2d Civil No. B239145

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

CARDIO DIAGNOSTIC IMAGING, INC.

Plaintiff and Appellant,

vs.

FARMERS GROUP, INC., et al.

Defendants and Respondents.

Appeal from Los Angeles Superior Court,
Case No. BC404888
Honorable Carl J. West

RESPONDENT'S BRIEF

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CERTIFICATE OF INTERESTED ENTITIES

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INTRODUCTION

A toilet, sink or tub backs up or overflows when, instead of going down the drain, water fills the fixture and then spills out over its brim. That's exactly what happened here. And that's the exact situation that the insurance policy in this case plainly and expressly excludes from coverage.

The opening brief seeks to ignore California law that enforces comparable policy language as plain and unambiguous. It instead asserts that the meaning of insurance policy language should be determined by selective Internet searches. But that's not, and should not be, the standard. Akin to misused statistics, one can find support for virtually any proposition on the Internet, depending on how the search is manipulated. That is not the standard for interpreting insurance policy language.

Where, as here, an insurance policy exclusion is facially unambiguous, it must be read according to its plain, ordinary, common-sense meaning. Here, the first-party commercial property insurance policy at issue excludes any "loss or damage caused directly *or indirectly* by . . . [w]ater that backs up or *overflows from* a sewer, *drain* or sump." (Emphasis added.) The trial court (consistent with precedent) found this language clear and unambiguous and that the water damage here—indisputably caused when a clogged sewer backed up causing water to overflow from a toilet—fell squarely within the exclusion.

Plaintiff/appellant Cardio Diagnostic Imaging, Inc. (Cardio) concedes that the exclusion is plain and unambiguous. Nonetheless, it embarks on a full-fledged attempt to rewrite it. In doing so, it omits and attempts to change the common-sense meaning of critical words, and seeks to apply inapplicable rules of construction. Although all of the exclusion's words presumably contribute to its meaning, the opening brief consistently ignores "overflows," "drain," and "indirectly"; it reads as if the only words in the exclusion are "direct" "sewer" and "back up." They are not. As a concededly unambiguous provision, the exclusion must be read according to the plain meaning of the words exactly as written.

As a matter of law, Cardio's attempts to trump up "reasonable expectations" and extrinsic evidence at odds with that plain meaning should play no part in the analysis. When the unambiguous exclusion is properly read, it is clear that no coverage was afforded.

With no coverage, Cardio's claims of insurance bad faith and for punitive damages necessarily fail. But even if that were not the case, more than reasonable cause supports the coverage denial here based on precedent and the exclusion's plain language that Cardio struggles so mightily to avoid. That, too, defeats any tort claims for insurance bad faith and punitive damages.

The opening brief attempts to impermissibly modify the policy's express and plain terms. It is a smoke-and-mirrors presentation. The judgment should be affirmed.

STATEMENT OF THE CASE

A. The Insurance Policy Excluding Drain Overflows.

Defendant and respondent Farmers Insurance Exchange (Farmers), insured plaintiff and appellant Cardio Diagnostic Imaging, Inc. (Cardio) under a first-party commercial property insurance policy. (1 Appellant's Appendix (AA) 108-133; 5 AA 1202 ¶ 1.) As relevant here, the policy expressly excludes loss caused by water overflowing from a drain:

> We will not pay for loss or damage caused directly or indirectly by . . . (3) Water that backs up or overflows from a sewer, drain or sump. (1 AA 116-117 [§ B.1.g.(3)] ("Water Exclusion #3" or "the Exclusion")]; see 5 AA 1203 ¶ 4.)[1]

This Exclusion expressly applies "regardless of any other cause or event that contributes concurrently or in any sequence to the loss." (1 AA 116 [§ B.1.].)

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[1] A separate "Negligent Work" exclusion bars coverage for any loss or damage caused by "[f]aulty, inadequate or defective . . . [d]esign, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction . . . [and m]aterials used in repair, construction, renovation or remodeling." (1 AA 94 ¶ 23, 119 [§ B.3.c.(2) & (3)]; 5 AA 1203 ¶ 5.)

B. Water Backs Up From A Clogged Sewer And Overflows Through A Toilet Drain, Causing Damage In Cardio's Office, For Which Cardio Claims Insurance Coverage.

On January 14, 2007, water overflowed out of a toilet in a third-floor office suite, causing damage in a first-floor office suite below rented by Cardio. (5 AA 1203-1204 ¶ 6.)

Cardio tendered an insurance claim the following day to Farmers. (1 AA 84 ¶ 10, 135; 5 AA 1203-1204 ¶ 6.) Within one day, Farmers assigned claims representative Marlon Adams to handle the claim. (1 AA 84 ¶ 11, 5 AA 1204 ¶ 7.)

Mr. Adams contacted Cardio's President, Jason Kay, that same day to find out more information about the purported loss. (1 AA 84 ¶ 11, 137; 5 AA 1204 ¶ 7.) Mr. Kay reported that water leaked from a bathroom in a third-floor unit, causing damage to wood floors and a CAT scan imaging machine in Cardio's office. (*Ibid.*)

The next day—three days after the claimed loss occurred—Mr. Adams inspected Cardio's suite (accompanied by Mr. Kay), at which time Mr. Kay described what happened again: A toilet from a third-floor office had overflowed, causing damage in Cardio's suite. (1 AA 85 ¶ 12, 139; 5 AA 1204-1205 ¶ 8; 6 AA 1605.) During his inspection, Mr. Adams photographed and inspected Cardio's suite and observed that the water

damage appeared to be consistent with the events described by Mr. Kay. (1 AA 85 ¶ 13, 139, 141-144; 5 AA 1204-1205 ¶ 8; 6 AA 1605.)

As part of his claim investigation, Mr. Adams also spoke with Jesse Medina, a representative of the building's management company, Mani Brothers Real Estate Investment. (1 AA 85 ¶ 14, 139; 5 AA 1205-1206 ¶ 10.) Mr. Medina said the toilet that overflowed was new, but possibly defective. (1 AA 85 ¶ 14, 139; 6 AA 1605.)

C. Farmers Denies Cardio's Water-Damage Claim Because It Was Not A Covered Loss.

After completing its field inspection and evaluating Cardio's various requests for reconsideration, Farmers ultimately denied coverage. (1 AA 202-204, 227-230; see also 1 AA 85-86 ¶¶ 17-21, 92 ¶¶ 15-16, 93-94 ¶¶ 20-22, 95-96 ¶¶ 27-29, 208-209, 214, 218-220, 222-225; 6 AA 1606-1607.) In its formal denial letter, Farmers explained that Water Exclusion #3 applied to the facts of this case:

> [A] toilet in Unit 305 on the third floor of the building backed up and overflowed, allowing water to leak into your office. We understand that wood flooring and CAT scan equipment in your office was damaged as a result of the overflow. Based on our investigation and analysis of this claim, we must

advise you that the claim is not covered by your policy, because water damage of this nature is specifically excluded from coverage . . . . (1 AA 202.)

Although it first denied Cardio's claim solely under Water Exclusion #3, Farmers expressly reserved all terms, conditions and provisions of the policy, including all available defenses. (1 AA 203, 229.) Later, in response to Cardio's claim that the cause of damage was a defective toilet (1 AA 210-212), it concluded that the Negligent Work exclusion would also apply (1 AA 218-220). Upon Cardio's request, Farmers also analyzed whether coverage would be afforded under a separate "water damage" provision,[2] concluding it would not. (1 AA 222-225, 227-229.)

