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2003 DEVELOPMENTS IN CALIFORNIA CASE LAW: INSURANCE

A summary prepared by Gordon & Rees, LLP of the holdings, organized by topic, of cases published during 2003 which apply California law to issues bearing on the rights and duties of the insurance industry.

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Gordon & Rees, LLP
February 2004

2003 DEVELOPMENTS IN CALIFORNIA INSURANCE CASE LAW

Accident

Loss did not arise out of an "accident" where insurer knew facts that established the insured's conduct was intentional and that the insured intended to inflict harm. *Uhrich v. State Farm Fire & Casualty Company* (2003) 109 Cal.App.4th 598.

Under California law, an "accidental death" is a death occurring from "external" rather than "natural" causes. An "accident" must entail some form of "external events and forces, as opposed to purely 'natural' processes," such as aging, congenital defects and disorders, cancer, and like conditions. Accordingly, a death from a stroke – resulting from chronic high blood pressure or hypertension or otherwise the culmination of a progressive deterioration of the vascular system – is generally not an "accident" within the meaning of an accidental death and dismemberment policy as interpreted under California law. *Khatchatrian v. Continental Cas. Co.* (9th Cir. 2003) 332 F.3d 1227.

Accidental Injury

Ninth Circuit, applying Oregon law, held that the insured's death from high altitude edema constituted an "accidental injury" and did not fit within the "disease or infirmity" exclusion contained in the insured's life insurance policy. *Chale v. Allstate Life Insurance Company* (9th Cir. 2003) 353 F.3d 742.

Additional Insured Endorsements

When determining coverage under an additional insured endorsement which is ambiguous in the context of the facts of the case, a court may consider the insured's objectively reasonable expectations, including the language of the underlying indemnity agreement and promise to procure insurance. Where an indemnity agreement only required indemnification for damages "caused by" the indemnitor, the additional insured coverage did not apply to losses resulting from the indemnities sole negligence or strict products liability. *St. Paul Mercury Ins. Co. v. Frontier Pacific Ins. Co.* (2003) 111 Cal.App.4th 1234.

Where a blanket additional insured endorsement included a landlord, the court looked to the indemnity terms in the lease as an expression of intent regarding the scope of the additional insured endorsement. The court found that the landlord's policy, which contained an other insurance clause stating it was excess unless the landlord was named as an additional insured, would be enforced in this contribution action because it was so specific despite the recent trend away from enforcement of excess other insurance clauses. *Hartford Cas. Ins. Co. v. Travelers Indemnity Co.* (2003) 110 Cal.App.4th 710.

Where subcontractor cuts opening in roof, but is not responsible for job site safety warnings or barriers and employee of another trade falls through the opening quite some time later, injury still arises out of the work of the subcontractor and the subcontractor's primary and umbrella policies afforded coverage to the general contractor pursuant to the additional insured endorsement. *Vitton Construction Co., Inc. v. Pacific Ins. Co.* (2003) 110 Cal.App.4th 762.

Where the minimal causal connection of "arising out of" was satisfied, the additional insured endorsement applied regardless of whether the named insured was negligent. *Vitton Construction Co., Inc. v. Pacific Ins. Co.* (2003) 110 Cal.App.4th 762.

Admissions

Where a party "stands in the shoes" of another in bringing a suit, that party is bound by the admissions of the former party. *Amex Assurance Company v. Allstate Insurance Company* (2003) 112 Cal.App.4th 1246.

Advertising Injury

Small business insureds' use of competitors' client list to solicit new customers was not "advertising injury" for CGL policy; "advertising injury" means "widespread promotional activities usually directed to the public at large." *Hameid v. National Fire Ins. of Hartford* (2003) 31 Cal.4th 16.

Design patent infringement allegations in underlying action could not reasonably be read as including "misappropriation of advertising idea or style of doing business" thereby triggering CGL insurer's duty to defend under policy's advertising injury provision, where the nature of the patent was one of design rather than method. Employing the objectively reasonable expectations' test, applicable in resolving assertions of ambiguity, the Ninth Circuit reasoned that as the patents at issue did not involve any process or invention which could reasonably be considered an advertising idea or style of doing business, a design patent infringement allegation did not trigger the duty to defend. *Homedics, Inc. v. Valley Forge Insurance Co.* (9th Cir. 2003) 315 F.3d 1135.

Agents

The Principal Occupation Provision of an insurer's contract with its agents gives the insurer discretion to give agents permission to place rejected business with other carriers even where the insurer's rules governing risks and exposure results in rejected business. To successfully argue bad faith, agents would have to show that the insurer acted in bad faith in refusing such permission. *Appling v. State Farm Automobile Insurance Group* (9th Cir. 2003) 340 F.3d 769.

Allocation

The United States Supreme Court, by split decision, upheld a jury's damages verdict for asbestosis suffering claimants who brought suit against their employer Norfolk & Western Railway Co. under the Federal Employers' Liability Act ("FELA") for anxiety arising from fear that they might in the future become ill from asbestos-related cancer. *Norfolk & Western Railway Co. v. Ayers* (2003) 583 U.S. 135.

The Supreme Court decided two issues involving FELA's application: (1) whether a railroad worker who suffers from asbestosis may recover for asbestosis-related "pain and suffering" including damages for fear of developing cancer; and (2) the extent of the railroad's liability when third parties not before the court, i.e., prior or subsequent employers or asbestos manufacturers or suppliers, may have contributed to the worker's injury. *Norfolk & Western Railway Co. v. Ayers* (2003) 583 U.S. 135..

In deciding the first issue, the Supreme Court, following *Metro-North Commuter R. Co. v. Buckley* (1997) 521 U.S. 424, held that mental anguish damages resulting from the fear of developing cancer may be recovered under the FELA by a railroad worker already suffering from actionable asbestosis caused by work-related exposure to asbestos. *Norfolk & Western Railway Co. v. Ayers* (2003) 583 U.S. 135.

In resolving the second issue, the Supreme Court held the FELA's express terms allow a worker to recover his entire damages from a railroad whose negligence jointly caused an injury, thus placing on the railroad the burden of seeking contribution from other tortfeasors. *Norfolk & Western Railway Co. v. Ayers* (2003) 583 U.S. 135.

Americans With Disabilities Act

The court held that this architectural design is intentional, as a matter of law, and thus cannot give rise to an "occurrence." The Court of Appeal thus held that the incident involving Moreno resulting from the intentional architectural design is not a covered event. *Modern Development Co. v. Navigators Ins. Co.* (2003) 111 Cal.App.4th 932.

Appellate Review

In the interests of public policy, where a pure question of law begs clarification, an appellate court has discretion to hear an unappeasable order as a writ of mandate and render a judgment on a settled case. *Black Diamond Asphalt, Inc. v. Superior Court (Adames)* (2003) 114 Cal.App.4th 109.

Application for Insurance

Public policy requires an insurer to conduct a reasonable investigation of an insured's insurability within a reasonable period of time from acceptance of the application and the

issuance of a policy to preserve its right to rescind the policy. *United States Automobile Association v. Pegos* (2003) 107 Cal.App.4th 392.

Arbitration

Whether a party rescinded a contract with an arbitration clause is properly a matter to be determined by the arbitrator. If the arbitrator determines the contract was rescinded, the nonrescinding party may waive its right to arbitration and proceed in court. *De Grezia v. Superior Court (Blue Cross of California)* 106 Cal.App.4th 1278, *review granted, depublished and not citable*.

Insured cannot be compelled to arbitration when the arbitration clause is ambiguous and unconscionable. *Boghos v. Lloyd's of London* (2003) 109 Cal.App.4th 1728, *review granted, depublished and not citable.*

"Arising Out Of"

Subcontractors' noncontractual claims for conversion, breach of trust and violation of stop notice "arose out of" or were related to a construction contract such that the policy exclusion applied. *Southgate Recreation and Park District v. California Association for Park and Recreation Insurance* (2003) 106 Cal.App.4th 293.

In the context of uninsured motorist coverage, an assault by an uninsured motorist on the insured while exchanging contact information after an accident did not arise out of the operation of the uninsured vehicle because the operation of the uninsured vehicle was not the direct, immediate cause of the accident. *California Automobile Ins. Co. v. Hogan* (2003) 112 Cal.App.4th 1292.

The terms "arising out of" or "arising from," in an additional insured endorsement, broadly links a factual situation with the event creating liability and "connotes only a minimal causal connection or incidental relationship." *Vitton Construction Co., Inc. v. Pacific Ins. Co.* (2003) 110 Cal.App.4th 762.

"[W]hen an insurer chooses not to use such clearly limited language in an additional insured clause, but instead grants coverage for liability 'arising out of' the named insured's work, the additional insured is covered without regard to whether injury was caused by the named insured or the additional insured." *Vitton Construction Co., Inc. v. Pacific Ins. Co.* (2003) 110 Cal.App.4th 762.

Asbestos – Recovery of Fear of Injuries

The United States Supreme Court, by split decision, upheld a jury's damages verdict for asbestosis suffering claimants who brought suit against their employer Norfolk & Western Railway Co. under the Federal Employers' Liability Act ("FELA") for anxiety arising from fear

that they might in the future become ill from asbestos-related cancer. *Norfolk & Western Railway Co. v. Ayers* (2003) 583 U.S. 135.

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Attorney-Client Privilege

Attorney-client and attorney work-product privilege does not extend to factual investigations of in-house claims adjusters who are also attorneys. Only those communications reflecting "the requesting of" or "rendering of legal advice" are protected by the attorney-client privilege, and only the attorney's legal impressions, conclusions, opinions, or legal research or theories are subject to the attorney work product privilege. *2,022 Ranch v. Superior Court of San Diego County* (2003)113 Cal.App.4th 1377.

Auto Insurance Fraud

Section 1871.7(h)(2) is intended to bar parasitic actions by persons taking advantage of public information without contributing to the exposure of the fraud. Where an insurer could have discovered a potential fraud through public disclosure, it could still pursue its claim if it could show that it uncovered further or other evidence of such fraud on its own. Insurer's suit against auto insurance fraud was not jurisdictionally barred by section 1871.7(h)(2) based on previously publicly disclosed information because insurer uncovered other evidence of the fraud on its own. *People ex rel. Allstate Ins. Co. v. Weitzman* (2003) 107 Cal.App.4th 534.

