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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

MARGARET CAROL FOSTER, Plaintiff and Appellant, v. INTERINSURANCE EXCHANGE OF THE AUTOMOBILE CLUB, Defendant and Respondent.	B278723 (Los Angeles County Super. Ct. No. BC560910)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lisa Hart Cole, Judge. Affirmed.

Derek G. Howard Law Firm, Derek G. Howard; Jenkins Mulligan & Gabriel, Daniel J. Mulligan; and Day Law Offices, Montie S. Day for Plaintiff and Appellant.

Lewis Brisbois Bisgaard & Smith, Raul L. Martinez, Jon P. Kardassakis and Celia Moutes-Lee for Defendant and Respondent.

Plaintiff Margaret Carol Foster appeals from a judgment of dismissal after the trial court sustained a demurrer without leave to amend to her causes of action against her automobile insurer, defendant Interinsurance Exchange of the Automobile Club. Plaintiff sought damages and equitable relief on behalf of herself and a putative class based on defendant's exercising its discretion under the insurance policy to repair damaged vehicles rather than pay for the loss of their preaccident value. We hold that defendant's alleged conduct complied with its obligations under its insurance policies, did not violate public policy as confirmed by several appellate courts that have addressed nearly identical arguments, and was not unlawful, unfair, or fraudulent under Business and Professions Code section 17200. We therefore affirm the judgment.

FACTUAL BACKGROUND

Because this is an appeal from a judgment following an order sustaining a demurrer, we accept as true the facts alleged in the complaint, which included as an exhibit the insurance contract between plaintiff and defendant. (*Baldwin v. AAA Northern California, Nevada & Utah Ins. Exchange* (2016) 1 Cal.App.5th 545, 548 (*Baldwin*).)

On October 21, 2011, plaintiff was driving her 2006 BMW 750Li on the 405 freeway. While completely stopped in traffic, her car was struck from behind by a vehicle driven by Austin B., then a minor. Plaintiff's vehicle was thrust forward into the vehicle ahead of her, which in turn was pushed into the vehicle ahead of it. Plaintiff's car sustained substantial damage.

Plaintiff's car was insured under a policy issued by defendant. Part III of the policy covered physical damage, including comprehensive and collision coverage. Under the

heading "OUR PROMISE TO YOU," the policy stated that "We will pay for loss to an automobile insured under this part for the coverage specified in the declarations" (italics and boldface omitted). Under the heading "PAYMENT OF LOSS" the policy stated that "at [defendant's] option" it could elect to "pay for a loss less any depreciation" or "repair or replace any damaged or stolen property with like kind and quality less any depreciation" (italics and boldface omitted). A number of coverage exclusions was listed under the heading "WHAT IS NOT COVERED—EXCLUSIONS" (boldface omitted). Item "n" under this heading excluded coverage for "any diminution in the value of an insured automobile or additional insured automobile after any damage covered under this part has been repaired" (italics and boldface omitted).

Plaintiff filed a claim with defendant requesting the full cash value of her car at the time of the accident, which was $31,342. Defendant represented that it would not declare the car a total loss and would instead repair it.[1] The car was repaired at a cost of $22,602.81.[2]

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[1] Plaintiff alleged that in denying her request to declare the vehicle a total loss and pay the cash value, defendant did not provide "an actual written notice of the denial . . . or the facts and/or law upon which the decision was based or determined." Plaintiff claims this violated provisions of the Insurance Code and the California Code of Regulations. Plaintiff did not link these allegations to any of her causes of action, nor does she explain their relevance. We therefore do not address them.

[2] More specifically, plaintiff alleged that the postaccident "net loss" from Austin B.'s negligence was $24,572 because the vehicle's salvage value was $6,770.

PROCEDURAL BACKGROUND

A. Plaintiff's Third Amended Complaint

Plaintiff filed suit against defendant, Austin B. and his parents. In her third amended complaint (TAC), the operative complaint in this appeal, plaintiff asserted combined individual and class action claims challenging defendant's option to repair damaged vehicles rather than pay for the loss of their preaccident value. In the "Statement of Facts and Summary of Allegations" (boldface, underlining, and some capitalization omitted), plaintiff alleged that the damage to her car "was so substantial that any insurer acting in good faith would have determined that the Vehicle could not economically be repaired." She claimed that the car "was in a post-accident condition that, for economical, safety and practical reasons, mandated the insurer to determine that the Vehicle was a 'total loss.' " She further alleged that her car "was not repairable to its pre-accident condition with respect to safety, reliability, mechanics and performance, as well as value." Plaintiff claimed that it was defendant's "policy, practice and procedure" to refuse to declare vehicles total losses when it was not to defendant's economic advantage to do so, "without regard to the interests of its policyholders or the terms of its insurance contracts."

