

1 TY S. VANDERFORD, STATE BAR NO. 130492
2 *tvanderford@vrlawyers.com*
3 JAMES J. McGARRY, STATE BAR NO. 92856
4 *jmcgarry@vrlawyers.com*
5 VANDERFORD & RUIZ, LLP
6 77 North Mentor Avenue
7 Pasadena, CA 91106
8 Tel: (626) 405-8800; Fax: (626) 405-8868

Electronically FILED by
Superior Court of California,
County of Los Angeles
8/09/2023 3:25 PM
David W. Slayton,
Executive Officer/Clerk of Court,
By K. Hung, Deputy Clerk

6 Attorneys for Defendants
7 CERTAIN UNDERWRITERS AT LLOYD'S,
8 LONDON SUBSCRIBING TO POLICY NUMBER
9 HGB0139660; and WASHINGTON & FINNEGAN, INC.

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF LOS ANGELES

12 JAN KORBELIN and MARINA GRASIC,

13 Plaintiff,

14 v.

15 CERTAIN UNDERWRITERS AT
16 LLOYD'S, LONDON SUBSCRIBING TO
17 CERTIFICATE NUMBER HGB0139660
18 and WASHINGTON & FINNEGAN INC.,

19 Defendants.

Case No. 21STCV15017

DEFENDANTS' NOTICE OF MOTION AND
MOTION FOR SUMMARY JUDGMENT, OR
IN THE ALTERNATIVE, MOTION FOR
SUMMARY ADJUDICATION, AND
MEMORANDUM OF POINTS AND
AUTHORITIES

*[Filed concurrently with Separate Statement of
Undisputed Facts, Declarations of Matthew
Steiner, Ty Vanderford, Exhibit list, and
[Proposed] Order]*

Judge: Hon. Rupert Byrdsong
Dept.: 28

Date: October 24, 2023
Time: 8:30 AM
Depart.: 28

RESERVATION ID: 919970994823

Complaint Filed: April 21, 2021
Trial Date: February 20, 2024

1 TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 NOTICE IS HEREBY GIVEN that on October 24, 2023, at 8:30 AM, or as soon thereafter
3 as the matter may be heard, in Department 28 of the above-entitled court, located at 111 N. Hill
4 Street, Los Angeles, CA 90012, Defendants Certain Underwriters at Lloyd's, London's
5 ("Defendant" or "Certain Underwriters") and Washington & Finnegan, Inc. will and hereby do
6 move this Court for an order granting summary judgment in their favor, pursuant to Code of Civil
7 Procedure section 437c, on the grounds that this action has no merit, there is no triable issue as to
8 any material fact, and defendants are entitled to judgment as a matter of law on each cause of action
9 in the operative Complaint. In the alternative, defendants seek an order adjudicating the following
10 issues under Code of Civil Procedure section 437f:

11 Issue 1: Plaintiffs Jan Korbelin and Marina Grasic's ("Plaintiffs") First Cause of Action for
12 Breach of Contract against Certain Underwriters fails as a matter of law because Plaintiffs' claimed
13 damage to property is not covered by the insurance policy.

14 Issue 2: Plaintiffs' Second Cause of Action for Breach of the Implied Covenant of Good
15 Faith and Fair Dealing against Certain Underwriters fails as a matter of law because it is dependent
16 on establishing insurance coverage and breach of contract, which Plaintiffs have failed to do.
17 Plaintiffs' Second Cause of Action also fails because Plaintiffs lack evidence to show that the
18 rejection of coverage was unreasonable or without proper cause.

19 Issue 3: Plaintiffs' First Cause of Action for Breach of Contract against Washington &
20 Finnegan, Inc. fails as a matter of law because there is no contract between Plaintiffs and
21 Washington & Finnegan, Inc.

22 Issue 4: Plaintiffs' Second Cause of Action for Breach of the Implied Covenant of Good
23 Faith and Fair Dealing against Washington & Finnegan, Inc. fails as a matter of law because there
24 is no contract between Plaintiffs and Washington & Finnegan, Inc. and Washington & Finnegan,
25 Inc. is thus not subject to an implied duty of good faith and fair dealing.

26 ///

27 ///

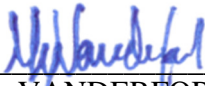
28 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Defendants' Motion is based on this Notice, the records filed herein, the attached Memorandum of Points and Authorities, the Declarations of Matthew Steiner and Ty Vanderford, the Separate Statement of Undisputed Material Facts, the Compendium of Supporting Evidence, and any other evidence as may be presented at the hearing on this motion.

Dated: August 9, 2023

VANDERFORD & RUIZ, LLP

By: 

TY S. VANDERFORD
JAMES J. McGARRY
Attorneys for Defendants
CERTAIN UNDERWRITERS AT LLOYD'S,
LONDON SUBSCRIBING TO CERTIFICATE NO.
HGB0139660 and WASHINGTON & FINNEGAN,
INC.

