4th Civil No. D062361

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

VINCENT GUY ADAMO,

Plaintiff and Appellant,

vs.

FIRE INSURANCE EXCHANGE,

Defendant and Respondent.

Appeal from San Diego County Superior Court,
Case No. 37-2009-00065797-CU-IC-EC,
Honorable Timothy Taylor, Judge Presiding
Honorable Joel M. Pressman, Judge Presiding

RESPONDENT'S BRIEF

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INTRODUCTION

Insurance policies are construed reasonably. Logically, coverage afforded under one part is not duplicated under another part. But that is what the insured here seeks—double coverage.

Insured Vincent Guy Adamo filed a claim under his homeowner's policy after a wildfire damaged his 1,000-tree avocado grove, 10,000-gallon water tank, irrigation system, culverts, two woodsheds, and landscaping on his property. His insurance carrier, Fire Insurance Exchange (Fire), denied coverage for his avocado trees under a commercial use/farming exclusion, but paid him $116,000 for various damages, including the policy's $53,100 policy limit for "other structures." Adamo claims additional benefits for damages to his elaborate water system—including the 10,000-gallon water tank, irrigation system and culverts associated with his avocado growing operation—covered as "other structures." But there isn't any applicable "other structures" coverage left.

Adamo admits that the 10,000-gallon water tank was separated from his dwelling by "clear space," putting it squarely within the plain language of his "other structures" coverage. And he has never disputed that Fire fully paid the "other structures" coverage limit. Yet, he posits a non-existent rule that once those benefits were paid, the carrier should ignore the "other structures" coverage and pay additional benefits as if that coverage, and its policy limit, never existed. That's not how policies are interpreted.

Rather, where an insured, as here, obtains residential coverage for a "dwelling" (Coverage A) and separate coverage for "other structures" "separated from the dwelling by clear space" (Coverage B), the provisions must be read together. If the damages are covered under B, they are *not* covered under A; the coverages do not overlap.

The policy lists some examples of "other structures" that fall under the Coverage B "clear space" definition, including structures—like the 10,000 gallon water tank—attached to the dwelling only by a "utility pipe or similar connection." The opening brief's novel policy construction seeks to use the Coverage B utility pipe connection definition to create coverage under the separate Coverage A "attached to the dwelling" provision, creating a bonanza of duplicative coverage. That's plainly wrong.

The opening brief also posits a Coverage A/dwelling catch-all provision for "[a]nything related to the occupation, use, and function of the entire property" as well as a separate coverage grant allowing the insured to use 10 percent of Coverage A "for whatever [he] want[s]," even if the claimed loss would otherwise fall under an already fully paid coverage. None of these claims survive a common-sense reading of the plain policy language. None of these arguments have an ally in the case law. Nothing in the policy language provides any additional coverage beyond the $116,000 Fire has already paid.

Without any additional coverage, the insurance bad faith claim necessarily fails. But even if the opening brief's strained reading could

create coverage, the precedent and plain policy language that Adamo struggles so mightily to avoid, establishes the reasonableness of Fire's coverage position, defeating any tort insurance bad faith claims.

Judgment should be affirmed.

STATEMENT OF THE CASE

A. Adamo's Standard Residential Insurance Policy Separately Covers His "Dwelling" And "Other Structures," But Only Up To Specified Limits.

Defendant and respondent Fire Insurance Exchange (Fire) insured plaintiff and appellant Vincent Guy Adamo under a standard first-party residential property insurance policy. (2 Appellant's Appendix (AA) 378 ¶ 1; see 2 AA 384-416.) As relevant here, the policy provided two separate categories of coverage for: (1) "Dwelling" ("Coverage A"); and (2) "Other Structures" ("Coverage B"). (2 AA 386; 4 AA 989 ¶ 4.)[1]

Coverage A ("Dwelling") applies to four sub-categories—all related to or including the dwelling: (a) "the dwelling on the Described Location, used principally for dwelling purposes";[2] (b) "structures attached to the dwelling"; (c) "materials and supplies on or adjacent to the Described Location for use in the construction, alteration or repair of the dwelling or other structures on this location"; and (d) "*if not otherwise covered in this policy*, building equipment and outdoor equipment used for the service of and located on the Described Location." (2 AA 386, emphasis added; see also 2 AA 378 ¶ 6.)

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[1] There are also several non-structural categories (not at issue), including "Personal Property" ("Coverage C"), "Fair Rental Value" ("Coverage D"), and "Additional Living Expense" ("Coverage E"). (2 AA 386-387.)

[2] The "Described Location" is the entire property. (2 AA 478.)

Coverage B ("Other Structures") applies to "other structures on the Described Location, separated from the dwelling by clear space." (2 AA 386.) Specific examples of structures that fall under Coverage B include those "connected to the dwelling by only a fence, utility line or similar connection." (*Ibid.*) The policy excludes "other structures" that would otherwise fall under Coverage B when "used in whole or in part for commercial, manufacturing or farming purposes" ("commercial use exclusion"). (*Ibid.*)

Policy Limits And Sub-Limits. Coverage A and Coverage B have different coverage limits and sub-limits. The policy expressly provides that Fire will not pay above these limits: Fire "shall not be liable: [¶] . . . [¶] b. for more than the limit of liability that applies." (2 AA 390.)

Coverage A has a $531,000 total liability limit. (2 AA 378 ¶ 6.a.; 2 AA 384; 4 AA 989 ¶¶ 4.a., 5.) It also has a $26,500 sub-limit, covering fire or smoke damage to "lawns, plants, shrubs, or trees." (2 AA 387 ¶ 8; see 2 AA 384 [5% of Coverage A's $531,000 limit].) A payment under this sub-limit reduces the "Coverage A limit of liability" (i.e., the "dwelling" coverage) "by the amount paid." (2 AA 387 ¶ 8.)

Coverage B ("other structures") has a lower $53,100 limit, which is defined under the heading "Other Coverages" in subsection 1: "**Other Structures** – You may use up to 10% of the Coverage A limit of liability [i.e., 10% of $531,000 or $53,100] for loss by a Peril Insured Against to other structures described in Coverage B. Use of this coverage does *not*

reduce the Coverage A limit of liability for the same loss." (2 AA 387 ¶ 1, emphasis added; see also 2 AA 378 ¶ 6; 2 AA 384; 4 AA 989 ¶ 4; 6 Reporter's Transcript (RT) 126:16-25; 139:27-140:3.)[3] Accordingly, the declarations page shows a $531,000 policy limit for Coverage A and a $53,100 policy limit for Coverage B. (2 AA 384.)

