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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

CRAIG STREIT et al., Plaintiffs, Cross-defendants and Appellants, v. FIRE INSURANCE EXCHANGE et al., Defendants, Cross-complainants and Respondents.	B276430 (Los Angeles County Super. Ct. No. BC434852)

APPEAL from a judgment of the Superior Court of Los Angeles County, John Shepard Wiley Jr., Judge. Reversed.

Eppsteiner Law, Stuart M. Eppsteiner; The Kralowec Law Group and Kimberly A. Kralowec for Plaintiffs, Cross-defendants and Appellants.

Hinshaw & Culbertson, Kent Keller and Larry M. Golub; Locke Lord, Stephen A. Tuggy and Matthew B. Nazareth for Defendants, Cross-complainants and Respondents.

INTRODUCTION

When you cancel an insurance policy during its term, you get a refund from your insurer of some of the premium you paid for the insurance. For example, if you cancel a one-year policy after six months, you might expect the insurance company to return 50 percent of the annual premium you paid. Or, if you cancel after three months, you might expect the insurance company to return 75 percent of your annual premium. You might think that whenever you cancel an insurance policy, you should get a pro rata or proportionate refund.

But, at least for the policies involved in this case, you would be wrong. Instead, you get something called a "short rate" return of the premium you paid, which is something less than a pro rata or proportionate refund. And that may be okay, if the insurer disclosed to you when you purchased the policy that if you cancel you get a short rate return of the premium and explained to you what a short rate is and how the insurer calculates it. This litigation, now in its seventh year, is about whether the insurer did that.

This appeal, however, is primarily about what we held and did not hold in a prior appeal. In the prior appeal we reversed an order sustaining a demurrer to the complaint without leave to amend, ruling the insureds had stated causes of action. The insureds, and the trial court, believed we did much more than that. We did not. Therefore, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The First Amended Complaint*

Craig Streit and Eric Lucan filed this action on behalf of themselves and others to whom Farmers Insurance Group, Inc. had issued insurance policies.[1] Streit paid an annual premium of $1,159.24 for a Farmers homeowners or landlord insurance policy, but he canceled it 39 days into the policy period. He expected a refund of $1,035.38, which he calculated as 326 days (365-39) at $3.176 per day ($1,159.24/365). Instead, Streit received only $915.80, or approximately $119 less than he thought he should have received.

Streit's policy stated that, if he canceled the policy, Farmers would "return the short rate unused share of the premium," but that, if Farmers canceled the policy, it would return "the prorated unused share of the premium." The policy, however, did not explain what a "short rate" was. Streit contacted his Farmers insurance agent and Farmers' billing department and asked why he had been penalized $119 and "charged a higher rate for his insurance when he terminated the policy than the premium rate used to compute his solicitation

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[1] The caption of the complaint identifies four entities as defendants: (1) Farmers Group, Inc. dba Farmers Underwriters Association, (2) Fire Insurance Exchange dba Farmers Underwriters Association, (3) Mid-Century Insurance Company, and (4) Fire Underwriters Association. The parties sometimes refer to all of the defendants as "Farmers" collectively and other times refer to the defendants individually. Complicating designations further, the respondents in this appeal are (2) Fire Insurance Exchange and (3) Mid-Century Insurance, and not (1) Farmers Insurance Group. We will use the terms "Farmers" or "the insurers" to refer to the defendants in this case.

quote and Original Premium." Neither the agent nor the billing department could explain "how Farmers computed the amount of his premium that was unused [or] how it computed the amount returned to him." Eventually, a Farmers customer relations manager wrote Streit and explained that Farmers calculated midterm policy cancellation refunds based on a "short rate," which "is calculated using a factor derived from the 'RONOCO Six and Twelve Month Calculator' . . . published by The Rough Notes Co., Inc. in Indianapolis, Indiana," and that this formula produced the "Short-rate unearned premium" of $915.80 for Streit's refund. The customer relations manager admitted it was not Farmers' "normal business practice to explain [its] cancellation procedure upon issuance of a policy."

Lucan paid $360.76, the first six-month installment of his $743.85 annual premium for a Farmers homeowners insurance policy, but he canceled it 81 days into the policy period. He expected a refund of approximately $196, but he received a refund of only $118, or approximately $77 less than he thought he should have received.

Like Streit's policy, Lucan's policy stated that, if he canceled his policy, Farmers would "return the short rate unused share of the premium," but that if Farmers canceled the policy it would "return the pro-rated unused share of the premium." The policy, however, did not explain what "short rate" meant. In response to Lucan's inquiries, his Farmers agent told him "he did not know how Farmers determined the amount of his returned unused portion of his premium and did not explain how Farmers calculated the sum it returned to" Lucan. Farmers' policy services department subsequently wrote Lucan and told him that, when he canceled his policy, Farmers' "system processed a 'short-rate' of the cancellation" using a "rate decimal in manual

page 10/40." When Lucan followed up with Farmers' policy services department, he learned the "premium rate" for his mid-term cancellation "was not stated in his Policy but rather was stated in the manual, which was an internal document that was not distributed to customers."

