7. PARKES v. MID-CENTURY INS. CO. SC-20160068

Defendant Mid-Century Ins. Co.'s Motion for Summary Adjudication.

Defendant Mid-Century Ins. Co. moves for entry of summary adjudication of an issue of duty and on the causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing on the following grounds: defendant Mid-Century Ins. Co. has no duty under its insurance agreement with plaintiffs to pay for construction defects and faulty repair work done by defendant Dick's Carpet One to repair damaged floors whose damage was a covered claim; defendant Mid-Century Ins. Co. has no duty under the implied covenant of good faith and fair dealing to pay for construction defects and faulty repair work done by defendant Dick's Carpet One to repair damaged floors whose damage was a covered claim; and there is no merit to the breach of contract and breach of implied covenant of good faith and fair dealing causes of action, because the defendant Mid-Century Ins. Co. was not obligated to pay for repairs to the repair work done by the contractors who repaired the damage that was covered by the insurance policy.

Plaintiffs oppose the motion on the following grounds: during repair work on the water damaged floors, which was a loss covered by the policy, the initial scope of work of the repairs to remove the wood planks and install new wood planks disclosed that the plaintiffs' wood flooring had strong glue attaching the flooring to the sub-floor, and defendant Mid-Century Ins. Co.'s consulting engineer opined that removal of the sub-floor would damage the structural I-joists of the home, which increased the cost to return he floors to their pre-loss condition; defendant Mid-Century Ins. Co. failed to pay the full amount to return the home to pre-loss condition taking into account the proper scope of repairs for the covered damage; when defendant Mid-Century Ins. Co. recommended defendant Dick's Carpet One as a preferred

vendor to repair the covered damage and bring the home to a pre-loss condition, a duty arose under the insurance contract for defendant to make sure such repairs restored the home to its pre-loss condition; the evidence submitted in support of the motion fails to establish defendant Mid-Century Ins. Co. fully paid a loss covered by the insurance policy agreement; at the very least there exists a triable issue of material fact as to whether defendant Mid-Century Ins. Co. paid plaintiffs the full amount required to restore their home to a pre-loss condition; in failing to pay to have the damaged flooring returned to its pre-loss condition as required under 10 CCR § 2695.9(c) defendant Mid-Century Ins. Co. violated its duty to pay for the cost of repair; there remain triable issues of material fact concerning the breach of implied covenant of good faith and fair dealing cause of action in that defendant Mid-Century Ins. Co. admits it is company policy to violate 10 CCR § 2695.9(c) by denial of claims related to poor workmanship of contractors that are recommended by its agents, and it was bad faith to fail to investigate the claimed loss further and prepare a new scope of repair and estimate after obtaining knowledge that it was obligated to pay more funds on the claim due to new information on the repairs required by the original water damage; and the cases cited by defendant Mid-Century Ins. Co. for the proposition it is not liable in bad faith for a vendor's conduct are factually distinguishable.

Defendant Mid-Century Ins. Co. replied to the opposition, submitted a response to plaintiffs' statement of additional undisputed material facts, and objected to portions of Laura Parkes' declaration submitted in opposition.

Defendant Mid-Century Ins. Co.'s Objections to Plaintiffs' Evidence Submitted in Opposition

"All written objections to evidence must be served and filed separately from the other papers in support of or in opposition to the motion. Objections on specific evidence may be referenced by the objection number in the right column of a separate statement in opposition or

reply to a motion, but the objections must not be restated or reargued in the separate statement. Each written objection must be numbered consecutively and must: ¶ (1) Identify the name of the document in which the specific material objected to is located; ¶ (2) State the exhibit, title, page, and line number of the material objected to; ¶ Quote or set forth the objectionable statement or material; and ¶ State the grounds for each objection to that statement or material…" (Rules of Court, Rule 3.1354(b).)