Automobile Financing

Auto financing company's Loss Damage Waiver program is not insurance because the primary purpose of the transaction is to finance automobiles not to shift risk of loss. *Automotive Funding Group, Inc. v. Garamendi* (2003) 113 Cal.App.4th 861.

Automobile Loss Waiver Program

Applying *Truta v. Avis Rent A Car System, Inc*. (1987) 193 Cal.App.3d 802, 812, the court found that auto financing company's Loss Damage Waiver program is not insurance because the primary purpose of the transaction is to finance automobiles not to shift risk of loss. *Automotive Funding Group, Inc. v. Garamendi* (2003) 113 Cal.App.4th 861.

Bad Faith

Insurer did not breach the implied covenant of good faith and fair dealing where there was a genuine dispute concerning the value of items stolen from the insured's home. In response to a request for documentation to support the insured's valuation of the stolen items, the insured referred the insurer to his wife. The insured's then wife gave conflicting statement regarding value of items stolen from the insured's house. In the absence of any documentation provided by the insured, it was not unreasonable for the insurer to rely on the wife's statements and deny the claim six months after it was made. *Feldman v. Allstate Insurance Company* (9th Cir. 2003) 322 F.3d 660.

Where an insurer is found to have acted unreasonably in denying a claim, it will be liable for breach of the covenant of good faith and fair dealing. Where the law is unsettled, an insurer will not be held liable for bad faith where it denies coverage for claims and relies on one line of authority versus another. A split of opinion among courts of appeal, even if all were not published, suggests insurer's position was not unreasonable. The Supreme Court's decision to hear the case is also evidence of reasonableness of an insurer's position. Being a zealous advocate for its position does not make an insurer liable for bad faith. The enactment of a statute, in itself, does not settle the law with regard to how the language is interpreted and how the statute is applied. It may be unreasonable for an insurer to attempt to spin its one shot success in convincing a single trial court of its position into proof that the position was reasonable, e.g., *Filippo Investments, Inc. v. Sun Ins. Co.* (1999) 74 Cal.App.4th 1441. *Morris v. Paul Revere Life Ins. Co.* (2003) 109 Cal.App.4th 966.

Burden of Proof

Under the carefully crafted language of a financial bond insurance policy, the use of the term "however" in a limiting clause narrowed coverage for employee dishonesty but did not transform the limiting clause into an exclusion and thereby shift the burden to the insurer to prove absence of coverage. *Mortgage Associates, Inc. v. Fidelity and Deposit Company of Maryland* (2003) 105 Cal.App.4th 28.

Business & Professions Code § 17200

Nonrestitutionary disgorgement of profits is not an available remedy in an individual action under Cal. Business and Professions Code Section 17200 et. seq. *Korea Supply Co. v. Lockheed Martin Corporation* (2003) 29 Cal.4th 1134.

Due process concerns could result if an individual business competitor is permitted to recover disgorgement of profits under Cal. Business and Professions Code Section 17200 et. seq., since nonrestitutionary disgorgement could result in recovery by a potentially unlimited number of individual plaintiffs. *Korea Supply Co. v. Lockheed Martin Corporation* (2003) 29 Cal.4th 1134.

No class can be certified for 17200 action because plaintiff may bring a representative action pursuant to the statute. *Kavruck v. Blue Cross* (2003) 108 Cal.App.4th 773.

An insurer does not violate Section 17200 by requiring lienholders or potential lienholders as co-payees on settlement proceeds. *Mercado v. Allstate Insurance Company* (9th Cir. 2003) 340 F.3d 824.

Allegations that an insurer failed to disclose impending changes in policies to purchasers may state causes of action for Unfair Competition and Fraud. *Pastoria v. Nationwide Insurance* (2003) 112 Cal.App.4th 1490.

"But only with respect to"

Where additional insured endorsement applies "but only with respect to" activities of named insured, coverage is extended to landlord of named insured which is sued as a result of injuries to employee of named insured on the premises. *Hartford Cas. Ins. Co. v. Travelers Indemnity Co.* (2003) 110 Cal.App.4th 710.

Cancellation

Cancellation of an automobile liability policy on the grounds of nonpayment of premiums is ineffective where notice of cancellation is sent prior to a default by the insured on the premium payments. *Mackey v. Bristol West Insurance Services of California, Inc.* (2003) 105 Cal.App.4th 1247.

Notification of cancellation and cancellation requirements are separate as to the insured and a lienholder or other loss payee under an automobile liability policy. That is, a policy may be cancelled as to the insured effective on a different date than the cancellation date for the loss payee. *Mackey v. Bristol West Insurance Services of California, Inc.* (2003) 105 Cal.App.4th 1247.

Carrying of Goods by Sea Act

A plaintiff seeking summary adjudication negating an affirmative defense based on a bill of lading's limitation of liability clause must offer evidence that the shipper received a fair opportunity to negotiate a higher limit. *Continental Ins. Co. v. Columbus Line, Inc.* (2003) 107 Cal.App.4th 1190.

Causation

An uninsured motorist policy did not cover an assault on the insured after a traffic accident. *California Automobile Ins. Co. v. Hogan* (2003) 112 Cal.App.4th 1292.

Choice of Law

The California Court of Appeal reversed the Superior Court's decision that California law governed a nationwide class action brought by State Farm policyholders regarding State Farm's Board of Director's decision not to pay dividends to policyholders. The Court of Appeal reached this conclusion because the declaration of dividends by State Farm's Board of Directors concerned the internal affairs of State Farm. States normally look to the state of incorporation for the law that provides the relevant corporate governance general standard of care. And, under the internal affairs doctrine, unless there is an explicitly applicable local statute to the contrary, then the local law of the state of incorporation has been applied to determine issues involving corporate acts like declaration of dividends. *State Farm Automobile Insurance Co. v. Superior Court (Hill)* (2003) 114 Cal.App.4th 434.

CIGA

California Insurance Guarantee Association does not guarantee an insolvent insurer's portion of workers' compensation claim where other insurance is available. Other insurance can be secondary, excess, or employer self-insurance. Workers' compensation statutory immunity from suit does not exempt self-insured employers from being included in "other available insurance" definition in California Insurance Code section 1063.1(c)(9). *Denny's Inc. v. Workers' Compensation Appeals Board* (2003) 104 Cal.App.4th 1433.

The California Court of Appeal, Second Appellate District, in a split decision, reversed summary judgment granted by the Los Angeles County Superior Court in favor of California Insurance Guarantee Association on the grounds that the phrase "loss adjustment expenses," contained an Insurance Code § 1063.2(h), did not exclude CIGA's obligation to pay the insureds' judgment obtained against his insurer for attorneys' fees incurred based on the insurer's unlawful refusal to defend before the insurer's insolvency. *Woodliff v. California Insurance Guarantee Association* (2003) 110 Cal.App.4th 1690.

CIGA is not a governmental entity and therefore is not prohibited by Ins. Code Section 11580.2(c)(4) from reducing its obligation to pay workers compensation benefits. Rather, CIGA

is a mandatory organization of insurance carriers. *California Insurance Guarantee Association v. Workers Comp. Appeals Board* (2003) 112 Cal.App.4th 358.

CIGA accepts the obligations of an insolvent insurer by indemnifying "claimants" seeking coverage under "covered claims." A "claimant" is someone, not an insurer, who is seeking indemnity for a "covered claim," a liability claim covered by the insolvent insurer's policy. *Black Diamond Asphalt, Inc. v. Superior Court (Adames)* (2003) 114 Cal.App.4th 109.

Claim Expenses and Costs

The costs of defending a suit covered by the policy will not be deducted from the limits of liability. The words "any suit" cannot be read to include any and all possible suits. Costs paid can only include what a reasonable insured would expect to be included in the defense of a claim for damages sought within the coverage of the policy. *Amex Assurance Company v. Allstate Insurance Company* (2003) 112 Cal.App.4th 1246.

Claim or Suit

An insured's payment of costs in response to an administrative environmental order were not covered under umbrella liability policies which incorporated "ultimate net loss" into their insuring agreements but were triggered by "damages." *CDM Investors v. American National Fire Ins. Co.* (2003) 112 Cal.App.4th 791.

Claims Regulation

Insured's notice to insurer that he was represented by counsel relieved insurer of duty to notify insured of applicable statutory time limits to bring a cause of action based on a claim under insured's policy's uninsured motorist provisions. The Court found that Insurance Code § 11580.2(k), rather than insurance unfair practice regulation ("Regulation") § 2695.4, governed the issue of notice because the former is a statute, rather than an administrative regulation, and the statute specifically applied. The Court independently questioned whether Regulation § 2695.4 applied because it expressly requires disclosure of time limits in an insurance policy, not in a statute. Under the statute, which trumps any inconsistent provision in a regulation, the insurer's disclosure requirement is eliminated when the insured has an attorney. *Juarez v. 21st Century Insurance Company* (2003) 105 Cal.App.4th 371.

Class Actions

Insurer denied coverage for earthquake damage arising from 1994 Northridge earthquake based on "Suit Against Us" provision. Subsequent action by insured homeowners for breach of contract and breach of the implied covenant of good faith and fair dealing cannot be certified as a class action where common questions of law and fact did not predominate. Similar to airport noise claims by nearby homeowners, "liability can be established only after extensive

examination of the circumstances surrounding each party." "The [class action] scheme is incompatible with the fundamental maxim that each parcel of land is unique." *Basurco v. 21st Century Insurance Company* (2003) 108 Cal.App.4th 110.

Insurer denied coverage for earthquake damage arising from 1994 Northridge earthquake based on "Suit Against Us" provision. Subsequent action for breach of contract and breach of the implied covenant of good faith and fair dealing cannot be certified as a class action where class action would not be superior to individual lawsuits. In deciding whether a class action would be superior, there are four factors to consider: (1) the interest of each member in controlling his or her own case personally; (2) the difficulties, if any, that are likely to be encountered in managing a class action; (3) the nature and extent of any litigation by individual class members already in progress involving the same controversy; and (4) the desirability of consolidating all claims in a single action before a single court. *Basurco v. 21st Century Insurance Company* (2003) 108 Cal.App.4th 110.

