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**2004 DEVELOPMENTS  
IN  
CALIFORNIA CASE LAW:  
INSURANCE**

A summary prepared by Gordon & Rees, LLP of the holdings, organized by topic, of cases published during 2004 which apply California law to issues bearing on the rights and duties of the insurance industry.

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**2004 DEVELOPMENTS IN  
CALIFORNIA INSURANCE CASE LAW**

**40 C.F.R. § 280**

Insurance companies providing Underground Storage Tank (“UST”) policies may not rescind these policies even when an insured makes a misrepresentation on an application. The Environmental Protection Agency’s (“EPA”) UST regulations provision providing for cancellation and future refusal to provide insurance is the insurers’ exclusive remedy. *Zurich American Ins. Co. v. Whittier Properties Inc.* (9th Cir. 2004) 356 F.3rd 1132.

**42 U.S.C. § 6991b**

Insurance companies providing Underground Storage Tank (“UST”) policies may not rescind these policies even when an insured makes a misrepresentation on an application. The Environmental Protection Agency’s (“EPA”) UST regulations provision providing for cancellation and future refusal to provide insurance is the insurers’ exclusive remedy. *Zurich American Ins. Co. v. Whittier Properties Inc.* (9th Cir. 2004) 356 F.3rd 1132.

**Administrative Remedies**

The primary jurisdiction doctrine mandates that disputes regarding insurance premiums under the California Automobile Assigned Risk Plan are determined by the Insurance Commissioner, or the CAARP committee with the specific expertise, not by the courts, as administrative remedies in such a case must be exhausted. *Jonathan Neil & Associates, Inc. v. Jones* (2004) 33 Cal.4th 917.

**Advertising Injury**

There is no duty to defend an alleged advertising injury absent a causal connection between advertising and the alleged injury. *We Do Graphics, Inc. v. Mercury Casualty Company* (2004) 124 Cal.App.4th 1392.

**Agents**

Although agents are generally not personally liable for conduct within their scope of employment, agents can nevertheless be personally liable for intentional misrepresentations or fraud. *McNeill v. State Farm Life Ins. Co.* (2004) 116 Cal.App.4th 597.

An insurer that employs “broker-agents” not formally designated to act for the insurer under Insurance Code § 1704 violates unfair competition laws. *Krumme v. Mercury Insurance Company* (2004) 123 Cal.App.4th 924.

### **Agents and Brokers**

A false representation by an independent broker to his insured-client that he had procured broader insurance coverage than was actually provided could not be imputed to the insurance company. There was no evidence that the insurance company ratified the broker's conduct or vested the broker with actual or ostensible authority to bind the broader coverage. *Rios v. Scottsdale Insurance Company* (2004) 119 Cal.App.4th 1020.

An insurance broker who knowingly makes false statements on an insurance application may be held liable to an insurer that reasonably relies on the statements. *Century Surety Company v. Crosby Insurance, Inc.* (2004) 124 Cal.App.4th 116.

### **Alternative Dispute Resolution Disqualification of Judges**

A judge should recuse himself or herself when the litigation involves an issue relating to the appointment of an alternative dispute resolution provider. *Hartford Casualty Insurance Company v. Superior Court (C3 Entertainment, Inc.)* (2004) 125 Cal.App.4th 250, *rv. granted and dismissed, not citable.*

### **Anti-SLAPP Statute**

Section 425.16, subdivision (b)(1) defines the class of claims subject to an anti-SLAPP motion. These include a cause of action "arising from" an "act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue." Under the statute, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connect with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law. Section 412.16 subd (e). *Dickens v. Provident Life & Accident Ins. Co.* (2004) 117 Cal.App.4th 705.

### **Appeals**

If an insured proves breach of the implied covenant of good faith and fair dealing at trial and successfully defends against an insurance company's appeal of that decision, the insured may collect attorneys' fees reasonably incurred in defending against that appeal. *McGregor v. Paul Revere Life Insurance Company* (9th Cir. 2004) 369 F.3d 1099.

### **Appellate Review**

An appellate court must review the validity of a regulation and the authority of the Insurance Commissioner to enact the regulation by conducting an independent examination.



(See 20<sup>th</sup> Century Ins. Co. v. Garamendi (1994) 8 Cal.4<sup>th</sup> 216, 271-272). *State Farm Mutual Automobile Insurance Company v. Garamendi* (2004) 32 Cal.4<sup>th</sup> 1029.

### **Appellate Review: Abuse of Discretion**

Vicki Jordan made a claim for disability benefits. Her disability plan expressly conferred discretion on the plan administrator, both to construe the terms of the plan and to make factual determinations. Jordan's claim was denied twice, and Jordan filed suit. The District Court granted MetLife's motion for summary judgment. On appeal, Jordan argued that the administrator arbitrarily denied her claim. The Ninth Circuit disagreed. An ERISA determination is reviewed de novo, unless the plan unambiguously confers discretion on the administrator. *Kearney v. Standard Insurance Co.* (9<sup>th</sup> Cir. 1999) 175 F.3d 1084, 1089. Because the MetLife Plan conferred discretion on the administrator, the Court concluded that the standard of review was abuse of discretion and not de novo review. Under the abuse of discretion standard, the Court can set aside the administrator's decision only if the factual findings concerning whether a claimant is disabled are "clearly erroneous." *Jones v. Laborers Health & Welfare Trust Fund* (9<sup>th</sup> Cir. 1990) 906 F.2d 480, 482. The Court found that the administrator did not abuse her discretion because she considered all available evidence. The Court also observed that a "treating physician's opinion gets no special weight and can be rejected on the basis of reliable evidence with no discrete burden of explanation." See, *Black & Decker Disability Plan v. Nord* (2003) 123 S.Ct. 1965. *Jordan v. Northrop Grumman Corp. Welfare Benefit Plan* (9<sup>th</sup> Cir. 2004) 370 F.3d 869.

### **Arbitration Awards**

California Code of Civil Procedure section 1286 provides a court with limited jurisdiction over arbitration awards. Pursuant to section 1286, a court must either confirm the award as made, correct it, or vacate it within the time prescribed by section 1288. Section 1288 states, in pertinent part, as follows: "a petition to confirm an award shall be served and filed not later than four years after the date of service of a signed copy of the award on the petitioner." (CCP 1288.) "A petition to vacate an award or to correct an award shall be served and filed not later than 100 days after the date of the service of the signed copy of the award on the petitioner." (Id.) [emphasis added.] These deadlines are strictly followed regardless of the inequities they might cause. (See, *Weinberg, supra*, [court confirmed an arbitration award into a money judgment against an insurance carrier far in excess of the policy limits]; see also *Louise Gardens of Encino Homeowners' Assn., Inc. v. Truck Ins. Exchange, Inc.* (2000) 82 Cal.App.4<sup>th</sup> 648, 659 ["A party who fails to timely file a petition to vacate under section [1286.2] may not thereafter attack that award by other means on grounds which would have supported an order to vacate."].) *Weinberg v. Safeco Insurance Company* (2004) 114 Cal.App.4<sup>th</sup> 1075).

### **Architects Practice Act**

Under Bus. & Profession Code Section 5500-5610.7, otherwise known as the Architects Practice Act, "settlement" is an agreement which means the parties have agreed to resolve their problems outside the courtroom. *Attorney General Opinion*, 04 C.D.O.S. 7949.

### **Attorney-Client Privilege**

The Common Interest Doctrine is appropriately characterized under California law as a non-waiver doctrine to be analyzed under standard waiver principles applicable to the attorney-client privilege and the work product doctrine. The party seeking to invoke the Common Interest Doctrine must (1) establish that the communicated information would otherwise be protected from disclosure by attorney-client privilege or the work product doctrine, and 2) demonstrate that such privileges were not waived. *OXY Resources California LLC v. Superior Court (Calpine Natural Gas LP)* 116 Cal.App.4th 2136.

An attorney's notes reflecting the attorney's impressions of an expert witness' statement are absolutely privileged. Opposing counsel inadvertently receiving such privileged notes must refrain from examining the materials any more than it is necessary to determine they are privileged, and immediately notify the sender that he has received the potentially privileged documents. If the opposing attorney fails to take these steps, she may be disqualified, along with her client's experts, if they also received and reviewed the privileged materials. *Rico v. Mitsubishi Motors Corp, et al.* (2004) 116 Cal. App. 4<sup>th</sup> 51.

### **Attorney Fees**

"Attorney fees" mean the "rate" of pay for counsel, not the entire "cost" or "expense" of the defense. *Gray Cary Ware & Freidenrich v. Vigilant Ins. Co.* (2004) 114 Cal.App.4th 1185.

A developer is not entitled to seek recovery of its attorney's fees from subcontractors, where the developer's insurer fully paid the attorney's fees. Even if the subcontractors were contractually obligated to reimburse the developer for its fees, the developer sustained no damages as a result of this alleged breach of contract. *Bramalea California, Inc. v. Reliable Interiors, Inc.* (2004) 119 Cal.App.4th 468.

In an ERISA action, a plan participant or beneficiary "should ordinarily recover attorneys' fees unless special circumstances would render the award unjust." *Carpenters Health and Welfare Trust for Southern California v. Vonderharr* (9th Cir. 2004) 384 F.3d 667.

### **Attorneys' Fees and § 17200**

While Business and Professions Code section 17200 is important for vindicating the rights of the public, it is not, in combination with California Code of Civil Procedure section 1021.5, "a license to bounty hunt for niggling statutory violations that neither harm no threaten

anyone.” Accordingly, the Court of Appeal affirmed lower court ruling denying plaintiff’s motion for attorneys’ fees. *Baxter v. Salutory Sportsclubs, Inc.* (2004) 122 Cal.App.4th 941.

### **Attorneys’ Fees Under California Code of Civil Procedure § 1021.5**

California Code of Civil Procedure section 1021.5 allows recovery of attorneys’ fees for those parties who provide a significant benefit to the public; attorneys’ fees should not be awarded under section 1021.5 if a private party brought the action under the guise of helping the public while actually providing “duplicative, unnecessary, and valueless services.” *Baxter v. Salutory Sportsclubs, Inc.* (2004) 122 Cal.App.4th 941.

### **Automobile Insurance**

The trial court applied the wrong criteria when it denied class certification in a case alleging that replacement car parts were not of "like kind and quality" as original car parts. Class certification requires predominant common questions of law or fact and plaintiffs had sufficient evidence on procedural grounds to meet this requirements for class certification. The phrase "like kind and quality" within automobile insurance policies refers to a part's material and suitability, not its age or extent of use. *Lebrilla v. Farmers Group, Inc.* (2004) 119 Cal.App.4th 1070.

### **Automobile Insurance: "Ownership, Maintenance or Use"**

Agreement to cover bodily injury resulting from “the ownership, maintenance or use” of an insured auto did not apply to injuries sustained by plaintiff who was bitten by a dog which jumped from the insured’s parked pickup truck. *State Farm Mutual Insurance Company v. Grisham* (2004) 122 Cal.App.4th 563.

### **Bad Faith: Discovery**

A plaintiff alleging an unpleaded bad faith claim that its insurer had a discriminatory claims handling process was entitled to discovery of claims files of other claimants, but only after obtaining individual authorizations from the insureds whose files were being produced. *Permanent General Assurance Corp. v. Superior Court (Hernandez)* (2004) 115 Cal.App.4th 874, review denied (1/19/05), *depublished and not citable*.

While the potential for punitive damages does not itself under *State Farm v. Campbell* make conduct toward other insureds relevant, such conduct may be relevant where, for example, the insured alleges “repeated or habitual discriminatory denial or handling of claims.” *Permanent General Assurance Corp. v. Superior Court (Hernandez)* (2004) 119 Cal.App.4th 874, review denied (1/19/05), *depublished and not citable*.

### **Bad Faith: Standard Defenses Under Arizona Law**

Under Arizona law, a claim for bad faith arises “when the insurance company intentionally denies, fails to process or pay a claim without a reasonable basis for such action.” *Noble v. Nat’l Am. Life Ins. Co.*, 624 P.2d 866, 868 (Ariz. 1981). Prior to 2000, Arizona courts generally held that “[a] bad faith claim cannot exist for claims that are ‘fairly debatable.’” *Tobel v. Travelers Ins. Co.*, 988 P.2d. 148 (Ariz. App.1999) (citing Nobel, 624 P.2d at 868). In *Zilisch v. State Farm Mut. Auto. Ins. Co.*, 995 P.2d 276 (Ariz. 2000), the Arizona Supreme Court changed its approach somewhat, find that: “The appropriate inquiry is whether there is sufficient evidence from which a reasonable juror could conclude that in the investigation, evaluation, and processing of the claim, the insurer acted unreasonably and either knew or was conscious of the fact that its conduct was unreasonable.” (995 P.2d at 280). *Prieto v. Paul Revere Ins. Co.* (9th Cir. 2004) 354 F.3d 1005.

### **Binders**

“An insurance binder may be deemed an insurance policy ‘only for the purpose of proving that the insured has the insurance coverage specified in the binder.’” *Rios v. Scottsdale Insurance Company* (2004) 119 Cal.App.4th 1020.

### **Breach of Implied Covenant**

Court reduced a punitive damage award to four times the amount of compensatory damages holding that the proportionality between the punitive and compensatory damages must focus on the amount awarded for breach of the covenant and exclude amounts awarded under breach of contract. *Textron Financial Corporation v. National Union Fire Ins. Co. of Pittsburgh, Pennsylvania* (2004) 118 Cal.App.4th 1061.