In their first amended class action complaint, Streit and Lucan alleged that Farmers' practice of charging them and the other members of the class "the higher Short Rate to determine the amount it would return as their unused portion of their premium" was unlawful, unfair, and fraudulent. Streit and Lucan claimed the short rate is an insurance premium rate that is higher than the rate Farmers stated in its solicitations and policies. They also alleged Farmers' policies did not define "short rate," explain how Farmers used it to calculate returns of premiums, or disclose that imposing a "short rate penalty" made the premiums more than those stated in the policies. They also claimed the use of the term "short rate" was ambiguous and prevented policyholders from understanding a material term of their policies. Streit and Lucan pointed out that Farmers did not disclose or make available to its insureds or its agents the RONOCO Six and Twelve Month Calculator apparently used to calculate short rate returns of premiums. In particular, Streit and Lucan alleged Farmers violated Insurance Code section 381, subdivision (f),[2] which provides that an insurance policy must specify either a "statement of the premium" or, if "the insurance is of a character where the exact premium is only determinable upon the termination of the contract, a statement of the basis and

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[2] Undesignated statutory references are to the Insurance Code.

rates upon which the final premium is to be determined and paid."

Streit and Lucan alleged six causes of action in their first amended complaint, including three unfair competition causes of action under Business and Professions Code section 17200: one for unlawful practices, one for unfair practices, and one for fraudulent practices. These causes of action were based on alleged violations of sections 330 (concealment by neglecting to communicate), 332 (failing to communicate required disclosures), and 381, subdivision (f) (failing to specify the premium in an insurance policy), and Civil Code sections 1573 (constructive fraud), 1709 (deceit), 1710 (deceit), 1670.5 (unconscionable contract), and 1671, subdivision (d) (void liquidated damages provision). Streit and Lucan also alleged causes of action for breach of the implied covenant of good faith and fair dealing, "unconscionability," and unjust enrichment.

B. *The Demurrer*

Farmers demurred. Farmers argued Streit and Lucan could not state a cause of action based on a violation of section 381, subdivision (f), because the "short rate return of premium" was not a premium, and therefore the policy did not need to "specify" what it meant. Farmers also argued its use of the term "short rate" was authorized by section 2071, which adopts a standard form of fire insurance that includes language stating, if an insured cancels a policy, the insurer must "refund the excess of paid premium above the customary short rates for the expired time." Farmers also relied on the Legislature's enactment in 2010 (effective January 1, 2011) of amendments to section 481 that imposed additional disclosure requirements for insurance policies providing for refunds of premiums other than on a pro

rata basis. Farmers argued that the Legislature's decision in 2010 to impose these new disclosure requirements on policies issued in 2012 meant that policies issued prior to 2012, like the policies at issue in this case, did not need to make those disclosures.

The trial court sustained Farmers' demurrer without leave to amend. The court ruled that section 2071 allowed Farmers to use a short rate to calculate returns of premiums, as stated in the policies, without explaining what the term meant, and that the use of the term "[s]hort rate" in the policy was "permissibl[e] . . . jargon," "expressly permitted by law," and "sufficient disclosure contrary to plaintiffs' hindsight request for greater disclosure." The court also ruled that the fact the 2010 amendments to section 481 regarding non-pro rata refunds "was deemed necessary and suitable tends to demonstrate that the prior conduct of Farmers and similarly situated carriers who used the 'short-rate premium' approach was lawful at the time."

C. *The Prior Appeal: Streit v. Farmers Group, Inc.* (*Streit I*)

We reversed. We held that Streit and Lucan did not state unfair competition causes of action based on Farmers' alleged violation of section 381, subdivision (f), because "the 'short rate' at issue in this complaint is not a 'premium' for purposes of" that provision, but that Streit and Lucan stated unfair competition causes of action, including for unlawful practices, based on sections 330 and 332 and Civil Code sections 1573, 1709, and 1710. (See *Streit I*, 2012 WL 6623683, at p. 10.) We held: "Although we conclude the 'short rate' at issue in this complaint is not a 'premium' for purposes of section 381, subdivision (f), Streit alleged, even if the 'short rate' is not a 'premium' within

the meaning of section 381, Farmers' nondisclosure of its 'short rate' penalty violated Insurance Code sections 330 (concealment) and 332 (communication of material facts) and Civil Code sections 1573 (constructive fraud), 1709 (deceit) and 1710 (what constitutes deceit) for purposes of the 'unlawful' prong of the [unfair competition law] so the first cause of action should have withstood Farmers' demurrer." (*Ibid.*)