B. The 2007 San Diego Wildfires Damage Adamo's 1,000-Tree Avocado Grove And Associated Water System.

The October 2007 wildfires in San Diego County damaged Adamo's landscaping, retaining wall, two woodsheds (plus their contents), a 1,000-tree avocado grove and "property associated with his avocado grove," including an irrigation system, culverts and a detached 10,000-gallon water tank. (1 AA 3 ¶ 9; 2 AA 378 ¶¶ 1, 3; 2 AA 418; 4 AA 989 ¶¶ 1, 3; Appellant's Opening Brief (AOB) 1, 7; 4 RT 57:19-25.) Adamo's residence incurred some minor smoke damage, but it didn't burn. (2 AA 461; see AOB 7.)

The principal fire damage was to Adamo's landscaping, woodsheds and the water system "associated with the avocado grove." (AOB 1; 2 AA

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[3] Coverage limits for categories other than Coverage A ("Dwelling") are also defined in the "Other Coverages" provision. (2 AA 387 ¶ 5 [providing the limits for "Rental Value and Additional Living Expense" (i.e., Coverages D and E)].) "Fair Rental Value" ("Coverage D") and "Additional Living Expense" ("Coverage E") are defined as "10% of the Coverage A limit of liability" or $53,100. (*Ibid.*) These limits, likewise, "do[] not reduce the Coverage A limit of liability for the same loss." (*Ibid.*)

379 ¶¶ 12-13; 2 AA 460.) The water system (water tank, irrigation system, and culverts) was separated from Adamo's dwelling by clear space and was completely detached from the dwelling, except a single underground water pipe connected the dwelling and water tank. (2 AA 379 ¶¶ 12-13; 2 AA 460; 4 AA 990 ¶ 7; 6 RT 133:13-15.)[4]

C. Fire Investigates Adamo's Claim And Pays Him Approximately $116,000 Under His Policy, Exhausting The "Other Structures" Policy Limit.

Adamo filed a claim under his policy seeking payment for his damaged property. (2 AA 378 ¶¶ 1, 4.) Fire promptly investigated.

When Fire's adjuster asked Adamo directly whether he had ever sold avocados grown on his property, he admitted that he had. (4 RT 57:26-58:1; 6 RT 121:8-11; see also 3 AA 651 [admitting past avocado sales].) After completing her initial investigation and damages inventory, Fire's adjuster notified Adamo that damage to the avocado trees was not covered under his policy because he "'indicated that they were being used for [a] commercial purpose,'" and such use is excluded under Coverage B's

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[4] An underground pipe connected the water tank to the residence, but the irrigation system and culverts were not connected to the dwelling; rather, they were only connected to the water tank. (2 AA 379 ¶¶ 14-15; 2 AA 466 [Adamo conceding that "the culverts were not physically attached to the home"]; 4 AA 990 ¶ 7 [court finding that the water tank "is only connected to the dwelling by a water pipe"].)

commercial use exclusion. (6 RT 121:16-28.)[5] She did, however, pay Adamo for all the items that she initially found Adamo's policy *did* cover: the smoke damage to the house, landscaping, and the two woodsheds plus their contents. (2 AA 378 ¶ 4; 4 AA 989 ¶ 4; 6 RT 121:22-25.) This was the first of two payments Fire made to Adamo.

After the first payment, Fire conducted a further investigation of Adamo's claim to look for additional available coverage, including hiring an expert to evaluate the damages Adamo sustained to his elaborate culvert system. (4 RT 58:24-27; 6 RT 122:5-123:14.) It then reimbursed Adamo under Coverage B for damage to the culverts (2 AA 379 ¶ 9), which fully exhausted Coverage B's $53,100 policy limit (2 AA 379 ¶ 10; 4 AA 990 ¶ 8; 6 RT 124:13-15; see also AOB 32 ["damage to retaining walls, woodsheds, culverts, water tank, and irrigation system exceeded the $53,100 limit . . ."], 33 ["There was no dispute that Coverage B limits had been exhausted"]).

Coverage B's policy limits having been exhausted, Adamo sought payment under Coverage A ("dwelling" coverage) for his water tank and irrigation system as well as additional coverage for damage to his culverts. (2 AA 378 ¶ 5.) The only remaining question was whether benefits remained under Coverage A. (6 RT 123:11-124:15, 145:17-22; AOB 11.)

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[5] Adamo has abandoned any claim for damage to his avocado trees. (2 AA 379 ¶ 16; 2 AA 461; AOB 2, fn. 1.)

In all, Fire paid Adamo approximately $116,000, in two installments. (2 AA 378 ¶ 4; 4 AA 989 ¶ 4; 4 RT 58:28-59:2.) This included $53,100—the maximum Coverage B benefit for "other structures"—and $26,550 for damage to lawns, plants, shrubs, and trees—the maximum available Coverage A landscaping sub-limit. (2 AA 277, 378-379 ¶¶ 6, 10, 16; 2 AA 461; 4 AA 941:15-942:3, 990 ¶ 5; 6 RT 123:15-124:3, 129:25-130:13; AOB 2, fn. 1; AOB 11; see also 2 AA 384, 386-387.) Along with its second payment, Fire informed Adamo that the applicable coverages in his policy had been exhausted and that it did not owe more than the $116,000 it had already paid. (2 AA 378-379 ¶¶ 4, 10; see also 6 RT 145:20-22.)

D. Adamo Sues Fire.

Adamo sued Fire for breach of contract, bad faith, promissory estoppel, declaratory relief and reformation. (1 AA 1.)[6] The gravamen of Adamo's complaint was that Fire "refused, and continues to refuse" to reimburse Adamo "for the cost of repair, replacement cost or the actual

[6] Adamo has not appealed the dismissal of the promissory estoppel, declaratory relief and reformation claims (1 AA 32-33; 5 AA 1057, 1197-1199; AOB 12), and acknowledges that they "are now moot" (AOB 5, fn. 4; see also 2 AA 378 ¶ 5; 5 AA 1189, 1197-1199).

cash value of [his] . . . irrigation system, or water tank as required by the terms and conditions of [his] policy." (1 AA 4 ¶ 15.)[7]

E. The Trial Court Tries The Coverage Issue, Finding No Additional Coverage And Enters Judgment In Fire's Favor.

The parties agreed to try the coverage issue as a threshold matter based on stipulated facts. (2 AA 345-346; 4 AA 988; 5 AA 1046-1047, 1197; 4 RT 61:13-18, 63:1-67:9, 93:6-12; AOB 13; see also 2 AA 377-380.) The trial court conducted a bench trial to decide the discrete coverage issue: Whether available coverage remained for the damaged water tank, irrigation system and culverts. (4 AA 875, 988-989; 5 AA 1046-1047; 4 RT 61:14-18, 66:3-12; 6 RT 103:28-104:10, 108:27-28.)[8] Both parties extensively briefed the issues. (See 6 RT 108:15-17 [Adamo's counsel didn't think he'd ever "had this much briefing on such distinct issues in (his) career"].)

Adamo's theory at trial was: (1) Coverage A provided additional coverage for any structure or equipment that is "physically attached" to the

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[7] Adamo did not allege anywhere in his complaint that he was seeking payment for damage to his culverts. (See 1 AA 1-21.)

[8] The judge who ordered the case bifurcated, Hon. Timothy Taylor, ultimately recused himself from the matter. (2 AA 347.) The case was then assigned to Hon. Joel M. Pressman, who conducted the bench trial. (2 AA 433-434.)

dwelling and "absolutely necessary" for its use (2 AA 466-469, 479-480); (2) even though Coverage B expressly covers "other structures" "separated from the dwelling by clear space" and connected by a "utility line or similar connection" (2 AA 386), nothing in the policy precluded concurrent or additional coverage for the same property under Coverage A (2 AA 469-471, 480); (3) even after Coverage B limits have been exhausted, an additional $53,100—i.e., 10% of the limits available in Coverage A—is also available to cover other structures defined in Coverage B (2 AA 472-473, 480; 7 RT 156:1-22); (4) Fire cannot enforce the commercial use exclusion in Coverage B (2 AA 473-474, 480); and (5) the commercial use exclusion is inconspicuous, unclear and ambiguous (2 AA 474-477, 480; 6 RT 119:20-27).

In opposition, Fire argued: (1) Adamo's water tank, irrigation system and culverts were not "attached" to the dwelling so there was no coverage available under Coverage A (3 AA 607-608, 618-620); (2) coverage for the water tank would only be available under Coverage B (for "other structures") because it expressly covered circumstances where, as here, there was "clear space" between the dwelling and other structure, and they were only connected by a "utility line" (3 AA 603-607, 618-620); (3) because both parties agreed that Coverage B's limit was fully exhausted (2 AA 379 ¶ 10), no additional benefits were available to Adamo (3 AA 603); (4) even if Coverage B's policy limit had not been exhausted, the water tank and other property associated with the avocado grove were not covered because they were used for a commercial purpose (3 AA 625-626);

and (5) the commercial use exclusion was clear, conspicuous and unambiguous (3 AA 622-624).

The trial court issued written findings all in Fire's favor as a statement of decision. (4 AA 880, 988-991.) Rejecting all of Adamo's arguments, the court found: (1) none of the applicable policy language was troublesome or ambiguous; (2) coverage for damage to the water tank, the irrigation system and culverts fell under Coverage B (applying to "other structures") and *not* Coverage A (applying to the "dwelling"); (3) since Coverage B had already been exhausted, there was nothing left for Fire to pay under the policy; (4) since there were no policy benefits due, there was no, and could be no, breach of contract or bad faith. (4 AA 875, 990 ¶¶ 5-8; 5 AA 1047, 1198-1199; 6 RT 145:15-28; 8 RT 183:2-16; AOB 6, fn. 5.) The court did not address the commercial-use exclusion. (AOB 5.)

The court entered judgment on April 30, 2012 and notice of entry was served on May 7, 2012. (5 AA 1197, 1330.)

F. The Trial Court Denies Adamo's New Trial Motion Finding No Surprise Or Newly Discovered Evidence And Adamo Timely Appeals.

Adamo moved for a new trial on various grounds, including surprise and newly-discovered evidence. (5 AA 1333-1335, 1337-1339.) In support of his motion, Adamo presented—for the first time—an expert declaration and an insurance industry bulletin that purported to show that

the "other coverages" section of his policy provided a "distinct and separate category from which coverage is still available." (5 AA 1334; 6 AA 1349, 1353-1354, 1364-1366; see also 6 AA 1367, 1471.) His claimed surprise was Fire's alleged change of position that the "other coverages" section was a separate category of coverage. (6 AA 1354-1355.)

The trial court denied Adamo's new trial motion. (7 AA 1730.) The court found that Adamo "failed to meet his burden on any of the grounds he raised in his motion or otherwise." (*Ibid.*) It sustained objections to Adamo's newly proffered expert testimony and insurance industry bulletin. (7 AA 1729-1730.)[9]

Adamo timely appealed the judgment entered against him. (7 AA 1731.)

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[9] The opening brief does not challenge the propriety of the court's denial of his new trial motion on appeal or the threshold admissibility of the proffered extrinsic evidence; thus, any such argument has been waived. (See p. 30, *post*; *Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 685.) Raising it in the reply, of course, will be too late. (E.g., *Aviel v. Ng* (2008) 161 Cal.App.4th 809, 821.)

STANDARD OF REVIEW

Where, as here, the relevant facts are stipulated, the meaning and interpretation of the policy provisions at issue are decided de novo under well-settled rules of contract interpretation. (*E.M.M.I. Inc. v. Zurich American Ins. Co.* (2004) 32 Cal.4th 465, 470; *Employers Mut. Cas. Co. v. Philadelphia Indem. Ins. Co.* (2008) 169 Cal.App.4th 340, 347.) That's especially so where, as here, there is no conflicting extrinsic evidence. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865; *Maryland Casualty Co. v. Nationwide Ins. Co.* (1998) 65 Cal.App.4th 21, 29.) Whether or not a policy provision is ambiguous is reviewed de novo as are the objectively reasonable expectations of coverage. (*Union Oil Co. v. International Ins. Co.* (1995) 37 Cal.App.4th 930, 936.)

ARGUMENT

I. THE TRIAL COURT PROPERLY FOUND THAT FIRE OWED NO ADDITIONAL COVERAGE AMOUNTS.

Adamo claims that Fire owes him for damage to his water system, including a 10,000-gallon water tank and associated irrigation system and culverts. Coverage B's limit was concededly exhausted by Fire's $53,100 in payments under that coverage. (2 AA 378-379 ¶¶ 4, 10.) Adamo's claim is that his policy provides additional coverage under some policy provision other than Coverage B for damage to the water system. As we now show, no such additional coverage exists.

A. The $53,100 Coverage For "Other Structures" Was The Only Coverage Available For Adamo's Water System; Fire Paid That Full Policy Limit.

1. Coverage B for "other structures" squarely applies to the 10,000-gallon water tank, irrigation system and culverts because these structures are "separated from the dwelling by clear space."

