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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

AMERICAN STATES INSURANCE COMPANY, Plaintiff, Cross-defendant and Appellant, v. CHRISTINA RAMIREZ et al., Defendants, Cross-complainants and Respondents.	E052849 (Super.Ct.No. CIVVS703193) **OPINION**

APPEAL from the Superior Court of San Bernardino County. Steve Malone, Judge. Reversed with directions.

Horvitz & Levy, Peter Abrahams, Curt Cutting; Sedgwick, Gregory H. Halliday, Bruce D. Celebrezze, and Chelsea N. Trotter for Plaintiff, Cross-defendant, and Appellant.

Shernoff Bidart Echeverria, Michael J. Bidart, Gregory L. Bentley, and Steven M. Schuetze; the Ehrlich Law Firm and Jeffrey Isaac Ehrlich for Defendants, Cross-complainants, and Respondents.

A drunk driver caused a traffic accident that took the life of one person and severely injured two others. He was driving his own vehicle — albeit in the course of his employer's business — and he had liability coverage under his own auto insurance policy for up to $300,000. His employer's auto insurance policy, by its terms, covered only certain company vehicles listed in the policy.

The issue in this appeal is whether an objectively reasonable insured would nevertheless have expected coverage under the employer's policy, in light of an accompanying "stuffer" in which the insurer requested information about "employees who drive their own vehicles on company business . . . ." The trial court ruled that it would; it therefore required the employer's insurer to pay $5,896,675.11. Reviewing this ruling de novo, we conclude that it was erroneous. The policy itself was not ambiguous. It would have been objectively unreasonable to view the stuffer as part of the policy. Moreover, even if the stuffer was viewed as part of the policy, it would have been objectively unreasonable to understand it as broadening the coverage otherwise provided.

I

FACTUAL BACKGROUND

A. *The American States Policy*.

Hector LaBastida was the principal of HLCD, Inc. (HLCD), as well as its employee.[1]

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[1] HLCD stood for Hector LaBastida Construction and Development.

In October 2003, American States Insurance Company (American States) issued a commercial auto insurance policy (the policy) to HLCD. It was a renewal of a previous policy. The policy was 39 pages long. At trial, a copy of the policy was Exhibit 1.[2]

The declarations pages of the policy[3] stated that the policy had a liability limit of $750,000. They also stated that liability coverage (along with the other coverages provided) "will apply only to those 'autos' shown as covered 'autos.'" (Capitalization omitted.)

The declarations pages then used a system of numerical symbols (defined elsewhere in the policy)[4] to designate which coverages applied to which motor vehicles. The symbol "1" would have meant any motor vehicle. The symbol "2" would have meant all motor vehicles owned by the named insured. The symbol "9" would have meant motor vehicles not owned, leased, rented, or borrowed by the named insured — specifically including motor vehicles owned by the named insured's employees — that were used in connection with the named insured's business.

In fact, the declarations pages used the symbol "7," which was defined as motor vehicles listed in the policy for which a separate premium was paid. The declarations

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[2] Exhibit 1 included not only the policy as originally issued, which was 39 pages long, but also 13 pages of subsequent changes and amendments, for a total of 52 pages. The trial court mistakenly found that policy *when it arrived* was 52 pages long.

[3] A copy of the declarations pages are attached as Appendix A.

[4] A copy of the page defining the coverage symbols is attached as Appendix B.

pages listed two vehicles: A 1997 Ford, at premium of $1,490, and a 1998 Chevrolet, at a premium of $1,396.[5] HLCD could have chosen symbol "1" or symbol "9" coverage, but that would have entailed a higher premium.

The declarations pages also included a list of forms (by number and title) that were included in the policy.

One of the listed forms ("Company Common Policy Conditions" (capitalization omitted)) stated:

"This policy consists of:

"**Common Policy Declarations** . . . .

"**Common Policy Conditions**.

"Coverage parts consist of one or more of the following: [¶] . . . [¶]

"Commercial Automobile [¶] . . . [¶]

"Each of the coverage parts consist of:

"One or more coverage forms

"One or more coverage part conditions

"Applicable endorsements."

A second listed form ("Common Policy Conditions"(capitalization omitted)) stated, "This policy contains all the agreements between you and us concerning the

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[5] In January 2004, a 1994 International was added to the policy, for an additional premium of $1,532.89.

insurance afforded. . . . This policy's terms can be amended or waived only by endorsement issued by us and made a part of this policy."

Yet another listed form ("Business Auto Coverage Form" (capitalization omitted)) contained the insuring agreement. It provided: "We will pay all sums an 'insured' legally must pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies, caused by an 'accident' and resulting from the ownership, maintenance or use of a covered 'auto'."

All of the other listed forms were headed, "THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ CAREFULLY."

When HLCD received the policy, it was in an envelope along with various printouts, forms, and notices — what American States called "stuffers." Neither the policy pages nor the stuffer pages were fastened in any way. The stuffers were 20 pages long. At trial, a copy of the stuffers was Exhibit 2.[6]

One of the stuffers was Form 6-3124A.[7] It stated:

"IMPORTANT - PLEASE REVIEW [¶] . . . [¶]

"Dear Valued Policyholder,

"We appreciate the opportunity to write your commercial auto coverage. Please take a minute to review your policy.

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[6] Much like Exhibit 1, Exhibit 2 included not only the stuffers as originally issued, which were 20 pages long, but also one page issued in 2004.

[7] A copy of Form 6-3124A is attached as Appendix C.

"Your policy has been issued based on the drivers listing below. In order to insure that your policy is issued with the most current information, please review this list and update as necessary. *Include employees who drive their own vehicles on company business* or anyone who will drive an insured vehicle. Contact your [i]ndependent agent to advise of any changes.

"Also remember to report all newly hired employees to your agent during the year.

"Thank you for your business!" (Italics added; boldface omitted.)

The only driver listed in Form 6-3124A was LaBastida.

Form 6-3124A was a "generic letter" that American States sent with every renewal of an auto insurance policy. It requested information about employees who drive their own vehicles because some American States policies — though not HLCD's — provided coverage for employee-owned vehicles (i.e., symbol "9"-type coverage).

