Annual Insurance Law Report

Developments in Insurance Case Law 2011

FOCUS: California

A summary prepared by Gordon & Rees LLP of the holdings, alphabetized by topic, of the cases published in 2011 applying California law, as well as select cases from other jurisdictions, which address the rights and duties of the insurance industry.

DEVELOPMENTS IN CALIFORNIA & SELECT OTHER JURISDICTIONS CASE LAW 2011: INSURANCE

January 2012

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DEVELOPMENTS IN CALIFORNIA & SELECT OTHER JURISDICTIONS CASE LAW 2011: INSURANCE

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Accident

Under California law the word "accident" in the coverage clause of a liability policy refers to the conduct for which liability is sought, not to the consequences of that conduct. *State Farm Gen. Ins. Co. v. Frake*, 197 Cal.App.4th 568 (2011).

A deliberate act is not an accident unless some additional, unexpected, independent, and unforeseen happening occurs that produces the damage. *State Farm Gen. Ins. Co. v. Frake*, 197 Cal.App.4th 568 (2011).

Accidental Contamination

Accidental Contamination refers to actual or potential contamination by an error committed by the insured. Recoverable losses are those which are the direct result of an error by the insured. *Fresh Express Inc. v. Beazley Syndicate 2623/623 at Lloyd's*, 199 Cal.App.4th 1038 (2011).

Accrual of Action

ERISA does not contain a statute of limitations applicable to actions for the recovery of benefits or the miscalculation of benefits under ERISA § 502(a)(1)(B), and courts must apply the state statute of limitations that is most analogous to the ERISA claim. *Withrow v. Bache Halsey Stuart Shield, Inc.*, 655 F.3d 1032 (9th Cir. 2011).

Action for the proper calculation of disability benefits under ERISA § 502(a)(1)(B) is governed by California's four-year statute of limitations for contract disputes. *Withrow v. Bache Halsey Stuart Shield, Inc.*, 655 F.3d 1032 (9th Cir. 2011).

Federal law governs the determination of when an ERISA cause of action accrues, which accrues either at the time benefits are actually denied, or when the insured has reason to know that the claim has been denied. *Withrow v. Bache Halsey Stuart Shield, Inc.*, 655 F.3d 1032 (9th Cir. 2011).

Claim was not time-barred by policy's contractual limitations provision because provision was meaningless when applied to disputes over the correct calculation of monthly benefit amounts, as opposed to disputes over entitlement to benefits. *Withrow v. Bache Halsey Stuart Shield, Inc.*, 655 F.3d 1032 (9th Cir. 2011).

Actual Cash Value

Insurance code section 2051 applies to open policies and provides that when an open policy requires payment of actual cash value for a structure's contents, the measure of the actual cash value recovery is the amount it would cost the insured to repair, rebuild, or replace the thing lost or injured less a fair and reasonable deduction for physical depreciation based upon its condition at the time of the injury or the policy limit, whichever is less. *Doan v. State Farm General Ins. Co.,* 195 Cal.App.4th 1082 (2011).

Insurance code section 2071 sets forth the required contents of the standard-form fire insurance policy and requires such policies to provide coverage to the extent of the actual cash value (or fair market value) of the property at the time of loss. *Doan v. State Farm General Ins. Co.,* 195 Cal.App.4th 1082 (2011).

Adjusters

An admission by the insurer's employees does not establish liability under an insurance policy. *Hibbs v. Allstate Ins. Co.,* 193 Cal.App.4th 809 (2011).

An adjuster is not irrevocably bound by his or her choice of methods for settling the claim absent a showing of estoppel by the insured. *Hibbs v. Allstate Ins. Co.,* 193 Cal.App.4th 809 (2011).

Advertising Injury

Stealing someone's product idea does not become an "advertising injury" just because the insured advertises the stolen product. *The Oglio Entm't Group, Inc. v. Hartford Cas. Ins. Co.,* 200 Cal.App.4th 573 (2011).

Agents and Brokers

An insurance agent's failure to procure agreed-upon coverage can constitute actionable negligence. *Wallman v. Suddock,* 200 Cal.App. 4th 1288 (2011).

An insurance agent assumes only those duties normally found in any agency relationship. The mere existence of such a relationship imposes no duty on the agent to advise the insured on specific insurance matters. *Wallman v. Suddock,* 200 Cal.App. 4th 1288 (2011).

An insurance agent may assume a greater duty to the insured by holding himself out to be more than an ordinary agent or by misrepresenting the policy's terms or extent of coverage. *Wallman v. Suddock,* 200 Cal.App. 4th 1288 (2011).

Appeals: Standard of Review

Construction of a contractual insurance policy is a question of law and therefore subject to *de novo* review. *Trishan Air, Inc. v. Fed. Ins. Co.*, 635 F.3d 422 (9th Cir. 2011).

On appeal following the trial court's sustaining of a demurer, the reviewing court determines independently whether the provisions of an insurance policy potentially cover the allegations of a lawsuit and thus gave rise to a duty to defend. *The Oglio Entm't Group, Inc. v. Hartford Cas. Ins. Co.*, 200 Cal.App.4th 573 (2011).

Appraisal

An appraisal provision in an insurance policy constitutes an agreement for contractual arbitration but an appraisal is a form of limited arbitration, and there are significant differences between the powers of an arbitrator and the more limited powers of an appraiser. *Doan v. State Farm General Ins. Co.*, 195 Cal.App.4th 1082 (2011); *Kirkwood v. Cal. State Auto. Ass'n Inter-Insurance Bureau*, 193 Cal.App.4th 49 (2011).

The function of appraisers is to determine the amount of damage resulting to various items submitted for their consideration; it is not their function to resolve questions of coverage and interpret provisions of the policy. *Doan v. State Farm General Ins. Co.*, 195 Cal.App.4th 1082 (2011); *Kirkwood v. Cal. State Auto. Ass'n Inter-Insurance Bureau*, 193 Cal.App.4th 49 (2011).

Appraisal is not an exclusive remedy where the insured seeks declaratory relief and a statutory construction question lies at the heart of the dispute between the parties and the court may delay appraisal until the determination of other issues not subject to appraisal. *Doan v. State Farm General Ins. Co.*, 195 Cal.App.4th 1082 (2011); *Kirkwood v. Cal. State Auto. Ass'n Inter-Insurance Bureau*, 193 Cal.App.4th 49 (2011).

A decision to stay an appraisal under section 2071 in order to resolve statutory interpretation issues does not run afoul of section 2071 or the arbitration statutes. *Doan v. State Farm General Ins. Co.*, 195 Cal.App.4th 1082 (2011).

Arbitration

Arbitration provisions do not require disclosure outside the policy. *Mission Viejo Emergency Medicals Associates v. Beta Healthcare Group*, 197 Cal.App.4th 1146 (2011).

Assignment

When a healthcare provider accepts the patient's assignment for payment from the insurance company, the healthcare provider becomes subject to all the terms of the assignment, including any limitations and setoffs. *Quality Infusion Care, Inc. v. Health Care Serv. Corp.,* 628 F.3d 725 (5th Cir. 2010).

When an insurance company and healthcare provider do not have a separate contractual relationship the insurance company's right to a setoff stems from the assigned contract. *Quality Infusion Care, Inc. v. Health Care Serv. Corp.,* 628 F.3d 725 (5th Cir. 2010).

A third party judgment creditor is merely an incidental beneficiary of obligations that arise under the duty to defend. Unless the third party obtains an assignment by the insured of its rights under the insurance contract, the third party has no right to bring a claim upon a duty owed only to the insured. *Clark v. Cal. Ins. Guarantee Assn.,* 200 Cal.App.4th 391 (2011).

A judgment creditor cannot enforce an award of costs and interest in a section 11580 direct action against the insurer regardless of whether the insurer had actually defended its insured. *Clark v. Cal. Ins. Guarantee Assn.,* 200 Cal.App.4th 391 (2011).

Section 11580 permits direct action subject to the terms and limitations of the policy. *Clark v. Cal. Ins. Guarantee Assn.,* 200 Cal.App.4th 391 (2011).

Breach of the Implied Covenant of Good Faith and Fair Dealing

Before an insurer can be found to have acted in bad faith for its delay or denial in the payment of policy benefits, it must be shown that the insurer acted unreasonably or without proper cause. *Trishan Air, Inc. v. Fed. Ins. Co.,* 635 F.3d 422 (9th Cir. 2011).