In connection with Streit's unfair competition theory based on alleged concealment and nondisclosure, we noted that, "although Streit's policy contained two pages of definitions and Lucan's contained *six*, the term 'short rate' is used in the policies without definition, explanation, mention of any table or any other means to confirm the term is anything other than a synonym for the 'pro rata' rate, in parallel sentences addressing the return of premium whether the insured or insurer terminates the policy, as Streit and Lucan say they understood. The term was not placed within quotation marks, capitalized or given any other indication of its particular significance as imposing a higher rate than the pro rata or proportional rate the stated premium would indicate." (*Streit I*, *supra*, 2012 WL 6623683, at p. 11.) We also stated that "Streit alleged, consistent with its business practice *not* to do so as alleged in the complaint, Farmers did not communicate any information whatsoever as to the meaning of 'short rate' or its calculation, but nevertheless withheld a portion of the premium greater than the amount corresponding with the unexpired time as required under section 481, subdivision (a)(2),"[3] and that,

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[3] At the time, section 481, subdivision (a), provided that, "[u]nless the insurance contract otherwise provides," an insured is entitled to a return of his or her premium upon cancelling as follows: "(1) To the whole premium, if the insurer has not been exposed to any risk of loss," or (2) "Where the insurance is made

"according to the allegations, Farmers' return of premium formula was contained in an internal document in Lucan's case and in a table not provided to the insured when the policy originates in Streit's case." (*Id.* at p. 12.)

We also rejected Farmers' argument "that the recent amendments to section 481 mean that any Farmers' policy predating these changes was necessarily lawful, fair and nonfraudulent in every respect as a matter of law." (*Streit I*, *supra*, 2012 WL 6623683, at p. 12.) On this issue, we concluded: "Notwithstanding the *added* disclosure requirements as to the timing and further detail required as a result of the amendments, we see nothing inconsistent between the allegations of Streit's complaint and the disclosures required under the statutory provisions in existence *prior* to these amendments, beginning with section 481, subdivision (a), as it has existed since 1935 as well as sections 330 and 332." (*Ibid.*)

Therefore, we held that, "[a]ccepting the allegations as true, Streit alleged statutory violations supporting his" causes of action for violation of the unfair competition law for unlawful, unfair, and fraudulent practices. (*Streit I*, *supra*, 2012 WL 6623683, at pp. 12-14.) We also held that Streit was entitled to leave to amend his cause of action for breach of the implied covenant of good faith and fair dealing, but that he had not challenged the trial court's ruling on his cause of action for

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for a definite period of time and the insured surrenders his or her policy, to such proportion of the premium as corresponds with the unexpired time, after deducting from the whole premium any claim for loss or damage under the policy which has previously accrued."

unconscionability and he had not stated a cause of action for unjust enrichment.[4] (*Id.* at p. 14.)

D. *The Third Amended Complaint*

According to Streit and Lucan, "[i]n the years following remand, [they] vigorously litigated this matter: through discovery, class certification, cross-motions for summary adjudication of issues, and judgment." The operative complaint governing the post-remand litigation was the third amended complaint, which included three revised causes of action for unfair competition (for unlawful, unfair, and fraudulent practices) and for breach of the implied covenant of good faith and fair dealing, and a new cause of action for breach of contract.

Streit and Lucan's allegations in the third amended complaint focused more specifically on section 481, subdivision (a). Quoting our opinion in *Streit I*, Streit and Lucan alleged Farmers' policies violated section 481, subdivision (a), as well as the statutes they had identified in prior versions of their complaint: sections 330 and 332 (but not section 381) and Civil Code sections 1573, 1709, 1710, (but not Civil Code sections 1670.5 and 1671, subdivision (d)). Streit and Lucan also amended their cause of action for breach of the implied covenant

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[4] Unconscionability is not a cause of action. (See *California Grocers Assn. v. Bank of America* (1994) 22 Cal.App.4th 205, 217; *Westlye v. Look Sports, Inc.* (1993) 17 Cal.App.4th 1715, 1738.) Neither is unjust enrichment. (See *Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal.App.4th 221, 231; *Hill v. Roll Internat. Corp.* (2011) 195 Cal.App.4th 1295, 1307; *Levine v. Blue Shield of California* (2010) 189 Cal.App.4th 1117, 1138; *Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350, 1370; *Jogani v. Superior Court* (2008) 165 Cal.App.4th 901, 911.)

of good faith and fair dealing to reference section 481, subdivision (a), and this court's opinion in *Streit I*. Finally, Streit and Lucan added a new cause of action for breach of contract alleging that section 481, subdivision (a), was "read into and . . . deemed a part of each insurance policy contract issued by Farmers" and that Farmers breached the terms of its policies because the insureds "did not agree in the insurance policy contract that return of premium would be calculated pursuant to a particular formula other than 'pro rata.'"