Two of the stuffers stated, "This is a notice only. The full and exact contract is contained in the policy." (Capitalization omitted.) However, most — including Form 6-3124A — did not.

B. *The Wawanesa Policy*.

LaBastida had a personal auto insurance policy issued by Wawanesa Insurance Company (Wawanesa). That policy was subject to a limit of $300,000. The Wawanesa policy covered the 2003 Hummer that LaBastida personally owned.

C. *The Accident*.

In May 2004, LaBastida, while driving drunk, hit another car. The driver of the other car — Martin Ortiz, Jr. — was killed. Two passengers in the other car — Christina Ramirez and her daughter, Alizah Ramirez — were injured. LaBastida was driving his personal vehicle, the 2003 Hummer. However, he was acting within the course and scope of his employment.

D. *The Underlying Actions*.

In 2005, Christina Ramirez, Alizah Ramirez, and Patricia Cordes (the mother of Martin Ortiz, Jr.) (collectively the injured parties) filed actions against HLCD and LaBastida (the underlying actions). HLCD and LaBastida tendered the defense to Wawanesa. Wawanesa accepted the tender and provided a defense.

HLCD and LaBastida also tendered the defense to American States. American States denied coverage, on the ground that the Hummer was not covered under its policy.

In 2007, the injured parties offered to settle their claims within the policy limits. American States refused this settlement offer, again on the ground that its policy did not provide coverage.

In 2008, the underlying actions resulted in a judgment in favor of the injured parties and against HLCD and LaBastida for a total of $6,196,675.11. Wawanesa paid

the injured parties its policy limits — $300,000.[8] Meanwhile, HLCD and LaBastida assigned their rights against American States to the injured parties.

II

PROCEDURAL BACKGROUND

In 2007, American States filed this action against the injured parties and others for declaratory relief. The injured parties filed a cross-complaint against American States and others for breach of contract and for declaratory relief.[9] By the time the case went to trial, the only parties were American States and the injured parties.

All of the parties entered into stipulations regarding the issues, the law, and the facts. In addition, two witnesses testified at trial: Lawrence Signaigo, Jr., the person most knowledgeable regarding American States's underwriting practices, and Michael Carroll, the person most knowledgeable regarding American States's denial of the claim.

The trial court then rendered a statement of decision. It found that the "average insured" would not have known "which documents were the policy and which documents were not." Hence, "the circumstances of this case require an examination of all the documents contained in the envelope to determine what a reasonable insured would

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[8] This fact appears in the trial court record only as an allegation of the Ramirezes' cross-complaint. Thus, ordinarily, we could not consider it as true. In their briefs, however, both sides represent that it is, in fact, true. We deem this tantamount to a stipulation.

[9] The injured parties also asserted a cause of action for bad faith. The trial court, however, granted summary judgment on this cause of action against the injured parties and in favor of American States.

expect . . . ." It further found that Form 6-3124A was ambiguous but that one "reasonable and plausible interpretation . . . is that employees who drive their own vehicles on company business are covered under the policy." It concluded that American States had a duty to defend.

Accordingly, the trial court entered judgment awarding the injured parties $5,896,675.11 (i.e., the $6,196,675.11 arbitration award, minus the $300,000 already paid by Wawanesa), against American States.[10]

III

DISCUSSION

A. *General Legal Principles.*

One aspect of this case is somewhat unusual — the parties entered into stipulations not only of fact, but also of law. By and large, these stipulations of law appear correct.[11]

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[10] In the trial court, American States argued that, because the trial court had granted summary adjudication on the bad faith cause of action, the injured parties could recover only the policy limits, not the total amount of their judgment. It has not reiterated this argument on appeal.

[11] One stipulation was that "LaBastida's subjective intent or understanding is inadmissible and irrelevant . . . ." It is not entirely clear that this is, in fact, the law. Certainly, when a policy is *unambiguous*, the insured's subjective belief that coverage *exists* is unreasonable and therefore not controlling. (E.g., *Qualcomm, Inc. v. Certain Underwriters at Lloyd's, London* (2008) 161 Cal.App.4th 184, 193-194; *Havstad v. Fidelity National Title Ins. Co.* (1997) 58 Cal.App.4th 654, 660.) However, when the policy is *ambiguous*, yet both the insured and the insurer believe that coverage does *not* exist, it could be argued that there is a meeting of the minds, and the fact that a hypothetical reasonable insured would believe that coverage *does* exist becomes irrelevant.

[footnote continued on next page]

Nevertheless, "we are not bound by stipulations as to questions of law [citations] . . . ." (*Reuter v. Superior Court* (1979) 93 Cal.App.3d 332, 340; see also *People v. Castillo* (2010) 49 Cal.4th 145, 171.) Hence, we do not rely on them.

"'"'"While insurance contracts have special features, they are still contracts to which the ordinary rules of contractual interpretation apply.' [Citations.] 'The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties.' [Citation.] 'Such intent is to be inferred, if possible, solely from the written provisions of the contract.' [Citation.] 'If contractual language is clear and explicit, it governs.' [Citation.]" [Citation.]'" (*County of San Diego v. Ace Property & Casualty Ins. Co.* (2005) 37 Cal.4th 406, 415.)

"If the terms are ambiguous, we interpret them to protect '"the objectively reasonable expectations of the insured."' [Citation.] Only if these rules do not resolve a claimed ambiguity do we resort to the rule that ambiguities are to be resolved against the insurer. [Citation.]" (*Boghos v. Certain Underwriters at Lloyd's of London* (2005) 36 Cal.4th 495, 501.)

"'The policy should be read as a layman would read it and not as it might be analyzed by an attorney or an insurance expert.' [Citation.]" (*Haynes v. Farmers Ins. Exchange* (2004) 32 Cal.4th 1198, 1209.)

[footnote continued from previous page]

Fortunately, we do not need to rely on evidence of LaBastida's subjective intent. Accordingly, we need not decide this issue.

"[T]he trial court's interpretation of the insurance polic[y] in this case is subject to de novo review. [¶] The interpretation of an insurance contract, as with that of any written instrument, is primarily a judicial function. [Citation.] Unless the interpretation of the instrument turns upon the credibility of conflicting extrinsic evidence, a reviewing court makes an independent determination of the policy's meaning. [Citations.]" (*Cooper Companies v. Transcontinental Ins. Co.* (1995) 31 Cal.App.4th 1094, 1100.) There is no conflicting evidence in this case. Indeed, most of the facts were stipulated.

