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28UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ALLSTATE INSURANCE COMPANY,

No. C-10-0077 EMC

Plaintiff,

v.

RICHARD BARNETT, *et al.*,

Defendants.

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION TO DISMISS
COUNTERCLAIMS****(Docket No. 74)**

Plaintiff Allstate Insurance Company initiated this lawsuit against Defendants Richard Barnett and Mario Alexander. Previously, Allstate had issued a homeowners insurance policy to Mr. Barnett. While the policy was in place, Mr. Alexander (who has now been dismissed from the case, see Docket No. 59 (order)) was allegedly injured as a result of being shot by Mr. Barnett. Mr. Alexander thus filed an action against Mr. Barnett in state court. Mr. Barnett tendered defense of this underlying action to Allstate, which eventually accepted subject to a reservation of rights. In its claims, Allstate has asked for a declaration that it has no duty to defend or indemnify Mr. Barnett. In turn, Mr. Barnett has filed counterclaims against Allstate, including claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and intentional infliction of emotional distress. Currently pending before the Court is Allstate's motion to dismiss the counterclaims. Having considered the parties' briefs and the oral argument of counsel, the Court hereby **GRANTS** in part and **DENIES** in part Allstate's motion.

1 I. DISCUSSION

2 Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss based on the
3 failure to state a claim upon which relief may be granted. *See* Fed. R. Civ. P. 12(b)(6). A motion to
4 dismiss based on Rule 12(b)(6) challenges the legal sufficiency of the claims alleged. *See Parks*
5 *Sch. of Bus. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). In considering such a motion, a court
6 must take all allegations of material fact as true and construe them in the light most favorable to the
7 nonmoving party, although “conclusory allegations of law and unwarranted inferences are
8 insufficient to avoid a Rule 12(b)(6) dismissal.” *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir.
9 2009). While “a complaint need not contain detailed factual allegations . . . it must plead ‘enough
10 facts to state a claim to relief that is plausible on its face.’” *Id.* “A claim has facial plausibility when
11 the plaintiff pleads factual content that allows the court to draw the reasonable inference that the
12 defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); *see*
13 *also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). “The plausibility standard is not akin to
14 a ‘probability requirement,’ but it asks for more than sheer possibility that a defendant acted
15 unlawfully.” *Id.*

16 In the instant case, Mr. Barnett has asserted the following causes of action against Allstate:

- 17 (1) Breach of contract.
- 18 (2) Breach of the implied covenant of good faith and fair dealing.
- 19 (3) Intentional infliction of emotional distress.
- 20 (4) Negligent misrepresentation.
- 21 (5) Violation of 42 U.S.C. § 1983 (Second Amendment).
- 22 (6) Declaratory relief (Second Amendment).
- 23 (7) Violation of Fair Claims Practice Settlement Act.
- 24 (8) Violation of California Business & Professions Code § 17200.

25 Allstate moves for a dismissal of each of the claims.

26 A. Failure to Oppose

27 As a preliminary matter, the Court takes note that Mr. Barnett has failed to substantively
28 oppose Allstate’s motion to dismiss three of the causes of action, namely, the claims for violation of

1 42 U.S.C. § 1983 (Second Amendment); declaratory relief (Second Amendment); and violation of
2 the Fair Claims Practice Settlement Act.

3 Mr. Barnett tries to excuse his failure, asserting that, “[d]ue to the time constraints created by
4 the fact that this court issued a stay and created a very short time frame thereunder to conduct
5 discovery, [he] has not had time to respond” with respect to these causes of action. Opp’n at 13.
6 Mr. Barnett also asks for an enlargement of time to respond with respect to these causes of action.

7 Mr. Barnett’s request for an enlargement of time is denied. Allstate filed the motion to
8 dismiss on April 21, 2011, setting the motion for hearing on June 8, 2011. Given the June 8 hearing
9 date, Mr. Barnett did not have to file his opposition – and in fact did not file his opposition – until
10 May 18, 2011. Thus, he had almost one month to prepare an opposition to the motion to dismiss,
11 which is much more than the typical two-week period to respond to a motion provided for by the
12 Civil Local Rules.

