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**DEVELOPMENTS  
IN CALIFORNIA CASE LAW 2007:  
INSURANCE**

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A summary prepared by Gordon & Rees, LLP of the holdings, organized by topic, of cases published in 2007 which apply California law to issues bearing on the rights and duties of the insurance industry.

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### **Additional Insured**

Employer was not an “additional insured” entitled to a defense under a charitable nonprofit corporation’s commercial general liability policy where an employee sought recovery for personal injuries sustained while performing volunteer work on behalf of the nonprofit organization. There was no ambiguity in the additional insured endorsement when read in the context of the policy as a whole. *Boeing Co. v. Continental Casualty* (2007) 157 Cal.App.4th 1258.

### **Agency Agreements**

A termination provision in an agency agreement between an insurer and an agent, which provides for termination upon specified notice, is not reasonably susceptible on its face to an interpretation requiring good cause for termination. Extrinsic evidence is therefore not admissible to prove that the insurer required good cause to terminate the agency. *Bernard v. State Farm Mutual Automobile Insurance Company* (2007) 158 Cal.App.4th 304.

A termination provision in an agency agreement between an insurer and an agent, which provides for review of the agent’s termination, does not render the termination reasonably susceptible to an interpretation requiring good cause for termination. Accordingly, extrinsic evidence is not admissible to prove that the insurer required good cause to terminate the agency. *Bernard v. State Farm Mutual Automobile Insurance Company* (2007) 158 Cal.App.4th 304.

An agency agreement between an insurer and an agent, which provides for termination upon specified notice by either party, creates an agreement terminable at will by any party without cause and for any reason. *Bernard v. State Farm Mutual Automobile Insurance Company* (2007) 158 Cal.App.4th 304.

An agency agreement which provides for review of an agent’s termination does not transform termination upon notice from being at-will termination. *Bernard v. State Farm Mutual Automobile Insurance Company* (2007) 158 Cal.App.4th 304.

An agency agreement that is terminable at will precludes a contract-based cause of action for breach of the covenant of good faith and fair dealing based on misrepresentations made by the insurer in the course of the agent’s termination. *Bernard v. State Farm Mutual Automobile Insurance Company* (2007) 158 Cal.App.4th 304.

### **Aggregation of Claims**

Aggregation provisions in CGL policy do not permit thousands of asbestos exposures to be deemed a single “occurrence.” *London Market Insurers v. Superior Court (Truck Ins. Exchange)* (2007) 146 Cal.App.4th 648.

### **Ambiguity**

It is not a court’s function to select a particular definition of a single word and apply it without regard to other policy language. Ambiguity is not necessarily found in the fact that a word or phrase isolated from its context is susceptible of more than one meaning. The critical principle is an insurance policy must be interpreted as a whole and in context. *Boeing Co. v. Continental Casualty* (2007) 157 Cal.App.4th 1258.

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### **Attorney and Client**

Legal counsel retained by a ceding insurer to provide advice and representation with respect to a claim against an insured generally owes no legal duty of care under a third-party beneficiary theory or an implied contract theory to a reinsurer. *Zenith Insurance Company v. Cozen O'Connor* (2007) 148 Cal.App.4th 998.

### **Attorney Client Privilege**

A corporation's attorney-client privilege extends to confidential communications between corporate agents regarding legal advice and strategy, including those in which the corporation's attorneys are not directly involved or which do not include excerpts of direct communications from the attorneys. *Zurich American Ins. Co. v. Superior Court* (2007) 155 Cal.App.4th 1485.

"Confidential communication" between client and lawyer is defined in California Evidence Code section 952. *Zurich American Ins. Co. v. Superior Court* (2007) 155 Cal.App.4th 1485.

California courts have held that the attorney-client privilege extends to communications which are intended to be confidential, if they are made to attorneys, to family members, business associates, or agents of the party or his attorneys on matters of joint concern, when disclosure of the communication is reasonably necessary to further the interest of the litigant. *Zurich American Ins. Co. v. Superior Court* (2007) 155 Cal.App.4th 1485.

While involvement of an unnecessary third person in attorney-client communications destroys confidentiality, involvement of third persons to whom disclosure is reasonably necessary to further the purpose of the legal consultation preserves confidentiality of communication. *Zurich American Ins. Co. v. Superior Court* (2007) 155 Cal.App.4th 1485.

There are circumstances in which the attorney-client privilege may be waived by the corporation. Thus, where the client communicates with his attorney in the presence of other persons who have no interest in the matter, or where he communicates in confidence but later breaches that confidence himself, he is held to have waived the privilege, but this does not mean that the privilege is waived simply because the communication was made through an agent of the client or of the attorney. *Zurich American Ins. Co. v. Superior Court* (2007) 155 Cal.App.4th 1485.

It is established that otherwise routine, non-privileged communications between corporate officers or employees transacting the general business of the company do not attain privileged status solely because in-house or outside counsel is "copied in" on correspondence or memoranda. *Zurich American Ins. Co. v. Superior Court* (2007) 155 Cal.App.4th 1485.

A corporation may not shield facts, as opposed to communications, from discovery on the basis of attorney-client privilege. Any relevant fact may not be withheld merely because it was incorporated into a communication involving an attorney. *Zurich American Ins. Co. v. Superior Court* (2007) 155 Cal.App.4th 1485.

It is settled that the attorney-client privilege is inapplicable where the attorney merely acts as a negotiator for the client, gives business advice or otherwise acts as a business agent. *Zurich American Ins. Co. v. Superior Court* (2007) 155 Cal.App.4th 1485.

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### **Attorneys' Fees**

Where counsel is required to take action to enforce a workers' compensation award, attorneys' fees should be awarded pursuant to California Labor Code Section 4607, regardless of whether the insurer filed a formal petition to terminate care. *Smith v. Workers' Compensation Appeals Board* (2007) 146 Cal.App.4th 1032. Not citable. Review granted.

There is no obligation for an insurer to pay costs, including attorneys' fees, awarded against its insured where the insurer defends under a complete reservation of rights and there is a finding that there was no coverage under the policies and no duty to defend. *Golden Eagle Insurance Corp. v. Cen-Fed, Ltd.* (2007) 148 Cal.App.4th 976.

Under Nevada law, there is no "categorical rule" that attorneys' fees must be awarded where there has been a finding of bad faith. *Merrick v. Paul Revere Life Insurance Company* (9th Cir. 2007) 500 F.3d 1007.

To the extent that appellate attorney fees reflect the continuation of services performed to obtain the rejected payment of policy benefits, they should be recoverable under the rationale of *Brandt*. *James Baron v. Fire Insurance Exchange* (2007) 154 Cal.App.4th 1184.

### **Automatic Stay**

An insurer's withdrawal of coverage post petition does not violate the automatic stay imposed by a bankruptcy court. *In Re: Benz* (9th Cir BAP 2007) 368 BR 861 .

### **Bad Faith**

Privity of contract with the insurer is essential to an implied covenant action against the insurer. *InfiNet Marketing Services v. American Motorist Insurance Co.* (2007) 150 Cal.App.4th 168.

Defense to a claim of bad faith that a "genuine dispute" exists is not available, unless insurer investigates all possible bases for coverage, despite one basis for denial being reasonable. *Jordan v. Allstate Insurance Company* (2007) 148 Cal.App.4th 1062.

An insurer's obligations under the implied covenant of good faith and fair dealing with respect to first party under insured motorist coverage only includes a duty not to unreasonably withhold benefits due under the policy. A failure to negotiate does not constitute bad faith. *Rappaport-Scott v. Interinsurance Exchange of the Automobile Club* (2007) 146 Cal.App.4th 831.

The District Court acted within its discretion in denying a motion for a new trial on a bad faith cause of action where, given the evidence, the jury could have concluded that a disability insurer conducted a biased investigation or that it misrepresented the terms of the policy as requiring "objective medical evidence" of disability. *Merrick v. Paul Revere Life Insurance Company*, (9th Cir. 2007) 500 F.3d 1007.

While an insurer has no obligation under implied covenant of good faith and fair dealing to pay every claim, it cannot deny a claim without fully investigating the basis for denial. *Wilson v. 21st Century Insurance Company* (2007) 42 Cal.4th 713.

To protect insured's contractual interest in security and peace of mind insurer must

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fully inquire into possible basis that may support claim before denying claim. *Wilson v. 21st Century Insurance Company* (2007) 42 Cal.4th 713.

Where insurer has good faith doubts about coverage it may further investigate claim by having insured examined by physicians of its choosing, having such physicians review records, or asking for additional information from insured's treating physician. *Wilson v. 21st Century Insurance Company* (2007) 42 Cal.4th 713.

An insurer's good or bad faith must be evaluated in light of the totality of circumstances surrounding its actions rather than on general rules regarding the extent and nature of the investigation required. *Wilson v. 21st Century Insurance Company* (2007) 42 Cal.4th 713.

Insurer's denial of or delay in paying policy benefits gives rise to tort damages only if insured shows denial or delay was unreasonable. *Wilson v. 21st Century Insurance Company* (2007) 42 Cal.4th 713.

Insurer's denial of or delay in paying policy benefits due to existence of genuine dispute with insured over existence or amount of coverage does not give rise to claim for bad faith even where insurer may be in breach of contract. *Wilson v. 21st Century Insurance Company* (2007) 42 Cal.4th 713.

"Genuine dispute" doctrine was originally invoked in cases involving disputes over policy interpretation, but is also applied to factual disputes. *Wilson v. 21st Century Insurance Company* (2007) 42 Cal.4th 713.

"Genuine dispute" doctrine does not alter standard for summary judgment; summary judgment in favor of insurer can only be granted where even under the insured's version of the facts there is a genuine issue as to the insurer's liability. *Wilson v. 21st Century Insurance Company* (2007) 42 Cal.4th 713.

Insurer's decision is in bad faith where it is prompted not by an honest mistake, bad judgment, or negligence but by a conscious and deliberate act. *Wilson v. 21st Century Insurance Company* (2007) 42 Cal.4th 713.

It is the nature of the relief or remedy sought by the insured which determines whether it sounds in contract or tort, i.e., bad faith. *Archdale v. American International Specialty Lines Insurance* (2007) 154 Cal.App.4th 449.

### **Bankruptcy**

An insurer's withdrawal of coverage post-petition does not violate the automatic stay imposed by a bankruptcy court. *In Re: Benz* (9th Cir BAP 2007) 368 BR 861.

### **California Civil Code Section 1559**

Under Civil Code section 1559, a party seeking coverage as a third party beneficiary must show the policy was procured expressly for its benefit, or that it was a member of the class of persons for whose benefit the policy was procured. It is not sufficient to show the party seeking coverage would receive some benefit from its performance. *InfiNet Marketing Services v. American Motorist Insurance Co.* (2007) 150 Cal.App.4th 168.

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### **California Civil Code Section 1646**

Provides the choice of law rule that determines the law governing the interpretation of a contract, notwithstanding the application of the governmental interest analysis. *Frontier Oil Corporation v. RLI Insurance Company* (2007) 154 Cal.App.4th 995.

A policy containing endorsements that indicate that the parties intended the policy to provide coverage for the insureds' operations in California can be sufficient to conclude that California law applies pursuant to Civil Code section 1646. *Frontier Oil Corporation v. RLI Insurance Company* (2007) 154 Cal.App.4th 995.

### **California Civil Code Section 1691**

The service of a pleading in an action or proceeding that seeks relief based on rescission, including an answer or a cross-complaint, shall be deemed to be such notice or offer or both. (Civil Code § 1691, subd. (b).) *LA Sound USA, Inc. v. St. Paul Marine Insurance Co.* (2007) 156 Cal.App.4th 1259.

### **California Civil Code Section 1750**

The Unfair Insurance Practices Action ("UIPA") does not create a private right of action for violations of its provisions. It does not allow an insured to seek punitive and compensatory damages against an insurer. *Fairbanks v. Superior Court* (2007) 154 Cal.App.4th 435. Not citable. Review granted.

Insurance is an essentially financial transaction, unrelated to the sale or lease of any identifiable consumer "good" or "service," as defined under the Consumer Legal Remedies Act ("CLRA"). *Fairbanks v. Superior Court* (2007) 154 Cal.App.4th 435. Not citable. Review granted.

An insured does not have a cause of action against an insurer for unfair and deceptive practices under the Consumer Legal Remedies Act ("CLRA"). *Fairbanks v. Superior Court* (2007) 154 Cal.App.4th 435. Not citable. Review granted.

### **California Code of Civil Procedure Section 340.1**

Civil Code of Procedure section 340.1(c) expresses an intent to allow victims of childhood sexual abuse to bring otherwise expired claims. It does not deal with the subject of insurance coverage. *Bjork v. State Farm Fire and Cas. Co.* (2007) 157 Cal.App.4th 1.

### **California Code of Civil Procedure Section 437c(h)**

When Defendant-insurer failed to provide evidence suggesting that either the Legislature or Plaintiff-insurer acted improperly in connection with the passage of section 11580.9(g), the court properly exercised its discretion under Code of Civil Procedure section 437c(h), (which governs continuances of summary judgment motions), by adjudicating Plaintiff-insurer's motion for summary judgment under section 11580.9(g), without permitting Defendant-insurer to complete its discovery. *Mercury Casualty Co. v. Scottsdale Indemnity Co.* (2007) 156 Cal.App.4th 1212.



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### **California Code of Civil Procedure Section 1033.5**

Insurance Code section 11580.9(g) requires both primary and excess insurers of personal automobile liability policies to pay for the cost of defending an insured in proportion to the amount each pays to satisfy the liability claim and the term 'defense costs' under section 11580.9(g) means reasonable attorneys' fees and expenses, investigation expenses, expert witness fees, and costs allowable under section 1033.5 of the Code of Civil Procedure. *Mercury Casualty Co. v. Scottsdale Indemnity Co.* (2007) 156 Cal.App.4th 1212.

### **California Code of Civil Procedure Section 1060**

Code of Civil Procedure section 1060 allows an intended beneficiary of an insurance policy to bring an action for a declaration of his or her rights and duties. *InfiNet Marketing Services v. American Motorist Insurance Co.* (2007) 150 Cal.App.4th 168.

### **California Code of Civil Procedure Section 2017.210**

Code of Civil Procedure section 2017.210 does not authorize discovery of reinsurance contracts from a nonparty insurer absent special circumstances. *Catholic Mutual Relief Society v. Superior Court* (2007) 42 Cal.4th 358.