B. *An Objectively Reasonable Insured Would Not Have Considered Form 6-3124A to Be Part of the Policy.*

The policy was not ambiguous with respect to whether employee-owned vehicles were covered. They were not. The policy specified that it applied only to "covered 'autos.'" By using symbol "7," it specified that the only autos that were covered were those listed in the policy for which a separate premium was shown. Two specific vehicles were listed. Moreover, a separate premium was shown for each of those two vehicles. The policy also indicated that, if symbol "1" or "9" had been used, employee-owned vehicles would have been covered.[12]

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[12] American States makes much of the fact that a separate premium was paid for each vehicle listed in the policy. The policy, however, included several "catchall" provisions affording coverage for certain *classes* of vehicles without a separate premium. For example, a nonowned trailer was covered, provided it was attached to a listed auto. Similarly, a nonowned auto was covered, provided it was being used, with the owner's permission, as a temporary substitute for a listed auto while the listed auto was serviced or repaired. Therefore, the absence of a separate premium was not inconsistent with an

[footnote continued on next page]

The trial court therefore found that the policy was ambiguous, not so much with respect to what vehicles were covered, but rather with respect to what documents constituted "the policy."[13] But again, it was not. As a witness testified at trial, "the declarations page lists all the forms and endorsements that comprise the policy . . . ." Specifically, the declarations pages stated, "The following forms currently apply to this coverage part." (Capitalization omitted.) They then proceeded to list some 14 forms by number and name. This list did not include Form 6-3124A.

The injured parties rely on the general provision that the policy included any "[a]pplicable endorsements." They argue that a reasonable insured could have understood Form 6-3124A to be an endorsement. Every endorsement that came with the policy, however, was both (1) specifically listed in the declarations pages, by number and by name, and (2) headed, "THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ CAREFULLY."

[footnote continued from previous page]
expectation that employee-owned vehicles used in the employer's business were covered as a class, if otherwise reasonable.

American States also points to the fact that LaBastida purchased a separate policy for the Hummer from Wawanesa. However, even if the American States policy covered the Hummer, it did so only when the Hummer was being used on company business; LaBastida would still have needed a policy covering the Hummer when it was being used for personal purposes.

[13] American States argues that this is contrary to the parties' stipulation, which identified Exhibit 1 as "the [p]olicy." The fact that the policy was "the policy," however, does not rule out the possibility that a reasonable insured might have understood that Form 6-3124A was also part of "the policy."

The injured parties respond that certain "uncontested endorsements" do not use this language. The only two endorsements that they cite, however, were issued *after* the initial issuance of the policy (e.g., when the 1994 International was added). Moreover, these specifically noted that they "change[d]" the policy by "add[ing]" coverage. Thus, they do not alter our conclusion that a reasonable insured who actually read the documents contained in the envelope would have realized that Form 6-3124A was not an endorsement.

In determining whether the policy was ambiguous, the trial court quite properly considered the stuffers themselves. "The existence of a material ambiguity in the terms of an insurance policy may not . . . be determined in the abstract, or in isolation. The policy must be examined as a whole, and in context, to determine whether an ambiguity exists. [Citations.]" (*Minkler v. Safeco Ins. Co. of America* (2010) 49 Cal.4th 315, 322.) We disagree, however, with its conclusion. The trial court focused on the fact that the policy and the stuffers arrived in the same envelope; there was no clear physical demarcation between them. This overlooks the fact that there was a clear *textual* demarcation between them.

Some of the stuffers indicated that they were *not* part of the policy. One bore the heading: "THIS IS A NOTICE ONLY. THE FULL AND EXACT CONTRACT IS CONTAINED IN THE POLICY." Another similarly stated: "This notice . . . contains a brief synopsis of the significant broadenings, restrictions and classifications of coverage that were made in each policy form and endorsement. Not every form and endorsement

discussed in this notice is applicable to your particular policy. *Please refer to your policy to determine which ones do apply*." (Italics added.) The injured parties argue that there was no such wording on Form 6-3124A itself. Nevertheless, this would have made a reasonable insured aware that the stuffers were not *necessarily* part of the policy.

C. *An Objectively Reasonable Insured Would Not Have Understood Form 6-3124A as Broadening the Policy*.

Even if Form 6-3124A is viewed as part of the policy, a reasonable insured would not have understood it as extending coverage to employee-owned vehicles. It did not purport to set forth — much less to change — any of the policy terms. It simply stated, "Your policy has been issued based on the drivers listing below. In order to insure that your policy is issued with the most current information, please review this list and update as necessary. Include employees who drive their own vehicles on company business or anyone who will drive an insured vehicle." This was merely a request for information.

In the injured parties' view, a reasonable insured would have concluded that employees who drove their own vehicles on company business were covered. However, Form 6-3124A specifically distinguished employees who drove their own vehicles on company business, on the one hand, from "anyone" who drove "an insured vehicle," on the other hand. Thus, it indicated that employee-owned vehicles were *not* insured.

Coverage under the policy was entirely vehicle-based; HLCD was covered for any accident arising out of the ownership or use of a covered vehicle, no matter who was

driving it at the time. It was not driver-based.[14] The statement in Form 6-3124A that the policy had been issued "based on" LaBastida being the only driver could not reasonably be understood as altering the very basis of coverage. That would have meant that Form 6-3124A *eliminated* the coverage that the policy otherwise provided whenever someone other than LaBastida drove a covered vehicle. Rather, it could only be reasonably understood as stating a fact that American States had relied on in issuing the policy. An insurance company may consider the number of drivers or their driving records in setting a premium or in deciding whether to issue a policy at all. That would not mean that the policy necessarily provides coverage for particular drivers, if that is contrary to its plain meaning.