### **Brokers**

The statute of limitations for a professional malpractice action against an insurance broker is not tolled until the insurer formally denies the insured’s claim. This tolling principle only applies to suits against insurers to allow the claims process to function effectively. Tolling the statute of limitations for actions against insurers allows the insurer to fully investigate the claim before the insured is required to file suit. The tolling principle has no application in suits against insurance brokers who do not investigate claims. *Hydro-Mill Company, Inc. v. Hayward, Tilton & Rolapp Insurance Association, Inc.* (2004) 115 Cal.App.4th 1145.

### **Building Code Upgrade "Ordinance Or Law" Exclusion**

Exclusion for costs associated with building code upgrades not applicable when policy guarantees 100% replacement cost coverage. *Fire Ins. Exchange v. Superior Court (Altman)* (2004) 116 Cal.App.4th 446.

**Business & Professions Code § 5500 – 5610.7**

Under Bus. & Profession Code Section 5500-5610.7, otherwise known as the Architects Practice Act, "settlement" is an agreement which means the parties have agreed to resolve their problems outside the courtroom. *Attorney General Opinion*, 04 C.D.O.S. 7949.

**Business & Professions Code § 17200**

While Business and Professions Code section 17200 is important for vindicating the rights of the public, it is not, in combination with California Code of Civil Procedure section 1021.5, "a license to bounty hunt for niggling statutory violations that neither harm no threaten anyone." Accordingly, the Court of Appeal affirmed lower court ruling denying plaintiff's motion for attorneys' fees. *Baxter v. Salutory Sportsclubs, Inc.* (2004) 122 Cal.App.4th 941

**California Approved Form Endorsements**

California Approved Form endorsements are required to limit or restrict coverage in workers' compensation policies. *General Casualty Insurance v. Workers' Compensation Appeals Board* (2004) 123 Cal.App.4th 202.

**California Code of Regulations 2646.6**

California Code of Regulations 2646.6, which requires community service statements and Record A data to be filed with the Insurance Commissioner and allows public disclosure of that information is valid and does not contain a trade secret exception to the public disclosure provision. *State Farm Mutual Automobile Insurance Company v. Garamendi* (2004) 32 Cal.4th 1029.

**California Procedure**

The trial court applied the wrong criteria when it denied class certification in a case alleging that replacement car parts were not of "like kind and quality" as original car parts. Class certification requires predominant common questions of law or fact and plaintiffs had sufficient evidence on procedural grounds to meet this requirements for class certification. The phrase "like kind and quality" within automobile insurance policies refers to a part's material and suitability, not its age or extent of use. *Lebrilla v. Farmers Group, Inc.* (2004) 119 Cal.App.4th 1070.

**Child Insurance Benefits**

Posthumously-conceived biological children of deceased wage earner entitled to child's insurance benefits under the Social Security Act. *Gillett-Netting v. Barnhart*, (9th Cir. 2004) 371 F.3d 593.

### **Choice of Law**

Where appellate court reverses district court on choice of law determination, upon remand a Code of Civil Procedure section 170.6 peremptory challenge is not permissible. *State Farm Mutual Automobile Ins. Co. v. Superior Court (Hill)* (2004) 121 Cal.App.4th 490.

### **CIGA**

The California Insurance Guarantee Association (“CIGA”) may not reduce payments to an insured by the amounts she received under her federal Social Security Disability Insurance or State of California’s unemployment compensation insurance when the claim submitted to her insolvent insurer, and hence CIGA, was for uninsured motorist benefits and a “covered claim.” The disability benefits received do not constitute “covered claims” within the meaning of CIGA’s statutory scheme. *Cole v. California Insurance Guarantee Association* (2004) 122 Cal.App.4th 552.

CIGA denied liability for a claim made by the Employment Development Department (“EDD”), arguing that since EDD is a state agency, its lien is excluded from the definition of “covered claims” in section 1063.1(c)(4) of the Insurance Code. The Workers’ Compensation Appeals Board ruled the EDD lien is “an ‘obligation’ to the injured worker and not to the ‘state.’” The California Court of Appeals reversed the Board’s decision, noting that “Subdivision (c)(4) [of Insurance Code section 1063.1] plainly and unambiguously excludes from the definition of ‘covered claims’ obligations to the State” and concluded, “The logical, inescapable conclusion is that the EDD lien is an obligation to the State and is not a covered claim that CIGA is obligated to pay.” *CIGA v. Workers’ Compensation Appeals Board* (2004) 117 Cal.App.4th 350.

Insurance Code Section 11663 applies to allocate payment of the workers’ compensation benefits as between workers’ compensation insurers and does not limit the employers’ joint and several liability. California Insurance Guarantee Association is not an insurer, therefore the allocation method provided for in Insurance Code section 11663 does not apply to CIGA. *General Casualty Insurance v. Workers’ Compensation Appeals Board* (2004) 123 Cal.App.4th 202.

Where temp agency’s employer’s workers’ compensation insurer is liquidated, CIGA does not cover temporary worker’s claims which must be covered by temporary employer’s workers’ compensation insurer. *General Casualty Insurance v. Workers’ Compensation Appeals Board* (2004) 123 Cal.App.4th 202.

### **Civil Code § 1649**

Civil Code Section 1649 “does not, as Disney suggests, mean the promisor’s subjective intent controls. The rule is instead designed to override the promisor’s subjective intent whenever necessary to protect the promisee’s objectively reasonable expectations.” *Wolf v. Superior Court (Walt Disney Pictures and Television)* (2004) 114 Cal.App.4th 1343.

Failure of policy to direct insured's attention to single-page endorsement which limited coverage rendered exclusion unenforceable. *Haynes v. Farmers Insurance Exchange* (2004) 32 Cal.4th 1198.

### **Civil Code § 2860**

California Code of Civil Procedure § 2860 only provides arbitration for disputes over the fees paid to the independent counsel for the insured, not for disputes over loss. *Gray Cary Ware & Freidenrich v. Vigilant Ins. Co.* (2004) 114 Cal.App.4th 1185.

### **Civil Code § 2860(c)**

While the parties are free to broaden the scope of an arbitration by agreement, § 2860(c) provides for arbitration solely on the issue of "attorney fees," not disputes regarding *Cumis* "expenses." *Gray Cary Ware & Freidenrich v. Vigilant Ins. Co.* (2004) 114 Cal.App.4th 1185.

### **Class Action**

Proposed class representatives were unable to meet commonality or superiority requirements for class certification where the homeowners challenged insurers' handling of earthquake related damage claims because each putative class member's recovery involved an individual assessment of his property, the damage sustained and the actual claims practiced employed. *Newell v. State Farm Gen'l Ins. Co.* 118 Cal.App.4th 1094.

The trial court applied the wrong criteria when it denied class certification in a case alleging that replacement car parts were not of "like kind and quality" as original car parts. Class certification requires predominant common questions of law or fact and plaintiffs had sufficient evidence on procedural grounds to meet this requirements for class certification. The phrase "like kind and quality" within automobile insurance policies refers to a part's material and suitability, not its age or extent of use. *Lebrilla v. Farmers Group, Inc.* (2004) 119 Cal.App.4th 1070.

### **Class Certification**

The trial court applied the wrong criteria when it denied class certification in a case alleging that replacement car parts were not of "like kind and quality" as original car parts. Class certification requires predominant common questions of law or fact and plaintiffs had sufficient evidence on procedural grounds to meet this requirements for class certification. The phrase "like kind and quality" within automobile insurance policies refers to a part's material and suitability, not its age or extent of use. *Lebrilla v. Farmers Group, Inc.* (2004) 119 Cal.App.4th 1070.

**Code of Civil Procedure § 170.3(b)(4)**

Code of Civil Procedure § 170.3(b)(4) does not apply where a judge should have been disqualified prior to ruling on an issue; the general rules applying to disqualified judges apply to rulings made after a judge should have been disqualified, which do not require a showing of good cause. *Hartford Casualty Insurance Company v. Superior Court (C3 Entertainment, Inc.)* (2004) 125 Cal.App.4th 250, *rv. granted and dismissed, not citable*.

**Code of Civil Procedure § 170.6**

The Court of Appeal concluded that a preemptory challenge is permitted under section 170.6(a)(2) where: (1) a trial court's decision or final judgment is made in conjunction with a "trial" and; (2) a subsequent reversal of that decision results in a "new trial." Applying this test, the Court of Appeal concluded that preemptory is impermissible where court of appeal remanded to district court reversing district court's decision on choice of law determination. The Court of Appeal viewed remand as ministerial in nature and not a retrial of any issues. *State Farm Mutual Automobile Ins. Co. v. Superior Court (Hill)* (2004) 121 Cal.App.4th 490.

**Code of Civil Procedure § 340.9**

Section 340.9 is inapplicable to malpractice suit against a broker which failed to place property insurance on certain leased properties damaged in the Northridge earthquake. *Hydro-Mill Company, Inc. v. Hayward, Tilton & Rolapp Insurance Association, Inc.* (2004) 115 Cal.App.4th 1145.

**Code of Civil Procedure § 425.16 (anti-SLAPP provision)**

A law firm and its client-insurer, defendants in a malicious prosecution action, filed a special motion to strike pursuant to CCP § 425.16 (anti-SLAPP motion) contending the fact they successfully defended against a motion for summary judgment in the underlying action meant plaintiff could not carry his burden in opposing the motion, i.e., show a probability that he will prevail on his claim. The court rejected this contention stating a de novo review of the evidence in the underlying action may still result in a finding defendants filed the underlying action without probable cause and with malice. *Slaney v. Ranger Insurance Company* (2004) 115 Cal.App.4th 306.

**Code of Civil Procedure § 656**

Court looked to definition of new trial in Code of Civil Procedure § 656 and case law interpreting it to interpret undefined "new trial" in Code of Civil Procedure § 170.6. *State Farm Mutual Automobile Ins. Co. v. Superior Court (Hill)*(2004) 121 Cal.App.4th 490.



### **Code of Civil Procedure § 998**

“In interpreting section 998, the court has placed squarely on the offering party the burden of demonstrating that the offer is a valid one under section 998. The corollary to this rule is that a section 998 offer must be strictly construed in favor of the party sought to be subjected to its operation. Further, while the statute contemplates that an offer made pursuant to its terms may properly include nonmonetary terms and conditions, the offer itself must, nonetheless, be unconditional.” Thus, joint offers contingent upon all parties’ acceptance are invalid under the statute. (*Id.*) However, not all joint offers are invalid. The general rule with regard to joint offers is that “offers made to multiple parties [are] valid only if it is expressly apportioned among them and not conditioned on acceptance by all of them. A single, lump sum offer to multiple plaintiffs which require them to agree to apportionment among themselves is not valid.” (*Id.* [citing *Santantonio v. Westinghouse Broadcasting Co.* (1994) 25 Cal.App.4th 102, 112].) Therefore, “to be effective, an offer to multiple parties under section 998 must be explicitly apportioned among the parties to whom the offer is made so that each offeree may accept or reject the offer individually.” (*Id.* [citing *Palmer v. Schindler Elevator Corp.* (2003) 108 Cal.App.4th 154, 157].) The exception to the general rule on joint offers is where the parties have a unity of interest such that there is a single, indivisible injury. (See, *Santantonio, supra*, 25 Cal.App.4th at 114.) Under these circumstances, a joint, nonapportioned single sum offer is valid under the statute. *Weinberg v. Safeco Insurance Company* (2004) 114 Cal.App.4th 1075.

### **Code of Civil Procedure § 1021.5**

California Code of Civil Procedure section 1021.5 allows recovery of attorneys’ fees for those parties who provide a significant benefit to the public; attorneys’ fees should not be awarded under section 1021.5 if a private party brought the action under the guise of helping the public while actually providing “duplicative, unnecessary, and valueless services.” *Baxter v. Salutory Sportsclubs, Inc.* (2004) 122 Cal.App.4th 941.

### **Code of Civil Procedure § 1286**

California Code of Civil Procedure section 1286 provides a court with limited jurisdiction over arbitration awards. Pursuant to section 1286, a court must either confirm the award as made, correct it, or vacate it within the time prescribed by section 1288. Section 1288 states, in pertinent part, as follows: “a petition to confirm an award shall be served and filed not later than four years after the date of service of a signed copy of the award on the petitioner.” (CCP 1288.) “A petition to vacate an award or to correct an award shall be served and filed not later than 100 days after the date of the service of the signed copy of the award on the petitioner.” (*Id.*) [emphasis added.] These deadlines are strictly followed regardless of the inequities they might cause. (See, *Weinberg, supra*, [court confirmed an arbitration award into a money judgment against an insurance carrier far in excess of the policy limits]; see also *Louise Gardens of Encino Homeowners’ Assn., Inc. v. Truck Ins. Exchange, Inc.* (2000) 82 Cal.App.4th 648, 659 [“A party who fails to timely file a petition to vacate under section [1286.2] may not thereafter attack that award by other means on grounds which would have supported an order to vacate.”].) *Weinberg v. Safeco Insurance Company* (2004) 114 Cal.App.4th 1075).