### **California Code of Regulations, Title 16, Section 3356**

Section does not apply to insurers, nor does it provide a minimum standard for repairs required to return a vehicle to its pre-collision condition. *Levy v. State Farm Mutual Automobile Insurance Co.* (2007) 150 Cal.App.4th 1.

### **California Constitution, Article 1, Section 3, subd. (a)**

Insurance companies have the right to petition the Legislature in support of any proposed legislation they so favors pursuant to California Constitution, Article 1, section 3, subd. (a), which provides, "The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good. *Mercury Casualty Co. v. Scottsdale Indemnity Co.* (2007) 156 Cal.App.4th 1212.

An insurer has a constitutional right to petition the government to enact legislation under California Constitution, article 1, section 3, subd. (a), regardless of whether the passage of the statute can be considered special interest legislation, or serves the interests of the petitioning insurer. *Mercury Casualty Co. v. Scottsdale Indemnity Co.* (2007) 156 Cal.App.4th 1212.

### **California Evidence Code Section 952**

"Confidential communication" between client and lawyer is defined in Evidence Code section 952. *Zurich American Ins. Co. v. Superior Court* (2007) 155 Cal.App.4th 1485.

### **California Evidence Code Section 1300**

Pursuant to Evidence Code section 1300, evidence of a final judgment adjudging a person guilty of a crime punishable as a felony is not made inadmissible by the hearsay rule when offered in a civil action to prove any fact essential to the judgment whether or not the

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judgment was based on a plea of *nolo contendere*. *Principal Life Insurance Company v. Peterson* (2007) 156 Cal.App.4th 676.

The phrase “final judgment adjudging a person guilty of a crime punishable as a felony” in Evidence Code section 1300, includes a judgment adjudging a person guilty of a crime punishable as a felony even when an appeal from that judgment is pending. *Principal Life Insurance Company v. Peterson* (2007) 156 Cal.App.4th 676.

### **California Health & Safety Code Section 1389.3**

Health and Safety Code section 1389.3 imposes a duty on health services plans to make reasonable efforts to ensure responses on applications from potential subscribers are accurate and complete before making a determination to issue coverage. *Hailey v. California Physicians' Service* (2007) 158 Cal.App.4th 452.

### **California Insurance Code Section 330**

Concealment, which is the neglect to communicate that which a party knows, and ought to communicate, as defined in Insurance Code section 330 entitles the injured party to rescind insurance. (Ins. Code § 331.) *LA Sound USA, Inc. v. St. Paul Marine Insurance Co.* (2007) 156 Cal.App.4th 1259.

### **California Insurance Code Section 331**

Courts have applied Insurance Code sections 331, 359 to permit rescission of an insurance policy based on an insured's negligent failure to disclose a material fact in the application for insurance. Therefore, misstatement or concealment of material facts is ground for rescission even if unintentional. The insurer need not prove that the applicant-insured actually intended to deceive the insurer. *LA Sound USA, Inc. v. St. Paul Marine Insurance Co.* (2007) 156 Cal.App.4th 1259.

Concealment, which is the neglect to communicate that which a party knows, and ought to communicate, as defined in Insurance Code section 330 entitles the injured party to rescind insurance. (Ins. Code § 331.) *LA Sound USA, Inc. v. St. Paul Marine Insurance Co.* (2007) 156 Cal.App.4th 1259.

### **California Insurance Code Section 332**

Each party to a contract of insurance shall communicate to the other, in good faith, all facts within his knowledge which are or which he believes to be material to the contract. Insurance Code section 332. *LA Sound USA, Inc. v. St. Paul Marine Insurance Co.* (2007) 156 Cal.App.4th 1259.

### **California Insurance Code Section 359**

Courts have applied Insurance Code sections 331, 359 to permit rescission of an insurance policy based on an insured's negligent failure to disclose a material fact in the application for insurance. Therefore, misstatement or concealment of material facts is ground for rescission even if unintentional. The insurer need not prove that the applicant-insured actually intended to deceive the insurer. *LA Sound USA, Inc. v. St. Paul Marine Insurance Co.* (2007) 156 Cal.App.4th 1259.

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If a representation is false in a material point, the injured party is entitled to rescind the contract from the time the representation becomes false. (Ins. Code § 359.) *LA Sound USA, Inc. v. St. Paul Marine Insurance Co.* (2007) 156 Cal.App.4th 1259.

### **California Insurance Code Section 381**

Interest charged on installment payments of insurance premium was not “premium” (under California Insurance Code section 381, subdivision (f)), that had to be disclosed in the insurance contract text. *Interinsurance Exchange of the Automobile Club v. Superior Court* (2007) 148 Cal.App.4th 1218.

### **California Insurance Code Sections 590 and 591**

Multiple insureds cannot recover more than the value of a home (the insured property) destroyed on a fire insurance claim resulting from a single occurrence. The insurers properly made pro rata payments to each insured. The Court of Appeal rejected the insureds’ argument that pro rata payment is only applicable where there is “double insurance” under Insurance Code sections 590 and 591. “Double insurance” exists where the same person is insured by several insurers separately, covering the same subject and interest. (Ins. Code § 590.) *Burns v. California Fair Plan* (2007) 152 Cal.App.4th 646.

### **California Insurance Code Section 650**

Insurance Code section 650 bars an insurer only from filing a separate suit for judicial rescission once a policyholder has filed an action to enforce the policy. It does not deprive insurers of their right under Civil Code section 1691 to provide the required notice and offer to restore simply by serving a pleading seeking rescission. And it does not undermine the established law that clearly affords the insurer the right to avoid coverage by way of cross-claims and affirmative defenses when the insured files an action on the contract before the insurer can file its action for rescission. *LA Sound USA, Inc. v. St. Paul Marine Insurance Co.* (2007) 156 Cal.App.4th 1259.

### **California Insurance Code Section 673**

An insurer is entitled to rely on a notice of cancellation issued by a financing company pursuant to Insurance Code section 673 and cancel the insurance policy. “[T]he lender’s [] instructions to cancel are conclusive for all purposes with respect to the insurer...Thus, once the lender has instructed the insurer to cancel, the cancellation is effective.” An insurer’s subsequently issued notice of cancellation does not change the effective date of the cancellation as set forth in the financing company’s notice of cancellation. Moreover, once the financing company notifies the insurer that it is cancelling the insurance policy, the insurer is relieved of any duty of notification. The insurer does not waive any “purported lapse in coverage” as the result of its later cancellation notice because waiver requires the actual intention to relinquish a known right, or conduct so inconsistent with that right as to induce a reasonable belief that it has been relinquished. *Pacific Business Connections, Inc. v. St. Paul Surplus Lines Ins. Co.* (2007) 150 Cal.App.4th 517.

### **California Insurance Code Section 790.03**

The consumer legal remedies act (CLRA”) does not destroy the regulatory scheme of Insurance Code section 790.03 which does not permit a private right of action. *Fairbanks v.*

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*Superior Court* (2007) 154 Cal.App.4th 435. Not citable. Review granted.

### **California Insurance Code Section 1063.1(c)**

CIGA is not obligated to fund the difference between a judgment and the portion through a settlement with solvent insurers where the settlement did not exhaust the limits of the policies issued by the solvent insurers. *Stonelight Tile, Inc. v. California Insurance Guarantee Assn.* (2007) 150 Cal.App.4th 19.

### **California Insurance Code Section 1063.1, (c)(5)**

Claims for contribution against CIGA are statutorily barred pursuant to California Insurance Code section 1063.1, subdivision (c)(5). *Stonelight Tile, Inc. v. California Insurance Guarantee Assn.* (2007) 150 Cal.App.4th 19.

### **California Insurance Code Section 1091**

Insurance Code section 650 bars an insurer only from filing a separate suit for judicial rescission once a policyholder has filed an action to enforce the policy. It does not deprive insurers of their right under Civil Code section 1691 to provide the required notice and offer to restore simply by serving a pleading seeking rescission. And it does not undermine the established law that clearly affords the insurer the right to avoid coverage by way of cross-claims and affirmative defenses when the insured files an action on the contract before the insurer can file its action for rescission. *LA Sound USA, Inc. v. St. Paul Marine Insurance Co.* (2007) 156 Cal.App.4th 1259.

### **California Insurance Code Section 1215.5**

Provides, among other things, that (1) the terms of transactions by insurers with their affiliates must be "fair and reasonable," (2) an insurer must notify the Insurance Commissioner before entering into certain types of transactions, and (3) the Commissioner may disapprove the transaction. *Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97.

### **California Insurance Code Section 1215.10, subdivision (c)**

Does not authorize the Insurance Commissioner to void contracts and restore the status quo unless (1) the insurer was required by Insurance Code section 1215.5 to notify the Commissioner of the proposed transaction or contract but failed to do so, and (2) the Commissioner would not have approved the transaction or contract had approval been requested. *Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97.

### **California Insurance Code Section 1215.16**

If certain requirements are met, Insurance Code section 1215.16 allows a receiver under a liquidation or rehabilitation order of a domestic insurer to recover improper distributions from a parent corporation, holding company, or other controlling person if those distributions were made within one year before the petition for liquidation was filed. *Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97.

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### **California Insurance Code Section 1215.19, subdivision (a)**

Authorizes the Insurance Commissioner to apply to the Superior Court for an order enjoining a violation of the Insurance Code or any rule, regulation, or order of the Commissioner, and for the other equitable relief, but does not authorize the Commissioner to commence a judicial action to void transactions or contracts or restore the status quo absent an actual or threatened violation of an order by the Commissioner to that effect. *Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97.

### **California Insurance Code Section 1871.7**

Three year statute of limitations period under Insurance Code section 1871.7 is triggered by inquiry notice, not actual notice. *State of California ex rel. Metz v. CCC Information Services, Inc.* (2007) 149 Cal.App.4th 402.

Under Insurance Code section 1871 (e)(5), “related” action does not mean “identical” action. *State of California ex rel. Metz v. CCC Information Services, Inc.* (2007) 149 Cal.App.4th 402.

An insurer may not be sued in a *qui tam* action under Insurance Code section 1871.7 for allegedly fraudulent claims handling and settlement practices. The legislative scheme of Insurance Code section 1871, et seq., is to reduce fraud against insurers in order to benefit policyholders. Taken as a whole, this legislation is specifically tailored toward preventing and punishing persons making fraudulent claims to insurance companies. *State of California ex rel. Metz v. Farmers Group, Inc.*, (2007) 156 Cal.App.4th 1063.

An insurer’s agents and affiliates aiding in the processing of claims may not be subject of a *qui tam* action under Insurance Code section 1871.7 arising from alleged fraudulent marketing and claims handling and settlement practices. The legislative scheme of Insurance Code section 1871, et seq., is to reduce fraud against insurers in order to benefit policyholders. Taken as a whole, this legislation is specifically tailored toward preventing and punishing persons making fraudulent claims to insurance companies. *State of California ex rel. Metz v. Farmers Group, Inc.*, (2007) 156 Cal.App.4th 1063.

### **California Insurance Code Section 2070**

The other insurance provisions of Insurance Code sections 2070 and 2071 show a legislative intent to allow pro rata payment of claims even where there is no “double insurance” and where there are different insureds on the same interest. *Burns v. California Fair Plan* (2007) 152 Cal.App.4th 646.

### **California Insurance Code Section 2071**

The other insurance provisions of Insurance Code sections 2070 and 2071 show a legislative intent to allow pro rata payment of claims even where there is no “double insurance” and where there are different insureds on the same interest. *Burns v. California Fair Plan* (2007) 152 Cal.App.4th 646.

### **California Insurance Code Section 10113**

Conduct in contravention of Insurance Code sections 10113, 10381.5 and 10384,

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including the failure to attach applications to or endorse them on the policies when issued and later engaging in postclaims underwriting by holding the insureds to statements in those unattached and unendorsed applications as grounds for voiding the policies, serves as a predicate unlawful practice to a cause of action under California's Unfair Competition Law. *Ticconi v. Blue Shield Of California Life & Health Insurance Company* (2007) 157 Cal.App.4th 707.

### **California Insurance Code Section 10381.5**

Conduct in contravention of Insurance Code sections 10113, 10381.5 and 10384, including the failure to attach applications to or endorse them on the policies when issued and later engaging in postclaims underwriting by holding the insureds to statements in those unattached and unendorsed applications as grounds for voiding the policies, serves as a predicate unlawful practice to a cause of action under California's Unfair Competition Law. *Ticconi v. Blue Shield Of California Life & Health Insurance Company* (2007) 157 Cal.App.4th 707.

### **California Insurance Code Section 10384**

Conduct in contravention of Insurance Code sections 10113, 10381.5 and 10384, including the failure to attach applications to or endorse them on the policies when issued and later engaging in postclaims underwriting by holding the insureds to statements in those unattached and unendorsed applications as grounds for voiding the policies, serves as a predicate unlawful practice to a cause of action under California's Unfair Competition Law. *Ticconi v. Blue Shield Of California Life & Health Insurance Company* (2007) 157 Cal.App.4th 707.

### **California Insurance Code Section 11580**

Because a default judgment against an insured may be satisfied through a direct action against a liability insurer (see California Ins. Code § 11580, subd. (b)(2)), the insurer may either intervene prior to judgment or move under Code of Civil Procedure section 473 to set aside the default judgment. *Belz v. Clarendon America Insurance Company* (2007) 158 Cal.App.4th 615.

Insurance Code section 11580 does not list reinsurance, or any other form of insurance other than liability insurance, as coming within its purview. *Catholic Mutual Relief Society v. Superior Court* (2007) 42 Cal.4th 358.

### **California Insurance Code Section 11580.2(d)**

Insurance Code section 11580.2(d) allows that a policy or endorsement may provide that if the insured has insurance available under more than one uninsured motorist (UM) coverage provision, any damages shall not be deemed to exceed the higher of the applicable limits of the respective coverages, and the damages shall be prorated between the applicable coverages as the limits of each coverage bear to the total of the limits. *State Farm Mutual Automobile Ins. Co. v. Progressive Marathon Ins. Co.* (2007) 148 Cal.App.4th Supp.1.

### **California Insurance Code Section 11580.9(g)**

Insurance Code section 11580.9(g) regulates all insurers, both primary and excess,

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with respect to the payment of “defense costs incurred in conjunction with personal automobile liability policies.” Accordingly, since section 11580.9(g) regulates a type of insurance and affects those insurers who elect to sell that type of insurance equally, and there is no constitutional violation. *Mercury Casualty Co. v. Scottsdale Indemnity Co.* (2007) 156 Cal.App.4th 1212.