Plaintiff's first cause of action was against Austin B. and his parents for negligence. Her second cause of action, asserted both individually and on behalf of a putative class, was against defendant for breach of contract, damages, and declaratory relief based on defendant's "wrongfully refusing to replace vehicles" (boldface and capitalization omitted). Plaintiff asserted that it was "common knowledge in the automobile and insurance industries" that once a vehicle is damaged to a certain extent

"it cannot be 'fully repaired' " and "is worth considerably less" than it was before the accident. Thus, defendant's preference to repair rather than pay for the loss put both plaintiff and the putative class "in a worse position" than if defendant "had replaced the damaged Vehicle." Plaintiff asserted that this breached the covenant of good faith and fair dealing, "which under California law is a breach of contract." Plaintiff claimed that her car "should have been 'totaled' " but defendant, "consistent with [its] policy and practice," chose to repair the car and not pay for the diminution in value, "result[ing] in a substantial net savings to [defendant] to the detriment of [plaintiff]." Plaintiff alleged that defendant's "refusal to pay diminution in value is not something that consumers would understand before taking out the policy, or even after the accident occurs." Further, "[p]lacing a complicated modern automobile back on the street after substantial repair causes a substantial loss to consumers, is a danger to the driving public and is otherwise unlawful and against public policy." As for the putative class, plaintiff sought to prevent defendant from opting to repair vehicles "when done in order to elevate the economic interest of the insurer over the driver." Plaintiff defined the class as "All California consumers insured by [defendant] who were in accidents and as to which [defendant] (a) acted in its own interest in determining whether to repair or total an automobile and/or (b) where [defendant] did not pay Diminution in Value damages after repairing an automobile in lieu of replacing the automobile."

Plaintiff's third cause of action was brought on behalf of a putative class seeking declarative and injunctive relief against defendant based on "illegal policy provisions and related practices" in violation of Business and Professions Code

section 17200 through 17210 (boldface and capitalizations omitted). Plaintiff sought an order "declar[ing] as void against public policy" any insurance contract provision "which expressly disallows the insured from receiving diminution in value damages after an automobile is repaired," as well as an order prohibiting defendant from failing to pay for "any and all detriment resulting for an insured loss involving the vehicle, including the diminution of value."

Plaintiff claimed public policy was implicated because of (1) the large number of insured drivers in California, (2) the significance of a vehicle's value to "consumers' safety and personal worth," (3) a "national policy priority" of "fair treatment of insured drivers," (4) "econometric detriment to California consumers" when insurers "wrongfully act[ ] in concert to avoid having to properly pay claims," and (5) "significant safety issues" caused by insurers refusing to " 'total' " vehicles and instead returning them to the road in worse than preaccident condition. Plaintiff also alleged that defendant had "engaged in false advertising . . . by claiming that the policies include all property damages and losses sustained . . . when in fact after an accident [defendant] takes the position that the fine print in the policy provides that the policy does no such thing." Plaintiff asserted that defendant's standard insurance policies "expressly exclude recovery of the diminution in value of a vehicle, making the notion of being covered for a loss completely illusory. For modern automobiles, a large accident damaging the vehicle's panels, and/or its electronic components, results in a vehicle that can never be repaired to its pre-accident condition." Plaintiff claimed this resulted in "a vehicle that has much less value than before

the accident no matter the good faith of the repairs that are made."

Plaintiff's fourth cause of action, asserted both individually and on behalf of a putative class, was against defendant for entering into a purportedly unlawful subrogation agreement with Austin B.'s parents' insurer.

Plaintiff claimed damages of $31,969, as well as taxes, registration, interest, attorney fees, and costs, and sought declaratory and injunctive relief.

B. Defendant's Demurrer

Defendant demurred to the second, third, and fourth causes of action.[3] As to the second cause of action for breach of contract, defendant argued that appellate courts have enforced contract language allowing insurers to choose to repair rather than replace a vehicle, and have rejected the argument that this choice breached the covenant of good faith and fair dealing. Defendant argued that plaintiff failed to allege facts supporting her conclusion that repairing her vehicle placed her or the public at risk. Defendant further argued that courts have held that the exclusion for diminution of value does not violate public policy.[4]

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[3] Defendant also moved to strike the class action allegations. In sustaining the demurrer, the trial court took the motion to strike off calendar as moot. That motion is not at issue in this appeal.

[4] Defendant also raised an argument based on the statute of limitations, which the trial court invoked as an additional basis to sustain the demurrer as to the second cause of action. Neither party discusses the issue on appeal. Given our holding that the demurrer was properly sustained on other grounds, we need not address it.

As to the third cause of action for violation of Business and Professions Code section 17200 et seq., defendant argued that prior cases have held that excluding coverage for diminution in value was neither unlawful nor unfair, and plaintiff failed to allege fraud sufficiently.

As to the fourth cause of action concerning the subrogation agreement, defendant argued that plaintiff did not have standing to assert it.

Following the filing of the demurrer, plaintiff filed a fourth amended complaint, which the trial court struck for failure to seek leave to file. Plaintiff then filed her opposition to the demurrer. She argued application of the coverage exclusion for diminution of value was both a breach of the covenant of good faith and fair dealing and an unfair business practice given defendant's (1) advertising and the language in the policy; (2) defendant's alleged knowledge that "cars cannot be fully repaired if severely damaged"; and (3) defendant's unilateral decisionmaking as to whether to repair or replace a damaged vehicle. Plaintiff pointed to a recent amendment to jury instruction CACI No. 3903J, "Damage to Personal Property (Economic Damage)," which, plaintiff claimed, now permitted plaintiffs to recover reduction of value as an item of damages in a tort claim for harm to personal property. Plaintiff further argued that the court must accept as true her allegation that modern vehicles could not be restored to their preaccident condition, and offered to provide more facts "to the detail this Court deems necessary to demonstrate that [plaintiff's car] could be driven, but not in pre-accident condition after hours of work on the [u]nibody." She asserted that the cases upon which defendant relied were distinguishable given the amended jury instruction

and changes in technology that made it more difficult to repair vehicles. She sought leave to amend "to the extent that the court determines that any amendment is necessary, including whether further facts are required or legal theories should be deleted or revised."