The court does not abuse its discretion to deny evidentiary objections that violate the requirements of Rule 3.1354. "To ensure we consider all of the admissible evidence, we first address Hodjat's complaint that the trial court erred when it refused to rule upon his evidentiary objections because they failed to comply with California Rules of Court, rule 3.1354. Rule 3.1354(b) dictates the format in which evidentiary objections must be submitted: "All written objections to evidence must be served and filed separately from the other papers in support of or in opposition to the motion. Objections on specific evidence may be referenced by the objection number in the right column of a separate statement in opposition or reply to a motion, but the objections must not be restated or reargued in the separate statement." ¶ Below, the trial court ruled on the objections made in a document entitled "Objections of Plaintiffs to Declaration of Hervey 'Skip' Davidson," but refused to rule on any other of Hodjat's evidentiary objections because they were not also filed separately as required under rule 3.1354. Instead, the objections were included in Hodjat's separate statement, in violation of rule 3.1354's requirement that the objections not be stated or argued in the separate statement. Hodjat contends that the trial court should properly have overlooked the deficiency or permitted him the opportunity to reformat his opposing papers. We find the trial court did not abuse its discretion. (See *Collins v. Hertz Corp.* (2006) 144 Cal.App.4th 64, 74, 50 Cal.Rptr.3d 149 (*Collins*) and *Parkview Villas Assn., Inc. v. State Farm Fire & Casualty Co.* (2005) 133

Cal.App.4th 1197, 1211, 35 Cal.Rptr.3d 411 (*Parkview Villas*).) ¶ Hodjat cites to *Collins* and *Parkview Villas* to support his contention. Both cases address whether a trial court abuses its discretion when it grants summary judgment on the ground the opposing party filed a deficiently formatted separate statement of material fact. While neither case precisely addresses the issue at hand,—whether a trial court is obligated to give a party a second chance at properly formatting its evidentiary objections under rule 3.1354—the analysis in *Collins* provides some insight as to why Hodjat did not deserve another opportunity to reformat his objections. ¶ The *Collins* court explained: " 'The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute. [Citation.]' [Citation.] To that end, the rules dictating the content and format for separate statements submitted by moving and responding parties 'permit trial courts to expeditiously review complex motions for ... summary judgment to determine quickly and efficiently whether material facts are disputed.' [Citations.] That goal is defeated where, as here, the trial court is forced to wade through stacks of documents, the bulk of which fail to comply with the substantive requirements of [Code Civil Procedure] section 437c, subdivision (b)(3), or the formatting requirements of [California Rules of Court,] rule 342,[FN 2.] in an effort to cull through the arguments and determine what evidence is admitted and what remains at issue. The realization of this goal is so important that the Legislature has determined '[f]ailure to comply with this requirement of a separate statement may constitute a sufficient ground, in the court's discretion, for granting the motion.' (§ 437c, subd. (b)(3).)" (*Collins, supra,* 144 Cal.App.4th at pp. 72–73, 50 Cal.Rptr.3d 149.) ¶ FN 2. California Rules of Court, former rule 342 (renumbered to rule 3.350) provided the formatting requirements for separate statements of fact. ¶ The same reasoning can be applied in this case. <u>The rules requiring evidentiary</u>

objections to be filed separately and not repeated in the separate statement are to allow the trial court to consider each piece of evidence and all of the objections applicable to that piece of evidence separately. Thus, the trial court correctly ruled on the separate objections to Davidson's declaration. Just as it was explained in *Collins,* interposing objections into the separate statement defeats the goal of allowing the trial court to quickly and efficiently determine what particular piece of evidence is admitted and what is not. This is because the separate statement is focused on individual facts, which may be supported by the same or different pieces of evidence. A trial court would be forced to wade through all of the facts in order to rule on a particular piece of evidence. ¶ In this case, Hodjat was well aware of the formatting requirements contained in rule 3.1354 since he separately objected to Davidson's declaration. There is no authority to support Hodjat's argument that the trial court was required to give him a second chance at filing properly formatted papers under these circumstances. The trial court did not abuse its discretion." (Emphasis added.) (Hodjat v. State Farm Mut. Auto. Ins. Co. (2012) 211 Cal.App.4th 1, 7–9.)

To the extent that there are objections to the evidence cited in support of the plaintiffs' statement of additional undisputed material facts, which are asserted in the response to the plaintiff's separate statement of additional undisputed facts, the court does not rule on such objections, because such objections violate Rule 3.1354 in that they must be raised in a separate document. To the extent that the objections appear in a separate written set of objections, the court has ruled on those objections below.

Defendant Mid-Century Ins. Co.'s written objection numbers 1-3 to portions of the declaration of plaintiff Laura Parkes in Opposition to the Motion for Summary Adjudication are overruled.