"The [class action] scheme is incompatible with the fundamental maxim that each parcel of land is unique." *Basurco v. 21st Century Insurance Company* (2003) 108 Cal.App.4th 110.

Insurer denied coverage for earthquake damage arising from 1994 Northridge earthquake based on "Suit Against Us" provision. Although section 340.9 revived homeowners' causes of action, section 340.9 "has no bearing on whether common questions of law or fact predominate." "The one-year 'Suit Against Us' provision in 21st Century's policies has the same purpose and effect as a statute of limitations." *Basurco v. 21st Century Insurance Company* (2003) 108 Cal.App.4th 110.

Where the Superior Court has taken steps to manage all of the earthquake insurance cases with respect to all insurance company defendants, to "certify a class in this case would undermine the efforts of the superior court to manage the hundreds of other similar cases." The Superior Court had created a method of case management for all of the individual cases whereby the superior court divided the earthquake insurance cases into five groups, by insurer, and assigned each group to one of five superior court judges. General orders were entered based on input from counsel in an effort to expedite and simplify resolution of these cases. *Basurco v. 21st Century Insurance Company* (2003) 108 Cal.App.4th 110.

Code of Civil Procedure § 340.9

California Code of Civil Procedure Section 340.9 revives all insurance claims for damage arising out of the Northridge earthquake that are barred solely because the applicable statute of limitations has or had expired and revives claims that are barred by statutorily-mandated contractual limitations periods. Section 340.9 applies only to cases in which the insured contacted the insurer prior to January 1, 2000, regarding potential Northridge earthquake damage. It gave plaintiffs until January 1, 2002, to bring suit on their revived claims. Section 340.9 has no effect on any claim that had been "litigated to finality in any court of competent jurisdiction" prior to January 1, 2001. *Campanelli v. Allstate Life Insurance Company* (9th Cir. 2003) 222 F.3d 1086.

Insurer denied coverage for earthquake damage arising from 1994 Northridge earthquake based on "Suit Against Us" provision. Although section 340.9 revived homeowners' causes of action, section 340.9 "has no bearing on whether common questions of law or fact predominate." "The one-year 'Suit Against Us' provision in 21st Century's policies has the same purpose and effect as a statute of limitations." *Basurco v. 21st Century Insurance Company* (2003) 108 Cal.App.4th 110.

Code of Civil Procedure § 382

Insurer denied coverage for earthquake damage arising from 1994 Northridge earthquake based on "Suit Against Us" provision. Subsequent action by insured homeowners for breach of contract and breach of the implied covenant of good faith and fair dealing cannot be certified as a class action where common questions of law and fact did not predominate. Similar to airport noise claims by nearby homeowners, "liability can be established only after extensive examination of the circumstances surrounding each party." *Basurco v. 21st Century Insurance Company* (2003) 108 Cal.App.4th 110.

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Code of Civil Procedure § 392: Class Action

Action seeking medical monitoring may be certified as class action so long as common issues of law and fact predominate. *Lockheed Martin Corporation v. Superior Court (Carrillo)* (2003) 109 Cal.App.4th 24, *review granted, depublished and not citable*.

Code of Civil Procedure § 425.16: Anti-SLAPP Statute

Bringing bad faith lawsuit is not exempt from anti-SLAPP motions, but the facts must meet the statutory standard. *Beach v. Harco National Insurance Company* (2003) 110 Cal.App.4th 82.

Code of Civil Procedure § 2003(n): Admissions

Where a party "stands in the shoes" of another in bringing a suit, that party is bound by the admissions of the former party. *Amex Assurance Company v. Allstate Insurance Company* (2003) 112 Cal.App.4th 1246.

Collateral Estoppel

An insurer is not collaterally estopped (due to the Ninth Circuit's ruling in *Sanberg v. State Farm Mut. Auto Ins.*, 182 F.3d 927 (9th Cir. 1999)) from litigating the issue of whether the Termination Provision in its agents' contracts requires good cause. *Appling v. State Farm Automobile Insurance Group* (9th Cir. 2003) 340 F.3d 769.

Completed Operations

CGL policy applicable to "completed operations" did not provide coverage for construction defects completed after the policy expired. Any defects that occurred while the insured performing operations was merely speculative. *Baroco West, Inc. v. Scottsdale Ins. Co.* (2003) 110 Cal.App.4th 96.

Conflict of Interest

Courts apply the "substantial relationship" test in determining whether there is a disqualifying conflict of interest in "successive representation" cases. *Jessen v. Hartford Cas. Ins. Co*. (2003) 111 Cal.App.4th 698.

"[W]hen ruling upon a disqualification motion in a successive representation case, the trial court must first identify where the attorney's former representation placed the attorney with respect to the former client. If the court determines that the placement was direct and personal, this …is settled as a matter of law in favor of disqualification and the only remaining question is whether there is a connection between the two successive representations, a study that may not include an 'inquiry into the actual state of the lawyer's knowledge' acquired during the lawyers' representation of the former client." *Jessen v. Hartford Cas. Ins. Co.* (2003) 111 Cal.App.4th 698.

"However, if the court determines the former attorney was not placed in a direct, personal relationship with the former client, the court must assess whether the attorney was positioned during the first representation so as to make it likely the attorney acquired confidential information relevant to the current representation, given the similarities or lack of similarities between the two." *Jessen v. Hartford Cas. Ins. Co.* (2003) 111 Cal.App.4th 698.

A "substantial relationship" exists whenever the "subjects" of the prior and the current representations are linked in some rational manner. The word "subject" means "more than the strict facts, claims, and issues involved in a particular action. "Subjects" encompasses a

"broader definition than the discrete legal and factual issues involved in the compared representations." *Jessen v. Hartford Cas. Ins. Co.* (2003) 111 Cal.App.4th 698.

Contract Interpretation

Primary commercial general liability insurer could not rely on "Other Insurance" clause to avoid defense and indemnity obligation. *Century Surety Company v. United Pacific Insurance* (2003) 109 Cal.App.4th 1246.

An excess insurer-one that is solely and explicitly providing only secondary coverage-has no duty to defend or indemnify until all primary insurance has exhausted, but primary insurers with conflicting excess "other insurance" clauses can have immediate defense obligations. *Century Surety Company v. United Pacific Insurance* (2003) 109 Cal.App.4th 1246.

Ambiguity between service of suit clause and arbitration clause is resolved against the drafter of insurance policy in favor of the insured, permitting a legal action by the insured for wrongful refusal to pay benefits. *Boghos v. Lloyd's of London* (2003) 109 Cal.App.4th 1728, *review granted, depublished and not citable.*

Interpretation of a contract that renders part of a contract surplusage should be avoided. *Boghos v. Lloyd's of London* (2003) 109 Cal.App.4th 1728, *review granted, depublished and not citable*.

Ambiguity between service of suit clause and arbitration clause is resolved against the drafter of insurance policy in favor of the insured, permitting a legal action by the insured for wrongful refusal to pay benefits. *Boghos v. Lloyd's of London* (2003) 109 Cal.App.4th 1728, *review granted, depublished and not citable.*

Injuries allegedly caused by indoor exposure to pesticide sprayed outdoors were not excluded by absolute pollution exclusion as California Supreme Court determined that "irritants" could only reasonably be construed to include "traditional" pollutants, i.e, environmental pollution. The reasoning applied to construing the insurance contract is a departure from recent California Supreme Court decisions. *MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635.

Interpretation of a contract that renders part of a contract surplusage should be avoided. *Boghos v. Lloyd's of London* (2003) 109 Cal.App.4th 1728, *review granted, depublished and not citable*.

Insured's objectively reasonable expectations must be considered when interpreting ambiguous coverage terms. This analysis may include consideration of the terms of an underlying indemnity agreement and promise to procure insurance, as well as consideration of the terms of the policy. *St. Paul Mercury Ins. Co. v. Frontier Pacific Ins. Co.* (2003) 111 Cal.App.4th 1134.

The California Supreme Court, by a split decision, held that a homeowner's policy that expressly defines the term "collapse" as "actually fallen down or fallen into pieces," could not be construed as providing coverage for imminent collapse based on public policy reasons. *Rosen v. State Farm General Insurance Company* (2003) 30 Cal.4th 1070.

Public policy does not support a finding of coverage under an uninsured motorist policy when the insured is assaulted, since public policy prohibits coverage for willful and criminal acts, and the uninsured operator was not a motorist when he committed the assault. *California Automobile Ins. Co. v. Hogan* (2003) 112 Cal.App.4th 1292.

If a first party policy provides coverage for "direct physical loss of or damage to Covered Property at the premises…caused by or resulting from any Covered Cause of Loss," then any loss or damage must be to physical, or tangible, property for coverage; that is, the loss must be to property with material existence and that is perceptible to touch. A database, or information, is intangible, unlike the physical medium in which it is stored. If the loss is to the physical medium along with the information therein, then there may be coverage. If the policy defines "Covered Cause of Loss" as "Risks of Direct Physical Loss," then coverage is triggered only if the loss results from such a risk. A computer operator's error or a defective software program are not risks of direct physical loss. *Ward General Insurance Services, Inc. v. The Employers Fire Insurance Company* (2003) 114 Cal.App.4th 548.

Coverage Counsel

If coverage counsel for a defendant's carrier makes fraudulent statements regarding the scope of coverage to the underlying plaintiff and the plaintiff detrimentally relies on them, that attorney may be directly liable to the underlying plaintiff because the attorney has an independent duty to such a plaintiff not to make fraudulent statements. *Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone* (2003) 107 Cal.App.4th 54.

Coverage Grant v. Exclusion

Under the carefully crafted language of a financial bond insurance policy, the use of the term "however" in a limiting clause narrowed coverage for employee dishonesty but did not transform the limiting clause into an exclusion and thereby shift the burden to the insurer to prove absence of coverage. *Mortgage Associates, Inc. v. Fidelity and Deposit Company of Maryland* (2003) 105 Cal.App.4th 28.