### **Code of Civil Procedure § 1288**

California Code of Civil Procedure section 1286 provides a court with limited jurisdiction over arbitration awards. Pursuant to section 1286, a court must either confirm the award as made, correct it, or vacate it within the time prescribed by section 1288. Section 1288 states, in pertinent part, as follows: “a petition to confirm an award shall be served and filed not later than four years after the date of service of a signed copy of the award on the petitioner.” (CCP 1288.) “A petition to vacate an award or to correct an award shall be served and filed not later than 100 days after the date of the service of the signed copy of the award on the petitioner.” (Id.) [emphasis added.] These deadlines are strictly followed regardless of the inequities they might cause. (See, *Weinberg, supra*, [court confirmed an arbitration award into a money judgment against an insurance carrier far in excess of the policy limits]; see also *Louise Gardens of Encino Homeowners’ Assn., Inc. v. Truck Ins. Exchange, Inc.* (2000) 82 Cal.App.4th 648, 659 [“A party who fails to timely file a petition to vacate under section [1286.2] may not thereafter attack that award by other means on grounds which would have supported an order to vacate.”].) *Weinberg v. Safeco Insurance Company* (2004) 114 Cal.App.4th 1075).

### **Collapse**

The Ninth Circuit Court of Appeal held that under Washington Law, the collapse provision in an insurance policy includes both actual and imminent collapse. In policies providing coverage for "risk of direct physical loss," Washington law does not require actual collapse. Rather, the date of loss is the earliest of either: (1) the date of actual collapse; or (2) the date when the decay which poses the risk of collapse is no longer obscured from view. *Assurance Company of America v. Wall & Associates LLC of Olympia* (9th Cir. 2004) 379 F.3d 557 .

### **Collection of Premium**

Workers compensation insurers’ failure to collect a premium for claims is not relevant to determination of whether coverage exists. *General Casualty Insurance v. Workers’ Compensation Appeals Board* (2004) 123 Cal.App.4th 202.

### **Commercial Landlord-Tenant Relationship**

Exculpatory clause in favor of landlord in commercial real property does not absolve landlord for active negligence, unless lease expressly discusses active negligence. *Burnett v. Chimney Sweep* (2004) 123 Cal.App.4th 1057 .

### **Common Interest Doctrine**

The Common Interest Doctrine is appropriately characterized under California law as a non-waiver doctrine to be analyzed under standard waiver principles applicable to the attorney-client privilege and the work product doctrine. The party seeking to invoke the Common Interest

Doctrine must 1) establish that the communicated information would otherwise be protected from disclosure by attorney-client privilege or the work product doctrine, and 2) demonstrate that such privileges were not waived. *OXY Resources California LLC v. Superior Court (Calpine Natural Gas LP)* 116 Cal.App.4th 2136.

The common interest shared by parties does not disappear once their business transaction is complete, as, arguably, the parties then have an even stronger common interest. *OXY Resources California LLC v. Superior Court (Calpine Natural Gas LP)* 116 Cal.App.4th 2136.

If the predicate findings for application of the common interest doctrine are present, then any party sharing the common interest has standing to object to the production of documents protected from disclosure by the doctrine. The question is not who holds the document, but whether the party asserting the privilege has demonstrated that the documents are privileged and that there has been no waiver by disclosure. *OXY Resources California LLC v. Superior Court (Calpine Natural Gas LP)* 116 Cal.App.4th 2136.

To avoid waiver, the parties asserting the Common Interest which exchange information must have a reasonable expectation that such information disclosed will remain confidential and the disclosure must be reasonably necessary to accomplish the purpose for which the attorney was consulted. *OXY Resources California LLC v. Superior Court (Calpine Natural Gas LP)* 116 Cal.App.4th 2136.

### **Comprehensive General Liability**

Construction company did not suffer “property damage” within the meaning of a CGL policy when it modified equipment to meet design specifications. *F & H Construction v. ITT Hartford Ins. Co.* (2004) 118 Cal.App.4th 364.

### **Condition Precedent: Examination Under Oath**

Failure of the named insured to submit to an examination under oath, pursuant to the terms of the policy, bars the insured's actions against the insurer for claimed loss. Cases in support of this holding include: *Hickman v. London Assurance Corp.* (1920) 184 Cal. 524, *Global Indemnity Co. v. Superior Court* (1992) 6 Cal.App.4th 725, *Robinson v. National Auto Ins. Co.* (1955) 132 Cal.App.2d 709 and *West v. State Farm Fire and Cas. Co.* (9th Cir. 1989) 868 F.2d 348. *Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, is distinguishable, as in that case there was evidence in the record that the insured's failure to submit to an examination under oath was due to conduct by the insurer. *California Fair Plan Association v. Superior Court (Darwish)* (2004) 115 Cal.App.4th 158.

### **Conflict of Interest**

Former representation of an insurance company mandated an attorney's disqualification as counsel for plaintiffs alleging bad faith denial of coverage by the same insurance company. *Farris v. Fireman's Fund Ins. Co.* (2004) 119 Cal.App.4th 671.

### **Conflict of Interest and Disqualification of Attorneys**

An attorney engaged in employment adverse to a former client is subject to disqualification where a “substantial relationship” exists between the lawyer’s current employment and the lawyer’s representation of the former client. *Brand v. 20<sup>th</sup> Century Insurance Company* (2004) 124 Cal.App.4th 594.

A “substantial relationship” is presumed when it appears by virtue of the nature of the former representation or the relationship of the attorney to his former client, confidential information material to the current dispute would normally have been imparted to the attorney or to subordinates for whose legal work he was responsible. *Brand v. 20<sup>th</sup> Century Insurance Company* (2004) 124 Cal.App.4<sup>th</sup> 594.

An attorney is subject to disqualification in a successive representation case if the nature of the representation is such that confidences *would* have been exchanged between the lawyer and the client. Courts will conclusively presume they were exchanged, and disqualification will be required. A limited exception exists where the lawyer can show there was no opportunity for confidential information to be divulged. However, the limited exception is not available when the lawyer’s former and current employment are on opposite sides of the very same matter or the current matter involves the work the lawyer performed for the former client. *Brand v. 20<sup>th</sup> Century Insurance Company* (2004) 124 Cal.App.4<sup>th</sup> 594.

### **Contribution**

A personal umbrella insurer is obligated to contribute to the defense of an auto accident case where the settlement exceeds the primary policy limits. *Mercury Insurance Company v. Allstate Insurance Company* (2004) 123 Cal.App.4th 1392.

### **Construction Defect**

Subcontractor’s work in erecting a sign was negligent including improper welding and modifications of the bolts connecting the various steel components of the sign. The Nevada Supreme Court viewed improper welding or general negligent acts as intangible, economic injuries and not the type of physical, tangible injury or destruction to property that a reasonable person would contemplate as covered under the policy. As such, the Court concluded there was no potential coverage and thus no duty to defend. *United National Ins. Co. v. Frontier Ins. Co.*, (Nev. 2004) 99 P.3d 1153.

### **Contract Interpretation**

It is reversible error for a trial court to refuse to consider such extrinsic evidence on the basis of the trial court’s own conclusion that the language of the contract appears to be clear and unambiguous on its face. Even if a contract appears unambiguous on its face, a latent ambiguity may be exposed by extrinsic evidence which reveals more than one possible meaning to which

the language of the contract is yet reasonably susceptible. *Wolf v. Superior Court (Walt Disney Pictures and Television)* (2004) 114 Cal.App.4th 1343.

The interpretation of a contract involves “a two-step process: ‘First the court provisionally receives (without actually admitting) all credible evidence concerning the parties’ intentions to determine “ambiguity,” i.e., whether the language is “reasonably susceptible” to the interpretation urged by a party. If in light of the extrinsic evidence the court decides the language is “reasonable susceptible” to the interpretation urged, the extrinsic evidence is then admitted to aid in the second step—interpreting the contract. The trial court’s determination of whether an ambiguity exists is a question of law, subject to independent review on appeal. [The second step is t]he trial court’s resolution of an ambiguity [which] is also a question of law if no parol evidence is admitted or if the parol evidence is not in conflict. However, where the parol evidence is in conflict, the trial court’s resolution of that conflict is a question of fact and must be upheld if supported by substantial evidence. Furthermore, “[w]hen two equally plausible interpretations of the language of a contract may be made . . . parol evidence is admissible to aid in interpreting the agreement, thereby presenting a question of fact which precludes summary judgment if the evidence is contradictory.’” *Wolf v. Superior Court (Walt Disney Pictures and Television)* (2004) 114 Cal.App.4th 1343.

Where “there is no evidence in this case of objective manifestations of the parties’ intent, and [ ] the term at issue is undefined in the parties’ contract, the only way to construe the meaning of the term “gross receipts” is to consider the nature of the contract and the circumstances under which the parties negotiated.” *Wolf v. Superior Court (Walt Disney Pictures and Television)* (2004) 114 Cal.App.4th 1343.

The offered evidence of industry custom and usage revealed the term “gross receipts” had more than one possible meaning. Thus, the industry expert’s statements of fact were relevant and admissible to expose the latent ambiguity in the contract language regarding the industry’s customary usage of the term. *Wolf v. Superior Court (Walt Disney Pictures and Television)* (2004) 114 Cal.App.4th 1343.

Civil Code Section 1649 “does not, as Disney suggests, mean the promisor’s subjective intent controls. The rule is instead designed to override the promisor’s subjective intent whenever necessary to protect the promisee’s objectively reasonable expectations.” *Wolf v. Superior Court (Walt Disney Pictures and Television)* (2004) 114 Cal.App.4th 1343.

Where there is no evidence of what the parties intended a particular undefined term to mean when entering into a contract, the court considered a legal dictionary and a prior appellate decision before focusing on expert testimony regarding custom and usage of that term in the particular industry. *Wolf v. Superior Court (Walt Disney Pictures and Television)* (2004) 114 Cal.App.4th 1343.

Where there is a conflict between an insurance policy exclusion which precludes coverage and the "additional coverage" section which grants coverage, an ambiguity exists requiring the court to analyze the "reasonable expectations" of the insured. *Jordan v. Allstate Ins. Co.* (2004) 116 Cal.App.4th 1206.

To construe the exception to the vehicle theft exclusion, and specifically the word "upon," as applying only to situations in which the insured is inside or physically touching the vehicle would upset the reasonable expectations of the insured. *E.M.M.I., Inc. v. Zurich American Insurance Co.* (2004) 32 Cal.4th 465.

“Accepting Zurich's interpretation would require that we give different meanings to the same term used in the same policy paragraph. This would run afoul of the rule of contract interpretation that [HN13] the same word used in an instrument is generally given the same meaning unless the policy indicates otherwise. (See, e.g., *Palmer v. Truck Ins. Exchange* (1999) 21 Cal.4th 1109, 1116-1117; *Victoria v. Superior Court* (1985) 40 Cal.3d; *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2003) 107 Cal.App.4th 516, 526.” *E.M.M.I., Inc. v. Zurich American Insurance Co.* (2004) 32 Cal.4th 465.

“This historical meaning of the words used in a policy, however, does not illuminate the meaning of the policy language to a reasonable layperson in contemporary times, who may well be unaware of this historical meaning. Even accepting that the words once unambiguously referred to horses and horse-drawn carriages, that clarity loses its luster when applied to "vehicles" in a modern insurance policy. That is, words that may once have been unambiguous, are not necessarily so when the context of their usage has changed.” *E.M.M.I., Inc. v. Zurich American Insurance Co.* (2004) 32 Cal.4th 465.

Construction company did not suffer “property damage” within the meaning of a CGL policy when it modified equipment to meet design specifications. *F & H Construction v. ITT Hartford Ins. Co.* (2004) 118 Cal.App.4th 364.

The trial court applied the wrong criteria when it denied class certification in a case alleging that replacement car parts were not of "like kind and quality" as original car parts. Class certification requires predominant common questions of law or fact and plaintiffs had sufficient evidence on procedural grounds to meet this requirements for class certification. The phrase "like kind and quality" within automobile insurance policies refers to a part's material and suitability, not its age or extent of use. *Lebrilla v. Farmers Group, Inc.* (2004) 119 Cal.App.4th 1070.

Court upheld exclusions for damage to land as being "clear and explicit," such that there is no coverage for damage to land underneath a dwelling. *Fire Ins. Exchange v. Superior Court (Altman)* (2004) 116 Cal.App.4th 446.

### **Contract Interpretation: Reasonable Expectations of Insured (Cal.Civ. Code 1649)**

Failure of policy to direct insured’s attention to single-page endorsement which limited coverage rendered exclusion unenforceable. *Haynes v. Farmers Insurance Exchange* (2004) 32 Cal.4th 1198.

### **Contribution**

The effect of the indemnity provision in an underlying contract on an insurer's obligations will not be superceded by an insurer's right to contribution when the indemnity provision speaks directly to the issue. Each case will turn on its own facts. However, where there are two levels of insurance, i.e., a primary and excess carrier, the indemnity provision will not prevail to preclude a contribution suit amongst insurers because the risks involved in providing primary coverage differ from those involved in issuing an excess policy. *Hartford Casualty Insurance Co. v. Mt. Hawley Insurance Co.* (2004) 123 Cal.App.4th 278.

### **Costs**

"Costs" or "expense," as opposed to "attorney fees," is the amount charged for something. *Gray Cary Ware & Freidenrich v. Vigilant Ins. Co.* (2004) 114 Cal.App.4th 1185.

### **Damages**

An insured's residential insurance policies did not insure against diminution in market value as a result of the property's environmental condition because such diminution in value did not constitute "damages" within the meaning of those policies. *Block v. Golden Eagle Insurance Corporation* (2004) 121 Cal.App.4th 186.