Summary Adjudication Principles

"A party may move for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty, if that party contends that the cause of action has no merit or that there is no affirmative defense thereto, or that there is no merit to an affirmative defense as to any cause of action, or both, or that there is no merit to a claim for damages, as specified in Section 3294 of the Civil Code, or that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs. A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (Code of Civil Procedure, § 437c(f)(1).)

"A motion for summary adjudication may be made by itself or as an alternative to a motion for summary judgment and shall proceed in all procedural respects as a motion for summary judgment." (Code of Civil Procedure, § 437c(f)(2).)

"The purpose of summary judgment is to penetrate through pleadings to ascertain, by means of affidavits, the presence or absence of triable issues of material fact. (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107 [252 Cal.Rptr. 122, 762 P.2d 46].) The trial judge determines whether triable issues of fact exist by examining the affidavits and evidence, including any reasonable inferences which may be drawn from the facts. (*People v. Rath Packing Co.* (1974) 44 Cal.App.3d 56, 61-64 [118 Cal.Rptr. 438].) The evidence of the moving party is strictly construed and the evidence of the opposing party liberally construed. Doubts as to the propriety of granting the motion must be resolved in favor of the party resisting the motion. (*Stationers Corp. v. Dun & Bradstreet, Inc*. (1965) 62 Cal.2d 412, 417 [42 Cal.Rptr. 449, 398 P.2d 785].)" (Crouse v. Brobeck, Phleger & Harrison (1998) 67 Cal.App.4th 1509, 1524.)

"In ruling on the motion, the court must "consider all of the evidence" and "all" of the "inferences" reasonably drawn therefrom (id., § 437c, subd. (c)), and must view such evidence (e.g., *Molko v. Holy Spirit Assn.*, supra, 46 Cal.3d at p. 1107, 252 Cal.Rptr. 122, 762 P.2d 46; *Stationers Corp. v. Dun & Bradstreet, Inc.* (1965) 62 Cal.2d 412, 417, 42 Cal.Rptr. 449, 398 P.2d 785) and such inferences (see, e.g., *Crouse v. Brobeck, Phleger & Harrison* (1998) 67 Cal.App.4th 1509, 1520, 80 Cal.Rptr.2d 94 [review on appeal]; *Ales-Peratis Foods Internat., Inc. v. American Can Co.* (1985) 164 Cal.App.3d 277, 280, 209 Cal.Rptr. 917, fn. * [same]), in the light most favorable to the opposing party." (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 843.)

With the above-cited principles in mind, the court will rule on defendant's motion for summary adjudication.

Duty

The following facts are undisputed: on or about February 17, 2011 plaintiffs experienced a covered water loss in their home when the master bathtub overflowed and poured down three levels of the home; the overflow damaged the hickory wood flooring in the upstairs master bedroom, a guest room and hallway, the family room below the master bedroom, and the basement; plaintiff Laura Parkes reported the claim to defendant Mid-Century Ins. Co.; defendant Mid-Century Ins. Co. uses a flooring option program (FOP) that involves repair of its insureds' claims involving damaged flooring; the FOP is administered by CCA Global, who when referred a claim by defendant Mid-Century Ins. Co. provides a vendor who can perform the repairs for the insureds, and the vendor provides the repair work at a discounted rate; plaintiffs chose Dick's Carpet One to do the repairs, because the work was guaranteed and because the vendor who originally installed the hickory wood floors estimated it would cost $30,000 more than estimated by Dick's Carpet One to repair the damage; the scope of repair

