Developments in Insurance Case Law 2009

FOCUS: California

A summary prepared by Gordon & Rees LLP of the holdings, alphabetized by topic, of the cases published in 2009 applying California law, as well as select cases from other jurisdictions, which address the rights and duties of the insurance industry.

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DEVELOPMENTS IN CALIFORNIA & SELECT OTHER JURISDICTION CASE LAW 2009: INSURANCE

March 2010

Abstention

A trial court's decision to abstain is reviewed under an abuse of discretion standard. *Blue Cross of California, Inc. v. Super. Ct.*, 180 Cal.App.4th 1237 (2009).

A court may abstain from adjudicating an action that seeks equitable remedies if granting the requested relief would require a trial court to assume the functions of an administrative agency, or to interfere with the functions of an administrative agency. *Blue Cross of California, Inc. v. Super. Ct.*, 180 Cal.App.4th 1237 (2009).

A court may abstain from adjudicating a suit that seeks equitable remedies if the lawsuit involves determining complex economic policy, which is best handled by the Legislature or an administrative agency. *Blue Cross of California, Inc. v. Super. Ct.*, 180 Cal.App.4th 1237 (2009).

A court may abstain from adjudicating a suit that seeks equitable remedies if granting injunctive relief would be unnecessarily burdensome for the trial court to monitor and enforce given the availability of more effective means of redress. *Blue Cross of California, Inc. v. Super. Ct.*, 180 Cal.App.4th 1237 (2009).

Agents

In the absence of later disclaimers, an insured can reasonably rely on prior coverage representations by his agent when he or she decides to renew an insurance policy. *Williams v. HILB, Rogal & Hobbs Ins. Services*, 177 Cal. App. 4th 624 (2009).

Agents: Duties

An insurance agent does not have a duty to volunteer to an insured that the latter should procure additional or different insurance. *Williams v. HILB, Rogal & Hobbs Ins. Services*, 177 Cal.App.4th 624 (2009).

An agent has a duty to advise on the need for different or additional coverage only if one of the following three situations presents itself: (a) the agent misrepresents the nature, extent or scope of the coverage being offered or provided, (b) there is a request or inquiry by the insured for a particular type or extent of coverage, or (c) the agent assumes such duty by either express agreement or by "holding himself out" as having expertise in a given field of insurance being sought by the insured. *Williams v. HILB, Rogal & Hobbs Ins. Services*, 177 Cal.App.4th 624 (2009).

At a minimum, an insurance agent has a duty to use reasonable care, diligence, and judgment in procuring the insurance requested by its client. *Williams v. HILB, Rogal & Hobbs Ins. Services*, 177 Cal.App.4th 624 (2009).

All Sums

The all sums approach is not literal joint and several liability. Insurers are not jointly liable on each other's policies; rather, each insurer is severally liable on its own policy. *State of California v. Continental Ins. Co.*, 169 Cal.App.4th 1114 (2009). ***Not citable. Review granted.***

When there is a continuous loss spanning multiple policy periods, any insurer that covered any policy period is liable for the entire loss, up to the limits of its policy. *State of California v. Continental Ins. Co.*, 169 Cal.App.4th 1114 (2009). ***Not citable. Review granted.***

Each insurer covers total amount of insured's liability for property damage (subject to policy limits), including property damage that actually occurred before or after their policy periods. *State of California v. Continental Ins. Co.*, 169 Cal.App.4th 1114 (2009). ***Not citable. Review granted.***

When there is a continuous loss spanning multiple policy periods, any insurer that covered any policy period is liable for the entire loss, up to the limits of its policy. Insurer that pays more than its equitable share of loss can seek contribution against additional insurers covering the loss. *State of California v. Continental Ins. Co.*, 69 Cal.App.4th 1114 (2009). ***Not citable. Review granted.***

Alter Ego

"In California, two conditions must be met before the alter ego doctrine will be invoked. First, there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist. Second, there must be an inequitable result if the acts in question are treated as those of the corporation alone." *Troyk v. Farmers Group Inc.,* 171 Cal.App.4th 1305 (2009).

Where insurer and third party administrator act as a single enterprise, insurer may be liable for Unfair Competition Law restitution for acts of third party administrator. *Troyk v. Farmers Group Inc.,* 171 Cal.App.4th 1305 (2009).

There is substantial evidence that an insurer's third party administrator is a mere shell or conduit for the performance of the billing and forwarding functions for insurer where: the third party administrator is a wholly owned subsidiary of the insurer, all of its directors are officers or employees of the insurer, the third party administrator fulfills most of its billing and forwarding activities by using the insurer's equipment and personnel and pays the insurer for such use, and the insurer designed and effected the scheme whereby any insured who selected a certain policy would be required by the insurer to enter into a payment agreement with the third party administrator. *Troyk v. Farmers Group Inc.,* 171 Cal.App.4th 1305 (2009).

Among the principles applied in determining the enforcement of an arbitration agreement by or against non-signatories are: incorporation by reference; assumption; agency; veil-piercing/alter ego; and estoppel. *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042 (9th Cir. 2009).

Appeals & Writs

A party may not challenge an order issued almost twenty years ago. *The Travelers Indemnity Co. v. Bailey*, 129 S. Ct. 2195 (2009).

The appellate court cannot affirm a summary judgment based on a matter that is not alleged in the pleadings. *Superior Dispatch, Inc. v. Ins. Corp. of New York*, 176 Cal.App.4th 12 (2009). ***Not citable*. *Rehearing Granted.***

The contention that a plaintiff does not have standing to prosecute an Unfair Competition Law cause of action can be raised at any time, including on appeal because it goes to the existence of the cause of action. *Troyk v. Farmers Group Inc.,* 171 Cal.App.4th 1305 (2009).

An injured-third party has standing to file an appeal of a court's declaratory relief judgment as between the insurer and its insured. *Westchester Fire Ins. