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2002 DEVELOPMENTS IN CALIFORNIA CASE LAW: INSURANCE

A summary prepared by Gordon & Rees, LLP of the holdings, organized by topic, of cases published during 2002 which apply California law to issues bearing on the rights and duties of the insurance industry.

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2002 DEVELOPMENTS IN CALIFORNIA INSURANCE CASE LAW

Agency Actions

Although there is no duty to indemnify cleanup and abatement costs resulting from administrative agency orders under the language of a standard commercial general liability policy, such costs may be covered where policy language provides coverage for more than just "damages," e.g., "damages and expenses." *Powerine Oil Company, Inc. v. Superior Court (Central National Ins. Co.)* (2002) 104 Cal.App.4th 957.

Annuities

Tax-deferred variable annuities are covered securities under the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") and thus precluded plaintiff's state action claims for violation of Cal. Bus. & Prof. Code § 17200 and § 17500. *Patenaude v. The Equitable Life Assurance Society of the United States* (9th Cir. 2002) 290 F.3d 1020.

Appellate Jurisdiction

Where a trial court clearly intended to finally dispose of plaintiff's complaint, an appellate court can amend the order to make it an effective judgment. *Swain v. California Casualty Ins. Co.* (2002) 99 Cal.App.4th 1.

Where an order on summary judgment effectively disposes of the issues, an appellate court can amend it to do explicitly what it did only implicitly. *Swain v. California Casualty Ins. Co.* (2002) 99 Cal.App.4th 1.

Bad Faith

"Not every instance of bad faith conduct by an insurer gives rise to a tort cause of action." Specifically here, there is no tort cause of action for bad faith where the sole dispute between parties involves retrospective assessment of insurance premiums based on receipts, not claims expenses. Unlike a dispute involving an insurer's duties to defend, settle or pay a claim, a premium dispute does not give rise to a tort claim for bad faith because it does not create a situation where: (1) the insurer has virtually sole control of the proceeding; (2) the insured is subject to financial pressures that the insurance is intended to mitigate; and (3) the insured must initiate action against the insurer in order to obtain the benefits of the insurance policy. *Jonathan Neil & Associates, Inc. v. Jones, et al.* (2002) 98 Cal.App.4th 434, *review granted, depublished and not citable*.

To determine a bad faith claim, the court must determine whether or not the insurer's denial of disability coverage was reasonable and not whether the insurer's denial of coverage

was not unreasonable so long as there existed a genuine issue as to the insurer's liability. Application of the 'genuine issue rule' to bad faith claims is used when it is undisputed or indisputable that the basis for the insurer's denial of benefits was reasonable. *Amadeo v. Principal Mutual Life Insurance Company* (9th Cir. 2002) 290 F.3d 1152.

Disability insurer's denial of disability benefits to insured based on the interpretation of its policy term that "regular occupation … just prior to disability" meant the insured's condition of unemployment despite her twenty-years of prior work experience meant that the jury would determine if the insurer's interpretation was unreasonable, arbitrary and capricious, and thus was in bad faith. *Amadeo v. Principal Mutual Life Insurance Company* (9th Cir. 2002) 290 F.3d 1152.

Claimants who were forced to pursue bad faith claim against insurer in liquidation proceedings by filing a proof of claim, which was rejected without a hearing, were not denied due process. Insurance insolvency proceedings are "special proceedings" which do not require express findings of fact and conclusions of law, and the insurance liquidation statutes do not provide for jury trials. *Low v. Golden Eagle Insurance Co.* (2002) 99 Cal.App.4th 837.

Court addressing Insurance Code § 11580 quotes commentators and courts critical of *Hand v. Farmers Ins. Exch.* (1994) 23 Cal.App.4th 1847 as an over-extension of the law regarding bad faith. *San Diego Housing Commission v. Industrial Indemnity Co.* (2002) 95 Cal.App.4th 669.

The attorney-in-fact for a reciprocal insurer may be liable for breach of fiduciary duty for failure to perform its appointed function, such as issuing a policy with correct limits. The attorney-in-fact may also be liable for bad faith under the "alter ego" or "unity of interest" doctrine, if facts are proved to bear out such a theory. *Tran v. Farmers Group, Inc.* (2002) 104 Cal.App.4th 1202, *modified by (2003) Cal.App.LEXIS 112*.

Brokers

Where an insurance broker fails to procure insurance to cover a particular claim, the defendant must establish that, but for the professional negligence, the absent insurance would have covered the claim. *Roger H. Proulx & Co. v. Crest-Liners, Inc.* (2002) 98 Cal.App.4th 182.

Evidence that a general contractor's claim against a subcontractor included covered "property damage" barred summary judgment in favor of an insurance broker who was sued for failing to obtain additional insured coverage on behalf of the subcontractor. *Roger H. Proulx & Co. v. Crest-Liners, Inc.* (2002) 98 Cal.App.4th 182.

An insurance broker's failure to add an entity as an additional insured is analogous to an insurer's wrongful denial of coverage. Just as an insurer cannot assert a "no suit" defense if it has wrongfully repudiated its policy, an insurance broker cannot assert the "no suit" defense when it negligently fails to obtain coverage. *Roger H. Proulx & Co. v. Crest-Liners, Inc.* (2002) 98 Cal.App.4th 182.

Business & Professions Code § 17200

The UCL authorizes restitution even in the absence of any individualized proof of harm. *People ex. rel. Lockyer v. Fremont Life Ins. Co.* (2002) 104 Cal.App.4th 508.

The combination of a restitution order and imposition of civil penalties does not constitute excessive double punishment, as the remedies provided under the UCL are cumulative. *People ex. rel. Lockyer v. Fremont Life Ins. Co.* (2002) 104 Cal.App.4th 508.

"Unfair" business practice or act is not based on "purely subjective notions of fairness," but includes deceptive or sharp practices and inclusion of "unconscionable provisions in standardized agreements." *People ex. rel. Lockyer v. Fremont Life Ins. Co.* (2002) 104 Cal.App.4th 508.

A class action is properly brought under California's Unfair Competition Law and Consumer Legal Remedies Act without individual proof that each class member relied on particular representations. *Massachusetts Mutual Life Ins. Co. v. Superior Court (Karges)* (2002) 97 Cal.App.4th 1282.

Tax-deferred variable annuities are covered securities under the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") and thus precluded plaintiff's state action claims for violation of Cal. Bus. & Prof. Code section 17200 and section 17500. *Patenaude v. The Equitable Life Assurance Society of the United States*, (9th Cir. 2002) 290 F.3d 1020.

Insurer cannot rely on Code of Civil Procedure section 425.16 (the "anti-SLAPP" statute) to strike plaintiff's suit against insurer for injunctive, restitutionary and other equitable relief under California's Unfair Competition Act (Bus. & Prof. Code §§ 17200, et seq.) based on information plaintiff obtained from Department of Insurance investigation of insurer's claims handling. Section 425.16 was designed to prevent lawsuits that chill free speech. Insurer's communications and responses to Department of Insurance investigation did not give rise to plaintiff's suit, but rather insurer's improper claims handling did. *Gallimore v. State Farm Fire & Casualty Insurance Company* (2002) 102 Cal.App.4th 1388.

To defeat an unfair competition claim based on allegations of unethical or illegal profits derived from providing legal representation to its insured, the insurer can either (1) present admissible evidence demonstrating it does not obtain any profit derived from its use of employee attorneys, thus eliminating the court's need to determine whether such profit was illegal or unfair; or (2) present argument that, assuming it derives a profit from its use of employed counsel to represent its insured, such profit is not illegal or unfair within the meaning of the Unfair Competition Law (Business and Professions Code § § 17200, et seq.). An insurer can also demonstrate through admissible evidence that the claimant does not possess, and can not reasonably obtain, needed evidence in support of its Unfair Competition claim. Thus, a declaration of an insurer's deputy general counsel in support of summary judgment averring, "[Insurer] makes no profit from its use of staff counsel," is sufficient to meet the insurer's threshold summary judgment burden. Absent any evidence raising an inference to the contrary, summary judgment as to the Unfair Competition claim is proper *Gafcon, Inc. v. Ponsor & Associates, et al.* (2002) 98 Cal.App.4th 1388.

Causation

"Bankruptcy" exclusion from coverage under an errors and omissions liability insurance policy of one of multiple proximate causes for injury did not preclude coverage for loss resulting from other causes. Where bankruptcy and malpractice both gave rise to a claim, the issue was one of proximate causation. Where there are concurrent causes, the one that sets others in motion is the cause to which the loss is to be attributed. Where there is some question as to the "prime" cause of the accident, coverage under a liability insurance policy is equally available to an insured whenever an insurance risk constitutes simply a concurrent proximate cause of injuries. Under either standard, coverage should have been afforded because there were multiple causes for loss. *Conestoga Services v. Executive Risk Indemnity* (9th Cir. 2002) 312 F.3d 976.

Triable issues of fact were raised by the insured as to whether exclusions for a flood confined to the premises and movement of land applied and as to whether the claim was properly submitted under the proof of loss provisions of the policy. A declaration from a neighbor whose own property suffered damage from the flood was sufficient to raise a triable issue of fact as to whether the exclusion for a flood confined to the premises applied. Since "land subsidence" was covered in the policy, but not "movement of land," the evidence submitted by the insured was sufficient to raise a triable issue of fact as to whether the exclusion for "movement of land" applied. In addition, Allstate did and could waive procedural provisions in the policy for submitting a claim. *Pecarovich v. Allstate Insurance Company* (9th Cir. 2002) 309 F.3d 652, *amended by (9th Cir. 2003) 2003 U.S. App. LEXIS 2184.*

An insurer owes policy benefits to an insured if the "efficient proximate cause" of the insured's loss is a covered peril, even when other excluded perils contribute to the loss. However, when all of the perils contributing to the loss are excluded under the insured's policy, judgment for the insurer can be entered as a matter of law. *Julian v. Hartford Underwriters Ins. Co.* (2002) 100 Cal.App.4th 811, *review granted, depublished and not citable*.

Where evidence shows that the sole cause of property damage was an uncovered peril, the commercial property insurer does not have a burden to prove that there was no other possible cause of damage. *Alex R. Thomas & Co. v. Mutual Service Casualty* (2002) 98 Cal.App.4th 66.

CERCLA

Sections of the City of Lodi's local environmental ordinance, Municipal Environmental Response and Liability Ordinance ("MERLO"), conflict with and are therefore preempted by federal law (CERCLA) and state law (California's Carpenter-Presley-Tanner Hazardous Substance Account Act, "HSAA"). Additional sections of MERLO may be preempted if Lodi is adjudged a PRP. Under CERCLA, PRPs are jointly and severally liable, while under MERLO Lodi is immune from suit. If Lodi is a PRP it may not "legislate away" its responsibilities under federal and state law. *Fireman's Fund Ins. Co. v. City of Lodi, et al.* (9th Cir. 2002) 302 F.3d 928.

Civil Code § 1645

Where "damages" was not defined in the policy and there was no California authority on point, the court relied on a Fire Casualty & Surety (FC&S) bulletin as an interpretive aid, citing Civil Code § 1645, which provides: "Technical words are to be intepreted as usually understood by persons in the profession or business to which they relate...." Because the FC&S bulletin is used by insurance agents and brokers to interpret standard insurance policy provisions, the court found that reliance on an FC&S bulletin to interpret the policy was appropriate under Cal. Civ. Code § 1645. *Golden Eagle Ins. Co. v. Insurance Co. of the West, et al.* (2002) 99 Cal.App.4th 837.

Civil Code § 2351

Although section 2351 of the Civil Code exempts supervising employees from vicarious liability to third persons for the tortious conduct of subordinates, section 2351 does not protect an insurer's agent from liability based on actions of the agent's employees. *Hillenbrand v. Insurance Co. of North America* (2002) 104 Cal.App.4th 784.

Civil Code § 2860

Although Civil Code section 2860 requires an exchange of information between the respective counsel, it does not sanction the disclosure by insurer's counsel of the confidences of another client, nor make it possible for an attorney to disclose information he or she does not possess. *Frazier v. Superior Court* (2002) 97 Cal.App.4th 23.

Claims Made

The notice-prejudice standard applies to claims-made policies that only require a claim to be reported as soon as practicable instead of during the policy period. *Pension Trust Fund for Operating Engineers v. Federal Insurance Co.* (9th Cir. 2002) 307 F.3d 944.

Claims Regulations

Insurer's failure to notify third party claimant of applicable statute of limitations, in violation of insurance unfair practice regulation § 2695.7(f), may estop insured from asserting statute of limitations as defense. Even though an administrative regulation may not give rise to a negligence duty of care, the doctrine of equitable estoppel is available to prevent an insurer and its insured from taking advantage of a violation of a regulation created to ensure fairness. The regulation would not have applied if the third party claimant was represented by counsel in connection with its claim against the insured. *Northwest Airlines, Inc. v. Ontario Aircraft Services, Inc.* (2002) 104 Cal.App.4th 1053.

Class Action

A class action is properly brought under California's Unfair Competition Law and Consumer Remedies Act without individual proof that each class member relied on particular representations. *Massachusetts Mutual Life Ins. Co. v. Superior Court (Karges)* (2002) 97 Cal.App.4th 1282.

Code of Civil Procedure § 425.16 (the "anti-SLAPP" statute)

Insurer cannot rely on Code of Civil Procedure section 425.16 (the "anti-SLAPP" statute) to strike plaintiff's suit against insurer for injunctive, restitutionary and other equitable relief under California's Unfair Competition Act (Bus. & Prof. Code §§ 17200, et seq.) based on information plaintiff obtained from Department of Insurance investigation of insurer's claims handling. Section 425.16 was designed to prevent lawsuits that chill free speech. Insurer's communications and responses to Department of Insurance investigation did not give rise to plaintiff's suit, but rather insurer's improper claims handling did. *Gallimore v. State Farm Fire & Casualty Insurance Company* (2002) 102 Cal.App.4th 1388.

Code of Civil Procedure § 877.6

A settlement found to be in good faith under Code of Civil Procedure section 877.6 does not bind an insurer which neither participates in nor agrees to pay the settlement. *Hamilton v. Maryland Cas. Co.* (2002) 27 Cal.4th 718.

Collateral Estoppel

Disability insurer erroneously requested for application of issue preclusion based on the fact that dismissal of breach of contract claim barred the insured's bad faith action for denying disability benefits on the basis that the insured's regular occupation just prior to disability referred to the insured's condition of unemployment despite her 20 years of prior work history. *Amadeo v. Principal Mutual Life Insurance Company* (9th Cir. 2002) 290 F.3d 1152.

Collateral estoppel or issue preclusion "attaches when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment." *Res judicata* or claim preclusion "bars successive litigation of the very same claim." *Amadeo v. Principal Mutual Life Insurance Company* (9th Cir. 2002) 290 F.3d 1152.

Contract Interpretation

In order to resolve ambiguity in additional insured endorsement, court read the endorsement in the context of the subcontract, to which the endorsement expressly referred. It was enough that the insurer knew a party would be added, but irrelevant if the insurer knew the specific party that was added. *St. Paul Fire & Marine Ins. Co. v. American Dynasty Surplus Lines Ins. Co.* (2002) 101 Cal.App.4th 1038.

The "reasonable expectations" doctrine is triggered only where a policy provision is ambiguous, in which case the court inquires into what a reasonable insured would expect. Absent ambiguity, the "reasonable expectations" doctrine becomes immaterial. *Ananda Church of Self-Realization v. Massachusetts Bay Ins. Co.* (2002) 95 Cal.App.4th 1273.

It is immaterial that employees admitted coverage in like situations. Such admissions are only opinion testimony that is irrelevant under *Chatton v. National Union. Prudential Ins. Co. of America v. Superior Court (Dunniway)* (2002) 98 Cal.App.4th 585.

A definition of an insurance term contained in an insurance industry bulletin may be relevant to defeat an insurer's contention that the term in a standard commercial liability policy should be narrowly construed. *Cunningham v. Universal Underwriters* (2002) 98 Cal.App.4th 1141.

An insurer's duty to defend is not absolute but is measured by the nature and kinds of risks covered by the policy. Thus, in analyzing the duty to defend, the focus must be on the language of the policy itself, not upon "general" rules of coverage that are not necessarily responsive to the policy language. *Cunningham v. Universal Underwriters* (2002) 98 Cal.App.4th 1141.

Ambiguous additional insured endorsements which refer to, and are required by, another contract must be interpreted in the context of the other contract. *St. Paul Fire & Marine Ins. Co. v. American Dynasty Surplus Lines Ins. Co.* (2002) 101 Cal.App.4th 1038.

A reasonable indemnitee would not expect that an indemnity provision encompassing the indemnitor's "acts and omissions" would cover injury incidental to work by the indemnitor. *St. Paul Fire & Marine Ins. Co. v. American Dynasty Surplus Lines Ins. Co.* (2002) 101 Cal.App.4th 1038.

Additional insured endorsement found ambiguous, i.e., it was a reasonable interpretation that it either barred coverage or extended coverage for jobsite injury. Court resolves ambiguity using the subcontract indemnity and insurance provisions to interpret the endorsement. *St. Paul Fire & Marine Ins. Co. v. American Dynasty Surplus Lines Ins. Co.* (2002) 101 Cal.App.4th 1038.

Insurer need not know the identity of an additional insured added to coverage pursuant to a policy term which extends coverage to a party that requires it under a separate contract with the insured. The insurer expressly contemplates the obligations undertaken under the separate contract. *St. Paul Fire & Marine Ins. Co. v. American Dynasty Surplus Lines Ins. Co.* (2002) 101 Cal.App.4th 1038.

When an insurance policy is drafted entirely by the insurer, it is a contract of adhesion. *Mogck v. Unum Life Ins. Co. of Am*. (9th Cir. 2002) 292 F.3d 1025 .

Where an automobile liability policy's coverage limit for "permissive users" was found in "other insurance" section of policy as well as an endorsement to the policy, the provision was deemed inconspicuous and vague and therefore unenforceable. Although a policy endorsement

may limit coverage, where the terms of the policy conflict with the endorsement, the latter prevails. In order to be given effect, provisions that limit coverage must be conspicuous, plain and clear, for example, by placing the limitation on the declarations page. *Haynes v. Farmers Insurance Exchange,* (2002) 95 Cal.App.4th 588, *review granted, depublished and not citable.*

Consideration of the drafting history of the "pollution exclusion" is improper where the exclusion language is clear and unambiguous. *MacKinnon v. Truck Ins. Exch.* (2002) 95 Cal.App.4th 235, *review granted, depublished and not citable.*

Where the policy terms are clear and unambiguous, an insured's "reasonable expectations" for coverage are not considered. *MacKinnon v. Truck Ins. Exch.* (2002) 95 Cal.App.4th 235, *review granted, depublished and not citable.*

Courts cannot rewrite insurance contracts based on their view of a provision's historical purpose. Thus, the pollution exclusion is not limited to environmental damage. *Bechtel Petroleum Operations, Inc. v. Continental Insurance Company* (2002) 96 Cal.App.4th 571, *review granted, and deferred pending disposition of MacKinnon v. Truck Ins. Exch., review granted, depublished and not citable.*

Where "damages" was not defined in the policy and there was no California authority on point, the court relied on a Fire Casualty & Surety (FC&S) bulletin as an interpretive aid, citing Civil Code § 1645, which provides: "Technical words are to be intepreted as usually understood by persons in the profession or business to which they relate...." Because the FC&S bulletin is used by insurance agents and brokers to interpret standard insurance policy provisions, the court found that reliance on an FC&S bulletin to interpret the policy was appropriate under Cal. Civ. Code § 1645. *Golden Eagle Ins. Co. v. Insurance Co. of the West, et al.* (2002) 99 Cal.App.4th 837.

Trade secrets are not tangible property with intrinsic value and thus not afforded coverage under insurance policies with provisions for loss from criminal acts. *Avery Dennison Corp. v. Allendale Mutual Ins. Co*. (9th Cir. 2002) 310 F.3d 1114

A jeweler's block insurance policy, which excluded coverage for theft of jewelry from an automobile unless the insured is "actually in or upon" the vehicle, did exclude coverage when an insured's employee was standing behind the car when it was driven away by a thief. The court refused to consider expert testimony regarding the scope, meaning, or interpretation of the phase "actually in or upon." The court held that opinion as to the meaning of the terms based on industry custom and practice was irrelevant to the court's interpretation of the policy language. *E.M.M.I., Inc. v. Zurich American Insurance Company* (2002) 100 Cal.App.4th 460, *review granted, depublished and not citable.*

Contract of Adhesion

When an insurance policy is drafted entirely by the insurer it is a contract of adhesion. *Mogck v. Unum Life Ins. Co. of Am.* (9th Cir. 2002) 292 F.3d 1025.

Contractual Limitations on Time for Suit

"When an insurer drafts particular policy terms and procedures relating to the insured's right to commence a legal action, the insurer must utilize those basic terms and procedures in order for the policy provisions to be triggered." *Mogck v. Unum Life Ins. Co. of Am.* (9th Cir. 2002) 292 F.3d 1025.

Contribution

The reciprocal rights and duties of several insurers covering the same event arise not out of contract, but from equitable principles. *Scottsdale Ins. Co. v. National Union Fire Ins. Co. of Pittsburgh, et al.* (2002) 95 Cal.App.4th 891, *opinion withdrawn by order of the court, depublished, and not citable.*

Insurer involved in pure contribution action is not entitled to a ruling broadly specifying its duties to the absent insured. *Scottsdale Ins. Co. v. National Union Fire Ins. Co. of Pittsburgh, et al.* (2002) 95 Cal.App.4th 891, *opinion withdrawn by order of the court, depublished, and not citable.*

In dispute among insurers regarding allocation of defense costs of an indemnitee that the insured assumed under an indemnity agreement, all three insurers were determined to be on the risk and equally liable because the indemnitee's defense costs are sums the insured is legally obligated to pay as damages within the meaning of the CGL policies. There was no equitable basis to shift entire burden of defense costs to the one insurer among the three who was the indemnitee's insurer. *Golden Eagle Ins. Co. v. Insurance Co. of the West, et al.* (2002) 99 Cal.App.4th 837.

The doctrine of equitable contribution, requiring multiple insurers who share a common obligation for the same insured to pay on the same claim, did not apply where the insured failed to comply with a special condition endorsement under the liability policy, which required the insured contractor to obtain certificates of insurance and hold-harmless agreements from all subcontractors as a condition to coverage. The court found the endorsement a valid condition and rejected the trial court's finding that it was illusory, ambiguous, analogous to an "other insurance" provision, and unenforceable for impossibility of compliance and against the spirit and rationale of the condition. *Scottsdale Ins. Co. v. Essex Insurance Company* (2002) 98 Cal.App.4th 86.

Declaratory Relief

An insurance company's declaratory relief action to resolve coverage issues does not qualify as a SLAPP suit. *State Farm General Ins. Co. v. Majorino* (2002) 99 Cal.App.4th 974.

Section 425.16 does not apply merely because a declaratory relief action follows the filing of a personal injury action. *State Farm General Ins. Co. v. Majorino* (2002) 99 Cal.App.4th 974.

Treating a declaratory relief action as a SLAPP suit would be inconsistent with the fundamental purpose of § 425.16, namely, to stem the flow of lawsuits brought primarily to chill the valid exercise of constitutional rights. *State Farm General Ins. Co. v. Majorino* (2002) 99 Cal.App.4th 974.

Where declaratory relief action has been stayed pending the outcome of an underlying personal injury action, there is no risk of inconsistent factual finding in the two proceedings. *State Farm General Ins. Co. v. Majorino* (2002) 99 Cal.App.4th 974.

Under the doctrine of *res judicata*, a valid and final judgment in an action brought to declare rights or other legal relations of the parties is conclusive in a subsequent action between them involving the same site but different details on matters which were raised or could have been raised, on matters litigated or litigable. *Aerojet-General Corporation v. American Excess Insurance Company* (2002) 97 Cal.App.4th 387.

Under the doctrine of *res judicata*, where the prior judgment in unambiguous, resort to the underlying record to determine the scope of the judgment is unnecessary. *Aerojet-General Corporation v. American Excess Insurance Company* (2002) 97 Cal.App.4th 387.

Declaratory judgments are properly given *res judicata* effect as to those matters expressly and unambiguously declared in the judgment. Once final, they may not be collaterally attacked for a nonjurisdictional error. *Aerojet-General Corporation v. American Excess Insurance Company* (2002) 97 Cal.App.4th 387.

A declaratory judgment in conclusive as to the matters unambiguously declared, but is not *res judicata* on matters not covered in the judgment. *Aerojet-General Corporation v. American Excess Insurance Company* (2002) 97 Cal.App.4th 387.

Defamation

No duty to defend an employee's defamation claim against his employer, the insured, for allegedly libelous statements made by the insured's president against the employee. The "Employment Related Practices" (ERP) exclusion bars coverage where the allegedly defamatory statements were "employment-related" and there was no "extra-employment" relationship between the employee and the president. *Low v. Golden Eagle Insurance Company* (2002) 104 Cal.App.4th 306.

Defense Costs: Reasonable and Necessary

In a construction defect suit involving a residential development, the developer may recover from its insurer costs to repair nonplaintiff homes if the costs are "reasonable and necessary" to defend the underlying action. *Barratt American, Inc. v. Transcontinental Ins. Co.* (2002) 102 Cal.App.4th 848.

Objective standard for determining whether costs are "reasonable and necessary." The question is whether a "reasonable insured" would have incurred all of these expenses in defending against the underlying action. *Barratt American, Inc. v. Transcontinental Ins. Co.* (2002) 102 Cal.App.4th 848.

Definition: "Accident"

It is not an "accident" in common speech when an employer intentionally fires a worker, or a landlord evicts a tenant, whether or not the actor believes himself entitled to do so. *Swain v. California Casualty Ins. Co.* (2002) 99 Cal.App.4th 1.

A harm knowingly and purposefully inflicted is not "accidental" merely because the person inflicting it erroneously believed himself entitled to do so. *Swain v. California Casualty Ins. Co.* (2002) 99 Cal.App.4th 1.

Insurer's duty to defend manufacturer triggered, even though complaint failed to allege an accident, where there existed the possibility that the product defects were unexpected. "[A]ccidents need not crash or clatter; they need only be unexpected consequences." "[A]t bottom, an occurrence is simply an unexpected consequence of an insured's act." (The court seems to have missed the target as "occurrence," under California law, is the cause of the loss, not the loss itself.) *Anthem Electronics, Inc. v. Pacific Employers Ins. Co.* (9th Cir. 2002) 302 F.3d 1049.

Definition: "Advertising Injury"

Artists alleged injury to reputation as a result of insured's destruction of mural in the course of building repairs. After comparing the complaint's Visual Artists Rights Act ("VARA"), 17 U.S.C. § 106A, and California Business & Professions Code Section 17200 allegations with the CGL policy terms, the Ninth Circuit determined that by no conceivable theory could the complaint raise a single issue which could bring it within the policy coverage. While the insured's policy did not specifically mention VARA, or California Business & Professions Code Section §17200, the court noted that the duty to defend arose when the facts alleged in the underlying complaint give rise to a potentially covered claim, regardless of the technical legal cause of action pleaded by the third party. *Cort v. St. Paul Fire and Marine Ins.* (9th Cir. 2002) 311 F.3d. 979.

Definition: "Arising out of"

An indemnitee liable for loss "arising out of" any act or omission on the indemnitee's part is not liable for an injury to its employee where the only causal nexus is the employee's presence in the zone of danger. *St. Paul Fire & Marine Ins. Co. v. American Dynasty Surplus Lines Ins. Co.* (2002) 101 Cal.App.4th 1038.

Specific endorsement, which includes "arising out of" acts of named insured provisions, but does "not extend coverage to acts or omissions of" the additional insured, is not applicable where named insured is found by jury to bear no responsibility for loss. Coverage for additional insured is limited to vicarious liability. *Truck Insurance Exchange v. County of Los Angeles* (2002) 95 Cal.App.4th 13.

Injury to insured subcontractor's employee, caused by general contractor's negligence and not through fault of the subcontractor, does not "arise out of" subcontractor's operations sufficient to trigger coverage under additional insured endorsement. An injury does not "arise out of" the insured's operations when the only causal connection between the insured's operations and the injury was the employee's presence at the site. *St. Paul Fire & Marine Ins. Co. v. American Dynasty Surplus Lines Ins. Co.* (2002) 101 Cal.App.4th 1038.

Definition: "As a Result of"

California courts have repeatedly construed "as a result of" and "arising out of" as requiring only a slight causal connection. "As a result of" should not be read more narrowly than "arising out of." *Pension Trust Fund for Operating Engineers v. Federal Insurance Co.* (9th Cir. 2002) 307 F.3d 944.

Definition: "Damages"

Contractual liability coverage in CGL policies includes an insured's liability for an indemnitee's defense costs as sums an insured in legally obligated to pay as "damages." Where "damages" is not defined in the policy, court found that the term could reasonably be interpreted to include the indemnitee's costs in defending against third party claims for property damage. *Golden Eagle Ins. Co. v. Insurance Co. of the West, et al.* (2002) 99 Cal.App.4th 837.

An affirmative defense seeking an offset of damages based on property damage seeks "damages" as required by a commercial general liability policy because it seeks money ordered by a court. *Construction Protective Services, Inc. v. TIG Specialty Ins. Co.* (2002) 29 Cal.4th 189.

Appellate court applied the "damages" definition articulated in *Certain Underwriters of Lloyds of London v. Superior Court* (2001) 24 Cal.4th 945 (Powerine) in finding no duty to indemnify on the part of the CGL insurer to pay unapproved, non-adjudicated, environmental clean up costs required by an administrative agency. The policy covered "all sums that the insured becomes legally obligated to pay his damages." The court determined that the lack of a court order, coupled with the insured's failure to obtain the insurer's assent prior to paying clean up expenses, abnegated the insurer's duty to indemnify the insured. *County of San Diego v. Ace Property & Casualty Company* (2002) 103 Cal.App.4th 1335, *rehearing granted, depublished, and holding reaffirmed at* (2003) __ Cal.App.4th __, 03 C.D.O.S. 1457.

In a breach of contract and "bad faith" suit against a property insurer, a lender's contract damages for the property owner's default on the mortgage loan are limited to the difference

between the lender's full credit bid at the foreclosure sale and the total amount of debt on the property. The insurer is not liable for all consequential damages because the lender's only insurable interest is the amount of the debt secured by the trust deed. *Track Mortgage Group, Inc. v. Crusader Insurance Company* (2002) 98 Cal.App.4th 857.

Including a self-insured retention violated terms of subcontract calling for subcontractor to provide insurance, but there were no damages where no coverage was afforded by reason of the additional insured endorsement. *St. Paul Fire & Marine Ins. Co. v. American Dynasty Surplus Lines Ins. Co*. (2002) 101 Cal.App.4th 1038.

Definition: "Eviction"

"In order that there be a constructive eviction it is essential that the tenant should vacate the property. There is no constructive eviction if the tenant continues in possession of the premises however much he may be disturbed in the beneficial enjoyment." *Cunningham v. Universal Underwriters* (2002) 98 Cal.App.4th 1141.

An eviction requires that a person first be in actual possession of real property, and then be removed from that property. A "wrongful eviction" thus occurs when the person recovering the property had no right to dispossess the other party from the property. *Cunningham v. Universal Underwriters* (2002) 98 Cal.App.4th 1141.

Definition: "Legally Obligated to Pay as Damages"

A setoff claim under section 431.70 of the California Code of Civil Procedure which is pleaded as an affirmative defense is similar to "monetary recovery" and may constitute "damages" depending on the exact definitions and terms of the policy. *Construction Protective Services, Inc. v. TIG Specialty Ins. Co.* (2002) 29 Cal.4th 189.

Although "damages" are limited to monies ordered by a court, there may be coverage for costs resulting from administrative agency actions where a policy provides coverage for more than just "damages," e.g., "damages and expenses." *Powerine Oil Company, Inc. v. Superior Court (Central National Ins. Co.)* (2002) 104 Cal.App.4th 957.

Definition: "Occurrence"

A wrongful eviction cannot not be properly conceived as having arisen from an "occurrence" where it was not an "accident" but "intentional conduct." *Swain v. California Casualty Ins. Co.* (2002) 99 Cal.App.4th 1.

Definition: "Personal Injury"

Given broad policy language defining personal injury offense as "an oral or written publication of material that slanders or libels a person or organization or disparages a person's or

organization's goods, products or services," the court held personal injury coverage in liability policy extended to product disparagement and trade libel (not just defamation). *Atlantic Mut. Ins. Co. v. J. Lamb, Inc., et al*., (2002) 100 Cal.App.4th 1017.

Artists alleged injury to reputation as a result of insured's destruction of mural in the course of building repairs. After comparing the complaint's Visual Artists Rights Act ("VARA"), 17 U.S.C. § 106A, and California Business & Professions Code Section §17200 allegations with the CGL policy terms, the Ninth Circuit determined that by no conceivable theory could the complaint raise a single issue which could bring it within the policy coverage. While the insured's policy did not specifically mention VARA, or California Business & Professions Code Section 17200, the court noted that the duty to defend arose when the facts alleged in the underlying complaint give rise to a potentially covered claim, regardless of the technical legal cause of action pleaded by the third party. *Cort v. St. Paul Fire and Marine Ins.* (9th Cir. 2002) 311 F.3d. 979.

No duty to defend under "disparagement," "defamation," or "invasion of privacy" parts of personal injury coverage because painting over a mural did not satisfy the definition of these torts under California law. *Cort v. St. Paul Fire and Marine Ins.* (9th Cir. 2002) 311 F.3d. 979.

Definition: "Pollutants"

Court finds that exposure to work site injuries allegedly caused by exposure to substances generated through crude oil production and storage was caused by pollutants. *Bechtel Petroleum Operations, Inc. v. Continental Insurance Company* (2002) 96 Cal.App.4th 571, *review granted, and deferred pending disposition of MacKinnon v. Truck Ins. Exch., review granted, depublished and not citable.*

Court, having found injuries caused by worksite exposure to toxic substances satisfies policy's definition of "pollutants," does not have to determine when it would be "absurd" to apply definition and does not embrace out of state cases finding only "typical forms of environmental pollution" come within definition. *Bechtel Petroleum Operations, Inc. v. Continental Insurance Company* (2002) 96 Cal.App.4th 571, *review granted, and deferred pending disposition of MacKinnon v. Truck Ins. Exch., review granted, depublished and not citable.*

Definition: "Property Damage"

Property which has been discarded cannot form the basis for a cause of action for interference with personal property rights because by placing property in the garbage, the owner renounces title, possession and the right to control. *Ananda Church of Self-Realization v. Massachusetts Bay Ins. Co.* (2002) 95 Cal.App.4th 1273.

A claimed injury for property damage must relate to the property's value as tangible property, e.g., the cost of a sheet of paper, not to an intangible value attached to the property,

e.g., information on a sheet of paper. *Ananda Church of Self-Realization v. Massachusetts Bay Ins. Co.* (2002) 95 Cal.App.4th 1273.

Evidence that leaks in a waterproof liner had damaged pumps and valves, required patching drywall, repairing and painting in an office area, and replacing a transmitter, raised a triable issue of fact sufficient to overcome summary judgment regarding whether covered "property damage" took place. *Roger H. Proulx & Co. v. Crest-Liners, Inc.* (2002) 98 Cal.App.4th 182.

A tenant's right to take possession of real property is an intangible contractual right, not "property damage," that does not mature into a property right until possession actually occurs. A nonpossessing tenant has no greater possessory property rights than does an easement holder. *Cunningham v. Universal Underwriters* (2002) 98 Cal.App.4th 1141.

Where there exists a potentially covered claim, one involving property damage which continued and progressed, perhaps even after the policy period expired, but which began with the defective construction of the hotel during the insureds' policy periods, there exists a duty to indemnify absent other exclusionary provisions in the policy. *Century Indemnity Company, et al. v. Roy Hearrean, et al.* (2002) 98 Cal.App.4th 734.

Trade secrets are not tangible property with intrinsic value and thus not afforded coverage under insurance policies with provisions for loss from criminal acts. *Avery Dennison Corp. v. Allendale Mutual Ins. Co.* (9th Cir. 2002) 310 F.3d 1114.

Court determined that the loss of use of electronic equipment qualified as property damage, after internally malfunctioning components failed. The court understood that the component circuit boards were damaged, but the rest of the scanning equipment were not. "It is the risk of loss worth more than the price of the component itself, *i.e., to other property,* against which these CGL policies mitigate." The court rejected the insurers' argument that this was insuring against defective workmanship by finding that "the defect to the circuit boards caused the lost use of tangible property, namely the KLA scanners." *Anthem Electronics, Inc. v. Pacific Employers Ins. Co.* (9th Cir. 2002) 302 F.3d 1049.

Definition: "Suit"

A third party's affirmative defense in answer to a complaint by the insured falls within the "suit" definition of a commercial general liability policy as it involves actual court proceedings initiated by a complaint. *Construction Protective Services, Inc. v. TIG Specialty Ins. Co.* (2002) 29 Cal.4th 189.

Disqualification of Counsel

If an attorney's former client can demonstrate a "substantial relationship" between the subjects of the prior and current representations, the client may seek to have a previous attorney disqualified from serving as counsel to a successive client in litigation adverse to the interests of

the former client. However, the primary concern of the test should be whether and to what extent the attorney actually acquired confidential information. *Frazier v. Superior Court* (2002) 97 Cal.App.4th 23.

Due Process: Procedural

Sufficient notice of a prohibitive act under the Unfair Competition Law (UCL) given where there is evidence that a consumer would likely experience difficulty in ascertaining the impact of a "misleading and deceptive" provision of an annuity, and where such "misleading and deceptive" provision was previously disapproved by the Department of Insurance. *People ex. rel. Lockyer v. Fremont Life Ins. Co.* (2002) 104 Cal.App.4th 508.

The license to do business in California is a property interest that cannot be taken away without procedural due process. Thus, a right to a hearing is implied under California law whenever a statute mandates revocation or suspension of a license upon failure to comply with its provisions. *Gerling Global Reins. Corp. of America, et al. v. Low* (9th Cir. 2002) 296 F.3d 832.

Due Process: Substantive

Failure of a state reporting statute, such as HVIRA, to allow for foreign-affiliate and foreign-law defenses to reporting does not violate substantive due process if the statute is rationally related to a legitimate governmental interest. Otherwise, an insurer could always evade state disclosure laws simply by transferring all relevant documents to an affiliate over which it lacks direct control. In addition, state regulatory efforts could be hindered by foreign statutes enacted for the purpose of shielding foreign corporations from routine reporting requirements. California can condition the privilege of doing business on disclosure of information in which California has a legitimate interest. *Gerling Global Reins. Corp. of America, et al. v. Low* (9th Cir. 2002) 296 F.3d 832.

Duty to Defend

Where the policy includes an absolute pollution exclusion, the insurer has no duty to defend claims for bodily injuries allegedly caused by toxic substances, which are "pollutants" within the meaning of the exclusion. *Bechtel Petroleum Operations, Inc. v. Continental Insurance Company* (2002) 96 Cal.App.4th 571, *review granted, and deferred pending disposition of MacKinnon v. Truck Ins. Exch., review granted, depublished and not citable.*

Insured cannot bring an action based upon a breach of the duty to defend where another insurer has assumed the defense because the insured has suffered no damages, citing *Ringler Associates, Inc. v. Maryland Casualty Co.* (2000) 80 Cal.App.4th 1165. *Tradewinds Escrow, Inc. v. Truck Ins. Exch.* (2002) 97 Cal.App.4th 704.

An insurer's duty to defend is not absolute but is measured by the nature and kinds of risks covered by the policy. Thus, in analyzing the duty to defend, the focus must be on the language of the policy itself, not upon "general" rules of coverage that are not necessarily responsive to the policy language. *Cunningham v. Universal Underwriters* (2002) 98 Cal.App.4th 1141.

An insurer has no duty to defend an insured against third party lawsuits where there is an express disclaimer of claim for recovery of damages for alleged bodily injuries, even if the complaint includes an allegation that the third party plaintiff sustained personal injuries. *Low v. Golden Eagle Insurance Company* (2002) 104 Cal.App.4th 306.

Speculation about unpled causes of action runs afoul of the rule enunciated in cases such as *Gunderson v. Fire Ins. Exchange* (1995) 37 Cal.App.4th 1106 and *Hurley Construction Co. v. State Farm & Casualty Co.* (1992) 10 Cal.App.4th 533, as they limit the sweep of the rule of *Gray v. Zurich Ins. Co.* (1966) 65 Cal.2d 263 and *Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287. *Low v. Golden Eagle Insurance Company* (2002) 104 Cal.App.4th 306.