D. Cardio Sues Farmers For Contract Breach And Insurance Bad Faith.

Cardio thereafter sued Farmers asserting claims for breach of contract, insurance bad faith and declaratory relief, and praying for both

[2] That provision affords coverage "[i]f loss or damage caused by or resulting from covered water or other liquid . . . occurs, [in which event, Farmers] will also pay the cost to tear out and replace any part of the building or structure to repair damage to the system or appliance from which the water or other substance escapes." (1 AA 111 [§ A.5.e.]; see 1 AA 95 ¶ 27, 223.)

compensatory and punitive damages. (1 AA 1, 7-16; 6 AA 1630.)[3]

The operative second amended complaint alleged that Cardio "suffered water damage when a newly-installed, defective toilet on the third floor of the business premises *overflowed* because the intake water to the toilet did not shut off and the clean city water flowing into the toilet could not proceed down the toilet due to an impediment." (1 AA 4 ¶ 4, emphasis added.)

E. Both Parties Move For Summary Resolution.

Farmers moved for summary judgment, or in the alternative, summary adjudication of issues, based on (1) Water Exclusion #3, or alternatively, (2) the Negligent Work exclusion. (1 AA 64, 73-75.)

In addition to evidence of its investigation of Cardio's claim, Farmers supported its motion with excerpts from the deposition of Jay Chase, the Vice-President of Muir-Chase Plumbing Co.—the licensed plumbing contractor who had installed the toilet in the third-floor suite

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[3] Cardio sued both Farmers Group, Inc. and Farmers Insurance Exchange, but the former was dismissed from the case prior to summary judgment. (6 AA 1631.) Cardio did not appeal that dismissal and does not challenge it on this appeal. This appeal only concerns the claims against Farmers Insurance Exchange.

during recent renovations. (1 AA 239-271.)[4] Mr. Chase, who had approximately thirty-one years of plumbing experience, inspected and tested the toilet multiple times in the office suite where the water first overflowed, successfully recreating the stoppage. (5 AA 1215-1216 ¶¶ 28-30; see 6 AA 1610.) He then removed the toilet so that he could test it at his facility. (5 AA 1215-1216 ¶ 28; see 1 AA 246:5-9; 6 AA 1609.) In all, he "ran 50-plus tests" on the toilet, replicating the occurrence, so that he could correctly determine what caused the water to overflow out of it. (1 AA 253:2-16, 258:6-10; 5 AA 1215-1216 ¶ 28.) Each time Mr. Chase tested the toilet his findings were the same. (1 AA 252:15-17.)

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[4] The Chase deposition was taken in conjunction with a separate, related action, in which Cardio sued several other defendants, including the third-floor tenant whose office contained the overflowed toilet and the plumbing company that installed the toilet (*Cardiodiagnostic Imaging, Inc. v. Mani Brothers Sunset Medical Tower (DE) et al.* (Super. Ct. L.A. County, filed Apr. 26, 2007, No. SC093698). A deposition transcript from another lawsuit can be used to support a summary judgment motion. (*Williams v. Saga Enterprises, Inc.* (1990) 225 Cal.App.3d 142, 149; but see *Gatton v. A.P. Green Services, Inc.* (1998) 64 Cal.App.4th 688, 694.) That is especially true where, as here, the deposition is in a case in which the party against which it is offered (Cardio) was also a party. In any event, Cardio made no objection to the deposition's use either in the trial court or on appeal, and in fact, relied on it in its interrogatory responses. (See 1 AA 172-173; Code Civ. Proc., § 437c, subd. (b)(5) [as to summary judgment motion, objections waived if not made in trial court]; *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 534 ["the burden (is) on the objector to renew the objections in the appellate court"].)

He opined that there was "a blockage in the sewer line" that caused the water in the toilet to flood the third-floor Suite and, in turn, damage Cardio's property. (5 AA 1216 ¶ 30; see 1 AA 262:21-263:6, 264:19-265:21; 6 AA 1610.) This conclusion was based on his observation that "the sewer back[ed] up" during testing, "and the only way a sewer can back up is if there's stoppage down the line . . . ." (1 AA 263:2-3; see 5 AA 1216-1217 ¶ 30.) Mr. Chase concluded that, *in this case*, it was impossible for the blockage to have been in the toilet itself "[b]ecause it took so long for it to back up." (1 AA 266:19-24; see also 1 AA 264:19-23; 5 AA 1216-1217 ¶ 30; 6 AA 1610.) Thus, he concluded that the blockage was in the sewer line—approximately 20 to 40 feet away from the toilet. (1 AA 264:19-23; 5 AA 1217 ¶ 30.)

In opposition, Cardio did *not* dispute why or how the toilet overflow occurred. (See 3 AA 781 ¶ 6 [admitting that the property damage was caused "when a toilet in a business suite on a higher floor overflowed, causing water to leak downward into (Cardio)'s business premises"]; 4 AA 1110 & fn. 2 [admitting that "the water damage would not have occurred *absent* drain blockage"; "(i)n contrast, damage could have occurred from the blockage *even without the running toilet*," emphases in original.) Rather, relying on extraneous advertising materials, Farmers' website, and Internet sources, it argued about the scope and meaning of the policy's exclusions. (4 AA 1105-1124; 5 AA 1129-1130, 1265-1276, 1312-1330.)

At the same time, Cardio moved for summary adjudication in *its* favor, asking the trial court to construe Water Exclusion #3 as requiring a regurgitation of effluent that had previously entered a sewer system:

> In order for [Water Exclusion #3] . . . to apply to a claim, the water causing damage must, at a minimum, have been inside the relevant sewer, drain, or sump and then come out of the sewer, drain, or sump causing the damage. This exclusion does not, for example, exempt from payment damages due to water overflowing a sink, toilet, bathtub, washing machine, dishwasher, or other fixture or appliance as the result of water being unable to proceed into a drain attached to such fixtures or appliances. (2 AA 313.)

F. The Trial Court Grants Summary Judgment In Farmers' Favor.

The trial court granted summary judgment in Farmers' favor and concomitantly denied adjudication in Cardio's favor. (6 AA 1625-1626.) It found Water Exclusion #3 "clear, and unambiguous," such that the loss "falls directly outside of coverage." (5 AA 1377-1378; see also 6 AA 1625 ["coverage is unambiguously excluded based on the face of the policy"].)

It implicitly rejected Cardio's strained construction. (5 AA 1377 [emphasizing the word "*or*" between "backed up" and "overflowed"].)

The trial court originally found the Negligent Work exclusion ambiguous and concluded that, as a result, there was a genuine issue as to the "efficient proximate cause" of the loss. (5 AA 1380.) Upon Farmers' motion, however, the trial court reconsidered and granted Farmers' summary judgment. (6 AA 1625-1626.) It concluded that "based on the evidence before it in conjunction with [Farmers'] motion for summary judgment, there was only one cause of the loss, and that loss was the blockage in the drain." (6 AA 1624.) As there was only one cause, the "efficient proximate cause" doctrine was inapplicable. (6 AA 1625-1626.) That cause was an excluded back-up or overflow from a sewer or drain:

> [T]here was a blockage in the sewer line that caused the water in the toilet to flood the [neighbor's third-floor] Suite and, in turn, damage the Plaintiff's property. The facts of this case show that there was water that backed up *or* overflowed from a sewer, drain, or sump. The policy exclusion is clear, and unambiguous, and the loss claimed falls outside of coverage. Defendant [Farmers] has satisfied its burden under CCP §437c(p)(2). (6 AA 1625, emphasis in original.)

On Cardio's bad faith claim, the court found that Farmers' interpretation of the policy was reasonable, and therefore, the claim failed

as a matter of law. (6 AA 1614.) For similar reasons, Cardio's punitive damages claim also failed. (6 AA 1615.)

The court entered judgment in favor of Farmers on February 10, 2012; Cardio timely appealed. (6 AA 1595-1597, 1627-1628.)

STANDARD OF REVIEW

The trial court's grant of summary judgment is reviewed de novo. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.) This court applies the same legal standards as the trial court in determining whether any genuine issues of material fact or questions of law exist. (*Trop v. Sony Pictures Entertainment Inc.* (2005) 129 Cal.App.4th 1133, 1143.)