"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." (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18.) Where, as here, there is no evidence the parties intended for words in the policy to have any special or

technical meaning, the plain, common-sense meaning of the words—viewed in the context of the policy as a whole—controls the interpretation. (*Ibid.*; *Ameron Intern. Corp. v. Insurance Co. of State of Pennsylvania* (2010) 50 Cal.4th 1370, 1378; *Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.* (1993) 5 Cal.4th 854, 867-868 (*Bay Cities*); *Garamendi v. Mission Ins. Co.* (2005) 131 Cal.App.4th 30, 42; Civ. Code, §§ 1635, 1638, 1639, 1641, 1644.)

Coverage B defines "other structures" as those "separated from the dwelling by clear space." (2 AA 386.) Although the policy does not define the phrase "clear space" it has a plain meaning based on common understanding. It refers to an open area. (See, e.g., *Porco v. Lexington Ins. Co.* (S.D.N.Y. 2009) 679 F.Supp.2d 432, 438 & fn. 3 [defining "clear space" as a two- or three-dimensional physical area unhampered by restriction or limitation]; see also Webster's 9th New Collegiate Dict. (1985) pp. 247 [defining "clear"], 1129 [defining "space"] (Webster's).) "Moreover, '[a]ny reasonably intelligent person reading Coverage "B" of the [P]olicy would conclude for a structure to be considered an "other structure," it must be separated from the dwelling by clear space.' [Citation.]" (*Porco*, *supra*, 679 F.Supp.2d at p. 440, brackets in original.)

Here, there is no dispute that the 10,000-gallon water tank is "separated from the dwelling by clear space." (2 AA 379 ¶ 13.) Thus, the water tank is precisely the type of "other structure" expressly falling within Coverage B.

Coverage B's definition also contains a non-exhaustive list of "other structures" that it covers, including structures—like the water tank—connected to the dwelling only by a "utility line or similar connection." (2 AA 386.) Adamo agrees that the water tank is "only connected to the dwelling by a water pipe" (2 AA 379 ¶ 12), and has not advanced any argument on appeal that a water pipe is anything other than a "utility line" (see, e.g., 23 C.F.R. § 645.105 [defining "utility" as including privately owned lines or systems for distributing water]; Civ. Code, § 1001 [defining "utility service" including water service]).[10] Furthermore, he has never disputed that his irrigation system and culverts—connected only to the water tank—are separated from the dwelling by clear space. (2 AA 379 ¶¶ 14-15; see also 2 AA 466 ["the culverts were not physically attached to the home"].)

The opening brief suggests, without any cogent argument, that there is some ambiguity in the language used in Coverage B because the terms "clear space" and "utility line" are undefined. (AOB 28.) Not so. The lack of a policy definition for every word used does not create ambiguity where none otherwise exists. (*Bay Cities*, *supra*, 5 Cal.4th at p. 866.) "Clear space" and "utility line" have common sense meanings. Further, Adamo hasn't offered a single case finding similar language to be ambiguous, nor

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[10] Even were the water pipe somehow not a "utility line," at the very least, it is a "similar connection" (2 AA 386), still keeping it within Coverage B's plain language.

has he offered any other reasonable construction of the language. On the other hand, several recent cases hold unambiguous identical provisions to Coverage B. (See, e.g., *Porco*, *supra*, 679 F.Supp.2d at pp. 439-440 ["the Court has found no decisions holding that the plain language used in Coverage A and Coverage B is ambiguous"]; *Lazechko v. Auto Owners Ins. Co.* (Mich.Ct.App., July 10, 2008, No. 276111) 2008 WL 2697428, at p. *4.)[11]

There is no question that the water tank was "separated from the dwelling by clear space" as defined in Coverage B and was "only connected to the dwelling by a water pipe," which "is considered a utility line." (4 AA 990 ¶¶ 6-7.) As the trial court properly concluded, the damaged water system—i.e., the 10,000-gallon water tank, irrigation system and culverts—fell squarely within Coverage B's definition of "other structures." (4 AA 990 ¶ 7; 6 RT 145:17-20.)

2. Coverage B's $53,100 limit was fully paid, leaving no additional coverage for "other structures."

The parties agree that Fire paid the $53,100 policy limit for "other structures." (2 AA 378 ¶¶ 4, 6, 10; see also 2 AA 387 ¶ 1 [defining Fire's

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[11] As Adamo's counsel acknowledged, "ambiguity" is often "a fallback argument for plaintiffs' bad faith lawyers. 'Oh my goodness, it's ambiguous!'" (6 RT 119:25-27.) The trial court found none of the policy language was "troublesome or ambiguous." (6 RT 145:14-17.)

liability limit as "10% of the Coverage A limit of liability"].) Further, it is undisputed that after Fire's second payment to Adamo, there was "no more available coverage under the policy under Coverage B since the policy limits ha[d] been paid." (2 AA 379 ¶ 10; see also 6 RT 145:20-22; AOB 32 ["damage to retaining walls, woodsheds, culverts, water tank, and irrigation system exceeded (Coverage B's) $53,100 limit"].)

Adamo received every penny available under his policy for "other structures"; he exhausted his Coverage B. (AOB 33 ["There was no dispute that Coverage B limits had been exhausted"]; see 2 California Ins. Law Dictionary & Desk Ref. (2012 ed.) § E51:1 [exhaustion refers to "*using up or consuming completely* the policy limits of the primary insurer," emphasis in original]; 39A Cal.Jur.3d (2013) Insurance Contracts, § 411 ["the measure of the actual cash value recovery, in whole or partial settlement of the claim, must be determined in the case of total loss to the structure, by the policy limit or the fair market value of the structure, whichever is less," citing Ins. Code, § 2051, subd. (b)].)

An insurance carrier is permitted to set policy limits on a homeowner's fire policy. (*Everett v. State Farm General Ins. Co.* (2008) 162 Cal.App.4th 649, 656.) "It is up to the insured to determine whether he or she has sufficient coverage for his or her needs." (*Id.* at p. 660.)

In this case, Adamo purchased a policy that expressly cut off benefits when the policy's limits were met: "'[W]e shall not be liable [¶] . . . [¶] for more than the limit of liability that applies." (2 AA 390.)

Therefore, as a matter of law, Fire cannot be in breach of Adamo's policy for refusing to pay additional amounts for "other structures" because no additional coverage was available under Coverage B. (See Civ. Code, § 3358 ["(N)o person can recover a greater amount in damages for the breach of an obligation, than he could have gained by the full performance thereof on both sides"]; *Lazechko*, *supra*, 2008 WL 2697428, at p. *2 & fn. 2 [where Coverage A's policy limit was met, there were no additional funds to pay for the attached garage that would otherwise have fallen under Coverage A].)