work was prepared by Dick's Carpet One and approved by defendant Mid-Century Ins. Co.; the scope of repairs included the removal and replacement of damaged flooring; Dick's Carpet One subcontracted with Rubicon to sand, stain and refinish the Parkes' hickory flooring, because Dick's Carpet One did not specialize in and had no employees qualified to perform this aspect of the repair work; during repair of the floor Dick's Carpet One discovered that removal of the flooring was damaging the subfloor due to the strength of the glue used to attach the wood planks to the subfloor; the scope of work was changed to only sand and refinish the damaged wood planks, rather than remove and replace certain areas of the damaged flooring; the repair work did not return the damaged flooring to its pre-loss condition, because the stain and finish on the repaired areas did not match the undamaged flooring and new flooring was not installed to the edge of the wall underneath the baseboards; there was additional damage caused to the baseboards, walls, doors and moldings; Ms. Parkes complained to defendant Mid-Century Ins. Co. about the condition of the floors; defendant Mid-Century Ins. Co. sent out an FOP adjuster and FOP supervisor to view the condition of the flooring; the FOP adjuster wrote in defendant Mid-Century Ins. Co. claim notes that they walked through the house and observed improper workmanship that did not put the insured where she was pre-loss, and the finish color does not match the old unaffected floor; defendant Mid-Century Ins. Co. initially planned to prepare an estimate to repair the workmanship issues, but then decided to demand that Rubicon's general liability insurer pay the amount of the estimate and if Rubicon's insurer refused to pay, defendant Mid-Century Ins. Co. would pay the Parkes the amount of the estimate and then seek subrogation for reimbursement; defendant Mid-Century Ins. Co. did not prepare any estimate and did not pay the plaintiffs the amount to repair the workmanship issues; defendant Mid-Century Ins. Co. is bound by and the plaintiffs' claim had to be adjusted in accordance with 10 CCR § 2695.9(c) if it applied to the flooring

claim; defendant Mid-Century Ins. Co.'s engineer reported on February 26, 2015 – "Provided the finish floor planks were adhered to the underlayment, removal without damaging the structural floor sheathing and prefabricated floor joists' upper edge is unlikely. A typical repair might involve cutting away and then removing both the finish floor planks and its adhered subfloor sheathing. Common practice is to glue and screw-fasten the structural floor sheathing to the floor joists. To release this bond and allow for removal of the damaged finish flooring, careful sawing and grinding along the floor joists' upper edge is required…For projects where the joist flange is damaged, we have specified an additional reinforcing member be placed and fastened alongside the existing one. Also we recommend installing flat blocking at the seams where replacement floor sheathing is installed to maintain the existing floor diaphragm's structural integrity."; and defendant Mid-Century Ins. Co. never provided any further payment to the plaintiffs for the costs to repair the original flooring damage after it received the engineer's report. (Plaintiffs' Responses to Defendant's Statement of Undisputed Material Fact, Fact Numbers 5-8; and Defendant Mid-Century Ins. Co.'s Responses to Plaintiffs' Statement of Additional Undisputed Material Facts, Fact Numbers 1,2, 4, 8-16, 18 and 19.)

Defendant Mid-Century Ins. Co. also concedes in its moving papers that there is no dispute that there was a covered water loss at plaintiff's home. (Defendant Mid-Century Ins. Co.'s Motion for Summary Adjudication, page 1, lines 22-23.)

The subject insurance policy provides: defendant Mid-Century Ins. Co. does not insure loss or damage which is a construction defect in the dwelling or a separate structure except for extension of coverage for building collapse or collapse of a part of the building structure, unless if by fire or lightening; and it does not insure loss, damages or costs directly or indirectly caused by, or arising out of or resulting from faulty, inadequate, defective or incomplete

repairs. (Complaint, Exhibit A – Insurance Policy, page 23, Section I.A.3; and page 26, Section I.B.5..)

On the other hand, Insurance claims regulations provide that where an insurer suggests or recommends to the insured that a specific contractor repair the covered loss, the insurer is obligated to cause the damaged property to be restored to no less than its condition prior to the loss and repaired in a manner which meets accepted trade standards for good and workmanlike construction at no additional cost to the claimant."(c) No insurer shall suggest or recommend that the insured have the property repaired by a specific individual or entity unless: ¶ (1) the referral is expressly requested by the claimant; or ¶ (2) the claimant has been informed in writing of the right to select a repair individual or entity and, if the claimant accepts the suggestion or recommendation, the insurer shall cause the damaged property to be restored to no less than its condition prior to the loss and repaired in a manner which meets accepted trade standards for good and workmanlike construction at no additional cost to the claimant other than as stated in the policy or as otherwise allowed by these regulations." (Emphasis added.) (10 CCR § 2695.9(c).)

While violation of Insurance claims regulations does not mandate finding the insurer acted unreasonably in violation of the contract or acted in bad faith, such violations may be used by the trier of fact to infer the insurer acted unreasonably and would be considered as evidence of a breach of the agreement and/or bad faith conduct. (Rattan v. United Services Auto. Ass'n (2000) 84 Cal.App.4th 715, 724.)

