



LEXSEE 81 CAL.APP.4TH 1282



Caution

As of: Aug 27, 2009

ERNEST FRALEY et al., Plaintiffs and Appellants, v. ALLSTATE INSURANCE COMPANY, Defendant and Respondent.

No. D032817.

**COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT,
DIVISION ONE**

81 Cal. App. 4th 1282; 97 Cal. Rptr. 2d 386; 2000 Cal. App. LEXIS 532; 2000 Daily Journal DAR 7355

June 14, 2000, Decided

SUBSEQUENT HISTORY: [***1] The Publication Status of this Document has been Changed by the Court from Unpublished to Published July 6, 2000.

PRIOR HISTORY: APPEAL from a judgment of the Superior Court of San Diego County. Super. Ct. No. 717906. Thomas Ray Murphy, Judge.

DISPOSITION: The judgment is affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellants sought review of the order of the Superior Court of San Diego County (California), which granted summary judgment in favor of respondent insurer in appellants' action for breach of contract, breach of the implied covenant of good faith and fair dealing, fraud, and bad faith.

OVERVIEW: A fire caused damage to appellants' home, which was covered by respondent insurer's homeowners policy. The policy covered the actual cash value, or in the alternative, the full replacement cost of the building if it

was repaired or replaced within 180 days of the actual cash value payment. Respondent paid the actual cash value of the property. Thereafter, respondent advised appellants' that because reconstruction could not be completed by the end of the stipulated 180-day period, replacement cost benefits were no longer available. Appellants filed an action against respondent for breach of contract, breach of the implied duty of good faith and fair dealing, fraud, and bad faith. Respondent filed a motion for summary judgment, which was granted. Appellants' sought review. Judgment was affirmed because the policy clearly required appellants to comply with the 180-day period for full replacement costs benefits, respondent did not misrepresent the terms of the policy, and appellants' claims were barred as a matter of law. Further, because there was a genuine dispute regarding respondent's contractual obligations, appellants' claim for bad faith failed as a matter of law.

OUTCOME: Summary judgment in favor of respondent was affirmed because the policy required appellants to comply with the 180-day period for full replacement costs benefits, respondent did not misrepresent the terms of the policy, and appellants' claims were barred as a

matter of law. Further, because there was a genuine dispute regarding respondent's contractual obligations, appellants' claim for bad faith failed as a matter of law.

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Standards > General Overview

[HN1] A summary judgment motion is appropriate if the cause of action has no merit, that is, if one or more of the elements of the cause of action cannot be separately established. *Cal. Civ. Proc. Code §437c(a), (n)(1)*.

Civil Procedure > Summary Judgment > Standards > Materiality

[HN2] A motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Cal. Civ. Proc. Code §437c(c)*.

Civil Procedure > Summary Judgment > Appellate Review > General Overview

Civil Procedure > Appeals > Standards of Review > De Novo Review

Insurance Law > Claims & Contracts > Policy Interpretation > Appellate Review

[HN3] The appellate court reviews the trial court's ruling on the summary judgment motion, and its interpretation of the insurance policy, de novo.

Insurance Law > Claims & Contracts > Policy Interpretation > Plain Language

[HN4] The rules governing insurance policy interpretation require the courts to look first to the language of the contract in order to ascertain its plain meaning or the meaning a layperson would ordinarily attach to it.

Contracts Law > Contract Interpretation > General Overview

Insurance Law > Claims & Contracts > Policy Interpretation > Reasonable Expectations > General Overview

[HN5] The fundamental rules of contract interpretation

are based on the premise that the interpretation of a contract must give effect to the mutual intention of the parties. Such intent is to be inferred, if possible, solely from the written provisions of the contract.

Insurance Law > Claims & Contracts > Policy Interpretation > Ambiguous Terms > Coverage Favored

[HN6] If an insurance policy is ambiguous, i.e. susceptible to more than one reasonable interpretation, the ambiguity is construed in favor of coverage. However, the predicate to interpreting ambiguities in favor of coverage is that the policy be reasonably susceptible to more than one interpretation.

Insurance Law > Claims & Contracts > Policy Interpretation > Ambiguous Terms > Coverage Favored

[HN7] Where an insurance policy clearly excludes coverage, the court will not indulge in tortured construction to divine some theoretical ambiguity in order to find coverage.