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- I. INTRODUCTION 6
- II. FACTS 6
 - A. Plaintiffs’ Application For Renewal Of Homeowners Insurance 6
 - B. Plaintiffs’ Notice of Claim 7
 - C. The Damage..... 8
- III. PERTINENT POLICY TERMS 8
- IV. ARGUMENT 12
 - A. Summary Judgment is Proper Where Policy Provisions Preclude Coverage 12
 - B. Plaintiffs’ Make Two Claims of Damage, the Causes are Undisputed and the Claims Are Not Covered 13
 - 1. Plaintiffs’ First Claim of Damage: Water damage on the ground floor and near the wall 13
 - a. Description of the Area.....13
 - b. The Source of Intrusion..... 17
 - c. The Subject Policy Does Not Cover this Type of Loss..... 17
 - 2. Plaintiffs’ Second Claim of Damage: Sagging of Second Floor Dining Room.....17
 - a. Description of the Area.....17
 - b. The Source of Intrusion18
 - c. The Subject Policy Does Not Cover This Loss 18
 - C. The Lack of Coverage Does Not Violate the Efficient Proximate Cause Rule 19
 - D. Plaintiffs’ Claim for Breach of the Implied Covenant of Good Faith and Fair Dealing Fails as a Matter of Law..... 21
 - E. The Causes of Action Against Washington & Finnegan Fail as a Matter of Law Because Washington & Finnegan is Not a Party to the Policy..... 21
- V. CONCLUSION 22

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

State Cases

Alex R. Thomas & Co. v. Mutual Service Casualty Ins. Co.
(2002) 98 Cal.App.4th 66 10

Benavides v. State Farm General Ins. Co.
(2006) 136 Cal.App.4th 1241 18

Case v. State Farm Mutual Automobile Ins. Co., Inc.
(2018) 30 Cal.App.5th 397 18

De Bruyn v. Superior Court
(2008) 158 Cal.App.4th 1213 17

Grebow v. Mercury Insurance Co.
(2015) 241 Cal. App. 4th 564–82 18

Gruenberg v. Aetna Ins. Co.
(1973) 9 Cal.3d 566 19

Jordan v. Allstate Ins. Co.
(2004) 116 Cal.App.4th 1206 15

Julian v. Hartford Underwriters Ins. Co.
(2005) 35 Cal.4th 747 16, 17

Love v. Fire Ins. Exch.
(1990) 221 Cal.App. 3d 1136 (1) 18

Sanchez v. Lindsey Morden Claims Services, Inc.
(1999) 72 Cal.App.4th 249 19

Scottsdale Ins. Co. v. State Farm Mutual Automobile Ins. Co.
(2005) 130 Cal.App.4th 890 10, 11, 14

Waller v. Truck Ins. Exchange, Inc.
(1995) 11 Cal.4th 1 10

State Statutes

Code of Civil Procedure § 437c 2

Code of Civil Procedure § 437f 2

Code of Civil Procedure § 437c, subd. (o) 10

1 **I. INTRODUCTION**

2 This case involves a homeowner claim for long term water damage under a SPECIAL
3 FORM H03 policy. Such policies are intended to cover sudden and accidental occurrences — like
4 fire, or accidental discharge from home appliances — not long-term water damage causing decay
5 and rot. Indeed, all of the damage here is decay and rot. The policy is clear that decay and rot are
6 not covered.

7 Plaintiffs’ claim involves two areas of damage. The ground floor damage was caused by
8 water accumulating in a negligently maintained drain basin, and seeping underground through the
9 building. A water damage exclusion specifically excludes this loss. Apparently, this was not the
10 first time this happened, as it is undisputable that there was patching present in the area of
11 intrusion. The second-floor loss, which is all dry rot, mold, fungus and wet rot is excluded on
12 multiple grounds. First, dry rot is not covered. Second, mold, fungus, or wet rot is only covered if
13 such loss results from the accidental discharge or overflow of water from a household appliance
14 or from an off-property sewer back up. The policy specifically states that a roof drain, gutter or
15 downspout is not considered a household appliance. Here, it is undisputed that the water intrusion
16 was from the downspout.

17 Defendant Certain Underwriters seek summary judgment on grounds that the policy does
18 not cover the claimed areas of damage, thus entitling Underwriters to summary judgment as a
19 matter of law. Defendant Washington & Finnegan, Inc. were the adjusters for the claim and seek
20 summary judgment on grounds that there is no contract between Plaintiffs and Washington &
21 Finnegan, Inc., thus defeating Plaintiffs’ causes of action as a matter of law.

22
23 **II. FACTS**

24 **A. Plaintiffs’ Application For Renewal Of Homeowners Insurance**

25 On June 2, 2020, Plaintiffs submitted (through their insurance agent, Don Burke) a
26 Homeowner Application for a renewal of their homeowner policy. The housekeeping, plumbing
27 and roof condition were all reported as good. Under “Loss History” asking if “any losses, whether
28 or not paid by insurance,” with “Y/N” the box is filled “N.” (Decl. of Ty S. Vanderford

1 (“Vanderford Decl.”), Exhibit A, Homeowner Application.) This was, in fact, false. Plaintiffs
2 now claim they knew the property was damaged at least by early May 2020.