13 As to the merits of the claims, the Court agrees with Allstate that dismissal is warranted for
14 failure to state a claim for relief. With respect to the § 1983 and declaratory relief counterclaims,
15 both are based on an asserted violation of the Second Amendment. See U.S. Const., amend. II
16 (providing that “[a] well regulated Militia, being necessary to the security of a free State, the right of
17 the people to keep and bear Arms, shall not be infringed”). But there does not appear to be any
18 authority supporting Mr. Barnett’s position that a claimed violation of the Second Amendment may
19 be brought against a private actor such as Allstate. For example, § 1983 imposes civil liability on an
20 individual only where he or she acted under color of state law. See *Franklin v. Fox*, 312 F.3d 423,
21 444 (9th Cir. 2002) (noting that “plaintiffs do not enjoy Fourteenth Amendment protections against
22 ‘private conduct abridging individual rights’”). “A private individual’s action may be ‘under color
23 of state law’ where there is ‘significant’ state involvement in the action” or the individual’s action is
24 otherwise “‘fairly attributable’” to the state. *Id.* In the instant case, there are no allegations in Mr.
25 Barnett’s counterclaims that suggest there was any state involvement behind the conduct of Allstate
26 complained of herein.

27 As for the claim for violation of the Fair Claims Practice Settlement Act, Mr. Barnett’s
28 position is, in essence, that Allstate violated his rights because, under state law regulations, Allstate

1 should have agreed to defend him within 40 days after tender, not 72 days. *See* 10 Cal. Code Regs.
2 § 2695.7(b) (providing that, “[u]pon receiving proof of claim, every insurer . . . shall immediately,
3 but in no event more than forty (40) calendar days later, accept or deny the claim, in whole or in
4 part”). But, as Allstate points out, California courts have held that “neither the Insurance Code nor
5 regulations adopted under its authority provide a private right of action.” *Rattan v. United Servs.*
6 *Auto. Ass’n*, 84 Cal. App. 4th 715, 724 (2001); *see also City of Hollister v. Monterey Ins. Co.*, 165
7 Cal. App. 4th 455, 488 (2008) (noting that “violations of the fair claims practices regulations do not
8 give rise to a private right of action”); *Raisin Bargaining Ass’n v. Hartford Cas. Ins. Co.*, 715 F.
9 Supp. 2d 1079, 1091 (E.D. Cal. 2010) (taking note of plaintiffs’ claims for relief for alleged
10 violation of § 2695.7 and California Insurance Code § 780 and then stating that “California law does
11 not provide a private right of action for violations of California Insurance Code section 780 or the
12 attendant regulations”).

13 Accordingly, the Court dismisses with prejudice the § 1983, declaratory relief (which is
14 based on the constitutional claim), and Fair Claims Practice causes of action.

15 B. Breach of Contract

16 The Court now turns to the first of the two main claims asserted by Mr. Barnett, *i.e.*, the
17 claim for breach of contract. While Mr. Barnett did not, in his pleading, specify exactly what acts
18 constituted the alleged breach, *see* Countercl. ¶ 30 (alleging breach on the part of Allstate “by doing
19 each and every of the things alleged in paragraphs 1-27 of this Answer to Complaint and
20 Counterclaim”), his opposition to the motion to dismiss clarified matters. Based on the opposition,
21 it appears that Mr. Barnett is asserting breach because (1) Allstate delayed in agreeing to defend
22 him; (2) Allstate failed to defend him by not paying all of his independent counsel’s fees
23 (approximately \$20,000); and (3) he had to pay out-of-pocket some of his defense costs. *See* Opp’n
24 at 6-7.

25 The first and third claims are related – *i.e.*, Mr. Barnett’s contention is that, because Allstate
26 delayed in agreeing to defend him, he had to personally pay out-of-pocket some defense costs before
27 Allstate agreed to defend. At the hearing, Allstate argued that this theory was not articulated in Mr.
28 Barnett’s counterclaims, but the Court does not agree. In his counterclaims, Mr. Barnett expressly

1 alleges as follows: “On 10-22-09, having not heard anything from Allstate [after his tender] Barnett
2 filed an answer to Alexander’s complaint in Humboldt County Superior Court causing Barnett to
3 incur legal fees and filing expenses due to Allstate’s failure to respond to Barnett’s tender.”
4 Countercl. at 9.