E. *The Cross-motions for Summary Adjudication*

Streit and Lucan moved for summary adjudication against Fire Insurance Exchange and Mid-Century Insurance Company (but not Farmers Group) on the first cause of action for unfair competition based on unlawful business practices and the fifth cause of action for breach of contract. Streit and Lucan argued section 481, subdivision (a), "requires a pro rata return of premium 'unless the insurance contract otherwise provides,'" the "Court of Appeal has already held that the policy contracts contained no language allowing this, and [Fire Insurance Exchange and Mid-Century Insurance] have admitted that no other contracts exist in which plaintiffs or the Class agreed that the return of premium would be calculated in any manner other than pro rata." Streit and Lucan asserted that the "undisputed facts, drawn from [Fire Insurance Exchange and Mid-Century Insurance's] own records, also establish the amount of restitution or damages each defendant owes to plaintiffs and each member of the Class—namely, the difference between the 'short rate' unearned premium . . . and the pro rata unearned premium . . . ." They asked the court to direct Fire Insurance Exchange and Mid-

Century Insurance to pay the class members "restitution, damages, and prejudgment interest in undisputed amounts."

Streit and Lucan asserted that, "ever since the Court of Appeal remanded the case back to [the trial court] for further proceedings, [Fire Insurance Exchange] and Mid-Century Insurance have persisted in misreading the Court of Appeal's opinion, and in repeating worn-out arguments that the Court of Appeal already considered and rejected." Streit and Lucan emphasized that, "[u]nder the 'law of the case' doctrine, the Court of Appeal's determinations are final, binding, and must be followed." For example, Streit and Lucan argued that this court had considered the language "return the short rate unused share of the premium" and had "concluded that it was inadequate under section 481[, subdivision] (b)." Quoting our opinion in *Streit I*, they also argued the insureds "had no 'means to confirm' what 'customary short rate table and procedure' is referred to, or what 'particular formula' would be used to calculate their return of premium, if not pro rata."

In opposition to the motion for summary adjudication, Fire Insurance Exchange and Mid-Century Insurance argued the policies "in fact expressly 'otherwise provided' for a return of premium on a short rate basis." They argued that, although the policies do not define or explain the term "short rate," neither this court's opinion in *Streit I* nor California insurance law requires a policy to include a definition or explanation of the term. Fire Insurance Exchange and Mid-Century Insurance also argued the term "short rate" has an established meaning in the insurance industry that is "reflected in multiple sources of insurance industry information," including online publications and glossaries on Farmers' website and the website of the California Department of Insurance. They also argued that the

California Department of Insurance reviewed and approved the policies without objecting that the policies "did not contain a definition of short rate or short rate tables." Finally, Fire Insurance Exchange and Mid-Century Insurance argued that factual issues regarding the plaintiffs' damages calculations precluded summary adjudication. Meanwhile, Farmers filed a motion for summary adjudication on the first and fifth causes of action based on the same arguments they made in opposition to Streit and Lucan's motion for summary adjudication.

The trial court granted the motion by Streit and Lucan for summary adjudication and denied the motion by Farmers. The trial court ruled: "The essence of the 2012 appellate decision in this case [*Streit I*] . . . is that insurers cannot adopt a 'short rate' formula unless they define that term in the contract itself. Farmers deploys a series of arguments against this interpretation of the appellate decision. Farmers made the same series of arguments years ago to the Court of Appeal, however, which rejected all of them. That is the end of the matter in the trial court." The court stated: "A fair reading of the Court of Appeal decision shows the appellate court has established the principles needed to resolve these issues in Streit's favor." Citing a 1993 opinion by Judge Richard Posner, the trial court emphasized it believed our decision in *Streit I* required granting the motion for summary adjudication by Streit and Lucan: "The duty of a lower court [is] to give unstinting respect to appellate statements of law. [Citations.] Respect for the hierarchical nature of American law is an important part of the rule of law. The duty of trial courts is to apply governing law in a predictable and impartial way. Here Farmers has made its arguments before and the Court of Appeal found them to be erroneous. Department 311 follows that Court's guidance."

In denying Farmers' motion for summary adjudication, the trial court, referring to the argument that the policies "otherwise provide[ ]" for a return of premium on a short rate basis because they refer to the return of a "short rate unused share of the premium," stated "Farmers made and lost the 'otherwise provided' argument in the appellate court." The trial court, addressing the issue of interpreting the policy language, stated that "Farmers previously made that argument to the Court of Appeal and lost. The appellate court considered Farmers' arguments about these contract interpretation rules in the course of the last appeal. Those arguments now are settled in the trial court. Farmers loses." The court also ruled that this court had rejected Farmers' arguments based on section 2071, contract interpretation, and the 2010 amendments to section 481. Responding to Farmers' argument that the law of the case doctrine could not apply to the first and fifth causes of action because those causes of action did not exist prior to this court's opinion in *Streit I*, the trial court stated the "two new counts are based on the 2012 appellate decision. To narrow the 2012 appellate decision to exclude claims based upon it would not bear true allegiance to that appellate victory."