B. The "Dwelling" Coverage Does Not Cover The Water System.

The opening brief's primary argument is that even though Coverage B's $53,100 limit was admittedly fully paid and exhausted (AOB 32-33), *additional* coverage exists because "the stipulated facts and the policy language established coverage was still available to indemnify for the loss" under Coverage A's $531,000 limit (AOB 19-20, 26-31). In essence, Adamo argues that *both* Coverage A and Coverage B should apply to the *same* loss suffered as to the same property. But that's not how insurance policies are read.

1. As the water system falls under Coverage B, "other structures," it does not fall under Coverage A, "dwelling."

Insurance policies are to be read as a whole. As the opening brief acknowledges, "the court must look at the *entirety* of the policy, with *each clause lending meaning to the others*." (AOB 24, citing *Holz Rubber Co., Inc. v. American Star Ins. Co.* (1975) 14 Cal.3d 45, 55, emphasis added; see also Civ. Code, § 1641 [effect should be given to every part of a contract; each clause helps to interpret the other].) That means where multiple coverages are afforded, they are read as covering different, separate things. (*Fibreboard Corp. v. Hartford Accident & Indemnity Co.* (1993) 16 Cal.App.4th 492, 509 (*Fibreboard*) [interpreting premises liability coverage in light of fact that separate products liability coverage was provided].)

Adamo's theory is that when the applicable coverage's limits have been exhausted, carriers and courts should direct payment under another facially inapplicable coverage into which a loss might be shoehorned. (AOB 26-31.) But that is precisely how policy language is *not* to be read. (*American Intern. Underwriters Ins. Co. v. American Guarantee & Liability Ins. Co.* (2010) 181 Cal.App.4th 616, 629 [avoiding strained reading].) In this case, a reasonable reading of the policy means giving effect to the language in Coverage B, not ignoring it.

Porco v. Lexington Ins. Co., *supra*, is on all fours, specifically applying these principles to this very policy: "[T]he cases teach that both

Coverage A and Coverage B have to be read together to make sense out of the Policy and to determine the Parties' expectations in the contract." (*Porco, supra*, 679 F.Supp.2d at p. 440; see also *Mentesana v. State Farm Fire and Cas. Co.* (W.D.Mo., May 28, 2008, No. 07-0456-CV-W-ODS) 2008 WL 2225737, at p. *2 [reading the provisions together]; *Arch v. Nationwide Mut. Fire Ins. Co.* (E.D.Pa., Nov. 10, 1988, Civ A. No. 88-5421) 1988 WL 122408, at pp. *2-*3 [same].)

Just like this case, *Porco* turned on the interpretation of structures "set apart from the dwelling by clear space . . . and connected to the dwelling by only a fence, utility line or similar connection." (679 F.Supp.2d at p. 434.) And just like the water tank and dwelling here, clear space separated the disputed damaged property—a swimming pool—from the dwelling and a water pipe connected the two structures. (*Id.* at p. 439.) Although the homeowners there sought coverage for an outdoor swimming pool rather than a water tank, the analysis is identical.

Reading Coverage B's plain language in conjunction with Coverage A, *Porco* had "little difficulty" finding that the swimming pool unambiguously fell within Coverage B ("other structures") and not within Coverage A ("dwelling"). (*Id.* at pp. 439-441.) It held "that the connection between the pool and the dwelling through the filtering pipes is precisely the type of 'similar connection' to a 'utility line' that also defines 'other structures' in Coverage B." (*Id.* at p. 439.)

Most importantly, because the damage falls under Coverage B, as a matter of law, it cannot *also* fall under Coverage A. (*Id.* at p. 441 [where Coverage B applies, Coverage A does not apply].) Other cases confirm this critical point—if Coverage B applies, there is no residual coverage under Coverage A. (*Arch*, *supra*, 1988 WL 122408, at p. *3 ["Since it is clear that the swimming pool in question qualifies as an 'other structure' (under Coverage B) it follows that it cannot also qualify as an 'attached structure' (under Coverage A)"]; *Mentesana*, *supra*, 2008 WL 2225737, at p. *2 [holding that swimming pool and waterfall, separated from the dwelling by clear space, fell under coverage extension and not dwelling coverage]; see also *Lazechko*, *supra*, 2008 WL 2697428, at pp. *1 & fn. 1, *4 [holding that because the policy limit for Coverage A had been met, and Coverage B did not apply to the attached garage, there was no additional coverage]; *Employers Reinsurance Co. v. Superior Court* (2008) 161 Cal.App.4th 906, 911, fn. 2 [finding that coverages for products and non-products "are complementary and not overlapping"].)

In the policy here, the plain language and physical relationship between Coverage A and Coverage B dictate that the two coverages are mutually exclusive, not compounded. Coverage B ("other structures") immediately follows Coverage A ("dwelling"). (2 AA 386.) In addition, "other structures" are defined *in relationship to* the "dwelling"—i.e., they must be "*separated from the dwelling* by clear space" to qualify. (2 AA 386, emphasis added.) Property is covered under one *or* the other of Coverages A and B, *not* under both. Structures covered under Coverage B

are structures "*other*" than, and distinct from, those covered under Coverage A ("dwelling"). (See Black's Law Dict. (6th ed. 1990) p. 1101, col. 1 [defining "other" as "(d)ifferent or distinct from that already mentioned"]; Webster's, *supra*, p. 835 ["other": "being the one or ones distinct from that or those first mentioned or implied"].)

Damage that falls under Coverage B cannot logically also fall under Coverage A. The two coverages do not overlap. If B, not A (and, if A, not B). No other interpretation makes sense.

Not surprisingly, that's what the trial court held. It held that because damage to the water tank, irrigation system, and culverts fell under Coverage B, and Coverage B was exhausted, there was "nothing left for the carrier to pay out under this policy" as a matter of law. (6 RT 145:17-22; see also 4 AA 990 ¶¶ 7-8.) This ruling is undoubtedly correct. Because Coverage B applies, Coverage A does not apply.

In any event, as we now show, nothing in the plain language of Coverage A would afford coverage to the water system.

2. The 10,000-gallon water tank, irrigation system and culverts are not "attached" to the dwelling as required for Coverage A to apply.

Even if Coverages A and B were not mutually exclusive, there is no plausible basis for coverage under Coverage A. The opening brief argues that Coverage A, subparagraph (b), covering "structures attached to the

dwelling," affords additional coverage for the 10,000-gallon water tank above and beyond what would have been available under Coverage B because a water pipe "connects" the water tank to his dwelling and it is "integral and necessary" for supplying water to his home. (AOB 26-27, citing 2 AA 386.) Adamo pushes the argument a step further, contending that because the water tank is connected to the dwelling, and his irrigation system and culverts are connected to the water tank, by some transitive property, the irrigation system and culverts must be "attached" to the dwelling, and, therefore, Coverage A should apply to those structures as well. (AOB 29 [contending that the "related equipment" is also "'attached'"].) These arguments completely defy the policy's plain language.