In our view, a reasonable insured would have seen Form 6-3124A as exactly what it was — a ploy to sell more insurance. Suppose an insured notified his or her agent that an employee had started driving a personal vehicle on company business. If the policy did provide coverage for employee-owned vehicles (e.g., symbol "9" coverage), American States would have an opportunity to determine whether to charge an additional premium. If, however, the policy did *not* provide coverage for employee-owned vehicles, American States would have an opportunity to try to "upsell" the insured to a policy that

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[14] In June 2004 — i.e., *after the accident* — American gave HLCD written notice that the premium under the policy had increased because "the liability limit has been increased [and] a driver has been added." (Capitalization omitted.) Needless to say, this document could not possibly have created any reasonable expectation that the policy was driver-based back when the policy was issued or at any time *before* the accident.

did. This would be a more reasonable expectation than that such vehicles were covered without being listed in the policy.

One of the cases cited by American States — *Mercury Ins. Co. v. Pearson* (2008) 169 Cal.App.4th 1064 — is analogous. There, the insurer issued an auto insurance policy in which Susan Hyung was the "named insured," and her fiancé, David Pearson, was a "designated person." (*Id*. at pp. 1066-1067.) The policy provided third party coverage both for the named insured and for designated persons. (*Id*. at pp. 1067-1069.) However, subject to a number of exceptions, it provided first party (i.e., uninsured motorist) coverage only for the named insured. (*Id*. at pp. 1067, 1069.) A page at the beginning of the policy, headed, "'IMPORTANT NOTICE,'" stated, "'Unless drivers residing with the Insured are NAMED in the declarations, coverage may not be afforded. If you desire coverage for drivers other than those shown, request your agent/broker to have your policy amended to list the additional drivers.'" (*Id*. at p. 1068.)

Pearson was injured by an uninsured motorist. (*Mercury Ins. Co. v. Pearson*, *supra*, 169 Cal.App.4th at p. 1066.) He argued that the "'IMPORTANT NOTICE'" created an ambiguity, because it implied that, as long as he was named in the declarations, his coverage was coextensive with Hyung's. (*Id*. at p. 1070.) The appellate court disagreed: "Construed according to its plain meaning, the 'Important Notice' is simply a courtesy warning to the policyholder that *drivers* residing with the named insured who are not listed on the declarations page are not necessarily afforded the same coverage under the policy as additional *drivers* who *are* listed in the declarations page. The word

'drivers' appears three times in the notice. This notice simply warns policyholders of the fact that the *liability* provisions of the policy — the only provisions that apply exclusively to *drivers* — apply differently to potential drivers who reside with the named insured, depending on whether such persons are or are not listed as additional drivers in the declarations page. The notice cannot reasonably be construed as a promise that, notwithstanding the actual language of the policy, a driver named in the declarations automatically receives the same coverage as the named insured for every type of loss, liability, or accident covered by the policy." (*Id*. at pp. 1070-1071, fn. omitted.) It concluded that the policy "is clear and explicit that the uninsured motorist coverage would not provide coverage for bodily injury sustained by Pearson . . . , and that he had no coverage under any portion of the policy unless he was operating or occupying a motor vehicle listed in the declarations." (*Id*. at p. 1071.)

Here, almost identically, the policy was clear and explicit that it covered only vehicles specifically listed on the declarations pages. Form 6-3124A was simply a "courtesy warning" that, if (1) someone other than LaBastida started driving an "insured vehicle," or (2) an employee started driving his or her own vehicle on company business, American States should be notified. It could not reasonably be construed as a promise that, notwithstanding the actual language of the policy, employee-owned vehicles would be covered without any further action on the part of either American States or HLCD.

On the other hand, the case that comes closest to supporting the injured parties' position, *Fryer v. Kaiser Foundation Health Plan, Inc.* (1963) 221 Cal.App.2d 674, is

distinguishable. There, when the insured received his group medical policy, he also received a membership card, which listed phone numbers to be called in case of emergency, as well as two booklets, which likewise listed phone numbers to be called "[d]ay or night" in case of emergency. (*Id*. at pp. 677-678.)

The court stated: "We think that all these documents must be read together as part of a single contract [citation] and that, when so read, they amount to a contract on the part of defendant to maintain a 24-hour telephone answering service for use in case of emergency as well as a 24-hour emergency ambulance service. The several documents were prepared by defendant, all relate to the same general subject — namely, the benefits granted by the group insurance scheme; they are not contradictory, but rather supplement each other, in that the two booklets explain, in greater detail, the methods by which defendant proposed to carry out the duties summarily listed in the basic documents. If there be any ambiguity, it must be resolved against the insurance company which drafted them. [Citations.]" (*Fryer v. Kaiser Foundation Health Plan, Inc.*, *supra*, 221 Cal.App.2d at p. 678.)

Here, however, the policy itself listed the documents that constituted the policy. It does not appear that this was the case in *Fryer*. Moreover, Form 6-3124A (at least as construed by the injured parties) contradicted, rather than supplemented, the policy. Accordingly, *Fryer* is not controlling here.

For these reasons, we conclude that the policy was not ambiguous and that an objectively reasonable insured would not have understood it as affording coverage for employee-owned vehicles. Thus, American States was entitled to judgment in its favor.

IV

DISPOSITION

The judgment is reversed. The matter is remanded to the trial court with directions to enter judgment in favor of American States and against the injured parties. American States is awarded costs on appeal against the injured parties.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

I concur:

McKINSTER
Acting P.J.

KING, J., Dissenting.

I disagree with the majority on a number of grounds. Rather than applying a de novo standard of review to the question of whether Exhibit 3 is part of the insurance policy, I believe we should use the substantial evidence test. Based thereon, substantial evidence supports the conclusion that Exhibit 3 is part of the underlying insurance agreement. Lastly, the language of the insurance policy is ambiguous in that it is susceptible to more than one reasonable interpretation in the context of the policy as a whole. I would therefore affirm the lower court judgment.

A. We review the question of whether Exhibit 3 is part of the insuring agreement under the substantial evidence test.

At page 2 of its opinion, the majority states, " Reviewing [the trial court's] ruling de novo, we conclude that it was erroneous." With this said, the majority embarks on a discussion in which it determines that the insurance "policy specifie[s] that it applie[s] only to 'covered "autos,"'" and "[a]s a witness testified at trial, 'the declarations page lists all the forms and endorsements that comprise the policy . . . .'" (Maj. opn. *ante*, at pp. 11-12.)