Since a bad faith action seeks recovery of a property right, to prevail the insured must show proof of economic loss, and a claim for plaintiffs' time is not a claim seeking compensation for economic loss. *Richards v. Sequoia Ins. Co.,* 195 Cal.App.4th 431 (2011).

Where there is no breach of contract, there can be no bad faith. *Behnke v. State Farm Gen. Ins. Co.,* 196 Cal.App.4th 1443 (2011); *Minich v. Allstate Ins. Co.,* 193 Cal.App.4th 477 (2011).

An insurer breaches the implied covenant of good faith and fair dealing when it unreasonably withholds policy benefits. *Hibbs v. Allstate Ins. Co.,* 193 Cal.App.4th 809 (2011).

The performance of an act specifically authorized by the policy cannot, as a matter of law, constitute bad faith. *Hibbs v. Allstate Ins. Co.,* 193 Cal.App.4th 809 (2011).

Insurer did not act in bad faith when it authorized repairs to insured's vehicle because the insurer's authorization was subject to further authorization by insured under Business & Professions Code section 9984.9. *Hibbs v. Allstate Ins. Co.,* 193 Cal.App.4th 809 (2011).

Insurer did not act in bad faith by ignoring insured's requests for a mechanical and safety inspection to ensure their vehicle was safe when the language of the policy did not obligate the insurer to conduct such inspections. *Hibbs v. Allstate Ins. Co.,* 193 Cal.App.4th 809 (2011).

The insurer did not act in bad faith by failing to respond to the insured's settlement demand for the full market value of the vehicle, when the language of the policy did not obligate the insurer to pay the full market value of the vehicle. *Hibbs v. Allstate Ins. Co.,* 193 Cal.App.4th 809 (2011).

The insurer may be liable in bad faith, when it pays for repairs not authorized by the insured, and then recovers from the tortfeasor in subrogation because the subrogation action may be prejudicial to the insured's direct action against the tortfeasor. *Hibbs v. Allstate Ins. Co.,* 193 Cal.App.4th 809 (2011).

If an automobile insurance policy clearly and unambiguously gives the insurer the option to pay for damages to an insured vehicle or to repair it, the insurer satisfies its contractual obligation when it elects to repair, although the insured refuses to authorize the repairs. *Hibbs v. Allstate Ins. Co.,* 193 Cal.App.4th 809 (2011).

Where an insurer chooses its option to repair, the insured's prevention of the insurer's performance excuses the insurer's obligation under the automobile insurance policy. *Hibbs v. Allstate Ins. Co.,* 193 Cal.App.4th 809 (2011).

California Civil Code Section 360.5

A provision in writing signed by both the secretary and president of an insurance company complies with Code of Civil Procedure section 360.5. *Blue Shield of Cal. Life & Health Ins. Co. v. Super. Ct.,* 192 Cal. App. 4th 727 (2011).

California Civil Code Section 877

Pursuant to the Code of Civil Procedure §877.6(a)(1), a joint tortfeasor is entitled to a good faith settlement determination. *PacifiCare of Cal. v. Bright Med. Assoc.Inc.*, 198 Cal.App.4th 1451 (2011).

The term "joint tortfeasors," pursuant to Code of Civil Procedure §877.6(a)(1), is broadly construed to include any parties to an action in which it is alleged that the parties are joint tortfeasors. *PacifiCare of Cal. v. Bright Med. Assoc.Inc.*, 198 Cal.App.4th 1451 (2011).

California Civil Code Section 1021

Code of Civil Procedure section 1021.6 only applies when the party seeking attorney fees bears no fault. *PacifiCare of Cal. v. Bright Med. Assoc.Inc.*, 198 Cal.App.4th 1451 (2011).

California Civil Code Section 2860

If an insurer is providing a defense under a reservation of rights and has agreed to utilize independent counsel, an insurer may compel arbitration to resolve a dispute regarding the payment of defense fees pursuant to Civil Code Section 2860(c). *The Hous. Group v. PMA Capital Ins. Co.*, 193 Cal.App.4th 1150 (2011).

To take advantage of the provisions of Civil Code Section 2860, an insurer must meet its duty to defend and accept the tender of the insured's defense, subject to a reservation of rights. *The Hous. Group v. PMA Capital Ins. Co.*, 193 Cal.App.4th 1150 (2011).

Civil Code Section 2860(c), which provides for compelled arbitration between insurers and insureds in *Cumis* counsel fee disputes, does not apply if an insurer reserves its rights by merely agreeing to reimburse *Cumis* fees. *The Hous. Group v. PMA Capital Ins. Co.*, 193 Cal.App.4th 1150 (2011).

California Insurance Code Section 533

California Insurance Code section 533 is implied into every policy of insurance in California and precludes coverage for losses caused by the willful acts of the insured. *Century-National Ins. Co. v. Garcia,* 51 Cal. 4th 564 (2011).

California Insurance Code section 533, which precludes coverage for losses caused by the willful acts of an insured, should not be applied to innocent co-insureds, at least within the context of a fire insurance policy. *Century-National Ins. Co. v. Garcia*, 51 Cal. 4th 564 (2011).

California Insurance Code Section 2051

Section 2051 applies to open policies and provides that when an open policy requires payment of actual cash value for a structure's contents, the measure of the actual cash value recovery is the amount it would cost the insured to repair, rebuild, or replace the thing lost or injured less a fair and reasonable deduction for physical depreciation based upon its condition at the time of the injury or the policy limit, whichever is less. *Doan v. State Farm General Ins. Co.,* 195 Cal.App.4th 1082 (2011).

California Insurance Code Section 2051(b)(1) and 2051.5

Provision in a homeowners' policy authorizing payment of 150% of the policy's limit of liability if the homeowner decided to rebuild did not increase the "policy limit" within the meaning of California Insurance Code §2051(b)(1). Insurance Code §2051.5 did not require an insurer to pay 150% of the policy's limit of liability regardless of whether the insured replaced the property. *Minich v. Allstate Ins. Co.,* 193 Cal.App.4th 477 (2011).

California Insurance Code Section 2070

Section 2070 states the general rules that all fire insurance policies must be on the standard form. One objective of the standard form is to promote better understanding of the policy provisions among insurers and insured and more uniform interpretation by the judiciary. *Doan v. State Farm General Ins. Co.,* 195 Cal.App.4th 1082 (2011).

Under California Insurance Code Sections 2070 and 2071, insurers must utilize the standard fire insurance forms set forth in the Code or provide "substantially equivalent" coverage. *Century-National Ins. Co. v. Garcia,* 51 Cal. 4th 564 (2011).

California Insurance Code Section 2071

Section 2071 sets forth the required contents of the standard-form fire insurance policy and requires such policies to provide coverage to the extent of the actual cash value (or fair market value) of the property at the time of loss. *Doan v. State Farm General Ins. Co.,* 195 Cal.App.4th 1082 (2011).

Section 2071 requires fire insurance policies to include a provision for appraisal to settle disagreements between the insurer and the insured concerning the amount of loss. *Doan v. State Farm General Ins. Co.,* 195 Cal.App.4th 1082 (2011).

Use of the phrases "an insured" and "the insured," as opposed to "any insured," in the standard fire insurance forms set forth in Insurance Code section 2071 represent an intent by the Legislature that a fire policy's coverage be applied on a several basis and that exclusionary language applicable to one insured should not be applied to other innocent co-insureds. *Century-National Ins. Co. v. Garcia,* 51 Cal. 4th 564 (2011).

California Insurance Code Section 2860

Where an insurer reserves its right under Insurance Code section 2860 to submit *Cumis* counsel fee disputes to arbitration, allegations that the insurer represented it would pay *Cumis* counsel fees and then submitted a dispute over those fees to arbitration did not demonstrate a misrepresentation of material fact to support a fraud claim in favor of the insured. *Behnke v. State Farm Gen. Ins. Co.*, 196 Cal.App.4th 1443 (2011).

California Insurance Code Section 10350.11

Insurance Code § 10350.11 requires health insurance policies to state "No action at law or in equity shall be brought to recover on this policy prior to the expiration of 60 days after written proof of loss has been furnished in accordance with the requirements of this policy. No such action shall be brought after the expiration of three years after the time written proof of loss is required to be furnished." However, section 10350.12 allows insurers to use different wording approved by the Insurance Commissioner which is not less favorable in any respect to the insured or beneficiary. *Blue Shield of Cal. Life & Health Ins. Co. v. Super. Ct.*, 192 Cal. App. 4th 727 (2011).