Substantively, summary judgment is proper where there is a complete defense to plaintiff's cause of action—such as the existence of an express policy provision excluding the claimed loss from coverage. (6 AA 1625; Code Civ. Proc., § 437c, subds. (o)(2) & (p)(2); see also, e.g., *California Traditions, Inc. v. Claremont Liability Ins. Co.* (2011) 197 Cal.App.4th 410, 416; *Clarendon America Ins. Co. v. General Security Indemnity Co. of Arizona* (2011) 193 Cal.App.4th 1311, 1316; *Alex R. Thomas & Co. v. Mutual Service Casualty Ins. Co.* (2002) 98 Cal.App.4th 66, 72.).

Once the moving defendant makes a prima facie showing of no liability, the plaintiff must come forward with admissible evidence of "specific facts showing that a triable issue of material fact exists" as to the asserted defense. (Code Civ. Proc., § 437c, subds. (d) & (p)(2); *Jessen v. Mentor Corp.* (2008) 158 Cal.App.4th 1480, 1484-1485.) In other words, once Farmers presented facts showing that the exclusion applied, it was

Cardio's burden to show specific facts through admissible evidence that would avoid the exclusion. Without such a showing, courts should not "hesitate to summarily dispose of meritless litigation upon nothing more than [a] smoke and mirrors presentation." (*Rochlis v. Walt Disney Co.* (1993) 19 Cal.App.4th 201, 217, 219, disapproved on another ground in *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1251.)

If the trial court's grant of summary judgment is correct on *any* ground, regardless of the trial court's stated reasons, it must be affirmed. (*Shamsian v. Atlantic Richfield Co.* (2003) 107 Cal.App.4th 967, 975.)

ARGUMENT

I.

THE POLICY UNAMBIGUOUSLY EXCLUDES THE EXACT OVERFLOW DAMAGES CLAIMED HERE.

A. Water Exclusion #3 Is Clear And Unambiguous; No Extrinsic Interpretative Aids Or Evidence Are Appropriate.

An insurance carrier is free to exclude coverage for particular injuries or damages while providing coverage in other circumstances. (*Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 759.) It "can limit the coverage of a policy issued by it as long as such limitation conforms to the law and is not contrary to public policy." (*Ibid.*, additional quotation marks and citation omitted.)

Where, as here, a dispute arises over the meaning of an insurance policy exclusion, the question is one of law to be resolved under the rules of construction applicable to contracts. (Civ. Code, § 1635; Evid. Code § 310, subd. (a); *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18; *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865; *Penn-America Ins. Co. v. Mike's Tailoring* (2005) 125 Cal.App.4th 884, 889 (*Penn-America*).)

The first inquiry must always be the plain meaning of the language used in the provision. (*Ameron Intern. Corp. v. Insurance Co. of State of Pennsylvania* (2010) 50 Cal.4th 1370, 1378 (*Ameron*). That is because "the intention of the parties is to be ascertained from the writing alone, if possible." (Civ. Code, § 1639.) If a layperson would ascribe clear and unambiguous meaning to the provision, a court must apply that meaning—period, end of story. (*Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, 666-667; *Ameron*, *supra*, 50 Cal.4th at p. 1378.) If the language is "clear and explicit, and does not involve an absurdity," the language itself "governs its interpretation." (Civ. Code, § 1638.) Thus, "[w]here [a policy provision] is clear, the language must be read accordingly." (*Buss v. Superior Court* (1997) 16 Cal.4th 35, 45.)

Here, Cardio concedes that Water Exclusion #3 (what it mislabels as a "sewer backup" exclusion) "is not ambiguous." (Appellant's Opening Brief (AOB) 31; see 5 AA 1203 ¶ 4 [Cardio admitting that the Exclusion "speaks for itself"]; 6 AA 1610-1611, 1625 [trial court finding the same].) That's undoubtedly correct. This finding is squarely supported by California authority. Directly, on-point California authority holds that the phrase "'[w]ater that backs up from a sewer or drain' is facially *unambiguous*." (*Penn-America*, *supra*, 125 Cal.App.4th at p. 890, emphasis

added.) That is the law in other jurisdictions, too—a point acknowledged in one of Cardio's cited cases.[5]

As there is no ambiguity here, the Exclusion's common-sense meaning governs; no foray into additional interpretation beyond its clear and express language is necessary—nor is it permitted. (*Waller*, *supra*, 11 Cal.4th at p. 18; *Montrose Chemical Corp.*, *supra*, 10 Cal.4th at p. 666, citing Civ. Code, §§ 1638, 1644; *Penn-America*, *supra*, 125 Cal.App.4th at

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[5] *Rodin v. State Farm Fire & Cas. Co.* (Mo.Ct.App. 1992) 844 S.W.2d 537, 539 ["Courts in other jurisdictions, find[] no ambiguity in insurance policy language excluding from coverage loss resulting from water backing up through sewers and drains," collecting several state and federal cases; cited at AOB 27-28, fn. 11]; see also *Lattimore Road Surgicenter, Inc. v. Merchants Group, Inc.* (2010) 898 N.Y.S.2d 741, 742 [71 A.D.3d 1379, 1380] [held: provision excluding "'damage caused directly or indirectly' by 'water' that . . . 'backs up or overflows from a sewer, drain or sump'" is unambiguous]; *Arkansas Valley Drilling, Inc. v. Continental Western Ins. Co.* (D.Colo. 2010) 703 F.Supp.2d 1232, 1236, 1238 [same]; *St. Joseph's Condominium Ass'n, Inc. v. Pacific Ins. Co.* (E.D.La., Oct. 27, 2008, Civ. A. No. 07-3959) 2008 WL 4717463, at p. *4 ["this Court finds that the terms of the policy unambiguously exclude water that backs up or overflows from a sewer, drain or sump"]; *For Kids Only Child Development Center, Inc. v. Philadelphia Indem. Ins. Co.* (Tex.Ct.App. 2008) 260 S.W.3d 652, 656 ["We conclude the policy unambiguously excludes from coverage the type of drain and sewer backup appellant experienced"]; *Capelouto v. Valley Forge Ins. Co.* (1999) 98 Wash.App. 7, 9, 17 [990 P.2d 414, 416, 419] [water back-up exclusion unambiguously precluded recovery for the claimed loss]; *Jennings v. Hartford Fire Ins. Co.* (E.D.Pa., Apr. 25, 1991, Civ. A. No. 90-3125) 1991 WL 68019, at p. *4 (*Jennings*) ["Because I find the language of the exclusion to be unambiguous and to apply to the loss in question, I must give it effect and hold that no coverage is available in this case"].

p. 890; *Jacobs v. Fire Ins. Exchange* (1991) 227 Cal.App.3d 584, 590 ["there is no need for construction if a provision is unambiguous"].)

Even without such a concession and overwhelming authority, the Exclusion is unambiguous. A policy provision is only ambiguous (and thus open to interpretation using extrinsic aids) if the language used is reasonably susceptible to more than one common-sense interpretation; it is not ambiguous merely because it is not defined. (*Ameron*, *supra*, 50 Cal.4th at p. 1378; *First American Title Ins. Co. v. XWarehouse Lending Corp.* (2009) 177 Cal.App.4th 106, 114-115.) As a matter of law, the opening brief's strained and illogical interpretations cannot create an ambiguity. (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1276.) Rather, the proper question is whether the language is "ambiguous in the context of *this* policy and the circumstances of *this* case." (*Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.* (1993) 5 Cal.4th 854, 868, emphasis in original.)