The trial court subsequently held a hearing on the damages "phase" of the motion by Streit and Lucan for summary adjudication.[5] Finding "Streit's expert's method is flawed," the

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[5] During the briefing on the cross-motions for summary adjudication, the court approved the parties' stipulation that "the issues of liability and damages shall be bifurcated into two hearings." Pursuant to the stipulation, the court agreed to "conduct a bifurcated hearing on two separate dates and enter a separate initial order or ruling addressing only the Liability

court adopted the damages method used by Farmers' expert. The court ruled the "appropriate amount of damages" against Mid-Century Insurance was $6,597,814.20 and the "appropriate amount of damages" against Farmers Insurance Exchange was $7,522,150.04, plus interest.

F. *"Judgment"*

The court recognized that its rulings on the parties' cross-motions for summary adjudication on the first and fifth causes of action might not, without more, result in an appealable judgment. In fact, the parties briefed the issue. Putting aside that Streit and Lucan did not move for summary adjudication against Farmers Insurance Group, Farmers argued the trial court could not enter judgment against Fire Insurance Exchange and Mid-Century Insurance because there were still causes of action remaining against them (namely, the second, third, and fourth). Streit and Lucan argued the trial court could enter judgment against Fire Insurance Exchange and Mid-Century Insurance "because all issues of monetary relief as between plaintiffs, on the one hand, and [Fire Insurance Exchange and Mid-Century Insurance], on the other, have now been resolved" and, even though "other causes of action remain pending against those defendants, those causes of action do not seek any greater monetary relief than has already been awarded by this Court in its order" at the damages phase of the hearing. Streit and Lucan, however, did not dismiss the second, third, and fourth causes of action. Streit and Lucan also stated they "reserve[d] the right to

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Issues" and to "defer its ruling on the Damages Issues until after the second hearing date."

argue on appeal, or in a writ petition, that the amount of the monetary awards should have been greater."

The court entered judgment against Fire Insurance Exchange and Mid-Century Insurance. The court stated in its order entering the judgment, "Should this judgment be incorrect and should appellate courts treat it merely as an interlocutory order, this court states its belief under section 166.1 of the Code of Civil Procedure that there is a controlling question of law as to which there are substantial grounds for difference of opinion, appellate resolution of which will materially advance the conclusion of the litigation." The court also stated, "If I have erred in signing this judgment, I am going to implore that the Court of Appeal take up the writ, treat the appeal from the judgment as a writ request and heartedly recommend, indeed, implore, the Court of Appeal to get to the meat of this case that is so important to the parties."

Fire Insurance Exchange and Mid-Century Insurance challenge the trial court's orders granting Streit and Lucan's motion for summary adjudication and denying Farmers' motion for summary adjudication. Streit and Lucan challenge the trial court ruling at the damages phase of the hearing on their motion for summary adjudication.

DISCUSSION

A. *We Did Not Say in* Streit I *What Streit and Lucan Contend (and the Trial Court Ruled) We Said*

As a preliminary matter, we have serious reservations about whether the trial court's judgment is appealable because there are outstanding causes of action between the parties to this appeal. (See *Kurwa v. Kislinger* (2013) 57 Cal.4th 1097, 1101

["the one final judgment rule . . . precludes an appeal from a judgment disposing of fewer than all the causes of action extant between the parties, even if the remaining causes of action have been severed for trial from those decided by the judgment"]; *Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 697 ["'an appeal cannot be taken from a judgment that fails to complete the disposition of all causes of action between the parties even if the causes of action disposed of by judgment have been ordered to be tried separately, or may be characterized as 'separate and independent' from those remaining'"]; *Sese v. Wells Fargo Bank N.A.* (2016) 2 Cal.App.5th 710, 714 ["'a judgment that fails to dispose of all the causes of action pending between the parties is generally not appealable'"].) There are still causes of action remaining between Streit and Lucan (and the class members), on one side, and Fire Insurance Exchange and Mid-Century Insurance, on the other.

Nevertheless, assuming we have jurisdiction to review the trial court's ruling, either by appeal or by extraordinary writ, the trial court erred. The court's ruling was based on its belief that we held in *Streit I* that under section 481, subdivision (a), "insurers cannot adopt a 'short rate' formula unless they define that term in the contract itself." We did not. We held only that Streit stated a cause of action for, among other things, unfair competition based on unlawful practices because, by alleging Farmers concealed and did not communicate what "short rate" meant or how Farmers used it to calculate return of premium, Streit had alleged violations of several statutes. We did not say section 481, subdivision (a), requires the insurer to define the term "short rate" in the contract. Indeed, we did not even hold that Streit had stated a cause of action for unfair competition for unlawful practices based on a violation of section 481, subdivision

(a). To the contrary, we held the first cause of action for unfair competition based on unlawful practices "should have withstood Farmers' demurrer" because Streit alleged Farmers violated statutes in the Insurance Code other than section 481 (i.e., sections 330 and 332) and statutes in the Civil Code (sections 1573, 1709, and 1710) that prohibit various forms of nondisclosure: concealment, failure to communicate, and fraud. Contrary to the trial court's ruling, our opinion in *Streit I* did not mandate summary adjudication in favor of Streit and Lucan.