Insurance Code section 11580.9(g) requires both primary and excess insurers of personal automobile liability policies to pay for the costs of defending an insured in proportion to the amount each pays to satisfy the liability claim, and for the purposes of section 11580.9(g), an excess policy is defined under section 108, either by its terms or by operation of law. *Mercury Casualty Co. v. Scottsdale Indemnity Co.* (2007) 156 Cal.App.4th 1212.

Insurance Code section 11580.9(g) requires both primary and excess insurers of personal automobile liability policies to pay for the costs of defending an insured in proportion to the amount each pays to satisfy the liability claim, and for the purposes of section 11580.9(g), a primary policy is defined under subdivision (a) of section 660, either by its terms or by operation of law. *Mercury Casualty Co. v. Scottsdale Indemnity Co.* (2007) 156 Cal.App.4th 1212.

### **California Insurance Guarantee Association**

California Insurance Guarantee Association is entitled to full reimbursement from the State Compensation Insurance Fund (“SCIF”) for all temporary disability benefits CIGA paid an injured employee, where the SCIF is jointly and severally liable for the worker’s temporary disability claim. *California Insurance Guarantee Association v. Workers’ Compensation Appeals Board* (2007) 153 Cal.App.4th 524.

CIGA is not obligated to fund the difference between a judgment and the portion through a settlement with solvent insurers where the settlement did not exhaust the limits of the policies issued by the solvent insurers. *Stonelight Tile, Inc. v. California Insurance Guarantee Assn.* (2007) 150 Cal.App.4th 19.

Other insurance is deemed available from solvent insurers, thereby precluding claim against CIGA, where the general verdict entered against insured did not allocate damages among various theories asserted by claimant, and coverages exist under policies issued by solvent insurers for damages under at least one theory advanced by plaintiff. *Stonelight Tile, Inc. v. California Insurance Guarantee Assn.* (2007) 150 Cal.App.4th 19.

### **California Labor Code Section 3850**

Though California’s workers’ compensation statutes (California Labor Code Section 3850 et seq.) impose no explicit duties of notification or consent on an alleged third-party tortfeasor, if it settles with an employer that has failed to carry out these duties to the injured employee, and if third-party tortfeasor is or reasonably should be aware of the possibility of the employee’s claim for damages, then that knowing tortfeasor settles with the employer at the peril of being sued by the employee. *McKinnon v. Otis Elevator Company* (2007) 149 Cal.App.4th 1125.

### **California Labor Code Section 3853**

Letters from an Employer advising an injured employee of Employer’s subrogation

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lawsuit and settlement with a third-party tortfeasor failed to satisfy Labor Code section 3853, which requires Employer serve Employee with a copy of its complaint against the third party tortfeasor via personal service or certified mail, and to file proof of service in the subrogation action. *McKinnon v. Otis Elevator Company* (2007) 149 Cal.App.4th 1125.

### **California Labor Code Section 3859**

Pursuant to Labor Code section 3859, a settling employer has a duty to obtain the employee's consent to settlement of the employer's subrogation claim against the alleged tortfeasor. *McKinnon v. Otis Elevator Company* (2007) 149 Cal.App.4th 1125.

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### **California Labor Code Section 3860(a)**

Failure to comply with Labor Code section 3860(a) prevents an alleged third-party tortfeasor from utilizing its settlement with the employer as a bar to an independent action brought by an employee against the alleged third-party tortfeasor. *McKinnon v. Otis Elevator Company* (2007) 149 Cal.App.4th 1125.

Though no explicit duties of notification or consent are placed upon an alleged third-party tortfeasor, if it settles with an employer that has failed to carry out these duties to the injured employee, and if third-party tortfeasor is or reasonably should be aware of the possibility of the employee's claim for damages, then that knowing third-party tortfeasor settles with the employer at the peril of being sued by the employee. *McKinnon v. Otis Elevator Company* (2007) 149 Cal.App.4th 1125.

Failure to comply with Labor Code section 3860(a) prevents an alleged third-party tortfeasor from utilizing its settlement with the employer as a bar to an independent action brought by an employee against the alleged third-party tortfeasor. *McKinnon v. Otis Elevator Company* (2007) 149 Cal.App.4th 1125.

An employer settling a subrogation claim against the alleged third-party tortfeasor has a duty to provide notice to the injured employee in such way that provides the employee with the opportunity to recover all damages the employee has suffered. *McKinnon v. Otis Elevator Company* (2007) 149 Cal.App.4th 1125.

Although no explicit duties of notification or consent are placed upon an alleged third-party tortfeasor, if it settles with an employer that has failed to carry out these duties to the injured employee, and if third-party tortfeasor is or reasonably should be aware of the possibility of the employee's claim for damages, then that knowing third-party tortfeasor settles with the employer at the peril of being sued by the employee. *McKinnon v. Otis Elevator Company* (2007) 149 Cal.App.4th 1125.

### **California Labor Code Section 4607**

Where counsel is required to take action to enforce a workers' compensation award, attorneys' fees should be awarded pursuant to Labor Code section 4607, regardless of whether the insurer filed a formal petition to terminate care. *Smith v. Workers' Compensation Appeals Board* (2007) 146 Cal.App.4th 1032. Not citable. Review granted.



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### **California Labor Code Section 3602(d)**

Insurance broker was not an intended third-party beneficiary under a worker's compensation policy issued to employee leasing company, where the broker did not contract with the employee leasing company to lease employees, nor did it contract with the leasing company to obtain worker's compensation insurance to cover the workers that the broker had borrowed. *InfiNet Marketing Services v. American Motorist Insurance Co.* (2007) 150 Cal.App.4th 168.

### **California Probate Code**

A named beneficiary of a bond, life insurance policy, or other contractual arrangement who feloniously and intentionally kills the principal obligee or the person upon whose life the policy is issued is not entitled to any benefit under the bond, policy, or other contractual arrangement, and it becomes payable as though the killer had predeceased the decedent. *Principal Life Insurance Company v. Peterson* (2007) 156 Cal.App.4th 676.

In the absence of conflicting evidence, a beneficiary's judicially noticed criminal conviction for first degree murder of insured was sufficient to preclude beneficiary from an award of life insurance proceeds despite pending appeal of criminal conviction. *Principal Life Insurance Company v. Peterson* (2007) 156 Cal.App.4th 676.

A final judgment of conviction of felonious and intentional killing is conclusive for purposes of Probate Code section 252. *Principal Life Insurance Company v. Peterson* (2007) 156 Cal.App.4th 676.

In the absence of a final judgment of conviction of felonious and intentional killing, the court may determine by a preponderance of the evidence whether the killing was felonious and intentional for purposes of Probate Code section 252. The burden of proof is on the party seeking to establish that the killing was felonious and intentional for purposes of Probate Code section 252. *Principal Life Insurance Company v. Peterson* (2007) 156 Cal.App.4th 676.

The phrase "final judgment of conviction" in Probate Code section 254 does not include a judgment on appeal. *Principal Life Insurance Company v. Peterson* (2007) 156 Cal.App.4th 676.

### **California Probate Code Section 252**

A final judgment of conviction of felonious and intentional killing is conclusive for purposes of Probate Code section 252. *Principal Life Insurance Company v. Peterson* (2007) 156 Cal.App.4th 676.

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### **California Probate Code Section 254**

The phrase “final judgment of conviction” in Probate Code section 254 does not include a judgment on appeal. *Principal Life Insurance Company v. Peterson* (2007) 156 Cal.App.4th 676.

### **Cancellation for Nonpayment of Premium**

An insurer is entitled to rely on a notice of cancellation issued by a financing company pursuant to Insurance Code section 673 and cancel the insurance policy. “[T]he lender’s [] instructions to cancel are conclusive for all purposes with respect to the insurer...Thus, once the lender has instructed the insurer to cancel, the cancellation is effective.” An insurer’s subsequently issued notice of cancellation does not change the effective date of the cancellation as set forth in the financing company’s notice of cancellation. Moreover, once the financing company notifies the insurer that it is cancelling the insurance policy, the insurer is relieved of any duty of notification. The insurer does not waive any “purported lapse in coverage” as the result of its later cancellation notice because waiver requires the actual intention to relinquish a known right, or conduct so inconsistent with that right as to induce a reasonable belief that it has been relinquished. *Pacific Business Connections, Inc. v. St. Paul Surplus Lines Ins. Co.* (2007) 150 Cal.App.4th 517.

### **Challenge to Appointment of Receiver**

A challenge to a party’s standing to prosecute contract based claims and a right to claim punitive damages could not be construed as a challenge to the validity of the party’s appointment as receiver. *James Baron v. Fire Insurance Exchange* (2007) 154 Cal.App.4th 1184.

Failure to challenge the validity of a receiver’s appointment in the trial court forfeits the ability to challenge the validity on appeal. *James Baron v. Fire Insurance Exchange* (2007) 154 Cal.App.4th 1184.

### **Choice Of Law**

Pursuant to Civil Code section 1646, California law controls an insurance policy where the parties’ intention to apply California law can be gleaned from the nature of the contract and the surrounding circumstances, not necessarily if the parties specifically set forth a place of performance in the contract itself. *Frontier Oil Corporation v. RLI Insurance Company* (2007) 154 Cal.App.4th 995.

### **Class Certification**

Where equitable defenses may not be used to wholly defeat a UCL cause of action and where the insurer may not raise a defense made in unattached and unendorsed applications, the diverse facts making up the insurer’s fraud and unclean hands defenses are not to be factored in when determining whether the community interest requirement is met. *Ticconi v. Blue Shield Of California Life & Health Insurance Company* (2007) 157 Cal.App.4th 707.

### **Conclusive Presumptions**

Where two or more policies affording valid and collectible liability insurance apply to

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the same motor vehicle or vehicles in an occurrence out of which a liability loss shall arise, it shall be conclusively presumed that the insurance afforded by that policy in which the motor vehicle is described or rated as an owned automobile shall be primary and the insurance afforded by any other policy or policies shall be excess. *State Farm Mutual Automobile Ins. Co. v. Progressive Marathon Ins. Co.* (2007) 148 Cal.App.4th Supp.1.

Insurance Code section 11580.9(d)'s conclusive presumption of which policy is primary only is triggered when each of the competing policies apply to the same vehicle. *State Farm Mutual Automobile Ins. Co. v. Progressive Marathon Ins. Co.* (2007) 148 Cal.App.4th Supp.1.

### **Consumer Legal Remedies Act Does Not Apply to Insurance**

An insured does not have a cause of action against an insurer for unfair and deceptive practices under the Consumer Legal Remedies Act ("CLRA"). *Fairbanks v. Superior Court* (2007) 154 Cal.App.4th 435. Not citable. Review granted.

The consumer legal remedies act (CLRA") does not destroy the regularity scheme of Insurance Code Section 790.03 which does not permit a private right of action. *Fairbanks v. Superior Court* (2007) 154 Cal.App.4th 435. Not citable. Review granted.

### **Contract Interpretation**

Exclusions are construed narrowly against the insurer and must be construed in light of the overarching requirement that the risks insured against (or excluded from coverage) must have a connection to the insured. Thus a general exclusion precluding coverage for wrongful acts "arising out of the construction, design, remodeling or rehabilitation of a structure" applied only to the insured's construction-related activity, not those of a third party. *Marquez Knolls Property Owners Association, Inc. v. Executive Risk Indemnity, Inc.* (2007) 153 Cal.App.4th 228.

Reading the terms of an insurance policy in context – which is critical for proper interpretation of the policy terms – demonstrates that in order for construction related activities to be excluded by a general exclusion precluding coverage for wrongful acts related to the development and construction of real property the construction related activities must be performed by the insured and not some other third party. *Marquez Knolls Property Owners Association, Inc. v. Executive Risk Indemnity, Inc.* (2007) 153 Cal.App.4th 228.

Although the phrase "arising out of" is interpreted broadly, this interpretation does not eliminate the need to have a connection between the excluded risk and the insured in order for the exclusion to apply. *Marquez Knolls Property Owners Association, Inc. v. Executive Risk Indemnity, Inc.* (2007) 153 Cal.App.4th 228.

Terms of an insurance policy are given the "objectively reasonable" meaning a lay person would attribute to them. Thus, no reasonable person would have construed a general exclusion precluding coverage for wrongful acts "arising out of the construction, design, remodeling or rehabilitation of a structure" to exclude the insured's construction related activity as well as the insured's involvement in resolving a dispute concerning a third party's construction related activities. *Marquez Knolls Property Owners Association, Inc. v. Executive Risk Indemnity, Inc.* (2007) 153 Cal.App.4th 228.

The Court rejected the insured's argument that his policy was ambiguous and should

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not be read to require him to arbitrate his underinsured motorist (“UIM”) claim. The Court held the insurer’s policy language regarding resolution of UIM claim disputes over entitlement and amount of damages conformed to the statutory language of Insurance Code section 11580.2. Thus, the principle that ambiguities in insurance policies must be construed against the insurer did not apply. In reaching its conclusion, the Court looked to other California courts which have interpreted 11580.2(f) as applying to UIM claims. *O’Hanesian v. State Farm Mutual Automobile Insurance Company* (2007) 145 Cal.App.4th 1305. Not citable. Review granted.

Policy language is the primary guide to determining the obligation created by insurance contracts. *London Market Insurers v. Superior Court (Truck Ins. Exchange)* (2007) 146 Cal.App.4th 648.

While insurance contracts have special features, the ordinary rules of contractual interpretation apply. The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties. If contractual language is clear and explicit, it governs. Indemnity agreements are no different and are to be interpreted under the same rules governing other contracts with a view to determining the actual intent of the parties. *JPI Westcoast Construction, L.P. v. RJS & Associates, Inc., et al.* (2007) 156 Cal.App.4th 1448.

The contractual terms of insurance coverage are enforced whenever possible. *JPI Westcoast Construction, L.P. v. RJS & Associates, Inc., et al.* (2007) 156 Cal.App.4th 1448.

Under the terms of the charitable nonprofit corporation’s CGL, third party employer had no standing to request policy changes. *Boeing Co. v. Continental Casualty* (2007) 157 Cal.App.4th 1258.