The plain meaning of the Exclusion in *this* case is clear: Water damage caused, even indirectly, by a backed-up or overflowing drain or sewer is not covered. Yet, in the face of this conceded unambiguity, Cardio has proffered arguments premised on various extrinsic interpretative aids, ranging from the supposed non-textual "reasonable expectations" of insureds to Internet search results. (AOB 6, 12-13, 14-19.) The simple answer is that none of that is relevant. Extrinsic aids and evidence only

come into play if contract or policy language is ambiguous. 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 *Lange v. TIG Ins. Co.* (1998) 68 Cal.App.4th 1179, 1186 ["Extrinsic evidence is relevant . . . in interpreting a written instrument only if the instrument's language is ambiguous"].)

Thus, Cardio's proffered extrinsic evidence is irrelevant. (*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]; *Supervalu, Inc. v. Wexford Underwriting Managers, Inc.* (2009) 175 Cal.App.4th 64, 76 ["We recognize that our interpretation makes adjustment of claims more difficult than (the insured's) interpretation, but the parties agreed to the policy language and we have no power to rewrite it"]; see 6 AA 1611 [trial court rejected Cardio's proffered "extraneous material," e.g., dictionary definitions, as "not relevant" to the Exclusion's interpretation].)

And, the conceded lack of ambiguity also renders irrelevant any analysis of Cardio's "reasonable expectations" of coverage. As a matter of law, the *only* thing that Cardio (or any insured) "may 'reasonably expect' is the coverage afforded by the plain language of the mutually agreed-upon terms." (*TIG Ins. Co. of Michigan v. Homestore, Inc.* (2006) 137

Cal.App.4th 749, 755, citation and internal quotation marks omitted; see *General Reinsurance Corp. v. St. Jude Hospital* (2003) 107 Cal.App.4th 1097, 1108 ["insured's expectations are considered only when the policy is ambiguous (citation); they cannot be relied upon to create an ambiguity where none exists"]; Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2010) ¶ 4:5, p. 4-2.)[6]

As we now explain, the Exclusion's plain, unambiguous language applies to the loss here.

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[6] Even if the Exclusion were ambiguous (it's not), the insured's reasonable expectations are measured first and foremost by the objective and reasonable meaning of language, read in context. (*Buss*, *supra*, 16 Cal.4th at p. 45; *Bank of the West*, *supra*, 2 Cal.4th at pp. 1264-1265, quoting Civ. Code, § 1649.) That means applying a common-sense understanding of the phrase "backs up or overflows" (see *Penn-America*, *supra*, 125 Cal. App.4th at p. 886) and reading Water Exclusion #3 in its context as one of several general, broad coverage carve-outs in the "Water" exclusion (see pp. 30-31, *post*). Cardio's *subjective* understandings or wishful coverage thinking are irrelevant. These rules resolve any purported ambiguity in favor of Farmers' interpretation before ever reaching any rule construing the ambiguity against the carrier. (See *Bank of the West*, *supra*, 2 Cal.4th at pp. 1264-1265 [cautioning against relying on rule favoring the insured's construction "too early in the process" of policy interpretation; "(o)nly if this rule does not resolve the ambiguity do we then resolve it against the insurer"].)

B. The Ordinary And Common-Sense Meaning Of The Phrase "Directly Or Indirectly" Caused By "Water That Backs Up Or Overflows From A Sewer, Drain Or Sump" Compels a Finding That The Toilet Drain Overflow In This Case Fell Squarely Within The Policy's Exclusion.

The opening brief contends that reading Water Exclusion #3 to encompass damage caused—either directly or indirectly—by water that comes out of a toilet because of a clogged sewer or drain somehow "contradict[s] the universal meaning of both 'drain' and 'backs up or overflows from,'" and "the purpose of the exclusion." (AOB 8.) That argument totally lacks merit, as we now show.

1. As a layperson understands, water flowing out of a toilet due to a clogged sewer is directly or indirectly caused by a backed-up or overflowing drain or sewer.

Cardio's central argument for reversal—which mirrors its theme in opposing summary judgment—is one of semantics: It contends that Water Exclusion #3 does not apply because a "toilet," in its view, "is not a drain." (AOB 11 [quoting *Drutz v. Scottsdale Ins. Co.* (D.Md., Feb. 28, 2012, Civ.

A. No. WMN-10-3499) 2012 WL 665984, at p. *3], 12 [claiming that Farmers "mischaracteriz(es) . . . a 'toilet' as a 'drain'"].)

But as the evidence indisputably shows, the toilet in this case *was* part of a "drain." The water from the toilet did not discharge into a hole in the ground, it went into a drain and thence into a sewer. The *undisputed* evidence in this case was that the water damage was caused "when a clogged sewer pipe 'directly or indirectly' allowed water to backup and overflow out of the drain servicing the toilet" in the neighbor's upper-floor suite. (1 AA 75; 3 AA 695 [40:6-8]; 5 AA 1216-1218 ¶ 30; see also 3 AA 781 ¶ 6.) In Cardio's own words, a "clog in the drain line" "resulted in a toilet overflow." (AOB 37; see also 3 AA 781 ¶ 6; 4 AA 1110 & fn. 2.) The only reasonable meaning a layperson would attach to the phrase "[w]ater that backs up or overflows from a sewer [or] drain" is that it includes an overflowing bathtub drain, sink drain, or—as here—a toilet drain. And, that common-sense meaning is confirmed by the Exclusion's specific reference to water damage caused *indirectly* by a drain or sewer backup or overflow. (1 AA 116 [§ B.1.].) When the sewer is clogged (as is the *undisputed* fact here) water backs-up in the sewer and then overflows out of the toilet's drain, eventually spilling over the toilet brim.

This common-sense reading (that damage caused by water spilling out of a toilet due to a clogged drain or sewer is expressly excluded by a provision excluding coverage where water "backs up" or "overflows" *from*

a drain or sewer) is recognized by a number of authorities. To begin with *Penn-America*, *supra*, 125 Cal.App.4th at p. 890, holds that "[i]t is . . . unreasonable to assume the term 'sewer,' which is facially unqualified, has a latent, technical meaning which limits its application to the public portion of the sewer line." In other words, as *Penn-America* acknowledges, the ordinary understanding of a drain or sewer includes the components (e.g., a sink, a tub, a toilet) that are connected to it—the "drain system" as Farmers described it in the trial court. As here, the issue in *Penn-America* was a clogged sewer (there, backing up through an attached clean-out pipe); as here, the exclusion applied.

Even more recently (last month), the Rhode Island Supreme Court applied a comparable exclusion to a toilet overflow, just like here. In *Iozzi v. City of Cranston* (R.I., July 5, 2012, Civ. A. No. 2010-87-APPEAL) 2012 WL 2588509, a sewer system had become overloaded, causing water and raw sewage to overflow from a basement-level toilet. (*Id.* at p. *4.) In affirming summary judgment for the carrier applying a similar exclusion the Rhode Island Supreme Court held that the damage sustained from the overflowing toilet was "excluded by the plain language of the homeowner's policy." (*Ibid.*) This case is no different.

The New York appellate court reached the same analytical result in *Newlo Realty Co. v. U.S. Fid. & Guar. Corp.* (1995) 624 N.Y.S.2d 33, 33 [213 A.D.2d 295, 295] (*Newlo Realty*). The exclusion there was virtually

identical to the Exclusion in Cardio's policy. There, water damage resulted from an overflowed bathroom sink. (*Ibid.*) In affirming summary judgment for the insurer (the same procedural posture as here), the appellate court held that there is nothing "about the common understanding of the word 'drain', or in the policy itself, that requires a construction limited to underground pipes. The word is unambiguous"; a drain backing up and overflowing a sink is excluded. (*Ibid.*) Conceptually and legally, there is no difference between a backed-up or overflowed sink drain and a backed-up or overflowed toilet drain. (See *City of Hollister v. Monterey Ins. Co.* (2008) 165 Cal.App.4th 455, 504, quoting Plumbing Code, § 218.0, p. 22 ["a 'plumbing fixture' may include a sink, bathtub, or washing machine as well as a toilet"].) *Newlo Realty*, too, is on point and requires the result that the trial court reached here.[7]

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[7] See also *Scorpio v. Underwriters at Lloyd's, London* (D.R.I., June 5, 2012, Civ. A. No. 10-325 ML) 2012 WL 2020168, at p. *3 [rejecting plaintiff's narrow construction of the word "drain," concluding that "the plain and ordinary meaning of the word 'drain' is not so limited"]; *Jennings*, *supra*, 1991 WL 68019, at p. *2 ["Whenever water or sewage flows into a dwelling through drains or pipes that normally carry this effluent out, the water and sewage can be seen to have 'backed up', having gone backwards *through the fixtures* designed to carry it the other direction," emphasis added]; *For Kids Only Child Development Center, Inc. v. Philadelphia Indem. Ins. Co.*, *supra*, 260 S.W.3d at p. 655, rehg. den. Aug. 26, 2008, review den. Feb. 27, 2009 [cautioning against reading water back-up exclusions so as to eliminate instances where "water has traveled through appellant's plumbing system" because it "would, in effect, be reading the exclusion out of the policy"].