Where insured's parts were incorporated into plaintiffs' water systems and allegedly caused ongoing lead contamination, plaintiffs' requested remedies were at least partially remedial or mitigative and not entirely prophylactic, and thus sought "damages." *Watts Industries, Inc. v. Zurich American Ins. Co.* (2004) 121 Cal.App.4th 1029.

### **Declaratory Relief**

Certification of a class action is justified when the expense and amount of recovery for plaintiffs to maintain their own individual actions makes it unlikely that they will be able to do so. *Lebrilla v. Farmers* (2004) 119 Cal.App.4th 1070.

### **Default Judgment**

A few days prior to trial, Golden Eagle discovered its insured had been suspended for failure to pay corporate taxes. The trial court said it would allow Golden Eagle to intervene to defend its insured's interests. Golden Eagle chose not to do so and the court entered judgment against the insured. The plaintiffs then filed suit against Golden Eagle pursuant to Insurance Code section 11580 to recover the judgment. The Insurance Commissioner subsequently seized Golden Eagle and instituted conservation proceedings. The claims administrator declined to consider the judgment, citing Insurance Code section 1028, which precludes consideration of default judgments. The liquidation court disagreed, holding the judgment was not a default judgment. Golden Eagle appealed. The Court of Appeal affirmed the judgment was not a

default judgment and could be considered as evidence of the insurer's liability. *Garamendi v. Golden Eagle* (2004) 116 Cal.App.4th 694.

**Definition: "Accident"**

Plaintiff's bodily injury claim against defendant airline based on deep vein thrombosis failed to allege an "accident" under the Warsaw Convention. Summary judgment in favor of the defendant was granted and affirmed on appeal. There was no unexpected or unusual event or happening external to the passenger. *Rodriguez v. Ansett Australia Ltd.* (9th Cir. 2004) 383 F.3d 914.

**Definition: "Actually Upon"**

The word 'upon' is interchangeable with 'on' and that the definition of 'on' includes 'in close proximity.' *E.M.M.I., Inc. v. Zurich American Insurance Co.* (2004) 32 Cal.4th 465.

The exception to the vehicle theft exclusion is phrased in the disjunctive--"actually in or upon" -- and therefore a reasonable insured would likely interpret the exception to mean that the insured must be either inside the vehicle, or in some other location relative to the vehicle. *E.M.M.I., Inc. v. Zurich American Insurance Co.* (2004) 32 Cal.4th 465.

**Definition: "Ownership, Maintenance or Use"**

Agreement to cover bodily injury resulting from "the ownership, maintenance or use" of an insured auto did not apply to injuries sustained by plaintiff who was bitten by a dog which jumped from the insured's parked pickup truck. *State Farm Mutual Insurance Company v. Grisham* (2004) 122 Cal.App.4th 563.

**Definition: "Related"**

"Related" as it is commonly understood and used encompasses both logical and causal connections." *Friedman v. Norcal* (citations omitted).

**Definition: "Totally Disabled"**

Vicki Jordan made a claim for disability benefits because she was suffering from fibromyalgia, which cannot be objectively diagnosed. To qualify for disability benefits, Jordan had to be totally disabled and under a physician's care for six consecutive months. Her disability plan expressly conferred discretion on the plan administrator, both to construe the terms of the plan and to make factual determinations. Jordan's claim was denied because Jordan's physicians failed to provide evidence substantiating the claim that she was totally disabled. Jordan appealed. Following the appeal, MetLife received a letter from one of Jordan's physicians explaining that Jordan could not perform "even sedentary work at the present time because of a flare up of her



fibromyalgia.” MetLife retained a physician to perform an independent evaluation of Jordan’s condition. He reported her condition was “moderate,” and MetLife denied Jordan’s claim. Jordan filed suit. The District Court granted MetLife’s motion for summary judgment. On appeal, Jordan argued that the administrator arbitrarily denied her claim. The Ninth Circuit disagreed. The Court concluded that the standard of review was abuse of discretion and not de novo review because the MetLife Plan conferred discretion on the administrator. Under the abuse of discretion standard, the Court can set aside the administrator’s decision only if the factual findings concerning whether a claimant are disabled are “clearly erroneous.” *Jones v. Laborers Health & Welfare Trust Fund* (9<sup>th</sup> Cir. 1990) 906 F.2d 480, 482. The Court found that the administrator did not abuse her discretion because she considered all available evidence. Jordan argued that MetLife improperly denied the claim because they were seeking “objective” evidence of her condition. The Court observed that MetLife never disputed that Jordan suffered from fibrositis; MetLife disputed that the condition prevented Jordan from working, which, ultimately, was consistent with the evidence reviewed by the administrator. The Court also observed that a “treating physician’s opinion gets no special weight and can be rejected on the basis of reliable evidence with no discrete burden of explanation.” *See, Black & Decker Disability Plan v. Nord* (2003) 123 S.Ct. 1965. *Jordan v. Northrop Grumman Corp. Welfare Benefit Plan* (9<sup>th</sup> Cir. 2004)370 F.3d 869.

**Definition: “Use”**

A truck driver employed by MSM Trucking was injured when he fell during the weighing of his truck after it had been loaded with sewage at a City facility. After the driver sued the City, the City sought a defense and indemnity from MSM Trucking’s insurers. The insurers refused to defend the City, and the City was found liable for the driver’s injuries. The City then sued the insurers, and a single issue was bifurcated and tried to the court: whether, under the terms of MSM’s insurance contract, the City was a “borrower” of MSM’s truck when the driver was injured. The City contended it was a “user” of the truck under the controlling case law (*Home Indemnity Co. v. King* (1983) 34 Cal.3d 803, 813) holding that “use” of a vehicle includes its loading and unloading. The City argued that “it is difficult to use a truck one does not own unless one has borrowed or hired it,” and that the same facts establishing the City was a user of the truck -- its control over the loading process -- also established it was a borrower of the truck. The Court of Appeal disagreed, finding “[o]ne can load or unload -- and therefore ‘use’ -- a truck one does not own and has not borrowed or hired.” According to the Court of Appeal, “The pertinent question, in determining whether the City borrowed MSM’s truck, is whether the City had ‘the requisite dominion and control over the truck [citation omitted] not whether it directed or controlled ‘the loading process.’” *City of Los Angeles v. Allianz Insurance Co.* (2004) 125 Cal.App.4<sup>th</sup> 287.

**Definition: Who Is An Insured: “Borrower”**

A truck driver employed by MSM Trucking was injured when he fell during the weighing of his truck after it had been loaded with sewage at a City facility. After the driver sued the City, the City sought a defense and indemnity from MSM Trucking’s insurers. The insurers refused to defend the City, and the City was found liable for the driver’s injuries. The City then sued the

insurers, and a single issue was bifurcated and tried to the court: whether, under the terms of MSM's insurance contract, the City was a "borrower" of MSM's truck when the driver was injured. The City contended it was a "user" of the truck under the controlling case law (*Home Indemnity Co. v. King* (1983) 34 Cal.3d 803, 813) holding that "use" of a vehicle includes its loading and unloading. The City argued that "it is difficult to use a truck one does not own unless one has borrowed or hired it," and that the same facts establishing the City was a user of the truck -- its control over the loading process -- also established it was a borrower of the truck. The Court of Appeal disagreed, finding "[o]ne can load or unload -- and therefore 'use' -- a truck one does not own and has not borrowed or hired." According to the Court of Appeal, "The pertinent question, in determining whether the City borrowed MSM's truck, is whether the City had 'the requisite dominion and control over the truck [citation omitted] not whether it directed or controlled 'the loading process.'" *City of Los Angeles v. Allianz Insurance Co.* (2004) 125 Cal.App.4<sup>th</sup> 287.

### **Diminution**

An insured's residential insurance policies did not insure against diminution in market value as a result of the property's environmental condition because such diminution in value did not constitute "damages" within the meaning of those policies. *Block v. Golden Eagle Insurance Corporation* (2004) 121 Cal.App.4<sup>th</sup> 186.

### **Discovery**

Writings, including photographs, witness statements, "raw test data," are protected from discovery if they were made for the purpose of, in the course of, or pursuant to, a mediation. *Rojas v. Superior Court (Coffin)* (2004) 33 Cal.4<sup>th</sup> 407.

The Orange County Superior Court had exclusive jurisdiction over a discovery dispute arising in an uninsured motorist arbitration. The Fourth District Court of Appeal affirmed the superior court's dismissal of plaintiff's uninsured motorist arbitration because plaintiff failed to obey a discovery order compelling the release of medical records. The Court of Appeal rejected plaintiff's contentions the superior court lacked subject matter or personal jurisdiction to make orders against plaintiff and that the court abused its discretion by dismissing plaintiff's arbitration action as a terminating sanction without first imposing a lesser sanction. *Miranda v. 21st Century Insurance Co.* (2004) 117 Cal.App.4<sup>th</sup> 913.

### **Discovery of Non-Party Claim Files**

Discovery of the insurance claims files of non-party insureds, where it is allowed, is conditioned upon obtaining specific authorization from all of the insureds whose claims files are to be produced. *Permanent General Assurance Corp. v. Superior Court (Hernandez)* (2004) 119 Cal.App.4<sup>th</sup> 874, *review denied (1/19/05), depublished and not citable.*

### **Disqualification of Judges**

A judge should rescue himself or herself when the litigation involves an issue relating to the appointment of an alternative dispute resolution provider and the judge may be prospectively employed by that provider. *Hartford Casualty Insurance Company v. Superior Court* (C3 Entertainment, Inc.) (2004) 125 Cal.App.4th 250, *rv. granted and dismissed, not citable*.

### **Diversity Jurisdiction**

Federal diversity jurisdiction is proper where the amount-in-controversy is alleged by a preponderance of the evidence. Allegations “on information and belief” are insufficient to meet this burden of proof. *Valdez v. Allstate Insurance Co.* (9th Cir. 2004) 372 F.3d 1115.

### **Duty to Defend**

Insurer did not breach duty to defend insured in suit alleging violations of gambling laws because complaint did not allege bodily injury. Speculation that a lawsuit could amend a complaint to allege bodily injury is not enough to present a potential for coverage giving rise to a duty to defend. *The Upper Deck Co., LLC v. Fed. Ins. Co.* (9th Cir. 2004) 358 F.3d 608; 04 C.D.O.S. 242.

An insurer had no duty to defend its insured in a second lawsuit filed by the same plaintiff for injuries received during surgery, after defending its insured in a “related” claim in the initial lawsuit and paying out its policy limits based on the definition of occurrence as a “single act or omission or series of related acts or omissions.” Speculation that a lawsuit could amend a complaint to allege bodily injury is not enough to present a potential for coverage giving rise to a duty to defend. *Friedman Professional Management Co., Inc. v. Norcal Mutual Insurance Company* (2004) 120 Cal.App.4th 17.

“An insured is not entitled to a defense just because one can imagine some additional facts which would create the potential for coverage . . . the potentiality rule for the duty to defend is pegged to the possibility of actual indemnity coverage, not the mere existence of a plausible argument.” *Friedman Professional Management Co., Inc. v. Norcal Mutual Insurance Company* (2004) 120 Cal.App.4th 17.

The Fourth District Court of Appeal held an excess umbrella insurer’s duty to defend its insured, a general contractor and developer, was triggered by exhaustion of underlying primary insurance even though the insured was named as an additional insured in policies issued to subcontractors. *Travelers Casualty & Surety Company v. Transcontinental Insurance Company* (2004) 122 Cal.App.4th 949.

The Court of Appeal reversed the trial court’s ruling granting summary judgment in favor of insurer Federal Insurance Company (“Federal”) on the grounds there was no duty to defend Sunrise Desert Partners (“Sunrise”) under Federal’s “excess” umbrella insurance policy. At the trial court level, Federal argued it did not have a duty to defend Sunrise under the excess policy because Sunrise was also named as an “additional insured” on certain unexhausted primary

insurance policies issued to subcontractors working on the project. The Court of Appeal disagreed and held Federal's duty to defend was triggered because the specific underlying primary policy referenced in Federal's excess policy had been exhausted. *Travelers Casualty & Surety Company v. Transcontinental Insurance Company* (2004) 122 Cal.App.4th 949.

In reaching its conclusion, the Court of Appeal rejected Federal's contention that under principles of "horizontal exhaustion," an excess policy does not cover a loss, nor does a duty to defend arise, until all the primary insurance has been exhausted. *Travelers Casualty & Surety Company v. Transcontinental Insurance Company* (2004) 122 Cal.App.4th 949.

### **Earthquake Claims**

Statute of limitations barred the insured's coverage dispute over an earthquake claim when such claim was not pursued more than one year after settlement payment. *Marselis v. Allstate Insurance Company* (2004) 121 Cal.App.4th 122.

### **Economic Loss**

The economic loss rule does not bar a plaintiff from recovering damages when a component part of a structure has already suffered appreciable harm and will ultimately disintegrate. *Mesa Vista South Townhome Association v. California Portland Cement Company* (2004) 118 Cal.App.4th 308.

### **Economic Loss Rule, Tort Remedies**

The economic loss rule barring tort remedies in breach of contract actions does not apply if a tort was committed independent and not related to the breach of contract. The Supreme Court held that punitive damages were appropriate in a breach of contract lawsuit when the Plaintiff also had claims for intentional and negligent misrepresentation. *Robinson Helicopter Company, Inc. v. Dana Corporation* (2004) 34 Cal.4th 979.