The rules pertaining to contractual interpretation are clearly delineated in published case law, and apply equally to insurance contracts. Interpretation of an insurance policy is a question of law. While insurance contracts have special features, they are still contracts to which the ordinary rules of contractual interpretation apply. Thus, the mutual intention of the parties at the time the contract is formed governs interpretation. If possible, intent is inferred solely from the written policy provisions. If the policy language is clear and explicit, it governs. When interpreting a policy provision, its terms must be given their ordinary and popular sense, unless used by the parties in a technical sense or a special meaning is given to them by usage. Terms are interpreted in context, and every part of the policy helps to interpret the others. *Boeing Co. v. Continental Casualty*, (2007) 157 Cal.App.4th 1258.

Exclusions must be plain and clear in order to preclude coverage. *Essex Ins. Co. v. City of Bakersfield* (2007) 154 Cal.App.4th 696.

### Contracts Clause

The contracts clause imposes limits on the power of a State to abrogate existing contractual relationships, and its provisions automatically become part of any new personal automobile liability policies issued in California as a matter of law. *Mercury Casualty Co. v. Scottsdale Indemnity Co.* (2007) 156 Cal.App.4th 1212.

### Conversion

Conversion actions are not restricted to recovery of tangible property, and intangible property may be subject to a conversion action if the property at issue and the owner’s rights

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of possession and exclusive use are sufficiently definite and certain. *Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97.

An insurer's net operating loss is a definite amount pursuant to 26 U.S.C. section 172(c) which, if misappropriated, can give rise to a claim for conversion. *Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97.

### Damages

It is the nature of the relief or remedy sought by the insured which determines whether it sounds in contract or tort, i.e., bad faith. *Archdale v. American International Specialty Lines Insurance* (2007) 154 Cal.App.4th 449.

### Declaratory Relief

Code of Civil Procedure section 1060, allows an intended beneficiary of an insurance policy to bring an action for a declaration of his or her rights and duties. *InfiNet Marketing Services v. American Motorist Insurance Co.* (2007) 150 Cal.App.4th 168.

### Definition: "Accident"

Intentional self-defense may be deemed an "accident" within a third party liability coverage clause, and thereby give rise to a duty to if the insured is provoked by a third party's unexpected and unintended acts. *Jafari v. EMC Insurance Companies* (2007) 155 Cal.App.4th 885. Not citable. Review granted.

Where a third party's actions provoking an insured's self-defense are an unforeseen and unexpected element in the causal chain of events making the insured's acts in self-defense unplanned and involuntary, there is an accident within the coverage clause, thereby giving rise to a duty to defend. *Jafari v. EMC Insurance Companies* (2007) 155 Cal.App.4th 885. Not citable. Review granted.

In determining whether a duty to defend exists for claims against the insured for assault and battery, an insurer must take a broad view of any incident raising the question of self-defense and not just look at the insured's actions. *Jafari v. EMC Insurance Companies* (2007) 155 Cal.App.4th 885. Not citable. Review granted.

In assault and battery cases, a third party's actions prompting an insured to act in self-defense are part of the causal chain of events leading to potential injury that must be considered in evaluating a potential for coverage. *Jafari v. EMC Insurance Companies* (2007) 155 Cal.App.4th 885. Not citable. Review granted.

When a policy excludes from coverage injuries which are "expected" or "intended," courts will construe this policy language merely to exclude from coverage injuries and damage "resulting from acts involving an element of wrongfulness or misconduct, even though the acts otherwise are performed intentionally." *Jafari v. EMC Insurance Companies* (2007) 155 Cal.App.4th 885. Not citable. Review granted.

"Defamation, which includes libel and slander, is an intentional tort which requires proof that the defendant intended to publish the defamatory statement. [Citation.] The very nature of defamation precludes the conclusion that it can occur 'accidentally.'" *Stellar v. State Farm General Insurance Co.* (2007) 157 Cal.App.4th 1498 quoting *Allstate Ins. Co. v.*

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*LaPore* (N.D. Cal. 1988) 762 F.Supp. 268, 271.

### **Definition: “Advertising Injury”**

Advertising injury provision of the policy does not provide coverage for violations of the Telephone Consumer Protection Act of 1991. *ACS Systems, Inc. v. St. Paul Fire and Marine Insurance Company* (2007) 147 Cal.App.4th 138.

### **Definition: “Arising Out Of”**

Although the phrase “arising out of” is interpreted broadly, this interpretation does not eliminate the need to have a connection between the excluded risk and the insured in order for the exclusion to apply. *Marquez Knolls Property Owners Association, Inc. v. Executive Risk Indemnity, Inc.* (2007) 153 Cal.App.4th 228.

### **Definition: “Covered Claim”**

CIGA is not obligated to fund the difference between a judgment and the portion through a settlement with solvent insurers where the settlement did not exhaust the limits of the policies issued by the solvent insurers. *Stonelight Tile, Inc. v. California Insurance Guarantee Assn.* (2007) 150 Cal.App.4th 19.

### **Definition: “Defamation”**

“Defamation, which includes libel and slander, is an intentional tort which requires proof that the defendant intended to publish the defamatory statement. [Citation.] The very nature of defamation precludes the conclusion that it can occur ‘accidentally.’” *Stellar v. State Farm General Insurance Co.* (2007) 157 Cal.App.4th 1498 quoting *Allstate Ins. Co. v. LaPore* (N.D. Cal. 1988) 762 F.Supp. 268, 271.

### **Definition: “Double Insurance”**

Multiple insureds cannot recover more than the value of a home (the insured property) destroyed on a fire insurance claim resulting from a single occurrence. The insurers properly made pro rata payments to each insured. The Court of Appeal rejected the insureds’ argument that pro rata payment is only applicable where there is “double insurance” under Insurance Code sections 590 and 591. “Double insurance” exists where the same person is insured by several insurers separately, covering the same subject and interest. (Ins. Code § 590.) *Burns v. California Fair Plan* (2007) 152 Cal.App.4th 646.

### **Definition: “Event”**

Manufacture and distribution of asbestos products can not be an “event” or “exposure to conditions.” The plain meaning of “event” is a discreet happening that occurs at a specific point in time. *London Market Insurers v. Superior Court (Truck Ins. Exchange)* (2007) 146 Cal.App.4th 648.

### **Definition: “Legally Obligated to Pay”**

Settlement costs negotiated within the context of a court suit are not “damages” within the meaning of the insuring agreement of an excess liability policy which provides the insurer

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to be liable for “damages” the insured is “legally obligated to pay.” *Aerojet-General Corporation v. Commercial Union Insurance Co.* (2007) 155 Cal.App.4th 132.

The final judgment clause is not rendered redundant by *Powerine I*'s interpretation due to the fact that money can be expressly ordered by the court as damages in a final judgment, or can also be ordered by the court outside of a final judgment by means of interim orders or awards of costs and attorney fees. Thus, both clauses have independent meaning within the context of court ordered damages. *Aerojet-General Corporation v. Commercial Union Insurance Co.* (2007) 155 Cal.App.4th 132.

The phrase “money ordered by a court” means what it states and there is no authority supporting any other interpretation. Thus, no matter how an obligation to pay money is arrived at, the insurer must indemnify only damages, i.e. all money ordered by a court, pursuant to the express terms of the policy. *Aerojet-General Corporation v. Commercial Union Insurance Co.* (2007) 155 Cal.App.4th 132.

### **Definition: “Loss”**

The term “loss,” as used in a liability policy, is broader than the common meaning of “damages,” and is therefore not limited to money ordered by a court. *Ameron International Corporation v. Insurance Company of the State of Pennsylvania* (2007) 150 Cal.App.4th 1050. Not citable. Review granted..

### **Definition: “Occurrence”**

“Occurrence” means injurious exposure to asbestos, not the manufacture and distribution of the products containing asbestos. *London Market Insurers v. Superior Court (Truck Ins. Exchange)* (2007) 146 Cal.App.4th 648.

Manufacture and distribution of asbestos products can not be an “event” or “exposure to conditions.” The plain meaning of “event” is a discreet happening that occurs at a specific point in time. *London Market Insurers v. Superior Court (Truck Ins. Exchange)* (2007) 146 Cal.App.4th 648.

The definitions of “occurrence” in a policy only determine whether coverage exists under that policy, and not the amount of coverage available. To determine the amount of coverage available, an occurrence means a proximate and uninterrupted cause. *Safeco Insurance Company Of America v. Fireman’s Fund Insurance Company* (2007) 148 Cal.App.4th.620.

When all injuries emanate from a common source, such as a landslide, there is only a single occurrence for purposes of policy coverage. It is irrelevant that there are multiple injuries or injuries of different magnitudes, or that the injuries extend over a period of time through successive policy periods. *Safeco Insurance Company Of America v. Fireman’s Fund Insurance Company* (2007) 148 Cal.App.4th.620.

Both a precipitating act or event and the ensuing harm are necessary to constitute an “occurrence.” *Safeco Insurance Company Of America v. Fireman’s Fund Insurance Company* (2007) 148 Cal.App.4th.620.

The mere continuation of damage during successive policy periods, by itself, does not create a series of indefinitely ongoing occurrences. A subsequent policy period that consists

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solely of preexisting or continuing damage, without another precipitating act or event, does not provide additional benefits. *Safeco Insurance Company Of America v. Fireman's Fund Insurance Company* (2007) 148 Cal.App.4th.620.

Although a nuisance may constitute a continuing offense under substantive tort law, this is not necessarily true for purposes of determining the number of occurrences under a personal injury insuring agreement that does not reference "nuisance." Rather than assuming a nuisance constitutes multiple occurrences under successive policies, one must focus on the particular facts of the case. *Safeco Insurance Company Of America v. Fireman's Fund Insurance Company* (2007) 148 Cal.App.4th.620.

Acts of an insured corporation's managers that lead to its failure to fulfill a lease are not the result of a fortuitous accident and thus do not constitute an "occurrence." *Golden Eagle Insurance Corp. v. Cen-Fed, Ltd.* (2007) 148 Cal.App.4th 976.

Property damage provisions of the policy does not provide coverage for violations of the Telephone Consumer Protection Act of 1991 ("TCPA"), because the act of transmitting a fax is not an occurrence and is barred by the expected or intended injury exclusion. *ACS Systems, Inc. v. St. Paul Fire and Marine Insurance Company* (2007) 147 Cal.App.4th 138.

There was no duty to defend a defamation suit arising out of intentional conduct even though the lawsuit alleged physical manifestation of emotional distress because there was no "occurrence" or "bodily injury." *Stellar v. State Farm General Insurance Co.* (2007) 157 Cal.App.4th 1498.

### **Definition: "Premium"**

Interest charged on installment payments of insurance premium was not "premium" (under California Insurance Code section 381, subdivision (f)), that had to be disclosed in the insurance contract text. *Interinsurance Exchange of the Automobile Club v. Superior Court* (2007) 148 Cal.App.4th 1218.

### **Definition: "Pollution Incident"**

Policy deleting absolute pollution exclusion and affording coverage for "pollution incident" applied to oil and gas loss in Beverly Hills. *Frontier Oil Corp. v. RLI Ins. Co.* (2007) 153 Cal.App.4th 1436.

### **Definition: "Property Damage"**

No duty to indemnify exists where the underlying allegations are for breach of lease and therefore do not claim "property damage" or physical injury to tangible property. *Golden Eagle Insurance Corp. v. Cen-Fed, Ltd.* (2007) 148 Cal.App.4th 976.

Property damage provisions of the policy does not provide coverage for violations of the Telephone Consumer Protection Act of 1991 ("TCPA"), because the act of transmitting a fax is not an occurrence and is barred by the expected or intended injury exclusion. *ACS Systems, Inc. v. St. Paul Fire and Marine Insurance Company* (2007) 147 Cal.App.4th 138.

### **Definition: "Right to Privacy"**

The Policy's advertising injury offense provides coverage only if the harmful content



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violates the secrecy right of privacy, not for a violation of the seclusion right of privacy. The Telephone Consumer Protection Act of 1991 (“TCPA”) prohibits the faxing of unsolicited advertising, and not the content, thus the TCPA only protects the seclusion right of privacy, which is not covered under the Policy. *ACS Systems, Inc. v. St. Paul Fire and Marine Insurance Company* (2007) 147 Cal.App.4th 138.

### **Definition: “Result From”**

Liability for sexual assault does not result from “use” of vehicle where victim willfully enters and exits vehicle, and is later assaulted outside of vehicle. The fact the insured is a common carrier shuttle service provider does not change this holding. *R. A. Stuchberry & Others Syndicate 1096 v. Redland Insurance Company* (2007) 154 Cal.App.4th.796.

### **Definition: “Suit”**

A government claim settled pursuant to a Federal Board of Contract Appeals hearing constitutes a “suit” only if the insurance policy defines a “suit” as a “civil proceeding” and/or “arbitration proceeding.” *Ameron International Corporation v. Insurance Company of the State of Pennsylvania* (2007) 150 Cal.App.4th 1050. Not citable. Review granted..

### **Definition: “Use”**

Liability for sexual assault does not result from “use” of vehicle where victim willfully enters and exits vehicle, and is later assaulted outside of vehicle. The fact the insured is a common carrier shuttle service provider does not change this holding. *R. A. Stuchberry & Others Syndicate 1096 v. Redland Insurance Company* (2007) 154 Cal.App.4th.796.

### **Direct Actions**

Because a default judgment against an insured may be satisfied through a direct action against a liability insurer (see Ins. Code § 11580, subd. (b)(2)), the insurer may either intervene prior to judgment or move under Code of Civil Procedure section 473 to set aside the default judgment. *Belz v. Clarendon America Insurance Company* (2007) 158 Cal.App.4th 615.

### **Discovery**

The District Court did not abuse its discretion in suppressing from trial those documents added to a claim file after litigation was initiated where the defendant’s conduct led the District Court to find that the defendant was picking and choosing which documents to produce in discovery. *Merrick v. Paul Revere Life Insurance Company* (9th Cir. 2007) 500 F.3d 1007.

### **Due Process**

Where primary and excess insurance companies each issued automobile liability policies to the same insured, and where primary insurer provided insured with a defense and then sought reimbursement of a portion of the defense costs from excess insurer under Insurance Code section 11580.9(g), the statute was enforceable against excess insurer and did not violate excess insurer’s due process rights, even though primary insurer was involved in promoting the passage of Insurance Code section 11580.9(g). *Mercury Casualty Co. v.*

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*Scottsdale Indemnity Co.* (2007) 156 Cal.App.4th 1212.