The ordinary meaning of the word "attached" in the context of Coverage A "'is the physical union or joining of two structures.' [Citation.]" (*Porco*, *supra*, 679 F.Supp.2d at p. 440; *Mentesana*, *supra*, 2008 WL 2225737, at p. *2 [same]; accord, Black's Law Dict., *supra*, at p. 125, col. 2 [same].) Even the opening brief agrees that to fall under Coverage A, subparagraph (b), "[s]ome form of connection is required. . . ." (*Porco*, at p. 438; AOB 27.) The irrigation system and culverts are not physically attached in any way to the dwelling (2 AA 379 ¶¶ 14-15; 2 AA 466); therefore, they are not covered under subparagraph (b) as a matter of law (see *Porco*, at p. 438 [rejecting plaintiff's argument that swimming pool attached to house via pool deck and that all interconnected manmade property is "attached"]). Under Adamo's irrigation-system-is-connected-

to-the-water-tank-is-connected-to-the-house theory, a municipal water line, a pumping station, or even a cross-country water supply canal would be "attached" to a dwelling. That's absurd.

Nor is the water tank physically "attached to the dwelling" for Coverage A purposes regardless if connected by a utility line. (See 2 AA 379 ¶ 12; 2 AA 386.) Coverage B immediately follows Coverage A, confirming that a utility line does not suffice to make the structure "attached." It would make no sense to read the policy as defining the same structure as "not attached" for purposes of Coverage B but at the same time as "attached" for purposes of Coverage A. (See *E.M.M.I. Inc.*, *supra*, 32 Cal.4th at p. 475 [same word used in different parts of a policy given the same meaning]; *Mirpad, LLC v. California Ins. Guarantee Assn.* (2005) 132 Cal.App.4th 1058, 1071-1072 [same].) "Coverage A and Coverage B have to be read *together* to make sense out of the Policy." (*Porco*, *supra*, 679 F.Supp.2d at p. 440, emphasis added; see *Fibreboard*, *supra*, 16 Cal.App.4th at p. 509 [reading premises liability coverage in conjunction with products liability coverage].) Indeed, Coverage A cannot be interpreted correctly *without* reference to Coverage B.

The opening brief next argues that the water tank falls under Coverage A because it is "integral and necessary for legal occupancy" and thus, "reasonably considered part of the home." (AOB 26-29.) Nothing in the policy's plain language refers to any such "integral and necessary" criteria, and Adamo offers no governing authority supporting this supposed rule.

The only case Adamo proffers, *Meyerstein v. Great American Ins. Co.* (1927) 82 Cal.App. 131, is an almost-century-old decision, dealing with completely different policy language. There, the sole issue was how the word "additions" should be interpreted. At issue was whether the parties intended to cover a separate laundry building and water tank as "additions" in connection with the main building. (*Id.* at p. 134; see also AOB 27 [admitting that *Meyerstein*'s focus "was on 'additions'"].) "Addition" coverage is not at issue here. Even more important, the policy in *Meyerstein* had no separate, express coverage for "other structures." *Meyerstein* sheds no light on this case.

Even if there reasonably could be duplicative coverage under both Coverage B and Coverage A, nothing here suggests that the water tank, irrigation system or culverts could independently fall under Coverage A.

3. As the water system was covered under Coverage B, it was "otherwise covered" in the policy; therefore, the Coverage A, subparagraph (d), ancillary "equipment" provision does not apply.

Adamo next relies on Coverage A, subparagraph (d) covering "*if not otherwise covered in this policy*, building equipment and outdoor equipment used for the service of and located on the Described Location." (2 AA 386, emphasis added; see 4 AA 990 ¶ 6.) The opening brief contends that this is a "catch-all provision" duplicatively covering

"[a]nything related to the occupation, use, and function of the entire property" even if the property is covered elsewhere in the policy such as in Coverage B. (AOB 30.) According to Adamo's interpretation, where policy limits have been met, the loss "is not 'otherwise covered'" for purposes of Coverage A, subparagraph (d). (AOB 30-31.) The opening brief provides no authority for this proposition. It merely argues that this strained interpretation is "objectively reasonable." (AOB 30.)

The trial court rejected this argument, finding that prior to full payment of the Coverage B policy limit, the water system was "'*otherwise covered*' under Coverage B"; therefore, subparagraph (d) did not apply. (4 AA 990 ¶ 6, emphasis added; see also 4 RT 145:17-22.)

This is the objectively reasonable view. A strained or absurd interpretation cannot create an ambiguity where none exists. (*Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal.3d 800, 807; *Bosetti v. U.S. Life Ins. Co. in City of New York* (2009) 175 Cal.App.4th 1208, 1227; Civ. Code, § 1638.) The water system undeniably *is* "otherwise covered" under Coverage B as shown in Section I.A. above. Adamo's reading simply makes a sham out of the policy limits for admittedly applicable coverages. But all policy provisions are given meaning, including policy limits. (See Civ. Code, § 1641.) The "catch-all" provision is for property not otherwise covered, not for covered property once a policy limit is exhausted.

The plain language of subdivision (d) applies only where the policy provides no other coverage. Here, the property at issue is expressly

"otherwise covered" under Coverage B. Therefore, there is no additional coverage under Coverage A, subdivision (d). Without any applicable coverage, the judgment must be affirmed.

C. The Policy-Limit Definition In "Other Coverages," Subsection 1, Did Not Create Double Coverage Not Evident In The Insuring Agreement.

As a last ditch effort to find additional coverage beyond the policy's express limits, the opening brief argues that where the loss has not been fully paid, but Coverage B's $53,100 limit has been exhausted, "Other Coverages, Subsection 1" provides "an additional benefit under the policy allowing [Adamo] to use 10 percent for whatever [he] want[s] elsewhere" beyond the limits stated on the policy's declarations page. (6 RT 136:17-20; see AOB 32.)

The trial court flatly and correctly rejected this argument as nonsensical. It correctly concluded that "Other Coverages, Subsection 1" is "a quantitative definition" of the policy limits for the various coverages, including Coverage B. (6 RT 139:27-140:3; see also 4 AA 989 ¶ 5.) In other words, Coverage B's limit is calculated under Other Coverages, Subsection 1. (4 AA 989 ¶ 5.) Coverage B's limit is 10% of Coverage A (or $53,100, 10% of Coverage A's $531,000 limit shown on the declarations page). (4 AA 990 ¶ 5; see 2 AA 384.) That same 10%

number—$53,100—is reflected as the Coverage B policy limit on the declarations page. (2 AA 384.)

