term "specific," at a minimum, the Billingsleas have raised a triable issue of material fact on FIE's waiver. We conclude summary judgment was improper.

III

Wallace contends the court erred in granting summary judgment in favor of FIE on his claims under the Unfair Competition Law (UCL), Business and Professions Code section 17200.

The UCL prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." (Bus. & Prof. Code, § 17200.) The UCL authorizes injunctive relief and restitution. (Bus. & Prof. Code, § 17203.) The

statute imposes strict liability and it is not necessary to show the defendant intended to injure the plaintiff.

Because the statute's definition is disjunctive, a practice is prohibited as unfair or deceptive even if not unlawful, and vice versa. An unlawful business act or practice is one that is """forbidden by law."" (*People v. McKale* (1979) 25 Cal.3d 626, 634.) The UCL "borrows" violations of other laws and makes a violation of that law a per se violation of the UCL. (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 950.)

The Unfair Insurance Practices Act (UIPA), provides that no person may engage in an unfair or deceptive act or practice in the business of insurance. (§ 790.02.) An unfair practice is defined as the failure to attempt in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear. (§ 790.03, subd. (h)(5).)

In *Moradi-Shalal*, *supra*, 46 Cal.3d at page 304, the California Supreme Court held that the UIPA does not create a private cause of action. Rather, enforcement of the UIPA is left primarily to the California Insurance Commissioner.

A party cannot plead around *Moradi-Shalal* by relabeling a cause of action for violations of UIPA as a cause of action under the UCL. (*Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 283 (*Manufacturers Life*).) In other words, UIPA's provisions may not be "borrowed" to serve as a basis for a UCL action. (*Id.* at pp. 283-284.)

There is a split of authority on whether a breach of contract or bad faith cause of action may serve as a predicate for a UCL claim where the allegations supporting the claim also would constitute a violation of the UIPA.

In *State Farm Fire & Casualty Co. v. Superior Court* (1996) 45 Cal.App.4th 1093 (*State Farm*), the plaintiffs sued for common law fraud, bad faith, intentional infliction of emotional distress, and a violation of the UCL based on the fraud and bad faith claims. They alleged the insurer surreptitiously reduced the earthquake coverage offered in its homeowner insurance policies. (*Id.* at pp. 1099-1101.) Defendants demurred to the UCL claim on the ground that it was barred by *Moradi-Shalal*. (*State Farm*, at p. 1101.) The

court held that *Moradi-Shalal* did not bar a UCL claim based on common law theories of fraud or bad faith, even though such alleged acts might also violate the provisions of the UIPA. (*State Farm*, at pp. 1098-1099.) The court reasoned that since the other two prongs under the UCL, forbidding unfair or deceptive acts, provide independent bases for relief, the causes of action could proceed because they met the definition of an unfair or deceptive business act or practice. (*Id.* at pp. 1104-1105.) The court noted that UIPA did not destroy common law or statutory claims and *Moradi-Shalal* expressly held that courts retained jurisdiction to impose "'other remedies against insurers in appropriate common law actions.'" (*State Farm*, at p. 1108, quoting *Moradi-Shalal, supra*, 46 Cal.3d at pp. 304-305.) Moreover, since the plaintiffs sought only injunctive and restitutive relief on the UCL claim, the court was persuaded that the plaintiffs were not attempting to "do an 'end-run' on *Moradi-Shalal* and recover *damages* for conduct *which violated* [the UIPA] by recasting their claim on some ground other than that [statute]." (*Ibid.*)

The court in *Textron Financial Corp. v. National Union Fire Ins. Co.* (2004) 118 Cal.App.4th 1061 (*Textron*), disagreed with *State Farm.* The *Textron* court reasoned that *State Farm* had been "undercut" by the California Supreme Court's decision in *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163 (*Cel-Tech*), which disapproved *State Farm's* "amorphous" construction of the term "'unfair' business practice" as any conduct that """offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers."""" (*Textron, supra*, 118 Cal.App.4th at pp. 1071-1072, quoting *State Farm, supra*, 45 Cal.App.4th at pp. 1103-1104).) The *Cel-Tech* court instead required the UCL's "'unfair' business practices" prong to "be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition." (*Cel-Tech,* 20 Cal.4th at pp. 186-187.) Based on "the Supreme Court's disapproval of *State Farm's* 'amorphous' definition of 'unfair' practices and its focus on legislatively declared public policy" (*Textron*, at p. 1072), the court concluded that where an insured's UCL cause of action is based on common law claims amounting to "the type of activities covered by the UIPA," it is barred by *Moradi-Shalal.* (*Textron*, at p. 1070;

see also *Safeco Ins. Co. v. Superior Court* (1990) 216 Cal.App.3d 1491.) The court noted that an insured's UCL claim based on a statutory violation like the Cartwright Act[12] would not be barred, even when the statutory claim would also constitute a violation of the UIPA. (*Textron, supra,* at p. 1070.)