The opening brief relies almost exclusively on a federal district court opinion, *Drutz v. Scottsdale Ins. Co.*, *supra*, 2012 WL 665984 (*Drutz*), to support its "a toilet is not a drain" mantra. *Drutz*'s main holding appears to be that in order to "back up" or "overflow," water needs to first enter the drain or sewer and then reverse direction; in *Drutz*'s view merely being obstructed from entering the drain or sewer is not enough. (*Id.* at p. *3.) That is simply not a reasonable reading of the exclusion.

Drutz focuses on the term "backs up," but nowhere does it discuss the word "overflow." But "overflow" presumably provides added meaning. (See § I.B.4., *post*.) For instance, excess water that overflows a riverbank may never have entered the river's normal channel, excess water that overflows from a full glass doesn't necessarily enter the glass and then reverse course, and a venue may be overflowing such that patrons outside never reach the inside. (See, e.g., Webster's 9th New Collegiate Dict. (1985) p. 841 (Webster's) [defining "overflows" as "to flow over the brim of"]; Random House Unabridged Dict. (2d ed. 1993) p. 1381 (Random House Dict.) ["(O)verflow": "to flow or run over, as rivers or water: *After the thaw, the river overflows and causes great damage*"; "to have the contents flowing over or spilling, as an overfull container: *Stop pouring or your glass is going to overflow*"]; The New Oxford American Dict. (2001) p. 1219 (Oxford Dict.) ["(O)verflow": "(of a container) be so full that the contents go over or extend above the sides: *a bath had overflowed*

upstairs"; "(of a space) be so crowded that people cannot fit inside: *the waiting room was overflowing*," emphases in original].) *Drutz* goes through no such analysis, it just announces its rule ipse dixit.[8]

Likewise, nowhere does *Drutz* address the critical point that the exclusion covers damage caused *indirectly* from the backup or overflow of drains or sewers.

Not surprisingly, *Drutz* appears to be an outlier decision, out of step with more cogent and well-reasoned authority. It appears to be the exception rather than the rule. (See *Penn-America*, *supra*, 125 Cal.App.4th at p. 890; *Iozzi*, *supra*, 2012 WL 2588509 at pp. *4-*5; *Newlo Realty*, *supra*, 624 N.Y.S.2d at p. 33 [213 A.D.2d at p. 295].)

In addition to its myopic reliance on *Drutz*, the opening brief asserts that because Farmers—in denying Cardio's claim—stated it was doing so based on the evidence that a "toilet . . . backed up and overflowed" (1 AA 202), it somehow conceded that no drain or sewer was involved (AOB 8-9). But that makes no sense. There is no dispute that the water ultimately came out of the toilet, and it did so because the toilet's drain overflowed due to

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[8] Indeed, the cases that *Drutz* relies on all found that the exclusion *applied*, including to toilet overflows. (E.g., *Old Dominion Ins. Co. v. Elysee, Inc.* (Fla.Ct.App. 1992) 601 So.2d 1243, 1245-1246; *Hallsted v. Blue Mountain Convalescent Ctr., Inc.* (1979) 23 Wash.App. 349, 352-353 [595 P.2d 574, 575-576] [toilet]; *Haines v. United Sec. Ins. Co.* (1979) 43 Colo.App. 276, 277-278 [602 P.2d 901, 902].)

the sewer being clogged and backed up. That's what happened; those are the undisputed facts. Farmers' accurate statement of the facts in no way detracts from the effect of the Exclusion's plain language.

In any event, the coverage characterization given by a carrier's agents and representatives is irrelevant since the interpretation of the Exclusion is a question of law for the courts. (E.g., *Chatton v. National Union Fire Ins. Co.* (1992) 10 Cal.App.4th 846, 865 [irrelevant whether "employees themselves admitted the existence of (covered) liability" as "(i)t is well settled that the interpretation of an insurance policy is a legal rather than a factual determination," emphasis omitted]; accord, *Industrial Indemnity Co. v. Apple Computer, Inc.* (1999) 79 Cal.App.4th 817, 835, fn. 4.) And, Farmers' characterization in denying the claim does not bar the Exclusion's application. (See *Waller*, *supra*, 11 Cal.4th at p. 31 [carrier does not waive grounds not specified in denying claim]; *Karl v. Commonwealth Land Title Ins. Co.* (1997) 60 Cal.4th 858, 874-875 [applying *Waller* in first-party insurance context].)

2. Neither dictionary definitions nor policy-language context suggest that, as used in the exclusion, a "drain" or "sewer" backup or overflow should be limited to a narrow, technical definition.

Cardio also resorts to syllogistically arguing that a dictionary definition of "drain" does not mention a "toilet" and therefore a toilet overflow cannot be directly or indirectly caused by a backed-up or overflowing drain or sewer. (AOB 11.) But that's exactly the kind of attempt to "make 'a fortress out of the dictionary,' [citation]" that *MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635, 649—a case repeatedly cited in the opening brief—decries. "Although examination of various dictionary definitions of a word will no doubt be useful, such examination does not necessarily yield the 'ordinary and popular' sense of the word if it disregards the policy's context. [Citation.]" (*Ibid*.)

Even Cardio acknowledges that dictionary definitions "can be misleading" when read in isolation. (AOB 6, citing *MacKinnon*, at p. 649.) Rather, the key is to unearth common understanding; that is, a court "must attempt to put itself in the position of a layperson and understand how he or she might reasonably interpret the exclusionary language." (*Ibid*., additional quotation marks and internal citations omitted.) That requires reading language in the context of the whole policy. (*Ibid.*; Civ. Code, § 1641.) As discussed above, when a toilet, sink, or tub has water rising over

its brim because the water has nowhere to go (i.e., nowhere to drain), the layman's understanding in context of this policy is that *the drain* or *the sewer* has backed-up and overflowed.

The context here confirms the breadth of Water Exclusion #3. The relevant language (subsection (3)) is one of several broad water damage exclusion subsections. (1 AA 117.) Subsection (1) excludes damage caused by a flood or "overflow of any body of water"; subsection (2) excludes water damage due to mudslides; and subsection (4) excludes damage caused by underground water seepage through the property's foundation, walls and floors. (*Ibid.*) Words and phrases "take[] meaning from the company [they] keep[]." (*People v. Drennan* (2000) 84 Cal.App.4th 1349, 1355.) They are "known by [their] associates," such that "the meaning of a word may be enlarged or restrained by reference to the object of the whole clause in which it is used." (*Texas Commerce Bank v. Garamendi* (1992) 11 Cal.App.4th 460, 471, fn. 3, citations and internal quotation marks omitted.)[9] Here, the other subsections all cover broad categories—natural floods, mudslides, water intrusion. Accordingly, in context, the language of Water Exclusion #3 must be read as delineating a

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[9] This is sometimes known as the *noscitur a sociis* doctrine or, literally, "it is known by its associates." (See *Seid Pak Sing v. Barker* (1925) 197 Cal. 321, 341 [applying doctrine to contract interpretation].)

broad category, not some small, esoteric and rarely applicable subcategory. (See Code Civ. Proc., § 1858 ["where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all"].) So read, it would apply to any water set on a course to travel into a drain or sewer that instead spills out because that path is obstructed, including water that overflows from a toilet, tub, sink, or similar fixture.