Enforcement of Insurance Code section 11580.9(g) by a primary insurer of a personal automobile liability policy against an insurer of an excess policy did not violate excess policy insurer's due process rights as section 11580.9(g) was not "too narrowly drawn to achieve its stated purpose," but was an even-handed regulation requiring all insurers to bear the same portion of the cost of defending a personal automobile liability claim as they pay to satisfy the claim itself. *Mercury Casualty Co. v. Scottsdale Indemnity Co.* (2007) 156 Cal.App.4th 1212.

Where an insurer of an excess policy of automobile liability claimed Insurance Code section 11580.9(g) violated its due process rights under both Federal and California Constitution, but referenced only the U.S. Constitution and federal cases in support of its position, the Court held Insurance Code section 11580.9(g) did not violate the equal protection clause of the U. S. Constitution because it regulates a type of insurance (personal automobile liability policies) and affects all insurers equally. *Mercury Casualty Co. v. Scottsdale Indemnity Co.* (2007) 156 Cal.App.4th 1212.

### **Duty to Defend**

Advertising injury and property damage provisions of the policy do not provide coverage for violations of the Telephone Consumer Protection Act of 1991 ("TCPA"), because there is no publication of material that violates a person's right of secrecy privacy, the act of transmitting a fax is not an occurrence and is barred by the expected or intended injury exclusion. *ACS Systems, Inc. v. St. Paul Fire and Marine Insurance Company* (2007) 147 Cal.App.4th 138.

An excess insurer does not have a duty to drop down and defend in an underlying action alleging that the insured caused continuous property damage that existed at points in time prior to the inception of a policy of the only primary insurer that is defending the insured. *Padilla Construction Company v. Transportation Insurance Company* (2007) 150 Cal.App.4th 984.

A corporate officer's mistake or negligent act in contracting does not create coverage under a Directors & Officers liability policy for breach of contract because a contractual obligation is a debt that the corporation voluntarily accepted, and not a "wrongful act" within the meaning of the policy. *August Entertainment, Inc. v. Philadelphia Indemnity Insurance Company* (2007) 146 Cal.App.4th 565.

Allegations of liability arising from creation of a dangerous condition in a street, as opposed to the use of an auto by the insured, give rise to a potential for coverage and therefore trigger the duty to defend in a CGL policy. *Essex Ins. Co. v. City of Bakersfield* (2007) 154 Cal.App.4th 696.

Intentional self-defense may be deemed an "accident" within a third party liability coverage clause, and thereby give rise to a duty to if the insured is provoked by a third party's unexpected and unintended acts. *Jafari v. EMC Insurance Companies* (2007) 155 Cal.App.4th 885. Not citable. Review granted.

Where a third party's actions provoking an insured's self-defense are an unforeseen and unexpected element in the causal chain of events making the insured's acts in self-defense unplanned and involuntary, there is an accident within the coverage clause, thereby giving rise to a duty to defend. *Jafari v. EMC Insurance Companies* (2007) 155 Cal.App.4th 885. Not

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In determining whether a duty to defend exists for claims against the insured for assault and battery, an insurer must take a broad view of any incident raising the question of self-defense and not just look at the insured's actions *Jafari v. EMC Insurance Companies* (2007) 155 Cal.App.4th 885. Not citable. Review granted.

In assault and battery cases, a third party's actions prompting an insured to act in self-defense are part of the causal chain of events leading to potential injury that must be considered in evaluating a potential for coverage. *Jafari v. EMC Insurance Companies* (2007) 155 Cal.App.4th 885. Not citable. Review granted.

When a policy excludes from coverage injuries which are "expected" or "intended," courts will construe this policy language merely to exclude from coverage injuries and damage "resulting from acts involving an element of wrongfulness or misconduct, even though the acts otherwise are performed intentionally." *Jafari v. EMC Insurance Companies* (2007) 155 Cal.App.4th 885. Not citable. Review granted.

There was no duty to defend a defamation suit arising out of intentional conduct even though the lawsuit alleged physical manifestation of emotional distress because there was no "occurrence" or "bodily injury." *Stellar v. State Farm General Insurance Co.* (2007) 157 Cal.App.4th 1498.

There is no duty to defend claims for "bodily injury" that stem from an underlying claim not covered by the policy. *Stellar v. State Farm General Insurance Co.* (2007) 157 Cal.App.4th 1498.

"If, at the time of tender, the allegations of the complaint together with extrinsic facts available to the insurer demonstrate no potential for coverage, the carrier may properly deny a defense." *Stellar v. State Farm General Insurance Co.* (2007) 157 Cal.App.4th 1498, quoting *Medill v. Westport Ins. Corp.* (2006) 143 Cal.App.4th 819, 828.

"[C]laims do not exist in the ether, they consist of pleaded allegations coupled with extrinsic facts. That is what defines the insurer's coverage duties, not the label chosen by the pleader." *Stellar v. State Farm General Insurance Co.* (2007) 157 Cal.App.4th 1498, quoting *Ulrich v. State Farm Fire & Casualty Co.* (2003) 109 Cal.App.4th 598, 611.

### **Equal Protection Clause**

Insurance Code section 11580.9(g) does not violate the equal protection clause of the United States Constitution as it does not "favor those insurers who sell primary automobile liability policies" or distinguish between "similarly situated groups of excess insurers." *Mercury Casualty Co. v. Scottsdale Indemnity Co.* (2007) 156 Cal.App.4th 1212.

Where an insurer of an excess policy of automobile liability claimed Insurance Code section 11580.9(g) violated its equal protection rights under both Federal and California Constitution, but referenced only the U.S. Constitution and federal cases in support of its position, the Court held Insurance Code section 11580.9(g) did not violate the equal protection clause of the U. S. Constitution because it regulates a type of insurance (personal automobile liability policies) and affects all insurers equally. *Mercury Casualty Co. v. Scottsdale Indemnity Co.* (2007) 156 Cal.App.4th 1212.

### Equitable Subrogation and Contribution

Equitable contribution does not apply between primary and excess insurance carriers. *Transcontinental Insurance Co. v. Insurance Co. of the State of Pennsylvania* (2007) 148 Cal.App.4th 1296.

A primary carrier may seek equitable subrogation from an excess carrier, not contribution. *Transcontinental Insurance Co. v. Insurance Co. of the State of Pennsylvania* (2007) 148 Cal.App.4th 1296.

An excess carrier with a duty to defend must reimburse the primary insurance carrier's payment of uncovered defense costs through equitable subrogation. *Transcontinental Insurance Co. v. Insurance Co. of the State of Pennsylvania* (2007) 148 Cal.App.4th 1296.

Equitable contribution does not apply between primary and excess insurance carriers. *Transcontinental Insurance Co. v. Insurance Co. of the State of Pennsylvania* (2007) 148 Cal.App.4th 1296.

The presence of an indemnity clause may render one of two primary insurance policies excess to the other. This is a function of the contractual language and intent of the insureds. *Edmonson Property Management v. Klock* (2007) 156 Cal.App.4th 197.

The general rule is that when multiple insurance carriers insure the same insured and cover the same risk, each insurer may assert a claim against a coinsurer for equitable contribution when it has undertaken the defense or paid a liability on behalf of the insured. *Edmonson Property Management v. Klock* (2007) 156 Cal.App.4th 197.

Equitable contribution is not a matter of contract and exists independently of the insured's rights under the insurance policy. *Edmonson Property Management v. Klock* (2007) 156 Cal.App.4th 197.

The question of whether an indemnity agreement negates the contribution rights of an insurer is one of contract interpretation. Among the issues to consider is what kind of conduct or claims the parties intended their indemnity agreement to protect the indemnitee against, and whether the parties intended to make the insurance obtained by the indemnitor primary to any obtained by the indemnitee. *Edmonson Property Management v. Klock* (2007) 156 Cal.App.4th 197.

Essential elements of an insurer's cause of action for equitable subrogation are as follows: (a) the insured suffered a loss for which the defendant is liable; (b) the claimed loss was one for which the insurer was not primarily liable; (c) the insurer has compensated the insured in whole or in part for the same loss for which the defendant is primarily liable; (d) the insurer has paid the claim of its insured to protect its own interest and not as a volunteer; (e) the insured has an existing, assignable cause of action against the defendant which the insured could have asserted for its own benefit had it not been compensated for its loss by the insurer; (f) the insurer has suffered damages caused by the act or omission upon which the liability of the defendant depends; (g) justice requires that the loss be entirely shifted from the insurer to the defendant, whose equitable position is inferior to that of the insurer; and (h) the insurer's damages are in a liquidated sum, generally the amount paid to the insured. *JPI Westcoast Construction, L.P. v. RJS & Associates, Inc., et al.* (2007) 156 Cal.App.4th 1448.

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### **ERISA**

A member of an ERISA disability plan has not “received” other income, as that word is defined in the ERISA plan, that would permit a reduction in disability benefits when retirement benefits are directly “rolled over” into an Individual Retirement Account. *Blankenship v. Liberty Life Assurance* (9th Cir. 2007) 486 F.3d 620 .

### **Excess Insurance**

An excess insurer does not have a duty to drop down and defend in an underlying action alleging that the insured caused continuous property damage that existed at points in time prior to the inception of a policy of the only primary insurer that is defending the insured. *Padilla Construction Company v. Transportation Insurance Company* (2007) 150 Cal.App.4th 984.

### **Exclusion: Auto**

Auto exclusions in a CGL policy excluding coverage for “‘bodily injury’ or ‘property damage’ arising out of, caused by or contributed to by the ownership, non-ownership, maintenance, use or entrustment to others of any ‘auto’” or “arising out of... automobiles” were not plain and clear enough to defeat an insured’s reasonable expectation of coverage. *Essex Ins. Co. v. City of Bakersfield* (2007) 154 Cal.App.4th 696.

Coverage for a suit arising out of creation of a dangerous condition in a street is not barred by auto exclusion in CGL policy. *Essex Ins. Co. v. City of Bakersfield* (2007) 154 Cal.App.4th 696.

### **Exclusion: “Expected or Intended Injury”**

Property damage provisions of the policy does not provide coverage for violations of the Telephone Consumer Protection Act of 1991 (“TCPA”), because the act of transmitting a fax is not an occurrence and is barred by the expected or intended injury exclusion. *ACS Systems, Inc. v. St. Paul Fire and Marine Insurance Company* (2007) 147 Cal.App.4th 138.

### **Exclusion: Pollution**

Pollution exclusions does not provide coverage for odors discharged and released by composting facility. *Cold Creek Compost, Inc. et al. v. State Farm Fire and Casualty* (2007) 156 Cal.App.4th 1469.

Pollution exclusions does not provide coverage for dust. *Cold Creek Compost, Inc. et al. v. State Farm Fire and Casualty* (2007) 156 Cal.App.4th 1469

Pollution exclusion applies “only to injuries arising from events commonly thought of as pollution,” and not “to all acts of negligence involving substances that can be characterized as irritants or contaminants.” *Cold Creek Compost, Inc. et al. v. State Farm Fire and Casualty* (2007) 156 Cal.App.4th 1469.

Pollution exclusion was not formulated to exclude “all injuries from toxic substances,” but rather avoiding potential liability arising from gradual or repeated discharge of hazardous substances into the environment. *Cold Creek Compost, Inc. et al. v. State Farm Fire and*

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*Casualty* (2007) 156 Cal.App.4th 1469.

Odors are “gaseous...irritant or contaminant” as defined by the policy. *Cold Creek Compost, Inc. et al. v. State Farm Fire and Casualty* (2007) 156 Cal.App.4th 1469.

### **Exclusion: Resident Relative**

Child molestation by a family member living with victim is not covered by reason of the resident relative exclusion. *Bjork v. State Farm Fire and Cas. Co.* (2007) 157 Cal.App.4th 1.

While the resident relative exclusion was designed to prevent suspect inter-family legal actions which may not be truly adversary and over which the insurer has little or no control, the exclusion is not limited to instances where collusion between family members is present. The exclusion excludes coverage for every claim involving injury to a relative who resides with a named insured. *Bjork v. State Farm Fire and Cas. Co.* (2007) 157 Cal.App.4th 1.

Severability clause does not require disregarding the definition of “insured” under a policy. It does not delete from the definition of “insured,” as used in the resident relative exclusion, all persons except for the person claiming coverage. *Bjork v. State Farm Fire and Cas. Co.* (2007) 157 Cal.App.4th 1.

CCP section 340.1(c) expresses an intent to allow victims of childhood sexual abuse to bring otherwise expired claims. It does not deal with the subject of insurance coverage. *Bjork v. State Farm Fire and Cas. Co.* (2007) 157 Cal.App.4th 1.

It is irrelevant that an insurance policy lacks an express exclusion for sexual molestation. The resident relative exclusion applies whenever an insured seeks coverage for liability caused by physical injury to a resident relative of a named insured. *Bjork v. State Farm Fire and Cas. Co.* (2007) 157 Cal.App.4th 1.

### **Exclusions**

Exclusions must be plain and clear in order to preclude coverage. *Essex Ins. Co. v. City of Bakersfield* (2007) 154 Cal.App.4th 696.

### **Failure to Investigate**

Defense to a claim of bad faith that a “genuine dispute” exists is not available, unless insurer investigates all possible bases for coverage, despite one basis for denial being reasonable. *Jordan v. Allstate Insurance Company* (2007) 148 Cal.App.4th 1062.

### **Forum Non Conveniens**

Where plaintiff seeking status as class action representative is an out-of-state resident, was involved in an automobile accident out-of-state, holds an out-of-state automobile insurance policy, and alleged a claim based on that same foreign state’s unfair business practices statute, the doctrine of forum non conveniens is appropriate to bar that plaintiff’s action in California. *Levy v. State Farm Mutual Automobile Insurance Co.* (2007) 150 Cal.App.4th 1.

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### **Genuine Dispute Doctrine**

Defense to a claim of bad faith that a “genuine dispute” exists is not available, unless insurer investigates all possible bases for coverage, despite one basis for denial being reasonable. *Jordan v. Allstate Insurance Company* (2007) 148 Cal.App.4th 1062.

Insurer’s denial of or delay in paying policy benefits due to existence of genuine dispute with insured over existence or amount of coverage does not give rise to claim for bad faith even where insurer may be in breach of contract. *Wilson v. 21st Century Insurance Company* (2007) 42 Cal.4th 713.

“Genuine dispute” doctrine was originally invoked in cases involving disputes over policy interpretation, but is also applied to factual disputes. *Wilson v. 21st Century Insurance Company* (2007) 42 Cal.4th 713.