Covered Claim

CIGA is precluded to compensate anything but a "covered claim" as defined by Ins. Code section 1063.2(c)(1). However, Ins. Code section 1063.1(c)(9) removes from the definition of "covered claim" any claim already covered by any other insurance available. Furthermore, an insurer is entitled to full priority reimbursement over any recovery by the claimant. *California Insurance Guarantee Association v. Workers Comp. Appeals Board* (2003) 112 Cal.App.4th 358.

Damages

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 as 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, *review granted, depublished, and not citable*.

Definition: "Seller of Insurance"

Auto financing company's Loss Damage Waiver program is not insurance because the primary purpose of the transaction is to finance automobiles not to shift risk of loss. *Automotive Funding Group, Inc. v. Garamendi* (2003) 113 Cal.App.4th 861.

Disclosure

Allegations that an insurer failed to disclose impending changes in policies to purchasers may state causes of action for Unfair Competition and Fraud. *Pastoria v. Nationwide Insurance* (2003) 112 Cal.App.4th 1490.

Disparagement

The Ninth Circuit rejected insured's claim that CGL insurer owed duty to defend patent infringement allegations under the "personal injury" provisions of the policy. Employing the objectively reasonable expectations' test, applicable in resolving assertions of ambiguity, the court rejected the insured's argument that by advertising products which infringed on Nikken's patents, it was engaged in "disparagement," an offense covered under the provision of the CGL policy for "personal injuries arising out of oral or written publication of material that disparages an organization's goods, products, or services…" *Homedics, Inc. v. Valley Forge Insurance Co.* (9th Cir. 2003) 315 F.3d 1135.

The court held that product imitation did not constitute disparagement. It further cited *U.S. Test, Inc. v. NDE Environmental Corp*. (Fed. Cir. 1999) 196 F.3d 1376 as persuasive authority for the proposition that a patent is right to exclude, therefore not a "good," subject to disparagement. *Homedics, Inc. v. Valley Forge Insurance Co.* (9th Cir. 2003) 315 F.3d 1135.

Duty to Defend

Employing the "objectively reasonable expectations' test," applicable in resolving assertions of ambiguity, the Ninth Circuit held that CGL-insured's "objectively reasonable

expectations" would not have included defense of a design patent infringement suit under the policy's "advertising injury," nor an expectation of defense based upon the product disparagement clauses of the policy's "personal injury" provisions. *Homedics, Inc. v. Valley Forge Insurance Co.* (9th Cir. 2003) 315 F.3d 1135.

Primary commercial general liability insurer could not rely on "Other Insurance" clause to avoid defense and indemnity obligation. *Century Surety Company v. United Pacific Insurance* (2003) 109 Cal.App.4th 1246.

An excess insurer-one that is solely and explicitly providing only secondary coverage-has no duty to defend or indemnify until all primary insurance has exhausted, but primary insurers with conflicting excess "other insurance" clauses can have immediate defense obligations. *Century Surety Company v. United Pacific Insurance* (2003) 109 Cal.App.4th 1246.

California Court of Appeal, Third Appellate District, distinguishes *Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478 and holds insurer does not owe a duty to defend against intentional torts where torts could also be committed via negligent conduct, the insurance policy required the insured to show an accident, and there was no separate promise to defend against an inherently intentional tort. *Uhrich v. State Farm Fire & Casualty Company* (2003) 109 Cal.App.4th 598.

CGL policy applicable to "completed operations" did not provide coverage for construction defects completed after the policy expired. Any defects that occurred while the insured performing operations was merely speculative. *Baroco West, Inc. v. Scottsdale Ins. Co.* (2003) 110 Cal.App.4th 96.

The California Court of Appeal, Third Appellate District, held that an insurer owed a duty to defend against a claim of failing to report sexual misconduct despite a coverage bar under Insurance Code Section 533. The appellate court determined that the failure of the dentists' assistants to protect a patient they observed being touched sexually by a dentist while the patient was under the influence of nitrous oxide was negligent as to the dentists, due to vicarious liability, and did fall under the definition of a "dental incident" of a Dentist Professional Liability Policy. The appellate court found that there was no duty to indemnify because the assistants' negligence was so intertwined with the dentists' willful wrongdoing that it was inseparable; the alleged negligence did not give rise to an insurer's duty to defend. *Marie Y. v. General Star Indemnity* (2003) 110 Cal.App.4th 928.

An insurer's duty to defend is not triggered by purely defensive affirmative defenses, but may be triggered be affirmative defenses that could give rise to an independent suit for damages within the scope of the insurer's contractual obligations. *CDM Investors v. American National Fire Ins. Co.* (2003) 112 Cal.App.4th 791, *review granted, depublished and not citable.*

Where a non-ISO policy contains a qualified pollution exclusion that requires both the release of contaminants and the damage occur "during the policy period," there is no duty to defend a suit that sought damages for release of chemicals prior to inception of policy. *Westoil Terminals Co., Inc. v. Industrial Indemnity* (2003) 110 Cal.App.4th 139.

Duty to Indemnify

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, *review granted, depublished, and not citable*.

Primary commercial general liability insurer could not rely on "Other Insurance" clause to avoid defense and indemnity obligation. *Century Surety Company v. United Pacific Insurance* (2003) 109 Cal.App.4th 1246.

An excess insurer-one that is solely and explicitly providing only secondary coverage-has no duty to defend or indemnify until all primary insurance has exhausted, but primary insurers with conflicting excess "other insurance" clauses can have immediate defense obligations. *Century Surety Company v. United Pacific Insurance* (2003) 109 Cal.App.4th 1246.

Environmental Law

There is no overriding public interest which warrants sealing documents that indicate a party or a non-party may have violated state and federal pollution laws. *Huffy Corp. v. Superior Court* (2003) 112 Cal.App.4th 97.

***Erie* Doctrine**

In diversity cases, a federal court must apply state substantive law. Although evidentiary rules are procedural in nature, California Penal Code section 632 is an exception. California Penal Code section 632 provides, "[e]xcept as proof in an action or prosecution for violation of this section, no evidence obtained as a result of eavesdropping upon or recording a confidential communication in violation of this section shall be admissible in any judicial, administrative, legislative, or other proceeding." This code section "embodies a state substantive interest in the privacy of California citizens from exposure of their confidential conversations to third parties." Thus, illegally recorded conversations are inadmissible in federal diversity actions, as well as state actions. *Feldman v. Allstate Insurance Company* (9th Cir. 2003) 322 F.3d 660.

ERISA

Supreme Court created new test for whether a state law is law "which regulates insurance" under ERISA: (1) it must be specifically directed toward entities engaged in insurance and (2) it must substantially affect the risk pooling arrangement between the insurer

and the insured. *Kentucky Association of Health Plans, Inc. v. Miller* (2003) 538 U.S. 329 (holding ERISA did not pre-empt Kentucky's "any willing provider" statutes).

Supreme Court held that ERISA did not pre-empt Kentucky's "any willing provider" statute and created new test for whether a state law is law "which regulates insurance" under ERISA: (1) it must be specifically directed toward entities engaged in insurance and (2) it must substantially affect the risk pooling arrangement between the insurer and the insured. When a state law satisfies these two requirements, ERISA does not pre-empt it. *Kentucky Association of Health Plans, Inc. v. Miller* (2003) 538 U.S. 329.

Where gravamen of plaintiff's complaint against medical services provider is that the provider denied plaintiff treatment for reasons unrelated to her eligibility for treatment under an ERISA plan, ERISA preemption does not apply. ERISA preemption applies when the actionable conduct is the denial of benefits based on administrative or eligibility decisions. *Benitez v. North Coast Women's Care Medical Group, Inc*. (2003) 106 Cal.App.4th 978.

ERISA preemption does not apply to state claims asserted against non-ERISA entities. ERISA entities include the employer, the plan beneficiaries, the plan, and the plan fiduciaries. *See Morstein v. Nat'l Ins. Services, Inc*. (11th Cir. 1996) 93 F.3d 715, 722. *Benitez v. North Coast Women's Care Medical Group, Inc*. (2003) 106 Cal.App.4th 978.

A medical practitioner who makes treatment rather than eligibility decisions is not acting as an ERISA fiduciary even though the treatment decision has the incidental effect of granting or denying a patient the benefits of medical treatment under an ERISA plan. *See Pegram v. Herdrich* (2000) 530 U.S. 211. *Benitez v. North Coast Women's Care Medical Group, Inc.* (2003) 106 Cal.App.4th 978.

The preemption clause of ERISA § 502(a), 29 U.S.C. § 1132(a), which preempts the enforcement of state laws which provide for damages above and beyond those provided in ERISA, is a limited exception to the savings clause under ERISA § 514, 29 U.S.C. § 1144(b)(2)(A), which saves from preemption "any law of any State which regulates insurance, banking, or securities." As such, a state law regulating insurance, banking or securities remains preempted by ERISA if its enforcement provisions provide damages above and beyond those provided under ERISA, such as punitive damages. *Elliot v. Fortis Benefits Insurance Company* (9th Cir. 2003) 337 F.3d 1138.

The Supreme Court held that administrators are not obligated to apply the "treating physician rule" ("Rule") to a disability plan governed by the Employee Retirement Income Security Act of 1974 ("ERISA"). *The Black & Decker Disability Plan v. Nord* (2003) 538 U.S. 822.

When reviewing a claim under an ERISA benefit plan, the Court held that courts cannot oblige Plan administrators to justify their evaluations just because it conflicts with the treating physician, as long as the Plan physician relies on credible evidence. *The Black & Decker Disability Plan v. Nord* (2003) 538 U.S. 822.

ERISA Preemption

The preemption clause of ERISA § 502(a), 29 U.S.C. § 1132(a), which preempts the enforcement of state laws which provide for damages above and beyond those provided in ERISA, is a limited exception to the savings clause under ERISA § 514, 29 U.S.C. § 1144(b)(2)(A), which saves from preemption "any law of any State which regulates insurance, banking, or securities." As such, a state law regulating insurance, banking or securities remains preempted by ERISA if its enforcement provisions provide damages above and beyond those provided under ERISA, such as punitive damages. *Elliot v. Fortis Benefits Insurance Company* (9th Cir. 2003) 337 F.3d 1138.