The trial court sustained the demurrer without leave to amend. It ruled that an insurer's decision to repair rather than replace a vehicle did not breach the covenant of good faith and fair dealing, citing *Baldwin, supra*, 1 Cal.App.5th 545 and *Carson v. Mercury Insurance Co.* (2012) 210 Cal.App.4th 409 (*Carson*). The court found that plaintiff had not alleged any factual support for her claim that her vehicle could not be repaired to preaccident condition. The court also rejected the argument that failure to pay diminution in value constituted a breach of contract, and found the amended jury instruction inapplicable because it related to tort claims, not contract. As for the claim for unfair business practices, the court found that plaintiff had not alleged any unlawful or unfair conduct, and had not alleged "that the public is likely to be deceived by [defendant's] policy terms." The court sustained the demurrer to the fourth cause of action based on plaintiff's lack of standing and failure to address that cause in her opposition to the demurrer.

The court denied leave to amend, finding as to the second and fourth causes of action that plaintiff had failed to state in her opposition how she would cure the defects in the TAC. The court also denied leave to amend the third cause of action, but did not expressly state its reasons for the denial.

The court entered judgment in favor of defendant. Plaintiff timely appealed.

STANDARD OF REVIEW

"A demurrer is properly sustained when '[t]he pleading does not state facts sufficient to constitute a cause of action.' (Code Civ. Proc., § 430.10, subd. (e).) On appeal, a resulting judgment of dismissal is reviewed independently. [Citation.] ' " '[W]e accept as true all the material allegations of the complaint' " ' [citation], but do not 'assume the truth of contentions, deductions or conclusions of law' [citation]." (*Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc.* (2017) 2 Cal.5th 505, 512.)

A trial court's decision to sustain a demurrer without leave to amend is reviewed for abuse of discretion. (*Phoenix Mechanical Pipeline, Inc. v. Space Exploration Technologies Corp.* (2017) 12 Cal.App.5th 842, 846.) "If the complaint does not state facts sufficient to constitute a cause of action, the appellate court must determine whether there is a reasonable possibility that the defect can be cured by amendment." (*Id.* at p. 847.) The plaintiff bears the burden on appeal of showing how the complaint may be amended to state a cause of action. (*Annocki v. Peterson Enterprises, LLC* (2014) 232 Cal.App.4th 32, 36.) The plaintiff may make that showing in the reviewing court even if not made below. (*Ibid.*)

DISCUSSION

On appeal, plaintiff challenges the court's order sustaining the demurrer as to the second and third causes of action only. We hold that the demurrer was properly sustained.

I. Second Cause Of Action—Breach Of Contract

A. The insurance policy expressly excluded coverage for diminution of value, and plaintiff has not pleaded sufficient facts to support damages on another basis

In analyzing plaintiff's claim for breach of contract, we begin with the language of the contract itself, interpretation of which is a question of law. (*Rosen v. State Farm General Ins. Co.* (2003) 30 Cal.4th 1070, 1074.) " ' "[T]he mutual intention of the parties at the time the contract is formed governs interpretation." [Citation.] If possible, we infer this intent solely from the written provisions of the insurance policy. [Citation.] If the policy language "is clear and explicit, it governs." ' " (*Ibid.*)

Plaintiff's insurance contract states that "at [defendant's] option" it may "pay for a loss less any depreciation" or, alternatively, "repair or replace any damaged or stolen property with like kind and quality less any depreciation." The contract expressly excludes coverage for "any diminution in the value of an insured automobile or additional insured automobile after any damage covered under this part has been repaired." Thus, it cannot be disputed that the express terms of the contract granted

defendant the right to choose to repair plaintiff's car without being responsible for any diminution in value.[5]

Case law further defines the scope of an insurer's obligations under this policy language. If an insurer opts to repair a vehicle rather than declare it a loss and pay its preaccident value, the insurer's obligation to the insured is discharged if those repairs return the car to its "preaccident safe, mechanical, and cosmetic condition." (*Ray v. Farmers Ins. Exchange* (1988) 200 Cal.App.3d 1411, 1418 (*Ray*).) This does not require restoration to "pristine factory condition." (*Carson, supra*, 210 Cal.App.4th at p. 420 [approving use of car manufacturer's repair specifications as an appropriate measure of preaccident condition].) Nor does it require restoring the vehicle to its preaccident market value. " 'Where the insurer, in the exercise of its option to repair, restores the automobile to its *normal running condition*, there is by hypothesis no total loss of the insured vehicle.' " (*Ray, supra*, 200 Cal.App.3d at p. 1417.) This principle is all the stronger here, where the policy expressly excluded coverage for diminution of value.[6] Thus, so long as "the

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[5] Plaintiff argues that "any ambiguities in an insurance policy must be read against the insurer and in favor of coverage," and that coverage provisions should be read broadly while coverage exclusions should be construed narrowly. Here, the language is unambiguous and clear; we need not apply plaintiff's proffered rules of interpretation.