Contracts Law > Contract Interpretation > General Overview

Insurance Law > Claims & Contracts > Policy Interpretation > General Overview

[HN8] The court interprets insurance contracts as a whole, with each clause lending meaning to the others.

Contracts Law > Contract Interpretation > General Overview

Insurance Law > Claims & Contracts > Policy Interpretation > General Overview

[HN9] The court should interpret contractual language in a manner which gives force and effect to every clause rather than to one which renders clauses nugatory.

Insurance Law > Claims & Contracts > Policy Interpretation > Parol Evidence > Extrinsic Evidence

[HN10] Extrinsic evidence may be admitted to aid in the interpretation of an insurance policy only where the terms are ambiguous.

Civil Procedure > Appeals > Reviewability > Preservation for Review

[HN11] Where a point is merely asserted by counsel without any argument of or authority for its proposition,

it is deemed to be without foundation and requires no discussion.

Contracts Law > Types of Contracts > Covenants

Contracts Law > Types of Contracts > Implied-in-Law Contracts

Insurance Law > Claims & Contracts > Good Faith & Fair Dealing > General Overview

[HN12] The covenant of good faith and fair dealing is implied in law to assure that a contracting party refrains from doing anything to injure the right of the other to receive the benefits of the agreement. In essence, the covenant is implied as a supplement to the express contractual covenants, to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party's rights to the benefits of the contract.

Contracts Law > Types of Contracts > Covenants

Insurance Law > Claims & Contracts > Good Faith & Fair Dealing > Payments

[HN13] Where 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 of good faith and fair dealing because it frustrates the insured's primary right to receive the benefits of his contract, i.e. prompt compensation for losses.

Contracts Law > Types of Contracts > Covenants

Insurance Law > Bad Faith & Extracontractual Liability > Payment Delays & Denials

[HN14] In a bad faith case, the primary test is whether the insurer withheld payment of an insured's claim unreasonably and in bad faith. Where benefits are withheld for proper cause, there is no breach of the implied covenant.

Insurance Law > Bad Faith & Extracontractual Liability > General Overview

[HN15] It is well established that bad faith liability cannot be imposed where there exists a genuine issue as to the insurer's liability under California law.

Insurance Law > Bad Faith & Extracontractual Liability > General Overview

[HN16] A court can conclude as a matter of law that an insurer's denial of a claim is not unreasonable, so long as there exists a genuine issue as to the insurer's liability.

Insurance Law > Bad Faith & Extracontractual Liability > General Overview

[HN17] The "genuine dispute" doctrine may be applied where the insurer denies a claim based on the opinions of experts.

Insurance Law > Bad Faith & Extracontractual Liability > General Overview

[HN18] Where the parties rely on expert opinions, even a substantial disparity in estimates for the scope and cost of repairs does not, by itself, suggest the insurer acted in bad faith.

Insurance Law > Bad Faith & Extracontractual Liability > General Overview

[HN19] Despite the special relationship between an insurer and its insureds, an insurer may give its own interests consideration equal to that it gives the interests of its insureds.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court granted an insurer summary judgment in a bad faith action by insured homeowners. A fire had extensively damaged the insureds' house in 1994. The policy provided for replacement cost or actual cash value, and also provided that if the insurer paid the actual cash value, the insureds could apply for additional replacement costs if the repair or replacement occurred within 180 days of the cash value payment. The insurer paid a cash value estimate of \$ 200,000 and advised the insureds that they were entitled to additional benefits if they actually repaired or replaced their home. The insureds submitted the claim dispute to appraisers, who in 1997 confirmed the actual cash value at \$ 200,000 and the replacement cost at \$ 364,500. The insurer then advised the insureds that they had 180 days from the date of the appraisal to repair or replace the house. Over five months later, the insureds had just secured a contractor, and the insurer advised them that replacement benefits were not available, since the replacement would not be completed within 180 days. The insureds purchased a different home

to protect their replacement rights and the insurer paid the difference between the \$ 200,000 cash value already paid and the replacement cost award. The insureds then brought this action, alleging that the insurer's delay in payment resulted in the insureds' purchasing a less desirable home. The trial court found that the 180-day provision applied to the insureds' claim and that insurer acted reasonably under the circumstances. (Superior Court of San Diego County, No. 717906, Thomas Ray Murphy, Judge.)