In so concluding, the majority has ignored the proper standard of review as it relates to the determination of which documents comprise the insurance contract. The majority has concluded, based on a de novo review, that the policy is as represented by

American States. This reasoning is identical to the insurance company's approach at trial where the following colloquy occurred between the court and American States's counsel:

"THE COURT: Well, [defendants] said all these documents were provided in the same envelope loosely, not attached, and they are all just combined together.

"[AMERICAN STATES'S COUNSEL]: Okay. That's what they are saying. I'm saying that that doesn't mean it's part of the policy.

"THE COURT: You have to look at it to determine if it is, don't you?

"[AMERICAN STATES'S COUNSEL]: No, you do not."

In disagreeing with both American States and the majority, I believe that the question as to what documents comprise the insurance policy is a factual question for the trier of fact, and that our review should be guided by the substantial evidence test, not a de novo review.

As stated in Civil Code section 1642, "[s]everal contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together." As evident from the record, American States does not disagree with this; as argued by its counsel at trial: "That's how it works, and that's how you get—after you have a policy in the first place, that's how you get additional endorsements onto a policy." Thus, as American States concedes, more than one document may comprise the insuring agreement and, under Civil Code section 1642, they *are to be taken together*.

"[W]hen there is a question as to whether a part of a written agreement was intended by the parties to become a part of such agreement, the inquiry is directed to the *identity* of the real contract entered into between the parties. Such question is one of fact for the jury to be determined from all the circumstances surrounding its execution, and extrinsic evidence is competent to determine what constitutes the real contract." (*Distefano v. Hall* (1963) 218 Cal.App.2d 657, 671-672.) "Under section 1642 of the Civil Code, it is the general rule that several papers relating to the same subject matter and executed as parts of substantially one transaction, are to be construed together as one contract. . . . The documents need not be executed contemporaneously; it is a question of fact as to whether several writings comprise one transaction." (*Nevin v. Salk* (1975) 45 Cal.App.3d 331, 338 [Fourth Dist., Div. Two].) "'[T]he use of extrinsic evidence to show [whether] several written instruments were intended to constitute a single contract does not involve a violation of the parol evidence rule.' [Citation.] The applicability of Civil Code section 1642 is a question of fact for the trial court, and the appellate court will affirm the court's resolution if it is supported by substantial evidence." (*Versaci v. Superior Court* (2005) 127 Cal.App.4th 805, 814-815.) Where the record is silent, we must presume that the trial court found all of the necessary facts to support a conclusion that multiple documents comprise one contract. (*Pellegrini v. Weiss* (2008) 165 Cal.App.4th 515, 534.) Lastly, in determining whether the documents at issue are part of a single contract, any ambiguity as to the issue must be resolved against the insurer. (*Fryer v. Kaiser Foundation Health Plan* (1963) 221 Cal.App.2d 674, 678 [the court

concluded that a booklet and membership card which accompanied the insuring agreement were part of the insurance contract].)

Furthermore, the fact that "[t]here is no conflicting evidence in this case," does not support the majority's de novo standard of review. (See maj. opn. *ante*, at p. 11.) From the record before us, it is clear that the trial court drew a number of inferences from the undisputed facts to support its conclusion that Exhibit 3 was part of the insurance contract. As stated in *Tobola v. Wholey* (1946) 75 Cal.App.2d 351, 355, "even where the probative facts are undisputed, the question as to the inferences to be drawn therefrom is still within the exclusive province of the trial court, and if there is any substantial evidence to support them this court is bound by the determination of the trial court. In other words, it is just as much the function of the trial court to resolve a conflict between opposing inferences as it is to resolve a conflict between contradictory statements of fact." (See *Blix Street Records, Inc. v. Cassidy* (2010) 191 Cal.App.4th 39, 49 ["When different inferences may be drawn from undisputed facts, the appellate court should accept the inference drawn by the trial court, unless that inference is inconsistent with clear, positive and uncontradicted evidence."]; see also *CenterPoint Energy, Inc. v. Superior Court* (2007) 157 Cal.App.4th 1101, 1119; *Holmes v. Kizer* (1992) 11 Cal.App.4th 395, 401.)

Thus, contrary to the majority's de novo approach, the first question which must be addressed is whether there is substantial evidence to support the trial court's conclusion that Exhibit 3 is part of the insurance contract. I believe there is.

B. Substantial evidence supports the trial court's implied finding that Exhibit 3 is part of the insurance policy.

In determining whether Exhibit 3 is part of the insurance contract, we look to the intent of the parties. "[T]he relevant intent is 'objective'—that is, the objective intent as evidenced by the words of the instrument, not a party's subjective intent." (*Shaw v. Regents of University of California* (1997) 58 Cal.App.4th 44, 54-55.) "The parties' intent must, in the first instance, be ascertained objectively from the contract language." And, the use of extrinsic evidence is not prohibited. (*Versaci v. Superior Court, supra,* 127 Cal.App.4th at pp. 814-815.) On appeal, "if there is any substantial evidence to support the verdict or finding it cannot be set aside by the reviewing court, although said court may believe the great preponderance of the evidence was the other way. The power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion of the trier of the facts. . . . When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial judge or jury." (*Jackson v. Burke* (1954) 124 Cal.App.2d 519, 521-522.)

Here, the evidence cuts both ways. In support of American States's approach, there is a 52-page insurance policy, which contains declaration pages, the main body of the policy, and various endorsements setting forth the fact that they represent a "policy change." (Exhibit 1.) The documents contained in Exhibit 2, which includes Exhibit 3, are miscellaneous documents that generally relate to and discuss various portions of the

policy. None of the documents are entitled "endorsement" and none state that they are a "policy change." As such, there is substantial evidence to support a conclusion that a reasonable insured would not objectively believe that Exhibit 3 was part of the policy.