This reading is further supported by the policy's extension of coverage to specific "water damage" (pipe bursts), a category into which the facts here do not fit. (1 AA 111 [§ 5.e.].) There are, thus, broad, general exclusions of coverage and a specific grant of coverage. The facts here fall within one of the broad general exclusions and don't fall within the specific grant.

3. Cardio's "U-Turn" definition of "backs up" is baseless.

The heart of Cardio's interpretation is that for Water Exclusion #3 to apply, water has to travel into a drain or sewer and then make a U-turn and reverse course such that the same water reemerges from the drain or sewer. Not only is that a nonsensical reading at odds with common understanding, it is one that has been expressly rejected by California precedent.

Penn-America is directly on point. There, the insured (like Cardio here) "argue[d] that the term 'backs up' means to move in a reverse direction, and there was no evidence the water reversed its flow." (125 Cal.App.4th at p. 892.) The Third District "disagree[d]." (*Ibid*.) As it explained, "[t]he dictionary definition of 'back up' is an intransitive verb meaning 'to accumulate in a congested state. . . .' [Citation.] It also means 'to rise and flow backward or overflow adjacent areas . . .' such as 'water checked by an obstruction.' [Citation.]" (*Id*. at pp. 892-893.) Here, as there, "[t]hese definitions accurately describe what happened." (*Id*. at p. 893.)

4. The words "or overflows"—virtually ignored in the opening brief—are not surplusage, but provide additional meaning to the exclusion.

The opening brief attempts to persuade by mislabeling Water Exclusion #3 as only a "sewer backup" exclusion. In doing so, it ignores the equally applicable exclusion of damages from a drain that "*overflows*." (See, e.g., AOB 2.) No doubt, the Exclusion eliminates coverage when a sewer or drain "backs up." But that's not all it does. It also expressly excludes coverage when a sewer or drain "overflows." (See 1 AA 117 [§ B.1.g.(3)].)

The phrase "or overflows" is not to be interpreted as mere surplusage. (See *ACL Technologies, Inc.*, *supra*, 17 Cal.App.4th at pp. 1785-1786 [insurance contracts "are construed to avoid rendering terms surplusage"]; see also *AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 827 (*AIU*) [declining to apply a definition that would create a redundancy]; *Shell Oil Co. v. Winterthur Swiss Ins. Co.* (1993) 12 Cal.App.4th 715, 753 [same]; *Stein v. International Ins. Co.* (1990) 217 Cal.App.3d 609, 613-614 [same]; *Mid-Century Ins. Co. v. Bash* (1989) 211 Cal.App.3d 431, 438; *Southern Ins. Co. v. Domino of California, Inc.* (1985) 173 Cal.App.3d 619, 624 [same].) The words "or overflows" presumptively provide added, necessarily broader meaning. Cardio cannot avoid the operative policy language by selectively quoting it and ignoring important words.

Cardio boldly contends that "backs up *and* overflows from" should be read as "a redundant (pleonastic) phrase" comparable to phrases like "each and every, null and void, and cease and desist" and should be constructed that way in the context of this policy. (AOB 13, emphasis added and omitted.) But, according to controlling Supreme Court authority, that is precisely how policy language is *not* to be read. (*AIU*, *supra*, 51 Cal.3d at pp. 826-827 [refusing to read the phrase "legally obligated to pay" as having "no meaning not already expressed by the subsequent phrase providing coverage of 'damages'"].) Adopting Cardio's redundant construction would be at odds with "established principles." (*Ibid.*; accord,

Mirpad, LLC v. California Ins. Guarantee Assn. (2005) 132 Cal.App.4th 1058, 1072-1073.) On the other hand, if not ignored, the phrase "or overflows" has real meaning that confirms Farmers' reading.

"Or" means "or"—not "and." To begin with, "or" means "or"—not "and." The Exclusion doesn't use "*and*" between "backs up" and "overflows," it uses "*or*." (Compare 1 AA 117 [§ B.1.g.(3)].) As a matter of law, "or" in *any* insurance policy—indeed, *any contract*—is to "be accorded its ordinary meaning," marking "an alternative such as 'either this or that.'" (*Kelly v. William Morrow & Co.* (1986) 186 Cal.App.3d 1625, 1630, citation omitted.) To read "or" as "and" (as Cardio does, see AOB 13 [using "and" instead of "or"]) is to rewrite the policy. But in construing a contract, a court may not "insert what has been omitted, or . . . omit what has been inserted" (Code Civ. Proc., § 1858), and must avoid constructions that would render words superfluous or a nullity (Civ. Code, § 1641).

"Overflows" is distinct from "backs up." Given both the "or" connection and the rule against redundancy, "overflows" must have a distinct meaning from "backs up." "Backs up" means "to accumulate in a congested state" (like a traffic back-up). (Webster's, *supra*, p. 124; *Penn-America*, *supra*, 125 Cal.App.4th at p. 892.) Even that understanding would appear not to carry the weight of Cardio's enters-into-and-then-reverses-out-of theory. A driver can be caught in a traffic back-up without ever entering

the intersection where the back-up originated. But "backs up" is at least closer to Cardio's theory than "overflows."

By contrast, "*overflows*" does not begin to connote entering into and then exiting. It means "to flow over the brim of." (Webster's, *supra*, at p. 841; see also Oxford Dict., *supra*, at p. 1219 ["(esp. of a liquid) flow over the brim of a receptacle"]; Random House Dict., *supra*, p. 1381 ["to flow over or beyond (the brim, bank, borders, etc.)"; "hav(ing) the contents flowing over or spilling, as an overfull container"]; cf. AOB 13 [Cardio defining "overflows" as meaning "to abound, to flow over the top, to emit liquid, and to inundate with water"].) Undoubtedly, a crowd "overflowing" a venue includes many people who have never gotten in. Even if "backs up" had the limited meaning that Cardio ascribes to it, "overflows" necessarily cannot be so limited.

Cardio rightly concedes that "backs up" and "overflows" can "have multiple meanings in isolation," but argues that in this case they should mean the same thing. (AOB 13.) Wrong. That ignores the settled rule that the words must be read in context. (*MacKinnon*, *supra*, 31 Cal.4th at p. 649; see also *Fire Ins. Exchange*, *supra*, 116 Cal.App.4th at p. 454 ["fact that a word or phrase isolated from its context is susceptible of more than one meaning" does not create an ambiguity or dictate its meaning].) That context is that "backs up" and "overflows" are joined *disjunctively*, suggesting that they must have different meanings and they are to be read to

avoid redundancy. That context confirms that one is not subject to the same limitations as the other. The use of the phrase "backs up *or overflows*" necessarily precludes the narrow, idiosyncratic goes-in-before-coming-out reading that Cardio proposes.

5. The phrase "or indirectly" broadens the exclusion's scope.

The Exclusion's breadth is reinforced by its lead-in phrase, that the policy "will not pay for loss or damage caused directly *or indirectly* by . . ." the enumerated back-ups or overflows. (1 AA 116 [§ B.1.].) Even Cardio cannot claim that directly and indirectly mean the same (pleonastic) thing. Rather, the opening brief simply argues that the distinction and additional phrasing can be ignored. (AOB 31, fn. 13, quoting 1 AA 116-117.) Wrong again.