3 **B. Plaintiffs’ Notice of Claim**

4 On Wednesday, June 24, 2020 at 3:47 p.m., Mr. Burke advised Plaintiffs that he was very
5 sorry to inform them that their Homeowner’s Insurance premium was increasing from \$10,000 to
6 \$90,568. Mr. Burke further advised “other companies have declined issuing quotes due to the fire
7 risk.” (Vanderford Decl., Exhibit B, 6/24/20 3:47 p.m. email). It was very unfortunate, but with
8 the recent Malibu fires, the entire insurance market was making a swift retreat from the Malibu
9 area. At 4:13 p.m. on the same date, Jan Korbelin responded: “This is beyond ridiculous. . . We
10 have paid for 15 years and never used the insurance. It's disgusting.” (Id., Exhibit C, 6/24/20 4:13
11 p.m. email). Thirty minutes later, at 4:43 p.m., Jan Korbelin wrote to Mr. Burke again: “I want to
12 see if we can get insurance applied for the water damage from the heavy rains at the beginning of
13 the year. The damage occurred a bit afterward as it **seeped into the structure** and damaged the
14 deck as well as the floor in the ground floor and the ceiling/floor above (floor of second floor,
15 which sagged about 1 and 1/5 inches) of the house.” (emphasis added). (Id., Exhibit D, 6/24/20
16 4:43 p.m. email). On Monday, June 29, 2020 at 11:27 a.m., Mr. Burke emailed Plaintiffs, and
17 “per our conversation,” attached a loss form for Plaintiffs to review. The loss form describes the
18 loss as “WATER DAMAGE DUE TO HEAVY RAINS AT THE BEGINNING OF THE
19 YEAR.” Under “Kind of Loss” the word “WATER” is provided. (Id., Exhibit E, 6/29/20 11:27
20 a.m. email with attachment). At 3:58 p.m. that same day, the NOTICE OF CLAIM was
21 forwarded to Nelson Oliva, the Gorst underwriter. (Id., Exhibit F, 6/29/20 3:58 p.m. email). He
22 responded at 7:03 p.m. that day, stating “By the way. . . Noticed the loss was experienced early
23 this year. Would you happen to know why the customer waited so long after the loss to submit
24 this claim? Please let us know.” (Id., Exhibit G, 6/29/20 2:03 p.m. email).

25 Mr. Burke, Plaintiff’s agent, testified he knew right away this would be a problematic
26 claim, and that he would have asked Plaintiffs in the initial conversation when they discovered
27 the loss. The fact it is not in the notice is because Plaintiffs had no answer. (Vanderford Decl.,
28 Exhibit H, Burke depo, 34:10-16 (dry rot not covered because it’s a maintenance issue, not a
sudden peril); 37:6-18 (“you realize that there’s been a big time gap in between. I’m not sure “if

1 this is gonna be covered thing, but if you want me to put the claim in, that's my job" 38:18-39:11
2 (expected the Underwriter to ask about the delay in submitting the claim).

3 The next day at 10:32 a.m., Mr. Burke wrote Plaintiffs: "They are asking for the date of
4 loss. Please let me know as soon as possible." (Vanderford Decl., Exhibit I, 6/30/20 10:32 a.m.
5 email). Plaintiff Marina Grasic responded 10 hours later at 8:22 p.m., "We noticed the damage at
6 the end of May. The second floor dining room started to buckle near the floorboard. When we
7 inspected the room directly below it on the ground floor, we then noted (when we moved the area
8 rugs) that there was extensive water damage on the floor and near the wall. Clear water intrusion.
9 Also as we were using the deck (also on the ground floor one room away on the ground floor) it
10 collapsed and we noticed that the beams underneath were rotting due to water." (Id., Exhibit J,
11 6/30/20 8:22 p.m. email). Ms. Grasic *now* claims that they were not actually using the deck when
12 it collapsed, and noticed the deck collapse a week before the other damage.¹ What did Plaintiffs
13 do about any of this for the alleged month before making the claim? Nothing.

14 C. The Damage

15 All of the damage related to the sagging of the floor was caused by water entering through
16 the downspout and is dry rot, mold, mildew, decay and deterioration. (Separate Statement of
17 Undisputed Facts ("Fact") No. 5.) Underwriters paid Plaintiffs for the cost to open the walls and
18 lift the travertine floor, replace and repaint the walls and reinstall the floor (Fact No. 6.)
19 Vanderford Decl., Ex. P). The damage caused by the water that seeped through the foundation is
20 staining of the floor in the first floor office/bedroom. (Fact No. 4.)