On the other hand, all of the documents were sent loosely in the same envelope. They all deal with the subject insurance in one fashion or another.[1] The main body of the policy and the endorsements appear as preprinted documents and do not reference the name of the insured or the policy number. The declaration pages as well as the "policy change" pages do, however, reference the named insured and the policy number. Of the remaining documents contained in the envelope (i.e., those comprising Exhibit 2), Exhibit 3, like the declaration pages and the "policy change" pages, is only one of two documents that references the named insured as well as the policy number. Each of the endorsements indicate that they change the policy and that the insured should "Please Read Carefully." Of the documents in Exhibit 2, Exhibit 3 is the only document that informs the insured: "IMPORTANT - PLEASE REVIEW." Furthermore, in reading Exhibit 3, it appears to directly relate to the coverage provided by the policy and the fact that Hector LaBastida is a covered driver; and in order to cover employees who drive their own cars in the business, the carrier needs to be advised of their identity. Viewing these documents as a whole, there is substantial evidence from which the trier of fact could conclude that a reasonable insured would objectively believe that Exhibit 3 was part

[1] The evidence does not disclose the exact order in which the documents appeared in the envelope.

of the policy. Substantively, Exhibit 3 appears by its terms to affect the coverage afforded. Additionally, its likeness in form to the "policy change" documents could lead one to objectively believe it is part of the policy.

C. The language of the insurance policy is ambiguous in that it is susceptible to more than one reasonable interpretation in the context of the policy as a whole.

"'The interpretation of an insurance contract, as with that of any written instrument, is primarily a judicial function. [Citation.] Unless the interpretation of the instrument turns upon the credibility of conflicting extrinsic evidence, a reviewing court makes an independent determination of the policy's meaning.' [Citation.]" (*Lockheed Martin Corp. v. Continental Ins. Co.* (2005) 134 Cal.App.4th 187, 196.)

"'"'The fundamental rules of contract interpretation are based on the premise that the interpretation of a contract must give effect to the 'mutual intention' of the parties. . . . 'Such intent is to be inferred, if possible, solely from the written provisions of the contract. [Citation.] The "clear and explicit" meaning of these provisions, interpreted in their "ordinary and popular sense" . . . controls judicial interpretation. [Citation.]'" [Citation.]' [Citation.] 'Thus, if the meaning a layperson would ascribe to contract language is not ambiguous, we apply that meaning. [Citations.]' [Citation.]" (*Clarendon America Ins. Co. v. North American Capacity Ins. Co.* (2010) 186 Cal.App.4th 556, 566 [Fourth Dist., Div. Two].)

"'A policy provision is ambiguous when it is susceptible to two or more reasonable constructions. [Citation.] Language in an insurance policy is "interpreted as a whole,

and in the circumstances of the case . . . ." [Citation.] "The proper question is whether the [provision or] word is ambiguous in the context of *this* policy and the circumstances of *this* case. [Citation.]"'" (*Clarendon America Ins. Co. v. North American Capacity Ins. Co., supra,* 186 Cal.App.4th at pp. 566-567.) "The language of an insurance policy is ambiguous if it is susceptible of more than one reasonable interpretation in the context of the policy as a whole." (*Id.* at p. 573.)

"'"'"[A]mbiguous language is construed against the party who caused the uncertainty to exist. [Citation.]' 'This rule, as applied to a promise of coverage in an insurance policy, protects not the subjective beliefs of the insurer but, rather, "the objectively reasonable expectations of the insured."'" [Citation.] "Any ambiguous terms are resolved in the insureds' favor, consistent with the insureds' reasonable expectations."' [Citation.]" (*E.M.M.I. Inc. v. Zurich American Ins. Co*. (2004) 32 Cal.4th 465, 470-471.)

In looking to the policy as a whole, including Exhibit 3, we first attempt to determine whether the policy provisions clearly and unambiguously set forth what is a covered loss. I begin by noting that the policy in question appears to be a form policy which can apply in nine different scenarios, depending upon how one defines a "covered 'auto.'" Under the policy, a "covered 'auto'" can be a nonowned auto, an owned auto, an owned private passenger auto, an owned auto other than a private passenger auto, a specifically described auto, a hired auto, or a combination thereof. The only designation in the policy that sets forth specifically what kind of auto the particular policy applies to is

a number ranging from one to nine. The page of the policy that defines specifically which autos are "covered 'autos'" is four pages removed from the page setting forth the "Schedule of Coverages and Covered Autos." Thus, in an attempt to have "one size fits all," the carrier has not clearly set forth what autos the policy applies to and what autos it does not apply to.

The "one size fits all" aspect is further illustrated by the testimony of Lawrence Signaigo, who was a commercial underwriting specialist with American States. He testified that Exhibit 3 was a generic document and that it was "sent on all renewals." He further indicated that the reason for the specific wording in Exhibit 3 is that some of the policies issued by American States provide nonowned auto coverage.

Thus, in its attempt to standardize its approach to all of its insureds, American States has not clearly and explicitly set forth what is a covered loss. To further confuse the issue, one need only look to the specific language of Exhibit 3. In its relevant portion, Exhibit 3 states: "Your policy has been issued based on the drivers listing below. In order to insure that your policy is issued with the most current information, please review this list and update as necessary. Include employees who drive their own vehicles on company business or anyone who will drive an insured vehicle. Contact your agent to advise of any changes. [¶] Also remember to report all newly hired employees to your agent during the year. . . .

"NAME OF DRIVER	DATE OF BIRTH	DRIVERS LICENSE NUMBER	STATE	DATE OF HIRE
LABASTIDA HECTOR	04-23-68	C5192148	04"	

The above clearly tells the insured that the identity of drivers is important as to the specific insurance policy at issue.[2] The import of Exhibit 3 is to state that Hector LaBastida is the only covered driver under the insurance policy. And, for purposes of covering employees who drive their own cars or anyone else driving a listed vehicle, it is necessary for the named insured to contact the carrier. Taken as a whole, it tells the named insured that the policy is driver based.

All told, the policy is not clear and explicit and is susceptible to more than one reasonable interpretation. One reasonable construction is that the policy covers only named autos. An equally reasonable construction is that the policy is driver based and that Hector LaBastida was a covered driver while driving on company business, regardless of what automobile he was driving.

When dealing with the duty to defend on a declaratory relief cause of action, "the insured must prove the existence of a *potential for coverage*, while the insurer must establish *the absence of any such potential*. In other words, the insured need only show that the underlying claim *may* fall within policy coverage; the insurer must prove it *cannot.*" (*Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 300.) In that under the present facts there are two or more reasonable constructions, the ambiguity must be resolved against the insurer and in favor of the defendant's right to a defense.