5 To the extent Allstate maintains there is no “authority holding that a mere delay in accepting
6 the insured’s defense is a breach of contract,” Reply at 3, the Court does not agree. At the hearing,
7 Mr. Barnett pointed to *The Housing Group v. PMA Capital Insurance Co.*, 193 Cal. App. 4th 1150
8 (2011), where the court stated that

9 [a]n insurer’s “duty to defend arises when tender is made. It obligates
10 the insurer, unless no part of any claim is potentially covered, to fund
11 a defense to minimize the insured’s liability.” “To defend
12 meaningfully, the insurer must defend immediately.” “Imposition of
13 an immediate duty to defend is necessary to afford the insured what it
14 is entitled to: the full protection of a defense on its behalf.” “If the
15 courts did not impose an *immediate* defense obligation upon a showing
16 of a ‘potential for coverage,’ thereby relieving the insured from the
17 burden of financing his own defense and then having to sue the insurer
18 for reimbursement, the premiums paid by the insured would purchase
19 nothing more than a lawsuit.

20 *Id.* at 1155-56 (emphasis in original); *see also Intergulf Dev. LLC v. Superior Court*, 183 Cal. App.
21 4th 16 (2010) (involving delay by insurer in agreeing to accept defense with reservation of right and
22 not responding to request to appoint independent counsel).

23 In any event, in the instant case, there was more than just “mere delay,” at least as pled by
24 Mr. Barnett. Mr. Barnett contends that, in his initial letter tendering the defense to Allstate, he told
25 Allstate that a responsive pleading was due by a certain date but Allstate failed to respond prior to
26 that day, thus causing him to incur defense costs (costs that Allstate did not pay). Mr. Barnett then
27 sent a second tender letter, but Allstate still failed to respond more than a month later. *See*
28 Countercl. at 8-9. When Allstate finally did respond, it was well past the time frame required by
regulations.¹

Moreover, the Court also holds that Mr. Barnett has adequately stated a claim for relief based

¹ Even though Allstate’s non-compliance with the regulations is not per se actionable since no private right of action is provided under the Insurance Code and regulations as noted above, that does not mean its failure to comply is not relevant to Mr. Barnett’s claim of breach of contract.

1 on his allegation that Allstate failed to pay all of his independent counsel’s fees (approximately
2 \$20,000). Allstate implicitly recognizes such by arguing that “that claim has already been referred
3 to arbitration by this Court for resolution.” Mot. at 4. But the fact that the arbitrator will determine
4 the amount of fees that should be paid to independent counsel does not answer the question of
5 whether Allstate did in fact have a duty to defend (*i.e.*, the coverage issue). If Allstate did have a
6 duty, then, if Allstate failed to pay all *Cumis* counsel fees, it would be in breach of its contractual
7 obligation.

8 The Court thus denies Allstate’s motion to dismiss the claim for breach of contract.

9 C. Breach of Implied Covenant of Good Faith and Fair Dealing

10 The other main claim asserted by Mr. Barnett is breach of the implied covenant of good faith
11 and fair dealing. Although this claim is not the model of clarity, Mr. Barnett contends the
12 allegations establish bad faith because (1) Allstate delayed in accepting his defense; (2) Allstate has
13 refused to pay for *Cumis* fees incurred in the underlying action; (3) Allstate initiated this coverage
14 action for declaratory relief causing Mr. Barnett to incur double fees; and (4) Allstate was refusing
15 to participate in settlement negotiations for the underlying action in the attempt to get a ruling in this
16 case first that there is no coverage.

17 In his opposition to Allstate’s motion to dismiss, Mr. Barnett does not appear to pursue the
18 fourth theory, presumably because Allstate did eventually settle the underlying action and for less
19 than the policy limits. Mr. Barnett, however, is still asserting the other three theories.

20 On the third theory of bad faith, the Court finds that it is not fairly raised by the allegations in
21 the counterclaims. In any event, even if it were, the mere filing of a coverage action does not give
22 rise to a bad faith claim. In *Dalrymple v. United States Automobile Association*, 40 Cal. App. 4th
23 497 (1995), the court stated that,

24 [a]bsent other facts, the mere filing of an action to declare the insurer’s
25 rights and duties relative to an insurance policy cannot form the basis
26 of breach of the duty of good faith and fair dealing. Assuming the
27 insurer has not otherwise abandoned, compromised or rejected the
insurer’s claim, an action seeking declaratory relief does not in any
way frustrate the insured’s enjoyment of his contract rights.