21 III. PERTINENT POLICY TERMS

22 The Policy insures "against risk of direct physical loss to" the covered dwelling with
23 stated exceptions and exclusions.

24 The Policy states as relevant:

25 SECTION I – PERILS INSURED AGAINST²

26
27 ¹ Plaintiffs have since withdrawn this claim for the deck.

28 ² Vanderford Decl., Exhibit K, HOMEOWNERS 3 – SPECIAL FORM portion of policy, at page 8 of 22, Bates stamp DEFS 00307.

1 A. Coverage A – Dwelling and Coverage B – Other Structures

2 1. We insure against risk of direct physical loss to property described
3 in Coverages A [Dwelling] and B [Other Structures].

4 2. We do not insure, however, for loss:

5 a. Excluded under Section I – Exclusions;

6 ***

7 c. Caused by:

8 ***

9 (5) Mold, fungus or wet rot. However, we do insure for loss caused by mold,
10 fungus or wet rot that is hidden within the walls or ceilings or beneath the
11 floors or above the ceilings of a structure if such loss results from the
12 accidental discharge or overflow of water or steam from within:

13 (a) A plumbing, heating, air conditioning or automatic fire protective
14 sprinkler system, or a household appliance, on the “residence
15 premises”; or

16 (b) A storm drain, or water, steam or sewer pipes, off the “residence
17 premises”.

18 For purposes of this provision, a **plumbing system or household**
19 **appliance does not include** a sump, sump pump or related equipment or a
20 **roof drain, gutter, downspout** or similar fixtures or equipment; or

21 (6) Any of the following:

22 (a) **Wear and tear, marring, deterioration;**

23 ***

24 (c) Smog, rust or other corrosion, or **dry rot**;³

25 ***

26
27
28 _____
³ Vanderford Decl., Exhibit K at Page 9 of 22, Bates Stamp DEFS 00308.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

(f) Settling, shrinking, bulging or expansion, including resultant cracking, of bulkheads, pavements, patios, footings, foundations, walls, floors, roofs or ceilings;

SECTION I – EXCLUSIONS⁴

B. We do not insure for loss to property described in Coverages A and B caused by any of the following. However, any ensuing loss to property described in Coverages A and B not precluded by any other provision in this policy is covered.

3. **Faulty, inadequate or defective:**

- b. Design, specifications, **workmanship**, repair, **construction**, renovation, remodeling, grading, compaction;
- c. **Materials** used in repair, construction, renovation or remodeling; or
- d. Maintenance;

* * *

of part or all of any property whether on or off the “residence premises”.

**WATER BACK UP AND
SUMP DISCHARGE OR OVERFLOW [HGB-WB/SO (01/05)]⁵**

* * *

1. D. Exclusion

The Water Damage exclusion is deleted and replaced by the following:

⁴ Vanderford Decl., Exhibit K, HOMEOWNERS 3 – SPECIAL FORM portion of policy, at Page 12 of 22, Bates Stamp DEFS 00311
⁵ Vanderford Decl., Exhibit K, Policy, Bates Stamp DEFS 00274.

1 Water Damage, meaning:

2 * * *

3 c. Water, or water-borne material, below the surface of the ground, including
4 **water which:**

5 * * *

6 (2) **Seeps** or leaks **through;** a building, sidewalk, driveway, **foundation** ... caused by or
7 resulting from human or animal forces or any act of nature.

8 **MOLD, MILDEW AND FUNGUS ENDORSEMENT** [HGB-MSL (04/03)]⁶

9 A. Applicable to Coverage A – Dwelling, Coverage B – Other Structures, Coverage C
10 – Personal Property and Coverage D – Loss of Use

11 Notwithstanding any provision to the contrary within this policy or any
12 endorsement attached thereto this policy insures physical damage to property
13 insured under Coverage A, Coverage B, Coverage C and Coverage D by mold,
14 mildew or fungus but only when such damage is the direct result of physical loss
15 or damage to property insured under Coverage A, Coverage B, Coverage C and
16 Coverage D by one of the following Listed Perils occurring during the period of
17 this policy.

18 Listed Perils

19 Fire; Accidental Discharge or Overflow of Water

20 This coverage is subject to all limitations contained within this policy and, in
21 addition, to each of the following specific limitations:

- 22 1. The said property must be insured by this policy for physical
23 damage by the Listed Peril.
- 24 2. The insured must report to insurers the existence of the damage by
25 mold, mildew or fungus as soon as practicable but in no event later
26 than six months from the date that the Listed Peril first damaged the
27 insured property. This policy does not insure any damage by mold,

28 ⁶ Vanderford Decl., Exhibit K, Policy, Bates Stamp DEFS 00273.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

mildew or fungus first reported to insurers after such six month period.

3. Insurance under this policy in respect of mold, mildew or fungus shall not include any sum relating to:

- (i) faulty workmanship, material, construction or design;
- (ii) mold, mildew or fungus that is not the direct result of physical loss or damage to property insured under Coverage A, Coverage B, Coverage C and Coverage D by a Listed Peril during the period of this policy including any governmental or regulatory direction or request of whatsoever nature relating to such mold, mildew or fungus.