Establishing Insured's Liability

A bankruptcy order allowing a plaintiff's claim against the insured does not constitute judicial determination of an insured's liability. *Wolkowitz v. Redland Insurance Company* (2003) 112 Cal.App.4th 154.

A bankruptcy order allowing a plaintiff's claim against the insured provides no reasonable basis to establish damages proximately caused by the insurer's refusal to settle. *Wolkowitz v. Redland Insurance Company* (2003) 112 Cal.App.4th 154.

Estoppel

Insured's notice to insurer that he was represented by counsel relieved insurer of duty to notify insured of applicable statutory time limits to bring a cause of action based on a claim under insured's policy's uninsured motorist provisions. The Court found that Insurance Code § 11580.2(k), rather than insurance unfair practice regulation ("Regulation") § 2695.4, governed the issue of notice because the former is a statute, rather than an administrative regulation, and the statute specifically applied. The Court independently questioned whether Regulation § 2695.4 applied because it expressly requires disclosure of time limits in an insurance policy, not in a statute. Under the statute, which trumps any inconsistent provision in a regulation, the insurer's disclosure requirement is eliminated when the insured has an attorney. *Juarez v. 21st Century Insurance Company* (2003) 105 Cal.App.4th 371.

Underlying judgment was not a default judgment under Insurance Code section 1028 as insured filed an answer in accordance with Code of Civil Procedure section 580, and thus should have been considered by claims administrator as evidence of insurer's liability in liquidation proceedings. The insurer, who had assumed the defense of the insured in the underlying action, failed to intervene into the lawsuit in which the underlying judgment was obtained despite knowledge that the insured declined to participate in the trial after the insured's corporate status had been suspended. In addition, amount awarded in underlying judgment should not have been reduced because the judgment was binding on the insured, and thus the insurer, pursuant to Insurance Code section 11580. Further, although an insurer may not have waived any coverage defenses even though it failed to reserve its rights, it could be estopped from asserting such defenses. *Garamendi v. Golden Eagle Ins. Co.* (2003) 113 Cal.App.4th 861.

Evidence

Based on the mediation privilege and work-product statutes, Evidence Code sections 1119 and 1120 and Code of Civil Procedure section 2018, respectively, "raw evidence" or "non-derivative evidentiary material," such as mold test results, photographs and similar items, do not constitute protected work product and are not protected under a blanket of privilege merely because they were used in a mediation. *Rojas v. Superior Court (Coffin)* (2003) 102 Cal.App.4th 1062, *review granted, depublished and not citable*.

Excess Insurance

Primary commercial general liability insurer could not rely on "Other Insurance" clause to avoid defense and indemnity obligation. *Century Surety Company v. United Pacific Insurance* (2003) 109 Cal.App.4th 1246.

An excess insurer-one that is solely and explicitly providing only secondary coverage-has no duty to defend or indemnify until all primary insurance has exhausted, but primary insurers with conflicting excess "other insurance" clauses can have immediate defense obligations. *Century Surety Company v. United Pacific Insurance* (2003) 109 Cal.App.4th 1246.

Exclusion

Under the carefully crafted language of a financial bond insurance policy, the use of the term "however" in a limiting clause narrowed coverage for employee dishonesty but did not transform the limiting clause into an exclusion and thereby shift the burden to the insurer to prove absence of coverage. *Mortgage Associates, Inc. v. Fidelity and Deposit Company of Maryland* (2003) 105 Cal.App.4th 28.

Injuries allegedly caused by indoor exposure to pesticide sprayed outdoors were not excluded by absolute pollution exclusion as California Supreme Court determined that "irritants" could only reasonably be construed to include "traditional" pollutants, i.e, environmental pollution. The reasoning applied to construing the insurance contract is a departure from recent California Supreme Court decisions. *MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635.

Exclusion: Business Pursuits

The term "professional services" is no longer limited to the "learned professions" and may include services such as plumbing or even ear piercing. It is the type of activity, rather than actual compensation, that controls whether the exclusions apply. Business pursuits may even include work done as a favor without compensation. *Amex Assurance Company v. Allstate Insurance Company* (2003) 112 Cal.App.4th 1246.

Exclusion: Disease or Infirmity

Ninth Circuit, applying Oregon law, held that the insured's death from high altitude edema constituted an "accidental injury" and did not fit within the "disease or infirmity" exclusion contained in the insured's life insurance policy. *Chale v. Allstate Life Insurance Company* (9th Cir. 2003) 353 F.3d 742.

Exclusion: Performing Operations

CGL policy applicable to "completed operations" did not provide coverage for construction defects completed after the policy expired. Any defects that occurred while the insured performing operations was merely speculative. *Baroco West, Inc. v. Scottsdale Ins. Co.* (2003) 110 Cal.App.4th 96.

Exhaustion

Horizontal "stacking" is required to exhaust primary policies where the policy limits are "per occurrence per year" even where only one occurrence caused property damage over multiple policy periods. *Employers Insurance of Wausau v. Granite State Insurance Company* (9th Cir. 2003) 330 F.3d 1214.

Federal Jurisdiction (Diversity)

For the purposes of determining diversity citizenship under Washington law, the insured -- not the insurer -- is the real party in interest. *Allstate Insurance Company v. Hughes* (9th Cir. 2003) 346 F.3d 952.

The Ninth Circuit ordered the District Court of the Western District of Washington to dismiss a subrogation action by an insurer related to a fire at a Seattle area house because there was no diversity citizenship, and consequently the district court did not have subject matter jurisdiction. *Allstate Insurance Company v. Hughes* (9th Cir. 2003) 346 F.3d 952.

First Party Policy: Computer Data

If a first party policy provides coverage for "direct physical loss of or damage to Covered Property at the premises…caused by or resulting from any Covered Cause of Loss," then any loss or damage must be to physical, or tangible, property for coverage; that is, the loss must be to property with material existence and that is perceptible to touch. A database, or information, is intangible, unlike the physical medium in which it is stored. If the loss is to the physical medium along with the information therein, then there may be coverage. If the policy defines "Covered Cause of Loss" as "Risks of Direct Physical Loss," then coverage is triggered only if the loss results from such a risk. A computer operator's error or a defective software program are not risks of direct physical loss. *Ward General Insurance Services, Inc. v. The Employers Fire Insurance Company* (2003) 114 Cal.App.4th 548.

First Party Policy: Coverage Trigger

If a first party policy provides coverage for "direct physical loss of or damage to Covered Property at the premises…caused by or resulting from any Covered Cause of Loss," then any loss or damage must be to physical, or tangible, property for coverage; that is, the loss must be to property with material existence and that is perceptible to touch. A database, or information, is intangible, unlike the physical medium in which it is stored. If the loss is to the physical medium along with the information therein, then there may be coverage. If the policy defines "Covered Cause of Loss" as "Risks of Direct Physical Loss," then coverage is triggered only if the loss results from such a risk. A computer operator's error or a defective software program are not risks of direct physical loss. *Ward General Insurance Services, Inc. v. The Employers Fire Insurance Company* (2003) 114 Cal.App.4th 548.

First Party Policy: Covered Loss

If a first party policy provides coverage for "direct physical loss of or damage to Covered Property at the premises…caused by or resulting from any Covered Cause of Loss," then any loss or damage must be to physical, or tangible, property for coverage; that is, the loss must be to property with material existence and that is perceptible to touch. A database, or information, is intangible, unlike the physical medium in which it is stored. If the loss is to the physical medium along with the information therein, then there may be coverage. If the policy defines "Covered Cause of Loss" as "Risks of Direct Physical Loss," then coverage is triggered only if the loss results from such a risk. A computer operator's error or a defective software program are not risks of direct physical loss. *Ward General Insurance Services, Inc. v. The Employers Fire Insurance Company* (2003) 114 Cal.App.4th 548.

Fraud/Misrepresentation

Class certification may not be granted where claims are specific only to insured. *Kavruck v. Blue Cross* (2003) 108 Cal.App.4th 773.

Allegations that an insurer failed to disclose impending changes in policies to purchasers may state causes of action for Unfair Competition and Fraud. *Pastoria v. Nationwide Insurance* (2003) 112 Cal.App.4th 1490.

Fraud Upon the Court

A party's non-disclosure of discovery is not fraud upon the court. Fraud upon the court must be action aimed at the court and requires a "grave miscarriage of justice." *Appling v. State Farm Automobile Insurance Group* (9th Cir. 2003) 340 F.3d 769.

Genuine Dispute Doctrine

A bad faith claim should be dismissed on summary judgment if the insurer demonstrates that there was a "genuine dispute" as to coverage. The genuine dispute may concern either a reasonable factual dispute or an unsettled area of insurance law. *Feldman v. Allstate Insurance Company* (9th Cir. 2003) 322 F.3d 660.

Holocaust Victim Insurance Relief Act

United States Supreme Court found HVIRA was preempted because it violated foreign affairs as well as express federal policy. The McCarran-Ferguson Act, which delegates power to regulate insurance to the states, was not applicable here because that act related to the commerce power, not the foreign affairs powers of the federal government. *American Insurance Association v. Garamendi* (2003) 123 S.Ct. 2374.

"However"

Under the carefully crafted language of a financial bond insurance policy, the use of the term "however" in a limiting clause narrowed coverage for employee dishonesty but did not transform the limiting clause into an exclusion and thereby shift the burden to the insurer to prove absence of coverage. Mortgage *Associates, Inc. v. Fidelity and Deposit Company of Maryland* (2003) 105 Cal.App.4th 28.

Indemnity Actions Against CIGA

An insurer may not bring an action for indemnity against either CIGA or the insured of an insolvent insurer. However, an insurer may bring an action against the insured where the claims are in excess of the policy. *Black Diamond Asphalt, Inc. v. Superior Court (Adames)* (2003) 114 Cal.App.4th 109.

Insurance Code § 22

Auto financing company's Loss Damage Waiver program is not insurance because the primary purpose of the transaction is to finance automobiles not to shift risk of loss. *Automotive Funding Group, Inc. v. Garamendi* (2003) 113 Cal.App.4th 861.

Insurance Code § 660, et seq.

Cancellation of an automobile liability policy on the grounds of nonpayment of premiums is ineffective where notice of cancellation is sent prior to a default by the insured on the premium payments. *Mackey v. Bristol West Insurance Services of California, Inc.* (2003) 105 Cal.App.4th 1247.