The economic loss rule provides that where a purchaser's expectations in a sale are frustrated because the product he bought is not working properly, the remedy is contractual damages because only economic losses have been suffered. This rule requires a purchaser to recover in contract for purely economic loss due to disappointed expectations, unless a purchaser can prove and/or demonstrate harm above and beyond a broken contractual promise. *Robinson Helicopter Company, Inc. v. Dana Corporation* (2004) 34 Cal.4th 979.

California has permitted tort damages in contract cases where a breach of duty caused physical injury, for breach of the implied covenant of good faith and fair dealing, for wrongful discharge in violation of public policy or where the contract was fraudulently induced. In each of these cases, the duty that gives rise to tort liability is either completely independent of the contract or arises from conduct which is both intentional and intended to harm. *Robinson Helicopter Company, Inc. v. Dana Corporation* (2004) 34 Cal.4th 979.

## ERISA

The Ninth Circuit Court of Appeals reversed the Oregon district court's ruling that Providence's state law action against insureds for breach of healthcare contract, seeking enforcement of reimbursement provision of insured's plan, was not pre-empted by ERISA statute. This action was remanded to state court. The Ninth Circuit also upheld the Oregon district court's dismissal of Providence's second action, filed in federal court, for equitable relief under ERISA's civil enforcement provision, finding that regardless of title, Providence sought damages -- legal monetary relief -- not equitable relief. *Providence Health Plan v. McDowell*, (9th Cir. 2004) 385 F.3d 1168.

An ERISA plan must seek equitable, rather than legal, relief to state a cause of action under section 1132(a) (3). *Carpenters Health and Welfare Trust for Southern California v. Vonderharr* (9th Cir. 2004) 384 F.3d 667.

Vicki Jordan made a claim for disability benefits because she was suffering from fibromyalgia, which cannot be objectively diagnosed. To qualify, Jordan had to be totally disabled and under a physician's care for six consecutive months. Her disability plan expressly conferred discretion on the plan administrator, both to construe the terms of the plan and to make factual determinations. Jordan's claim was denied because Jordan's physicians failed to provide evidence substantiating the claim that she was totally disabled. Jordan appealed. Following the appeal, MetLife received a letter from one of Jordan's physicians explaining that Jordan could not perform "even sedentary work at the present time because of a flare up of her fibromyalgia and intensity of pains." MetLife retained a physician to perform an independent evaluation of Jordan's condition. He reported her condition was "moderate," and MetLife denied Jordan's claim. Jordan filed suit. The District Court granted MetLife's motion for summary judgment. On appeal, Jordan argued that the administrator arbitrarily denied her claim. The Ninth Circuit disagreed. An ERISA determination is reviewed de novo, unless the plan unambiguously confers discretion on the administrator. *Kearney v. Standard Insurance Co.* (9<sup>th</sup> Cir. 1999) 175 F.3d 1084, 1089. Because the MetLife Plan conferred discretion on the administrator, the Court concluded that the standard of review was abuse of discretion and not de novo review. Under the abuse of discretion standard, the Court can set aside the administrator's decision only if the factual findings concerning whether a claimant is disabled are "clearly erroneous." *Jones v. Laborers Health & Welfare Trust Fund* (9<sup>th</sup> Cir. 1990) 906 F.2d 480, 482. The Court found that the administrator did not abuse her discretion because she considered all available evidence. The Court also observed that a "treating physician's opinion gets no special weight and can be rejected on the basis of reliable evidence with no discrete burden of explanation." See, *Black & Decker Disability Plan v. Nord* (2003) 123 S.Ct. 1965. *Jordan v. Northrop Grumman Corp. Welfare Benefit Plan* (9th Cir. 2004) 370 F.3d 869.

## ERISA: "Anti-Cutback" Rule

The United States Supreme Court affirmed a divided Seventh Circuit Court of Appeal's holding that imposition of new conditions on rights to pension benefits already accrued violates ERISA's "anti-cutback" rule, which prohibits any amendment of a pension plan that reduces or

eliminates a participant's accrued benefit. *Central Laborers' Pension Fund v. Heinz* (2004) 541 U.S. 739, 02-891.

### **ERISA: Claim Preclusion**

The Ninth Circuit Court of Appeal held that an insurer's lawsuit against its insured seeking reimbursement of medical benefits paid pursuant to the policy was claim precluded because the insurer had previously filed a lawsuit involving the same parties disputing the same contractual provision and the fact that the first lawsuit was preempted under ERISA, precluded the insurer's second lawsuit. *Providence Health Plan v. McDowell*(9th Cir. 2004) 385 F.3d 1168.

### **ERISA: De Novo Review Of Denial Of Plan Benefits**

Typically, the denial of benefits by a Plan will be reviewed de novo. However, where the plan unambiguously confers discretionary authority upon the administrator to determine benefits eligibility, the denial will be reviewed for abuse of discretion. *Johnson v. Buckley, Carroll, Chase, Garbolewski, Sininger, Williams & W.L. Gore Associates* (9th Cir. 2004) 356 F.3d 1067.

### **ERISA: Elapsed-Time Regulation**

The elapsed-time regulation under C.F.R. § 1.410(a) is valid. Congress delegated authority to the Secretary to define "hour or service" and "year of participation" for "benefit accrual purposes" "on any reasonable and consistent basis." Additionally, one of the primary goals of ERISA was to reduce the burden of compliance with ERISA provisions. The elapsed-time regulation – which calculates an employee's vesting and benefit accrual with reference to the total period of time which elapses while the employee is employed – is less administratively burdensome than having to keep an actual tally of every hour worked. As such, the elapsed-time regulation is not arbitrary, capricious, or manifestly contrary to ERISA. *Johnson v. Buckley, Carroll, Chase, Garbolewski, Sininger, Williams & W.L. Gore Associates* (9th Cir. 2004) 356 F.3d 1067.

### **ERISA: Equitable Relief**

Under ERISA's civil enforcement provision, 29 U.S.C. § 1132(a), the statute permits a fiduciary to seek equitable relief for violations of the plan. The Ninth Circuit Court of Appeal held that an insurer's claim for breach of contract was a claim for monetary damages, despite the insurer's characterization of its claim as "specific performance." The Court held that despite the insurer's re-naming its cause of action as "specific performance," it was outside the scope of § 1132 because the underlying theory of the insurer's claim for specific performance was a claim for monetary damages, "despite [the insurer's] attempt to disguise its claim in equitable clothes." *Providence Health Plan v. McDowell*(9th Cir. 2004) 385 F.3d 1168.

**ERISA: Preemption**

A party cannot be unfairly forced to select between ERISA and state law claims in contravention of the clear purposes of Rule 8(e)(2). *Coleman v. Standard Life Insurance Company* (E.D. Cal. 2003) 288 F.Supp.2d 1116.

ERISA pre-empts state law creating a cause of action in tort against an HMO to the extent the cause of action arises out of administration of an ERISA-regulated employee benefits plan. *Aetna Health, Inc. v. Davila* (2004) 542 U.S. 1175.

**ERISA: Removal Jurisdiction**

The Ninth Circuit Court of Appeal held that a court has removal jurisdiction concerning a claim governed by ERISA if the claim is preempted by ERISA and falls within the scope of ERISA's enforcement provisions (29 U.S.C. § 1144(a)). The Court held that an insurer's breach of contract claim was not subject to removal jurisdiction because it did not "relate to" an ERISA plan and it did not fall within the civil enforcement provision of ERISA. *Providence Health Plan v. McDowell*(9th Cir. 2004) 385 F.3d 1168.

**ERISA: § 514(a)**

29 U.S.C. § 1144(a) shall supercede any and all State laws insofar as they relate to any employee benefit plan. *Coleman v. Standard Life Insurance Company* (E.D. Cal. 2003) 288 F.Supp.2d 1116.

**Estoppel**

No estoppel regarding statute of limitations against broker accused of malpractice where party seeking to assert estoppel (1) knew everything party to be estopped knew, (2) failed to identify any action to delay filing of suit, and (3) failed to contend reliance to its detriment. *Hydro-Mill Company, Inc. v. Hayward, Tilton & Rolapp Insurance Association, Inc.* (2004) 115 Cal.App.4th 1145.

A few days prior to trial, Golden Eagle discovered its insured had been suspended for failure to pay corporate taxes. The trial court said it would allow Golden Eagle to intervene to defend its insured's interests. Golden Eagle chose not to do so and the court entered judgment against the insured. The plaintiffs then filed suit against Golden Eagle pursuant to Insurance Code section 11580 to recover the judgment. The Insurance Commissioner subsequently seized Golden Eagle and instituted conservation proceedings. The claims administrator declined to consider the judgment, citing Insurance Code section 1028, which precludes consideration of default judgments. The liquidation court disagreed, holding the judgment was not a default judgment. Golden Eagle appealed. The Court of Appeal affirmed the judgment was not a default judgment and could be considered as evidence of the insurer's liability. The Court declined to hold that Golden Eagle had forfeited its right to contest coverage and remanded the

action to the liquidation court to determine if the insurer was estopped from asserting its coverage defenses. *Garamendi v. Golden Eagle* (2004) 116 Cal.App.4th 694.

### **Evidence Code § 915**

Although Evidence Code § 915 prohibits a court from requiring disclosure of information claimed privileged in order to rule on the claim, the rule is not absolute. “[I]f necessary to determine whether an exception to the privilege applies, the court may conduct an in camera review notwithstanding section 915.” *OXY Resources California LLC v. Superior Court (Calpine Natural Gas LP)* 116 Cal.App.4th 2136.

### **Examination Under Oath**

The Second District Court of Appeal held the failure of an insured to submit to an examination under oath as required by the policy justified the insurer’s denial of the insured’s fire claim regardless of whether the insurer was prejudiced. *Brizuela v. CalFarm Insurance Co.*, (2004) 116 Cal.App.4th 578.

### **Excess Policy**

The Fourth District Court of Appeal held an excess umbrella insurer’s duty to defend its insured, a general contractor and developer, was triggered by exhaustion of underlying primary insurance even though the insured was named as an additional insured in policies issued to subcontractors. *Travelers Casualty & Surety Company v. Transcontinental Insurance Company* (2004) 122 Cal.App.4th 949.

### **Exclusion: Coverage for Permissive Users of Auto**

Failure of policy to direct insured’s attention to single-page endorsement which limited coverage rendered exclusion unenforceable. *Haynes v. Farmers Insurance Exchange* (2004) 32 Cal.4th 1198.

### **Exclusion: Damage To Land**

Court upheld exclusions for damage to land as being "clear and explicit," such that there is no coverage for damage to land underneath a dwelling. *Fire Ins. Exchange v. Superior Court (Altman)* (2004) 116 Cal.App.4th 446.

### **Expert Witnesses**

The California Court of Appeal held that an expert witness for the plaintiff in a first party bad faith lawsuit must be disqualified because he had previously represented the defendant



insurer as coverage counsel in a substantially related matter. *Brand v. 20<sup>th</sup> Century Insurance Company* (2004) 124 Cal.App.4<sup>th</sup> 594.

The California Court of Appeal held that the evidence established that an attorney's current employment as an expert witness for the plaintiff shared numerous factual and legal elements with his prior representation of the defendant insurer such that it was readily apparent that confidential information material to the current dispute would normally have been imparted to the attorney. *Brand v. 20<sup>th</sup> Century Insurance Company* (2004) 124 Cal.App.4<sup>th</sup> 594.

### **Federal Rules of Civil Procedure 8(e)(2)**

A party is encouraged to bring all claims which, although inconsistent or contradictory, are not to be construed as admissions against one another. A party need not explicitly state that the pleadings presented are in the alternative. *Coleman v. Standard Life Insurance Company* (E.D. Cal. 2003) 288 F.Supp.2d 1116.

### **Federal Rules of Civil Procedure 12(b)(6)**

A court must give the plaintiff the benefit of every reasonable doubt in deciding on whether to dismiss plaintiff's complaint for failure to state a claim. However, courts are not obligated to assume facts not alleged. *Coleman v. Standard Life Insurance Company* (E.D. Cal. 2003) 288 F.Supp.2d 1116

### **Federal Subject Matter Jurisdiction**

The Ninth Circuit Court of Appeals lacked jurisdiction to review the California Central District Court's order denying defendant's motion to dismiss plaintiff's state-law securities action and sua sponte remanding the action to state court. The lack of jurisdiction prevented the Court of Appeals from reviewing defendant's argument the district court erred in deciding the Securities Litigation Uniform Standards Act did not preempt plaintiff's representative class action, and that it should not have remanded. *United Investors Life Insurance Co. v. Waddell & Reed, Inc.* (9th Cir. 2004) 360 F.3d 960.

### **First Party Coverage – Condominium**

A condominium unit owner's policy, covering real property items "which are [the unit owner's] insurance responsibility as expressed or implied under the governing rules of the condominium," could cover damages if the CC&R's merely suggested, and the parties reasonably understood, that the unit owner was responsible to obtain coverage for this type of damage. *Palacin v. Allstate Insurance Company* (2004) 119 Cal.App.4<sup>th</sup> 855.

### **Hawaii Law**

Under Hawaii law, negligent breach of contract is not a covered “occurrence” under a commercial general liability policy. *Burlington Ins. Co. v. Oceanic Design & Construction, Inc.* (9th Cir. 2004) 383 F.3d 940.