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[2] Lawrence Signaigo testified that in reality there were no designated drivers on the commercial policy and that the policy did not provide nonowned auto coverage.

(See *Smith Kandal Real Estate v. Continental Casualty Co*. (1998) 67 Cal.App.4th 406, 414-416.)

As such, I would affirm the present judgment.

KING
J.

APPENDIX A

COMMERCIAL INSURANCE POLICY

DECLARATIONS

H.L.C.D.
DBA HECTOR LABASTIDA
CONSTRUCTION AND DEVELOPMENT
13190 NORTHSTAR AVE
VICTORVILLE, CA 92392

POLICY NUMBER 01-CG-253160-2
RENEWAL OF 01-CG-253160-1 10-02

AGENT NAME AND ADDRESS
RAINTREE INSURANCE AGENCY INC
PO BOX 2488
SAN BERNARDINO, CA 92406

04-66026 (909) 881-2654

PERIOD FROM 10-07-03 TO 10-07-04 12:01 AM
STANDARD TIME AT YOUR MAILING ADDRESS SHOWN ABOVE.

THE TOTAL PREMIUM DUE FOR THE POLICY TERM IS $2,886.00.
YOU WILL BE BILLED THROUGH YOUR CUSTOMER ACCOUNT #228-1795-782-01.
YOU NEED NOT PAY ANY PREMIUM AT THIS TIME. WE WILL SEND A BILLING STATEMENT IN A SEPARATE MAILING.

IN RETURN FOR THE PAYMENT OF THE PREMIUM, AND SUBJECT TO ALL THE TERMS OF THIS POLICY, WE AGREE WITH YOU TO PROVIDE THE INSURANCE AS STATED IN THIS POLICY.

THIS RENEWAL SERVES THE SAME PURPOSE AS WRITING A NEW POLICY WITH THE SAME PROVISIONS, CONDITIONS AND INSURING AGREEMENTS. THE INDIVIDUAL COVERAGE PART DECLARATIONS WHICH FOLLOW, LIST ALL OF THE FORMS THAT APPLY TO YOUR RENEWAL AND THOSE, IF ANY, WHICH NO LONGER APPLY. ONLY NEW OR REVISED FORMS ARE ATTACHED TO THIS RENEWAL. YOU MUST ADD THEM TO YOUR PRIOR POLICY.

COMMERCIAL AUTO COVERAGE PART	$	2,886.00
		2,886.00
PREMIUM FOR CERTIFIED ACTS OF TERRORISM	$	0.00
TOTAL POLICY PREMIUM	$	2,886.00

(DATE) BY (AUTHORIZED REPRESENTATIVE)

COMPANY USE ONLY

12 ( ) CB INSURED COPY PREPARED 08-01-03

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BUSINESS AUTO COVERAGE PAR(CLARATIONS (PAGE BA - 1

ITEM ONE — NAMED INSURED: H.L.C.D. POLICY NUMBER: 01-CG-253160-2
FORM OF BUSINESS: INDIVIDUAL

ITEM TWO — SCHEDULE OF COVERAGES AND COVERED AUTOS

THIS POLICY PROVIDES ONLY THOSE COVERAGES WHERE A CHARGE IS SHOWN IN THE PREMIUM COLUMN BELOW. EACH OF THESE COVERAGES WILL APPLY ONLY TO THOSE "AUTOS" SHOWN AS COVERED "AUTOS." "AUTOS" ARE SHOWN AS COVERED "AUTOS" FOR A PARTICULAR COVERAGE BY THE ENTRY OF ONE OR MORE OF THE SYMBOLS FROM THE COVERED AUTO SECTION OF THE BUSINESS AUTO COVERAGE FORM NEXT TO THE NAME OF THE COVERAGE.

COVERAGES	LIMIT OF INSURANCE	DEDUCTIBLE	COVERED AUTO SYMBOL	PREMIUM
LIABILITY	$ 750,000		7	$ 1,826.00
UNINSURED MOTORISTS	$ 60,000		7	$ 68.00
AUTO MEDICAL PAYMENTS	$ 5,000		7	$ 142.00
COMPREHENSIVE - EACH COVERED AUTO	LESSER OF ACTUAL CASH VALUE OR REPAIR COST	$ 500	7	$ 210.00
COLLISION - EACH COVERED AUTO	LESSER OF ACTUAL CASH VALUE OR REPAIR COST	$ 500	7	$ 640.00
	*CERTIFIED ACTS OF TERRORISM			$ 0.00
	ESTIMATED TOTAL PREMIUM			$ 2,886.00

THIS POLICY PROVIDES COVERAGE FOR CERTIFIED ACTS OF TERRORISM WHEN A PREMIUM CHARGE S SHOWN IN THE PREMIUM COLUMN

ITEM THREE — SCHEDULE OF COVERED AUTOS YOU OWN

VEH NO.	CO*	YR	DESCRIPTION MAKE MODEL BODY	AUTO IDENTIFICATION NUMBER	COST NEW	CLASS CODE	OTHER INTERESTS	GARAGE LOC: STATE/TERR
001	01	97	FORD	1FDKE3753VHB24075	$ 19,500	011810		CA/070
002	01	98	CHEVY FLATBED	1GBKC34F1WF032790	$ 25,000	211810		CA/070

*INSURANCE COMPANY WITH RESPECT TO EACH AUTO IS DESIGNATED AS FOLLOWS:
01 AMERICAN STATES INSURANCE COMPANY
02 AMERICAN ECONOMY INSURANCE COMPANY
04 AMERICAN STATES OF TEXAS INSURANCE COMPANY
06 AMERICAN STATES PREFERRED INSURANCE COMPANY
24 GENERAL INSURANCE COMPANY OF AMERICA
25 FIRST NATIONAL INSURANCE COMPANY OF AMERICA
26 SAFECO INSURANCE COMPANY OF AMERICA

/—CC(BA)(0702) SOUTHWEST ( ) PREPARED 08-01-03 CM2E0 SEQ.0001

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BUSINESS AUTO COVERAGE PART DECLARATIONS PAGE BA 2 -LAST

NAMED INSURED: H.L.C.D. POLICY NUMBER: 01-CG-253160-2

ITEM THREE (CONTINUED)

LIMITS, DEDUCTIBLES, AND PREMIUMS

ABSENCE OF A DEDUCTIBLE OR LIMIT OF INSURANCE ENTRY IN A COLUMN BELOW MEANS THAT THE LIMIT OF INSURANCE OR DEDUCTIBLE ENTRY IN THE CORRESPONDING ITEM TWO COLUMN APPLIES INSTEAD.