Failure to use substantially the same language as Insurance Code § 10350.11 can result in the court using traditional insurance contract interpretation rules instead of traditional statutory interpretation principles. *Blue Shield of Cal. Life & Health Ins. Co. v. Super. Ct.*, 192 Cal. App. 4th 727 (2011).

Substituting a more favorable contractual limitation provision than the statutorily mandated language of Insurance Code § 10350.11 results in the court interpreting all ambiguities in a manner that protects the expectations of a reasonable policyholder. *Blue Shield of Cal. Life & Health Ins. Co. v. Super. Ct.*, 192 Cal. App. 4th 727 (2011).

California Insurance Code Section 11580

A third party judgment creditor is merely an incidental beneficiary of obligations that arise under the duty to defend. Unless the third party obtains an assignment by the insured of its rights under the insurance contract, the third party has no right to bring a claim upon a duty owed only to the insured. *Clark v. Cal. Ins. Guarantee Assn.,* 200 Cal.App.4th 391 (2011).

Insurance Code section 11580, subdivision (b)(2), is sometimes referred to as the "direct action" statute and provides that a policy insuring against loss or damage resulting from liability for an injury suffered by another shall either contain or be construed as containing a provision that, whenever judgment is secured against the insured or the executor of administrator of a deceased insured in an action based upon bodily injury, death, or property damage, then an action may be brought against the insurer on the policy and subject to its terms and limitations, by such judgment creditor to recover on the judgment. *W. Heritage Ins. Co. v. Super. Ct.,* 199 Cal.App.4th 1196 (2011).

The insurer's exposure to direct liability under Insurance Code section 11580, subdivision (b)(2), has repeatedly been held sufficient to create a basis for insurer intervention in a third party action against the insured. *W. Heritage Ins. Co. v. Super. Ct.,* 199 Cal.App.4th 1196 (2011).

A judgment creditor cannot enforce an award of costs and interest in a section 11580 direct action against the insurer regardless of whether the insurer had actually defended its insured. *Clark v. Cal. Ins. Guarantee Assn.,* 200 Cal.App.4th 391 (2011).

Section 11580 permits direct action subject to the terms and limitations of the policy. *Clark v. Cal. Ins. Guarantee Assn.,* 200 Cal.App.4th 391 (2011).

Cancellation

When a policy includes provisions that allow the insurer to cancel the policy if it learns that materials facts were concealed or misrepresented during the application process, invocation of the contractual right to rescind the policy is a matter that arises from the plan. *Blue Shield of Cal. Life & Health Ins. Co. v. Super. Ct.,* 192 Cal. App. 4th 727 (2011).

Cancelling an insured's policy waives the proof of loss notice provision of the policy. *Blue Shield of Cal. Life & Health Ins. Co. v. Super. Ct.,* 192 Cal. App. 4th 727 (2011).

Claims Handling

An admission by the insurer's employees does not establish liability under an insurance policy. *Hibbs v. Allstate Ins. Co.,* 193 Cal.App.4th 809 (2011).

An adjuster is not irrevocably bound by his or her choice of methods for settling the claim absent a showing of estoppel by the insured. *Hibbs v. Allstate Ins. Co.,* 193 Cal.App.4th 809 (2011).

Claims Made Policy

A claims-made policy is an insurance policy whereby the insurer agrees to assume liability for any errors, including those made prior to the inception of the policy, as long as a claim is made during the policy period. *Feldman v. Illinois Union Ins. Co.*, 198 Cal. App. 4th 1495 (2011).

An "interrelated wrongful acts" provision in a claims made insurance policy precludes coverage where later filed claims against the insured shared a common nexus with earlier filed claims. *Feldman v. Illinois Union Ins. Co.*, 198 Cal. App. 4th 1495 (2011).

Collateral Source Rule

If an injured party receives some compensation for his injuries from an independent source, the payment should not be deducted from the damages the plaintiff would otherwise collect from the tortfeasor. The collateral source rule thus allows a plaintiff to recover from the tortfeasor money an insurer has paid to medical providers on her behalf. *Howell v. Hamilton Meats & Provisions, Inc.*, 52 Cal.4th 541 (2011).

Plaintiff did not incur liability for providers' full bills and thus cannot seek the difference between the full amount on the bill and the negotiated rate differential from the tortfeasor. Plaintiff is only entitled to recover the amounts actually paid on her behalf by her health insurer and her own out-of-pocket expenses. *Howell v. Hamilton Meats & Provisions, Inc.*, 52 Cal.4th 541 (2011).

Conditions Precedent

Failure to strictly comply with a warranty precludes coverage because a warranty is an agreement in the nature of a condition precedent, and strict compliance is required. *Trishan Air, Inc. v. Fed. Ins. Co.,* 635 F.3d 422 (9th Cir. 2011).

Contract Interpretation

Interpretation of an insurance policy is a question of law and follows the general rules of contract interpretation. *Palp, Inc. v. Williamsburg Nat'l Ins. Co.,* 200 Cal.App.4th 282 (2011).

Exclusions are to be construed narrowly and in accordance with the reasonable expectations of the insured. *Palp, Inc. v. Williamsburg Nat'l Ins. Co.,* 200 Cal.App.4th 282 (2011).

Use of the phrase "any matter arising out of this Plan" in a limitation provision is so broad that it encompasses tort as well as contract claims. *Blue Shield of Cal. Life & Health Ins. Co. v. Super. Ct.*, 192 Cal. App. 4th 727 (2011).

The interpretation of a contract must give effect to the mutual intention of the parties at the time the contract is formed. The mutual intent of the parties is to be inferred, if possible, solely from the written provisions of the contract. The clear and explicit meaning of the contract provisions, interpreted in their ordinary and popular sense unless used by the parties in a technical sense or special meaning is given to them by usage, controls judicial interpretation. *Minich v. Allstate Ins. Co.*, 193 Cal.App.4th 477 (2011).

Under the objective theory of contract law adhered to in California, it is the objective intent, as evidenced by the words of the contract, rather than the subjective intent of one of the parties, that controls interpretation. *Mission Viejo Emergency Medicals Associates v. Beta Healthcare Group*, 197 Cal.App.4th 1146 (2011).

Plaintiffs admit the existence of the policy implicitly through their undisputed acceptance of policy benefits. *Mission Viejo Emergency Medicals Associates v. Beta Healthcare Group*, 197 Cal.App.4th 1146 (2011).

Coverage provisions are interpreted broadly to protect the insured, and exclusionary clauses are interpreted narrowly against the insurer, especially when the coverage provision would lead an insured to reasonably expect that a claim was covered. The burden is on the insured to establish that the claim is within the scope of the policy's coverage, and on the insurer to establish that the claim is specifically excluded. *The Oglio Entm't Group, Inc. v. Hartford Cas. Ins. Co.*, 200 Cal.App.4th 573 (2011).

Where the terms of the policy do not define "theft" for purposes of a theft provision, the court will look to the common and ordinary meaning of the word, which requires a criminal intent to steal or deprive the insured of possession of his property. *Barnett v. State Farm Gen. Ins. Co.*, 200 Cal.App.4th 536 (2011).

An insurer moving for a demurrer based on insurance policy language must establish conclusively that this language unambiguously negates beyond reasonable controversy the construction alleged in the body of the complaint. To meet this burden, an insurer is required to demonstrate that the policy language supporting its position is so clear that parol evidence would be inadmissible to refute it. *George v. Automobile Club of S. Cal.*, 201 Cal.App.4th 1112 (2011).

Contract Interpretation: Ambiguity

If an asserted ambiguity is not eliminated by the language and context of the policy, courts then invoke the principle that ambiguities are generally construed against the insurer in order to protect the insured's reasonable expectation of coverage. *Wallman v. Suddock*, 200 Cal.App. 4th 1288 (2011).

The fact that a term is not defined in the policies does not make it ambiguous. Nor does disagreement concerning the meaning of a phrase, or the fact that a word or phrase isolated from its context is susceptible of more than one meaning. The meaning of language is to be found in its applications. An indeterminacy in the application of language signals its ambiguity, which arises when language is reasonably susceptible of more than one application to material facts. There cannot be an ambiguity per se, i.e. an ambiguity unrelated to an application. *Wallman v. Suddock*, 200 Cal.App. 4th 1288 (2011).