Contract claims and contract-based tort claims are not within the scope of commercial general liability policies under Hawaii law. *Burlington Ins. Co. v. Oceanic Design & Construction, Inc.* (9th Cir. 2004) 383 F.3d 940.

Unlike California in *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, Hawaii has not rejected the distinction between contract and tort-based claims. *Burlington Ins. Co. v. Oceanic Design & Construction, Inc.* (9th Cir. 2004) 383 F.3d 940.

### **Horizontal Exhaustion**

The Fourth District Court of Appeal held an excess umbrella insurer’s duty to defend its insured, a general contractor and developer, was triggered by exhaustion of underlying primary insurance even though the insured was named as an additional insured in policies issued to subcontractors. In reaching its conclusion, the Court of Appeal rejected excess insurer’s contention that under principles of “horizontal exhaustion,” an excess policy does not cover a loss, nor does a duty to defend arise, until all the primary insurance has been exhausted. *Travelers Casualty & Surety Company v. Transcontinental Insurance Company* (2004) 122 Cal.App.4th 949.

### **Impaired Property Exclusion**

The “impaired property” exclusion does not apply if the other property which incorporates an allegedly defective product has been physically injured. Here, the municipalities alleged physical injury to their water systems through the incorporation of the insured’s faulty parts. Therefore the impaired property exclusion did not apply. *Watts Industries, Inc. v. Zurich American Ins. Co.* (2004) 121 Cal.App.4th 1029.

### **In Camera Review**

An in camera inspection must occur to determine whether communications that were exchanged between parties negotiating a business transaction prior to a lawsuit filed by a third party are discoverable. The magnitude of the task should not relieve a party from its obligation to substantiate its common interest claim. In most cases the common interest should be evident on the face of the document, and, if necessary, the court can appoint a discovery referee to assist in the review. *OXY Resources California LLC v. Superior Court (Calpine Natural Gas LP)* 116 Cal.App.4th 2136 .

Although Evidence Code § 915 prohibits a court from requiring disclosure of information claimed privileged in order to rule on the claim, the rule is not absolute. “[I]f necessary to

determine whether an exception to the privilege applies, the court may conduct an in camera review notwithstanding section 915.” *OXY Resources California LLC v. Superior Court (Calpine Natural Gas LP)* 116 Cal.App.4th 2136.

### **Injunctive Relief**

Certification of a class action is justified when the expense and amount of recovery for plaintiffs to maintain their own individual actions makes it unlikely that they will be able to do so. *Lebrilla v. Farmers* (2002) 119 Cal.App.4th 1070.

### **Insurance: Coverage**

Construction company did not suffer “property damage” within the meaning of a CGL policy when it modified equipment to meet design specifications. *F & H Construction v. ITT Hartford Ins. Co.* (2004) 118 Cal.App.4th 364.

Non-owned automobile policy is clear and explicit that where car is registered to an insured driver there is no coverage, even if that person is not the actual owner of the car. *Nava v. Mercury Casualty Co.* (2004) 118 Cal.App.4th 803.

### **Insurance: Disability – “Physician's Care” Requirement**

The "physician's care" requirement in finding an insured totally or residually disabled due to his depression may be satisfied where the insured's injuries caused his depressive condition and he received care or treatment from a physician for the injuries which themselves caused the depression; the requirement that the insured receive treatment from a physician for the condition causing his disability is met in such a case, even though the insured was not treated by a psychiatrist for depression. *Eichacker v. The Paul Revere Life Insurance Company* (9th Cir. 2004) 354 F.3d 1142.

### **Insurance: Excess and Primary**

Separate insurers of tractor and trailer must share loss arising from accident regardless of whether policies designate insurer as excess, or primary. *Wilshire Ins. Co. v. Sentry Select Ins. Co.* (2004) 124 Cal.App.4th 27.

### **Insurance: Has an Insured “Occupied” a Vehicle**

A person in close proximity to a vehicle need not occupy it in order to be deemed “upon” vehicle for purposes of coverage. *Atlantic Mutual Insurance Company v. Ruiz* (2004) 123 Cal.App.4th 1197.

### **Insurance: Underground Storage Tank Insurers**

Insurance companies providing Underground Storage Tank (“UST”) policies may not rescind these policies even when an insured makes a misrepresentation on an application. The Environmental Protection Agency’s (“EPA”) UST regulations provision providing for cancellation and future refusal to provide insurance is the insurers’ exclusive remedy. *Zurich American Ins. Co. v. Whittier Properties Inc.* (9th Cir. 2004) 356 F.3rd 1132.

### **Insurance Adjusters**

Public insurance adjuster’s contract was voidable at option of the insured if adjuster failed to obtain license from the Department of Insurance. Once voided, the contract was unenforceable, and the unlicensed adjuster could not recover any fees, including expenses incurred on the insured’s behalf in pursuing coverage claims. *Building Permit Consultants, Inc. v. Mazur* (2004) 122 Cal.App.4th 1400.

### **Insurance Code § 1028**

“An insurance binder may be deemed an insurance policy ‘only for the purpose of proving that the insured has the insurance coverage specified in the binder.’” *Rios v. Scottsdale Insurance Company* (2004) 119 Cal.App.4th 1020.

A few days prior to trial, Golden Eagle discovered its insured had been suspended for failure to pay corporate taxes. The trial court said it would allow Golden Eagle to intervene to defend its insured’s interests. Golden Eagle chose not to do so and the court entered judgment against the insured. The plaintiffs then filed suit against Golden Eagle pursuant to Insurance Code section 11580 to recover the judgment. The Insurance Commissioner subsequently seized Golden Eagle and instituted conservation proceedings. The claims administrator declined to consider the judgment, citing Insurance Code section 1028, which precludes consideration of default judgments. The liquidation court disagreed, holding the judgment was not a default judgment. Golden Eagle appealed. The Court of Appeal affirmed the judgment was not a default judgment and could be considered as evidence of the insurer’s liability. *Garamendi v. Golden Eagle* (2004) 116 Cal.App.4th 694.

### **Insurance Code § 1063.1**

An employer, who is an authorized self-insurer for the purpose of providing workers’ compensation insurance, is deemed to be an “insurer” providing “other insurance” within the meaning of Insurance Code section 1063.1(c)(9). Thus, that employer’s claim will be excluded as a “covered claim” and CIGA will not be responsible for any amounts paid by that employer to the employee in workers’ compensation benefits. *Roth v. L.A. Door Company* (2004) 115 Cal.App.4th 1249.

A special employers’ workers’ compensation policies for their regular employees are “other insurance” pursuant to Insurance Code section 1063, subdivision (c)(9) even though the

special employee was on the general employers' payroll at the time of the accident. In determining whether the policy was "other insurance" pursuant to Insurance Code section 1063.1, subdivision (d)(9), the court looked first to the policy language. The policy provided that "We will pay promptly when due the benefits required of you by the workers' compensation law." Because the court concluded that special employer was jointly and severally liable, the plain language of the policy provides coverage and such coverage was not excluded by Insurance Code section 11663, section 3602 (implicitly included in the policy pursuant to section 11650), and in part five, subdivision (c)(2) which provides: "this paragraph [dealing with premium payments] will not apply if you give us proof that the employers of these persons lawfully secured their workers compensation obligations." To the extent these provision were intended to exclude this type of claim, they were not sufficiently conspicuous, plain, and clear. *General Casualty Insurance v. Workers' Compensation Appeals Board* (2004) 123 Cal.App.4th 202.

### **Insurance Code § 1861.07**

There is no trade secret exception to Insurance Code Section 1861.07 which requires public disclosure of all information filed with the Insurance Commission pursuant to article 10 of the California Code of Regulations. But, insurers may invoke the trade secret exception at public hearings for information not supplied to the Commissioner. *State Farm Mutual Automobile Insurance Company v. Garamendi* (2004) 32 Cal.4th 1029.

### **Insurance Code § 3602(d)**

Insurance Code section 3602, subdivision (d) does not extinguish an employer's joint and several liability if the employer complies with the statute. Nor is joint and several liability extinguished by securing payment of compensation through another insurer under section 3700. This section because it deals with subrogation rights as between employer and insurer. *General Casualty Insurance v. Workers' Compensation Appeals Board* (2004) 123 Cal.App.4th 202.

### **Insurance Code § 10115**

Pursuant to Insurance Code Section 10115, when an insurer receives an initial premium check along with an application for life insurance at its home office, and the insurer subsequently approves the application for the class of risk and amount applied for, coverage is effective as of the application date even if the applicant dies on or after the application date. *Hodgson v. Banner Life Insurance Company* (2004) 124 Cal.App.4th 1358.

### **Insurance Code § 11580**

A few days prior to trial, Golden Eagle discovered its insured had been suspended for failure to pay corporate taxes. The trial court said it would allow Golden Eagle to intervene to defend its insured's interests. Golden Eagle chose not to do so and the court entered judgment against the insured. The plaintiffs then filed suit against Golden Eagle pursuant to Insurance Code section 11580 to recover the judgment. The Insurance Commissioner subsequently seized

Golden Eagle and instituted conservation proceedings. The claims administrator declined to consider the judgment, citing Insurance Code section 1028, which precludes consideration of default judgments. The liquidation court disagreed, holding the judgment was not a default judgment. Golden Eagle appealed. The Court of Appeal affirmed the judgment was not a default judgment and could be considered as evidence of the insurer's liability. *Garamendi v. Golden Eagle* (2004) 116 Cal.App.4th 694.

### **Insurance Code § 11580.2**

Section 11580.2 sets out the minimum uninsured motorist coverage which every car insurance policy must include. It provides that unless the insured agrees in writing to the contrary, the uninsured motorist coverage must have limits at least equal to the limits of liability for bodily injury in the underlying policy of insurance. Section 11580.2 also specifies that the uninsured motorist limits can be "no . . . less than the financial responsibility requirements specified in Section 16056 of the Vehicle Code insuring the insured . . . for all sums within the limits that he . . . shall be legally entitled to recover as damages for bodily injury or wrongful death from the owner or operator of an uninsured motor vehicle." Under the Vehicle Code, a liability policy must have a limit of "not less than fifteen thousand dollars (\$15,000) because of bodily injury to or death of one person in any one accident and, subject to that limit for one person, to a limit of not less than thirty thousand dollars (\$30,000) because of bodily injury to or death of two or more persons in any one accident . . ." Veh. Code §16056, subd. (a). *Mercury Ins. Co. v. Ayala* (2004) 116 Cal.App.4th 1198.

Insurance Code § 11580.2 does not require a person to have used or have "permissive" use of a vehicle to be "upon" a vehicle for coverage purposes. *Atlantic Mutual Insurance Company v. Ruiz* (2004) 123 Cal.App.4th 1197.

### **Insurance Code § 11663**

Insurance Code Section 11663 applies to allocate payment of the workers' compensation benefits as between workers' compensation insurers and does not limit the employers' joint and several liability. California Insurance Guarantee Association is not an insurer, therefore the allocation method provided for in Insurance Code section 11663 does not apply to CIGA. *General Casualty Insurance v. Workers' Compensation Appeals Board* (2004) 123 Cal.App.4th 202.

### **Insurance Code § 15007**

Insurance Code section 15007 requires a license for anyone who, for compensation, aids an insured in negotiating for or effecting the settlement of a claim. The terms of the statute are broad, and concern all persons, other than those exempt under section 15008, whose conduct or involvement impacts the resolution of the insurance claim. *Building Permit Consultants, Inc. v. Mazur* (2004) 122 Cal.App.4th 1400.

### **Insurance Regulations**

California Code of Regulations section 2695.8(g) provides that an insurer cannot require the use of non-original equipment manufacturer parts unless they are at least equal in quality to original equipment manufacturer parts. This section does not impliedly determine that non-OEM parts are not inferior. *Lebrilla v. Farmers* (2002) 119 Cal.App.4th 1070.

### **Joint Defense Agreement**

The Common Interest Doctrine applies to joint defense agreements. Such agreements alone, without the protection of attorney-client privilege or the work product rule, cannot be used to prevent disclosure of communications between the parties to the agreement. *OXY Resources California LLC v. Superior Court (Calpine Natural Gas LP)* 116 Cal.App.4th 2136.

While there is potential for abuse when parties rely on common interest agreements to protect pre-lawsuit communications that may be highly relevant to issues presented in a lawsuit, the concern does not render the joint defense agreement void as the agreement alone cannot be used to prevent disclosure of non-privileged communications. *OXY Resources California LLC v. Superior Court (Calpine Natural Gas LP)* 116 Cal.App.4th 2136.

### **Labor Code § 3852**

The Third District Court of Appeal reversed the trial court's ruling that Labor Code section 3852 did not provide standing for the subrogated insurer who paid death benefits to the former wife of an employee killed on the job. The Court of Appeal held the insurer could have sued to recoup benefits paid to the worker while alive. Labor Code Section 3851 permits recoupment actions to survive the death of the worker, and just because the insurer paid a death benefit, rather than vocational rehabilitation or medical benefits, makes no difference to recoupment. *Fremont Compensation Insurance Company v. Sierra Pine, Ltd.* (2004) 121 Cal.App.4th 389.

### **Labor Code § 5412**

Either compensable temporary disability or permanent disability is required to satisfy section 5412 of the Labor Code. *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (C.I.G.A.)* (2004) 119 Cal.App.4th 998.