AUTO NO.	COVERAGES	LIMIT OF INSURANCE	DEDUCTIBLE	PREMIUM
001	LIABILITY			$ 913.00
	UNINSURED MOTORISTS			$ 34.00
	AUTO MEDICAL PAYMENT			$ 71.00
	COMPREHENSIVE			$ 114.00
	COLLISION			$ 358.00
			AUTO PREMIUM TOTAL	$ 1,490.00
002	LIABILITY			$ 913.00
	UNINSURED MOTORISTS			$ 34.00
	AUTO MEDICAL PAYMENT			$ 71.00
	COMPREHENSIVE			$ 96.00
	COLLISION			$ 282.00
			AUTO PREMIUM TOTAL	$ 1,396.00

THE FOLLOWING FORMS CURRENTLY APPLY TO THIS COVERAGE PART:

CA0001(1001) - BUSINESS AUTO COVERAGE
CA0143(0297) - CALIFORNIA CHANGES
6-1260(1095) - CALIFORNIA INSUR PREMIUM S
IL7201(0392) - COMPANY COMMON POL CONDITIONS
IL0017(1198) - COMMON POLICY CONDITIONS
IL0021(1185) - NUCLEAR ENERGY EXCL. ENDT. (BROAD FORM)
IL0270(0300) - CALIFORNIA CHGS - CANCEL/NONRENEWAL
CA0029(1288) - CHG'S IN BUSINESS AUTO/TRUCKERS COV FORM
CA7110(1001) - ULTRA AUTO PLUS ENDORSEMENT
CA7120(0598) - WAIVER OF COLLISION DEDUCTIBLE
CA7233(0102) - ABUSE OR MOLESTATION EXCLUSION
CA2356(1102) - CERTIFIED ACTS OF TERRORISM
CA9903(0797) - AUTO MEDICAL PAYMENTS COVERAGE
CA2154(0401) - CA UNINSURED MOTORIST - BI

THE FOLLOWING FORMS NO LONGER APPLY TO THIS COVERAGE PART:

CA9917(1001) - INDIVIDUAL NAMED INSURED
CA7111(1101) - ULTRA AUTO PLUS - CA

APPENDIX B

BUSINESS AUTO COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations. The words "we", "us" and "our" refer to the Company providing this insurance.

Other words and phrases that appear in quotation marks have special meaning. Refer to SECTION V — DEFINITIONS.

SECTION I — COVERED AUTOS

Item Two of the Declarations shows the "autos" that are covered "autos" for each of your coverages. The following numerical symbols describe the "autos" that may be covered "autos". The symbols entered next to a coverage on the Declarations designate the only "autos" that are covered "autos".

A. Description Of Covered Auto Designation Symbols

Symbol	Description Of Covered Auto Designation Symbols	
1	Any "Auto"	
2	Owned "Autos" Only.	Only those "autos" you own (and for Liability Coverage any "trailers" you don't own while attached to power units you own). This includes those "autos" you acquire ownership of after the policy begins.
3	Owned Private Passenger "Autos" Only	Only the private passenger "autos" you own. This includes those private passenger "autos" you acquire ownership of after the policy begins.
4	Owned "Autos" Other Than Private Passenger "Autos" Only	Only those "autos" you own that are not of the private passenger type (and for Liability Coverage any "trailers" you don't own while attached to power units you own). This includes those "autos" not of the private passenger type you acquire ownership of after the policy begins.
5	Owned "Autos" Subject To No-Fault	Only those "autos" you own that are required to have No-Fault benefits in the state where they are licensed or principally garaged. This includes those "autos" you acquire ownership of after the policy begins provided they are required to have No-Fault benefits in the state where they are licensed or principally garaged.
6	Owned "Autos" Subject To A Compulsory Uninsured Motorists Law	Only those "autos" you own that because of the law in the state where they are licensed or principally garaged are required to have and cannot reject Uninsured Motorists Coverage. This includes those "autos" you acquire ownership of after the policy begins provided they are subject to the same state uninsured motorists requirement.
7	Specifically Described "Autos"	Only those "autos" described in Item Three of the Declarations for which a premium charge is shown (and for Liability Coverage any "trailers" you don't own while attached to any power unit described in Item Three).
8	Hired "Autos" Only	Only those "autos" you lease, hire, rent or borrow. This does not include any "auto" you lease, hire, rent, or borrow from any of your "employees" or partners or members of their households.
9	Nonowned "Autos" Only	Only those "autos" you do not own, lease, hire rent or borrow that are used in connection with your business. This includes "autos" owned by your "employees", partners (if you are a partnership), members (if you are a limited liability company), or members of their households but only while used in your business or your personal affairs.

APPENDIX C

10/02/2001 12:22 FAX

SAFECO

IMPORTANT - PLEASE REVIEW

6-3124A
(8-94)

Named Insured: H.L.C.D.

Policy No: 01-CG-253160-20

Agent: RAINTREE INSURANCE AGENCY INC
RAINTREE INSURANCE AGENCY INC

Address: PO BOX 2488
PO BOX 2488

Phone: (909) 881-2654

Dear Valued Policyholder,

We appreciate the opportunity to write your commercial auto coverage. Please take a minute to review your policy.

Your policy has been issued based on the drivers listing below. In order to insure that your policy is issued with the most current information, please review this list and update as necessary. Include employees who drive their own vehicles on company business or anyone who will drive an insured vehicle. Contact your independent agent to advise of any changes.

Also, remember to report all newly hired employees to your agent during the year.

Thank you for your business!

NAME OF DRIVER		DATE OF BIRTH	DRIVERS LICENSE NUMBER	STATE	DATE OF HIRE
LABASTIDA	HECTOR	04-23-68	C5192148	04	

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