28 *Id.* at 519 (internal quotation marks omitted). Mr. Barnett argues that there are “other facts” here

1 because it was clear that there was coverage for the Alexander lawsuit, and thus there was no basis
2 for the declaratory relief action. The Court rejects Mr. Barnett’s position that coverage was in fact
3 clear. In denying Allstate’s motion for summary judgment, the Court noted that there was a genuine
4 dispute of material fact as to whether Mr. Barnett intended to shoot Mr. Alexander. Indeed, it was a
5 close call whether there was sufficient evidence to create a disparity issue of fact which prevented
6 judgment as a matter of law for Allstate. While not entitled to summary judgment, Allstate had a
7 substantial basis for bringing the declaratory relief action and filing the motion for summary
8 judgment.

9 The Court further notes that California Civil Code § 47(b) generally immunizes an insurer
10 from liability for seeking declaratory relief from its insured. *See Old Republic Ins. Co. v. FSR*
11 *Brokerage*, 80 Cal. App. 4th 666, 685 (2000) (noting that, “in some circumstances the implied
12 covenant continues to protect the insured’s interests in the policy after litigation has begun between
13 the insured and the insurer, despite the absolute litigation privilege found in Civil Code section 47”
14 – *i.e.*, where there is malicious prosecution). *See* Docket No. 51 (Order at 11 n.5). Mr. Barnett fails
15 to respond to Allstate’s assertion of § 47(b).

16 The only questions remaining for the Court, therefore, are whether Mr. Barnett’s allegations
17 that Allstate delayed in accepting his defense and that Allstate failed to pay all of his *Cumis* counsel
18 fees are enough to support his claim for bad faith. In making this assessment, the Court must bear in
19 mind that, to prevail on a claim for bad faith, a plaintiff must establish only the following: “(1)
20 benefits due under the policy must have been withheld; and (2) the reason for withholding benefits
21 must have been unreasonable or without proper cause.” *Id.* at 512 (internal quotation marks
22 omitted). In the case at bar, Mr. Barnett has alleged that, when Allstate delayed in defending him,
23 he had to pay defense costs out-of-pocket – costs which Allstate still has not paid and for no
24 defensible reason. Mr. Barnett has also alleged that Allstate has not paid all of his *Cumis* counsel
25 fees, again, for no defensible reason.

26 It is fair to imply from the counterclaims that Allstate allegedly failed to undertake its
27 obligation to defend promptly because it was more interested in avoiding coverage and thus put its
28 own interests above that of Mr. Barnett. *See Bosetti v. United States Life Ins. Co. in City of N.Y.*,

1 175 Cal. App. 4th 1208, 1235 (2009) (stating that, “to ‘fulfill its implied obligation [of good faith
2 and fair dealing], an insurer must give at least as much consideration to the interests of the insured as
3 it gives to its own interests”). This is arguably evidenced by, *inter alia*, the alleged delay in
4 accepting the defense (with or without reservation) to the Alexander suit and the failure to pay all
5 the costs of defense (which Mr. Barnett alleges he had to incur personally in defending the
6 Alexander suit), as well as the alleged delay in settling the Alexander suit in order to first exhaust its
7 attempt to obtain a declaration of no coverage. *See* Countercl. at 12-13. While Allstate disputes any
8 assertion of bad faith, Mr. Barnett has adequately stated a claim for relief for purposes of the instant
9 motion to dismiss.

10 At the hearing, Allstate took the position that, at the very least, its decision to dispute the
11 amount of *Cumis* counsel fees was objectively reasonable. In support of this position, Allstate cited
12 an unpublished California state court opinion. *See Behnke v. State Farm General Ins. Co.*, No.
13 D056898, 2011 WL 2162894, at *18 (Cal. Ct. App. May 31, 2011). Even assuming this Court could
14 consider *Behnke* as potentially persuasive authority, *but see* Cal. Rule of Court 8.1115 (generally
15 barring citation of unpublished opinions, with limited exceptions not applicable here), the case does
16 nothing to advance Allstate’s position at this juncture of the proceedings. In *Behnke*, the court
17 determined that the insurer’s decision to dispute the amount of *Cumis* counsel fees was objectively
18 reasonable in large part because the arbitrator ultimately ordered the insurer to pay less than what
19 was billed. *See id.* at *18. Here, the results of the arbitration are not yet known, the arbitration not
20 having been completed. Moreover, Mr. Barnett alleges there was no good reason not to pay all the
21 *Cumis* fees.