The *Penn-America* court squarely debunked this very argument. It held that "'the impact of the water-damage exclusion is *substantially enlarged* by the language extending the concept to losses caused "indirectly" by water backing up through sewers or drains . . . .'" (*Penn-America*, *supra*, 125 Cal.App.4th at p. 890; see also *id.* at p. 890, fn. 2 [noting that the policy there also "applies to a loss 'caused . . . indirectly' by an excluded condition'"].) No doubt, the words "directly" and "indirectly" have

different, complementary, non-overlapping meanings (see Webster's, *supra*, p. 614 [defining the word as "not direct"]), especially connected as they are by the disjunctive "or." As a matter of common-sense, "indirectly" broadens the Exclusion's scope and must be so read.

Cardio's argument appears to be that in the undisputed circumstances here—a clogged sewer—there is *never* an overflow or backup *anywhere* in the entire drain/sewer system because nowhere do the particular molecules of water or effluent that actually make it to and enter the drain and sewer actually reverse course. (See AOB 31, fn. 13.) But absent some absurd, exceedingly rare, set of circumstances (e.g., a gas explosion, a pump reversing) that would *never* happen. Insurance policy language, like other contract language, is read to avoid just such absurd and strained results. (E.g., Civ. Code, § 1638 [plain contract language governs so long as it "does not involve an absurdity"]; *American Intern. Underwriters Ins. Co. v. American Guarantee & Liability Ins. Co.* (2010) 181 Cal.App.4th 616, 629 [avoiding strained reading].)

There is simply no doubt that there is an unbroken causative link here. There was a clog in the sewer that caused water flowing into the sewer to back up. It backed up into the drain. It overflowed the drain via the toilet and the resulting flood caused the loss. Whether "directly" or "indirectly," the backup and overflow of the sewer and drain caused the damage.

6. Cardio's Google searches and other Internet authorities can't change the unambiguous meaning of "backs up or overflows from."

Cardio argues that the meaning of the Exclusion (indeed, the meaning of all contracts) should be construed by relying on Internet searches "to see how words are normally used together." (AOB 12-13.) According to Cardio, a Google search of the phrase "backs up or overflows from" invariably returns situations where liquids *come out of* a location or object; i.e., from a lake, river, hole, pipe, reservoir, sewer, drain, etc." (AOB 13, emphasis added.) From this, Cardio argues that "an insured's reasonable expectation of the meaning of 'backs up or overflows from' is to 'come out of,'" and cannot include water unable to proceed into the sewer due to an obstruction. (AOB 14; see also AOB 13, 20-30 & fn. 10.)

Nonsense. Both Cardio's approach and its conclusion are flawed. To begin with, as established above, both extrinsic evidence (e.g., Internet searches) and the parties' "reasonable expectations" are irrelevant where, as here, the policy language is concededly unambiguous. (See § I.A., *ante.*)

Second, Google searches are not persuasive authority. It is almost a truism that the Internet is not sufficiently vetted or reliable to be trusted. Traditional concepts of precedent, stare decisis and trustworthiness suggest that non-legal Internet sources like Google should carry no weight at all.

(See, e.g., Barger, *On the Internet, Nobody Knows You're a Judge: Appellate Courts' Use of Internet Materials* (2002) 4 J. App. Prac. & Process 417, 425-426 ["not everything on the Internet can or should be trusted"; "(m)any Web sites are transient, lack timely updates, or may have had their URLs changed. Thus, as the Bluebook states, 'Many Internet sources . . . do not consistently satisfy traditional criteria for cite-worthiness'"]; McDonough, *In Google We Trust? Critics Question How Much Judges, Lawyers Should Rely on Internet Search Results* (Oct. 2004) A.B.A. J., at p. 30 ["Google and search engine returns are incomplete for research purposes"].)

In any event, two can play Cardio's game. A Google search of the phrase "water that backs up or overflows from" produces as the *first* result—i.e., *the most relevant result*—an article stating that "[t]oilets have the most direct path to the sewer and the biggest drain line in the house, so if there is a problem with the sewer drain you will notice it here. It is rare to

have a main line sewer stoppage and the toilets are working correctly." (Stickley, *Signs Of A Sewer Drain Clog*, About.com.)[10] Thus, even Google supports the reading that Water Exclusion #3 applies here. It, too, shows that a layperson's understanding of the phrase "[w]ater that backs up or overflows from a sewer [or] drain" often includes that which backs up or overflows through the toilet (or other fixture) attached to the drain system. (See pp. 22-25 & fn. 7, *ante*.)

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The bottom line is that Water Exclusion #3 applies here, precluding coverage. That should be the end of the line. Standing alone, that result requires that the judgment be affirmed.

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[10] Available at <http://plumbing.about.com/od/septic_and_sewer/a/Signs-Of-A-Sewer-Drain-Clog.htm> [as of Aug. 21, 2012]. Likewise, a Google search of "is a toilet a drain?" produces as the first (most relevant) search result an article with the phrase "toilet drains," bolstering our contention that, even in applying Cardio's Internet logic, the common-sense understanding of the word "drain" includes a "toilet drain." (See *How to Unclog a Toilet*, wikiHow <http://www.wikihow.com/Unclog-a-Toilet> [as of Aug. 21, 2012].) We could go on, but we've made the point.

II.

THE EFFICIENT PROXIMATE CAUSE DOCTRINE DOES NOT APPLY BECAUSE THE DAMAGE HAD ONLY ONE CAUSE.

Cardio advances various arguments about the "Negligent Work" exclusion and the "efficient proximate cause" doctrine. (AOB 32-37.) But the efficient proximate cause doctrine does not apply here. And, if it doesn't apply, the disputed meaning of the Negligent Work exclusion is irrelevant.[11]

"Under the efficient proximate cause theory, a loss that is caused by *a combination* of covered and excluded risks is covered if the covered risk is the efficient proximate cause of the loss." (*Penn-America*, *supra*, 125 Cal.App.4th at p. 891, emphasis added.) But, as this Division has held, the "efficient proximate cause" doctrine is only relevant when there are concurrent, *independent* causes. (*De Bruyn v. Superior Court* (2008) 158 Cal.App.4th 1213, 1223 [pipe burst (covered) that results in mold damage (excluded) is not independent cause of excluded mold damage; no coverage;

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[11] Authority is split over whether the negligent work exclusion is limited to the insured's own work. (Compare *Freedman v. State Farm Ins. Co.* (2009) 173 Cal.App.4th 957, 961-963 [not limited to insured's work] with *242-44 E. 77th St., LLC v. Greater N.Y. Mut. Ins. Co.* (2006) 815 N.Y.S.2d 507, 512 [31 A.D.3d 100, 106-107] [recognizing split in authority but holding limited to work by or for the insured].)

efficient proximate cause inapplicable]; *Pieper v. Commercial Underwriters Ins. Co.* (1997) 59 Cal.App.4th 1008, 1020-1021 [brush fire damage (excluded) not independent of arson (arguably covered) that started the fire; no coverage; efficient proximate cause inapplicable].) "[T]he efficient proximate cause theory does not apply unless there are two separate or distinct perils, each of which could have caused the loss independently. The analysis is not applicable where the loss results from a single cause, 'albeit one susceptible to various characterizations . . . .'" (*Penn-America*, *supra*, 125 Cal.App.4th at pp. 891-892, citations and internal quotation marks omitted.)

Penn-America, again, is directly on-point. There, the insured claimed that a pipe break caused the sewer back-up. Pipe breaks were covered; sewer back-ups were excluded. But that did not suffice to trigger the efficient proximate cause doctrine. The pipe break did not independently cause the loss. Rather, the only loss was from the excluded backup and overflow. (*Ibid.*; see also *Pieper*, *supra*, 59 Cal.App.4th at pp. 1020-1021.) As in *Penn-America*, whatever initiated the sewer obstruction or otherwise caused the subsequent backup and overflow, there was only one cause *of the damage*—the backup and overflow of water from the toilet. (125 Cal.App.4th at p. 892.) A toilet that was running, like a faucet that had not been shut off, did not cause *any* damage. It was doing what a toilet or faucet

normally does. The blocked sewer/drain caused the water overflow that caused the loss. (See 6 AA 1624.)