B. *Disputed Factual Issues Precluded Summary Adjudication*

Did Fire Insurance Exchange and Mid-Century Insurance violate the statutes in the Insurance Code and the Civil Code prohibiting concealment, failure to communicate, and fraud? That depends on whether the insurers adequately disclosed the meaning of the term "short rate" and their use of a "short rate" in calculating returns of premiums, which was a factual issue on which the sides submitted conflicting evidence. For example, Streit and Lucan submitted evidence that the "'short rate' tables and procedures that [Fire Insurance Exchange and Mid-Century Insurance] used to calculate the Class members' return of premium are all contained in internal . . . procedures and operations manuals that [Fire Insurance Exchange and Mid-Century Insurance] do not share with policyholders."[6] They also

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[6] Streit and Lucan also quoted the language in our opinion in *Streit I* that "[Farmers] did not communicate any information whatsoever as to the meaning of 'short rate' or its calculation, but nevertheless withheld a portion of the premium greater than the amount corresponding with the unexpired time as required under

submitted the letter Streit received stating Farmers did not normally explain its cancellation procedures when it issued a policy.

In response, Fire Insurance Exchange and Mid-Century Insurance submitted evidence that "Farmers maintains a public facing website that includes information about the company, frequently asked questions, contact information, a glossary of terms, and other information that may be relevant to consumers and policyholders." During the relevant period, the glossary of terms on Farmers' website defined in two places "short rate cancellation" as a "cancellation by the insured that refunds the unearned premium minus administrative expenses." Farmers also submitted copies of publications on the website of the Department of Insurance defining "short rate cancellation" as "[t]ermination of the policy prior to the expiration date at the policyholder's request, typically subject to a 10% penalty of the unearned premium to cover administrative expenses," and explaining that, "[w]hen the policy is terminated prior to the expiration date at the policy holder's request," the "[e]arned premium charged would be more than the pro-rata earned premium." The explanation continued: "Generally, the return premium would be approximately 90 percent of the pro-rata return premium. However, the company may also establish its own short-rate schedule." Farmers also submitted evidence that, in response to an inquiry from Streit, the Department of Insurance advised Streit that Farmers was "acting in compliance with the terms and conditions of the cancellation provision contained within [his] insurance agreement," was "not acting

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section 481, subdivision (a)(2)," but they omitted the words "Streit alleged" that preceded this language.

unreasonably or arbitrarily," and was "not in violation of the California Insurance Code by assessing short rate penalties upon cancellation of [his] policy."

In addition, Farmers submitted a declaration by a Farmers employee responsible for maintaining internal rules, policies, and procedures, who stated the Department of Insurance had approved manuals explaining Farmers' short rate refund policy. And Farmers submitted a declaration by a former deputy commissioner in the Department of Insurance, who stated "the custom and the understanding within the insurance industry and the [California Department of Insurance] is that the term 'short rate' or short rate refund means something less than pro rata" and, during the time he worked there, the Department of Insurance never rejected a policy because it "did not include a definition of the term 'short rate' or a short rate table."[7]

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[7] Streit and Lucan incorrectly assert the trial court struck these two declarations. The trial court did not sustain the objections by Streit and Lucan to this evidence at the liability phase of the motion for summary judication. Instead, the court ruled, "Streit's objections to Farmers'[] evidence are overruled. These matters are relevant and are not barred by the hearsay rule. Whether the evidence is significant to the analysis depends on the merits of the analysis. The Evidence Code does not govern that question of substantive law." Streit and Lucan do not appeal this ruling. It is true that, at the damages phase, the trial court excluded some of Farmers' evidence, and Streit and Lucan suggest that this later evidentiary ruling "modified" the prior one. There is no indication, however, the later ruling was a modification of the prior ruling. In any event, as all parties agree, the liability phase of the motion for summary adjudication was over when the court proceeded to the damages phase of the motion.

This evidence, which the trial court did not consider because the court erroneously ruled our decision in *Streit I* had decided the issue, created factual issues that precluded summary adjudication on Streit and Lucan's first cause of action for unfair competition. Whether the disclosures and explanations on the websites of Farmers and the Department of Insurance of the short rate return of premium were sufficient, or whether Fire Insurance Exchange and Mid-Century Insurance concealed or breached their duties to communicate, are questions for the trier of fact. (See *Countrywide Financial Corp. v. Bundy* (2010) 187 Cal.App.4th 234, 257 ["[w]hether particular conduct is 'unfair,' 'unlawful' or 'fraudulent' within the meaning of Business and Professions Code section 17200 is generally a question of fact which depends on the circumstances of each case"]; *Lovejoy v. AT & T Corp.* (2004) 119 Cal.App.4th 151, 160 [whether a disclosure satisfies a duty to disclose "is a question of fact for the jury"]; see also *O'Riordan v. Federal Kemper Life Assurance Co.* (2005) 36 Cal.4th 281, 287 [trial court erred in granting the insurer's motion for summary judgment where a triable issue of fact existed regarding whether the insured "concealed or failed to communicate material information" to the insurer in violation of section 330].)