The Court of Appeal affirmed. It held that the homeowners policy required the insureds to repair or replace their damaged property within 180 days of a certain date as a prerequisite to obtaining replacement cost. Although the 180-day provision in the policy was in the subdivision concerning actual cash value, and not the subdivision concerning replacement cost, when the policy was read as a whole, the 180-day period unambiguously applied to the insureds' claim. The court further held that the record demonstrated that no triable issue of fact remained as to whether the insurer acted reasonably under the circumstances. (Opinion by Nares, J., with Huffman, Acting P. J., and McDonald, J., concurring.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports

(1) Summary Judgment § 25--Appellate Review--Interpretation of Insurance Policy. --The appellate court reviews the trial court's ruling on a summary judgment motion, and its interpretation of an insurance policy, de novo.

(2a) (2b) (2c) (2d) Insurance Contracts and Coverage § 89--Liability of Insurer--Homeowners Policy--Fire Damage--Requirement That Insured Repair or Replace Home Within 180 Days. --In insured homeowners' bad faith action against their insurer, the trial court properly found that a 180-day provision to repair or replace the insureds' home applied to their claim. The policy provided for replacement cost or actual cash value, and also provided that if the insurer paid the actual cash value, the insureds could apply for additional replacement costs if the repair or replacement occurred within 180 days of the cash value payment. The insurer paid a cash value estimate of \$ 200,000 and advised the insureds that they were entitled to additional benefits. After approximately three years, appraisers confirmed the

actual cash value at \$ 200,000 and the replacement cost at \$ 364,500. The insurer then advised the insureds that they had 180 days from the date of the appraisal to repair or replace the house. Over five months later, the insureds had just secured a contractor, and the insurer advised them that replacement benefits would not be available, since the replacement would not be completed within 180 days. Consequently, the insureds purchased a less desirable home. Although the 180-day provision in the policy was in the subdivision concerning actual cash value, and not the subdivision concerning replacement cost, when the policy was read as a whole, the 180-day period unambiguously applied. The language of the policy demonstrated the necessary interrelation of the subdivisions. Further, the insureds initially accepted the actual cash value payment, and thus their claim fell within the subdivision containing the 180-day limit.

(3) Insurance Contracts and Coverage § 10--Interpretation of Insurance Policy.

--The rules governing policy interpretation require courts to look first to the language of the contract in order to ascertain its plain meaning or the meaning a layperson would ordinarily attach to it. The interpretation of a contract must give effect to the mutual intention of the parties. This intent is to be inferred, if possible, solely from the written provisions of the contract. If the policy is ambiguous, i.e., susceptible to more than one reasonable interpretation, the ambiguity is construed in favor of coverage. However, the predicate to interpreting ambiguities in favor of coverage is that the policy be reasonably susceptible to more than one interpretation. Where a policy clearly excludes coverage, a court will not indulge in construction to find some theoretical ambiguity in order to find coverage.

[See 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, §§ 698, 699.]

(4) Insurance Contracts and Coverage § 10--Interpretation of Insurance Policy--Reading Policy as Whole.

--Courts interpret insurance contracts as a whole, with each clause lending meaning to the others. Courts should interpret contractual language in a manner that gives force and effect to every clause rather than to one that renders clauses nugatory.

(5) Insurance Contracts and Coverage § 10--Interpretation of Insurance Policy--Extrinsic Evidence.

--Extrinsic evidence may be admitted to aid in the interpretation of an insurance policy only where the

terms of the policy are ambiguous.

(6a) (6b) (6c) (6d) Insurance Contracts and Coverage § 109--Duty of Insurer to Act in Good Faith--Handling of Claim Arising from Fire Damage to Home.