[6] For purposes of this appeal, we need not, and do not decide the standard by which to determine whether an insurer has adequately repaired a damaged vehicle, other than to conclude, in line with *Ray*, that adequate repair does not include restoring the vehicle's preaccident market value unless the

repair places the automobile substantially in its preaccident condition," the insurer need not declare the vehicle a total loss and is not "liable for the preaccident value of the car." (*Ibid.*, citing *Owens v. Pyeatt* (1967) 248 Cal.App.2d 840, 849.)[7]

Courts have upheld this rule while acknowledging that the rule can be economically detrimental to the insured. *Ray* stated that "[a]s a practical matter, one may assume that any automobile sustaining significant collision damage will lose some market value after repairs." (*Ray, supra*, 200 Cal.App.3d at p. 1417.) Nevertheless, "[t]o hold [the defendant] liable for the automobile's diminution in value would make [the defendant] an insurer of the automobile's cash value in virtually all cases and would render essentially meaningless its clear right to elect to repair rather than to pay the actual cash value of the vehicle at the time of loss." (*Ibid.*) Although plaintiff implies that *Ray* is inapplicable given advances in automotive technology (and, presumably, a concomitant increase in the loss of value following an accident), *Carson* affirmed the rule from *Ray* two decades later while acknowledging the new technology: "Although we believe the time may have come for insurance companies to evolve with the technological advances of cars and offer

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insurance policy provides otherwise. (See *Ray, supra*, 200 Cal.App.3d at p. 1417.)

[7] Plaintiff quotes a treatise for the proposition that " 'A vehicle is not restored to substantially the same condition if repairs leave the market value of the vehicle substantially less than the value immediately before the collision' " (quoting 12 Couch on Insurance (3d ed. 2005) § 175:47, 175:54). But the treatise cites no California authority for this proposition, and is in conflict with the holding in *Ray*.

consumers coverage for diminution in value, we cannot say [the defendant insurer] acted in bad faith by repairing, as promised in the policy, [the plaintiff's] vehicle to its preaccident safe, mechanical, and cosmetic condition." (*Carson, supra*, 210 Cal.App.4th at pp. 427-428.)[8]

In light of this authority, to state a claim for breach of contract sufficiently, plaintiff would need to allege that defendant's repairs were deficient in some way other than the failure to restore the car to its preaccident market value. Plaintiff did not do so.[9] Apart from general conclusory statements, she did not, for example, allege that her car did not run properly, was unsafe in some manner, or looked different than it did before the accident. Instead, the complaint focused on the economic damages stemming from defendant's decision to repair: (1) the vehicle was damaged such that it "could not economically be repaired"; (2) it was "common knowledge" that a vehicle as damaged as hers could not be " 'fully repaired' " and would be "worth considerably less"; (3) the choice to repair

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[8] Plaintiff argues that *Carson* is generally distinguishable because it concerned a judgment after trial as opposed to a demurrer, the plaintiff signed a release and could not seek damages for diminution of value, and the plaintiff chose her own repair facility. None of these facts undercuts *Carson*'s applicability to the issues for which it is cited herein.

[9] Indeed, such an allegation would be inconsistent with plaintiff's definition of the class—California consumers involved in accidents where defendant "did not pay Diminution in Value damages after repairing an automobile in lieu of replacing the automobile." This allegation underscores that plaintiff is seeking diminution in value damages and not additional sums to repair her vehicle properly.

"resulted in a substantial net savings to [defendant] to the detriment of [plaintiff]"; and (4) plaintiff sought to enjoin defendant from "elevat[ing] the economic interest of the insurer over the driver."

Plaintiff broadly asserted that her car "was not repairable to its pre-accident condition with respect to safety, reliability, mechanics and performance, as well as value," and argues that the trial court erred in not accepting that allegation as true on demurrer. Conclusory statements like this one have been rejected as inadequate to state a claim. (See *Baldwin, supra*, 1 Cal.App.5th at p. 550.) In *Baldwin*, a plaintiff suing his insurer alleged that his truck was not restored to "its preaccident condition 'with respect to safety, reliability, mechanics, cosmetics and performance,' " (*id.* at p. 549) and in fact could not be repaired to such condition (*id.* at p. 550). The court held that this was "a mere conclusion unsupported by any specific factual allegations." (*Id.* at p. 551.) "Other than the decline in future resale value . . . [the plaintiff] offers no specific factual allegations identifying any unrepaired damage or continuing performance issues with the insured vehicle. He does not allege that the pickup had specific mechanical problems when returned to him, was unsafe in any specific way, or had any specific cosmetic flaws." (*Id.* at p. 550.)

The allegations rejected in *Baldwin* are nearly identical to those here, and, as in *Baldwin*, the only specific claim that the repairs were inadequate is based on the loss in resale value. Although plaintiff argues that her allegation that "the unibody cannot be repaired in a collision of this nature" sufficiently alleged unrepaired damage, this is substantively no different than the rejected allegation in *Baldwin* that it was impossible

to repair the plaintiff's pickup truck.[10] (*Baldwin, supra*, 1 Cal.App.5th at p. 550.)