4. The maximum amount payable under this policy for insured damage by mold, mildew or fungus including all related costs and expenses is **\$10,000** any one loss and in the aggregate.

B. Except as set forth in the foregoing Section A this policy does not insure any loss, damage, claim, cost or expense or other sum directly or indirectly arising out of or relating to mold, mildew or fungus.

Furthermore, it is understood that no coverage is provided under Coverage E and Coverage F of this policy directly or indirectly arising or indirectly arising out of or relating to mold, mildew or fungus of whatsoever nature.

The foregoing Sections A and B replace and supersede any provision in the policy that may provide insurance, in whole or in part, for these matters.

IV. ARGUMENT

A. Summary Judgment is Proper Where Policy Provisions Preclude Coverage

“A defendant seeking summary judgment must show that at least one element of the plaintiff’s cause of action cannot be established, or that there is a complete defense to the cause of

1 action. ([Code of Civ. Proc.] § 437c, subd. (o)(2).) A defendant insurer, for example, may
2 establish that the insured's loss is excluded from coverage. The burden then shifts to the plaintiff
3 to show there is a triable issue of material fact on that issue. (See § 437c, subd. (o)(2);
4 [citation].)” (*Alex R. Thomas & Co. v. Mutual Service Casualty Ins. Co.* (2002) 98 Cal.App.4th
5 66, 72.)

6 The “interpretation of an insurance policy is a question of law.” (*Waller v. Truck Ins.*
7 *Exchange, Inc.* (1995) 11 Cal.4th 1, 18; (*Scottsdale Ins. Co. v. State Farm Mutual Automobile Ins.*
8 *Co.* (2005) 130 Cal.App.4th 890, 896 [“In the absence of conflicting extrinsic evidence,
9 interpretation of an insurance policy is a question of law which may be resolved by the court on
10 summary judgment.”].)

11
12 **B. Plaintiffs’ Make Two Claims of Damage, the Causes are Undisputed**
13 **and the Claims Are Not Covered**

14 As mentioned above, Plaintiffs now have two areas of claim:

15 **1. Plaintiffs’ First Claim of Damage: Water damage on the ground floor and near the**
16 **wall**

17 **a. Description of the Area**

18 The source of water in this location was through the wall near the basin at the Southwest
19 corner of the house. The drainage channel along the west side exterior wall directs runoff water to
20 a drain at the base of the channel.



West side drainage channel and site landscaping looking south.

(Decl. of Matt Steiner (Steiner Decl.) Exhibit N, 9/19/20 Envista Report, Page 4, ¶ 3) Stains were observed in the drywall at the base of the inside face of the retaining wall. (Id. ¶ 8). Sealant materials and patching materials that were observed along the point between the concrete drainage channel and the edge of the foundation were evidence of previous measures to prevent or minimize water intrusion below the drainage channel. This patching and sealant had failed in some locations, and separations up to approximately ¼ inch wide were observed.



Close-up of drainage channel, note separation and sealant/patching materials.

(Id. p. 6) The swell retention area and the drain at the base of the drainage channel were

1 not functioning, and standing water and debris filled the area around the drain inlet.

2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28



West side exterior wall at base of drainage channel, note debris filled drain, standing water and separation between retaining wall and drainage channel.



Close-up of drainage channel, note separation and sealant/patching materials.



Debris filled drain exit at base of west side drainage channel behind retaining wall adjacent to first floor office/bedroom.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28



Debris filled drain at base of west side drainage channel at first floor office/bedroom exterior wall.



Exposed foundation waterproofing membrane at first floor south of retaining wall, note separations and exposed pipe.



Close-up of debris filled drain exit at first floor west side exterior wall.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

b. The Source of Intrusion

The source of the water is rainwater or runoff that entered the soil behind the retaining wall through separations in sealant joints and gaps between the drainage channel and the foundation wall. (Fact No. 4.) The non-operable drain at the base of the west side drainage channel allowed rainwater to pool and overflow the drainage channel. This condition contributed to the water intrusion through separations between the retaining wall and the edge of the drainage channel. (Steiner Decl., Exhibit N, p.7, Conclusions, ¶¶ 1, 2).

c. This Subject Policy Does Not Cover this Type of Loss

According to the policy water exclusion: “Water. . . below the surface of the ground, including water which . . . seeps or leaks through a building. . . foundation. . . or other structure” is not insured (Vanderford Decl., Exhibit K, Policy, Water Back Up And Sump Discharge or Overflow Endorsement Bates Stamp DEFS 00275). The policy also contains exclusions for:

- Neglect;
- Faulty, inadequate or defective. . . Design specifications, workmanship, repair, construction, renovation; Materials used in repair. . . ; or Maintenance. (Id. HO3, Special Form page 12 of 22; Bates Stamp DEFS 00311)

This is because in addition to the water exclusion, the damage was caused by the original design, or the faulty repair (the ineffective patch job) and the lack of maintenance that allowed the drain to get to the state depicted in the photos with dirt, debris, and the displaced drain cap. Thus, this portion of the claim is not covered on at least three separate grounds, each on its own sufficient to show no coverage exists.