To trigger a duty to defend, the extrinsic facts must be known by the insurer, if not at the inception of the third party lawsuit, then at the time of tender. *Swain v. California Casualty Ins. Co.* (2002) 99 Cal.App.4th 1.

An insurer has a duty to defend an insured which is a plaintiff under a commercial general liability policy where a third party's answer to a complaint by the insured pleads an affirmative defense which seeks damages arising out of property damage and these damages are distinct from the initial action for outstanding fees. *Construction Protective Services, Inc. v. TIG Specialty Ins. Co.* (2002) 29 Cal.4th 189.

Insurer's duty to defend manufacturer triggered, even though complaint failed to allege an accident, where there existed the possibility that the product defects were unexpected. "[A]ccidents need not crash or clatter; they need only be unexpected consequences." "[A]t bottom, an occurrence is simply an unexpected consequence of an insured's act." (The holding seems off the target as "occurrence," under California law, is the cause of the loss, not the loss itself.) *Anthem Electronics, Inc. v. Pacific Employers Ins. Co.* (9th Cir. 2002) 302 F.3d 1049.

Artists alleged injury to reputation as a result of insured's destruction of mural in the course of building repairs. After comparing the complaint's Visual Artists Rights Act ("VARA"), 17 U.S.C. § 106A, and California Business & Professions Code Section § 17200 allegations with the CGL policy terms, the Ninth Circuit determined that by no conceivable theory could the complaint raise a single issue which could bring it within the policy coverage. While the insured's policy did not specifically mention VARA, or California Business & Professions Code Section § 17200, the court noted that the duty to defend arose when the facts alleged in the underlying complaint give rise to a potentially covered claim, regardless of the technical legal cause of action pleaded by the third party. *Cort v. St. Paul Fire and Marine Ins.* (9th Cir. 2002) 311 F.3d. 979.

No duty to defend Business & Professions Code § 17200 actions under CGL policy. *Cort v. St. Paul Fire and Marine Ins.* (9th Cir. 2002) 311 F.3d. 979.

The duty to indemnify can be broader than the duty to defend where policy language limits the duty to defend but does not limit the duty to indemnify. *Powerine Oil Company, Inc. v. Superior Court (Central National Ins. Co.)* (2002) 104 Cal.App.4th 957.

Title insurance coverage for lack of right of access to the insured's property was not triggered because access was impractical or difficult. Even though access was difficult or impractical, and the insured believed that the City in which the property was located would not allow for improvements in order to facilitate access, such evidence was insufficient to trigger coverage under a policy of title insurance. *Magna Enterprises, Inc. v. Fidelity National Title Insurance Company* (2002) 104 Cal.App.4th 122.

No duty to defend an employee's defamation claim against his employer, the insured, for allegedly libelous statements made by the insured's president against the employee. The "Employment Related Practices" (ERP) exclusion bars coverage where the allegedly defamatory statements were "employment-related" and there was no "extra-employment" relationship between the employee and the president. *Low v. Golden Eagle Insurance Company* (2002) 104 Cal.App.4th 306.

Supplementary payments provisions create duties under the insurer's duty to defend. Therefore, a judgment creditor pursuing an § 11580 claim has no right to collect damages, e.g., interest on attorneys' fees, falling within such provisions. *San Diego Housing Commission v. Industrial Indemnity Co.* (2002) 95 Cal.App.4th 669.

A setoff claim under section 431.70 of the California Code of Civil Procedure which is pleaded as an affirmative defense is similar to "monetary recovery" and may constitute "damages" depending on the exact definitions and terms of the policy. *Construction Protective Services, Inc. v. TIG Specialty Ins. Co.* (2002) 29 Cal.4th 189.

Duty to Indemnify

Insurers had duty to indemnify insureds for property damage that potentially occurred to the insureds' property during the policy periods when the insureds made the defective constructive improvements despite the fact that at the time the insureds' policies were in effect, the third party claimant had not yet suffered any damages because it had not yet purchased the hotel. *Century Indemnity Company, et al. v. Roy Hearrean, et al.* (2002) 98 Cal.App.4th 734.

The duty to indemnify can be broader than the duty to defend where policy language limits the duty to defend but does not limit the duty to indemnify. *Powerine Oil Company, Inc. v. Superior Court (Central National Ins. Co.)* (2002) 104 Cal.App.4th 957.

Appellate court applied the "damages" definition articulated in *Certain Underwriters of Lloyds of London v. Superior Court* (2001) 24 Cal.4th 945 (Powerine) in finding no duty to indemnify on the part of the CGL insurer to pay unapproved, non-adjudicated, environmental clean up costs required by an administrative agency. The policy covered "all sums that the insured becomes legally obligated to pay his damages." The court determined that the lack of a court order, coupled with the insured's failure to obtain the insurer's assent prior to paying clean

up expenses, abnegated the insurer's duty to indemnify the insured. *County of San Diego v. Ace Property & Casualty Company* (2002) 103 Cal.App.4th 1335, *rehearing granted, depublished, and holding reaffirmed at* (2003) __ Cal.App.4th __, 03 C.D.O.S. 1457 .

Duty to Settle

An insurer that provides a defense is not bound by a settlement in excess of the policy limits to which the insurer did not agree. *Hamilton v. Maryland Cas. Co.* (2002) 27 Cal.4th 718.

Endorsements

Where a policy directs the policy holder to read the entire policy, including endorsements, an amendatory endorsement, although not found in the main body of the policy, is sufficiently conspicuous, plain and clear. *Julian v. Hartford Underwriters Ins. Co.* (2002) 100 Cal.App.4th 811, *review granted, depublished and not citable.*

Endorsements: Additional Insured

Ambiguous additional insured endorsements which refer to, and are required by, another contract must be interpreted in the context of the other contract. *St. Paul Fire & Marine Ins. Co. v. American Dynasty Surplus Lines Ins. Co.* (2002) 101 Cal.App.4th 1038

Insurer need not know the identity of an additional insured added to coverage pursuant to a policy term which extends coverage to a party that requires it under a separate contract with the insured. The insurer expressly contemplates the obligations undertaken under the separate contract. *St. Paul Fire & Marine Ins. Co. v. American Dynasty Surplus Lines Ins. Co.* (2002) 101 Cal.App.4th 1038.

Where insured arranges for additional insured endorsement, the inclusion of a self-insured retention violated the terms of a contract requiring the insured to procure "primary and non-contributing" insurance for another party. *St. Paul Fire & Marine Ins. Co. v. American Dynasty Surplus Lines Ins. Co.* (2002) 101 Cal.App.4th 1038.

Specific endorsement, which includes "arising out of" acts of named insured provisions, but does "not extend coverage to acts or omissions of" the additional insured, is not applicable where named insured is found by jury to bear no responsibility for loss. Coverage for additional insured is limited to vicarious liability. *Truck Insurance Exchange v. County of Los Angeles* (2002) 95 Cal.App.4th 13.

Injury to insured subcontractor's employee caused by general contractor's negligence does not "arise out of" subcontractor's operations sufficient to trigger coverage under additional insured endorsement. An injury to an insured's employee did not "arise out of" the insured's operations when the only causal connection between the insured's operations and the injury was

the employee's presence at the site. *St. Paul Fire & Marine Ins. Co. v. American Dynasty Surplus Lines Ins. Co*. (2002) 101 Cal.App.4th 1038.

Including a self-insured retention violated terms of subcontract calling for subcontractor to provide insurance, but there were no damages where no coverage was afforded by reason of the additional insured endorsement. *St. Paul Fire & Marine Ins. Co. v. American Dynasty Surplus Lines Ins. Co*. (2002) 101 Cal.App.4th 1038.

Additional insured endorsement found ambiguous, i.e., it was a reasonable interpretation that it either barred coverage or extended coverage for jobsite injury. Court resolves ambiguity using the subcontract indemnity and insurance provisions to interpret the endorsement. *St. Paul Fire & Marine Ins. Co. v. American Dynasty Surplus Lines Ins. Co.* (2002) 101 Cal.App.4th 1038.

Endorsements: Special Condition Endorsement

Liability policy endorsement requiring insured contractor to obtain certificates of insurance and hold-harmless agreements from all of its subcontractors was a valid condition of coverage. No showing of prejudice was required to enforce the condition, but insurer was prejudiced by the insured contractor's failure to comply with the condition. Thus, no coverage was afforded under the policy and other insurers had no right of equitable contribution. *Scottsdale Ins. Co. v. Essex Insurance Company* (2002) 98 Cal.App.4th 86.

Environmental Injury

"Discharge or release" of prohibited chemicals as defined by Proposition 65 (the Safe Drinking Water and Toxic Enforcement Act of 1986, now codified at Health & Safety Code Section 25249.5 et seq.) refers to a movement of chemicals from a confined space into the land or the water, whereas the "continued presence" or "passive migration" of chemicals through the soil or water after having been discharged or released does not constitute another discharge or release within the meaning of the statute. *Consumer Advocacy Group, Inc. v. Exxon Mobil Corp.* (2002) 104 Cal.App.4th 438.

ERISA

Insurer can not bring an action under ERISA § 502(a)(3) to pursue reimbursement of money from a beneficiary based on funds received by the beneficiary from a third-party because such relief is legal and § 502(a)(3) only expressly permits equitable relief. *Great West Life & Annuity Ins. Co. v. Knudson* (2002) 534 U.S. 204.

Under §1132(a)(1)(B) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1001 et seq., a plaintiff may not sue a plan's insurer for additional ERISA plan benefits if the insurer was not acting as a plan administrator. *Everhart v. Allmerica Financial Life Insurance Company* (9th Cir. 2001) 275 F.3d 751.

Suicide exclusion does not preclude recovery of death benefits under ERISA-regulated plan for death resulting from autoerotic asphyxiation because death was neither expected or intended; intentionally self-inflicted injury exclusion does not apply because the injury suffered, i.e., death, was not intended. ERISA-regulated plans are governed by federal common law. *Padfield v. AIG Life Insurance Company* (9th Cir. 2002) 290 F.3d 1121.

Estoppel

Insurer's failure to notify third party claimant of applicable statute of limitations, in violation of insurance unfair practice regulation § 2695.7(f), may estop insured from asserting statute of limitations as defense. Even though an administrative regulation may not give rise to a negligence duty of care, the doctrine of equitable estoppel is available to prevent an insurer and its insured from taking advantage of a violation of a regulation created to ensure fairness. The regulation would not have applied if the third party claimant was represented by counsel in connection with its claim against the insured. *Northwest Airlines, Inc. v. Ontario Aircraft Services, Inc.* (2002) 104 Cal.App.4th 1053.

Exclusion

The United States Court of Appeals for the Ninth Circuit reversed summary judgment in favor of Allstate Insurance Company ("Allstate") on the grounds that triable issues of fact were raised by the insured as to whether exclusions for a flood confined to the premises and movement of land applied and as to whether the claim was properly submitted under the proof of loss provisions of the policy. A declaration from a neighbor whose own property suffered damage from the flood was sufficient to raise a triable issue of fact as to whether the exclusion for a flood confined to the premises applied. Since "land subsidence" was covered in the policy, but not "movement of land," the evidence submitted by the insured was sufficient to raise a triable issue of fact as to whether the exclusion for "movement of land" applied. In addition, the Court determined that Allstate did and could waive procedural provisions in the policy for submitting a claim. *Pecarovich v. Allstate Insurance Company* (9th Cir. 2002) 309 F.3d 652, *amended by (9th Cir. 2003) 2003 U.S. App. LEXIS 2184.*

Exclusion: Bankruptcy

A "bankruptcy" exclusion in an errors and omissions policy did not preclude coverage for loss when there were causes for loss in addition to bankruptcy. When there are multiple causes for loss, the court uses a proximate cause analysis. Where there are concurrent causes, the one that sets others in motion is the cause to which the loss is to be attributed. Where there is some question as to the "prime" cause of the accident, coverage under a liability insurance policy is equally available to an insured whenever an insurance risk constitutes simply a concurrent proximate cause of injuries. *Conestoga Services v. Executive Risk Indemnity* (9th Cir. 2002) 312 F.3d 976.

Exclusion: Commercial Property

There is no coverage under a commercial property policy for property damage that arises from pitting in aluminum refrigeration coils which was caused by chloride corrosion because of the exclusion for property damage caused by contamination, corrosion and deterioration. *Alex R. Thomas & Co. v. Mutual Service Casualty* (2002) 98 Cal.App.4th 66.

Exclusion: Contractual Liability

Despite policy's definition of "insured contract," in exception to contractual liability exclusion that refers only to assumption of tort liability and does not expressly include the assumption of defense costs, contractual liability coverage in a CGL policy includes an insured's liability for an indemnitee's defense costs and treats them as damages. *Golden Eagle Ins. Co. v. Insurance Co. of the West, et al*. (2002) 99 Cal.App.4th 837.

Exclusion: Employment Practices

In examining the "Employment Related Practices" (ERP) exclusion, the mere fact the alleged tort sued on arose *after* the employment relationship had ceased cannot, per se, serve to take the case out of the ambit of the ERP exclusion. *Low v. Golden Eagle Insurance Company* (2002) 104 Cal.App.4th 306.

In determining the applicability of the ERP exclusion, a relevant factor is the nexus between the allegedly defamatory statement (or other tort) at issue and the third party plaintiff's employment by the insured. The ERP exclusion applies where the required nexus is more direct. *Low v. Golden Eagle Insurance Company* (2002) 104 Cal.App.4th 306.

In determining the applicability of the ERP exclusion, a court should consider the existence (or nonexistence) of a relationship between the employer and the third party plaintiff *outside the employment relationship*. *Low v. Golden Eagle Insurance Company* (2002) 104 Cal.App.4th 306.