--In a bad faith insurance action arising from extensive fire damage to the insured homeowners' house, no triable issue of fact existed as to whether the insurer acted in good faith, and thus the trial court properly granted the insurer summary judgment. Although the insurer's original repair estimate was \$ 115,000 and the eventual replacement cost arbitration award was \$ 364,500, the insurer acted reasonably. The insurer promptly hired two contractors who rendered estimates of approximately \$ 110,000 and \$ 115,000, respectively, and the insureds' contractor estimated repairs at approximately \$ 227,000. The insureds then provided the insurer with a \$ 291,106.57 repair estimate by another contractor, and in response, the insurer's expert rendered his opinion on the damage at \$ 182,549. After comparing the various bids, the insurer conceded that the minimum repair cost was \$ 199,671.94. There was a genuine dispute regarding the insurer's contractual obligations, and the record revealed that the insurer handled the claim reasonably by retaining experts and investigating, paying the undisputed actual cash value of the loss, and proceeding to appraisal on the disputed portion of the claim, i.e., the replacement cost. Moreover, the insurer promptly paid the replacement cost appraisal award after the insureds purchased another home.

(7) Appellate Review § 109--Briefs--Argument and Authority. --Where a point is merely asserted by counsel without any argument of or authority for its proposition, it is deemed to be without foundation and requires no discussion by the court.

(8) Insurance Contracts and Coverage § 109--Duty of Insurer to Act in Good Faith--Covenant of Good Faith and Fair Dealing. --The covenant of good faith and fair dealing is implied in law to assure that a contracting party refrains from doing anything to injure the other party's right to receive the benefits of the agreement. In essence, the covenant is implied as a supplement to the express contractual covenants, to prevent a contracting party from engaging in conduct that, while not technically transgressing the express covenants, frustrates the other party's rights to the benefits of the contract. Thus, where 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 the conduct frustrates the insured's primary right to receive the benefits of his or her contract, i.e., prompt compensation for losses.

(9) Insurance Contracts and Coverage § 109--Duty of Insurer to Act in Good Faith--Bad Faith Action.

--In a bad faith case against an insurer, the primary test is whether the insurer withheld payment of an insured's claim unreasonably and in bad faith. Where benefits are withheld for proper cause, there is no breach of the implied covenant of good faith and fair dealing. Bad faith liability cannot be imposed where there exists a genuine issue as to the insurer's liability under California law. A court can conclude as a matter of law that an insurer's denial of a claim is not unreasonable, so long as there existed a genuine issue as to the insurer's liability. This "genuine dispute" doctrine may be applied where the insurer denies a claim based on the opinions of experts.

(10) Insurance Contracts and Coverage § 109--Duty of Insurer to Act in Good Faith--Disparity Between Experts for Insured and for Insurer.

--Where an insurer and its insured rely on expert opinions, even a substantial disparity in estimates for the scope and cost of repairs does not, by itself, suggest the insurer acted in bad faith. Despite the special relationship between an insurer and its insureds, an insurer may give its own interests consideration equal to that it gives the interests of its insured.

COUNSEL: Levine, Steinberg & Miller and Harris I. Steinberg for Plaintiffs and Appellants.

Luce, Forward, Hamilton & Scripps, Charles A. Bird, Peter H. Klee, Charles A. Danaher and William G. Peterson for Defendant and Respondent.

JUDGES: Opinion by Nares, J., with Huffman, Acting P. J., and McDonald, J., concurring.

OPINION BY: NARES

OPINION

[*1286] [**387] **NARES, J.**

In this insurance bad faith case, Ernest Fraley and Linda Fraley appeal a summary judgment in favor of

Allstate Insurance Company (Allstate). The principal issue is whether a homeowners policy required the Fraleys to repair or replace their damaged property within 180 days of a certain date as a prerequisite to obtaining replacement cost. We conclude it did, and accordingly affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On May 17, 1994, a fire extensively damaged the Fraleys' home. The loss was covered by their deluxe homeowners policy with [***2] Allstate. It provides in pertinent part:

"5. How We Pay For a Loss

"Building Structures

"Payment for covered loss to building structures insured under the Dwelling Protection coverage will be by one of the following methods:

"a) Replacement Cost. This means there will not be a deduction for depreciation. [P] Payment will not exceed the smallest of the following amounts: [P] 1) the replacement cost of that part of the building structure damaged for equivalent construction and use on the same premises; [P] 2) the amount actually and necessarily spent to repair or replace the damaged building structure; or [P] 3) the limit of liability applicable to the building structure.

"We will not pay more than the actual cash value of the damaged building structure until the repair or replacement is completed.

[*1287] "b) Actual Cash Value. This means there may be a deduction for depreciation.