### **Labor Code § 5500.5**

The Court of Appeal held that the date of injury for purposes of workers' compensation coverage is the first date the employee suffered either temporary or permanent work-related disability. In addition, medical treatment alone is not disability, but it may be evidence of compensable permanent disability. *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (C.I.G.A.)* (2004) 119 Cal.App.4th 998.

### **Life Insurance**

Cases establishing the parameters of temporary or interim insurance while an application for life insurance is pending focus on the reasonable expectations of the applicant. Temporary insurance arises when an insurance company receives and accepts a premium with a policy application. The contract of interim insurance is not terminated until the insurer both (1) rejects the application and notifies the insured, and (2) refunds the premium. *Hodgson v. Banner Life Insurance Company* (2004) 124 Cal.App.4th 1358.

Pursuant to Insurance Code Section 10115, when an insurer receives an initial premium check along with an application for life insurance at its home office, and the insurer subsequently approves the application for the class of risk and amount applied for, coverage is effective as of the application date even if the applicant dies on or after the application date. *Hodgson v. Banner Life Insurance Company* (2004) 124 Cal.App.4th 1358.

### **Limitations Period**

Statute of limitations barred the insured's coverage dispute over an earthquake claim when such claim was not pursued more than one year after settlement payment. *Marselis v. Allstate Insurance Company* (2004) 121 Cal.App.4th 122.

### **Malicious Prosecution**

A law firm and its client-insurer, defendants in a malicious prosecution action, filed a motion contending the fact they successfully defended against a motion for summary judgment in the underlying action meant they filed the action with probable cause and without malice. The court rejected this contention stating a de novo review of the evidence in the underlying action may still result in a finding defendants filed the underlying action without probable cause and/or with malice. The court evaluated the malicious prosecution claim retrospectively, i.e., based on the result of the original proceeding, that is, a bad faith verdict with punitive damages against the insurer on the complaint coupled with the jury's finding that a fraudulent claim cross-complaint was "without any substantive basis in law and/or fact." *Slaney v. Ranger Insurance Company* (2004) 115 Cal.App.4th 306.

A malicious prosecution cause of action predicated on the claim an insurer and its investigator were instrumental in bringing a federal criminal prosecution against the insured was subject to a strategic lawsuit against public participation (SLAPP suit) motion, because defendants' contact with federal authorities was with executive branch of government about a potential violation of law, and was preparatory to commencing a criminal prosecution for mail fraud. *Dickens v. Provident Life & Accident Ins. Co.* (2004) 117 Cal.App.4th 705.



### **Mediation**

Writings, including photographs, witness statements, “raw test data,” are protected from discovery if they were made for the purpose of, in the course of, or pursuant to, a mediation. *Rojas v. Superior Court (Coffin)* (2004) 33 Cal.4th 407.

### **Misrepresentation**

Insurance companies providing Underground Storage Tank (“UST”) policies may not rescind these policies even when an insured makes a misrepresentation on an application. The Environmental Protection Agency’s (“EPA”) UST regulations provision providing for cancellation and future refusal to provide insurance is the insurers’ exclusive remedy. *Zurich American Ins. Co. v. Whittier Properties Inc.* (9th Cir. 2004) 356 F.3rd 1132.

### **Negligent Design and Engineering**

Damage to property other than a repaired structure was not required to sustain negligence claims where an action arising out of reconstruction and repair of a damaged building was premised on allegations of negligent design and engineering (as opposed to negligent manufacture and installation). *Shekhter v. Seneca Structural Design, Inc.* (2004) 121 Cal.App.4th 1055, *review denied (11/17/04), depublished and not citable* .

### **Nevada Law**

Subcontractor’s work in erecting a sign was negligent including improper welding and modifications of the bolts connecting the various steel components of the sign. The Nevada Supreme Court viewed improper welding or general negligent acts as intangible, economic injuries and not the type of physical, tangible injury or destruction to property that a reasonable person would contemplate as covered under the policy. As such, the Court concluded there was no potential coverage and thus no duty to defend. *United National Ins. Co. v. Frontier Ins. Co.* (Nev. 2004) 99 P.3d 1153).

### **Occurrence**

Subcontractor’s work in erecting a sign was negligent including improper welding and modifications of the bolts connecting the various steel components of the sign. The Court read the word "occurrence" and the phrase "property damage" together and concluded that the policy unambiguously requires tangible, physical injury to occur during the policy period for coverage to be triggered. The Nevada Supreme Court viewed improper welding or general negligent acts as intangible, economic injuries and not the type of physical, tangible injury or destruction to property that a reasonable person would contemplate as covered under the policy. As such, the Court concluded there was no potential coverage and thus no duty to defend. *United National Ins. Co. v. Frontier Ins. Co.*, (Nev. 2004) 99 P.3d 1153.

### **“Other Insurance”**

When a general contractor and a subcontractor enter into an agreement, wherein the subcontractor agrees to indemnify the general contractor for acts or omissions arising out of the agreement, and the general contractor is not solely negligent nor had engaged in any willful misconduct, the general contractor’s commercial general liability insurer will not be liable to subcontractor’s commercial general liability insurer under the “other insurance” provisions of the policies or principles of equitable contribution. Because the subcontractor had no right to recover from general contractor pursuant to the indemnity provision, so too would the subcontractor’s insurer have no right to recover from the general contractor’s insurer. *Hartford Casualty Insurance Co. v. Mt. Hawley Insurance Co.* (2004) 123 Cal.App.4th 278.

### **Other Insurance Clauses - Equitable Contribution**

The Fourth District Court of Appeal affirmed the Orange County Superior Court’s judgment finding defendant insurer had a duty to contribute on a pro rata basis to defense and indemnity expenses incurred by plaintiff insurer in defending a common insured in a construction defect lawsuit despite an excess other insurance clause. *Travelers Casualty and Surety Company v. Century Surety Company* (2004) 118 Cal.App.4th 1156.

### **"Ownership, Maintenance or Use"**

Agreement to cover bodily injury resulting from “the ownership, maintenance or use” of an insured auto did not apply to injuries sustained by plaintiff who was bitten by a dog which jumped from the insured’s parked pickup truck. *State Farm Mutual Insurance Company v. Grisham* (2004) 122 Cal.App.4th 563.

### **Peculiar Risk Doctrine**

An independent contractor's lack of workers compensation insurance does not justify an independent contractor's employee's tort action against the project owner under the peculiar risk doctrine where there is no evidence of the project owner affirmatively contributing to injuries. *Bell v. Greg Agee Construction* (2004) 125 Cal.App.4th 453.

### **Peremptory Challenge**

The Court of Appeal concluded that a preemptory challenge is permitted under section 170.6(a)(2) where: (1) a trial court's decision or final judgment is made in conjunction with a "trial" and; (2) a subsequent reversal of that decision results in a "new trial." Applying this test, the Court of Appeal concluded that preemptory is impermissible where court of appeal remanded to district court reversing district court’s decision on choice of law determination. The Court of Appeal viewed remand as ministerial in nature and not a retrial of any issues. *State Farm Mutual Automobile Ins. Co. v. Superior Court (Hill)* (2004) 121 Cal.App.4th 490.

### **“Physician's Care” Requirement**

The "physician's care" requirement in finding an insured totally or residually disabled due to his depression may be satisfied where the insured's injuries caused his depressive condition and he received care or treatment from a physician for the injuries which themselves caused the depression; the requirement that the insured receive treatment from a physician for the condition causing his disability is met in such a case, even though the insured was not treated by a psychiatrist for depression. *Eichacker v. The Paul Revere Life Insurance Company* (9th Cir. 2004) 354 F.3d 1142.

### **Pollution/CERCLA**

Landowner incurred clean up costs after State Regulatory agency threatened it with legal action. Landowner then sued other potentially liable parties, seeking reimbursement for its clean up costs, under section 113(f)(1) of the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). The claims under section 113(f)(1) were dismissed. To pursue contribution claims from other potentially liable parties under section 113(f)(1), the landowner must have been sued under the CERCLA. Here the state regulatory agency had only threatened legal action, and the landowner thus lacked standing to pursue its claim. *Cooper Industries, Inc. v. Aviall Services, Inc.* United States Supreme Court (U.S. 2004) 125 S.Ct. 577.

### **Prejudgment Interest**

Insureds are not entitled to prejudgment interest on malicious prosecution damage awards against insurers. *George F. Hillenbrand, Inc. v. Insurance Co. of North America* (2004) 124 Cal.App.4th 846.

### **Prejudgment Interest and Cost on Confirmed Arbitration Awards**

The general rule is that prejudgment interest and costs do not apply to contractual arbitration. (*Gourley v. State Farm Mut. Auto. Ins. Co.* (1991) 53 Cal.3d 121, 126; *Woodward v. Southern Cal. Permanente Medical Group* (1985) 171 Cal.App.3d 656, 666-667.) However, when a court confirms the arbitration award into a money judgment pursuant to CCP 1287.4, the award becomes a judgment within the meaning of Civil Code section 3291 and prejudgment interest and costs are recoverable. (See, *Caro v. Smith* (1997) 59 Cal.App.4th 725, 736.) *Weinberg v. Safeco Insurance Company* (2004) 114 Cal.App.4th 1075

### **Privity of Contract**

Property owner and general contractor failed to meet their burden of proof in establishing that design engineers owed a duty of care to them regarding design of retaining walls on commercial construction project. The Court considered following factors when deciding whether a subcontractor who provides only professional services is liable for general negligence with whom no contractual privity exists, including the extent to which the transaction was

intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and injury suffered, the moral blame attached to defendant's conduct, the policy of preventing future harm, whether liability was out of proportion to fault, the prospect of private ordering, and the effect of professional service provider liability to third persons. *Weselo Family Limited Partnership v. K.L. Wessel Construction Co., Inc.* (2004) 125 Cal.App.4th 152.

### **Property Damage**

Construction company did not suffer "property damage" within the meaning of a CGL policy when it modified equipment to meet design specifications. *F & H Construction v. ITT Hartford Ins. Co.* (2004) 118 Cal.App.4th 364.

Plaintiff alleged defective parts incorporated into their water systems were causing ongoing lead contamination. This allegation raised a sufficient prima facie showing of physical injury to tangible property to constitute "property damage." Where products or work containing hazardous materials are incorporated into other products or structures, other "property" is immediately physically injured at the moment incorporation occurs. *Watts Industries, Inc. v. Zurich American Ins. Co.* (2004) 121 Cal.App.4th 1029.

Subcontractor's work in erecting a sign was negligent including improper welding and modifications of the bolts connecting the various steel components of the sign. The Nevada Supreme Court viewed improper welding or general negligent acts as intangible, economic injuries and not the type of physical, tangible injury or destruction to property that a reasonable person would contemplate as covered under the policy. As such, the Court concluded there was no potential coverage and thus no duty to defend. *United National Ins. Co. v. Frontier Ins. Co.* (Nev. 2004) 99 P.3d 1153.

### **Property Damage Claims**

Court upheld exclusions for damage to land as being "clear and explicit," such that there is no coverage for damage to land underneath a dwelling. *Fire Ins. Exchange v. Superior Court (Altman)* (2004) 116 Cal.App.4th 446.

### **Proposition 103**

Applicant for insurance coverage stated claim against insurer under Unfair Competition Law for penalizing applicant for lack of prior insurance. *Donabedian v. Mercury Insurance Company* (2004) 116 Cal.App.4th 968.

### **Public Policy**

In a contract based action which also included claims for negligent and intentional misrepresentation, the California Supreme Court held that tort remedies were allowed and the

economic loss rule did not apply where the tort based cause of action was independent of the breach of contract. In *Robinson Helicopter Company, Inc. v. Dana Corporation*, the Supreme Court held that California public policy favors permitting tort remedies in breach of contract lawsuits when the tort is independent of the breach because courts will generally enforce the breach of a contractual promise through contract law, except when the actions that constitute the breach violate a special policy that merits the imposition of tort remedies. *Robinson Helicopter Company, Inc. v. Dana Corporation* (2004) 34 Cal.4th 979.

### **Punitive Damages**

In breach of fiduciary duty case, punitive damages award of \$7 million deemed excessive when compensatory damages were only \$165,527.63. Court reduced punitive damages award to \$1.5 million in light of *State Farm Mut. Ins. Co. v. Campbell* (2003) 123 S.Ct. 1513, when ratio between punitive damages and compensatory damages was 42:1. *Bardis, et al v. Oates, et al* (2004) 119 Cal.App.4th 1.

Court reduced a punitive damage award to four times the amount of compensatory damages holding that the proportionality between the punitive and compensatory damages must focus on the amount awarded for breach of the covenant and exclude amounts awarded under breach of contract. *Textron Financial Corporation v. National Union Fire Ins. Co. of Pittsburgh, Pennsylvania* (2004) 118 Cal.App.4th 1061.

Under *State Farm Mutual Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, a defendant can be punished only for the harm done to plaintiff, and plaintiff may not enhance proof of reprehensibility as a basis for punitive damages by showing defendant's pattern and practice of bad faith in denying similar claims. *Permanent General Assurance Corp. v. Superior Court (Hernandez)* (2004) 119 Cal.App.4th 874, review denied (1/19/05), depublished and not citable.