Exclusion: Flood

Triable issues of fact were raised by the insured as to whether exclusions for a flood confined to the premises and movement of land applied and as to whether the claim was properly submitted under the proof of loss provisions of the policy. A declaration from a neighbor whose own property suffered damage from the flood was sufficient to raise a triable issue of fact as to whether the exclusion for a flood confined to the premises applied. Since "land subsidence" was covered in the policy, but not "movement of land," the evidence submitted by the insured was sufficient to raise a triable issue of fact as to whether the exclusion for "movement of land" applied. In addition, Allstate did and could waive procedural provisions in the policy for submitting a claim. *Pecarovich v. Allstate Insurance Company* (9th Cir. 2002) 309 F.3d 652, *amended by (9th Cir. 2003) 2003 U.S. App. LEXIS 2184.*

Exclusion: Impaired Property

Court found that because there was at least a possibility that the "sudden and accidental" exception to the exclusion applied, there was a duty to defend. The "sudden and accidental" exception addresses physical injury to the insured's product. The court noted that the complaint specifically referred to intermittent failures, which might be sudden and accidental. In addition, extrinsic evidence available to at least one insurer indicated that the product failed after being put in use on an intermittent basis. Thus, "separation only upon thermal stressing strongly suggests that the damage may have occurred suddenly." *Anthem Electronics, Inc. v. Pacific Employers Ins. Co.* (9th Cir. 2002) 302 F.3d 1049.

Exclusion: Inadequate Renovation

Loss of value in house due to inadequate or incomplete renovation undertaken with the knowledge of the mortgagee, as distinguished from complete destruction, is not covered under homeowner's policy because of inadequate renovation exclusion. The insurance policy is not intended to protect the insured against its own failure to complete work on the house. *Wilson v. Farmers Insurance Exchange* (2002) 203 Cal.App.4th 1171.

Exclusion: Movement of Land

Triable issues of fact were raised by the insured as to whether exclusions for a flood confined to the premises and movement of land applied and as to whether the claim was properly submitted under the proof of loss provisions of the policy. A declaration from a neighbor whose own property suffered damage from the flood was sufficient to raise a triable issue of fact as to whether the exclusion for a flood confined to the premises applied. Since "land subsidence" was covered in the policy, but not "movement of land," the evidence submitted by the insured was sufficient to raise a triable issue of fact as to whether the exclusion for "movement of land" applied. In addition, Allstate did and could waive procedural provisions in the policy for submitting a claim. *Pecarovich v. Allstate Insurance Company* (9th Cir. 2002) 309 F.3d 652, *amended by (9th Cir. 2003) 2003 U.S. App. LEXIS 2184.*

Exclusion: Perils

A property insurer has the right to exclude a category of peril from coverage under its policy. The fact that the exclusion contains an exception does not transform it into a grant of coverage that would permit recovery under the policy, distinguishing and disagreeing with *Palub v. Hartford Underwriters Ins. Co.* (2001) 92 Cal.App.4th 645. *Julian v. Hartford Underwriters Ins. Co.* (2002) 100 Cal.App.4th 811, *review granted, depublished and not citable.*

Exclusion: Pollution

Application of the absolute pollution exclusion is not limited in scope to "traditional environmental contamination" cases, and precludes coverage under a wide variety of circumstances. The exclusion clearly and unambiguously applies to claims for bodily injuries allegedly caused by toxic substances, which are "pollutants" within the meaning of the exclusion. *Bechtel Petroleum Operations, Inc. v. Continental Insurance Company* (2002) 96 Cal.App.4th 571, *review granted, and deferred pending disposition of MacKinnon v. Truck Ins. Exch., review granted, depublished and not citable.*

For purposes of applying the absolute pollution exclusion, contractors and subcontractors continuously performing operations at various areas of a site over a period of years have "occupied" the "premises, site or location" within the ordinary meaning of the policy. *Bechtel Petroleum Operations, Inc. v. Continental Insurance Company* (2002) 96 Cal.App.4th 571, *review granted, and deferred pending disposition of MacKinnon v. Truck Ins. Exch., review granted, depublished and not citable.*

The "pollution exclusion" in a CGL policy is not limited to "environmental pollution," and whether or not a pollutant is harmful to the environment is irrelevant. *MacKinnon v. Truck Ins. Exch.* (2002) 95 Cal.App.4th 235, *review granted, depublished and not citable.*

Under the pollution exclusion, the definition of "pollutant" encompasses pesticide sprayed in an apartment building. *MacKinnon v. Truck Ins. Exch.* (2002) 95 Cal.App.4th 235, *review granted, depublished and not citable*..

Under the "pollution exclusion," there is no requirement that a pollutant be recognized as polluting the environment, and no requirement that a pollutant be recognized in industry or by governmental regulators as a toxic or particularly harmful substance. *MacKinnon v. Truck Ins. Exch.* (2002) 95 Cal.App.4th 235, *review granted, depublished and not citable*.

The "pollution exclusion" precludes coverage for injuries caused by the spraying in an apartment building of pesticide to eliminate of yellow jackets. *MacKinnon v. Truck Ins. Exch.* (2002) 95 Cal.App.4th 235, *review granted, depublished and not citable*.

Consideration of the drafting history of the "pollution exclusion" is improper where the exclusion language is clear and unambiguous. *MacKinnon v. Truck Ins. Exch.* (2002) 95 Cal.App.4th 235, *review granted, depublished and not citable.*

The designation "pollution exclusion" has been created by litigants, the judiciary and attorneys to describe an otherwise unnamed and untitled clause, and the use of the term "pollution exclusion" does not create an ambiguity in that clause. *MacKinnon v. Truck Ins. Exch.* (2002) 95 Cal.App.4th 235, *review granted, depublished and not citable.*

Exclusion: Suicide

Suicide exclusion does not preclude recovery of death benefits under ERISA-regulated plan for death resulting from autoerotic asphyxiation because death was neither expected or intended; intentionally self-inflicted injury exclusion does not apply because the injury suffered, i.e., death, was not intended. ERISA-regulated plans are governed by federal common law. *Padfield v. AIG Life Insurance Company* (9th Cir. 2002) 290 F.3d 1121.

Exclusion: Theft of Jewelry from Auto

A jeweler's block insurance policy, which excluded coverage for theft of jewelry from an automobile unless the insured is "actually in or upon" the vehicle, did exclude coverage when an insured's employee was standing behind the car when it was driven away by a thief. The court refused to consider expert testimony regarding the scope, meaning, or interpretation of the phase "actually in or upon." The court held that opinion as to the meaning of the terms based on industry custom and practice was irrelevant to the court's interpretation of the policy language. *E.M.M.I., Inc. v. Zurich American Insurance* Company (2002) 100 Cal.App.4th 460, *review granted, depublished and not citable.*

Extrinsic Fraud

A misrepresentation regarding applicable limits of an insurance policy constitutes intrinsic, not extrinsic, fraud and therefore provides no basis for equitable relief. Such a misrepresentation does not prevent plaintiffs from presenting their case in court, because plaintiffs can, through a reasonable investigation and use of discovery, ascertain the true extent of the defendants' insurance coverage. *Home Insurance Company v. Zurich Insurance Company* (2002) 96 Cal.App.4th 17.

Fiduciary Duty

Generally, insurers do not have a fiduciary relationship with their insureds. *Royal Surplus Lines Ins. Co., Inc. v. Ranger Ins. Co.* (2002) 100 Cal.App.4th 193.

The attorney-in-fact for a reciprocal insurer may be liable for breach of fiduciary duty for failure to perform its appointed function, such as issuing a policy with correct limits. The attorney-in-fact may also be liable for bad faith under the "alter ego" or "unity of interest" doctrine, if facts are proved to bear out such a theory. *Tran v. Farmers Group, Inc.* (2002) 104 Cal.App.4th 1202 *modified by (2003) Cal.App.LEXIS 112*.

"Full Credit Bid" by Lender at Foreclosure Sale

When a lender makes a full credit bid at a trustee's foreclosure sale, it is not entitled to insurance proceeds payable for prepurchase damage to the property because the lender's only interest in the property, the repayment of its debt, has been satisfied and any further payment

would result in a double recovery. *Norwest Mortgage, Inc. v. State Farm Fire and Casualty Company* (2002) 97 Cal.App.4th 571, *opinion withdrawn by order of court, depublished and not citable*.

Health & Safety Code § 25249.5 et seq.

"Discharge or release" of prohibited chemicals as defined by Proposition 65 (the Safe Drinking Water and Toxic Enforcement Act of 1986, now codified at Health & Safety Code Section 25249.5 et seq.) refers to a movement of chemicals from a confined space into the land or the water, whereas the "continued presence" or "passive migration" of chemicals through the soil or water after having been discharged or released does not constitute another discharge or release within the meaning of the statute. *Consumer Advocacy Group, Inc. v. Exxon Mobil Corp.* (2002) 104 Cal.App.4th 438.

Holocaust Victim Insurance Relief Act of 1999 (HVIRA)

Reporting required by HVIRA is constitutional. The California legislature did not exceed its legislative authority by regulating extraterritorially when it enacted the reporting requirements of HVIRA because merely reporting required by the statute applies only to California insurers and these insurers may comply by either disaffiliating from foreign companies or sending their own employees to review the records of the foreign companies. *Gerling Global Reins. Corp. of America, et al. v. Low* (9th Cir. 2002) 296 F.3d 832.

Imputation of Knowledge

When an attorney who actively represents one party in litigation moves to another law firm that represents the opposing party in the same matter, the knowledge of that one attorney with confidential information is imputed to his or her new firm and both the attorney and the entire new firm will be disqualified. However, the knowledge is imputed only once, from the attorney with the confidential information to the remainder of his or her firm, and is not subject to the double imputation theory absent evidence to the contrary. *Frazier v. Superior Court* (2002) 97 Cal.App.4th 23.

Indemnity

Where insured subcontractor enters into indemnity agreement with contractor and contractor is later sued by third party, subcontractor's insurers are obligated to indemnify contractor for its attorneys fees and costs in that action. Contractual liability coverage in a CGL policy includes an insured's liability for the contractor's defense costs. *Golden Eagle Ins. Co. v. Insurance Co. of the West, et al*. (2002) 99 Cal.App.4th 837.

Independent Counsel

In order to establish that the insured is not entitled to independent counsel, the insurer must conclusively establish that the in-house law firm or staff counsel it provided the insured could not impact coverage to the insured's detriment by positions it might take in litigation. In other words, the insurer must show that the lawyers it retained for its insured could not impact coverage by the manner in which they defended the case. *Gafcon, Inc. v. Ponsor & Associates, et al.* (2002) 98 Cal.App.4th 1388.

Neither the "substantial relationship" test nor the doctrine of imputed knowledge extended to automatically disqualify *Cumis* counsel where the insurer's attorney covered a few depositions for *Cumis* counsel and, unbeknownst to the insurer's attorney, his firm had a conflict of interest. *Frazier v. Superior Court* (2002) 97 Cal.App.4th 23.

Insurable Interest

In a breach of contract and "bad faith" suit against a property insurer, a lender's contract damages for the property owner's default on the mortgage loan are limited to the difference between the lender's full credit bid at the foreclosure sale and the total amount of debt on the property. The insurer is not liable for all consequential damages because the lender's only insurable interest is the amount of the debt secured by the trust deed. *Track Mortgage Group, Inc. v. Crusader Insurance Company* (2002) 98 Cal.App.4th 857.

Insurance Code § 554

An objection to the late tender of a claim is not waived under Insurance Code section 554 where the policy contains a no-voluntary-payment provision and the only issue is the reimbursement of pre-tender defense costs. Where a no-voluntary-payment provision exists and is violated by the insured, an insurer is not obligated to reimburse an insured's payment of pre-tender defense costs. The denial of coverage on other grounds does not bar a no-voluntary-payments defense by the insurer. Unlike notice and cooperation provisions, an "as soon as practicable" provision does require an insurer to establish prejudice from an insured's pre-tender voluntary payments to be enforceable. *Insua v. Scottsdale Insurance Company* (2002) 104 Cal.App.4th 737.

Insurance Code § 1034 – Voidable Preference

A Liquidator for an insolvent insurance company has three years from the date of petition for liquidation to bring a voidable preference action under California Insurance Code section 1034. The voidable preference statute allows transfers to be avoided within four months of the insurer being petitioned into liquidation. The relevant "transfer" date is not the date of the transaction effecting the transfer, but the actual receipt of the property or assets. Also, an "antecedent debt" arises when liability is owed on a claim and not when the alleged claim arose. *Low v. Lan* (2002) 96 Cal.App.4th 1371.

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Insurance Code § 11580

Court addressing Insurance Code § 11580 quotes commentators and courts critical of *Hand v. Farmers Ins. Exch.* (1994) 23 Cal.App.4th 1847 as an over-extension of the law regarding bad faith. *San Diego Housing Commission v. Industrial Indemnity Co.* (2002) 95 Cal.App.4th 669.

Only legal questions are presented regarding whether the coverage afforded to an insured applies to the damages awarded to a judgment creditor. *San Diego Housing Commission v. Industrial Indemnity Co.* (2002) 95 Cal.App.4th 669.

Property damage need not be caused by a draught animal or an automobile for § 11580 to apply. *People ex. Rel. City of Willits v. Certain Underwriters* (2002) 97 Cal. App.4th 1125.

California Insurance Code § 11580 creates a direct action provision "in most liability policies issued to California residents." *People ex. Rel. City of Willits v. Certain Underwriters* (2002) 97 Cal. App.4th 1125.