22 The Court thus denies Allstate’s motion to dismiss the bad faith claim.

23 D. Intentional Infliction of Emotional Distress

24 To prevail on a claim for intentional infliction of emotional distress, a plaintiff must establish
25 the following: “(1) extreme and outrageous conduct by the defendant with the intention of causing,
26 or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff’s suffering
27 severe or extreme emotional distress; and (3) actual and proximate causation of the emotional
28 distress by the defendant’s outrageous conduct.” *Catsouras v. Department of California Highway*

1 *Patrol*, 181 Cal. App. 4th 856, 874 (2010) (internal quotation marks omitted). Courts have
2 emphasized that extreme and outrageous conduct is conduct that “go[es] beyond all possible
3 [bounds] of decency, and [is] regarded as atrocious, and utterly intolerable in a civilized
4 community.” *Mintz v. Blue Cross of Cal.*, 172 Cal. App. 4th 1594, 1608 (2009) (internal quotation
5 marks omitted).

6 Behavior may be considered outrageous if a defendant (1) abuses a
7 relation or position which gives him power to damage the plaintiff’s
8 interest, (2) knows the plaintiff is susceptible to injury through mental
9 distress; or (3) acts intentionally or unreasonably with the recognition
10 that the acts are likely to result in illness through mental distress.^{2]}

9 *Hernandez v. General Adjustment Bureau*, 199 Cal. App. 3d 999, 1007 (1988) (internal quotation
10 marks omitted). “In the usual case, outrageousness is a question of fact,” *Spinks v. Equity*
11 *Residential Briarwood Apartments*, 171 Cal. App. 4th 1004, 1045 (2009). However, there is no
12 liability where an insurer “simply delayed or denied insurance benefits.” *Mintz*, 172 Cal. App. 4th at
13 1608 (internal quotation marks omitted).

14 In the instant case, Allstate argues that the claim for intentional infliction should be
15 dismissed because Mr. Barnett has failed to include allegations establishing extreme and outrageous
16 conduct on the part of Allstate. In his counterclaims, Mr. Barnett alleges that Allstate’s conduct was
17 extreme and outrageous for the following reasons: (1) because Allstate knew that there was coverage
18 but only agreed to defend under a reservation of rights; (2) because Allstate knew he was especially
19 vulnerable, both emotionally and financially; and (3) because Allstate and he had a special
20 relationship, *i.e.*, insurer-insured. *See* Countercl. ¶¶ 41-42.

21 The first argument is without merit. As Allstate points out, it is difficult to say that it goes
22 beyond all bounds of decency for an insurer to question coverage in a situation such as this where
23 the insured volitionally fired a gun in the general direction of the victim. *See also* Docket No. 51
24 (Order at 11 n.5) (denying Allstate’s motion for summary judgment because there was a genuine
25 dispute as to whether Mr. Barnett intended to shoot Mr. Alexander).

26
27 _____
28 ² This standard comes from the Restatement (Second) of Torts. *See Agarwal v. Johnson*, 25
Cal. 3d 932, 946 (1979) (citing, *inter alia*, § 46 of the Restatement (Second) of Torts), *overruled on*
other grounds by White v. Ultramar, 21 Cal. 4th 563 (1999).

1 As for the second argument, it is a closer call. Mr. Barnett claims that he was peculiarly
2 susceptible to emotional distress because he was facing the prospect of an embarrassing trial, but
3 that is not the kind of vulnerability contemplated by either the Restatement or California case law.
4 Both the Restatement and California case law reflect that a person is peculiarly susceptible to
5 emotional distress where, *e.g.*, he or she suffers from a physical or mental condition or peculiarity.
6 *See* Rest. (2d) of Torts § 46, cmt. f; *McDaniel v. Gile*, 230 Cal. App. 3d 363, 372 (1991). For
7 example, in *Hernandez*, 199 Cal. App. 3d at 999, the plaintiff was a sales clerk who

8 submitted a claim for workers' compensation benefits, based upon the
9 psychological harm caused by crimes committed at the convenience
10 store in which she had worked. [She] gave the insurance adjuster
11 "medical records and reports detailing her serious medical and
12 psychiatric problems which included major depression, nightmares,
13 anxiety and repeated suicide attempts." The claimant alleged the
14 adjuster knew of [this] fragile emotional condition, and that she
provided the sole economic support for her three children. Despite
this knowledge, and the lack of any dispute as to the claimant's
entitlement to benefits, the adjuster consistently delayed disability
payments. Based on these allegations, the trial court concluded the
claimant stated a cause of action for intentional infliction of emotional
distress.