A complaint must " ' "set forth the essential facts of [a] case with reasonable precision and with particularity sufficient to acquaint a defendant with the nature, source and extent of [the] cause of action." ' " (*Doheney Park Terrace Homeowners Assn., Inc. v. Truck Ins. Exchange* (2005) 132 Cal.App.4th 1076, 1099.) This test is not met here; plaintiff alleged a breach based on the car's loss of resale value, but did not indicate with "precision" or "particularity" any other deficiencies in the repairs such that defendant is aware of the "nature, source and extent" of her cause of action. (*Ibid.*) Although some language in the TAC suggested a distinction between preaccident *condition* and preaccident *value*, the only measure plaintiff offered for the former is the latter; that is, the only specific indication of inadequate repair was the decline in value. This conflation was made explicit in the allegations underlying her third cause of action, stating that a modern vehicle in "a large accident damaging the vehicle's panels, and/or its electronic components . . . can never be repaired to its pre-accident condition." The result, plaintiff alleged, is "a vehicle that has much less value than before the accident no matter the good faith of the repairs that are made." As made clear by *Ray* and *Carson*, loss of value is insufficient to establish

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[10] Plaintiff argues that *Baldwin* is distinguishable because defendant was the insurer for both the plaintiff and the other driver in the accident, that the defendant paid $30,000 to satisfy a demand for property damage, and that defendant agreed to pay for diminution of value in exchange for a release. Plaintiff does not explain how these facts make *Baldwin* inapplicable, and they do not undercut our reliance on that case.

that the vehicle was not adequately repaired, given that even cars otherwise restored to preaccident condition can be expected to lose resale value. (See *Ray, supra*, 200 Cal.App.3d at p. 1417; *Carson, supra*, 210 Cal.App.4th at pp. 427-428.)

Other than asserting the trial court should have accepted her allegation that her car was unrepairable as true, plaintiff offers little argument against the court's determination that the allegation was conclusory and inadequate. She asserts that her allegation of damage was sufficient "because the details of the subject are expert details" and plaintiff "has found no case explaining where the pleading line falls as to what is 'conclusory' pleading where the allegation necessarily contemplates an expert dispute." Given *Baldwin*'s rejection of a nearly identical allegation, and plaintiff's failure to cite any authority in support of her argument, we are unpersuaded.

Plaintiff also argues that her allegation that her car dropped in value "is evidence that supports the allegation that vehicles cannot be repaired into their exact pre-accident state." But here again she wrongly equates preaccident condition with preaccident value. Plaintiff further argues that the court's rejection of her allegation is contradicted by *Carson*'s acknowledgement of advances in automotive technology. To the extent plaintiff is arguing that *Carson* supports her conclusion that modern vehicles cannot be substantially restored to preaccident condition, this is belied by *Carson* itself, which affirmed that despite the advances in technology, an insurer could still comply with its obligations by restoring the vehicle to its "preaccident safe, mechanical, and cosmetic condition." (*Carson, supra*, 210 Cal.App.4th at pp. 427-428.)

In sum, because the insurance contract did not provide coverage for diminution in value, and plaintiff has not adequately alleged any other failure on the part of defendant in repairing the vehicle, plaintiff cannot state a cause of action on that basis.

B. CACI No. 3903J concerns tort damages and is inapplicable

Plaintiff argues that revisions to jury instruction CACI No. 3903J undercut the trial court's conclusion that plaintiff cannot seek damages for diminution of value. Plaintiff also challenges the applicability of *Ray*, *Carson*, and *Baldwin* in light of the revisions.

CACI No. 3903J, entitled "Damage to Personal Property (Economic Damage)" provides a measure of damages "for harm to personal property." In its current form, it provides an optional paragraph stating that if the jury finds the damaged property (the example given is an automobile) "can be repaired, but after repairs it will be worth less than it was before the harm, the damages are (1) the difference between its value before the harm and its lesser value after the repairs have been made; plus (2) the reasonable cost of making the repairs." The case cited in support of this part of the instruction is *Merchant etc. Assn. v. Kellogg E. & Dr. Co.* (1946) 28 Cal.2d 594, 600 (*Merchant*), which involved a judgment for damages sustained "by reason of defendant's handling of a piece of machinery in the course of delivery to its destination." (*Id.* at p. 595.)

CACI No. 3903J and *Merchant* clearly pertain to tort claims for damages, in which a plaintiff may seek from the tortfeasor not only costs of repair but also diminution in value. They have no application here, where defendant is not an alleged tortfeasor or otherwise the cause of the damage to plaintiff's

vehicle. Neither the jury instruction nor *Merchant* purports to impose on insurers an obligation to pay for diminution in value in a contract action. Indeed, in *Ray,* the appellate court expressly rejected an argument based on *Merchant* because *Merchant* "involved liability for damages in tort, not in contract. Rules applicable to recovery in tort do not apply to an action on a contract of insurance." (*Ray, supra*, 200 Cal.App.3d at p. 1417.)

Plaintiff does not explain how CACI No. 3903J applies other than to say "the damages claim for loss of value of automobile[s] are conceptually the same under tort and contract." This of course is not so, as *Ray* illustrates, and we decline to hold that CACI No. 3903J has any bearing on this case.