Plaintiff Laura Parkes declares: in 2008 they installed and had sanded, stained and refinished 7,000 square feet of natural hickory plank flooring in their home; a total of approximately 2,500 square feet of the flooring was damaged on three floors of the home as a result of the February 17, 2013 water loss; they submitted a claim to defendant Mid-Century

Ins. Co. for the damage caused by the water loss; defendant Mid-Century Ins. Co.'s adjuster for the claim told them that Dick's Carpet One Floor and Home (Dick's Carpet One) could repair the damaged wood flooring in the home; they had not heard about Dick's Carpet One prior to the time that the adjustor informed them about the company; the adjuster told them they could chose Dick's Carpet One to do the repairs, or they could have the floors repaired by anther vendor of their choice, however, defendant Mid-Century Ins. Co. would only pay the amount of Dick's Carpet One's estimate of costs of repair, less the policy deductible, that if Dick's Carpet One was chosen to repair the damage, defendant Mid-Century Ins. Co. would pay for that work and the work was guaranteed; plaintiffs chose Dick's Carpet One to do the repairs, because the work was guaranteed and because the vendor who originally installed the hickory wood floors estimated it would cost $30,000 more to repair the damage than was estimated by Dick's Carpet One to repair the damage; based upon the representation of defendant Mid-Century Ins. Co.'s adjuster, it was plaintiffs' understanding that defendant Mid-Century Ins. Co. would guarantee defendants Dick's Carpet One's and Rubicon's repairs of the damaged flooring; the repairs did not return the flooring to its pre-loss condition, because the stain and finish on the areas repaired did not match the undamaged flooring and because the new flooring was not installed to the edge of the wall underneath the baseboards; there was additional damage to baseboards, walls, doors, and moldings; and after initial complaints to Dick's Carpet One, Dick's Carpet One and Rubicon sanded, stained, and finished the floors a second time and Rubicon failed to match the stain. (Declaration of Laura Parkes in Opposition to Motion, paragraphs 3-9.)

In addition, the following evidence was submitted in opposition to the motion: the FOP adjuster admits in deposition testimony that if the insurer received information that the scope of repair and cost of repair for the original damaged flooring was something different than the

estimate then the insurer would reopen the claim and readjust it to make sure that the plaintiffs were compensated for their actual costs to repair the original loss and damage. (Plaintiff's Exhibit 4 – Transcript of Deposition Testimony of Anthoulla Yiannakou, page 161, lines 8-16.)

Defendant Mid-Century Ins. Co. admits it had a duty to pay for its insureds' water loss. The insurance contact placed a duty upon defendant Mid-Century Ins. Co. to pay sufficient funds to compensate plaintiffs fully for repairs to their home that would bring the home back to its pre-loss condition, provided the payment was within the polity coverage limits. There is no evidence before the court that plaintiffs' claim exceeded the policy coverage limits.

There remains a dispute and triable issue of material fact as to whether defendant discharged its duty to compensate plaintiffs fully for the water loss by merely paying defendant Mid-Century Ins. Co.'s preferred vendor the amount it charged for repairs that did not repair the floors of the home to the condition that existed prior to the water loss.

There is evidence before the court that defendant Mid-Century Ins. Co. agreed to guarantee that it would fulfill its contractual obligations under the insurance policy by having its preferred vendor repair the covered loss to the condition it was in prior to the loss in a specified manner at no further cost to plaintiffs, other than their deductible.

The appellate court in Rattan v. United Services Auto. Ass'n (2000) 84 Cal.App.4th 715, held that where an insurer guaranteed the work of a preferred vendor who was selected to perform the repairs for a covered loss, the insurer had a duty in contract to compensate the insured for any defective workmanship in repairing the loss. The appellate court stated: "…the insured who has been provided a policy's financial benefits but is unhappy with the paint job performed by an agent of the insurer has contractual remedies against the painter, as well as any insurer, such as USAA, acting as a guarantor of workmanship. The insured may, as was the case here, simply find another painter and require that the insurer pay for it. In this situation

it is difficult to see any substantial public interest which supports any additional tort remedy." (Rattan v. United Services Auto. Ass'n (2000) 84 Cal.App.4th 715, 723.)