This construction makes perfect sense. The other categories' limits—other than for Coverage A ("dwelling")—are also defined in the "Other Coverages" section and then reflected on the declarations page. (See, e.g., 2 AA 387 ¶ 5 [providing the liability limits for "Rental Value and Additional Living Expense" (i.e., Coverages D and E)]; cf. 2 AA 384 [policy limit for Coverage A].)

Attempting to bolster its strained contrary interpretation, the opening brief cites to two pieces of extrinsic evidence that Adamo attached, for the first time, to his failed new trial motion: an insurance industry bulletin and an expert declaration. (AOB 32, fn. 12.) But in denying the new trial motion, the trial court expressly rejected Adamo's claim of surprise or newly discovered evidence and sustained Fire's specific objections to the bulletin and expert declaration. (7 AA 1729-1730.) Adamo has not challenged those rulings on appeal. (See p. 13, fn. 9, *ante*.) His post-trial proffered evidence, thus, is not properly before this Court.

In any event, the proffered extrinsic evidence is inadmissible to interpret the policy because the policy language was unambiguous. (6 RT 145:15-17.) Controlling precedent "clearly require[s] a showing of ambiguity before extrinsic evidence may be admitted to shed light on that ambiguity." (*ACL Technologies, Inc. v. Northbrook Property & Casualty Ins. Co.* (1993) 17 Cal.App.4th 1773, 1790-1791; see also *Fire Ins.*

Exchange v. Superior Court (2004) 116 Cal.App.4th 446, 457 [rejecting plaintiff's request to consider extrinsic evidence to interpret terms where the policy's terms were explicit, clear and unambiguous].)

The insurance bulletin is also inadmissible hearsay (Evid. Code, § 1200) and is clearly irrelevant given that it was a 1998 bulletin and Adamo's policy was a 1983 policy (see 2 AA 386 [DP-3 Ed. 9-83]; 6 AA 1469). The bulletin has no bearing on the interpretation of Adamo's policy.

Likewise, the expert whose declaration Adamo submitted was never properly designated as an expert (7 AA 1729) and was not qualified to offer an expert opinion (Evid. Code, §§ 720, 801; see also 7 AA 1617 [Adamo conceding that "experts do not 'decide' coverage" issues]; *Transport Indem. Co. v. American Fid. & Cas. Co.* (1970) 4 Cal.App.3d 950, 960 [where policy language is unambiguous, expert testimony is inadmissible]).

Try as he might, Adamo simply cannot invent additional coverage for the water system above and beyond the $53,100 in "other structures" coverage Fire already paid. Judgment should be affirmed.

D. Even If Coverage B's Limit Had Not Been Exhausted, Its Commercial Use Prohibition Squarely Excluded Coverage For The Property Associated With Adamo's 1,000-Tree Avocado Grove.

Only if the Court finds additional coverage must it consider any applicable policy exclusions. (*Waller*, *supra*, 11 Cal.4th at p. 16.) In such

cases, policy exclusions must be interpreted and applied to produce a "fair result within the reasonable expectations of both the insured and the insurer." (*Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 761.) Exclusions must be applied as written. (*Waller*, *supra*, at pp. 26-28.)

In this case, immediately following Coverage B's definition of "other structures" (in the same section), the policy explains, in clear, common-sense, non-technical language that Coverage B does not cover structures used for farming or commercial purposes: "We do not cover other structures: [¶] a. used in whole or in part for commercial, manufacturing or farming purposes." (2 AA 386.)

The exclusion's clear intent is to avoid the potentially huge unknown risks of commercial ventures that are not contemplated in a residential insurance policy. (See, e.g., *Erickson v. Christie* (Minn.Ct.App. 2001) 622 N.W.2d 138, 140 [function of analogous business pursuits exclusion "is to confine the homeowner's policy coverage to nonbusiness risks and to relegate business coverage to a commercial policy"].) As Adamo's counsel stated to the trial court, in interpreting the applicability of the commercial use exclusion, "you have to also sit back and say, why would [the carrier] have the right to exclude for such things? And the reason is quite simple. Commercial activities tend to be a lot more expensive. So when they burn down, they're a lot more expensive to pay for." (6 RT 120:14-18.)

Given the plain, unambiguous language of this exclusion, Adamo could not have had any reasonable expectation that the property he used to

service his 1,000-tree avocado grove—including a 10,000-gallon water tank, elaborate irrigation system and complex culvert system—would be covered. He has never suggested that his irrigation system and culverts served *any* residential purpose, nor is there any such evidence in the record. A home does not need a 10,000-gallon water tank. When Fire's adjuster asked Adamo directly whether he sold the avocados he grew, he admitted that he had. (4 RT 57:26-58:1; 6 RT 121:6-11.)[12] One glance at a photograph of Adamo's immense 10,000-gallon water tank creates a reasonable inference—because of the tank's sheer size—that Adamo's intended use of the water system could not have been confined to residential purposes. (2 AA 418.)

In short, Adamo could have had no expectation that the policy would cover his farm water system because it was a *residential* special form fire policy, not a commercial or farm policy. (See 2 AA 384-386; *Nichols v. Great Am. Ins. Companies* (1985) 169 Cal.App.3d 766, 777 ["This is a *homeowner's* policy. . . . (Plaintiff) could not reasonably expect protection under his homeowner's policy for the business injury alleged," emphasis in original].) If Adamo wanted to cover his avocado grove operation, he could have obtained a commercial or farm policy. Yet, he chose not to.

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[12] Whether Adamo sold avocados or not during the policy period is irrelevant as "it is the type of activity, rather than actual compensation" that controls whether these exclusions apply. (*Amex Assur. Co. v. Allstate Ins. Co.* (2003) 112 Cal.App.4th 1246, 1252 [applying analogous "business pursuits" exclusion].)

Adamo cannot avoid the exclusion simply by exhausting one coverage limit and then writing it out of the policy. If somehow additional coverage might be available for "other structures," the commercial use limitation excludes it.

II. EVEN HAD ADAMO PRESERVED THE ISSUE ON APPEAL (HE HAS NOT), THERE COULD BE NO BAD FAITH AS A MATTER OF LAW.

A. The Opening Brief's Passing Footnote Reference To Adamo's Bad Faith Claim Waives That Claim On Appeal.

The opening brief argues for reversal based exclusively on the breach of contract claim without any substantive discussion of the bad faith cause of action. (See AOB 19-38.) Accordingly, Adamo has failed to carry his burden as the appellant to raise any potential errors that might support a reversal on his bad faith action; the Court should treat any such contention as abandoned or waived. (*Christoff v. Union Pacific R. Co.* (2005) 134 Cal.App.4th 118, 125; *Spitler v. Children's Institute International* (1992) 11 Cal.App.4th 432, 442.)