15 *Hailey v. California Physicians' Serv.*, 158 Cal. App. 4th 452, 475 (2007). Mr. Barnett's emotional
16 condition based on the prospect of an embarrassing trial is hardly comparable to the fragile
17 emotional condition of the plaintiff in *Hernandez*.

18 Mr. Barnett also claims susceptibility to emotional distress based on his economic
19 vulnerability. As alleged in his counterclaims, the potential judgment for severely injuring Mr.
20 Alexander "would financially ruin him." Countercl. ¶ 41. This vulnerability argument is stronger
21 than the one above. In *Hernandez*, there was an economic vulnerability component, and there have
22 been similar components in other cases as well. *See, e.g., Wallis v. Superior Court*, 160 Cal. App.
23 3d 1109 (1984) (indicating that the plaintiff was in an extremely vulnerable position because of his
24 age, lack of work skills, and financial responsibilities). Mr. Barnett claims Allstate knew a potential
25 judgment would financially ruin him. To be sure, Mr. Barnett has not presented any case authority
26 holding economic vulnerability by itself would be enough to establish outrageous conduct by an
27 insurance company. In both *Hernandez* and *Wallis*, for example, there was more than just economic
28 vulnerability supporting the claim of outrageousness. But neither side has cited any authority

1 holding economic vulnerability can never establish outrageous conduct, or at least serve as a factor
2 in the calculus, particularly in the context of the third argument discussed below.

3 Mr. Barnett’s third argument – *i.e.*, that Allstate acted outrageously given its special
4 relationship with Mr. Barnett – is enough to support his claim for intentional infliction of emotional
5 distress. Here, *Bogard v. Employers Casualty Co.*, 164 Cal. App. 3d 602 (1985), is instructive. In
6 *Bogard*, the insurer advised its insureds that they were not represented by counsel hired by the
7 insurer in the settlement aspect of the case and that they should retain their own counsel at their own
8 cost. The court stated that this

9 was an abuse of a relation which gave [the insurer] power to damage
10 [its insureds’] interest. Such conduct, by virtue of the position of
11 power [the insurer] enjoyed by controlling the litigation in the
underlying action, and in light of [the insurer’s] duty to defend, was
outrageous.

12 By informing [the insureds] that counsel hired by [the insurer] to
13 defend [the insureds’] interests did not represent [them] in a significant
14 aspect of the case, [the insurer] undermined the very security that the
insureds paid for when they took out an insurance policy calling for
15 the insurer to defend them in a lawsuit relating to the subject matter of
the policy. While the insurer “is privileged, in pursuing its own
16 economic interests, to assert in a permissible way its legal rights and to
communicate its position in good faith to its insured even though it is
substantially certain that in so doing emotional distress will be
17 caused,” such a privilege does not insulate conduct which negates the
insurer’s duty to defend.

18 *Id.* at 616-17. If Allstate – as Mr. Barnett contends – delayed in defending the Alexander suit,
19 delayed in settling the suit, and failed to pay *Cumis* counsel fees without good reason by putting its
20 interests ahead of Mr. Barnett’s interests, then Allstate severely compromised its duty to defend
21 without good faith. Again, although Allstate disputes these allegations, Mr. Barnett has adequately
22 stated a claim for intentional infliction of emotional distress.

23 E. Negligent Misrepresentation

24 “The elements of negligent misrepresentation include: (1) misrepresentation of a past or
25 existing material fact, (2) without reasonable ground for believing it to be true, (3) with intent to
26 induce another’s reliance on the misrepresentation, (4) ignorance of the truth and justifiable reliance
27 on the misrepresentation by the party to whom it was directed, and (5) resulting damage.” *Glenn K.*
28

1 *Jackson Inc. v. Roe*, 273 F.3d 1192, 1201 n.2 (9th Cir. 2001). In its motion to dismiss, Allstate
2 argues that Mr. Barnett has failed to allege both reliance and damages.

3 In evaluating this argument, the Court takes note that, in his counterclaims, Mr. Barnett
4 alleges that the misrepresentation occurred was when Allstate stated that it would provide a defense
5 under reservation of rights. *See* Countercl. ¶ 51. However, in his opposition, Mr. Barnett has
6 changed his tune and argues that the misrepresentation took place when Allstate advertised on its
7 website that, in essence, it would provide insurance coverage for accidents. *See* Opp’n at 11.