On the other hand, where the insurer has unreasonably withheld the policy's full financial benefits due to the insured, such conduct is more than the mere breach of the insurance policy. "Tort liability for breach of the implied covenant of good faith and fair dealing has been variously measured. The primary test is whether the insurer withheld payment of an insured's claim unreasonably and in bad faith. (*Frommoethelydo v. Fire Ins. Exchange*, supra, 42 Cal.3d 208, 214-215, 228 Cal.Rptr. 160, 721 P.2d 41.) Where benefits are withheld for proper cause, there is no breach of the implied covenant. (*California Shoppers Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1, 54-55, 221 Cal.Rptr. 171.) The duty imposed by law is not unreasonably to withhold payments due under the policy. (*Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 920, 148 Cal.Rptr. 389, 582 P.2d 980.)" (Love v. Fire Ins. Exchange (1990) 221 Cal.App.3d 1136, 1151.)

Defendant Mid-Century Ins. Co. admits it received information from its engineer that the scope of work that it initially based its estimate on and the work paid for was woefully inadequate to repair the plaintiff's flooring to restore it to the pre-loss condition. The work done by defendant's preferred flooring contractor and its subcontractor was not merely faulty workmanship and/or defective construction, when liberally construing the evidence in favor of the plaintiff opposing the motion the work approved by defendant Mid-Century Ins. Co. was the wrong procedures to apply in the first place, which was the only approved procedures that defendant Mid-Century Ins. Co. would pay for. The defendant's own engineer essentially reported that the process selected for removal and replacement was not appropriate where the finish floor planks were adhered to the underlayment such as was the case here. In other words, defendant Mid-Century Ins. Co. had a duty under the policy to pay for restoration of the

flooring to the pre-loss condition and then only authorized and approved the faulty method of repair without regard to that duty. This was a case where there was a claimed water loss and a faulty adjustment of the claim that resulted in the violation of the insurer's duty under its policy to pay for return the property to a pre-loss condition by exacerbating the loss. This is not merely an excluded claim for construction defect and faulty workmanship.

In addition, since defendant Mid-Century Ins. Co. suggested and recommended Dick's Carpet One as its vendor who would estimate the cost of repair, that cost estimate controlled the amount that defendant Mid-Century Ins. Co. would pay to compensate for the covered water loss, and plaintiffs chose defendant's recommended preferred vendor, evidence of defendant Mid-Century Ins. Co.'s failure to make sure that the damaged property was restored to no less than its condition prior to the loss and repaired in a manner which meets accepted trade standards for good and workmanlike construction at no additional cost to the claimant is evidence for the trier of fact to consider in determining whether defendant's conduct was unreasonable such that it breached the insurance agreement duty to pay for restoration of the property to its pre-loss condition.

Strictly construing the moving party's evidence, liberally construing the evidence submitted in opposition to the motion, resolving doubts as to the propriety of granting the motion in favor of the party resisting the motion, and considering all of the evidence and all of the inferences reasonably drawn therefrom in the light most favorable to the opposing party (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 843; and Crouse v. Brobeck, Phleger & Harrison (1998) 67 Cal.App.4th 1509, 1524.), the original replace and remove and later sand and refinish without removal scope of work approved by defendant Mid-Century Ins. Co. did not come close to discharging the defendant's duties to pay for repairs to place the plaintiff's home in a pre-loss condition.

To the extent there is no coverage for a construction defect or faulty repairs, this does not excuse defendant Mid-Century Ins. Co.'s duties to pay for covered losses by payment for services and repairs that is appropriate to bring the property back to its pre-loss condition.

The court finds that while there is no duty under the terms of the policy to cover losses and damages from garden variety construction defects and faulty repairs as an initial claimed loss, defendant Mid-Century Ins. Co.'s duty under the policy of insurance and as an implied covenant of good faith and fair dealing not to deprive plaintiffs of the benefit of their bargain was to pay sufficient funds to repair an admittedly covered water loss to include removal and repair as detailed by its engineer as being required to properly repair the damage and maintain the structural integrity of the home. Defendant Mid-Century Ins. Co. has not established as a matter of law that it does not owe any duty other than to pay for the repair services of the previously approved limited scope of work of sand and stain, or remove and replace without special attention to the sheathing and joists, or that it did not owe a duty to make sure its selected vendor restored the flooring to its pre-loss condition in a manner that met trade standards for good, workmanlike construction. The motion for summary adjudication of the issue that defendant Mid-Century Ins. Co. had no duty to compensate plaintiffs for defendant Dick's Carpet One's execution of the approved procedure to repair the loss claimed either under a provision of the insurance policy or an implied covenant of good faith or fair dealing is denied. The approved repair methods did not return the property to its pre-loss condition. It is defendant Mid-Century Ins. Co.'s duty to make sure that the scope of work it selects and authorizes to repair a loss and its payment for the loss is sufficient to bring the property to its pre-loss condition.