Contractual Limitations Provisions

An insurance policy limitation is conspicuous if it is positioned and printed in a form which adequately attracts the reader's attention to the limitation. *Mission Viejo Emergency Medicals Associates v. Beta Healthcare Group*, 197 Cal.App.4th 1146 (2011).

Arbitration provisions do not require disclosure outside the policy. *Mission Viejo Emergency Medicals Associates v. Beta Healthcare Group*, 197 Cal.App.4th 1146 (2011).

An insurance company is bound by a greater coverage in an earlier policy when a renewal policy is issued but the insured is not notified of the specific reduction in coverage. *Mission Viejo Emergency Medicals Associates v. Beta Healthcare Group*, 197 Cal.App.4th 1146 (2011).

Cooperation

An excess policy's cooperation clause precludes an insured from assigning its rights after stipulating to a judgment far in excess of the primary policy's limits. *Leflet v. Redwood Fire & Cas. Ins. Co.*, 247 P.3d 180 (Ariz. 2011).

Because *Morris* agreements are fraught with risk of abuse, a settlement that mimics *Morris* in form but does not find support in the legal and economic realities that gave rise to that decision is both unenforceable and offensive to the policy's cooperation clause. *Leflet v. Redwood Fire & Cas. Ins. Co.*, 247 P.3d 180 (Ariz. 2011).

Cumis **Counsel**

An insurer retaining *Cumis* counsel is only obligated to pay reasonable and necessary defense costs. *Behnke v. State Farm Gen. Ins. Co.*, 196 Cal.App.4th 1443 (2011).

An insurer who agrees to retain *Cumis* counsel subject to a reservation of rights under Insurance Code section 2860 does not breach its contractual obligations if it properly submits a dispute over *Cumis* counsel fees to arbitration. *Behnke v. State Farm Gen. Ins. Co.*, 196 Cal.App.4th 1443 (2011).

An insurer fulfills its contractual obligation to defend by promptly paying the arbitrator's resolution of the insurer's Cumis fee dispute with the retained defense firm. *Behnke v. State Farm Gen. Ins. Co.*, 196 Cal.App.4th 1443 (2011).

Where an insurer is unaware of an insured's separate agreement to be personally responsible for *Cumis* counsel fees not paid by the insurer, foreclosure on the insured's home pursuant to this agreement does not constitute reasonably foreseeable consequential damages sufficient to support a breach of contract action against the insurer. *Behnke v. State Farm Gen. Ins. Co.*, 196 Cal.App.4th 1443 (2011).

Cumis **Counsel Arbitration**

If an insurer is providing a defense under a reservation of rights and has agreed to utilize independent counsel, an insurer may compel arbitration to resolve a dispute regarding the payment of defense fees pursuant to Civil Code Section 2860(c). *The Hous. Group v. PMA Capital Ins. Co.*, 193 Cal.App.4th 1150 (2011).

To take advantage of the provisions of Civil Code Section 2860, an insurer must meet its duty to defend and accept the tender of the insured's defense, subject to a reservation of rights. *The Hous. Group v. PMA Capital Ins. Co.*, 193 Cal.App.4th 1150 (2011).

Civil Code Section 2860(c), which provides for compelled arbitration between insurers and insureds in *Cumis* counsel fee disputes, does not apply if an insurer reserves its rights by merely agreeing to reimburse *Cumis* fees. *The Hous. Group v. PMA Capital Ins. Co.*, 193 Cal.App.4th 1150 (2011).

Where an insurer reserves its right under Insurance Code section 2860 to submit *Cumis* counsel fee disputes to arbitration, allegations that the insurer represented it would pay *Cumis* counsel fees and then submitted a dispute over those fees to arbitration did not demonstrate a misrepresentation of material fact to support a fraud claim in favor of the insured. *Behnke v. State Farm Gen. Ins. Co.*, 196 Cal.App.4th 1443 (2011).

Declaratory Relief Actions

Declaratory relief operates prospectively, serving to set controversies at rest before obligations are repudiated, before rights of invaded or wrongs are committed. *Kirkwood v. Cal. State Auto. Ass'n Inter-Insurance Bureau,* 193 Cal.App.4th 49 (2011).

The remedy of declaratory relief is cumulative and does not restrict other remedies. *Kirkwood v. Cal. State Auto. Ass'n Inter-Insurance Bureau,* 193 Cal.App.4th 49 (2011); *Doan v. State Farm General Ins. Co.,* 195 Cal.App.4th 1082 (2011).

An action for declaratory relief is authorized by Code of Civil Procedure Section 1060, and the granting of declaratory relief is committed to the sound discretion of the trial court. *Doan v. State Farm General Ins. Co.,* 195 Cal.App.4th 1082 (2011).

Where a multiplicity of action would result unless the parties rights are first declared and relief given in the same action, it is an abuse of discretion to deny the relief requested. *Doan v. State Farm General Ins. Co.,* 195 Cal.App.4th 1082 (2011).

Declaratory relief should not be used in cases where an appropriate procedure has been provided by special statute, but a party is trying to circumvent the statutory procedure by filing a declaratory relief action. *Doan v. State Farm General Ins. Co.,* 195 Cal.App.4th 1082 (2011).

Default of Insured

An insurer intervening in an action to pursue its own interests after its insured has defaulted is not required to move to vacate the insured's default; the insured's default simply has no effect on the insurer. *W. Heritage Ins. Co. v. Super. Ct.,* 199 Cal.App.4th 1196 (2011).

An insurer's intervention right could be defeated only by a refusal to defend, not by mere assertion of a right to later dispute coverage while a defense was, in the meantime, provided. *W. Heritage Ins. Co. v. Super. Ct.,* 199 Cal.App.4th 1196 (2011).

Defense Costs

Compensation for self-representation is not payment of attorney's fees expended by the insured. *Richards v. Sequoia Ins. Co.,* 195 Cal.App.4th 431 (2011).

A liability insurance contract obligates the insurer to compensate the insured for "expenses incurred" at insurer's request, but not expenses voluntarily assumed by the insured. "Incur" means "to become obligated to pay" a fee and an attorney litigating in propria persona cannot be said to "incur" compensation for time and lost business opportunities. *Richards v. Sequoia Ins. Co.*, 195 Cal.App.4th 431 (2011).

The measure of attorneys' fees possibly owed by insurer are those "expended" by the insured, not those based upon the value of the insured's time or services. *Richards v. Sequoia Ins. Co.*, 195 Cal.App.4th 431 (2011).

Demurrer

An insurer moving for a demurrer based on insurance policy language must establish conclusively that this language unambiguously negates beyond reasonable controversy the construction alleged in the body of the complaint. To meet this burden, an insurer is required to demonstrate that the policy language supporting its position is so clear that parol evidence would be inadmissible to refute it. *George v. Automobile Club of S. Cal.*, 201 Cal.App.4th 1112 (2011).

Direct Action

Section 11580 permits direct action subject to the terms and limitations of the policy. *Clark v. Cal. Ins. Guarantee Assn.*, 200 Cal.App.4th 391 (2011).

Insurance Code section 11580, subdivision (b)(2), is sometimes referred to as the "direct action" statute and provides that a policy insuring against loss or damage resulting from liability for an injury suffered by another shall either contain or be construed as containing a provision that, whenever judgment is secured against the insured or the executor of administrator of a deceased insured in an action based upon bodily injury, death, or property damage, then an action may be brought against the insurer on the policy and subject to its terms and limitations, by such judgment creditor to recover on the judgment. *W. Heritage Ins. Co. v. Super. Ct.*, 199 Cal.App.4th 1196 (2011).

A third party judgment creditor is merely an incidental beneficiary of obligations that arise under the duty to defend. Unless the third party obtains an assignment by the insured of its rights under the insurance contract, the third party has no right to bring a claim upon a duty owed only to the insured. *Clark v. Cal. Ins. Guarantee Assn.*, 200 Cal.App.4th 391 (2011).

A judgment creditor cannot enforce an award of costs and interest in a section 11580 direct action against the insurer regardless of whether the insurer had actually defended its insured. *Clark v. Cal. Ins. Guarantee Assn.*, 200 Cal.App.4th 391 (2011).