The opening brief's only reference to the bad faith claim comes in a footnote at the end of the opening summary, stating—without any citation—"[r]eversal of the coverage issues will necessitate reversal of the court's determination that there was no bad faith, inasmuch as that ruling was made solely on the grounds that there was no further coverage

available under the policy." (AOB 6, fn. 6.) This conclusory statement did not preserve the issue for appeal as the mere assertion of a legal position in a footnote, without supporting argument or authority, does not present an issue for a reviewing court to adjudicate. (See *Kunec v. Brea Redevelopment Agency* (1997) 55 Cal.App.4th 511, 526, fn. 9 ["We give the matter the same footnoted shrift as did the (appellant). A 'passing reference' in a brief does not suffice to establish a legal argument"]; see also Cal. Rules of Court, rule 8.204(a)(1)(B) ["Each brief must . . . (s)tate each point under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation of authority"].) Nor is the asserted proposition sufficient.

All intendments are indulged in favor of the trial court's ruling. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) The trial court, thus, implicitly found Fire's coverage interpretation not only correct, but also reasonable. Nowhere does the opening brief address this implicit finding. "A point suggested by appellant's counsel, with no supporting arguments or authority, will be deemed to be without foundation and require no discussion." (*Morris v. Associated Securities, Inc.* (1965) 232 Cal.App.2d 220, 231; *In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830 ["We are not bound to develop appellants' arguments for them. (Citation.) The absence of cogent legal argument or citation to authority allows this court to treat the contentions as waived"]; *Lowery v. Robinson* (1965) 238 Cal.App.2d 36, 39 ["mere suggestions of error

without supporting argument or authority" do not afford grounds for appellate relief].)

Adamo has waived on appeal any bad faith claim.

B. Without Coverage There Can Be No Bad Faith As A Matter Of Law.

On the merits, bad faith claims necessarily fail if there is no coverage, as the trial court found. (4 AA 991; 5 AA 1176, 1197-1199; AOB 6, fn. 6.) *Waller v. Truck Ins. Exchange, Inc.*, *supra*, 11 Cal.4th at p. 35, is controlling and on point: "[B]ecause a contractual obligation is the underpinning of a bad faith claim, such a claim cannot be maintained unless policy benefits are due under the contract." (Accord, e.g., *Love v. Fire Ins. Exchange* (1990) 221 Cal.App.3d 1136, 1151 ["where benefits are withheld for proper cause, there is no breach of the implied covenant"]; *MRI Healthcare Center of Glendale, Inc. v. State Farm General Ins. Co.* (2010) 187 Cal.App.4th 766, 784.)

Because Fire owed no additional benefits under the policy, there can be no bad faith liability, no matter how Fire handled the claim. (See *Brodkin v. State Farm Fire & Casualty Co.* (1989) 217 Cal.App.3d 210, 218 [because the insurer correctly denied the claim, even if there was evidence that the claim was improperly handled, there could be no cause of action for breach of the covenant of good faith].) Adamo does not appear to contest this point.

C. In Any Event, There Is At Least A Reasonable Basis For Fire's Coverage Interpretation, Precluding Bad Faith As A Matter Of Law.

There's an additional reason to affirm the judgment on Adamo's bad faith claim, even if coverage remains open to dispute: A reasonable legal basis for a carrier's position precludes, as a matter of law, recovery against an insurer for bad faith. (*Morris v. Paul Revere Life Ins. Co.* (2003) 109 Cal.App.4th 966, 973-977 [no bad faith as a matter of law where insurer's policy interpretation was reasonable even though Supreme Court ultimately disagreed with it].)

The coverage dispute at this stage is purely a legal one. There is no dispute that the water system falls under Coverage B ("other structures") and Coverage B's liability limit was exhausted. The only remaining question, therefore, is a legal one: Does the policy provide additional coverage above and beyond what was available in Coverage B for Adamo's "other structures" loss? The reasonableness, for bad faith purposes, of Fire's legal policy-interpretation position is a question of law. (*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 723-724; *Morris*, *supra*, 109 Cal.App.4th at p. 973; *Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co.* (2001) 90 Cal.App.4th 335, 347.) On the policy-interpretation issue, Fire's position is more than reasonable, as demonstrated in Section I, above. Indeed, we believe that Section I demonstrates that Fire's position is correct as a matter of law. But at a minimum, that position is amply supported by recent case law.

(E.g., *Porco*, *supra*, 679 F.Supp.2d at pp. 436-441; *Mentesana*, *supra*, 2008 WL 2225737, at p. *2; *Arch*, *supra*, 1988 WL 122408, at p. *1; *Fibreboard*, *supra*, 16 Cal.App.4th at p. 509.)

That precedent establishes the reasonableness of Fire's position as a matter of law and no possibility of insurance bad faith liability. (See, e.g., *Bosetti*, *supra*, 175 Cal.App.4th at p. 1239 [carrier's position reasonable as a matter of law where it relied on authority that Court of Appeal then disagreed with]; *Morris*, *supra*, 109 Cal.App.4th at pp. 973, 976 [same; insurer's policy interpretation was premised on a reasonable legal position based on out-of-state authorities]; *Dalrymple v. United Services Auto. Assn.* (1995) 40 Cal.App.4th 497, 522-523 [carrier's position reasonable as a matter of law where law was developing as to distinction between "occurrence" and "accident" in third-party coverage].)

Regardless whether Fire ultimately prevails as to Adamo's contractual claim, ample, reasonable legal bases support its position, negating, as a matter of law, any possible bad faith liability. The bad faith judgment should be affirmed.

CONCLUSION

Fire paid its full policy limits for "other structures," Coverage B. There were no additional limits under Coverage A to pay for the damaged water system falling squarely within Coverage B. Property covered under Coverage B (and subject to its policy limits) is not *also* covered under Coverage A and thereby afforded additional policy limits. No additional limits were available under any policy limits definition. In any event, a commercial use prohibition excluded coverage.

With no coverage remaining, judgment in favor of Fire was proper. It should be affirmed.

Respectfully submitted,

March 27, 2013

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CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that this **RESPONDENT'S BRIEF** contains **8,839** words, not including the tables of contents and authorities, the caption page, or this certification page, as counted by the word processing program used to generate it.

Dated: March 27, 2013 _____

Gary J. Wax

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On March 27, 2013, I served the foregoing document described as: **RESPONDENT'S BRIEF** on the parties in this action by serving:

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(X) (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____
Leslie Barela