"As the [Supreme C]ourt itself acknowledged, we are not to read *Cel-Tech* as suggesting that such a restrictive definition of 'unfair' should be applied in the case of an alleged *consumer* injury. The court stated, '[t]his case involves an action by a competitor alleging anticompetitive practices. *Our discussion and this test are limited to that context*. Nothing we say relates to actions by consumers . . . .'" (*Smith v. State Farm Mutual Automobile Ins. Co.* (2001) 93 Cal.App.4th 700, 720, fn. 23, quoting *Cel-Tech, supra,* 20 Cal.4th at p. 187, fn. 12; but see *Aleksick v. 7-Eleven, Inc.* (2012) 205 Cal.App.4th 1176, 1192 [noting split of authority on definition of "unfair" in consumer cases].)

The Supreme Court in *Moradi-Shalal* expressly stated that insurers who violate UIPA can be liable to the injured party for other civil claims; "the courts retain jurisdiction to impose civil damages or other remedies against insurers in appropriate common law actions, based on such traditional theories as fraud, infliction of emotional distress, and (as to the insured) either breach of contract or breach of the implied covenant of good faith and fair dealing." (*Moradi-Shalal, supra,* 46 Cal.3d at pp. 304-305.)

Consistent with this statement, in *Manufacturers Life*, the California Supreme Court clarified that *Moradi-Shalal* did not hold that the UIPA "exempts insurance companies from other state antitrust laws or from civil liability for anticompetitive conduct." (*Manufacturers Life, supra,* 10 Cal.4th at p. 279.) In that case, the insurer demurred to claims for anticompetitive conduct brought under the Cartwright Act and the UCL. The insurer claimed that permitting a UCL action "for an unfair insurance practice that is prohibited by the UIPA would 'seriously compromise'" this court's holding in

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[12] Business and Professions Code section 16720 et seq.

[*Moradi-Shalal*,] . . . even if the conduct also constitutes a violation of the Cartwright Act." (*Id.* at p. 268.) The Supreme Court rejected the insurer's claims and allowed the UCL cause of action to proceed. Construing the UIPA, it found the Legislature did not intend the UIPA to displace the UCL. (*Id.* at p. 274.) Moreover, it noted "the Legislature has clearly stated its intent that the remedies and penalties under the [UCL] are cumulative to other remedies and penalties." (*Id.* at p. 284 (conc. opn. of Mosk, J.).)

The Supreme Court has granted review to clarify the issue. (*Zhang v. Superior Court* (2009) 178 Cal.App.4th 1081, review granted Feb. 10, 2010, S178542.)

We follow *State Farm*, and based on the reasoning of *Manufacturers Life*, we conclude that *Moradi-Shalal* does not bar a UCL cause of action based on an insurer's bad faith, even though the conduct in question may also constitute a violation of the UIPA. Since "courts retain jurisdiction to impose civil damages or other remedies against insurers in appropriate common law actions," including those based on breach of the implied covenant of good faith and fair dealing (*Moradi-Shalal, supra*, 46 Cal.3d at p. 304), a UCL claim based on those actions is not an end-run around *Moradi-Shalal*. Thus, we conclude the trial court's grant of summary judgment on this basis was erroneous.

IV

Appellants claim that all defendants should be jointly liable for the causes of action against FIE under theories of alter ego and joint venture liability.

A cause of action for breach of the implied covenant of good faith and fair dealing "lies only against the insurer, and is based on the contractual relationship between insurer and insured." (*Tran v. Farmers Group, Inc.* (2002) 104 Cal.App.4th 1202, 1217 (*Tran*), citing *Waller, supra,* 11 Cal.4th at p. 36.) Liability may be imposed on an entity shown to be the insurer's "'alter ego,'" and courts have pierced the corporate veil to impose alter ego liability on the attorney-in-fact of an inter-insurance exchange. (See *Tran, supra*, at pp. 1219-1220.) There are two elements that must be shown to support a finding that an entity is the alter ego of another: (1) such a unity of interest and ownership that the separate corporate personalities are merged, so that one corporation is a mere adjunct of

another or the two companies form a single enterprise; and (2) an inequitable result if the acts in question are treated as those of one entity alone. (*Tran, supra*, 104 Cal.App.4th at p. 1219.) "[T]he corporate form will be disregarded only in narrowly defined circumstances." (*Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 301.)

FIE is a reciprocal or inter-insurance exchange, which is an insuring entity in which the policyholders are insureds with respect to their own risks and insurers with respect to the risk of other policyholders. (See *Lee v. Interinsurance Exchange* (1996) 50 Cal.App.4th 694.) FIE's ownership is vested with its subscribers (policyholders).

"[U]nder section 1305, the attorney-in-fact is 'involved' as a matter of law in the execution of insurance contracts by a reciprocal insurer." (*Tran, supra*, 104 Cal.App.4th at p. 1216.) This is because "[t]he insurer can issue contracts only through the agency of the attorney-in-fact." (*Ibid.*) FIE's attorney-in-fact is FUA, which is a wholly owned subsidiary of Farmers Group.