Duty to Defend

An insurer's duty to defend arises when tender is made. To defend meaningfully, the insurer must defend immediately. *The Hous. Group v. PMA Capital Ins. Co.*, 193 Cal.App.4th 1150 (2011).

Whether an insurer has a duty to defend depends upon the terms of the insurance policy it issued; if the insurer issued more than one policy to the insured, and the terms of those policies are not identical, the duty must be analyzed separately under each policy. *Shanahan v. State Farm Gen. Ins. Co.*, 193 Cal.App.4th 780 (2011).

Compensation for self-representation is not payment of attorney's fees expended by the insured. Duty to defend does not include obligation to pay insureds for time they expended working as attorneys on their own behalf. *Richards v. Sequoia Ins. Co.,* 195 Cal.App.4th 431 (2011).

An insurer owes a duty to defend its insureds for claims that potentially fall within the policy's coverage provisions. An insurer must defend a suit which potentially seeks damages within the coverage of the policy. However, in an action where no claim is even potentially covered, the insurer owes no duty to defend. *Feldman v. Illinois Union Ins. Co*., 198 Cal. App. 4th 1495 (2011).

The determination whether the insurer owes a duty to defend usually is made by comparing the allegations of the complaint with the terms of the policy. Facts extrinsic to the complaint also give rise to a duty to defend when they reveal a possibility that the claim may be covered-Facts known to the insurer and extrinsic to the third party complaint can generate a duty to defend, even though the face of the complaint does not reflect a potential for liability. *The Oglio Entm't Group, Inc. v. Hartford Cas. Ins. Co.*, 200 Cal.App.4th 573 (2011); *Palp, Inc. v. Williamsburg Nat'l Ins. Co.,* 200 Cal.App.4th 282 (2011).

An insurer is obligated to provide a defense where an exclusion arguably applies but may reasonably be interpreted to be inapplicable to the alleged facts. *The Oglio Entm't Group, Inc. v. Hartford Cas. Ins. Co.*, 200 Cal.App.4th 573 (2011).

Duty to Indemnify

Failure of plaintiff to participate in liquidation proceeding may obviate insurer's duty to indemnify bankrupt insured. *Jones v. Golden Eagle Ins. Corp.*, 201 Cal.App.4th 139 (2011).

If a plaintiff's claim is denied under a co-carrier's liquidation proceeding, argument can be made that the practical effect is that bankrupt insured is deemed to have had no coverage during policy period(s) of defunct insurer. *Jones v. Golden Eagle Ins. Corp.,* 201 Cal.App.4th 139 (2011).

E. Coli Outbreak

E. Coli outbreak was not an "Insured Event" of "Accidental Contamination" under a policy where the outbreak was not an error of the insured and there was not sufficient evidence that any error by the insured caused the claimed losses. *Fresh Express Inc. v. Beazley Syndicate 2623/623 at Lloyd's,* 199 Cal.App.4th 1038 (2011).

Equitable Contribution

Failure of plaintiff to participate in liquidation proceedings may bar equitable contribution claim by co-carrier for bankrupt insured. *Jones v. Golden Eagle Ins. Corp.,* 201 Cal.App.4th 139 (2011).

Equitable Estoppel

There is no stand-alone cause of action for equitable estoppel. *Behnke v. State Farm Gen. Ins. Co.,* 196 Cal.App.4th 1443 (2011).

ERISA

In the ERISA context, conditioning an award on the existence of evidence that cannot exist is arbitrary and capricious. *Salomaa v. Honda Long Term Disability Plan,* 642 F.3d 666 (9th Cir. 2011).

Evidence of a Social Security award of disability benefits is of sufficient significance that failure to address it offers support that the plan administrator's denial was an abuse of discretion. *Salomaa v. Honda Long Term Disability Plan,* 642 F.3d 666 (9th Cir. 2011).

In the ERISA context, conditioning an award on the existence of evidence that cannot exist is arbitrary and capricious. *Salomaa v. Honda Long Term Disability Plan,* 642 F.3d 666 (9th Cir. 2011).

The test for abuse of discretion in a factual determination (as opposed to legal error) is whether the court is left with a definite and firm conviction that a mistake has been committed, and the court may not merely substitute its view for that of the fact finder. To do so, the court considers whether application of a correct legal standard was (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record. A higher degree of skepticism is appropriate where the administrator has a conflict of interest. *Salomaa v. Honda Long Term Disability Plan,* 642 F.3d 666 (9th Cir. 2011).

The quarterly meeting rule extending time for making benefit claim decisions pursuant to 29 C.F.R. § 2560.503-1(i) is restricted to multiemployer plans and is not extended to disability claims. *Barboza v. Cal. Ass'n of Prof'l Firefighters,* 651 F.3d 1073 (9th Cir. 2011).

Claimant's failure to exhaust administrative remedies may be excused where employee benefits plan fails to establish or follow reasonable claims procedures. *Barboza v. Cal. Ass'n of Prof'l Firefighters,* 651 F.3d 1073 (9th Cir. 2011).

To determine whether action is timely, the court first determines if it is barred by the applicable statute of limitations and then if it is barred by the contractual limitations provision in the policy. *Withrow v. Bache Halsey Stuart Shield, Inc.*, 655 F.3d 1032 (9th Cir. 2011).

In ERISA action for proper calculation of long term disability benefits Court of Appeals reviews *de novo* if the claim is barred by the applicable statute of limitations, and reviews the district court's factual findings under the "clearly erroneous" standard. *Withrow v. Bache Halsey Stuart Shield, Inc.*, 655 F.3d 1032 (9th Cir. 2011).

Section 502(a)(1)(B) does not authorize relief for misrepresentations in a summary plan description. *Cigna Corp. v. Amara,* 131 S. Ct. 1866 (2011).

In seeking relief under section 502(a)(3), a court may impose a remedy equivalent to estoppel, reformation of contract or surcharge where a showing of detrimental reliance is made. In making this showing, a plan participant or beneficiary must only show harm and causation rather than demonstrate the more rigorous standard implicit in the words "detrimental reliance." *Cigna Corp. v. Amara,* 131 S. Ct. 1866 (2011).

Summary plan descriptions provide communication with beneficiaries about the plan, but the statements do not themselves constitute the terms of the plan for purposes of section 502(a)(1)(B). *Cigna Corp. v. Amara,* 131 S. Ct. 1866 (2011).

Exclusions

Exclusions are to be construed narrowly and in accordance with the reasonable expectations of the insured. *Palp, Inc. v. Williamsburg Nat'l Ins. Co.*, 200 Cal.App.4th 282 (2011).

Exclusion j(5) applies to works in progress and bars coverage for property damage that occurs while the insured is performing operations on that property. *Clarendon Am. Ins. Co. v. General Sec. Indemn. Co. of Ariz.*, 193 Cal.App.4th 1311 (2011).

Exclusion j(6) precludes coverage for physical injury to, or loss of use of, that part of the property that must be replaced because the insured's work was performed incorrectly. *Clarendon Am. Ins. Co. v. General Sec. Indemn. Co. of Ariz.*, 193 Cal.App.4th 1311 (2011).

The mechanical device exclusion in a commercial auto/truckers policy only applies where damage results from the "movement of property" to or from the covered auto by a mechanical device (other than a hand truck) unless the device is attached to the covered auto. *Palp, Inc. v. Williamsburg Nat'l Ins. Co.*, 200 Cal.App.4th 282 (2011).

To be enforceable, any provision that takes away or limits coverage reasonably expected by an insured must be conspicuous, plain and clear. *Wallman v. Suddock*, 200 Cal.App. 4th 1288 (2011).

An insurance policy limitation is conspicuous if it is positioned and printed in a form which adequately attracts the reader's attention to the limitation. *Mission Viejo Emergency Medicals Associates v. Beta Healthcare Group*, 197 Cal.App.4th 1146 (2011).

An insurance company is bound by a greater coverage in an earlier policy when a renewal policy is issued but the insured is not notified of the specific reduction in coverage. *Mission Viejo Emergency Medicals Associates v. Beta Healthcare Group*, 197 Cal.App.4th 1146 (2011).

An insurer is obligated to provide a defense where an exclusion arguably applies but may reasonably be interpreted to be inapplicable to the alleged facts. *The Oglio Entm't Group, Inc. v. Hartford Cas. Ins. Co.*, 200 Cal.App.4th 573 (2011).