To be sure, in *Streit I* we discussed that Streit and Lucan *alleged* Farmers had not explained what "short rate" meant or how it was calculated. But we emphasized these were allegations. In disagreeing with the trial court's ruling on demurrer that the use of "short rate" in the policy was "sufficient disclosure," we noted in the *allegations* by Streit and Lucan that the policy did not define or explain the term, Farmers' agents were unable to explain its meaning, and Farmers did not provide its insureds with material that would explain what a short rate

was and how Farmers used it to calculate returns of premium. (*Streit I*, *supra*, 2012 WL 6623693, at pp. 11-12.) We wrote: "The issue is not whether a 'short rate' penalty as Farmers uses the term may ever be collected, but rather whether, given the *alleged* nondisclosure of such a practice, Farmers collection of this 'short rate' under the circumstances presented here is actionable." (*Id.* at p. 12, italics added.) We answered that question in the affirmative: "*Accepting the allegations as true*, Streit alleged statutory violations supporting his cause of action for violation of the 'unlawful' prong" of the [unfair competition law]." (*Id.* at p 13, italics added.) In response to Streit and Lucan's motion for summary adjudication, however, Fire Insurance Exchange and Mid-Century Insurance submitted evidence creating factual issues on the truth of these allegations.

Similarly, there were factual disputes that precluded summary adjudication on Streit and Lucan's fifth cause of action for breach of contract. As noted, Streit and Lucan alleged in their breach of contract cause of action that section 481, subdivision (a), is "read into" and "deemed part of each insurance policy contract issued by Farmers." Streit and Lucan alleged the policies "did not 'provide' that the return of premium would be calculated in a manner other than pro rata" because, although the policies stated the insurers would "return the short rate unused share of the premium," this language was "not sufficient" because the policies did not define the term "short rate" and Farmers did not disclose it would use a short rate formula to calculate returns of premiums. As noted, however, we did not hold in *Streit I* that Farmers violated section 481, subdivision (a), let alone, as Streit and Lucan argue, that by "violat[ing] section 481[, subdivision] (a) (and the [unfair competition law])" Farmers "breached the policy contracts for all class members." To the

contrary, whether, as Streit and Lucan alleged, Farmers breached the policies by paying members of the class a "return of premium on a 'short-rate' basis" instead of pro rata is a factual issue. (See *Moresco v. Foppiano* (1936) 7 Cal.2d 242, 245 [whether a party breaches a contract is a question of fact]; *Ash v. North American Title Co.* (2014) 223 Cal.App.4th 1258, 1268 ["[t]he determinations of whether there was a breach of contract and whether the contract damages were foreseeable are questions of fact"]; *Brown v. Grimes* (2011) 192 Cal.App.4th 265, 278 ["'[t]he determination whether a material breach has occurred is generally a question of fact'"].)

Finally, there were factual issues on the element of damages that precluded the trial court from summarily adjudicating the first and the fifth causes of action. (See *Paramount Petroleum Corp. v. Superior Court* (2014) 227 Cal.App.4th 226, 243 ["summary judgment or adjudication improper where amount of damages raises factual issue"]; *Department of Industrial Relations v. UI Video Stores, Inc.* (1997) 55 Cal.App.4th 1084, 1097 [same].) As noted, both sides submitted declarations by expert witnesses, and the court rejected the method used by Streit's expert and adopted the method used by the insurers' expert. Perhaps this was something the court could have done in the damages phase of a bifurcated trial, but not as part of a damages phase of a hearing on a motion for summary adjudication. (See *Alvis v. County of Ventura* (2009) 178 Cal.App.4th 536, 539 ["[i]n summary judgment or adjudication motions, conflicting declarations from experts on opposing sides usually establish a triable issue of fact"]; *People ex rel. Dept. of Transportation v. Clauser/Wells Partnership* (2002) 95 Cal.App.4th 1066, 1083 [whether to apply an expert's "methodology was a factual question for the jury"];

Darling v. Caterpillar Tractor Co. (1959) 171 Cal.App.2d 713, 721 ["the weight to be accorded to conflicting expert testimony is primarily a question for the trier of fact"]; see also *EHP Glendale, LLC v. County of Los Angeles* (2011) 193 Cal.App.4th 262, 276 ["'[t]he actual weighing of conflicting evidence by the factfinder is a process which can never take place in the context of a summary judgment motion'"].)