"If you do not repair or replace the damaged building structure, payment will be on an actual cash value basis, not to exceed the limit of liability shown on the declarations page for Coverage A--Dwelling Protection. You may make a claim for any additional payment on a replacement [***3] cost basis if you repair or replace the damaged building structure within 180 days of the actual cash value payment." ¹

¹ In *Hess v. North Pacific Ins. Co.* (1993) 122 Wn.2d 180 [859 P.2d 586], the court explained the genesis of replacement cost provisions of fire policies: "Traditional coverage was for the actual

or fair cash value of the property. The owner was indemnified fully by payment of the fair cash value, in effect the market value, which is what the owner lost if the insured building was destroyed. [Citation.] [P] However, it was recognized that an owner might not be made whole because of the increased cost to repair or to rebuild. Thus, replacement cost coverage became available. 'Replacement cost coverages . . . go beyond the concept of indemnity and simply recognize that even expected deterioration of property is a risk which may be insured against.' " (*Id. at p. 587.*)

Allstate promptly investigated the claim, but the parties' contractors could not agree on the scope [***4] or cost of repair. In the meantime, Allstate's appraiser set actual cash value of the home at \$ 200,000. [**388] In September 1994, Allstate paid the Fraleys \$ 164,822, the amount of its latest repair estimate. In December 1994, however, Allstate conceded the minimum repair cost was \$ 199,671.94. It sent the Fraleys a check for \$ 35,178, explaining that it, "together with the \$ 164,822 previously paid . . . , represented payment of the actual cash value [of \$ 200,000]" Allstate advised the Fraleys they were entitled to additional benefits under the policy if they actually repaired or replaced their home.

The Fraleys, whose final repair estimate was approximately \$ 490,107, exercised their right to have the claim submitted to a panel of three appraisers. The hearing was delayed until late 1996 because of the Fraleys' "two successive attempts to disqualify Allstate's appraiser (one successful, one unsuccessful), [the Fraleys'] . . . fallout with their own appraiser, and the withdrawal of the original appraisal umpire." On February 25, 1997, the appraisers set the actual cash value at \$ 200,000 and the replacement cost at \$ 364,500.

On March 4, 1997, Allstate advised [***5] the Fraleys as follows: "The Appraisal Award indicates the actual cash value loss at \$ 200,000 That amount was paid to you . . . as of December 8, 1994. Pursuant to the terms of the policy, no additional payments will be made until repair or replacement of the damaged building structure is completed." On April 8, 1997, Allstate [*1288] informed the Fraleys that under the terms of the policy, they had 180 days following payment of the actual cash value of the property to repair or replace their home. However, because the 180-day period had already

expired, Allstate offered to stipulate that the time would run from the service of the appraisal award.

On April 17, 1997, the Fraleys' counsel, Bruce Cornblum, sent Allstate a letter stating: "Given the fact that the actual cash value was paid in December 1994 to the Fraleys, and the [appraisers'] award was not rendered until [February 10, 1997], and the confirmation will be rendered April 28, 1997, I would agree that the 180 day time period commences as of the date of confirmation. It was my opinion to Mr. Fraley that such would be the commencement date" Allstate agreed to treat April 28, 1997, as the date the [***6] limitation period began to run, without consideration of whether the award was confirmed. Although not required by the policy, in May 1997 Allstate also agreed to fund reconstruction of the Fraleys' home by making periodic payments to the contractor or setting up an escrow fund.

The parties apparently had no further contact until September 26, 1997, when the Fraleys notified Allstate they had "finally been able to secure a general contractor to rebuild our home" and completion was expected by March 30, 1998. The Fraleys said they were "hopeful that [the project] will proceed in accordance with the time specified in the contract." On October 14, 1997, Allstate advised the Fraleys that because reconstruction could not be completed by October 25, 1997, the end of the stipulated 180-day period, replacement cost benefits were no longer available. On October 22, 1997, Cornblum wrote to Allstate that in order to preserve their right to replacement cost, the Fraleys purchased another home. ² Allstate paid them the difference between the \$ 200,000 previously paid and the replacement cost award.

² In *Conway v. Farmers Home Mut. Ins. Co.* (1994) 26 Cal. App. 4th 1185, 1192 [31 Cal. Rptr. 2d 883], this court held that under a replacement cost provision the insured has the option of purchasing a replacement dwelling at another location.