C. The policy provisions are not confusing, misleading, or contradictory

To the extent plaintiff is suggesting the language excluding coverage for diminution of value is unenforceable as confusing, ambiguous, or misleading, we reject this argument. In *Baldwin*, the plaintiff raised a similar argument, claiming "that the exclusion [for diminution of value] may be disregarded because it was contained in the 'fine print' of the insurance policy." (*Baldwin, supra*, 1 Cal.App.5th at p. 553.) The court disagreed, noting that the exclusion was listed in a section designated with a capitalized and boldfaced heading in simple language. (*Ibid.*) The exclusions themselves were "stated in numbered paragraphs, with adequate spacing, using the same style and size of print found elsewhere in the policy." (*Ibid.*) This, the court held, satisfied the requirement that exclusion clauses be " ' "conspicuous, plain and clear." ' " (*Ibid.*; see *National Ins. Underwriters v. Carter* (1976) 17 Cal.3d 380, 384 [exclusion "plain and conspicuous" when listed under the boldface heading

" 'EXCLUSIONS' " "in printing of size and intensity identical to that of the rest of the policy save only for paragraph headings"].)

Here, similarly, the exclusion was listed in the part of the policy for property damage under the capitalized and boldfaced heading "WHAT IS NOT COVERED—EXCLUSIONS." The exclusion itself appeared in the same size and typeface as the rest of the policy. There was nothing confusing or misleading about its placement in the policy.

Nor did the exclusion contradict other provisions in the policy. Plaintiff claims that defendant promised to "make the plaintiff whole in the event of an accident." But the language quoted by plaintiff does not reflect this. Plaintiff cites the language under the heading "OUR PROMISE TO YOU" stating that "[w]e will pay for loss to an automobile insured under this part for the coverage specified in the declarations." But the "coverage specified" cannot be read to include diminution of value, since that item of damages was expressly excluded. (See *Baldwin, supra*, 1 Cal.App.5th at p. 553 [policy exclusion for diminution of value limited the scope of, but did not contradict, provision promising to cover loss].) Plaintiff also cites the definition of " 'property damage' " as " 'injury to or [destruction] of property, including the loss of use.' " Plaintiff does not explain how this language gives rise to an obligation to pay diminution of value; moreover, this definition appears in the policy section pertaining to damages for which *plaintiff* "is legally liable," and thus has no bearing on the coverage issue here.

Plaintiff also states that defendant promised " 'full' coverage," but this does not appear to be alleged in the TAC, and plaintiff does not identify where in the policy or any other document this language appears. (Boldface omitted.)

D. Defendant's exercise of discretion as alleged did not breach the implied covenant of good faith and fair dealing because it was permitted under the contract and within the parties' reasonable expectations

Plaintiff argues, as was alleged in the TAC, that regardless of the policy language, defendant's decision to repair rather than replace the car in order to save money breached defendant's obligation to comply with the implied covenant of good faith and fair dealing. Plaintiff quotes the TAC's claim that an insurer must "give 'at least as much weight to the insured's interest as it gives its own interest.' " Plaintiff also argues that when "a contract confers on one party a discretionary power affecting the rights of the other," that power must be exercised "in good faith and in accordance with fair dealing."

Similar arguments were raised and rejected in *Carson* and *Baldwin*. In *Carson*, the plaintiff argued that the defendant insurer had breached the implied covenant of good faith and fair dealing by not taking into account her financial interests when opting to repair her vehicle rather than pay for the loss. (*Carson, supra*, 210 Cal.App.4th at p. 430.) The court was unpersuaded: "That [the plaintiff's] financial interests were negatively affected after the repair was not a breach of the covenant because stigma damages [i.e., diminution in value] were not a contracted benefit of the bargain. [The defendant] did all that it promised to do." (*Ibid.*)

Similarly, *Baldwin* held that the plaintiff had failed to state a cause of action for breach of the implied covenant because the defendant's "alleged conduct [in deciding to repair the vehicle] was consistent with the express provisions of the

contract." (*Baldwin, supra*, 1 Cal.App.5th at p. 557.) The court disagreed with the plaintiff that the contract provisions granting the insurer discretion to repair without paying for diminution of value "impermissibly contradicted the implied covenant of good faith and fair dealing." (*Ibid.*) The court stated that "the 'performance of an act specifically authorized by the policy cannot, as a matter of law, constitute bad faith,' " and " ' "courts are not at liberty to imply a covenant directly at odds with a contract's express grant of discretionary power." ' " (*Id.* at pp. 557-558.)

We find these authorities persuasive and determinative on this issue. Here, defendant did what was required of it under the contract, opting to cover the loss through repair rather than replacement. As discussed, plaintiff has not adequately alleged that the repairs were insufficient apart from not restoring the car to its preaccident value. The fact that defendant's choice was economically disadvantageous to plaintiff—and, by extension, economically advantageous to defendant—did not constitute bad faith; otherwise, defendant could never choose to repair rather than pay the loss, a result rejected in *Ray*. (*Ray, supra*, 200 Cal.App.3d at p. 1417.) *Ray* in fact upheld policy language that "unambiguously reserves to [the insurer] the right to elect the most economical method of paying claims," acknowledging that an insurer may make the decision based on its financial interests. (*Ibid.*)

Plaintiff quotes a number of cases suggesting that insurers in handling claims and exercising contractual discretion are obligated to take into account the interests of the insured, but these cases are distinguishable and do not undercut the holdings of *Ray*, *Carson*, and *Baldwin*. *Comunale v. Traders & General*