In addition, one of the most important issues at the damages phase of the hearing was what the parties refer to as the "effective date issue." This issue arose from the fact that, when a Farmers insured cancels a policy, the insured can sometimes choose an effective date of cancellation that is earlier than the notice of cancellation or surrender date, making it a "retroactive cancellation." The expert for the insurers calculated this was a $2.6 million issue for Fire Insurance Exchange and a $2 million issue for Mid-Century Insurance. Streit and Lucan argued for the effective date, Fire Insurance Exchange and Mid-Century Insurance argued for the notice of cancellation date. There was evidence the insurers used the effective date, not the cancellation date, to calculate the short rate return of premium. Farmers submitted evidence (and concedes) it allowed some policyholders to make their cancellations retroactive (i.e., the effective date of cancellation was prior to the date the insured gave notice of the cancellation), but did so only as a favor or accommodation to its customers and always intended to use the cancellation date in calculating a return of premium for a canceled policy. Whether Farmers used the effective date or the cancellation date to calculate returns of premiums was a disputed factual issue the court should not have resolved on summary adjudication. The trial court erred in ruling on summary adjudication, "Farmers wins the 'Effective Date' issue."

C. *The Trial Court Properly Denied Farmers' Motion for Summary Adjudication*

As noted, Farmers also moved for summary adjudication on the first and fifth causes of action. The trial court properly denied that motion because, as discussed, there were factual issues on both of those causes of action.

Farmers argues the trial court should have granted its motion for summary adjudication because the language regarding the short rate return of premium is "consistent with section 2071" and "modeled" after that statute. We rejected this argument in *Streit I*. (See *Streit I*, 2012 WL 6623682, at p. 10, fn. 9 [Farmers' "reliance on section 2071 is misplaced"].) Moreover, even if the use of the term "short rate" in Farmers' policies is the same as the use of the term in section 2071, that does not answer the question whether Farmers adequately disclosed, as required by other statutes in the Insurance Code and the Civil Code, what the term meant and how Farmers used it to calculate a return of premium. Farmers' companion argument that "'short rate' cannot reasonably be interpreted to mean 'prorated'" because the policies contain both terms similarly does not support summary adjudication in favor of Farmers. Whether Farmers adequately disclosed and explained that short rate did not mean pro rata does not determine whether Farmers adequately disclosed and explained what short rate meant and how Farmers used it to calculate a return of premium.

Farmers also argues the "'short rate' cancellation provision is an enforceable, contractual 'open term'" that "gives one of the contracting parties the discretion to determine certain items such as purchase price, commission rates or, in this case, premium refund amount." An open term is a contractual term that gives a party to a contract the unilateral discretion to set the term,

although the party filling in the open term must exercise that discretion "within the standard of good faith and fair dealing." (*Lazar v. Hertz Corp.* (1983) 143 Cal.App.3d 128, 141; see *Third Story Music, Inc. v. Waits* (1995) 41 Cal.App.4th 798, 804.)

Farmers forfeited this argument by not raising it in the trial court. (See *In re Marriage of Harris* (2007) 158 Cal.App.4th 430, 440 ["[n]ew theories of defense may not be raised for the first time on appeal" because "it would be unfair to both the opposing litigant and the trial court to allow a party to adopt a new theory not explored below"]; accord, *Nellie Gail Ranch Owners Assn. v. McMullin* (2016) 4 Cal.App.5th 982, 997; see also *Federal Deposit Ins. Corp. v. Dintino* (2008) 167 Cal.App.4th 333, 355 [party moving for summary judgment forfeited argument by not making it in the trial court "and may not now raise it on appeal as a basis to challenge the trial court's denial of his motion for summary judgment"].) Although a reviewing court has discretion to consider a new issue on appeal if it involves a question of law (*C9 Ventures v. SVC-West, L.P.* (2012) 202 Cal.App.4th 1483, 1492; *Quantification Settlement Agreement Cases* (2011) 201 Cal.App.4th 758, 813; *Phillips v. TLC Plumbing, Inc.* (2009) 172 Cal.App.4th 1133, 1141), exercising such discretion is not appropriate here because whether Farmers breached the implied covenant of good faith and fair dealing, which limits any discretion Farmers may have had, is a question of fact (*Mt. Hawley Ins. Co. v. Lopez* (2013) 215 Cal.App.4th 1385, 1424), and Farmers did not move for summary adjudication on Streit and Lucan's cause of action for breach of the implied covenant.

DISPOSITION

The judgment (to the extent it is one) is reversed. The trial court is directed to vacate its order granting the motion for summary adjudication by Streit and Lucan and to enter a new order denying that motion. The order denying Farmers' motion for summary adjudication is affirmed. The parties are to bear their costs on appeal.

SEGAL, J.

We concur:

PERLUSS, P. J.

ZELON, J.