[***7] The Fraleys obtained new counsel and sued Allstate for breach of contract, breach of the implied duty of good faith and fair dealing and fraud. The Fraleys accused Allstate of unfairly delaying payment and forcing them to purchase a less desirable home by misrepresenting that the 180-day provision applied to a claim made under the replacement cost provision of the policy.

[**389] Allstate moved for summary judgment. The court granted the motion, determining the 180-day provision applied to the Fraleys' claim and Allstate [*1289] acted reasonably under the undisputed facts. Judgment was entered in Allstate's favor on November 19, 1998.

DISCUSSION

I

[HN1] A summary judgment motion is appropriate if "[the cause of] action has no merit . . ." (*Code Civ. Proc.*, § 437c, *subd. (a)*); that is, if "[o]ne or more of the elements of the cause of action cannot be separately established. . . ." (*Code Civ. Proc.*, § 437c, *subd. (n)(1)*) [HN2] "The motion [***8] . . . shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . ." (*Code Civ. Proc.*, § 437c, *subd. (c)*.) (1) [HN3] We review the trial court's ruling on the summary judgment motion, and its interpretation of the insurance policy, *de novo*. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal. 4th 666, 673-674 [25 Cal. Rptr. 2d 137, 863 P.2d 207]; *Truck Ins. Exchange v. Pozzuoli* (1993) 17 Cal. App. 4th 856, 859 [21 Cal. Rptr. 2d 650].)

II

(2a) The Fraleys concede they were not entitled to replacement cost until they actually repaired or replaced their home. (See *Myers v. Allstate Ins. Co.* (C.D. Cal. 1997) 989 F. Supp. 1250, 1253-1254.) In their view, however, the 180-day limitation period is inapplicable because they sought replacement cost under subdivision (a) of paragraph 5 of section I of the policy, which contains no express reference to it. Rather, the 180-day period appears only in subdivision (b) [***9] of paragraph 5 of that section, the actual cash value provision. The Fraleys also point out that the preface to subdivisions (a) and (b) of section I, paragraph 5 provides, "Payment for covered loss to building structures insured under the Dwelling Protection coverage will be by *one* of the following methods . . ." (Italics added.)

(3) "[HN4] The rules governing policy interpretation require us to look first to the language of the contract in order to ascertain its plain meaning or the meaning a layperson would ordinarily attach to it. [Citations.] . . .

[P] [HN5] The fundamental rules of contract interpretation are based on the premise that the interpretation of a contract must give effect to the 'mutual intention' of the parties. ' . . . Such intent is to be inferred, if possible, solely from the written provisions of the contract. [Citation.] ' (Waller v. Truck Ins. Exchange, Inc. (1995) 11 Cal. 4th 1, 18 [44 Cal. Rptr. 2d 370, 900 P.2d 619].)

[HN6] " [***10] If the policy is ambiguous (i.e., susceptible to more than one reasonable interpretation), the ambiguity is construed in favor of coverage. [Citation.] [*1290] [P] However, the predicate to interpreting ambiguities in favor of coverage is that the policy be *reasonably* susceptible to more than one interpretation. [HN7] Where a policy clearly excludes coverage, we will not indulge in tortured construction to divine some theoretical ambiguity in order to find coverage." (Titan Corp. v. Aetna Casualty & Surety Co. (1994) 22 Cal. App. 4th 457, 469 [27 Cal. Rptr. 2d 476], original italics.)

(2b) Contrary to the Fraleys' position, subdivision (a) of paragraph 5 of section I of the policy cannot be considered in isolation. (4) Rather, [HN8] we interpret insurance contracts "as a whole, with each clause lending meaning to the others. [Citation.] Importantly, [HN9] [***11] we should interpret contractual language in a manner which gives force and effect to every clause rather than to one which renders clauses nugatory." (Titan Corp. v. Aetna Casualty & Surety Co., supra, 22 Cal. App. 4th at pp. 473-474.) (2c) Indeed, the interrelation of subdivisions (a) and (b) of section I, paragraph 5 is illustrated by the description in subdivision (a)(1) through (3) of Allstate's replacement cost payment obligation, [***390] necessarily applicable to both subdivisions (a) and (b).