Supplementary payments provisions creates duties under the insurer's duty to defend. Therefore, a judgment creditor pursuing an § 11580 claim has no right to collect damages, e.g., interest on attorneys' fees, falling within such provisions. *San Diego Housing Commission v. Industrial Indemnity Co.* (2002) 95 Cal.App.4th 669.

Insurance Code § 13800-13807

Failure of a state reporting statute, such as HVIRA, to allow for foreign-affiliate and foreign-law defenses to reporting does not violate substantive due process if the statute is rationally related to a legitimate governmental interest. Otherwise, an insurer could always evade state disclosure laws simply by transferring all relevant documents to an affiliate over which it lacks direct control. In addition, state regulatory efforts could be hindered by foreign statutes enacted for the purpose of shielding foreign corporations from routine reporting requirements. California can condition the privilege of doing business on disclosure of information in which California has a legitimate interest. *Gerling Global Reins. Corp. of America, et al. v. Low* (9th Cir. 2002) 296 F.3d 832.

Reporting required by HVIRA is constitutional. The California legislature did not exceed its legislative authority by regulating extraterritorially when it enacted the reporting requirements

of HVIRA because merely reporting required by the statute applies only to California insurers and these insurers may comply by either disaffiliating from foreign companies or sending their own employees to review the records of the foreign companies. *Gerling Global Reins. Corp. of America, et al. v. Low* (9th Cir. 2002) 296 F.3d 832.

Insurance Insolvency

Claimants who were forced to pursue bad faith claim against insurer in liquidation proceedings by filing a proof of claim, which was rejected without a hearing, were not denied due process. Insurance insolvency proceedings are "special proceedings" which do not require express findings of fact and conclusions of law, and the insurance liquidation statutes do not provide for jury trials. *Low v. Golden Eagle Insurance Co.* (2002) 101 Cal.App.4th 1354.

A Liquidator for an insolvent insurance company has three years from the date of petition for liquidation to bring a voidable preference action under California Insurance Code section 1034. The voidable preference statute allows transfers to be avoided within four months of the insurer being petitioned into liquidation. The relevant "transfer" date is not the date of the transaction effecting the transfer, but the actual receipt of the property or assets. Also, an "antecedent debt" arises when liability is owed on a claim and not when the alleged claim arose. *Low v. Lan* (2002) 96 Cal.App.4th 1371.

Insurance Policy: Business Interruption Insurance

Law firm could not claim business interruption coverage for mere reduction in billable hours due to flooding from a water pipe failure. *Buxbaum v. Aetna Life and Casualty Co.* (2002) 103 Cal.App.4th 434.

Insurance Policy: Commercial Property

Where evidence shows that the sole cause of property damage was an uncovered peril, the commercial property insurer does not have a burden to prove that there was no other possible cause of damage. *Alex R. Thomas & Co. v. Mutual Service Casualty* (2002) 98 Cal.App.4th 66.

Insurance Policy: Errors and Omissions

"Bankruptcy" exclusion from coverage under an errors and omissions liability insurance policy of one of multiple proximate causes for injury did not preclude coverage for loss resulting from other causes. Where bankruptcy and malpractice both gave rise to a claim, the issue was one of proximate causation. Where there are concurrent causes, the one that sets others in motion is the cause to which the loss is to be attributed. Where there is some question as to the "prime" cause of the accident, coverage under a liability insurance policy is equally available to an insured whenever an insurance risk constitutes simply a concurrent proximate cause of

injuries. Under either standard, coverage should have been afforded because there were multiple causes for loss. *Conestoga Services v. Executive Risk Indemnity* (9th Cir. 2002) 312 F.3d 976.

Insurance Policy: Fiduciary Responsibility

The duty to defend arises under a fiduciary responsibility insurance policy for non-ERISA breaches when the policy defines "Breach of Fiduciary Duty" as: "the violation of any of the responsibilities, obligations or duties imposed upon fiduciaries by the [ERISA] or amendments thereto or by the common or statutory law." *Pension Trust Fund for Operating Engineers v. Federal Insurance Co.* (9th Cir. 2002) 307 F.3d 944.

Insurance Policy: Health

Insured's dependent under a health insurance policy, who was not registered at an academic institution and was not attending any classes, was therefore not "enrolled as a full-time student" under the plain meaning of the policy and so did not qualify for lifetime medical coverage for her accident-related medical expenses. *Prudential Ins. Co. of America v. Superior Court (Dunniway)* (2002) 98 Cal.App.4th 585.

Insurance Policy: Homeowner's

California public policy requires a homeowner's insurer provide coverage for imminent collapse even where the policy expressly limits coverage to "actual" collapses. *Rosen v. State Farm General Insurance Company* (2002) 98 Cal.App.4th 1322, *review granted, depublished and not citable*.

Under an "all risk" homeowners insurance policy, all risks are covered except those specifically excluded by the policy. The insurer owes policy benefits to the insured if the efficient proximate cause of the loss is a covered peril, even when other specifically excluded perils contribute to the loss; but the insurer does not owe benefits when an excluded peril is the efficient proximate cause of the loss. *Julian v. Hartford Underwriters Ins. Co.* (2002) 100 Cal.App.4th 811, *review granted, depublished and not citable.*

Loss of value in house due to inadequate or incomplete renovation undertaken with the knowledge of the mortgagee, as distinguished from complete destruction, is not covered under homeowner's policy because of inadequate renovation exclusion. The insurance policy is not intended to protect the insured against its own failure to complete work on the house. *Wilson v. Farmers Insurance Exchange* (2002) 102 Cal.App.4th 1171.

Insurance Policy: Jeweler's Block

A jeweler's block insurance policy, which excluded coverage for theft of jewelry from an automobile unless the insured is "actually in or upon" the vehicle, did exclude coverage when an insured's employee was standing behind the car when it was driven away by a thief. The court

refused to consider expert testimony regarding the scope, meaning, or interpretation of the phase "actually in or upon." The court held that opinion as to the meaning of the terms based on industry custom and practice was irrelevant to the court's interpretation of the policy language. *E.M.M.I., Inc. v. Zurich American Insurance* Company (2002) 100 Cal.App.4th 460, *review granted, depublished and not citable*.

Insurance Policy: Property

In a breach of contract and "bad faith" suit against a property insurer, a lender's contract damages for the property owner's default on the mortgage loan are limited to the difference between the lender's full credit bid at the foreclosure sale and the total amount of debt on the property. The insurer is not liable for all consequential damages because the lender's only insurable interest is the amount of the debt secured by the trust deed. *Track Mortgage Group, Inc. v. Crusader Insurance Company* (2002) 98 Cal.App.4th 857.

Insurance Policy: Title

Title insurance coverage for lack of right of access to the insured's property was not triggered because access was impractical or difficult. Even though access was difficult or impractical, and the insured believed that the City in which the property was located would not allow for improvements in order to facilitate access, such evidence was insufficient to trigger coverage under a policy of title insurance. *Magna Enterprises, Inc. v. Fidelity National Title Insurance Company* (2002) 104 Cal.App.4th 122.

Joinder of Insurer in Liability Action

Royal Globe Ins. Co. v. Superior Court (1979) 23 Cal. 3d 880, disapproved on other grounds by *Moradi-Shalal v. Fireman's Fund Ins. Cos.* (1988) 46 Cal. 3d 287, 292, 304-05, held that a joint lawsuit by a third-party claimant against both the insured for negligence and the insurer for violating its statutory duties would be improper. *Royal Globe*, however, does not apply to bar joint suits brought by additional insureds, which are considered first parties. *Royal Surplus Lines Ins. Co., Inc. v. Ranger Ins. Co.* (2002) 100 Cal.App.4th 193.

The authorities indicate that a defendant is entitled to have its demurrer sustained on grounds of misjoinder only when he can show that some prejudice is suffered or some interests affected by the misjoinder. A proper defendant is seldom injured by the joinder of unnecessary or improper parties, and his demurrer ought to be overruled. *Royal Surplus Lines Ins. Co., Inc. v. Ranger Ins. Co.* (2002) 100 Cal.App.4th 193.

Joint Venture Provision

Insurer could not rely on joint venture provision of the liability policy to deny coverage for the underlying construction defect claim even though the court found evidence that a valid

joint venture existed because the venture did not materially alter the insurer's risk, that is the insured would be individually liable for damages arising from the claim. Elements the court analyzed to determine the existence of the joint venture included whether: (a) the parties had joint control over the venture, even if they each played different roles, (b) the parties shared the profits, and (3) the parties had an ownership interest in the enterprise. *Scottsdale Ins. Co. v. Essex Insurance Company* (2002) 98 Cal.App.4th 86.

Limitation: Action by Insurer While Underlying Suit is Pending

Appellate court, in dicta, overstates the limitation on an action by an insurer by stating that the law *prohibits* an insurer from suing its insured during the pendency of the underlying action. However, the court only found that California law *limits* an action by an insurer during the pendency of the underlying case when the insured may be prejudiced. *Hillenbrand v. Insurance Co. of North America* (2002) 104 Cal.App.4th 784.

Litigation Privilege

An attorney's misrepresentation during settlement discussions regarding applicable limits of an insurance policy is absolutely privileged under Civil Code, section 47(b), and therefore can not support a subsequent direct fraud action for damages. *Home Insurance Company v. Zurich Insurance Company* (2002) 96 Cal.App.4th 17.

Lost or Missing Policies

The contents of an insurance policy to be proved by secondary evidence need not be proved verbatim. Rather, it is sufficient to prove the substance of the contents. *Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059.

Secondary evidence is admissible to prove the contents of an insurance policy where the policy was lost or destroyed without fraudulent intent on the part of the party seeking to prove the terms of the policy. Admissible secondary evidence includes oral testimony, a standard form of the lost document, and evidence of a routine practice of a party. *Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059.

The standard of proof applicable where contents of an insurance policy is proved by secondary evidence is the preponderance of the evidence. *Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059.

Malicious Prosecution

In a malicious prosecution action by an insured against the insurer, the probable cause requirement is not modified where the underlying action is one for declaratory relief. *Hillenbrand v. Insurance Co. of North America* (2002) 104 Cal.App.4th 784.

Where an insured brings a malicious prosecution action against the insurer based on the insurer's declaratory relief action against the insured, a finding of a triable issue of fact in a motion for summary judgment in the declaratory relief action does not refute the lack of probable cause requirement for malicious prosecution. *Hillenbrand v. Insurance Co. of North America* (2002) 104 Cal.App.4th 784.

Malpractice

A law firm's settlement of claims against the insured is not a proper basis for a subsequent legal malpractice suit where a "Consent Clause" in the policy gives the insurer the absolute right to settle the case. *New Plumbing Contractors, Inc. v. Edwards, Sooy & Byron* (2002) 99 Cal.App.4th 799.

Mediation Privilege

Based on the mediation privilege under Evidence Code Sections 1119 and 1120 in finding that "raw evidence," i.e., "non-derivative evidentiary material," such as mold test results, photographs and similar items are not protected under a blanket of mediation privilege merely because they were used in a mediation. "[M]ediation confidentiality is meant to protect the substance of the negotiations and communications in furtherance of the mediation, not the factual basis of those negotiations." Evidence is not protected from disclosure solely by reason of its introduction or use in a mediation. *Rojas v. Superior Court (Coffin)* 102 Cal.App.4th 1062, *review granted (2003), depublished and not citable.*

Mergers or Sales of Insureds

The sale of an insured entity does not relieve an insurer for liability arising from the pre-sale conduct of its insured, especially if the post-sale claim is one for which the insurer was initially asked to provide coverage. The insurer is required to defend and indemnify its insured as if no sale had not occurred. To hold otherwise would provide an unfair windfall to insurers as sales, mergers, and other transactions, however labeled, are common in corporate settings. *Associated Aviation Underwriters, Inc. v. Purex Industries, Inc., et al.* (2002) 99 Cal.App.4th 400, *review granted, and deferred pending disposition of Henkel Corp. v. Hartford Assoc. & Indem. Co., depublished and not citable.*

Misjoinder

The authorities indicate that a defendant is entitled to have its demurrer sustained on grounds of misjoinder only when he can show that some prejudice is suffered or some interests affected by the misjoinder. A proper defendant is seldom injured by the joinder of unnecessary or improper parties, and his demurrer ought to be overruled. *Royal Surplus Lines Ins. Co., Inc. v. Ranger Ins. Co.* (2002) 100 Cal.App.4th 193.

Royal Globe Ins. Co. v. Superior Court (1979) 23 Cal. 3d 880, disapproved on other grounds by *Moradi-Shalal v. Fireman's Fund Ins. Cos.* (1988) 46 Cal. 3d 287, 292, 304-05, held that a joint lawsuit by a third-party claimant against both the insured for negligence and the insurer for violating its statutory duties would be improper. *Royal Globe*, however, does not apply to bar joint suits brought by additional insureds, which are considered first parties. *Royal Surplus Lines Ins. Co., Inc. v. Ranger Ins. Co.* (2002) 100 Cal.App.4th 193.

Misrepresentation

An innocent co-insured who holds property jointly with an insured who has committed fraud may recover his or her proportionate share of the damaged property. *Watts v. Farmers Insurance Exchange* (2002) 98 Cal.App.4th 1246.

No Assignment Clause

The sale of an insured entity does not relieve an insurer for liability arising from the pre-sale conduct of its insured, especially if the post-sale claim is one for which the insurer was initially asked to provide coverage. The insurer is required to defend and indemnify its insured as if no sale had not occurred. To hold otherwise would provide an unfair windfall to insurers as sales, mergers, and other transactions, however labeled, are common in corporate settings. *Associated Aviation Underwriters, Inc. v. Purex Industries, Inc., et al.* (2002) 99 Cal.App.4th 400, *review granted, and deferred pending disposition of Henkel Corp. v. Hartford Assoc. & Indem. Co., depublished and not citable* .