Notification of cancellation and cancellation requirements are separate as to the insured and a lienholder or other loss payee under an automobile liability policy. That is, a policy may be cancelled as to the insured effective on a different date than the cancellation date for the loss payee. *Mackey v. Bristol West Insurance Services of California, Inc.* (2003) 105 Cal.App.4th 1247.

Insurance Code § 1028

Underlying judgment was not a default judgment under Insurance Code section 1028 as insured filed an answer in accordance with Code of Civil Procedure section 580, and thus should have been considered by claims administrator as evidence of insurer's liability in liquidation proceedings. The insurer, who had assumed the defense of the insured in the underlying action, failed to intervene into the lawsuit in which the underlying judgment was obtained despite knowledge that the insured declined to participate in the trial after the insured's corporate status had been suspended. In addition, amount awarded in underlying judgment should not have been reduced because the judgment was binding on the insured, and thus the insurer, pursuant to Insurance Code section 11580. Further, although an insurer may not have waived any coverage defenses even though it failed to reserve its rights, it could be estopped from asserting such defenses. *Garamendi v. Golden Eagle Ins. Co.* (2003) 113 Cal.App.4th 861.

Insurance Code § 1063.1

California Insurance Guarantee Association does not guarantee an insolvent insurer's portion of workers' compensation claim where other insurance is available. Other insurance can be secondary, excess, or employer self-insurance. Workers' compensation statutory immunity from suit does not exempt self-insured employers from being included in "other available insurance" definition California Insurance Code section 1063.1(c)(9). *Denny's Inc. v. Workers' Compensation Appeals Board* (2003) 104 Cal.App.4th 1433.

California Insurance Guarantee Association does not guarantee an insolvent insurer's portion of workers' compensation claim where other insurance is available. Other insurance can be secondary, excess, or employer self-insurance. Workers' compensation statutory immunity from suit does not exempt self-insured employers from being included in "other available insurance" definition California Insurance Code section 1063.1(c)(9). *Denny's Inc. v. Workers' Compensation Appeals Board* (2003) 104 Cal.App.4th 1433.

Insurance Code § 1063.1(c)(5)

An insurer may not bring an action for indemnity against either CIGA or the insured of an insolvent insurer. However, an insurer may bring an action against the insured where the claims are in excess of the policy. *Black Diamond Asphalt, Inc. v. Superior Court (Adames)* (2003) 114 Cal.App.4th 109.

A self-insured party is not an insurer for the purposes of § 1063.1(c)(5). *Black Diamond Asphalt, Inc. v. Superior Court (Adames)* (2003) 114 Cal.App.4th 109.

Insurance Code § 1063.1(c)(9)

An "original claimant," as defined by § 1063.1(c)(9) means "any insured making a first party claim" or "any person instituting a liability claim." Assignees are not considered "original claimants." *Black Diamond Asphalt, Inc. v. Superior Court (Adames)* (2003) 114 Cal.App.4th 109.

Insurance Code § 1871.1, et seq.

Section 1871.7(h)(2) is intended to bar parasitic actions by persons taking advantage of public information without contributing to the exposure of the fraud. Where an insurer could have discovered a potential fraud through public disclosure, it could still pursue its claim if it could show that it uncovered further or other evidence of such fraud on its own. Insurer's suit against auto insurance fraud was not jurisdictionally barred by section 1871.7(h)(2) based on previously publicly disclosed information because insurer uncovered other evidence of the fraud on its own. *People ex rel. Allstate Ins. Co. v. Weitzman* (2003) 107 Cal.App.4th 534.

Insurance Code § 1877.5

Insurance Code section 1877.5 authorizes malicious prosecution claims where workers compensation fraud report is made with malice. Such a claim is outside the "compensation bargain." *Mosby v. Liberty Mutual Insurance Company* (2003) 110 Cal.App.4th 995.

Insurance Code § 2071

Code of Civil Procedure Section 340.9 revives all causes of action that fall within the limitations period of Insurance Code Section 2071. Under California law any claim that is grounded in a failure to pay benefits that are due under the policy is treated as "on the policy" for purposes of section 2071's limitations period. *Campanelli v. Allstate Life Insurance Company* (9th Cir. 2003) 222 F.3d 1086.

Insurance Code § 11580

Underlying judgment was not a default judgment under Insurance Code section 1028 as insured filed an answer in accordance with Code of Civil Procedure section 580, and thus should have been considered by claims administrator as evidence of insurer's liability in liquidation proceedings. The insurer, who had assumed the defense of the insured in the underlying action, failed to intervene into the lawsuit in which the underlying judgment was obtained despite knowledge that the insured declined to participate in the trial after the insured's corporate status had been suspended. In addition, amount awarded in underlying judgment should not have been

reduced because the judgment was binding on the insured, and thus the insurer, pursuant to Insurance Code section 11580. Further, although an insurer may not have waived any coverage defenses even though it failed to reserve its rights, it could be estopped from asserting such defenses. *Garamendi v. Golden Eagle Ins. Co.* (2003) 113 Cal.App.4th 861.

Insurance Code § 11580.2(b)

Insured's notice to insurer that he was represented by counsel relieved insurer of duty to notify insured of applicable statutory time limits to bring a cause of action based on a claim under insured's policy's uninsured motorist provisions. The Court found that Insurance Code § 11580.2(k), rather than insurance unfair practice regulation ("Regulation") § 2695.4, governed the issue of notice because the former is a statute, rather than an administrative regulation, and the statute specifically applied. The Court independently questioned whether Regulation § 2695.4 applied because it expressly requires disclosure of time limits in an insurance policy, not in a statute. Under the statute, which trumps any inconsistent provision in a regulation, the insurer's disclosure requirement is eliminated when the insured has an attorney. *Juarez v. 21st Century Insurance Company* (2003) 105 Cal.App.4th 371.

Insurance Fraud

Through Insurance Code section 1871.7, an insurance company may pursue a qui tam action against its insured, as section 1871.7(e)(1) allows any interested person to bring a civil action for a violation of the section for the person and for the state in the name of the state. Section 1871.7(b) allows such actions to be brought for fraudulent claims in violation of Penal Code section 550. The burden of proof for actions ensued under Insurance Code section 1871.7 is a preponderance of evidence. *People ex rel. Allstate Insurance Company v. Muhyeldin* (2003) 112 Cal.App.4th 604.

Intentional Interference with Prospective Economic Advantage

A plaintiff need not plead a defendant acted with specific intent in order to state a claim for interference with prospective economic advantage. *Korea Supply Co. v. Lockheed Martin Corporation* (2003) 29 Cal.4th 1134.

Intervention

Underlying judgment was not a default judgment under Insurance Code section 1028 as insured filed an answer in accordance with Code of Civil Procedure section 580, and thus should have been considered by claims administrator as evidence of insurer's liability in liquidation proceedings. The insurer, who had assumed the defense of the insured in the underlying action, failed to intervene into the lawsuit in which the underlying judgment was obtained despite knowledge that the insured declined to participate in the trial after the insured's corporate status had been suspended. In addition, amount awarded in underlying judgment should not have been

reduced because the judgment was binding on the insured, and thus the insurer, pursuant to Insurance Code section 11580. Further, although an insurer may not have waived any coverage defenses even though it failed to reserve its rights, it could be estopped from asserting such defenses. *Garamendi v. Golden Eagle Ins. Co.* (2003) 113 Cal.App.4th 861.

Joint Powers Authority

Because joint authority risk pools are member created and directed, they are not considered insurance in a conventional sense, but are an alternative to commercial insurance. Questions of defense and coverage are answered by relying on rules of contract law that emphasizes the parties' intent. *Southgate Recreation and Park District v. California Association for Park and Recreation Insurance* (2003) 106 Cal.App.4th 293.

A joint powers authority had no duty to indemnify a member district for subcontractor lawsuits seeking payment for work arising out of a construction project. *Southgate Recreation and Park District v. California Association for Park and Recreation Insurance* (2003) 106 Cal.App.4th 293.

Life Insurance

Insured not entitled to return of paid but unearned premium upon surrender of whole-life insurance policy where the policy unambiguously described the method for calculating cash surrender value and method did not include unearned premium. *Lambros v. Metropolitan Life Insurance Company* (2003) 111 Cal.App.4th 43.

Ninth Circuit, applying Oregon law, held that the insured's death from high altitude edema constituted an "accidental injury" and did not fit within the "disease or infirmity" exclusion contained in the insured's life insurance policy. *Chale v. Allstate Life Insurance Company* (9th Cir. 2003) 353 F.3d 742.

Liquidation

Underlying judgment was not a default judgment under Insurance Code section 1028 as insured filed an answer in accordance with Code of Civil Procedure section 580, and thus should have been considered by claims administrator as evidence of insurer's liability in liquidation proceedings. The insurer, who had assumed the defense of the insured in the underlying action, failed to intervene into the lawsuit in which the underlying judgment was obtained despite knowledge that the insured declined to participate in the trial after the insured's corporate status had been suspended. In addition, amount awarded in underlying judgment should not have been reduced because the judgment was binding on the insured, and thus the insurer, pursuant to Insurance Code section 11580. Further, although an insurer may not have waived any coverage defenses even though it failed to reserve its rights, it could be estopped from asserting such defenses. *Garamendi v. Golden Eagle Ins. Co.* (2003) 113 Cal.App.4th 861.

Medical Payments Coverage

An insuring agreement in a medical payments coverage grant containing excess coverage and a reimbursement agreement entitles the insurer to reimbursement of medical payments from any judgment or settlement won by the injured third party beneficiary. *Mercury Casualty Company v. Sharla Rae Maloney* (2003) 113 Cal.App.4th 799.

Where, as is the case with medical payments coverage, a person is a third party beneficiary to an insurance contract, and the contract has not been rescinded, the party for whose benefit the contract was made may maintain an action against the promisor. The acts of the contracting parties create a duty between the promisor and the third party. *Mercury Casualty Company v. Sharla Rae Maloney* (2003) 113 Cal.App.4th 799.