We conclude that section I, paragraph 5 of the policy, read as a whole, unambiguously required the Fraleys to comply with the 180-day requirement. As explained in Myers v. Allstate Ins. Co., supra, 989 F. Supp. 1250, payment provisions such as the one here preclude recovery of replacement cost without proof of the insureds' actual repair or replacement of the damaged or lost property. To ameliorate the hardship to the insureds, however, the insureds may initially obtain the actual cash value of the property and use it "to begin the process of repair or replacement, at which point [they] could submit claims for expenditures that went above the

actual [***12] cash value of the loss." (Id. at p. 1254; see also Maryland Cas. Co. v. Knight (9th Cir. 1996) 96 F.3d 1284, 1293.)

Although the Fraleys ultimately sought the cost of reconstructing their property, they initially accepted the \$ 200,000 actual cash value from Allstate. The claim was thus adjusted under subdivision (b) of section I, paragraph 5 of the policy, which contains the 180-day limitation. The Fraleys' claim that the \$ 200,000 was a partial payment of replacement cost is without merit. Again, the policy states that Allstate "will not pay more than the actual cash value of the damaged building structure until the repair or replacement is completed." Moreover, as noted, the Fraleys' previous counsel expressly acknowledged that the \$ 200,000 represented the actual cash value of their home. Indeed, the Fraleys, through their prior counsel, agreed that the 180-day provision was applicable and stipulated to the date it would begin running.

[*1291] The Fraleys' reliance on Allstate's claims adjusting manual is misplaced. (5) [HN10] Extrinsic evidence may be [***13] admitted to aid in the interpretation of an insurance policy only where the terms are ambiguous. (ACL Technologies, Inc. v. Northbrook Property & Casualty Ins. Co. (1993) 17 Cal. App. 4th 1773, 1790-1791 [22 Cal. Rptr. 2d 206].) (2d) As discussed, the policy here unambiguously required the Fraleys to comply with the 180-day requirement. ³ In any event, the claims manual supports that conclusion: "Losses to building structures will be settled on an [actual cash value] basis, not to exceed the limit of liability shown on the Declarations Page for Coverage A, if the insured doesn't want to replace the damaged property. Occasionally, insureds suffer losses to property which they do not wish to replace. If the insured does decide to replace, he or she can apply for the difference between [actual cash value] and full replacement cost if the building structure is repaired or replaced within 180 days of the [actual cash value] payment."

³ For the same reason, we need not address the Fraleys' argument regarding amendments Allstate made to the standard policy language after the date of the policy here.

[***14] In sum, Allstate did not misrepresent the terms of the policy to the Fraleys. Therefore, breach of contract, breach of the implied covenant of good faith and fair dealing and fraud claims based on the ostensible

misapplication of the 180-day provision are barred as a matter of law.

III

(6a) Alternatively, the Fraleys contend there were triable issues of fact regarding whether Allstate acted in bad faith by hiring "captive" contractors and "low balling" the repair estimates. They rely solely on the differential between Allstate's original repair estimate of \$ 115,000 and the replacement cost arbitration award of \$ 364,500.

The Fraleys cite no authority for their position. (7) "[HN11] Where a point is merely asserted by counsel without any argument of or authority for its proposition, it is deemed to be without foundation and requires no discussion." (*People v. Ham* (1970) 7 Cal. App. 3d 768, 783 [86 Cal. Rptr. 906], disapproved on another ground in [**391] *People v. Compton* (1971) 6 Cal. 3d 55, 60, fn. 3 [98 Cal. Rptr. 217, 490 P.2d 537]; *People v. Sierra* (1995) 37 Cal. App. 4th 1690, 1693, fn. 3 [44 Cal. Rptr. 2d 575]; [***15] 9 Witkin, *Cal. Procedure* (4th ed. 1997) *Appeal*, § 594, p. 627.) (6b) *Even absent waiver, however, the Fraleys' claim is unavailing.*

(8) "[HN12] The covenant of good faith and fair dealing is implied in law to assure that a contracting party 'refrain[s] from doing anything to injure the [*1292] right of the other to receive the benefits of the agreement.' [Citation.] In essence, the covenant is implied as a *supplement* to the express contractual covenants, to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party's rights to the benefits of the contract. Thus, [HN13] when 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 it frustrates the insured's *primary* right to receive the benefits of his contract--i.e., prompt [***16] compensation for losses." (*Love v. Fire Ins. Exchange* (1990) 221 Cal. App. 3d 1136, 1153 [271 Cal. Rptr. 246], original italics.)