It is a long-standing rule that an insurance policy can be assigned after a loss without insurer consent, notwithstanding a no-assignment clause. In determining when a loss occurred, what is relevant is when did the predecessor's acts occurred, and not when cognizable causes of action arising from the those acts matured. *Associated Aviation Underwriters, Inc. v. Purex Industries, Inc., et al.* (2002) 99 Cal.App.4th 400, *review granted, and deferred pending disposition of Henkel Corp. v. Hartford Assoc. & Indem. Co., depublished and not citable* .

Notice-Prejudice Standard

The notice-prejudice standard applies to claims-made policies that only require a claim to be reported as soon as practicable instead of during the policy period. *Pension Trust Fund for Operating Engineers v. Federal Insurance Co.* (9th Cir. 2002) 307 F.3d 944.

An objection to the late tender of a claim is not waived under Insurance Code section 554 where the policy contains a no-voluntary-payment provision and the only issue is the reimbursement of pre-tender defense costs. Where a no-voluntary-payment provision exists and is violated by the insured, an insurer is not obligated to reimburse an insured's payment of pre-tender defense costs. The denial of coverage on other grounds does not bar a no-voluntary-payments defense by the insurer. Unlike notice and cooperation provisions, an "as soon as practicable" provision does require an insurer to establish prejudice from an insured's pre-tender

voluntary payments to be enforceable. *Insua v. Scottsdale Insurance Company* (2002) 104 Cal.App.4th 737.

Other Insurance

Where all primary insurance has been exhausted in a continuing loss situation and only one umbrella insurer's duty to defend is expressly limited by the existence of other available insurance, that excess insurer is not obligated to contribute to defense with other excess insurers whose duty to defend is unqualified. Unless the insured is left without a defense, that excess insurer will have no duty to defend until the other excess insurers' duty to defend has terminated. An "other insurance" clause is enforceable against any other available insurance covering the underlying claims, not only against policies covering the same period. The term “loss” as used in “other insurance” clauses does not include “defense costs” unless the policy expressly provides that the insurer has no duty to defend, merely a duty to reimburse the insured for defense costs. *Scottsdale Ins. Co. v. National Union Fire Ins. Co. of Pittsburgh, et al.* (2002) 95 Cal.App.4th 891, *opinion withdrawn by order of the court, depublished, and not citable*.

Other insurance clauses only apply between insurers on the same level, e.g., umbrella carriers in this case. *Scottsdale Ins. Co. v. National Union Fire Ins. Co. of Pittsburgh, et al.* (2002) 95 Cal.App.4th 891, *opinion withdrawn by order of the court, depublished, and not citable*.

Initial payment of an insured’s defense fees by an insurer who disclaims ultimate liability for payment does not deprive the insured of standing to seek those fees from other insurers on the risk. *Bechtel Petroleum Operations, Inc. v. Continental Insurance Company* (2002) 96 Cal.App.4th 571, *review granted, and deferred pending disposition of MacKinnon v. Truck Ins. Exch., review granted, depublished and not citable.*

Where umbrella insurer’s “Other Insurance” clause specifically refers to and limits duty to defend, that umbrella insurer is not obligated to contribute to defense until exhaustion of all other umbrella policies. *Scottsdale Ins. Co. v. National Union Fire Ins. Co. of Pittsburgh, et al.* (2002) 95 Cal.App.4th 891, *opinion withdrawn by order of the court, depublished, and not citable.*

Peremptory Challenges

The interests of primary and excess insurers are sufficiently diverse when sued in the same action to warrant separate California Code of Civil Procedures section 170.6 peremptory challenges. *Home Ins. Co. v. Superior Court (Montrose Chem. Corp.)* (2002) 101 Cal. App. 4th 515, *review granted, depublished and not citable.*

Plain Meaning

Insured's dependent under a health insurance policy, who was not registered at an academic institution and was not attending any classes, was therefore not "enrolled as a full-time student" under the plain meaning of the policy and so did not qualify for lifetime medical coverage for her accident-related medical expenses. *Prudential Ins. Co. of America v. Superior Court (Dunniway)* (2002) 98 Cal.App.4th 585.

Preemption

Sections of the City of Lodi's local environmental ordinance, Municipal Environmental Response and Liability Ordinance ("MERLO"), conflict with and are therefore preempted by federal law (CERCLA) and state law (California's Carpenter-Presley-Tanner Hazardous Substance Account Act, "HSAA"). Additional sections of MERLO may be preempted if Lodi is adjudged a PRP. Under CERCLA, PRPs are jointly and severally liable, while under MERLO Lodi is immune from suit. If Lodi is a PRP it may not "legislate away" its responsibilities under federal and state law. *Fireman's Fund Ins. Co. v. City of Lodi, et al.* (9th Cir. 2002) 302 F.3d 928.

Primary v. Excess

The interests of primary and excess insurers are sufficiently diverse when sued in the same action to warrant separate California Code of Civil Procedures section 170.6 peremptory challenges. *Home Ins. Co. v. Superior Court (Montrose Chem. Corp.)* (2002) 101 Cal. App. 4th 515, *review granted, depublished and not citable.*

Proof of Loss

Triable issues of fact were raised by the insured as to whether exclusions for a flood confined to the premises and movement of land applied and as to whether the claim was properly submitted under the proof of loss provisions of the policy. A declaration from a neighbor whose own property suffered damage from the flood was sufficient to raise a triable issue of fact as to whether the exclusion for a flood confined to the premises applied. Since "land subsidence" was covered in the policy, but not "movement of land," the evidence submitted by the insured was sufficient to raise a triable issue of fact as to whether the exclusion for "movement of land" applied. In addition, Allstate did and could waive procedural provisions in the policy for submitting a claim. *Pecarovich v. Allstate Insurance Company* (9th Cir. 2002) 309 F.3d 652, *amended by (9th Cir. 2003) 2003 U.S. App. LEXIS 2184.*

Property Damage: Trigger

California case law is clear that to determine whether the property damage occurred during the insureds' policy period to trigger coverage, it is not when the third party claimant was

damaged, but when the property, now owned by the third party claimant, was damaged. *Century Indemnity Company, et al. v. Roy Hearrean, et al.* (2002) 98 Cal.App.4th 734.

Proposition 65: Safe Drinking Water and Toxic Enforcement Act

"Discharge or release" of prohibited chemicals as defined by Proposition 65 (the Safe Drinking Water and Toxic Enforcement Act of 1986, now codified at Health & Safety Code Section 25249.5 et seq.) refers to a movement of chemicals from a confined space into the land or the water, whereas the "continued presence" or "passive migration" of chemicals through the soil or water after having been discharged or released does not constitute another discharge or release within the meaning of the statute. *Consumer Advocacy Group, Inc. v. Exxon Mobil Corp.* (2002) 104 Cal.App.4th 438.

Punitive Damages

Allowing stipulated judgments to bind an insurer would run counter to the public policy concerns which dictate that the insured pay punitive damages levied against it by allowing an insured to "covertly" shift such damages to the insurer. *Hamilton v. Maryland Cas. Co.* (2002) 27 Cal.4th 718.

Reciprocal Insurer

The attorney-in-fact for a reciprocal insurer may be liable for breach of fiduciary duty for failure to perform its appointed function, such as issuing a policy with correct limits. The attorney-in-fact may also be liable for bad faith under the "alter ego" or "unity of interest" doctrine, if facts are proved to bear out such a theory. *Tran v. Farmers Group, Inc.* (2002) 104 Cal.App.4th 1202 *modified by (2003) Cal.App.LEXIS 112*.

Rescission of Contract

A party's unilateral mistake is ground for rescission of a contract where the mistake is due to the fault of the other party, or the other party knows or has reason to know of the mistake. *Norwest Mortgage, Inc. v. State Farm Fire and Casualty Company* (2002) 97 Cal.App.4th 571, *opinion withdrawn by order of court, depublished and not citable*.

Unilateral mistake of fact sufficient to void a contract must be a mistake, not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in 1) an unconscious ignorance or forgetfulness of a fact past or present, material to the contract, or 2) belief in the present existence of a thing material to the contract, which does not exist. *Norwest Mortgage, Inc. v. State Farm Fire and Casualty Company* (2002) 97 Cal.App.4th 571, *opinion withdrawn by order of court, depublished and not citable.*

Recission of contract based upon unilateral mistake is unavailable to the party who assumed the risk of the mistake in entering into the contract. *Norwest Mortgage, Inc. v. State Farm Fire and Casualty Company* (2002) 97 Cal.App.4th 571, *opinion withdrawn by order of court, depublished and not citable.*

Res Judicata

Under the doctrine of *res judicata*, a valid and final judgment in an action brought to declare rights or other legal relations of the parties is conclusive in a subsequent action between them involving the same site but different details on matters which were raised or could have been raised, on matters litigated or litigable. *Aerojet-General Corporation v. American Excess Insurance Company* (2002) 97 Cal.App.4th 387.

Under the doctrine of *res judicata*, where the prior judgment in unambiguous, resort to the underlying record to determine the scope of the judgment is unnecessary. *Aerojet-General Corporation v. American Excess Insurance Company* (2002) 97 Cal.App.4th 387.

Declaratory judgments are properly given *res judicata* effect as to those matters expressly and unambiguously declared in the judgment. Once final, they may not be collaterally attacked for a nonjurisdictional error. *Aerojet-General Corporation v. American Excess Insurance Company* (2002) 97 Cal.App.4th 387.

A declaratory judgment in conclusive as to the matters unambiguously declared, but is not *res judicata* on matters not covered in the judgment. *Aerojet-General Corporation v. American Excess Insurance Company* (2002) 97 Cal.App.4th 387.

Rescission of Contract

A party's unilateral mistake is ground for rescission of a contract where the mistake is due to the fault of the other party, or the other party knows or has reason to know of the mistake. *Norwest Mortgage, Inc. v. State Farm Fire and Casualty Company* (2002) 97 Cal.App.4th 571, *opinion withdrawn by order of court, depublished and not citable*.

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Retraxit

Where a settlement results in a dismissal with prejudice in favor of one party, the dismissal can operate as a retraxit, equivalent to a judgment on the merits, barring further litigation on the same causes of action between the same parties. *Roger H. Proulx & Co. v. Crest-Liners, Inc.* (2002) 98 Cal.App.4th 182.

Securities

Tax-deferred variable annuities are covered securities under the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") and thus precluded plaintiff's state action claims for violation of Cal. Bus. & Prof. Code section 17200 and section 17500. *Patenaude v. The Equitable Life Assurance Society of the United States*, (9th Cir. 2002) 290 F.3d 1020.

Self-Insured Retentions

Where insured arranges for additional insured endorsement, inclusion of a self-insured retention violated the terms of a contract requiring the insured to procure "primary and non-contributing" insurance for another party. *St. Paul Fire & Marine Ins. Co. v. American Dynasty Surplus Lines Ins. Co.* (2002) 101 Cal.App.4th 1038.

Including a self-insured retention violated terms of subcontract calling for subcontractor to provide insurance, but there were no damages where no coverage was afforded by reason of the additional insured endorsement. *St. Paul Fire & Marine Ins. Co. v. American Dynasty Surplus Lines Ins. Co*. (2002) 101 Cal.App.4th 1038.

Settlement

Where a settlement results in a dismissal with prejudice in favor of one party, the dismissal can operate as a retraxit, equivalent to a judgment on the merits, barring further litigation on the same causes of action between the same parties. *Roger H. Proulx & Co. v. Crest-Liners, Inc.* (2002) 98 Cal.App.4th 182.

Under a policy provision giving an insurance company discretion to settle as it sees fit, the insurer is entitled to control settlement negotiations without interference from the insured regardless of whether the case is defensible and the insurer generally has no liability to the insured for settling within the policy limits. *New Plumbing Contractors, Inc. v. Edwards, Sooy & Byron* (2002) 99 Cal.App.4th 799.

A law firm's settlement of claims against the insured is not a proper basis for a subsequent legal malpractice suit where a "Consent Clause" in the policy gives the insurer the absolute right to settle the case. *New Plumbing Contractors, Inc. v. Edwards, Sooy & Byron* (2002) 99 Cal.App.4th 799.

SLAPP (Code Civ. Proc. § 425.16)

A SLAPP suit (strategic lawsuit against public policy) is a lawsuit brought for the primary purpose of chilling a party's constitutional right of petition or free speech. *State Farm General Ins. Co. v. Majorino* (2002) 99 Cal.App.4th 974.

Where appellant does not carry their initial burden of demonstrating that a declaratory relief action is a SLAPP suit under § 425.16(b)(2) it is unnecessary to determine whether respondent established a probability that it will prevail at trial. *State Farm General Ins. Co. v. Majorino* (2002) 99 Cal.App.4th 974.

Staff Counsel

Insurers do not engage in the unlawful splitting of fees with its in-house law firm or staff counsel where the insurer does not obtain an economic benefit or profit from providing legal representation to the insured. Even where the insurer recovers legal costs from other insurers, the insurer does not unlawfully profit from its in-house law firm or staff counsel where recovery is limited to actual costs incurred by the insurer plus overhead. *Gafcon, Inc. v. Ponsor & Associates, et al.* (2002) 98 Cal.App.4th 1388.

Insurers do not engage in the unauthorized practice by using in-house law firms or staff attorneys to defend its insureds against third party claims. Absent conflicts of interest giving rise to the necessity of independent counsel, the insurer and the insured share a common goal and purpose which lasts during the pendency of the claim or litigation against the insured. In such an instance, the insurer is entitled to have counsel represent its interests, as well as the interests of its insured, as long as their interests are aligned. *Gafcon, Inc. v. Ponsor & Associates, et al.* (2002) 98 Cal.App.4th 1388.