Breach of Contract Cause of Action

Defendant Mid-Century Ins. Co. argues that since it had no contractual duty to pay for damages caused by defendant Dick's Carpet One and its subcontractor, defendant Rubicon's, faulty and defective workmanship in repairing the water loss, and it did not guarantee the work, it can not be held liable for breach of contract for such faulty and defective repairs.

The court has found that there is evidence sufficient to raise a contractual duty to compensate plaintiffs for the full cost to return the property to its pre-loss condition and a contractual duty under defendant Mid-Century Ins. Co.'s claims adjuster's guarantee of defendant Dick's Carpet One's repair work to make sure its repair work met construction standards and returned the property to its pre-loss condition. In addition, the evidence and admitted facts cited earlier in this ruling raises the following triable issues of material fact: whether defendant Mid-Century Ins. Co.'s conduct violated 10 CCR § 2695.9(c) in a manner such that the insurer acted unreasonably in violation of the contract; and whether defendant Mid-Century Ins. Co.'s failure and refusal to pay for repairs in an amount that would have fully restored the property to its pre-loss condition as described in its engineer's report and maintaining that all it had to pay for was an unsuccessful approved procedure that did not come near to restoring the property to pre-loss condition breached the insurance policy duty to pay for the covered loss.

The motion for summary adjudication of the breach of contract cause of action is denied.

Breach of the Covenant of Good Faith and Fair Dealing Cause of Action

Defendant Mid-Century Ins. Co. argues that denial of payment for damages caused by defendants Dick's Carpet One and Rubicon for their defective and faulty work did not breach the implied covenant of good faith and fair dealing.

"Every contract imposes on each party an implied duty of good faith and fair dealing. (*Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 818, 169 Cal.Rptr. 691, 620 P.2d 141.) Simply stated, the burden imposed is " 'that neither party will do anything which will injure the right of the other to receive the benefits of the agreement.' " *Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 573, 108 Cal.Rptr. 480, 510 P.2d 1032, quoting, *Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 658, 328 P.2d 198.) Or, to put it another way, the "implied covenant imposes upon each party the obligation to do everything that the contract presupposes they will do to accomplish its purpose." (*Schoolcraft v. Ross* (1978) 81 Cal.App.3d 75, 80, 146 Cal.Rptr. 57; accord *Fletcher v. Western National Life Ins. Co.* (1970) 10 Cal.App.3d 376, 401, 89 Cal.Rptr. 78.) A " 'breach of the implied covenant of good faith and fair dealing involves something beyond breach of the contractual duty itself,' and it has been held that ' "[b]ad faith implies unfair dealing rather than mistaken judgment...." [Citation.]' [Citation.]" (*Congleton v. National Union Fire Ins. Co.* (1987) 189 Cal.App.3d 51, 59, 234 Cal.Rptr. 218.) ¶ For example, in the context of the insurance contract, it has been held that the insurer's responsibility to act fairly and in good faith with respect to the handling of the insured's claim " 'is not the requirement mandated by the terms of the policy itself-to defend, settle, or pay. It is the obligation ... under which the insurer must act fairly and in good faith in discharging its contractual responsibilities.' [Citation.]" (*California Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1, 54, 221 Cal.Rptr. 171, italics omitted, [quoting from *Gruenberg v. Aetna Ins. Co.*, supra, 9 Cal.3d at pp. 573-574, 108 Cal.Rptr. 480, 510 P.2d 1032].) ¶ "Thus, allegations which assert such a claim must show that the conduct of the defendant, whether or not it also constitutes a breach of a consensual contract term, demonstrates a failure or refusal to discharge contractual responsibilities, prompted not by an honest mistake, bad judgment or negligence but rather by a conscious and deliberate act,