“Genuine dispute” doctrine does not alter standard for summary judgment; summary judgment in favor of insurer can only be granted where even under the insured’s version of the facts there is a genuine issue as to the insurer’s liability. *Wilson v. 21st Century Insurance Company* (2007) 42 Cal.4th 713.

### **Health Care Service Plans**

Purpose of Knox-Keene Act, Health and Safety Code section 1340, et seq., is to promote the delivery and quality of health care to Californians who enroll in or subscribe to health care service plan and ensure the best possible health care at the lowest possible cost by shifting financial risk of care from patients to providers. *Hailey v. California Physicians’ Service* (2007) 158 Cal.App.4th 452.

### **Horizontal Exhaustion Rule**

California applies the horizontal exhaustion rule requiring all primary insurance to be exhausted when responding to a continuing loss unless excess coverage promises to cover a claim when specific underlying insurance is exhausted, i.e., vertical exhaustion. *Padilla Construction Co., Inc. v. Transportation Insurance Co.*, (2007) 150 Cal.App.4th 984.

### **Immediate Appeal of Stay Orders**

Although stay orders are generally not appealable, such orders are immediately appealable if a party would be “effectively out of court.” *Dependable Highway Express, Inc. v. Navigators Ins. Co.* (9th Cir. 2007) 498 F.3d 1059.

### **Indemnity Agreement**

In order to cover the active negligence of the indemnitee, the indemnity agreement has to contain express language to this effect. *Edmonson Property Management v. Klock* (2007) 156 Cal.App.4th 197.

An indemnity agreement is strictly construed against the indemnitee. Language imposing liability must be express and unequivocal so that the contracting party is advised fully in definite terms that it has agreed to indemnify the active negligence of the other party. *Edmonson Property Management v. Klock* (2007) 156 Cal.App.4th 197.

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The question of whether an indemnity agreement negates the contribution rights of an insurer is one of contract interpretation. What conduct or claims did the parties intend by their indemnity agreement to protect the indemnitee against, and did the parties intend to make the insurance obtained by the indemnitor primary to any obtained by the indemnitee? *Edmonson Property Management v. Klock* (2007) 156 Cal.App.4th 197.

A general indemnity agreement is one that does not address, and is silent with respect to, the issue of the indemnitee's negligence. *JPI Westcoast Construction, L.P. v. RJS & Associates, Inc., et al.* (2007) 156 Cal.App.4th 1448.

### **Insurance Applications**

Conduct in contravention of Insurance Code sections 10113, 10381.5 and 10384, including the failure to attach applications to or endorse them on the policies when issued and later engaging in postclaims underwriting by holding the insureds to statements in those unattached and unendorsed applications as grounds for voiding the policies, serves as a predicate unlawful practice to a cause of action under California's Unfair Competition Law. *Ticconi v. Blue Shield Of California Life & Health Insurance Company* (2007) 157 Cal.App.4th 707.

### **Insurance: Automobile**

The public policy of the Legislature is to avoid as far as possible conflicts and litigation, with resulting court congestion, between and among insured parties, insureds, and insurers concerning which, among various policies of liability insurance, is primary, excess, or sole coverage, and to what extent, under the circumstances of any given event involving death or injury to persons or property caused by the operation or use of a motor vehicle. *State Farm Mutual Automobile Ins. Co. v. Progressive Marathon Ins. Co.* (2007) 148 Cal.App.4th Supp.1.

Liability for sexual assault does not result from "use" of vehicle where victim willfully enters and exits vehicle, and is later assaulted outside of vehicle. The fact the insured is a common carrier shuttle service provider does not change this holding. *R. A. Stuchberry & Others Syndicate 1096 v. Redland Insurance Company* (2007) 154 Cal.App.4th.796.

In order to state claim against insurer for failing to follow "industry standards" in performing repairs, policy must obligate insurer to follow specified industry standards. *Levy v. State Farm Mutual Automobile Insurance Co.* (2007) 150 Cal.App.4th 1.

The requirement in an automobile insurance policy that obligates the insurer to return the vehicle to its "pre-loss condition" means the "pre-accident safe, mechanical, and cosmetic condition." *Levy v. State Farm Mutual Automobile Insurance Co.* (2007) 150 Cal.App.4th 1.

### **Insurance Broker**

If an insurance application was prepared by an insurance broker (the agent of the insured), the application's contents are the insured's responsibility. Policyholders are liable for misrepresentations in broker-prepared applications. *LA Sound USA, Inc. v. St. Paul Marine Insurance Co.* (2007) 156 Cal.App.4th 1259.



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### **Insurance: Directors & Officers**

A corporate officer's mistake or negligent act in contracting does not create coverage under a Directors & Officers liability policy for breach of contract because a contractual obligation is a debt that the corporation voluntarily accepted, and not a "wrongful act" within the meaning of the policy. *August Entertainment, Inc. v. Philadelphia Indemnity Insurance Company* (2007) 146 Cal.App.4th 565.

### **Insurance Not "Good" or "Service"**

Insurance is an essentially financial transaction, unrelated to the sale or lease of any identifiable consumer "good" or "service," as defined under the Consumer Legal Remedies Act ("CLRA") found in California Civil Code section 1750, et. seq.. *Fairbanks v. Superior Court* (2007) 154 Cal.App.4th 435. Not citable. Review granted.

### **Insurance: Property**

The threshold requirement under a contract of property insurance is that the insured property has sustained physical loss or damage. *Simon Marketing v. Gulf Insurance Company* (2007) 149 Cal.App.4th 616.

The requirement that the loss be "physical," given the ordinary definition of that term, is widely held to exclude alleged losses that are intangible or incorporeal and, thereby, to preclude any claim against the property insurer where the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of property. *Simon Marketing v. Gulf Insurance Company* (2007) 149 Cal.App.4th 616.

Mere insertion of the words "legal liability" into an employee dishonesty policy does not transform the policy into a liability policy. *Simon Marketing v. Gulf Insurance Company* (2007) 149 Cal.App.4th 616.

### **Insured's Reasonable Expectations**

Because a D&O insurance policy defined the term "wrongful act" as not including a breach of contract, the insured could not reasonably have an expectation that D&O coverage applied to a contract claim, whether an officer is sued in an individual or official capacity. *August Entertainment, Inc. v. Philadelphia Indemnity Insurance Company* (2007) 146 Cal.App.4th 565.

### **Intentional Acts**

Intentional self-defense may be deemed an "accident" within a third party liability coverage clause, and thereby give rise to a duty to if the insured is provoked by a third party's unexpected and unintended acts. *Jafari v. EMC Insurance Companies* (2007) 155 Cal.App.4th 885. Not citable. Review granted.

Where a third party's actions provoking an insured's self-defense are an unforeseen and unexpected element in the causal chain of events making the insured's acts in self-defense unplanned and involuntary, there is an accident within the coverage clause, thereby giving rise to a duty to defend. *Jafari v. EMC Insurance Companies* (2007) 155 Cal.App.4th 885. Not citable. Review granted.

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In determining whether a duty to defend exists for claims against the insured for assault and battery, an insurer must take a broad view of any incident raising the question of self-defense and not just look at the insured's actions. *Jafari v. EMC Insurance Companies* (2007) 155 Cal.App.4th 885. Not citable. Review granted.

In assault and battery cases, a third party's actions prompting an insured to act in self-defense are part of the causal chain of events leading to potential injury that must be considered in evaluating a potential for coverage. *Jafari v. EMC Insurance Companies* (2007) 155 Cal.App.4th 885. Not citable. Review granted.

When a policy excludes from coverage injuries which are "expected" or "intended," courts will construe this policy language merely to exclude from coverage injuries and damage "resulting from acts involving an element of wrongfulness or misconduct, even though the acts otherwise are performed intentionally." *Jafari v. EMC Insurance Companies* (2007) 155 Cal.App.4th 885. Not citable. Review granted.

### **International Comity**

There are limitations to the application of international comity. U.S. courts should be wary of enforcing foreign injunctions where the clear thrust of the requested relief is the termination of the domestic claim or where it would frustrate strong U.S. policy. *Dependable Highway Express, Inc. v. Navigators Ins. Co.* (9th Cir. 2007) 498 F.3d 1059.

### **Interpleader**

Any person, firm, corporation, association or other entity against whom double or multiple claims are made, or may be made, by two or more persons which are such that they may give rise to double or multiple liability, may bring an action against the claimants to compel them to interplead and litigate their several claims. *Principal Life Insurance Company v. Peterson* (2007) 156 Cal.App.4th 676.

When a person may be subject to conflicting claims for money or property, the person may bring an interpleader action to compel the claimants to litigate their claims among themselves. *Principal Life Insurance Company v. Peterson* (2007) 156 Cal.App.4th 676.

Once the person admits liability and deposits the money with the court, he or she is discharged from liability and freed from the obligation of participating in the litigation between the claimants. *Principal Life Insurance Company v. Peterson* (2007) 156 Cal.App.4th 676.

When the right of interpleader and discharge has been established, the trial of the issues between the conflicting claimants proceeds on the original and any additional pleadings deemed necessary. *Principal Life Insurance Company v. Peterson* (2007) 156 Cal.App.4th 676.

### **Judicial Notice**

On demurrer, although the existence of a document in a court file may be judicially noticeable, the truth of statements contained in the document and its proper interpretation are not subject to judicial notice if those matters are reasonably disputable. *Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97.

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On demurrer, a court cannot take judicial notice that a contract is binding and enforceable if the plaintiff claims it is unenforceable due to fraud or duress. *Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97.

### **Judicial Review**

When evaluating the validity and enforceability of a statute, the court shall presume the statute is valid and the statute shall not be struck down unless its invalidity is clearly established. *Mercury Casualty Co. v. Scottsdale Indemnity Co.* (2007) 156 Cal.App.4th 1212.

When evaluating the validity and enforceability of a statute and the court shall not consider or weigh the economic or social wisdom or general propriety of the legislation, as the judiciary's sole function is to evaluate a statute's legality in light of established constitutional standards. *Mercury Casualty Co. v. Scottsdale Indemnity Co.* (2007) 156 Cal.App.4th 1212.

### **Limits of Liability**

In continuing loss, one occurrence setting, only one per occurrence limit of first policy is owed. *Safeco Ins. Co. of America v. Fireman's Fund Ins. Co.* (2007) 148 Cal.App.4th 620.

### **Liquidation of Domestic Insurers**

If certain requirements are met, Insurance Code section 1215.16 allows a receiver under a liquidation or rehabilitation order of a domestic insurer to recover improper distributions from a parent corporation, holding company, or other controlling person if those distributions were made within one year before the petition for liquidation was filed. *Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97.

### **Misrepresentation**

When a policyholder conceals or misrepresents a material fact on an insurance application, the insurer is entitled to rescind the policy. *LA Sound USA, Inc. v. St. Paul Marine Insurance Co.* (2007) 156 Cal.App.4th 1259.

Each party to a contract of insurance shall communicate to the other, in good faith, all facts within his knowledge which are or which he believes to be material to the contract. (Ins. Code § 332.) *LA Sound USA, Inc. v. St. Paul Marine Insurance Co.* (2007) 156 Cal.App.4th 1259.

Materiality of misrepresentations is determined solely by the probable and reasonable effect which truthful answers would have had upon the insurer. The fact that the insurer has demanded answers to specific questions in an application for insurance is in itself usually sufficient to establish materiality as a matter of law. *LA Sound USA, Inc. v. St. Paul Marine Insurance Co.* (2007) 156 Cal.App.4th 1259.

Courts have applied Insurance Code sections 331, 359 to permit rescission of an insurance policy based on an insured's negligent failure to disclose a material fact in the application for insurance. Therefore, misstatement or concealment of material facts is ground for rescission even if unintentional. The insurer need not prove that the applicant-insured actually intended to deceive the insurer. *LA Sound USA, Inc. v. St. Paul Marine Insurance Co.* (2007) 156 Cal.App.4th 1259.

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Concealment, which is the neglect to communicate that which a party knows, and ought to communicate, as defined in Insurance Code section 330 entitles the injured party to rescind insurance. (Ins. Code § 331.) *LA Sound USA, Inc. v. St. Paul Marine Insurance Co.* (2007) 156 Cal.App.4th 1259.

Unless a copy of the application is attached to or endorsed on the policy, the insured shall not be bound by any statement made in an application for a policy and the insurer may not invoke the defense of misrepresentations in or omissions from the unattached and unendorsed application. *Ticconi v. Blue Shield Of California Life & Health Insurance Company* (2007) 157 Cal.App.4th 707.

Health and Safety Code section 1389.3 imposes a duty on health services plans to make reasonable efforts to ensure responses on applications from potential subscribers are accurate and complete before making a determination to issue coverage. *Hailey v. California Physicians' Service* (2007) 158 Cal.App.4th 452.

A health care service plan cannot rescind a contract unless it can show either (1) the subscriber willfully misrepresented or omitted material information on the application or (2) the plan made reasonable efforts to ensure the application was accurate and complete during the precontract underwriting process. *Hailey v. California Physicians' Service* (2007) 158 Cal.App.4th 452.

Whether a health care service plan's investigation of the accuracy and completeness of a potential subscriber's application is reasonable is a factual question that is dependent on the circumstances of each case. *Hailey v. California Physicians' Service* (2007) 158 Cal.App.4th 452.

Given the likelihood an applicant might make an inadvertent error, accurate underwriting requires a reasonable check on the information the health services plan uses to evaluate the risk. *Hailey v. California Physicians' Service* (2007) 158 Cal.App.4th 452.

### **Multiple Insurers**

An "other insurance" issue can arise only between carriers on the same level of coverage. *JPI Westcoast Construction, L.P. v. RJS & Associates, Inc., et al.* (2007) 156 Cal.App.4th 1448.

California insurance law recognizes a fundamental distinction between primary and excess insurance coverage. Primary coverage is insurance coverage whereby, under the terms of the policy, liability attaches immediately upon the happening of the occurrence that gives rise to liability. Primary insurers generally have the primary duty of defense. "Excess" or secondary coverage is coverage whereby, under the terms of the policy, liability attaches only after a predetermined amount of primary coverage has been exhausted. The excess insurance referred to in this definition is that secondary insurance which provides coverage after other identified insurance is no longer on the risk. In short, excess insurance is insurance that is expressly understood by both the insurer and insured to be secondary to specific underlying coverage which will not begin until after that underlying coverage is exhausted and which does not broaden that underlying coverage. *JPI Westcoast Construction, L.P. v. RJS & Associates, Inc., et al.* (2007) 156 Cal.App.4th 1448.