8 Even if the Court were to take into account the new misrepresentation argument made in the
9 opposition brief, Mr. Barnett’s revised theory fails to state a claim for relief. First, Allstate’s
10 statements in its website are not really statements of a past or existing fact. Second, Mr. Barnett has
11 made no assertion in his opposition that Allstate made the statement that it would provide insurance
12 coverage for accidents without reasonable ground for believing it to be true. The counterclaim
13 contains no specific facts making this claim plausible as required under *Twombly* and *Iqbal*. Finally,
14 to the extent Mr. Barnett argues that Allstate made a misrepresentation because it never intended to
15 provide coverage for the negligence of its insureds, *see* Opp’n at 11, Allstate correctly points out
16 that there is a difference between negligence and an accident. *See American Int’l Bank v. Fidelity &*
17 *Deposit Co.*, 49 Cal. App. 4th 1558, 1573 (1996) (stating that “[n]egligent’ and ‘accidental’ are not
18 synonymous”). Allstate never made a representation that it would provide coverage for negligence;
19 rather, it only indicated that it would cover accidents (*i.e.*, “‘accidentally causing injury’”).
20 Countercl. at 2 (quoting Allstate’s website). In view of the undisputed language of the policy, Mr.
21 Barnett’s theory does not state a plausible claim of misrepresentation.

22 The Court therefore dismisses the claim for negligent misrepresentation.

23 F. Violation of § 17200 (Fraudulent Sales Practice)

24 Finally, Mr. Barnett has asserted a § 17200 counterclaim predicated on Allstate’s allegedly
25 false statements in its website that it would, in essence, provide insurance coverage for accidents. In
26 its papers, Allstate contends that the claim should be dismissed because Mr. Barnett has no basis for
27 seeking injunctive relief since he has an adequate remedy at law. *See Prudential Home Mortg. Co.*
28 *v. Superior Court*, 66 Cal. App. 4th 1236, 1249 (1998) (holding that statutory relief under the UCL

1 “is subject to fundamental equitable principles, including inadequacy of the legal remedy”). In his
2 opposition, Mr. Barnett fails to address this argument. Moreover, to the extent Mr. Barnett is
3 seeking an injunction stopping Allstate “from contending that it’s [sic] homeowners insurance
4 policies do not provide coverage related to the negligence of it’s [sic] insured’s,” Opp’n at 13, then –
5 as Allstate argues – he has an adequate remedy at law, *i.e.*, he can sue for breach of contract and
6 recover damages.

7 Mr. Barnett points out that he has also brought the § 17200 claim because he wants
8 restitution – namely, return of the premiums he paid. The problem here is that Mr. Barnett’s
9 counterclaims as pled do not specifically identify this relief. While this problem could be overcome
10 with an amendment, there are additional problems with the § 17200 claim that mandate dismissal.
11 For example, similar to the claim for negligent misrepresentation, Mr. Barnett has not clearly alleged
12 that Allstate made the statement that it would provide insurance coverage for accidents with
13 knowledge of the falsity of the statement. *Cf. Lazar v. Superior Court*, 12 Cal. 4th 631, 638 (1996)
14 (stating that one of the elements of the tort action of fraud is knowledge of falsity). To the extent
15 Mr. Barnett argues that Allstate made a misrepresentation because it never intended to provide
16 coverage for the negligence of its insureds, there is, as noted above, a difference between negligence
17 and an accident, and his allegations are too conclusory to satisfy *Twombly* and *Iqbal*.

18 Accordingly, the Court dismisses the § 17200 claim.

19 **II. CONCLUSION**

20 For the foregoing reasons, the Court grants in part and denies in part Allstate’s motion to
21 dismiss. The § 1983, declaratory relief, and Fair Claims Practice causes of action are dismissed with
22 prejudice. The negligent misrepresentation and § 17200 causes of action are dismissed with leave to
23 amend. Mr. Barnett may proceed with his claims for breach of contract, bad faith, and intentional
24 infliction of emotional distress, consistent with this order.

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To the extent Mr. Barnett files an amended complaint to reassert claims for negligent misrepresentation and violation of § 17200 (based on fraud), he is forewarned that, in accordance with Federal Rule of Civil Procedure 11, he must have a good faith basis for any specific allegations. Any amended complaint must be filed within 20 days of the date of this order.

This order disposes of Docket No. 74.

IT IS SO ORDERED.

Dated: June 15, 2011



EDWARD M. CHEN
United States District Judge