Standing

Initial payment of an insured's defense fees by an insurer who disclaims ultimate liability for payment does not deprive the insured of standing to seek those fees from other insurers on the risk. *Bechtel Petroleum Operations, Inc. v. Continental Insurance Company* (2002) 96 Cal.App.4th 571, *review granted, and deferred pending disposition of MacKinnon v. Truck Ins. Exch., review granted, depublished and not citable.*

Statute of Limitations

A liquidator for an insolvent insurance company has three years from the date of petition for liquidation to bring a voidable preference action under California Insurance Code section 1034. The voidable preference statute allows transfers to be avoided within four months of the insurer being petitioned into liquidation. The relevant "transfer" date is not the date of the transaction effecting the transfer, but the actual receipt of the property or assets. Also, an

"antecedent debt" arises when liability is owed on a claim and not when the alleged claim arose. *Low v. Lan* (2002) 96 Cal.App.4th 1371.

The statutory extension in C.C.P. 340.9 for Northridge earthquake claims does not revive claims arising solely out of aftershocks of the Northridge earthquake. *Migliore v. Mid-Century Insurance Company* (2002) 97 Cal.App.4th 592.

Insurer's statement of a willingness to reconsider its decision does not render its denial of insured's claim "unequivocal." *Migliore v. Mid-Century Insurance Company* (2002) 97 Cal.App.4th 592.

The statutory extension of Northbridge-related cases (C.C.P. § 340.9) applies to extend limitations based upon either untimely notice to the insurer or to untimely filing of the lawsuit. *Bialo et al. v. Western Mutual Insurance Company* (2002) 95 Cal.App.4th 68.

Despite the fact that plaintiff's claim had been dismissed by the trial court prior to the effective date of § 340.9, the section nonetheless applied because plaintiffs had filed an appeal, and therefore the case was not yet "litigated to finality." *Bialo et al. v. Western Mutual Insurance Company* (2002) 95 Cal.App.4th 68.

Stipulated Judgments

A stipulated judgment with a covenant not to execute is insufficient to prove damages in an action based upon the breach of the duty to settle. *Hamilton v. Maryland Cas. Co.* (2002) 27 Cal.4th 718.

Subrogation

Insurer's default judgment against tortfeasor may not be reduced based on insured's pleading error, which was not replicated in insurer's complaint in subrogation. Although a subrogated insurer stands in the shoes of its insured and is subject to defenses against claims by the insured, this does not apply to limit the insurer's recovery for subrogation amounts appropriately pleaded in its complaint against tortfeasor. The tortfeasor was put on notice that the damages sought by the insurer were much higher than those sought by claimants because of the insurer's complaint-in-intervention. *Low v. Golden Eagle Insurance Co.* (2002) 101 Cal.App.4th 1354.

In a case of first impression in California, insurer entitled to equitable subrogation against additional insured for additional insured's liability which is *not* covered by insurer's hospital liability policy, provided the insured caused or was otherwise responsible for the loss. *Truck Insurance Exchange v. County of Los Angeles* (2002) 95 Cal. App.4th 13.

Suit Requirement

Just as an insurer cannot assert a "no suit" defense if it has wrongfully repudiated its policy, an insurance broker cannot assert the "no suit" defense when it negligently fails to obtain coverage. *Roger H. Proulx & Co. v. Crest-Liners, Inc.* (2002) 98 Cal.App.4th 182.

Suits by Additional Insured

An additional insured is a "first party" and has standing to sue the insurer for breach of contract and breach of the implied covenant. *Royal Surplus Lines Ins. Co., Inc. v. Ranger Ins. Co.* (2002) 100 Cal.App.4th 193.

Summary Judgment

An insurer is entitled to summary judgment in a bad faith action where the underlying complaint clearly and unambiguously alleges injuries arising out of exposure to toxic substances and the policy contains an absolute pollution exclusion. *Bechtel Petroleum Operations, Inc. v. Continental Insurance Company* (2002) 96 Cal.App.4th 571, *review granted, and deferred pending disposition of MacKinnon v. Truck Ins. Exch., review granted, depublished and not citable.*

Only those facts set forth in the separate statement of undisputed facts are relevant when determining whether summary judgment should be granted. *Roger H. Proulx & Co. v. Crest-Liners, Inc.* (2002) 98 Cal.App.4th 182.

Evidence that leaks in a waterproof liner had damaged pumps and valves, required patching drywall, repairing and painting in an office area, and replacing a transmitter, raised a triable issue of fact sufficient to overcome summary judgment regarding whether covered "property damage" took place. *Roger H. Proulx & Co. v. Crest-Liners, Inc.* (2002) 98 Cal.App.4th 182.

To defeat an unfair competition claim based on allegations of unethical or illegal profits derived from providing legal representation to its insured, the insurer can either (1) present admissible evidence demonstrating it does not obtain any profit derived from its use of employee attorneys, thus eliminating the court's need to determine whether such profit was illegal or unfair; or (2) present argument that, assuming it derives a profit from its use of employed counsel to represent its insured, such profit is not illegal or unfair within the meaning of the Unfair Competition Law (Business and Professions Code § § 17200, et seq.). An insurer can also demonstrate through admissible evidence that the claimant does not possess, and can not reasonably obtain, needed evidence in support of its Unfair Competition claim. Thus, a declaration of an insurer's deputy general counsel in support of summary judgment averring, "[Insurer] makes no profit from its use of staff counsel," is sufficient to meet the insurer's threshold summary judgment burden. Absent any evidence raising an inference to the contrary, summary judgment as to the Unfair Competition claim is proper. *Gafcon, Inc. v. Ponsor & Associates, et al.* (2002) 98 Cal.App.4th 1388.

Where it was undisputed that insured's dependent was not registered at an academic institution and was not attending any classes, summary judgment was appropriate where could present no triable issue of material fact to support claim that she was "enrolled as a full-time student" and therefore entitled to lifetime medical coverage for her accident-related medical expenses;. *Prudential Ins. Co. of America v. Superior Court (Dunniway)* (2002) 98 Cal.App.4th 585.

Order granting summary judgment may be ineffective as judgment where there is no express declaration of the ultimate rights of the parties, such as that "plaintiffs shall take nothing," or "the action is dismissed." *Swain v. California Casualty Ins. Co.* (2002) 99 Cal.App.4th 1.

Order granting summary judgment may be ineffective as judgment where the phrase "judgment shall be entered forthwith" could be understood not as an order operating as a judgment, but as contemplating a further separate instrument. *Swain v. California Casualty Ins. Co.* (2002) 99 Cal.App.4th 1.

Order granting summary judgment may be ineffective as judgment where there is no mention of pending cross-complaint on the face of the order. *Swain v. California Casualty Ins. Co.* (2002) 99 Cal.App.4th 1.

Triable issues of fact were raised by the insured as to whether exclusions for a flood confined to the premises and movement of land applied and as to whether the claim was properly submitted under the proof of loss provisions of the policy. A declaration from a neighbor whose own property suffered damage from the flood was sufficient to raise a triable issue of fact as to whether the exclusion for a flood confined to the premises applied. Since "land subsidence" was covered in the policy, but not "movement of land," the evidence submitted by the insured was sufficient to raise a triable issue of fact as to whether the exclusion for "movement of land" applied. In addition, Allstate did and could waive procedural provisions in the policy for submitting a claim. *Pecarovich v. Allstate Insurance Company* (9th Cir. 2002) 309 F.3d 652, *amended by (9th Cir. 2003) 2003 U.S. App. LEXIS 2184.*

Evidence that a general contractor's claim against a subcontractor included covered "property damage" barred summary judgment in favor of an insurance broker who was sued for failing to obtain additional insured coverage on behalf of the subcontractor. *Roger H. Proulx & Co. v. Crest-Liners, Inc.* (2002) 98 Cal.App.4th 182.

Summary Judgment: Evidence

Insurer moved for summary judgment based on application of "first publication" exclusion, and offered as evidence a declaration executed by its claims adjuster regarding a conversation with the insured indicating the first publication of disparaging material was prior to policy inception. Court denied the motion, noting that allegations in the complaint against the insured did not specify the date of first publication, and the insurer's evidence was "equivocal and self-serving" and thus did not rise to the level of conclusive evidence needed to bar coverage

under the first publication exclusion. *Atlantic Mut. Ins. Co. v. J. Lamb, Inc., et al.*, (2002) 100 Cal.App.4th 1017.

Supplementary Payments

Supplementary payments provisions create duties under the insurer's duty to defend. Therefore, a judgment creditor pursuing an § 11580 claim has no right to collect damages, e.g., interest on attorneys' fees, falling within such provisions. *San Diego Housing Commission v. Industrial Indemnity Co.* (2002) 95 Cal.App.4th 669.

Tort Damages – Economic and Noneconomic

Under Proposition 51, a tortfeasor is liable for the non-economic portion of damages only to the extent of its percentage share of comparative fault as determined by the jury. *Hackett v. John Crane, Inc.* (2002) 98 Cal.App.4th 1233.

Although a responsible tortfeasor is jointly and severally liable for all economic damages along with other defendants found to be at fault, the tortfeasor is entitled under CCP § 877 to an offset credit for any portion of the pre-verdict settlement proceeds that were properly attributable to economic damages. *Hackett v. John Crane, Inc.* (2002) 98 Cal.App.4th 1233.

Trade Secrets

Trade secrets are not tangible property with intrinsic value and thus not afforded coverage under insurance policies with provisions for loss from criminal acts. *Avery Dennison Corp. v. Allendale Mutual Ins. Co*. (9th Cir. 2002) 310 F.3d 1114.

Trigger of Coverage

It is a long-standing rule that an insurance policy can be assigned after a loss without insurer consent, notwithstanding a no-assignment clause. In determining when a loss occurred, what is relevant is when did the predecessor's acts occurred, and not when cognizable causes of action arising from the those acts matured. *Associated Aviation Underwriters, Inc. v. Purex Industries, Inc., et al.* (2002) 99 Cal.App.4th 400, *review granted, and deferred pending disposition of Henkel Corp. v. Hartford Assoc. & Indem. Co., depublished and not citable.*

Unauthorized Practice of Law

Insurers do not engage in the unauthorized practice by using in-house law firms or staff attorneys to defend its insureds against third party claims. Absent conflicts of interest giving rise to the necessity of independent counsel, the insurer and the insured share a common goal and purpose which lasts during the pendency of the claim or litigation against the insured. In such an instance, the insurer is entitled to have counsel represent its interests, as well as the interests of

its insured, as long as their interests are aligned. *Gafcon, Inc. v. Ponsor & Associates, et al.* (2002) 98 Cal.App.4th 1388.

Unlawful Fee Splitting

Insurers do not engage in the unlawful splitting of fees with its in-house law firm or staff counsel where the insurer does not obtain an economic benefit or profit from providing legal representation to the insured. Even where the insurer recovers legal costs from other insurers, the insurer does not unlawfully profit from its in-house law firm or staff counsel where recovery is limited to actual costs incurred by the insurer plus overhead. *Gafcon, Inc. v. Ponsor & Associates, et al.* (2002) 98 Cal.App.4th 1388.

Voluntary Payments

Payments made by an insured after an insurer has denied coverage are not barred by the "no voluntary payments" provision of a liability policy. *Roger H. Proulx & Co. v. Crest-Liners, Inc.* (2002) 98 Cal.App.4th 182.

Voluntary payments provision in policy bars insured's claim for pre-tender costs where insured produces no evidence such payments were made involuntarily. A separate showing of prejudice by the insurer is not required. *Tradewinds Escrow, Inc. v. Truck Ins. Exch.* (2002) 97 Cal.App.4th 704.

An objection to the late tender of a claim is not waived under Insurance Code section 554 where the policy contains a no-voluntary-payment provision and the only issue is the reimbursement of pre-tender defense costs. Where a no-voluntary-payment provision exists and is violated by the insured, an insurer is not obligated to reimburse an insured's payment of pre-tender defense costs. The denial of coverage on other grounds does not bar a no-voluntary-payments defense by the insurer. Unlike notice and cooperation provisions, an "as soon as practicable" provision does require an insurer to establish prejudice from an insured's pre-tender voluntary payments to be enforceable. *Insua v. Scottsdale Insurance Company* (2002) 104 Cal.App.4th 737.

Waiver

Triable issues of fact were raised by the insured as to whether exclusions for a flood confined to the premises and movement of land applied and as to whether the claim was properly submitted under the proof of loss provisions of the policy. A declaration from a neighbor whose own property suffered damage from the flood was sufficient to raise a triable issue of fact as to whether the exclusion for a flood confined to the premises applied. Since "land subsidence" was covered in the policy, but not "movement of land," the evidence submitted by the insured was sufficient to raise a triable issue of fact as to whether the exclusion for "movement of land" applied. In addition, Allstate did and could waive procedural provisions in the policy for

submitting a claim. *Pecarovich v. Allstate Insurance Company* (9th Cir. 2002) 309 F.3d 652, *amended by (9th Cir. 2003) 2003 U.S. App. LEXIS 2184.*

Work Product Doctrine

Based on the work-product doctrine under California Code of Civil Procedure Section 2018, "raw evidence," i.e., "non-derivative evidentiary material," such as mold test results, photographs and similar items, do not constitute protected work product. The work product doctrine is not an absolute protection of work performed by attorneys and their consultants. The court distinguished between "unprotected factual material and protected mental processes." Derivative material is subject to qualified protection, that sometimes may be ordered produced, and includes "charts and diagrams, audit reports, compilations of entries in documents, records and other databases, appraisals, opinions and reports of experts employed as non-testifying consultants." *Rojas v. Superior Court (Coffin)* 102 Cal.App.4th 1062, *review granted (2003), depublished and not citable.*