2. Plaintiffs’ Second Claim of Damage: Sagging of Second Floor Dining Room


a. Description of Area

Envista conducted a second inspection on October 21, 2020, after destructive testing was completed to expose the wood framing of the west wall and the ceiling/floor between the first-floor office/bedroom and second-floor dining room. Extreme decay, consisting of dry rot and fungus was observed in the joists and inner walls. (Fact No. 5.)

1 **b. The Source of Intrusion**

2 The November 4, 2020 report concluded the primary source of water intrusion that caused
3 decay of the first floor and second floor wall framing is through the exterior wall assembly and
4 not from soil behind the retaining wall. (Fact No. 7; Steiner Decl., Exhibit O, 11/4/20 Envista
5 Report p. 2 and 3). Plaintiff’s own expert, found that the source of water was from the
6 downspout: “Roof downspout-roof drain/scupper tested with wand and leak was observed less
7 than 5 minutes at multiple locations at the second and first floors. Leaks were observed in the
8 same areas as found stains. The roof drain/scupper appears to be the source of the water intrusion
9 and damage as observed in the pretesting photos.” (Fact No. 7; Vanderford Decl., Exhibit L, April
10 13, 2022 RPAA Report.)



18  IMG_4740 – Roof drain / scupper unsealed gaps at plaster interface.



21 IMG_4754 – Wand test – leak in less than 5 minutes.

22 **c. The Subject Policy Does Not Cover This Loss**

23 Simply put, Plaintiff’s loss is a long-term damage, not sudden and accidental. The damage
24 to the interior walls and joists occurred over several months, if not years. Deterioration, dry rot,
25 and wet rot are not covered by this policy.⁷ There is an exception, but the exception does not

26
27
28

⁷ The sagging of the dining room floor does not come within the Policy’s additional coverage for collapse because a “collapse” is defined as “an abrupt falling down or caving in of a building,” and expressly does not include “a building or any part of a building that is in danger of falling down or caving in,” “even if it shows evidence of ... sagging....” (Vanderford Decl., Ex. K, Policy, page 7 of 22)

1 apply here. The policy states:

2 . . . (5) We do insure for loss caused by mold, fungus or wet rot that is hidden
3 within the walls or ceilings or beneath the floors or above the ceilings of a
4 structure if such loss results from the accidental discharge or overflow of water. . .
5 from within: (a) A plumbing, heating, air conditioning or automatic fire protective
6 sprinkler system, or a household appliance, on the ‘residence premises’; or (b) A
7 storm drain, or water, steam or sewer pipes, off the ‘residence premises.’ ***For
8 purposes of this provision, a plumbing system or household appliance does not
9 include a sump, sump pump or related equipment or a roof drain, gutter,
10 downspout, or similar fixtures or equipment.***
11 (emphasis added).

12 Because the undisputed source of water was the downspout, the damage caused by mold,
13 fungus and wet rot is specifically not covered. Additional perils expressly not covered include
14 damage caused by “(a) wear and tear, marring, deterioration” and “(c) . . . dry rot” and “(f)
15 Settling. . . of patios, footings, foundations, walls, floors, roofs or ceilings.” Finally, as equally
16 applied to the ground floor loss, other applicable exclusions include the “B.3 Faulty, inadequate
17 or defective. . . b. Design, specifications, workmanship, repair, construction . . . , (and) c.
18 Materials used in repair, construction, renovation. . . ,” and “d. Maintenance.”

19 **C. The Lack of Coverage Does Not Violate the Efficient Proximate Cause Rule**

20 Plaintiffs have suggested that the Policy’s exclusions are not enforceable based on the
21 efficient proximate cause rule. The efficient proximate cause rule precludes insurers from
22 denying coverage for a loss proximately caused by a covered peril. (*Julian v. Hartford
23 Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 756.) Plaintiffs contend the heavy rains at the
24 beginning of the year that allegedly caused Plaintiffs’ damage constitute a covered peril which
25 cannot be defeated by the dry rot or water damage exclusions pursuant to the efficient proximate
26 cause rule.

27 Plaintiffs’ argument is based on a misunderstanding of the efficient proximate cause rule.
28 The rule does not preclude insurers from limiting coverage for mold or dry rot merely because

29 Plaintiffs have argued “dry rot” is ambiguous, citing *Jordan v. Allstate Ins. Co.* (2004) 116
30 Cal.App.4th 1206. However, *Jordan* found that a layperson would readily understand that “‘wet
31 or dry rot’ embraces damage or decay caused by a fungus.” (*Id.*, at p. 1218.) The ambiguity
32 analysis in *Jordan* concerned the insurer’s argument in that case that the “dry rot” exclusion
33 applied to collapse coverage. (*Id.*, at p. 1219.) Certain Underwriters do not contend that the “dry
34 rot” exclusion applies to collapse coverage. Thus the analysis Plaintiffs rely on is inapplicable.