Ins. Co. (1958) 50 Cal.2d 654 (*Comunale*) held that the implied covenant requires an insurer to settle claims brought by third parties against an insured "[w]hen there is great risk of a recovery beyond the policy limits," even if the policy otherwise grants the insurer discretion whether to settle. (*Id.* at p. 659.) *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 819 (*Egan*) held that an insurer breached the implied covenant by failing to investigate an insured's disability claim properly before denying coverage. *Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922 held that an insurer breached the implied covenant by denying coverage " 'by a conscious and deliberate act, which unfairly frustrate[d] the agreed common purposes and disappoint[ed] the reasonable expectations of the other party thereby depriving that party of the benefits of the agreement.' " (*Id.* at p. 949.) *Terzian v. California Cas. Indem. Exch.* (1974) 42 Cal.App.3d 942 held that an insurer could not invoke a coverage exclusion when it had already breached the insurance contract by its "repeated failure to respond" to the insured's demands for coverage following an automobile accident. (*Id.* at p. 950.) *Barney v. Aetna Casualty & Surety Co.* (1986) 185 Cal.App.3d 966 held that an insurer may not exercise its discretion to settle claims against an insured "in a manner injurious of [the insured's] rights," in that case by forfeiting the insured's right to counterclaim against a third party. (*Id.* at pp. 977-978.)

What unites these cases is that in each, the insurer acted against the reasonable expectations of the insured by denying or ignoring claims without cause or failing to defend the insured's interests in litigation properly. In contrast, here, as in *Ray*, *Carson*, and *Baldwin*, defendant provided coverage under one of

the methods expressly permitted in the contract, that is, by repairing the vehicle. Although plaintiff characterized the rejection of her request for full cash value as a denial of her claim, in fact she was provided with the coverage promised under the policy, and has not alleged that the coverage was withheld or delayed. Although plaintiff argues that a "reasonable consumer" would expect full coverage in the form of replacement or payment of diminution of value, this is implausible when the clear language of the policy gave defendant discretion to choose to repair the vehicle and expressly excluded coverage for diminution in value. Instead, the reasonable expectation would be that defendant would choose "the most economical method of paying claims." (*Ray, supra*, 200 Cal.App.3d at p. 1417.)

Thus, plaintiff has not adequately pleaded that defendant's choice to repair the vehicle breached the implied covenant of good faith and fair dealing.

II. Third Cause Of Action—Illegal Policy Provisions And Related Practices

Plaintiff claims that she adequately stated a claim that defendant's insurance policies and related practices violated the Unfair Competition Law (the UCL), (Bus. & Prof. Code, § 17200 et seq.). We disagree.

The UCL proscribes "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." (Bus. & Prof. Code, § 17200.) "By proscribing 'any unlawful' business act or practice [citation], the UCL ' "borrows" ' rules set out in other laws and makes violations of those rules independently actionable. [Citation.] However, a practice may violate the UCL even if it is not prohibited by another statute. Unfair and fraudulent practices are alternate

grounds for relief. [Citation.] False advertising is included in the 'fraudulent' category of prohibited practices." (*Zhang v. Superior Court* (2013) 57 Cal.4th 364, 370.)

A. Plaintiff has failed to establish that defendant's insurance policy and related practices violated the Insurance Code or public policy

Plaintiff argues that defendant's policy provisions and claims handling practice are in conflict with the California Insurance Code and public policy. Although plaintiff does not so state, we presume she makes these arguments to establish the "unlawful" and "unfair" prongs of the UCL. The arguments are without merit.

Plaintiff argues that defendant's policy "effectively vitiates or eliminates parts of the Insurance Code," particularly Insurance Code section 790.03, subdivision (h), which lists "unfair claims settlement practices." Plaintiff specifically identifies the following unfair practices under this subdivision: "Failing to adopt and implement reasonable standards for the prompt investigation and processing of claims arising under insurance policies" (*id.*, subd. (h)(3)); "Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear" (*id.*, subd. (h)(5)); and "Failing, after payment of a claim, to inform insureds or beneficiaries, upon request by them, of the coverage under which payment has been made" (*id.*, subd. (h)(9)).

Plaintiff does not explain how defendant's policy language or conduct violated these provisions. She did not allege any failure to investigate and process her claim promptly or to inform her of the coverage under which payment was made. The claimed violation of Insurance Code section 790.03,

subdivision (h)(5) presumably refers to her earlier argument that defendant's decision to repair the car to her financial detriment was a breach of good faith; as set forth above, she has failed to state a claim on that basis.[11]

As to public policy, plaintiff cites to *Comunale*, *Egan*, and *Silberg v. California Life Ins. Co.* (1974) 11 Cal.3d 452, 460-461, the latter holding that an insurer breached the implied covenant of good faith and fair dealing by failing to make payments under a policy. Presumably plaintiff refers to these cases again to establish that defendant acted in bad faith by not taking her interests into account. As we have explained above, she has failed to state a claim on that basis, whether she characterizes her claim as a breach of contract or a violation of the UCL.

Plaintiff therefore has failed to show that the trial court erred in ruling that she had not established that defendant's policy language or conduct were "unlawful" or "unfair" under the UCL.

B. Plaintiff's allegations are insufficient to state a claim for fraud or false advertising under the UCL

In the TAC, plaintiff alleged that defendant had falsely advertised "that the policies include all property damages and losses sustained" and failed to make certain disclosures including that "a vehicle . . . has much less value than before the accident no matter the good faith of the repairs that are made." The trial

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[11] The trial court concluded that plaintiff as a private litigant could not bring a claim under Insurance Code section 790.03, subdivision (h). Given our holding, we need not address that ruling.

court sustained the demurrer as to this allegation stating that plaintiff had "fail[ed] to allege that the public is likely to be deceived by [defendant's] policy terms." (See *Bardin v. DaimlerChrysler Corp.* (2006) 136 Cal.App.4th 1255, 1274 [to show violation of UCL fraud prong "it is only necessary to show that members of the public are likely to be deceived"].) Plaintiff challenges this determination; we find no error.