which unfairly frustrates the agreed common purposes and disappoints the reasonable expectations of the other party thereby depriving that party of the benefits of the agreement. Just what conduct will meet these criteria must be determined on a case by case basis and will depend on the contractual purposes and reasonably justified expectations of the parties." (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1395, 272 Cal.Rptr. 387; accord *State Farm Fire & Casualty Co. v. Superior Court* (1996) 45 Cal.App.4th 1093, 1105, 53 Cal.Rptr.2d 229.)" (Chateau Chamberay Homeowners Ass'n v. Associated Intern. Ins. Co. (2001) 90 Cal.App.4th 335, 345-346.)

"Tort liability for breach of the implied covenant of good faith and fair dealing has been variously measured. The primary test is whether the insurer withheld payment of an insured's claim unreasonably and in bad faith. (*Frommoethelydo v. Fire Ins. Exchange*, supra, 42 Cal.3d 208, 214-215, 228 Cal.Rptr. 160, 721 P.2d 41.) Where benefits are withheld for proper cause, there is no breach of the implied covenant. (*California Shoppers Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1, 54-55, 221 Cal.Rptr. 171.) The duty imposed by law is not unreasonably to withhold payments due under the policy. (*Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 920, 148 Cal.Rptr. 389, 582 P.2d 980.) ¶ Thus, there are at least two separate requirements to establish breach of the implied covenant: (1) benefits due under the policy must have been withheld; and (2) the reason for withholding benefits must have been unreasonable or without proper cause. (See also *California State Auto. Assn. Inter-Ins. Bureau v. Superior Court* (1986) 184 Cal.App.3d 1428, 1433, 229 Cal.Rptr. 409 [no award for bad faith can be made "without first establishing that coverage exists"]; *Kopczynski v. Prudential Ins. Co.* (1985) 164 Cal.App.3d 846, 849, 211 Cal.Rptr. 12.) [Footnote omitted.]" (Love v. Fire Ins. Exchange (1990) 221 Cal.App.3d 1136, 1151.)

While violation of Insurance claims regulations does not mandate finding the insurer acted unreasonably in violation of the contract or acted in bad faith, such violations may be used by the trier of fact to infer the insurer acted unreasonably and would be considered as evidence of a breach of the agreement and/or bad faith conduct. (Rattan v. United Services Auto. Ass'n (2000) 84 Cal.App.4th 715, 724.)

The evidence cited earlier in this ruling raises the following triable issues of material fact: whether defendant Mid-Century Ins. Co.'s conduct violated 10 CCR § 2695.9(c) such that the insurer acted unreasonably in bad faith denial of the amount of compensation to make sure that its selected vendor restored the flooring to its pre-loss condition in a manner that met trade standards for good, workmanlike construction; and whether defendant Mid-Century Ins. Co.'s failure and refusal to pay for repairs in a manner that would have fully restored the property to its pre-loss condition as described in its engineer's report and maintaining that all it had to pay for was an unsuccessful approved procedure that did not come near to restoring the property to pre-loss condition breached the insurance policy duty to pay for the covered loss and amounted to unreasonably withholding insurance benefits plaintiffs were entitled to.

The motion for summary adjudication of the breach of implied covenant of good faith and fair dealing is denied.

TENTATIVE RULING # 7: DEFENDANT MID-CENTURY INS. CO.'S MOTION FOR SUMMARY ADJUDICATION OF ISSUE OF DUTY AND THE CAUSES OF ACTION FOR BREACH OF CONTRACT AND BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AD FAIR DEALING IS DENIED. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-

6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, OCTOBER 11, 2019 IN DEPARTMENT NINE UNLESS OTHERWISE NOTIFIED BY THE COURT. ALL OTHER LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ANOTHER DATE. (EL DORADO COUNTY SUPERIOR COURT LOCAL RULES, RULE 7.10.05, et seq.) SHOULD A LONG CAUSE HEARING BE REQUESTED, THE PARTIES ARE TO APPEAR AT 8:30 A.M. ON FRIDAY, OCTOBER 11, 2019 IN DEPARTMENT NINE WITH THREE MUTUALLY AGREEABLE DATES FALLING ON A FRIDAY MORNING AT 2:30 P.M.