Use of the phrases "an insured" and "the insured," as opposed to "any insured," in the standard fire insurance forms set forth in Insurance Code section 2071 represent an intent by the Legislature that a fire policy's coverage be applied on a several basis and that exclusionary language applicable to one insured should not be applied to other innocent co-insureds. *Century-National Ins. Co. v. Garcia*, 51 Cal. 4th 564 (2011).

Asbestos is a pollutant for purposes of interpreting pollution exclusion in first party property and third party liability policies. *The Villa Los Alamos Homeowners Ass'n v. State Farm Gen. Ins. Co.*, 198 Cal. App. 4th 522 (2011).

Pollution exclusion in first party property policy is generally limited in application to traditional environmental pollution claims. *The Villa Los Alamos Homeowners Ass'n v. State Farm Gen. Ins. Co.*, 198 Cal. App. 4th 522 (2011).

Because there is no safe level of exposure to asbestos fibers even a single event leading to a localized release of asbestos fibers can constitute environmental pollution. *The Villa Los Alamos Homeowners Ass'n v. State Farm Gen. Ins. Co.*, 198 Cal. App. 4th 522 (2011).

When an exclusion excludes coverage for "any violation of any intellectual property rights, such as copyright, patent, trademark, trade name, trade secret, service mark, or other destination of origin or authenticity," right of publicity claims are also excluded. *Aroa Mktg., Inc. v. Hartford Ins. Co. of the Midwest*, 198 Cal.App.4th 781 (2011).

Health and Safety Code Section 1371.24

Health and Safety Code section 1371.24 bars holding a health care service plan vicariously liable for its health care provider's acts or omissions. However, Section 1371 does not prevent a health care service plan from being jointly and severally liable with its health care provider if they both contributed to the damages. *PacifiCare of Cal. v. Bright Med. Assoc.Inc.*, 198 Cal.App.4th 1451 (2011).

Health and Safety Code section 1371.24 prevents a health care service plan from recovering attorney fees it incurs in defending any vicarious liability claims. *PacifiCare of Cal. v. Bright Med. Assoc.Inc.*, 198 Cal.App.4th 1451 (2011).

Healthcare

When a healthcare provider accepts the patient's assignment for payment from the insurance company, the healthcare provider becomes subject to all the terms of the assignment, including any limitations and setoffs. *Quality Infusion Care, Inc. v. Health Care Serv. Corp.*, 628 F.3d 725 (5th Cir. 2010).

When an insurance company and healthcare provider do not have a separate contractual relationship the insurance company's right to a setoff stems from the assigned contract. *Quality Infusion Care, Inc. v. Health Care Serv. Corp.*, 628 F.3d 725 (5th Cir. 2010).

A provision in writing signed by both the secretary and president of an insurance company complies with Code of Civil Procedure section 360.5. *Blue Shield of Cal. Life & Health Ins. Co. v. Super. Ct.*, 192 Cal. App. 4th 727 (2011).

When a policy includes provisions that allow the insurer to cancel the policy if it learns that materials facts were concealed or misrepresented during the application process, invocation of the contractual right to rescind the policy is a matter that arises from the plan. *Blue Shield of Cal. Life & Health Ins. Co. v. Super. Ct.*, 192 Cal. App. 4th 727 (2011).

Cancelling an insured's policy waives the proof of loss notice provision of the policy. *Blue Shield of Cal. Life & Health Ins. Co. v. Super. Ct.*, 192 Cal. App. 4th 727 (2011).

Use of the phrase "any matter arising out of this Plan" in a limitation provision is so broad that it encompasses tort as well as contract claims. *Blue Shield of Cal. Life & Health Ins. Co. v. Super. Ct.*, 192 Cal. App. 4th 727 (2011).

For an insurance company to recoup overpayments made to a healthcare provider, the terms of the setoff must be contained within the plan. *Quality Infusion Care, Inc. v. Health Care Serv. Corp.*, 628 F.3d 725 (5th Cir. 2010).

Courts will uphold the contractual provisions for setoffs when the terms are set forth in the plan stating the insurance company's right to offset subsequent benefit payments, and the state's insurance code does not prohibit said setoffs. *Quality Infusion Care, Inc. v. Health Care Serv. Corp.*, 628 F.3d 725 (5th Cir. 2010).

Homeowners' Insurance

Insurance code section 2051 applies to open policies and provides that when an open policy requires payment of actual cash value for a structure's contents, the measure of the actual cash value recovery is the amount it would cost the insured to repair, rebuild, or replace the thing lost or injured less a fair and reasonable deduction for physical depreciation based upon its condition at the time of the injury or the policy limit, whichever is less. *Doan v. State Farm General Ins. Co.*, 195 Cal.App.4th 1082 (2011); *Kirkwood v. Cal. State Auto. Ass'n Inter-Insurance Bureau*, 193 Cal.App.4th 49 (2011).

Provision in a homeowners' policy authorizing payment of 150% of the policy's limit of liability if the homeowner decided to rebuild did not increase the "policy limit" within the meaning of California Insurance Code §2051(b)(1). Insurance Code §2051.5 did not require an insurer to pay 150% of the policy's limit of liability regardless of whether the insured replaced the property. *Minich v. Allstate Ins. Co.*, 193 Cal.App.4th 477 (2011).

Use of the phrases "an insured" and "the insured," as opposed to "any insured," in the standard fire insurance forms set forth in Insurance Code section 2071 represent an intent by the Legislature that a fire policy's coverage be applied on a several basis and that exclusionary language applicable to one insured should not be applied to other innocent co-insureds. *Century-National Ins. Co. v. Garcia,* 51 Cal. 4th 564 (2011).

Where the terms of the policy do not define "theft" for purposes of a theft provision, the court will look to the common and ordinary meaning of the word, which requires a criminal intent to steal or deprive the insured of possession of his property. *Barnett v. State Farm Gen. Ins. Co.*, 200 Cal.App.4th 536 (2011).

Insureds: Failure to Read Policy

It is a general rule that the receipt of a policy and its acceptance by the insured without an objection binds the insured as well as the insurer and he cannot thereafter complain that he did not read it or know its terms. It is a duty of the insured to read the policy. *Mission Viejo Emergency Medicals Associates v. Beta Healthcare Group,* 197 Cal.App.4th 1146 (2011).

Failing to read a policy (or its table of contents) is not sufficient reason to hold a clear and conspicuous policy provision unenforceable. *Mission Viejo Emergency Medicals Associates v. Beta Healthcare Group,* 197 Cal.App.4th 1146 (2011).

Intentional Conduct

California Insurance Code section 533 is implied into every policy of insurance in California and precludes coverage for losses caused by the willful acts of the insured. *Century-National Ins. Co. v. Garcia,* 51 Cal. 4th 564 (2011).

California Insurance Code section 533, which precludes coverage for losses caused by the willful acts of an insured, should not be applied to innocent co-insureds, at least within the context of a fire insurance policy. *Century-National Ins. Co. v. Garcia*, 51 Cal. 4th 564 (2011).

Speech is intentional, and where speech and action are so closely connected as to be one, the connected action cannot be considered "accidental." *Shanahan v. State Farm Gen. Ins. Co.*, 193 Cal.App.4th 780 (2011).

Interrelated Wrongful Acts

An "interrelated wrongful acts" provision in a claims made insurance policy precludes coverage where later filed claims against the insured shared a common nexus with earlier filed claims. *Feldman v. Illinois Union Ins. Co.*, 198 Cal. App. 4th 1495 (2011).

Intervention

Insurers may intervene when a third party has obtained a default against the insured and when insured's answer has been stricken because its corporate status has been suspended. An insurer that provides a defense to its insured and its insured's employee has a sufficient interest to justify intervention when a default is entered against the insured's employee. *W. Heritage Ins. Co. v. Super. Ct.*, 199 Cal.App.4th 1196 (2011).

An insurer intervening in an action to pursue its own interests after its insured has defaulted is not required to move to vacate the insured's default; the insured's default simply has no effect on the insurer. *W. Heritage Ins. Co. v. Super. Ct.*, 199 Cal.App.4th 1196 (2011).

An insurer's intervention right could be defeated only by a refusal to defend, not by mere assertion of a right to later dispute coverage while a defense was, in the meantime, provided. *W. Heritage Ins. Co. v. Super. Ct.*, 199 Cal.App.4th 1196 (2011).