### **Punitive Damages: Bad Faith Claim Under Arizona Law**

Punitive damages are recoverable in insurance bad faith tort actions only if the insured acted with an 'evil mind' in breaching the implied covenant of good faith and fair dealing. (*Rawling v. Apodaca*, 726 P.2d 565, 578-79 (Ariz. 1986).) *Prieto v. Paul Revere Ins. Co.* (9th Cir. 2004) 354 F.3d 1005.

### **Recovery Of Defense Costs**

The California Supreme Court granted the Insurer's petition for review of a decision of the California Court of Appeal, Second Appellate District, holding the insurer was precluded from recovering defense costs in an underlying action where the insurer lacked a duty to defend. *Scottsdale Ins. Co. v. MV Transportation, Inc., et al.* (2004) Cal. Lexis 8902.

### **Reformation**

The Court noted, in dicta, that where parties to an insurance policy attempt to reform the policy years after its inception and only after an adverse impact to a third party is apparent, such prejudice should be considered in determining the initial intent of the contracting parties. The Court said: “Under such circumstances, although [the parties to the contract] may eventually achieve reformation, they are not free merely to decide between themselves that something other than their clear written provision was their initial intent. A court of equity must look at the whole picture in deciding if there was mutual mistake that permits reformation.” *Schools Excess Liability Fund v. Westchester Fire Ins. Co.* (2004) 117 Cal.App.4th 1275.

### **Replacement Cost Coverage**

Exclusion for costs associated with building code upgrades not applicable when policy guarantees 100% replacement cost coverage. *Fire Ins. Exchange v. Superior Court (Altman)* (2004) 116 Cal.App.4th 446.

### **Reporting Requirements of Insurers under Architects Practice Act**

The California Attorney General opined that an insurer is required to report to the California Architects Board a settlement or arbitration award exceeding \$5,000 in any claim or action for damages alleging that an insured architect has engaged in wrongful conduct. *Attorney General Opinion*, 04 C.D.O.S. 7949.

An insurer's payment on behalf of an architectural firm of a settlement or an arbitration award exceeding \$5,000 for must be reported to the Architects Board naming the architect having responsible control of the project. *Attorney General Opinion*, 04 C.D.O.S. 7949.

### **Rescission**

Insurance companies providing Underground Storage Tank (“UST”) policies may not rescind these policies even when an insured makes a misrepresentation on an application. The Environmental Protection Agency’s (“EPA”) UST regulations provision providing for cancellation and future refusal to provide insurance is the insurers’ exclusive remedy. *Zurich American Ins. Co. v. Whittier Properties Inc.* (9th Cir. 2004) 356 F.3rd 1132.

### **Revenue and Taxation Code § 23301**

A few days prior to trial, an insurer discovered its insured had been suspended for failure to pay corporate taxes pursuant to Section 23301 of the Revenue and Taxation Code. The trial court advised the parties it would allow the insurer to intervene to defend its insured’s interests. The insurer chose not to do so and the court entered judgment against the insured. *Garamendi v. Golden Eagle* (2004) 116 Cal.App.4th 694.

**Social Security Act, 42 U.S.C. Sect. 416(e)**

Posthumously-conceived biological children of deceased wage earner entitled to child's insurance benefits under the Social Security Act. *Gillett-Netting v. Barnhart*(9th Cir. 2004) 371 F.3d 593.

**Standard Form Policy**

Court upheld exclusions for damage to land as being "clear and explicit," such that there is no coverage for damage to land underneath a dwelling. *Fire Ins. Exchange v. Superior Court (Altman)* (2004) 116 Cal.App.4th 446.

**Statute Of Limitations**

Statute of limitations barred the insured's coverage dispute over an earthquake claim when such claim was not pursued more than one year after settlement payment. *Marselis v. Allstate Insurance Company* (2004) 121 Cal.App.4th 122.

**Statute of Limitations: Tolling**

The statute of limitations for a professional malpractice action against an insurance broker is not tolled until the insurer formally denies the insured's claim. This tolling principle only applies to suits against insurers to allow the claims process to function effectively. Tolling the statute of limitations for actions against insurers allows the insurer to fully investigate the claim before the insured is required to file suit. The tolling principle has no application in suits against insurance brokers who do not investigate claims. *Hydro-Mill Company, Inc. v. Hayward, Tilton & Rolapp Insurance Association, Inc.* (2004) 115 Cal.App.4th 1145.

**Statutory Construction**

Where a statute excludes the application of two other statutes to its provisions, those two excluded statutes are only examples of *inapplicable* statutes, they are not an exhaustive list. The statutory construction rule of *unius est exclusio alt* is only applied if a statute is ambiguous. Also, the rule that additional statutes are applicable to the provisions of an underlying statute if the additional statutes are not expressly excepted from the underlying statute, is only followed when the underlying statute is ambiguous. *State Farm Mutual Automobile Insurance Company v. Garamendi*(2004) 32 Cal.4th 1029.

**Statutory Interpretation**

The words of a statute must be interpreted to give them their fair and usual meaning. Even where a statute appears unambiguous, it must be interpreted to avoid an absurd result. *Gray Cary Ware & Freidenrich v. Vigilant Ins. Co.* (2004) 114 Cal.App.4th 1185.

### **Stipulated Judgment**

Stipulated judgment is not presumptive evidence of the amount of damages in a claim against an insurance broker. It is only presumptive evidence in the first party context when an insurer wrongfully denies coverage or refuses to defend its insured. *Valentine, et al v. Membrila Insurance Services, Inc.* (2004) 118 Cal.App.4th 462.

### **Subrogation/Contribution**

The right of subrogation is when an insurer is in the same position as an assignee of the insured's claims, and succeeds only to the rights of the insurer. In contrast, the right to contribution belongs to each insurer individually and the right to recover is not from the party primarily liable for the loss but from a co-obligor who shares such liability. *Hartford Casualty Insurance Co. v. Mt. Hawley Insurance Co.* (2004) 123 Cal.App.4th 278.

### **Successive Representation**

Where attorney's former representation of prior client is direct and personal, and there is a substantial connection between successive representations, there exists a conflict of interest and the attorney should be disqualified from representing the current client. *Farris v. Fireman's Fund Ins. Co.* (2004) 119 Cal.App.4th 671.

### **Summary Judgment**

The question of causation is one for the jury to decide, not a court. Therefore, if the issue in determining a summary judgment motion is one of causal link, the motion should be denied as it cannot be determined as a matter of law. *Eichacker v. The Paul Revere Life Insurance Company* (9th Cir. 2004) 354 F.3d 1142.

Where a court determines that a contact term is at issue is ambiguous, i.e., susceptible to two or more reasonable meanings, triable issues of material fact exist which preclude summary judgment or adjudication if there is conflict in admissible extrinsic evidence. *Wolf v. Superior Court (Walt Disney Pictures and Television)* (2004) 114 Cal.App.4th 1343.

### **Superior Court Jurisdiction**

The Orange County Superior Court had exclusive jurisdiction over a discovery dispute arising in an uninsured motorist arbitration. The Fourth District Court of Appeal affirmed the superior court's dismissal of plaintiff's uninsured motorist arbitration because plaintiff failed to obey a discovery order compelling the release of medical records. The Court of Appeal rejected plaintiff's contentions the superior court lacked subject matter or personal jurisdiction to make orders against plaintiff and that the court abused its discretion by dismissing plaintiff's arbitration action as a terminating sanction without first imposing a lesser sanction. *Miranda v. 21st Century Insurance Co.* (2004) 117 Cal.App.4th 913.



### **Sureties**

A surety who pays only a portion of an underlying judgment lacks subrogation rights and must wait until the claimant has been made whole before pursuing subrogation claims. *American Contractors Indemnity Co. v. Saladino* (2004) 115 Cal.App.4th 1262.

### **Suspended Corporations**

A few days prior to trial, an insurer discovered its insured had been suspended for failure to pay corporate taxes pursuant to Section 23301 of the Revenue and Taxation Code. The trial court advised the parties it would allow the insurer to intervene to defend its insured's interests. The insurer chose not to do so and the court entered judgment against the insured. *Garamendi v. Golden Eagle* (2004) 116 Cal.App.4th 694.

### **Tolling Of Limitations Period**

Statute of limitations barred the insured's coverage dispute over an earthquake claim when such claim was not pursued more than one year after settlement payment. *Marselis v. Allstate Insurance Company* (2004) 121 Cal.App.4th 122.

### **Tort Damages**

In an action alleging negligent breach of a construction contract, plaintiffs are not precluded from recovering damages in tort if they can prove that defendant's defective design resulted in "appreciable, nonspeculative, present," "physical damage" to a repaired structure. *Shekhter v. Seneca Structural Design, Inc.* (2004) 121 Cal.App.4th 1055, *review denied, depublished and not citable (11/17/04)*.

### **Tortious Breach of Contract**

Tortious breaches of contract may be found when the breach is accompanied by a traditional common law tort, such as fraud or conversion, where the means used to breach the contract are tortious, including deceit or undue coercion, or where one party intentionally breaches the contract knowing that such a breach will cause severe, unmitigable harm in the form of mental anguish, personal hardship or substantial consequential damages. Focusing on intentional conduct gives substance to the proposition that a breach of contract is tortious only when some independent duty arising from tort law is violated. *Robinson Helicopter Company, Inc. v. Dana Corporation* (2004) 34 Cal.4th 979.

### **Total Disability Jury Instruction**

The district court's jury instruction was based upon the California Supreme Court's holding in *Erreca v. Western States Life Ins. Co.*, 121 P.2d 689 (Cal. 1942), that "the term 'total

disability' does not signify an absolute state of helplessness but means such a disability as renders the insured unable to perform the substantial and material acts necessary to the prosecution of a business or occupation in the usual or customary way." *Id.* at 695. Court of Appeals upheld district court's use of this instruction in spite of insurer's argument that the "total disability" provision of its policy was unambiguous, therefore district court's imposition of *Erreca's* definition of "total disability" was unwarranted under California law. *Hangarter v. The Paul Revere Life Insurance Company* (9th Cir. 2004) 373 F.3d 998.

### **Trade Secrets**

There is no trade secret exception to Insurance Code Section 1861.07 which requires public disclosure of all information filed with the Insurance Commission pursuant to article 10 of the California Code of Regulations. But, insurers may invoke the trade secret exception at public hearings for information not supplied to the Commissioner. *State Farm Mutual Automobile Insurance Company v. Garamendi* (2004) 32 Cal.4th 1029.

### **Unfair Competition Law (Business and Professions Code § 17200)**

Applicant for insurance coverage stated claim against insurer under Unfair Competition Law for penalizing applicant for lack of prior insurance. *Donabedian v. Mercury Insurance Company* (2004) 116 Cal.App.4th 968.

A UCL claim can be certified as a class action. Although a UCL claim is different from a class action, they are not incompatible. *Lebrilla v. Farmers* (2002) 119 Cal.App.4th 1070.

### **Uninsured Motorist Arbitration**

The Orange County Superior Court had exclusive jurisdiction over a discovery dispute arising in an uninsured motorist arbitration. The Fourth District Court of Appeal affirmed the superior court's dismissal of plaintiff's uninsured motorist arbitration because plaintiff failed to obey a discovery order compelling the release of medical records. The Court of Appeal rejected plaintiff's contentions the superior court lacked subject matter or personal jurisdiction to make orders against plaintiff and that the court abused its discretion by dismissing plaintiff's arbitration action as a terminating sanction without first imposing a lesser sanction. *Miranda v. 21st Century Insurance Co.* (2004) 117 Cal.App.4th 913.

An insured has no right to compel arbitration under uninsured motorist policy where insurer has paid policy limit. *State Farm Mut. Auto. Ins. Co. v. Superior Court (Balen)* (2004) 123 Cal.App.4th 1424.

### **Waiver**

No waiver of statute of limitations where affirmative defense cites statute, but not its successor. *Hydro-Mill Company, Inc. v. Hayward, Tilton & Rolapp Insurance Association, Inc.* (2004) 115 Cal.App.4th 1145.

### **Work Product Doctrine**

The Common Interest Doctrine is appropriately characterized under California law as a non-waiver doctrine to be analyzed under standard waiver principles applicable to the attorney-client privilege and the work product doctrine. The party seeking to invoke the Common Interest Doctrine must 1) establish that the communicated information would otherwise be protected from disclosure by attorney-client privilege or the work product doctrine, and 2) demonstrate that such privileges were not waived. *OXY Resources California LLC v. Superior Court (Calpine Natural Gas LP)* 116 Cal.App.4th 2136.

### **Workers Compensation**

The Court of Appeal held that the date of injury for purposes of workers' compensation coverage is the first date the employee suffered either temporary or permanent work-related disability. In addition, medical treatment alone is not disability, but it may be evidence of compensable permanent disability. *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (C.I.G.A.)* (2004) 119 Cal.App.4th 998.

An employee's injuries did not occur in the course of, nor arose out of, his employment where the employee was engaged in a prohibited activity after hours. Because the employee's activity was expressly prohibited by his employer, the "personal comfort" or "personal convenience" doctrine did not apply to bring the employee's injuries within the workers' compensation scheme. *Mason v. Lake Dolores Group, LLC* (2004) 117 Cal.App.4th 822.

Where temp agency's employer's workers' compensation insurer is liquidated, CIGA does not cover temporary worker's claims which must be covered by temporary employer's workers' compensation insurer. *General Casualty Insurance v. Workers' Compensation Appeals Board* (2004) 123 Cal.App.4th 202.