No-Assignment Clause

Where successor corporation assumed predecessor's liabilities based on contract and not by operation of law, successor not entitled to benefits of predecessor's liability insurance where there is a no-assignment clause and insurer does not consent. *Henkel Corp. v. Hartford Accident & Indemnity Co.* (2003) 29 Cal.4th 934.

Two circumstances "under which an assignment without the insurer's consent has been upheld: (1) when at the time of the assignment the benefit has been reduced to a claim for money due or to become due, or (2) when at the time of the assignment the insurer has breached a duty to the insured, and the assignment is of a cause of action to recover damages for that breach." *Henkel Corp. v. Hartford Accident & Indemnity Co.* (2003) 29 Cal.4th 934.

No Voluntary Payments Clause

An insured's post-tender breach of a no-voluntary-payments provision in a CGL policy barred recovery of both pre-tender and post tender expenses. Settlement by an insured is not involuntary where the insured was aware of the policy, participated in the lawsuit, and structured the settlement so as to incur no monetary costs. Where the language of the no-voluntary-payments provision does not limit its operation to pre-tender periods, and where the insured had not requested and been denied a defense, the insured cannot recover post-tender payments (including settlement). *Low v. Golden Eagle Insurance Company* (2003) 110 Cal.App.4th 1532.

Northridge Earthquake

California Code of Civil Procedure Section 340.9 revives all insurance claims for damage arising out of the Northridge earthquake that are barred solely because the applicable statute of limitations has or had expired and revives claims that are barred by statutorily-mandated contractual limitations periods. Section 340.9 applies only to cases in which the insured contacted the insurer prior to January 1, 2000, regarding potential Northridge earthquake damage. It gave plaintiffs until January 1, 2002, to bring suit on their revived claims. Section

340.9 has no effect on any claim that had been "litigated to finality in any court of competent jurisdiction" prior to January 1, 2001. *Campanelli v. Allstate Life Insurance Company* (9th Cir. 2003) 222 F.3d 1086.

Occurrence

The court held that this architectural design is intentional, as a matter of law, and thus cannot give rise to an "occurrence." The Court of Appeal thus held that the incident involving Moreno resulting from the intentional architectural design is not a covered event. *Modern Development Co. v. Navigators Ins. Co.* (2003) 111 Cal.App.4th 932.

"Other Insurance" Clause

Primary commercial general liability insurer could not rely on "Other Insurance" clause to avoid defense and indemnity obligation. *Century Surety Company v. United Pacific Insurance* (2003) 109 Cal.App.4th 1246.

An excess insurer-one that is solely and explicitly providing only secondary coverage-has no duty to defend or indemnify until all primary insurance has exhausted, but primary insurers with conflicting excess "other insurance" clauses can have immediate defense obligations. *Century Surety Company v. United Pacific Insurance* (2003) 109 Cal.App.4th 1246.

Where a blanket additional insured endorsement included a landlord, the court looked to the indemnity terms in the lease as an expression of intent regarding the scope of the additional insured endorsement. The court found that the landlord's policy, which contained an other insurance clause stating it was excess unless the landlord was named as an additional insured, would be enforced in this contribution action because it was so specific despite the recent trend away from enforcement of excess other insurance clauses. *Hartford Cas. Ins. Co. v. Travelers Indemnity Co.* (2003) 110 Cal.App.4th 710.

Parol Evidence

Where ambiguity in contract, specifically entry-age contract, a court may consider extrinsic evidence in interpreting the contract. *Kavruck v. Blue Cross* (2003) 108 Cal.App.4th 773.

Parol evidence cannot be used to interpret the Termination Provision in an insurer's agent's contract where agents were seeking to add a "good cause" provision where the plain meaning of the provision allowed termination at-will. *Appling v. State Farm Automobile Insurance Group* (9th Cir. 2003) 340 F.3d 769.

Penal Code § 632

In diversity cases, a federal court must apply state substantive law. Although evidentiary rules are procedural in nature, California Penal Code section 632 is an exception. California Penal Code section 632 provides, "[e]xcept as proof in an action or prosecution for violation of this section, no evidence obtained as a result of eavesdropping upon or recording a confidential communication in violation of this section shall be admissible in any judicial, administrative, legislative, or other proceeding." This code section "embodies a state substantive interest in the privacy of California citizens from exposure of their confidential conversations to third parties." Thus, illegally recorded conversations are inadmissible in federal diversity actions, as well as state actions. *Feldman v. Allstate Insurance Company* (9th Cir. 2003) 322 F.3d 660.

Permissive User

The permissive user of a vehicle, which is not owned by the named insured under an automobile liability policy, does not qualify as an insured under that policy, nor does California law under Insurance Code Section 11580.1(b)(4), or public policy, require an automobile insurer to extend coverage to the permissive user in that situation. *Gilmer v. State Farm Mutual Auto. Ins. Co.* (2003) 110 Cal.App.4th 416.

Pollution

Injuries allegedly caused by indoor exposure to pesticide sprayed outdoors were not excluded by absolute pollution exclusion as California Supreme Court determined that "irritants" could only reasonably be construed to include "traditional" pollutants, i.e, environmental pollution. The reasoning applied to construing the insurance contract is a departure from recent California Supreme Court decisions. *MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635.

Property Damage

If a first party policy provides coverage for "direct physical loss of or damage to Covered Property at the premises…caused by or resulting from any Covered Cause of Loss," then any loss or damage must be to physical, or tangible, property for coverage; that is, the loss must be to property with material existence and that is perceptible to touch. A database, or information, is intangible, unlike the physical medium in which it is stored. If the loss is to the physical medium along with the information therein, then there may be coverage. If the policy defines "Covered Cause of Loss" as "Risks of Direct Physical Loss," then coverage is triggered only if the loss results from such a risk. A computer operator's error or a defective software program are not risks of direct physical loss. *Ward General Insurance Services, Inc. v. The Employers Fire Insurance Company* (2003) 114 Cal.App.4th 548.

Protective Orders, Appeals, Sealed Documents

Absent an evidentiary finding by the lower court, a lower court's order sealing documents is entitled to no weight when the Court of Appeal conducts an independent review. *Huffy Corp. v. Superior Court* (2003) 112 Cal.App.4th 97.

A Court of Appeal can independently review a protective order which provides for the filing of documents under seal in law and motion matters. *Huffy Corp. v. Superior Court* (2003) 112 Cal.App.4th 97.

A moving party must demonstrate a substantial probability of harm to an overriding interest by disclosure to the public or an overriding public interest that warrants the sealing do documents. *Huffy Corp. v. Superior Court* (2003) 112 Cal.App.4th 97.

Punitive Damages

Partial reversal of a judgment following a jury trial holding that a punitive damages award against a worker's compensation carrier that wrongfully denied coverage had to be further reduced to comply with due process because it exceeded a 4-1 ratio. *Diamond Woodworks, Inc. v. Argonaut Insurance Company* (2003) 109 Cal.App.4th 1020.

There are procedural and substantive constitutional limitations on punitive damage awards. The most important guidepost for courts reviewing such awards to consider is the degree of reprehensibility of the defendant's conduct. Evidence of dissimilar out-of-state conduct is essentially irrelevant, bearing no relation to the plaintiff's harm. Single-digit multiples between a compensatory damage award and the punitive damage award are "more likely to comport with due process, while still achieving the State's goals of deterrence and retribution …" but this must be based on the defendant's conduct and the plaintiff's harm in a particular case. *State Farm Mut. Auto. Ins. v. Campbell* (2003) 123 S.Ct. 1513.

While through *State Farm Mutual Automobile Ins. Co. v. Campbell* (2003) 123 S.Ct. 1513, the U.S. Supreme Court requires that an award of punitive damages cannot be used to punish a tortfeasor for conduct that did not affect the particular plaintiff in the action and that the compensatory damages multiplier be single-digit, the California Court of Appeals determined that if the tortfeasor's malicious conduct results in death then a multiplier of the compensatory damages may be higher than single digit. *Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738.

Punitive damages award of $290 million in Ford Bronco rollover injury and death case reduced to $23,723, 287 in light of *State Farm Mutual Automobile Ins. Co. v. Campbell* 123 S.Ct. 1513 (2003). *Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738.

There is no mathematical formula to determine the ratio for an appropriate punitive damages award. In addition to the guidelines set forth in *State Farm Mutual Automobile Ins. Co. v. Campbell* (2003) 123 S. Ct. 1513 and *BMW of North America v. Gore* (1996) 517 U.S. 559, the circumstances of the defendant's conduct, the compensatory damages awarded to the plaintiff, and the actual harm to the plaintiff are all considered in determining whether the

punitive damages award violates the defendant's due process. While the ratio of damages awarded to punitive damages was 1:340, the ratio of "expectation" damages to punitive damages was just over 1:4 based on the estimated value of real estate being $400,000 more than the promised purchased price. *Simon v. San Paolo U.S. Holding Company, Inc*. (2003) 113 Cal.App.4th 1137.

Rescission

The party seeking rescission may only rely upon an arbitration clause in the insurance policy for the arbitrator to determine whether the policy was properly rescinded. If the arbitrator determines the contract was rescinded, the nonrescinding party may waive its right to arbitration and proceed in court. The rescinding party may not avail themselves of the arbitration provision in a contract that the party successfully rescinded. *De Grezia v. Superior Court (Blue Cross of California)* 106 Cal.App.4th 1278, *review granted, depublished and not citable.*

Public policy requires an insurer to conduct a reasonable investigation of an insured's insurability within a reasonable period of time from acceptance of the application and the issuance of a policy to preserve its right to rescind the policy. *United States Automobile Association v. Pegos* (2003) 107 Cal.App.4th 392.

Reservation of Rights

Underlying judgment was not a default judgment under Insurance Code section 1028 as insured filed an answer in accordance with Code of Civil Procedure section 580, and thus should have been considered by claims administrator as evidence of insurer's liability in liquidation proceedings. The insurer, who had assumed the defense of the insured in the underlying action, failed to intervene into the lawsuit in which the underlying judgment was obtained despite knowledge that the insured declined to participate in the trial after the insured's corporate status had been suspended. In addition, amount awarded in underlying judgment should not have been reduced because the judgment was binding on the insured, and thus the insurer, pursuant to Insurance Code section 11580. Further, although an insurer may not have waived any coverage defenses even though it failed to reserve its rights, it could be estopped from asserting such defenses. *Garamendi v. Golden Eagle Ins. Co.* (2003) 113 Cal.App.4th 861.