The insurer's exposure to direct liability under Insurance Code section 11580, subdivision (b)(2), has repeatedly been held sufficient to create a basis for insurer intervention in a third party action against the insured. *W. Heritage Ins. Co. v. Super. Ct.*, 199 Cal.App.4th 1196 (2011).

Intervener becomes an actual party to the suit by virtue of the order authorizing him to intervene. A party permitted to intervene is permitted to do so in order to pursue its own interests and once it is permitted to intervene it is not bound by other parties' procedural defaults. The entire purpose of the intervention is to permit the insurer to pursue it own interests, which necessarily include the litigation of defenses its insured is procedurally barred from pursuing. *W. Heritage Ins. Co. v. Super. Ct.*, 199 Cal.App.4th 1196 (2011).

Invasion of Privacy

Sending flowers and a card to a married person's home suggesting a personal relationship does not constitute an invasion of privacy. *Shanahan v. State Farm Gen. Ins. Co.*, 193 Cal.App.4th 780 (2011).

Limitations Period

ERISA does not contain a statute of limitations applicable to actions for the recovery of benefits or the miscalculation of benefits under ERISA § 502(a)(1)(B), and courts must apply the state statute of limitations that is most analogous to the ERISA claim. *Withrow v. Bache Halsey Stuart Shield, Inc.*, 655 F.3d 1032 (9th Cir. 2011).

Action for the proper calculation of disability benefits under ERISA § 502(a)(1)(B) is governed by California's four-year statute of limitations for contract disputes. *Withrow v. Bache Halsey Stuart Shield, Inc.*, 655 F.3d 1032 (9th Cir. 2011).

Federal law governs the determination of when an ERISA cause of action accrues, which accrues either at the time benefits are actually denied, or when the insured has reason to know that the claim has been denied. *Withrow v. Bache Halsey Stuart Shield, Inc.*, 655 F.3d 1032 (9th Cir. 2011).

Claim was not time-barred by policy's contractual limitations provision because provision was meaningless when applied to disputes over the correct calculation of monthly benefit amounts, as opposed to disputes over entitlement to benefits. *Withrow v. Bache Halsey Stuart Shield, Inc.*, 655 F.3d 1032 (9th Cir. 2011).

Liquidation Proceeding

Failure of plaintiff to participate in liquidation proceeding may obviate insurer's duty to indemnify bankrupt insured. *Jones v. Golden Eagle Ins. Corp.*, 201 Cal.App.4th 139 (2011).

If a plaintiff's claim is denied under a co-carrier's liquidation proceeding, argument can be made that the practical effect is that bankrupt insured is deemed to have had no coverage during policy period(s) of defunct insurer. *Jones v. Golden Eagle Ins. Corp.*, 201 Cal.App.4th 139 (2011).

Failure of plaintiff to participate in liquidation proceedings may bar equitable contribution claim by co-carrier for bankrupt insured. *Jones v. Golden Eagle Ins. Corp.*, 201 Cal.App.4th 139 (2011).

Morris Agreements

An insurer that reserves its rights may not employ Morris to reduce its liability below policy limits, and an insured that facilitates such an effort breaches its duty to cooperate. *Leflet v. Redwood Fire & Cas. Ins. Co.*, 247 P.3d 180 (Ariz. 2011).

A primary insurer who acts in good faith is subject to liability only to the extent of its policy limits. Leflet v. Redwood Fire & Cas. Ins. Co., 247 P.3d 180 (Ariz. 2011). Under a true Morris agreement, a non-settling insurer is bound by the settlement if, but only if, it was given notice and opportunity to defend. *Leflet v. Redwood Fire & Cas. Ins. Co.*, 247 P.3d 180 (Ariz. 2011).

A Morris agreement must be preceded by appropriate notice to the insurer. The mere threat of Morris in the course of settlement negotiations does not constitute sufficient notice. If proper notice is not provided, the insurer can face no liability for the resulting stipulated judgment. *Leflet v. Redwood Fire & Cas. Ins. Co.*, 247 P.3d 180 (Ariz. 2011).

Multiple Policies

Whether an insurer has a duty to defend depends upon the terms of the insurance policy it issued; if the insurer issued more than one policy to the insured, and the terms of those policies are not identical, the duty must be analyzed separately under each policy. *Shanahan v. State Farm Gen. Ins. Co.*, 193 Cal.App.4th 780 (2011).

Parol Evidence

Parol evidence relevant to interpretation of an insurance policy cannot be barred because of a judicial determination that a writing appears to have only one interpretation. Parol evidence is admissible to show mutually shared meanings of words used irrespective of their ordinary meaning. Parol evidence of custom and usage is similarly admissible to interpret the written words. *George v. Automobile Club of S. Cal.,* 201 Cal.App.4th 1112 (2011).

In the context of a demurrer, the court must conditionally consider parol evidence alleged in the complaint to determine if it would be relevant to prove a meaning to which the language of the instrument is reasonably susceptible. Trial courts err if they refuse to consider the alleged parol evidence on the ground that no parol evidence of any sort is pertinent because the particular contract in dispute is unambiguous. But there may be no error if the trial court conditionally accepts as true the parol evidence proffered by the insured and determines as a matter of law the parol evidence alleged must be disregarded because the contract is not reasonably susceptible of the interpretation the plaintiff alleged. *George v. Automobile Club of S. Cal.,* 201 Cal.App.4th 1112 (2011).

Policy Limits

Provision in a homeowners' policy authorizing payment of 150% of the policy's limit of liability if the homeowner decided to rebuild did not increase the "policy limit" within the meaning of California Insurance Code § 2051(b)(1). Insurance Code § 2051.5 did not require an insurer to pay 150% of the policy's limit of liability regardless of whether the insured replaced the property. *Minich v. Allstate Ins. Co.*, 193 Cal.App.4th 477 (2011).

Pollution Exclusion

Asbestos is a pollutant for purposes of interpreting pollution exclusion in first party property and third party liability policies. *The Villa Los Alamos Homeowners Ass'n v. State Farm Gen. Ins. Co.*, 198 Cal. App. 4th 522 (2011).

Pollution exclusion in first party property policy is generally limited in application to traditional environmental pollution claims. *The Villa Los Alamos Homeowners Ass'n v. State Farm Gen. Ins. Co.*, 198 Cal. App. 4th 522 (2011).

Because there is no safe level of exposure to asbestos fibers even a single event leading to a localized release of asbestos fibers can constitute environmental pollution. *The Villa Los Alamos Homeowners Ass'n v. State Farm Gen. Ins. Co.*, 198 Cal. App. 4th 522 (2011).

Products-Completed Operations Hazard

When an insured is fired from a project before completing its work, definition of "products-completed operations hazard" is not satisfied without evidence that insured had abandoned its work. *Clarendon Am. Ins. Co. v. General Sec. Indemn. Co. of Ariz.*, 193 Cal.App.4th 1311 (2011).

Within the context of a construction project, the term "abandoned" as used in a policy's definition of "products-completed operations hazard" refers to situations where either: (1) both sides to the contract expressly announce their intention to abandon it and release each other from their respective duties; or (2), result from the aggregation of numerous changes to a contract over time. *Clarendon Am. Ins. Co. v. General Sec. Indemn. Co. of Ariz.*, 193 Cal.App.4th 1311 (2011).

Proper Parties

ERISA § 1132(a)(1)(B) does not limit liability to the plan or plan administrator when there are other persons or entities, including claims administrator and any third party insurer, that could also be held liable for denying benefits to a plan participant or beneficiary. The Ninth Circuit explicitly overrules its prior decisions in *Ford v. MCI Communications Corp. Health & Welfare Plan*, 399 F.3d 1076 (9th Cir. 2005); *Everhart v. Allmerica Financial Life Insurance Co.*, 275 F.3d 751 (9th Cir. 2001); *Spain v. Aetna Life Insurance Co.*, 13 F.3d 310 (9th Cir. 1993); *Gelardi v. Pertec Computer Corp.*, 761 F.2d 1323 (9th Cir. 1985), that limit liability to the plan or plan administrator as it relates to § 1132(a)(1)(B). *Cyr v. Reliance Standard Life Ins. Co.*, 642 F.3d 1202 (9th Cir. 2011).