For efficient proximate cause to apply, the damage events must be such that "'they *could* each, *under some circumstances*, have occurred independently of the other and caused damage.'" (*De Bruyn*, *supra,* 158 Cal.App.4th at p. 1223, quoting *Finn v. Continental Ins. Co.* (1990) 218 Cal.App.3d 69, 72, emphases added in *De Bruyn*.) But here that's not the case. Without the sewer blockage that indisputably occurred, the water in the toilet would have continued down the toilet drain without causing any damage. Standing alone, a toilet that continues to run water does not overflow and cause damage unless there is an obstruction (i.e., back up) in the drain or sewer impeding the water's progress down the drain.

Put another way, just as in *De Bruyn*, the policy did not cover mold damages and in *Pieper*, the policy did not cover brush fire damage, the policy here does not cover water backup and overflow damage. There is *no* other damage here. The toilet itself caused no independent damage. Thus, efficient proximate cause does not apply.

III.

CARDIO'S OTHER CLAIMS NECESSARILY FAIL AS THERE WAS NO COVERAGE.

A. Absent A Covered Loss, There Can Be No Bad Faith As A Matter Of Law.

Bad faith claims necessarily fail if there is no coverage. *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." (Citations omitted; 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 no benefits were owed under the policy, there can be no bad faith liability, no matter how Farmers 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].)

B. Even If Coverage Existed, As A Matter Of Law, There Can Be No Bad Faith Because, At A Minimum, A Genuine Coverage Dispute Exists.

There's an additional reason to affirm summary disposition of Cardio's bad faith claim: A genuine dispute as to coverage (that is, a reasonable legal basis for the carrier's position) precludes recovery against an insurer for bad faith as a matter of law. (*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 723-724; *Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co.* (2001) 90 Cal.App.4th 335, 347 ["It is now settled law in California that an insurer denying or delaying the payment of policy benefits due to the existence of a genuine dispute with its insured as to the existence of coverage liability or the amount of the insured's coverage claim is not liable in bad faith"].)

The coverage dispute at this stage is purely a legal one: Does the Exclusion exclude losses from a drain or sewer that backs up and overflows through a toilet? The reasonableness, for bad faith purposes, of Farmers' legal policy-interpretation position is a question of law for the court to decide. (*Wilson*, *supra*, 42 Cal.4th at p. 723; *Chateau Chambray*, *supra*, 90 Cal.App.4th at p. 348.) On the legal, policy-interpretation issue, a more-than-genuine dispute exists, as demonstrated in Section I, above. Indeed, we believe that Section I demonstrates that Farmers position is *correct.* But at a minimum, that position is amply supported by California

precedent as well as factually analogous out-of-state authority. (E.g., *Penn-America*, *supra*, 125 Cal.App.4th 884; *Iozzi*, *supra*, 2012 WL 2588509; *Newlo Realty*, *supra*, 624 N.Y.S.2d at p. 33 [213 A.D.2d at p. 295].)

That establishes a genuine issue as a matter of law and no possibility of insurance bad faith liability. (See, e.g., *Bosetti v. United States Life Ins. Co. in City of New York* (2009) 175 Cal.App.4th 1208, 1239 [carrier's position reasonable as a matter of law where it relied on authority that Court of Appeal then disagreed with]; *Morris v. Paul Revere Life Ins. Co.* (2003) 109 Cal.App.4th 966, 973, 976 [same, that insurer's policy interpretation ultimately rejected by Supreme Court did not negate that it had been premised on a reasonable legal position]; *Dalrymple v. United Services Auto. Assn.* (1995) 40 Cal.App.4th 497, 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].)

But there's more. Reasonable coverage disputes—genuine disputes defeating bad faith liability—can exist as a matter of law based upon factual as well as legal disputes. (*Chateau Chambray*, *supra*, 90 Cal.App.4th at p. 348.) Here, Farmers' conclusion that the exclusive cause of the water damage was a clogged sewer line and the resulting backup or overflow of that sewer and the attached toilet drain is amply supported by not only expert testimony, but *undisputed* expert testimony.

Regardless, whether Farmers ultimately prevails as to Cardio's contractual coverage claims, ample, reasonable legal and factual bases support its position, negating, as a matter of law, any possible bad faith or tort liability. At a minimum, summary adjudication of the tort claims should be affirmed.

C. With No Potential Tort Liability, Punitive Damages Are Unavailable As A Matter Of Law.

That leaves punitive damages, which are not available at all on a breach of contract theory. (Civ. Code, § 3294, subd. (a); *Cates Construction, Inc. v. Talbot Partners* (1999) 21 Cal.4th 28, 61 [in the absence of an independent tort, punitive damages may not be awarded "even where the defendant's conduct in breaching of the contract was wilful, fraudulent, or malicious"].) In order to be entitled to punitive damages, Cardio needs a tort claim. But if there is no bad faith exposure, there is no tort and thus no punitive damages are available.

In addition, Cardio needed to present *evidence* that could at least rise to the level of clear and convincing evidence that Farmers acted with oppression, malice or fraud. (Civ. Code, § 3294, subd. (a); *Johnson & Johnson v. Superior Court* (2011) 192 Cal.App.4th 757, 762 ["clear and convincing evidence" standard for punitive damages "must be taken into

account in ruling on a motion for summary judgment"]; *Food Pro Intern., Inc. v. Farmers Ins. Exchange* (2008) 169 Cal.App.4th 976, 994 [same].)

Here, even if Farmers acted unreasonably (it didn't) there is no evidence that even begins to rise to the level of oppression, malice, or fraud, let alone clear and convincing evidence. Cardio claims such evidence in its assertions that "Farmers egregiously trains employees that a toilet is a 'drain,' contradicting common sense and known authority"; that it "flatly ignores its advertising"; and that its position "runs afoul of the purpose of the exclusion." (AOB 42.) Putting aside the threshold problems that Farmers construction is both correct and reasonable, there is no *evidence* for Cardio's factual predicates. As the trial court observed, they were "not supported by *any* admissible evidence in the record to raise a triable issue," let alone the requisite "clear and convincing evidence." (6 AA 1615, emphasis added.)

But even if there were evidentiary support for the claimed conduct, the asserted defalcations would rise to no more than the level of mistake, oversight and error, not to the level justifying punitive damages. "Punitive damages should not be allowable upon evidence that is merely consistent with the hypothesis of malice, fraud, gross negligence or oppressiveness. Rather some evidence should be required that is inconsistent with the hypothesis that the tortious conduct was the result of a mistake of law or fact, honest error of judgment, over-zealousness, mere negligence or other

such noniniquitous human failing." (*Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1288, fn. 14, citations and internal quote marks omitted.) They are *not* supported by evidence of insurer conduct that "falls within the common experience of human affairs, both with respect to its careless initial evaluation and its stubborn persistence in error." (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 892; accord, *Food Pro Intern., Inc.*, *supra*, 169 Cal.App.4th at p. 994 [evidence of inadequate, inept investigation based on incorrect factual assumptions and mistaken overly broad interpretation of policy exclusion to the point of overzealousness did not rise to level sufficient to support punitive damage claim in face of summary disposition].)

There's nothing close to supporting a punitive damage claim here and the trial court's summary disposition of the claim should be affirmed.

CONCLUSION

A clogged sewer leading to an overflowing toilet drain flooding the premises falls squarely within the policy's exclusion for any "loss or damage caused directly or indirectly by . . . [w]ater that backs up or overflows from a sewer, drain or sump." The trial court properly granted summary judgment in Farmers' favor. That judgment should be affirmed.

Dated: August 29, 2012

Respectfully submitted,

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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 10,504 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: August 29, 2012

_____

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 August 29, 2012, 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