Appellants contend that FIE and FUA are shell corporations for Farmers Group and that Farmers Group exercises complete control over both companies, rendering it vicariously liable for appellants' claims against FIE.

In support of its motion for summary judgment, FIE submitted its 2010 annual statement filed with the California Department of Insurance to show it is adequately capitalized. It also submitted the annual statements of the other members of the exchange to show each respective member was adequately capitalized. Declarations submitted by officers and employees of the exchange described the Department's periodic evaluation of the financial condition of the exchanges, which is done by analyzing their respective quarterly and annual statements. The purpose of the examination is to determine whether the exchanges improperly comingle or divert funds, misrepresent the identity of their respective ownership, management, and financial interest, or fail to maintain an arm's length relationship with each other. Wallace did not dispute these facts.

The trial court found that because FIE presented evidence that it had a $708,861,026 surplus in assets available to satisfy a judgment, it had made a prima facie showing that there would be no inequitable result to Wallace. The court concluded that

Wallace failed to rebut this showing since he had not presented any evidence that FIE was inadequately capitalized or unable to satisfy any judgment against it from the litigation.

Wallace, relying on *Cleveland v. Fire Ins. Exchange* (June 1, 1994, No. B062941 [nonpub. opn.]), which held Farmers Group liable under this theory, argues that Farmers Group is collaterally estopped from opposing this issue. In that case, a jury found FIE and Farmers Group guilty of bad faith conduct and liable for punitive damages in their wrongful handling of an insured's claim for damage sustained to his home in an arson. FIE and Farmers Group were found jointly and severally liable. On appeal Farmers Group contended there was insufficient evidence to support a finding that FIE was an actual or ostensible agent of Farmers Group and there was no substantial evidence that Farmers Group was engaged in the business of insurance. The court upheld the judgment, finding sufficient evidence from testimony that Farmers Group was responsible for advertising FIE's policies and employed the Farmers Group logo; Farmers Group referred to FIE's claims adjusters as employees and agents of Farmers Group; and correspondence to the plaintiff regarding his claim under the FIE policy was on Farmers Group letterhead.

That case does not support appellants' claim that Farmers Group is estopped from litigating its liability. The case is over 18 years old and involves a post-verdict determination of the sufficiency of the evidence. Moreover, the determination of alter ego liability necessarily depends on the particular facts of each case. "Because it is founded on equitable principles, application of the alter ego 'is not made to depend upon prior decisions involving factual situations which appear to be similar. . . . "It is the general rule that the conditions under which a corporate entity may be disregarded vary according to the circumstances of each case."' [Citations.]" (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1248.)

Wallace has not carried his burden of showing error in the trial court's ruling on this issue.

FIE is required by law to be adequately capitalized, and there is nothing to indicate that FIE fails to satisfy that requirement. FIE submits financial statements quarterly and annually to the California Department of Insurance and is audited on an annual basis by independent accountants. The Department of Insurance examines the financial condition of all of the exchanges simultaneously to ensure that each is adequately capitalized. It also allows the Department to trace and reconcile the transactions between the exchanges.

Wallace contends Farmers Group insulates itself from liability by "siphoning off profits from its exchanges' business operations by charging a 'management fee.'" Wallace provides no record citation to support this claim. The only evidence he presented below is a claim form for a class action settlement reached in a case that he asserts "accused Farmers and its exchanges of overpaying the 'management fee.'" But he offers no evidence that Farmers Group admitted liability, nor has he requested that we take judicial notice of the lawsuit to confirm the claims made by the plaintiffs in that case.

Wallace also argues that since the Farmers Group logo appears on letters sent by FIE, there was a unity of interest to support piercing the corporate veil. Standing alone, this is insufficient to raise a triable issue of material fact. (See *Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1284 [that insurers operate as a group under corporate parent insufficient to show alter ego].)

The only remaining contention is that the policyholders will ultimately be harmed by any loss in profits resulting from a judgment against FIE. This is inherent in the structure of a reciprocal or inter-insurance exchange and not a result that can be attributed to misdoing by Farmers Group in the absence of other evidence.

Thus, "there is nothing to indicate that [Wallace], if successful against [FIE], will not be able to collect on any judgment against [it]." (*Leek v. Cooper* (2011) 194 Cal.App.4th 399, 418.)

Wallace also references two other vicarious liability theories—joint venture and ostensible agency. But he cites no facts that support these theories and fails to articulate

why they apply. Without more, we find no error in the trial court's grant of summary judgment in favor of FIE on the issue of vicarious liability.

DISPOSITION

The summary judgment in favor of FIE on the joint venture liability is affirmed. The remaining summary judgments are reversed. Costs to all appellants except the appeal by Wallace, as to which parties are to bear their own.

CERTIFIED FOR PUBLICATION.

EPSTEIN, P. J.

We concur:

WILLHITE, J.

SUZUKAWA, J.