Property Damage

Exclusion j(5) applies to works in progress and bars coverage for property damage that occurs while the insured is performing operations on that property. *Clarendon Am. Ins. Co. v. General Sec. Indemn. Co. of Ariz.*, 193 Cal.App.4th 1311 (2011).

Exclusion j(6) precludes coverage for physical injury to, or loss of use of, that part of the property that must be replaced because the insured's work was performed incorrectly. *Clarendon Am. Ins. Co. v. General Sec. Indemn. Co. of Ariz.*, 193 Cal.App.4th 1311 (2011).

The mechanical device exclusion in a commercial auto/truckers policy only applies where damage results from the "movement of property" to or from the covered auto by a mechanical device (other than a hand truck) unless the device is attached to the covered auto. *Palp, Inc. v. Williamsburg Nat'l Ins. Co.*, 200 Cal.App.4th 282 (2011).

Punitive Damages

Without tort liability, there can be no liability for punitive damages. *Behnke v. State Farm Gen. Ins. Co.*, 196 Cal.App.4th 1443 (2011).

Reasonable Expectations of the Insured

If an asserted ambiguity is not eliminated by the language and context of the policy, courts then invoke the principle that ambiguities are generally construed against the insurer in order to protect the insured's reasonable expectation of coverage. *Wallman v. Suddock*, 200 Cal.App. 4th 1288 (2011).

Reimbursement

Insurer may obtain reimbursement from its insured for a policy limits settlement when the underlying claim is not covered by the policy, if the insurance company: (1) made a timely and express reservation of rights; (2) provided express notification to the insured of the insurer's intent to accept the proposed settlement offer; and (3) made an express offer that the insured could assume its own defense. *Am. Modern Home Ins. Co. v. Fahmian*, 194 Cal.App.4th 162 (2011).

Renewal

An insurance company is bound by a greater coverage in an earlier policy when a renewal policy is issued but the insured is not notified of the specific reduction in coverage. *Mission Viejo Emergency Medicals Associates v. Beta Healthcare Group*, 197 Cal.App.4th 1146 (2011).

Right of Publicity

When an exclusion excludes coverage for "any violation of any intellectual property rights, such as copyright, patent, trademark, trade name, trade secret, service mark, or other destination of origin or authenticity," right of publicity claims are also excluded. *Aroa Mktg., Inc. v. Hartford Ins. Co. of the Midwest*, 198 Cal.App.4th 781 (2011).

Right of publicity claims are a subset of the right of privacy claims. *Aroa Mktg., Inc. v. Hartford Ins. Co. of the Midwest*, 198 Cal.App.4th 781 (2011).

Stacking

Health and Safety Code section 1371.24 bars holding a health care service plan vicariously liable for its health care provider's acts or omissions. However, Section 1371 does not prevent a health care service plan from being jointly and severally liable with its health care provider if they both contributed to the damages. *PacifiCare of Cal. v. Bright Med. Assoc.Inc.*, 198 Cal.App.4th 1451 (2011).

Health and Safety Code section 1371.24 prevents a health care service plan from recovering attorney fees it incurs in defending any vicarious liability claims. *PacifiCare of Cal. v. Bright Med. Assoc.Inc.*, 198 Cal.App.4th 1451 (2011).

Subrogation

The insurer may be liable in bad faith, when it pays for repairs not authorized by the insured, and then recovers from the tortfeasor in subrogation because the subrogation action may be prejudicial to the insured's direct action against the tortfeasor. *Hibbs v. Allstate Ins. Co.*, 193 Cal.App.4th 809 (2011).

Summary Plan Description

Summary plan descriptions provide communication with beneficiaries about the plan, but the statements do not themselves constitute the terms of the plan for purposes of section 502(a)(1)(B). *Cigna Corp. v. Amara*, 131 S. Ct. 1866 (2011).

Supplemental Payments

Because costs and interest are part of the insurer's obligation to defend and because the obligation to defend is a covenant that runs only to the insured, a "supplemental payments" provision gives the right to recover costs taxed against the insured only to the insured who was directly owed the defense duty. *Clark v. Cal. Ins. Guarantee Assn.*, 200 Cal.App.4th 391 (2011).

Third-Party Judgment Creditors

A third party judgment creditor is merely an incidental beneficiary of obligations that arise under the duty to defend. Unless the third party obtains an assignment by the insured of its rights under the insurance contract, the third party has no right to bring a claim upon a duty owed only to the insured. *Clark v. Cal. Ins. Guarantee Assn.,* 200 Cal.App.4th 391 (2011).

A judgment creditor cannot enforce an award of costs and interest in a section 11580 direct action against the insurer regardless of whether the insurer had actually defended its insured. *Clark v. Cal. Ins. Guarantee Assn.,* 200 Cal.App.4th 391 (2011).

Uninsured Motorist

Every insurer that issues an automobile policy in Arizona is required by Statute (A.R.S. section 20-259.01) to "make available" uninsured and underinsured coverage and to offer such coverage "by written notice." *Ballesteros v. Am. Std. Ins. Co. of Wisconsin*, 248 P.3d 193 (Ariz. 2011).

An automobile insurer may satisfy the statutory requirement in A.R.S. section 20-259.01 to provide written notice of an offer of uninsured and underinsured coverage by providing an Insurance Department-approved English-language form to a Spanish-speaking insured. *Ballesteros v. Am. Std. Ins. Co. of Wisconsin*, 248 P.3d 193 (Ariz. 2011).

A.R.S. section 20-259.01 requirement that every insurer offer uninsured/underinsured coverage by "written notice" requires only that the insurer make an offer that, if accepted, would bind the insurer to provide the offered coverage. *Ballesteros v. Am. Std. Ins. Co. of Wisconsin*, 248 P.3d 193 (Ariz. 2011).

Warranty

Failure to strictly comply with a warranty precludes coverage because a warranty is an agreement in the nature of a condition precedent, and strict compliance is required. *Trishan Air, Inc. v. Fed. Ins. Co.,* 635 F.3d 422 (9th Cir. 2011).

Arizona Law

An excess policy's cooperation clause precludes an insured from assigning its rights after stipulating to a judgment far in excess of the primary policy's limits. *Leflet v. Redwood Fire & Cas. Ins. Co.,* 247 P.3d 180 (Ariz. 2011).

Because *Morris* agreements are fraught with risk of abuse, a settlement that mimics *Morris* in form but does not find support in the legal and economic realities that gave rise to that decision is both unenforceable and offensive to the policy's cooperation clause. *Leflet v. Redwood Fire & Cas. Ins. Co.*, 247 P.3d 180 (Ariz. 2011).

An insurer that reserves its rights may not employ *Morris* to reduce its liability below policy limits, and an insured that facilitates such an effort breaches its duty to cooperate. *Leflet v. Redwood Fire & Cas. Ins. Co.*, 247 P.3d 180 (Ariz. 2011).

A primary insurer who acts in good faith is subject to liability only to the extent of its policy limits. *Leflet v. Redwood Fire & Cas. Ins. Co.*, 247 P.3d 180 (Ariz. 2011).

A *Morris* agreement must be preceded by appropriate notice to the insurer. The mere threat of *Morris* in the course of settlement negotiations does not constitute sufficient notice. If proper notice is not provided, the insurer can face no liability for the resulting stipulated judgment. *Leflet v. Redwood Fire & Cas. Ins. Co.*, 247 P.3d 180 (Ariz. 2011).

Every insurer that issues an automobile policy in Arizona is required by Statute (A.R.S. section 20-259.01) to "make available" uninsured and underinsured coverage and to offer such coverage "by written notice." *Ballesteros v. Am. Std. Ins. Co. of Wisconsin*, 248 P.3d 193 (Ariz. 2011).

An automobile insurer may satisfy the statutory requirement in A.R.S. section 20-259.01 to provide written notice of an offer of uninsured and underinsured coverage by providing an Insurance Department-approved English-language form to a Spanish-speaking insured. *Ballesteros v. Am. Std. Ins. Co. of Wisconsin*, 248 P.3d 193 (Ariz. 2011).

A.R.S. section 20-259.01 requirement that every insurer offer uninsured/underinsured coverage by "written notice" requires only that the insurer make an offer that, if accepted, would bind the insurer to provide the offered coverage. *Ballesteros v. Am. Std. Ins. Co. of Wisconsin*, 248 P.3d 193 (Ariz. 2011).

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