There are two levels of insurance coverage, primary and excess. An excess or secondary policy does not cover a loss, nor does any duty to defend the insured arise, until all

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primary insurance has been exhausted. *JPI Westcoast Construction, L.P. v. RJS & Associates, Inc., et al.* (2007) 156 Cal.App.4th 1448.

### **Negligence**

Where emotional distress rather than the molestation caused the claimed injury, and the insurance policy excludes emotional distress, mental anguish, humiliation, mental distress, mental injury or any similar injury from the definition of “bodily injury,” there is no coverage for the alleged molestation under the auspices of continuous or progressively deteriorating bodily injury. *Bjork v. State Farm Fire and Cas. Co.* (2007) 157 Cal.App.4th 1.

### **No Private Right of Action Under Unfair Insurance Practices Act**

The Unfair Insurance Practices Action (“UIPA”) does not create a private right of action for violations of its provisions, and a plaintiff may not plead around the limitation by recasting a cause of action based on a violation of the UIPA as one brought under the Unfair Competition Law. *Levy v. State Farm Mutual Automobile Insurance Co.* (2007) 150 Cal.App.4th 1.

The Unfair Insurance Practices Action (“UIPA”) does not create a private right of action for violations of its provisions. It does not allow an insured to seek punitive and compensatory damages against an insurer. *Fairbanks v. Superior Court* (2007) 154 Cal.App.4th 435. Not citable. Review granted.

### **Other Insurance Provisions**

The other insurance provisions of Insurance Code sections 2070 and 2071 show a legislative intent to allow pro rata payment of claims even where there is no “double insurance” and where there are different insureds on the same interest. *Burns v. California Fair Plan* (2007) 152 Cal.App.4th 646.

An “excess insurer” does not have a duty to defend an insured until “primary insurance” in the form of an SIR is exhausted applies even if the excess insurer’s “other insurance” clause does not contain a direct reference to self insurance. *Padilla Construction Company v. Transportation Insurance Company* (2007) 150 Cal.App.4th 984.

The original purpose of these clauses was to prevent multiple recovery when more than one policy covers a given loss. *Edmonson Property Management v. Klock* (2007) 156 Cal.App.4th 197.

The modern trend is to require contribution where there is the same level of insurance for the same risk, regardless of “other insurance” language. *Edmonson Property Management v. Klock* (2007) 156 Cal.App.4th 197.

### **Policy Period**

Gaps in coverage are inconsistent with a “comprehensive” liability policy. *London Market Insurers v. Superior Court (Truck Ins. Exchange)* (2007) 146 Cal.App.4th 648..

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### **Post-Claims Underwriting**

Health and Safety Code section 1389.3 imposes a duty on health services plans to make reasonable efforts to ensure responses on applications from potential subscribers are accurate and complete before making a determination to issue coverage. *Hailey v. California Physicians' Service* (2007) 158 Cal.App.4th 452.

A health care service plan cannot rescind a contract unless it can show either (1) the subscriber willfully misrepresented or omitted material information on the application or (2) the plan made reasonable efforts to ensure the application was accurate and complete during the precontract underwriting process. *Hailey v. California Physicians' Service* (2007) 158 Cal.App.4th 452.

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Given the likelihood an applicant might make an inadvertent error, accurate underwriting requires a reasonable check on the information the health services plan uses to evaluate the risk. *Hailey v. California Physicians' Service* (2007) 158 Cal.App.4th 452.

### **Privies**

Under the doctrine of *res judicata*, an insured and its partially subrogated insurer are privies. *Intri-Plex Technologies v. The Crest Group* (9th Cir. 2007) 499 F.3d 1048 .

### **Products Hazard**

Neither manufacture nor distribution can be an "occurrence" because both necessarily occur before—not after—a product is relinquished by the manufacturer. *London Market Insurers v. Superior Court (Truck Ins. Exchange)* (2007) 146 Cal.App.4th 648.

### **Punitive Damages**

For punitive damages purposes, compensatory damages are substantial where the insureds recovered their economic damages, their attorney fees generated by their case against the insurer, and received \$750,000 apiece for emotional distress. In fact, the respondents' recovery of compensatory damages has a punitive element. This only supports a one-to-one ratio. *Walker, et al. v. Farmers Insurance Exchange* (2007) 153 Cal.App.4th 965.

An insurer's reiteration of a claim's denial does not satisfy the repeated actions prong of punitive damages evaluation. *Walker, et al. v. Farmers Insurance Exchange* (2007) 153 Cal.App.4th 965.

There is a relatively low level of reprehensibility where the insurer caused economic harm and emotional distress, but not physical harm; the insurer did not disregard the health

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and safety of others; there was but one isolated incident; and the insurer's conduct involved oversight and a mistake. *Walker, et al. v. Farmers Insurance Exchange* (2007) 153 Cal.App.4th 965.

Findings of a low degree of reprehensibility and substantial damages where insurer unreasonably refused to defend meant that punitive damages award could not exceed 1:1 ratio under Constitutional guidelines set forth in *State Farm* and other cases. *Walker, et al. v. Farmers Insurance Exchange* (2007) 153 Cal.App.4th 965.

Upon request, an insurer is entitled to an instruction that the jury may not impose punitive damages upon the insurer for injury inflicted upon nonparties. *Merrick v. Paul Revere Life Insurance Company* (9th Cir. 2007) 500 F.3d 1007.

A plaintiff seeking punitive damages may introduce evidence of injury to nonparties to demonstrate the reprehensibility of the defendant's conduct. *Merrick v. Paul Revere Life Insurance Company* (9th Cir. 2007) 500 F.3d 1007.

The District Court acted within its discretion in denying a motion for a new trial on punitive damages where, given the evidence, the jury could have concluded that a disability insurer acted oppressively, fraudulently, or maliciously by engaging in "claim-scrubbing procedures" intended to ensure denial of a disability claim. *Merrick v. Paul Revere Life Insurance Company* (9th Cir. 2007) 500 F.3d 1007.

A receiver will not be denied recovery of punitive damages where the receiver's judicially authorized role encompassed the pursuit of a request for punitive damages. *James Baron v. Fire Insurance Exchange* (2007) 154 Cal.App.4th 1184.

A receiver who seeks punitive damages pursuant to his judicially authorized role is not acting as an assignee, and therefore is not precluded from pursuing punitive damages that are personal and not assignable as a matter of law. *James Baron v. Fire Insurance Exchange* (2007) 154 Cal.App.4th 1184.

### **Reasonable Expectations of Insured**

The insured City purchased the policy for a 15-day period to cover occurrences during an event it was holding and it was reasonable to expect the policy to cover lawsuits alleging the City's traffic controls caused an auto accident resulting in bodily injury. *Essex Ins. Co. v. City of Bakersfield* (2007) 154 Cal.App.4th 696.

### **Reinsurance**

Code of Civil Procedure section 2017.210 does not authorize discovery of reinsurance contracts from a nonparty insurer absent special circumstances. *Catholic Mutual Relief Society v. Superior Court* (2007) 42 Cal.4th 358.

There is no California common law rule extending an injured party's limited right to discovery of a defendant's liability insurance to reinsurance agreements. *Catholic Mutual Relief Society v. Superior Court* (2007) 42 Cal.4th 358.

As a general matter, reinsurance has no relevance in an underlying tort action brought against an insured under a liability policy. *Catholic Mutual Relief Society v. Superior Court* (2007) 42 Cal.4th 358.

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Reinsurance does not alter the terms, conditions or provisions of a contract of liability insurance between the direct liability insurer and the insured. *Catholic Mutual Relief Society v. Superior Court* (2007) 42 Cal.4th 358.

Legal counsel retained by a ceding insurer to provide advice and representation with respect to a claim against an insured generally owes no legal duty of care under a third-party beneficiary theory or an implied contract theory to a reinsurer. *Zenith Insurance Company v. Cozen O'Connor* (2007) 148 Cal.App.4th 998.

### Rescission

When a policy is rescinded it is void ab initio and therefore treated as though it had never existed. A policy void ab initio thus cannot be breached. A rescission effectively renders the policy totally unenforceable from the outset so that there was never any coverage and no benefits are payable. *LA Sound USA, Inc. v. St. Paul Marine Insurance Co.* (2007) 156 Cal.App.4th 1259.

If a representation is false in a material point, the injured party is entitled to rescind the contract from the time the representation becomes false. (Ins. Code § 359.) *LA Sound USA, Inc. v. St. Paul Marine Insurance Co.* (2007) 156 Cal.App.4th 1259.

The service of a pleading in an action or proceeding that seeks relief based on rescission, including an answer or a cross-complaint, shall be deemed to be such notice or offer or both. (Civil Code § 1691, subd. (b).) *LA Sound USA, Inc. v. St. Paul Marine Insurance Co.* (2007) 156 Cal.App.4th 1259.

Insurance Code section 650 bars an insurer only from filing a separate suit for judicial rescission once a policyholder has filed an action to enforce the policy. It does not deprive insurers of their right under Civil Code section 1691 to provide the required notice and offer to restore simply by serving a pleading seeking rescission. And it does not undermine the established law that clearly affords the insurer the right to avoid coverage by way of cross-claims and affirmative defenses when the insured files an action on the contract before the insurer can file its action for rescission. *LA Sound USA, Inc. v. St. Paul Marine Insurance Co.* (2007) 156 Cal.App.4th 1259.

Health and Safety Code section 1389.3 imposes a duty on health services plans to make reasonable efforts to ensure responses on applications from potential subscribers are accurate and complete before making a determination to issue coverage. *Hailey v. California Physicians' Service* (2007) 158 Cal.App.4th 452.

A health care service plan cannot rescind a contract unless it can show either (1) the subscriber willfully misrepresented or omitted material information on the application or (2) the plan made reasonable efforts to ensure the application was accurate and complete during the precontract underwriting process. *Hailey v. California Physicians' Service* (2007) 158 Cal.App.4th 452.

Whether a health care service plan's investigation of the accuracy and completeness of a potential subscriber's application is reasonable is a factual question that is dependent on the circumstances of each case. *Hailey v. California Physicians' Service* (2007) 158 Cal.App.4th 452.

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Given the likelihood an applicant might make an inadvertent error, accurate underwriting requires a reasonable check on the information the health services plan uses to evaluate the risk. *Hailey v. California Physicians' Service* (2007) 158 Cal.App.4th 452.

### **Reimbursement**

Insurers seeking reimbursement bear the burden of proving the proper amount of reimbursement. In the rescission context, insurers seeking reimbursement must show which costs can be allocated to the defense or indemnity of each particular insured.) *LA Sound USA, Inc. v. St. Paul Marine Insurance Co.* (2007) 156 Cal.App.4th 1259.

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### **Removal to Federal Court**

The Class Action Fairness Act ("CAFA"), Pub. L. No. 109-2, section 5, 119 Stat. 4 (2005), only applies to actions commenced before its effective date, February 17, 2005. When an action is "commenced" depends on state law. California's relation-back doctrine does not apply to an amended cross-complaint. CAFA does not create an exception to the longstanding rule in *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 61 S. Ct. 868, 85 L. Ed. 1214 (1941) that a plaintiff/cross-defendant cannot remove an action to federal court. *Progressive West Ins. Co. v. Preciado* (9th Cir. 2007) 479 F.3d 1014.

### **Res Judicata**

Where a partially subrogated insurer and its insured both have a right of recovery against a wrongdoer for the same claim, such rights must be asserted in a single claim to avoid application of the rule against splitting causes of action. *Intri-Plex Technologies v. The Crest Group* (9th Cir. 2007) 499 F.3d 1048.

Under the doctrine of *res judicata*, an insured and its partially subrogated insurer are privies. *Intri-Plex Technologies v. The Crest Group* (9th Cir. 2007) 499 F.3d 1048.

### **Restrictions on Agency Employees**

An insurance company may control its agents' employees when those employees act on the insurance company's behalf to bind it to insurance obligations. *Patricia Adkins Insurance Agency, Inc. v. State Farm Mutual Automobile Insurance Company* (2007) 146 Cal.App.4th 526.

### **Self-Defense**

Intentional self-defense may be deemed an "accident" within a third party liability coverage clause, and thereby give rise to a duty to if the insured is provoked by a third party's

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unexpected and unintended acts. *Jafari v. EMC Insurance Companies* (2007) 155 Cal.App.4th 885. Not citable. Review granted.

Where a third party's actions provoking an insured's self-defense are an unforeseen and unexpected element in the causal chain of events making the insured's acts in self-defense unplanned and involuntary, there is an accident within the coverage clause, thereby giving rise to a duty to defend. *Jafari v. EMC Insurance Companies* (2007) 155 Cal.App.4th 885. Not citable. Review granted.

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In assault and battery cases, a third party's actions prompting an insured to act in self-defense are part of the causal chain of events leading to potential injury that must be considered in evaluating a potential for coverage. *Jafari v. EMC Insurance Companies* (2007) 155 Cal.App.4th 885. Not citable. Review granted.

When a policy excludes from coverage injuries which are "expected" or "intended," courts will construe this policy language merely to exclude from coverage injuries and damage "resulting from acts involving an element of wrongfulness or misconduct, even though the acts otherwise are performed intentionally." *Jafari v. EMC Insurance Companies* (2007) 155 Cal.App.4th 885. Not citable. Review granted.

### **Self-Insured Retention**

An "excess insurer" does not have a duty to defend an insured until "primary insurance" in the form of an SIR is exhausted applies even if the excess insurer's "other insurance" clause does not contain a direct reference to self insurance. *Padilla Construction Company v. Transportation Insurance Company* (2007) 150 Cal.App.4th 984.

### **Settlement**

An insurer that fails to accept a reasonable settlement offer is liable for the damages sustained by the insured caused by the breach, despite policy limits. When an insurer breaches the implied covenant of good faith and fair dealing for failing to accept a reasonable settlement offer, an insured's remedies lie in both tort and contract law. An insured's cause of action against an insurer for failing to settle a claim does not accrue until a judgment is rendered against the insured that exceeds the policy limits. *Archdale v. American International Specialty Lines Insurance* (2007) 154 Cal.App.4th 449.