(9) [HN14] In a bad faith case, the "primary test is whether the insurer withheld payment of an insured's claim unreasonably and in bad faith. [Citation.] Where benefits are withheld for proper cause, there is no breach of the implied covenant." (*Love v. Fire Ins. Exchange*,

supra, 221 Cal. App. 3d at p. 1151.) [HN15] *It is well established that "bad faith liability cannot be imposed where there 'exist[s] a genuine issue as to [the insurer's] liability under California law.' [Citation.]"* (*Opsal v. United Services Auto. Assn.* (1991) 2 Cal. App. 4th 1197, 1205-1206 [10 Cal. Rptr. 2d 352], citing *Safeco Ins. Co. of America v. Guyton* (9th Cir. 1982) 692 F.2d 551, 557, disapproved on other grounds in *Garvey v. State Farm Fire & Casualty Co.* (1989) 48 Cal. 3d 395, 410-411 [257 Cal. Rptr. 292, 770 P.2d 704].) [***17] "[[HN16] A] court can conclude as a matter of law that an insurer's denial of a claim is not unreasonable, so long as there existed a genuine issue as to the insurer's liability." (*Lunsford v. American Guarantee & Liability Ins. Co.* (9th Cir. 1994) 18 F.3d 653, 656.) [HN17] *The "genuine dispute" doctrine may be applied where the insurer denies a claim based on the opinions of experts. (See Allstate Ins. Co. v. Madan* (C.D.Cal. 1995) 889 F. Supp. 374, 380; *Austero v. National Cas. Co.* (1978) 84 Cal. App. 3d 1, 35 [148 Cal. Rptr. 653], disapproved on other grounds in *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal. 3d 809, 824, fn. 7 [169 Cal. Rptr. 691, 620 P.2d 141].)

(6c) Here, Allstate promptly hired contractors, Reconstruction Masters Incorporated (RMI) and Landmark Construction, Inc. (Landmark), and they rendered estimates of approximately \$ 110,000 and \$ 115,000, respectively. The Fraleys' contractor, Knight Construction of San Diego Incorporated [***18] (Knight), estimated repairs at approximately \$ 227,000. After discussions regarding the extent of damage, RMI, Landmark and Knight increased their repair estimates to approximately \$ 151,000, \$ 164,822 and \$ 235,763, respectively.

The Fraleys then provided Allstate with a \$ 291,106.57 repair estimate by Shoreline General Contractors, Inc. (Shoreline). In response, Allstate had [*1293] Tim Behnke, of BR Building Repairs, Inc., "provide his expert opinion on the damage and scope." On November 14, 1994, Behnke rendered a \$ 182,549 repair estimate. After comparing the various bids, in December 1994, Allstate conceded that the minimum repair cost was \$ 199,671.94. At the 1997 appraisal, the Fraleys no longer relied on Shoreline. Rather, they submitted a reconstruction estimate of \$ 490,107.37 by American Building Company.

The record plainly shows a genuine dispute

regarding Allstate's contractual obligations. In fact, the Fraleys concede that the "dispute over the 'scope' of what [**392] needed to be repaired was in large part the reason why [they] were forced to demand appraisal on the Replacement Cost of their home." [HN18] [***19] (10) Where the parties rely on expert opinions, even a substantial disparity in estimates for the scope and cost of repairs does not, by itself, suggest the insurer acted in bad faith. [HN19] Despite the " 'special relationship' " (*Love v. Fire Ins. Exchange, supra, 221 Cal. App. 3d at p. 1147*) between an insurer and its insureds, an insurer "may give its own interests consideration equal to that it gives the interests of its insured[s]." (*Id. at pp. 1148-1149.*)

(6d) The record reveals that Allstate handled the Fraleys' claim reasonably, by retaining experts and investigating, paying the undisputed actual cash value of the loss and proceeding to appraisal on the disputed portion of the claim, replacement cost. Moreover, Allstate promptly paid the replacement cost appraisal award after the Fraleys purchased another home. We agree with the trial court that their bad faith claim fails as a matter of law.

DISPOSITION

The judgment is affirmed.

Huffman, Acting P. J., and McDonald, J., concurred.