Right To Settle

Standard CGL language gives a defending carrier the right to settle over its insureds' objections, even if the settlement causes the insureds the loss of a potential future malicious prosecution action and results in injury to reputation and damage to future insurability, and even if an insured offered to withdraw its tender of defense. *Hurvitz v. St. Paul Fire & Marine Ins. Co.* (2003) 109 Cal.App.4th 918.

Right to Withdraw

An insurer's decision to choose to pay the disputed benefits pending a court decision as a strategy to mitigate damages is not an obligation to continue to pay once it determines that coverage is not available. *Morris v. Paul Revere Life Ins. Co.* (2003) 109 Cal.App.4th 966.

Statute of Limitations

California Code of Civil Procedure Section 340.9 revives all insurance claims for damage arising out of the Northridge earthquake that are barred solely because the applicable statute of limitations has or had expired and revives claims that are barred by statutorily-mandated contractual limitations periods. Section 340.9 applies only to cases in which the insured contacted the insurer prior to January 1, 2000, regarding potential Northridge earthquake damage. It gave plaintiffs until January 1, 2002, to bring suit on their revived claims. Section 340.9 has no effect on any claim that had been "litigated to finality in any court of competent jurisdiction" prior to January 1, 2001. *Campanelli v. Allstate Life Insurance Company* (9th Cir. 2003) 222 F.3d 1086.

Subrogation

In a subrogation action, the appropriate statute of limitations is the statue that would have applied had the subrogor brought the claim not the two year statute of limitations that applies to equitable actions. *Employers Insurance of Wausau v. Granite State Insurance Company* (9th Cir. 2003) 330 F.3d 1214.

Successor Liability by Operation of Law

Three situations in which a buyer of corporate assets may be liable for the torts of its predecessor by operation of law: (1) if the transaction amounts to a consolidation or merger, if the buyer is a mere continuation of the seller, or if the transfer of assets is for a fraudulent purpose; (2) if the acquisition causes the virtual destruction of remedies against the original manufacturer; or (3) if a statute imposes liability upon successor corporations without regard to contract, e.g., CERCLA. *Henkel Corp. v. Hartford Accident & Indemnity Co.* (2003) 29 Cal.4th 934.

Summary Judgment

Summary judgment in favor of bond issuer and title insurer was appropriate where insured mortgage loan company suffered losses when its employees engaged in a fraudulent loan scheme and (1) the insured failed to meet its burden of proving coverage by establishing the employees were motivated by personal financial gain, and (2) the fraudulent activity impaired the value of properties but did not create a defect in title. *Mortgage Associates, Inc. v. Fidelity and Deposit Company of Maryland* (2003) 105 Cal.App.4th 28.

An uninsured motorist policy did not cover an assault on the insured after a traffic accident. *California Automobile Ins. Co. v. Hogan* (2003) 112 Cal.App.4th 1292.

Plaintiff failed to satisfy its initial burden of production of a prima facie showing that the defendant's affirmative defense, based on the Carrying of Goods by Sea Act and a bill of lading, was without merit when it presented no evidence that the shipper was denied the fair opportunity to negotiate for a more favorable limitation of liability. *Continental Ins. Co. v. Columbus Line, Inc.* (2003) 107 Cal.App.4th 1190.

Summary Judgment: Procedure

Trial court has no authority to shorten the 75 day minimum notice requirement for hearing on summary judgment motions. *McMahon v. Superior Court (American Equity Insurance Company* (2003) 106 Cal.App.4th 112.

Supplementary Payments

The costs of defending a suit covered by the policy will not be deducted from the limits of liability. The words "any suit" cannot be read to include any and all possible suits. Costs paid can only include what a reasonable insured would expect to be included in the defense of a claim for damages sought within the coverage of the policy. *Amex Assurance Company v. Allstate Insurance Company* (2003) 112 Cal.App.4th 1246.

Suspended Corporation

Underlying judgment was not a default judgment under Insurance Code section 1028 as insured filed an answer in accordance with Code of Civil Procedure section 580, and thus should have been considered by claims administrator as evidence of insurer's liability in liquidation proceedings. The insurer, who had assumed the defense of the insured in the underlying action, failed to intervene into the lawsuit in which the underlying judgment was obtained despite knowledge that the insured declined to participate in the trial after the insured's corporate status had been suspended. In addition, amount awarded in underlying judgment should not have been reduced because the judgment was binding on the insured, and thus the insurer, pursuant to Insurance Code section 11580. Further, although an insurer may not have waived any coverage defenses even though it failed to reserve its rights, it could be estopped from asserting such defenses. *Garamendi v. Golden Eagle Ins. Co.* (2003) 113 Cal.App.4th 861.

Third Party Beneficiary

Where, as is the case with medical payments coverage, a person is a third party beneficiary to an insurance contract, and the contract has not been rescinded, the party for whose benefit the contract was made may maintain an action against the promisor. The acts of the

contracting parties create a duty between the promisor and the third party. *Mercury Casualty Company v. Sharla Rae Maloney* (2003) 113 Cal.App.4th 799.

A third party beneficiary, here a medical payments coverage claimant, takes a contract "as she finds it" and cannot reject those portions of the contract not advantageous to her. A third party beneficiary may not assert greater rights than the actual contracting party. *Mercury Casualty Company v. Sharla Rae Maloney* (2003) 113 Cal.App.4th 799.

Title Insurance

Existence of fraud in the chain of title for real property was not a defect in title affecting marketability and triggering coverage under a standard title insurance policy. *Mortgage Associates, Inc. v. Fidelity and Deposit Company of Maryland* (2003) 105 Cal.App.4th 28.

Toxic Tort Damages – Medical Monitoring

Class certification in medical monitoring cases was proper in limited toxic tort situations wherein the plaintiffs could demonstrate, *inter alia*, that each individual's exposure or "dosage" was susceptible to common proof. *Lockheed Martin Corporation v. Superior Court (Carrillo)* (2003) 198 Cal.App.4th 24, *review granted, depublished and not citable*.

Uninsured Motorist

Uninsured motorist coverage did not cover an assault on the insured after a traffic accident. *California Automobile Ins. Co. v. Hogan* (2003) 112 Cal.App.4th 1292.

Use of Unpublished Opinions

Based on the Ninth Circuit's earlier ruling in *Nunez v. City of San Diego* (9th Cir. 1997) 114 F.3d 935, the Ninth Circuit may review unpublished California case law to "lend support" to arguments although such case law has no precedential value. *Employers Insurance of Wausau v. Granite State Insurance Company* (9th Cir. 2003) 330 F.3d 1214.

Venue

The California Court of Appeal, Third Appellate District, held that an unincorporated association with its principal business in one county may still be sued in another county where the statutory liability allegedly occurred. *Black Diamond Asphalt, Inc. v. Superior Court (C.I.G.A.)* (2003) 109 Cal.App.4th 166.

Waiver

Underlying judgment was not a default judgment under Insurance Code section 1028 as insured filed an answer in accordance with Code of Civil Procedure section 580, and thus should have been considered by claims administrator as evidence of insurer's liability in liquidation proceedings. The insurer, who had assumed the defense of the insured in the underlying action, failed to intervene into the lawsuit in which the underlying judgment was obtained despite knowledge that the insured declined to participate in the trial after the insured's corporate status had been suspended. In addition, amount awarded in underlying judgment should not have been reduced because the judgment was binding on the insured, and thus the insurer, pursuant to Insurance Code section 11580. Further, although an insurer may not have waived any coverage defenses even though it failed to reserve its rights, it could be estopped from asserting such defenses. *Garamendi v. Golden Eagle Ins. Co.* (2003) 113 Cal.App.4th 861.

Insurer did not waive its right to assert qualified pollution exclusion defense where it reserved all its rights under the terms, conditions and exclusions contained in its policies and there was no evidence that insurer intended for insured to believe that it would not enforce the exclusion or to establish that insured detrimentally relied upon insurer's alleged decision not to enforce the exclusion. *Westoil Terminals Co., Inc. v. Industrial Indemnity* (2003) 110 Cal.App.4th 139.

Workers' Compensation

California Insurance Guarantee Association does not guarantee an insolvent insurer's portion of workers' compensation claim where other insurance is available. Other insurance can be secondary, excess, or employer self-insurance. Workers' compensation statutory immunity from suit does not exempt self-insured employers from being included in "other available insurance" definition California Insurance Code section 1063.1(c)(9). *Denny's Inc. v. Workers' Compensation Appeals Board* (2003) 104 Cal.App.4th 1433.

An exclusion in an excess policy for payments in excess of regular workers' compensation benefits precluded coverage for a 10% penalty charged against a self-insured hospital for unreasonable withholding of benefits. *General Reinsurance Corp. v. St. Jude Hospital* (2003) 107 Cal.App.4th 1097.

The Insurance Commissioner possesses substantial experience and technical expertise regarding complex insurance regulations. The Commissioner's interpretation of regulations governing reporting of workers' compensation claims and impacting the determination of premium rates was entitled to judicial deference. *Simi Corporation v. Garamendi* (2003) 109 Cal.App.4th 1496, 03 C.D.O.S. 5670.

By law, workers' compensation insurers are required to charge a minimum premium and are allowed to make that premium non-refundable. *Rail Services of America v. State Compensation Insurance Fund* (2003) 110 Cal.App.4th 323.

There was nothing unfair, unlawful or arbitrary about a workers' compensation carrier charging an employer a non-refundable premium for what turned out to be only 15 days of coverage where insured was aware of and agreed to those terms. *Rail Services of America v. State Compensation Insurance Fund* (2003) 110 Cal.App.4th 323.

An insured may bring malicious prosecution claim against workers compensation insurer because an insurer's alleged malicious accusation of workers' compensation fraud is not within the scope of normal insurer activity, thus does not fall within the exclusivity rule of worker's compensation. Such a claim is outside the "compensation bargain." *Mosby v. Liberty Mutual Insurance Company* (2003) 110 Cal.App.4th 995.

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