1 mold and dry rot may have originated with water intrusion at some point. Insurers are not
2 precluded by the rule from limiting coverage to some, but not all, manifestations of a given peril.
3 (*De Bruyn v. Superior Court* (2008) 158 Cal.App.4th 1213, 1223-1224; *Julian, supra* 35 Cal. 4th
4 at p. 759 [“It follows that an insurer is not absolutely prohibited from drafting and enforcing
5 policy provisions that provide or leave intact coverage for some, but not all, manifestations of a
6 particular peril. This is, in fact, an everyday practice that normally raises no questions regarding
7 section 530 or the efficient proximate cause doctrine.”].)

8 The Court in *De Bruyn* thus rejected the insured’s argument that the efficient proximate
9 cause rule precluded the insurer from never covering mold under any circumstances, even if the
10 mold results from a covered peril of sudden and accidental discharge of water. (*De Bruyn, supra*,
11 158 Cal.App.4th at p. 1224.) The Court explained:

12 By specifying in the water damage exclusion that even though water damage caused by a
13 sudden and accidental release of water is covered, mold resulting from that damage is not,
14 the policy makes clear that mold damage caused by a sudden and accidental release of
15 water is an excluded peril. Like the Supreme Court in *Julian, ...*, which held that a
16 weather conditions clause that excluded the peril of rain inducing a landslide did not
17 violate section 530 or the efficient proximate cause doctrine ..., we hold that the water
18 damages exclusion in this case—which excludes the peril of mold resulting from a sudden
19 release of water—similarly does not violate section 530 or the efficient proximate cause
20 doctrine.”

21 (*Ibid.*)

22 The same reasoning applies to the coverage limitations in the Policy at issue, which are
23 commonly found in most policies. (1 MBPG: New Appleman California Insurance Law 5.28
24 [“[T]ypical first-party exclusions include, but are not limited to, exclusions concerning earth
25 movement (subsidence); deterioration, inherent vice, latent defect, and/or wear and tear;
26 negligence of a third party; water damage; mold or fungus; and pollution.]”) That certain losses
27 caused by water (outside of the water damage exclusion) may be covered does not limit an
28 insurer’s election not to cover losses due to mold and dry rot which may eventually develop from
water. (*De Bruyn, supra*, 158 Cal.App.4th at p. 1216; *Julian, supra*, 35 Cal.4th at p. 759.)

1 **D. Plaintiffs’ Claim for Breach of the Implied Covenant of Good Faith and Fair Dealing**
2 **Fails as a Matter of Law**

3 Plaintiffs’ claim for Breach of the Implied Covenant of Good Faith and Fair Dealing fails
4 as a matter of law because the claim is predicated on Plaintiffs establishing that Certain
5 Underwriters did not pay benefits owed under the Policy. As demonstrated above, no benefits
6 were due. There can accordingly be no bad faith. (*Benavides v. State Farm General Ins.*
7 *Co.* (2006) 136 Cal.App.4th 1241, 1250 [“[T]o establish an implied covenant tortious breach, an
8 insured must show first, that benefits were due under the policy, and second, that the benefits
9 were withheld without proper cause.”]; *Grebow v. Mercury Insurance Co.* (2015) 241 Cal. App.
10 4th 564, 581–82 [“[T]here can be no claim under an implied covenant of good faith and fair
11 dealing or for bad faith unless the policy benefits are due under the contract.”].)

12 In addition, Plaintiffs lack evidence that Certain Underwriters’ claim denial was
13 “unreasonable or without proper cause.” (*Love v. Fire Ins. Exch.* (1990) 221 Cal.App. 3d 1136,
14 1151 [“[T]here are at least two separate requirements to establish breach of the implied covenant:
15 (1) benefits due under the policy must have been withheld; and (2) the reason for withholding
16 benefits must have been unreasonable or without proper cause.”]; *Case v. State Farm Mutual*
17 *Automobile Ins. Co., Inc.* (2018) 30 Cal.App.5th 397, 402 [“To establish bad faith, a policy holder
18 must demonstrate misconduct by the insurer more egregious than an incorrect denial of policy
19 benefits.”].) Determining an insurer’s reasonableness in denying a claim can be decided on
20 summary judgment. (*Id.* [““whe[n] there is a genuine issue as to the insurer’s liability under the
21 policy for the claim asserted by the insured, there can be no bad faith liability imposed on the
22 insurer for advancing its side of that dispute.”].)