### **Single Recovery Rule**

Multiple insureds cannot recover more than the value of a home (the insured property) destroyed on a fire insurance claim resulting from a single occurrence. The insureds argued pro rata payments on fire insurance are appropriate only when there is "double insurance" as defined in Insurance Code sections 590 and 591. Double insurance exists where the same person is insured by several insurers separately, covering the same subject and interest. (Ins. Code § 590.) Because the insurance policies in this case did not constitute "double insurance" under Insurance Code sections 590 and 591, the insureds argued pro rata payments were impermissible. The Court of Appeal rejected this argument because such a finding (a) offends

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a well-established rule of law barring profit under an insurance contract, and (b) is contrary to the Legislature's intent in the area of "other insurance." *Burns v. California Fair Plan* (2007) 152 Cal.App.4th 646.

### Statute of Limitations

Continuing accrual rule does not apply to every fraudulent statement that arose out of a single transaction. *State of California ex rel. Metz v. CCC Information Services, Inc.* (2007) 149 Cal.App.4th 402.

Three year statute of limitations period under Insurance Code section 1871.7 is triggered by inquiry notice, not actual notice. *State of California ex rel. Metz v. CCC Information Services, Inc.* (2007) 149 Cal.App.4th 402.

### Statutory Interpretation

"As a general rule, unless expressly provided, statutes should not be interpreted to alter the common law, and should be construed to avoid conflict with common law rules. A statute will be construed in light of common law decisions, unless its language clearly and unequivocally discloses an intention to depart from, alter, or abrogate the common-law rule concerning the particular subject matter." *Catholic Mutual Relief Society v. Superior Court* (2007) 42 Cal.4th 358.

"It is a settled principle of statutory interpretation that language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend." *Catholic Mutual Relief Society v. Superior Court* (2007) 42 Cal.4th 358.

The objective of statutory construction is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. *Principal Life Insurance Company v. Peterson* (2007) 156 Cal.App.4th 676.

Words used in statute should be given the meaning they bear in ordinary use. *Principal Life Insurance Company v. Peterson* (2007) 156 Cal.App.4th 676.

If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature. *Principal Life Insurance Company v. Peterson* (2007) 156 Cal.App.4th 676.

If the language permits more than one reasonable interpretation, the court looks to a variety of extrinsic aids including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part. *Principal Life Insurance Company v. Peterson* (2007) 156 Cal.App.4th 676.

The court must select the construction that comports most closely with the apparent intent of the Legislature, with a view of promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences. *Principal Life Insurance Company v. Peterson* (2007) 156 Cal.App.4th 676.

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### Stay

While a federal district court possesses the inherent power to control its docket and promote efficient use of judicial resources, a stay is inappropriate if there is even a fair possibility that the stay would work damage to some one else and if the order does not specify a reasonable duration for the stay. *Dependable Highway Express, Inc. v. Navigators Ins. Co.* (9th Cir. 2007) 498 F.3d 1059.

### Subrogation

When an insurer pays money to its insured for a loss caused by a third party, the insurer succeeds to its insured's rights against the third party in the amount the insurer paid. Upon subrogation, the insurer steps into the shoes of its insured. *Intri-Plex Technologies v. The Crest Group* (9th Cir. 2007) 499 F.3d 1048.

When an insurer settles a claim brought against its insured, it becomes subrogated to the rights that its insured may have against third parties, not the rights of the insured's third party claimant. This is no less true when the "benefit" that the insured receives from its insurer is a payment directly to a third party to avoid the third party's claim. *Intri-Plex Technologies v. The Crest Group* (9th Cir. 2007) 499 F.3d 1048.

Under *Allstate Ins. Co. v. Mel Rapton, Inc.* (2000) 77 Cal.App.4th 901, a tortfeasor with knowledge of an insurer's subrogation claim may not settle the entire cause of action by settling only with the insured and thereby foreclose a subsequent action by the insurer. This rule exists to protect the insurer from fraud, because it involves an insured's and tortfeasor's voluntary settlement and release of all claims with knowledge of an insurer's subrogation rights. *Intri-Plex Technologies v. The Crest Group* (9th Cir. 2007) 499 F.3d 1048.

Different insurance carriers covering different risks and liabilities may proceed against each other for reimbursement by subrogation rather than by contribution. *JPI Westcoast Construction, L.P. v. RJS & Associates, Inc., et al.* (2007) 156 Cal.App.4th 1448.

### Summary Judgment

When a party makes objections to evidence submitted as part of a summary judgment motion, but does not obtain a court ruling on the objections, the Court of Appeal will consider the objections as waived, and view the evidence as having been admitted. *Jafari v. EMC Insurance Companies* (2007) 155 Cal.App.4th 885. Not citable. Review granted.

If a plaintiff who would bear the burden of proof by a preponderance of evidence at trial moves for summary judgment, he must present evidence that would require a reasonable trier of fact to find any underlying material fact more likely than not otherwise, he would not be entitled to judgment as a matter of law. *Principal Life Insurance Company v. Peterson* (2007) 156 Cal.App.4th 676.

If a party moving for summary judgment carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact. *Principal Life Insurance Company v. Peterson* (2007) 156 Cal.App.4th 676.

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### **Telephone Consumer Protection Act of 1991 (“TCPA”) [47 U.S.C. Section 227]**

Advertising injury and property damage provisions of the policy do not provide coverage for violations of the Telephone Consumer Protection Act of 1991 (“TCPA”), because there is no publication of material that violates a person’s right of secrecy privacy, the act of transmitting a fax is not an occurrence and is barred by the expected or intended injury exclusion. *ACS Systems, Inc. v. St. Paul Fire and Marine Insurance Company* (2007) 147 Cal.App.4th 138.

### **The Class Action Fairness Act**

The Class Action Fairness Act (“CAFA”), Pub. L. No. 109-2, section 5, 119 Stat. 4 (2005), only applies to actions commenced before its effective date, February 17, 2005. When an action is “commenced” depends on state law. California’s relation-back doctrine does not apply to an amended cross-complaint. CAFA does not create an exception to the longstanding rule in *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 61 S. Ct. 868, 85 L. Ed. 1214 (1941) that a plaintiff/cross-defendant cannot remove an action to federal court. *Progressive West Ins. Co. v. Preciado* (9th Cir. 2007) 479 F.3d 1014.

### **Third Party Beneficiary**

Code of Civil Procedure section 1060 allows an intended beneficiary of an insurance policy to bring an action for a declaration of his or her rights and duties. *InfiNet Marketing Services v. American Motorist Insurance Co.* (2007) 150 Cal.App.4th 168.

Under California Civil Code section 1559, a party seeking coverage as a third party beneficiary must show the policy was procured expressly for its benefit, or that it was a member of the class of persons for whose benefit the policy was procured. It is not sufficient to show the party seeking coverage would receive some benefit from its performance. *InfiNet Marketing Services v. American Motorist Insurance Co.* (2007) 150 Cal.App.4th 168.

Insurance broker was not a third-party beneficiary under a worker’s compensation policy issued to employee leasing company, where Broker was not named as an insured and where the policy was not procured expressly for its benefit. *InfiNet Marketing Services v. American Motorist Insurance Co.* (2007) 150 Cal.App.4th 168.

### **Trade Secret**

Insurance company could not bind its agents’ employees to trade secret and noncompetition restrictions. *Patricia Adkins Insurance Agency, Inc., et al., v. State Mutual Automobile Insurance Company et al.* (2007) 146 Cal.App.4th 526.

### **Unclean Hands**

The equitable defense of unclean hands is not a defense to an unfair trade or business practices claim based on violation of a statute because allowing such a defense would be to judicially sanction the defendant for engaging in an act declared by statute to be void or against public policy. *Ticconi v. Blue Shield Of California Life & Health Insurance Company* (2007) 157 Cal.App.4th 707.

### United States Constitution 14th Amendment

Where primary and excess insurance companies each issued automobile liability policies to the same insured, and where the primary insurer paid for the insured's defense costs and sought reimbursement for a portion of those costs from excess insurer under Insurance Code section 11580.9(g), enforcement of the statute against excess insurer did not violate excess insurer's right to due process under the 14th Amendment of the United States Constitution, even though the primary insurer was involved in promoting the passage of Insurance Code section 11580.9(g). *Mercury Casualty Co. v. Scottsdale Indemnity Co.* (2007) 156 Cal.App.4th 1212.

Insurance Code section 11580.9(g) does not violate the equal protection clause of the United States Constitution because it regulates a type of insurance (personal automobile liability policies) and affects all insurers equally, whether primary or excess, who elect to sell this type of insurance. *Mercury Casualty Co. v. Scottsdale Indemnity Co.* (2007) 156 Cal.App.4th 1212.

Insurance Code section 11580.9(g) does not violate the equal protection clause of the United States Constitution as it does not "favor those insurers who sell primary automobile liability policies" or distinguish between "similarly situated groups of excess insurers." *Mercury Casualty Co. v. Scottsdale Indemnity Co.* (2007) 156 Cal.App.4th 1212.

### Uninsured Motorist Coverage

Uninsured motorist protection ("UMP") coverage was not available to an injured party where the driver was covered under a personal liability umbrella policy. It is irrelevant whether the umbrella policy applied directly to the vehicle. Rather, the sole issue in determining the availability of UMP coverage is whether the injured person can recover from the "owner or operator of an uninsured vehicle." *California Capital Insurance Company v. Nielsen* (2007) 153 Cal.App.4th 1221.

The purpose of uninsured motorist (UM) coverage is to allow an insured to recover sums the insured shall be legally entitled to recover as bodily injury or wrongful death from the owner or operator of an uninsured motor vehicle. Typically, one is legally entitled to recover only when the owner or operator of the uninsured vehicle is liable in tort. *State Farm Mutual Automobile Ins. Co. v. Progressive Marathon Ins. Co.* (2007) 148 Cal.App.4th Supp.1.

Insurance Code section 11580.2(d) allows that a policy or endorsement may provide that if the insured has insurance available under more than one uninsured motorist (UM) coverage provision, any damages shall not be deemed to exceed the higher of the applicable limits of the respective coverages, and the damages shall be prorated between the applicable coverages as the limits of each coverage bear to the total of the limits. *State Farm Mutual Automobile Ins. Co. v. Progressive Marathon Ins. Co.* (2007) 148 Cal.App.4th Supp.1.

### Uninsured/Underinsured Motorist Coverage

An insurer's obligations under the implied covenant of good faith and fair dealing with respect to first party under insured motorist coverage only includes a duty not to unreasonably withhold benefits due under the policy. A failure to negotiate payment under this coverage does not, by itself, constitute bad faith. *Rappaport-Scott v. Interinsurance Exchange of the Automobile Club* (2007) 146 Cal.App.4th 831.

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### **Voluntary Payments**

Under California law an insured's breach of a notice provision does not excuse the insurer's performance unless the insurer shows it suffered actual or substantial prejudice from the lack of notice. *Belz v. Clarendon America Insurance Company* (2007) (2007) 158 Cal.App.4th 615.

The purpose of a no-payment provision is to invest the insurer with the complete control and direction of the defense or compromise of suits or claims, thus alleviating the insurer from demonstrating it suffered actual substantial prejudice in order to be relieved from liability. On the other hand the notice provision requires a showing of prejudice to relieve the insurer of liability because its purpose is merely to aid the insurer in investigating, settling, and defending claims. *Belz v. Clarendon America Insurance Company* (2007) 158 Cal.App.4th 615.

A judgment creditor can seek recovery of a default judgment entered against an insured from an insurer on the applicable policy. (Ins. Code § 11580 subd. (b).) In turn, the insurer can be held liable for the default judgment entered against its insurer despite an insured's lack of notice in the absence of actual, substantial prejudice to the insurer. *Belz v. Clarendon America Insurance Company* (2007) 158 Cal.App.4th 615.

### **Waiver**

An insurer does not waive its right to rescind a policy on the ground of false representations if it was unaware of the falsity of those representations. Also, an insurer has the right to rely on the insured's answers to questions in the insurance application without verifying their accuracy. *LA Sound USA, Inc. v. St. Paul Marine Insurance Co.* (2007) 156 Cal.App.4th 1259.

### **Workers' Compensation**

Letters from an employer advising an injured employee of employer's subrogation lawsuit and settlement with a third-party tortfeasor failed to satisfy Labor Code section 3853, which requires Employer serve Employee with a copy of its complaint against the third party tortfeasor via personal service or certified mail, and to file proof of service in the subrogation action. *McKinnon v. Otis Elevator Company* (2007) 149 Cal.App.4th 1125.

An employer settling a subrogation claim against the alleged third-party tortfeasor has a duty to provide notice to the injured employee in such way that provides the employee with the opportunity to recover all damages the employee has suffered. *McKinnon v. Otis Elevator Company* (2007) 149 Cal.App.4th 1125.

Although an alleged third-party tortfeasor may not utilize its settlement with the employer as a bar to an independent action brought by an employee against the alleged third-party tortfeasor where the employer failed to adequately notify its employee of its subrogation lawsuit and proposed settlement and failed to obtain the employee's consent to the settlement, and the third-party tortfeasor was or reasonably should have been aware of the possibility of the employee's claim for damages, the employee's action for damages must take into account any worker's compensation benefits paid to the employee, or to be paid, so as to preclude double recovery for the employee and double liability for the tortfeasor. *McKinnon v. Otis Elevator Company* (2007) 149 Cal.App.4th 1125.

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Where counsel is required to take action to enforce a workers' compensation award, attorneys' fees should be awarded pursuant to California Labor Code section 4607, regardless of whether the insurer filed a formal petition to terminate care. *Smith v. Workers' Compensation Appeals Board* (2007) 146 Cal.App.4th 1032. Not citable. Review granted.

Although there is generally pro rata apportionment between workers' compensation carriers jointly and severally liable for temporary benefits, CIGA is not required to pay such an apportionment. Workers compensation carriers that are jointly and severally liable with CIGA for a worker's injuries are therefore responsible to pay one hundred percent of the worker's benefits. *California Insurance Guarantee Association v. Workers' Compensation Appeals Board* (2007) 153 Cal.App.4th 524.

State Compensation Insurance Fund ("SCIF") is jointly and severally liable for all temporary benefits paid to an injured worker where the worker's injuries acted in concert to cause his disability. *California Insurance Guarantee Association v. Workers' Compensation Appeals Board* (2007) 153 Cal.App.4th 524.

Insurance broker was not a third-party beneficiary under a worker's compensation policy issued to employee leasing company, where Broker was not named as an insured and where the policy was not procured expressly for its benefit. *InfiNet Marketing Services v. American Motorist Insurance Co.* (2007) 150 Cal.App.4th 168.