Plaintiff argues that the court "conflated or just did not accept" certain allegations that plaintiff asserts establish her claim. Those allegations, as characterized by plaintiff, are: "(1) that [defendant's] advertising about what its policies offered was misleading in that it does not explain that under the disputed exclusion, an insured will wind up with a vehicle that is worth only a fraction of what it was worth; (2) that prior to issuing a policy, [defendant] did not tell [plaintiff] (or the class) that through the claims process, [defendant] would weigh its interests above that of the insureds; (3) that [defendant] knew that due to technological advances in automobile manufacturing, [defendant] no longer has the same ability to return cars to a pre-accident condition; and (4) that despite the contractual 'PROMISE' to act in good faith, the premise of the claims process is the opposite."

We have already concluded defendant's conduct as alleged by plaintiff was in full compliance with the express and unambiguous terms of the policy and the law, and defendant neither breached the contract nor the implied covenant of good faith and fair dealing when it chose to repair plaintiff's vehicle and did not pay plaintiff for diminution in the value of her vehicle. Plaintiff presents no authority that under these

circumstances, defendant had an obligation to explain in its advertising the effect of policy exclusions or the decisions it might make in providing coverage. Indeed, the reasonable expectation would be that defendant would act in accordance with the policy, which as alleged it did. To the extent that defendant could not return cars to "pre-accident condition," plaintiff has only alleged that defendant could not return vehicles to their preaccident value, which, again, is not something the law requires, or that plaintiff has established defendant is obliged to disclose apart from the clear terms of the policy itself. In short, plaintiff has failed to allege or explain how defendant's advertising was misleading.

III. Plaintiff Has Failed To Show That The TAC May Be Amended To State A Cause Of Action

Although plaintiff in opposing the demurrer requested leave to amend, she has failed to establish that the trial court abused its discretion in denying that request. As a general matter, plaintiff's position below and on appeal is that she has adequately stated her claims. As discussed above, we disagree, and plaintiff has proposed no alternative theories under which her claims might survive.

In her opposition in the trial court, plaintiff offered to provide more facts "specific to the detail [the trial court] deems necessary to demonstrate that the Vehicle could be driven, but not in pre-accident condition after hours of work on the [u]nibody." On appeal, she complains that the trial court "was silent as to what other factual allegations must be specified" to correct the TAC. But "[i]t is not up to the judge to figure out how the complaint can be amended to state a cause of action. Rather, the burden is on plaintiff to show *in what manner* he or she can

amend the complaint, and *how* that amendment will change the legal effect of the pleading." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2017) ¶ 7:130, p. 7(l)-59.) It was plaintiff's responsibility to provide the additional facts and explain how those additional facts would establish her claims. Her general statement that the vehicle "could be driven, but not in pre-accident condition" is just as conclusory as the allegations in the TAC, and the trial court did not err in denying leave to amend based on that statement.

In her appellate briefing, plaintiff offers some additional facts describing advances in automotive technology that have had "a direct and substantial impact on automobile repair." Plaintiff lists various components of modern cars such as "airbags and expensive electronics," stating that such parts "are only available from original manufacturers at retail price." She asserts that "[m]agnesium, titanium and plastic parts cannot be bent back into place as would have occurred even twenty years ago." She claims that body shops "often do not have the expensive equipment or resources for the employee training which is necessary to restore a vehicle to both a safe and pre-accident condition."

These additional facts are insufficient to save plaintiff's claims, even if accepted as true. The primary factual deficiency in her pleadings was the failure to identify in what manner, apart from diminution in value, her car had not been restored to preaccident condition. Plaintiff merely makes generalized assertions about vehicle repair without applying those generalizations to her own claim. She does not, for example, indicate which of the aforementioned listed components, if any, was damaged in her vehicle, and whether that damage was

repaired or not. She suggests that some body shops are not equipped to perform necessary body work on modern cars, but says nothing about the shop that worked on her car. Nor does she explain how the fact that cars contain expensive components, and that some body shops are ill-equipped to perform repairs, supports the proposition that her vehicle, or even modern vehicles in general, cannot be restored to their preaccident state functionally and aesthetically.

Given plaintiff's lack of showing how she might amend the TAC to properly state a cause of action after several rounds of pleading, we cannot conclude that the trial court abused its discretion in denying leave to amend.[12]

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[12] Plaintiff refers to a repair bill "showing supplemental work on the frame" of which the trial court declined to take judicial notice. The bill appears to reflect the $22,602.81 that plaintiff alleged was spent on repairs. In her Reply, plaintiff argues that the "lower" market value of $18,000 following a repair costing $22,602 is a "specific fact" demonstrating that defendant did not take plaintiff's interests into account in electing to repair plaintiff's vehicle. This repair bill does not demonstrate an ability to amend around the clear language of the policy and the import of the case authorities discussed above.

DISPOSITION

The judgment is affirmed. Defendant is awarded its costs on appeal.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

CHANEY, Acting P. J.

JOHNSON, J.