23 **E. The Causes of Action Against Washington & Finnegan Fail as a Matter of Law**
24 **Because Washington & Finnegan is Not a Party to the Policy**

25 Defendant Washington & Finnegan was the insurance adjuster retained by Certain
26 Underwriters to investigate Plaintiffs’ claim. Washington & Finnegan is not a party to the Policy.
27 Fact No. 8; (Vanderford Decl., Exhibit K)
28

1 Insurance adjusters cannot be held liable for breaches of insurance contracts because they
2 are not parties to those contracts. (*Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 576
3 [“Obviously, the non-insurer defendants were not parties to the agreements for insurance;
4 therefore, they are not, as such, subject to an implied duty of good faith and fair dealing.”];
5 (*Sanchez v. Lindsey Morden Claims Services, Inc.* (1999) 72 Cal.App.4th 249, 255 [insurer-
6 retained adjuster owes not duty of care to insured].)

7 Plaintiffs’ causes of action against Washington & Finnegan for Breach of Contract and
8 Breach of the Implied Covenant of Good Faith and Fair Dealing therefore fail as a matter of law.

9
10 **V. CONCLUSION**

11 Based on the foregoing reasons, defendants respectfully request that the Court enter
12 judgment, or adjudication, in their favor.

13 Dated: August 9, 2023

VANDERFORD & RUIZ, LLP

14
15 By: 

16 TY S. VANDERFORD
17 JAMES J. McGARRY
18 Attorneys for Defendants
19 CERTAIN UNDERWRITERS AT LLOYD’S,
20 LONDON SUBSCRIBING TO CERTIFICATE NO.
21 HGB0139660 and WASHINGTON & FINNEGAN,
22 INC.
23
24
25
26
27
28

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action; my business address is 77 North Mentor Avenue, Pasadena, CA 91106.

On **August 9, 2023**, I served the document(s) described as DEFENDANT CERTAIN UNDERWRITERS’ NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY ADJUDICATION, AND MEMORANDUM OF POINTS AND AUTHORITIES on the interested party(s) as follows:

Glenn R. Kantor, Esq. Stacy Monahan Tucker, Esq. Jaclyn D. Conover, Esq. KANTOR & KANTOR, LLP 19839 Nordhoff Street Northridge, CA 91324	Attorneys for Plaintiffs, JAN KORBELIN and MARINA GRASIC Tele: (818) 886-2525 - Fax: (818) 350-6272 Email: gkantor@kantorlaw.net; stucker@kantorlaw.net; jconover@kantorlaw.net cspencer@kantorlaw.net cmormann@kantorlaw.net
---	---

(BY MAIL) I am readily familiar with this firm’s practice of collection and processing mail. Under that practice it would be placed in this firm’s outgoing mail bin on that same day, with postage thereon fully prepaid, to be deposited with the U.S. Postal Service at Pasadena, California. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

(BY ELECTRONIC SERVICE VIA FIRST LEGAL SUPPORT SERVICES) I caused the above-referenced document(s) to be served on the individual(s) listed above via electronic transmission through First Legal Support Services in compliance with the e-filing system and guidelines of the Los Angeles Superior Court.

(BY FEDERAL EXPRESS) By placing a true and correct copy of the above document(s) in a sealed envelope addressed as indicated above and causing such envelope(s) to be delivered to the FEDERAL EXPRESS delivery service and to be delivered by the next business day to the address(s) designated.

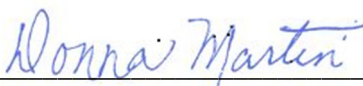
(BY EMAIL) Based on an agreement of the parties to accept service by e-mail or electronic transmission, I caused the above document(s) to be sent to the person(s) at the e-mail addresses listed above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

(BY PERSONAL DELIVERY) I caused the document(s) listed above to be personally delivered to the person(s) at the address(es) set forth above.

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

Executed on **August 9, 2023**, at Pasadena, California.

DONNA MARTIN
Print Name


Signature



Court Reservation Receipt

Reservation	
Reservation ID: 919970994823	Status: RESERVED
Reservation Type: Motion for Summary Judgment	Number of Motions: 1
Case Number: 21STCV15017	Case Title: JAN KORBELIN, et al. vs CERTAIN UNDERWRITERS AT LLOYD'S LONDON SUBSCRIBING TO CERTIFICATE NO. HGB0139660, et al.
Filing Party: Certain Underwriters at Lloyd's London Subscribing to Certificate No. HGB0139660 (Defendant)	Location: Stanley Mosk Courthouse - Department 28
Date/Time: October 24th 2023, 8:30AM	Confirmation Code: CR-ZEVJ96GHW94AV9C5N

Fees			
Description	Fee	Qty	Amount
Reschedule Fee	20.00	1	20.00
Credit Card Percentage Fee (2.75%)	0.55	1	0.55
TOTAL			\$20.55

Payment	
Amount: \$20.55	Type: MasterCard
Account Number: XXXX4642	Authorization: 17217P
Payment Date: 2023-06-15	

[◀ Back to Main](#)[🖨 Print Page](#)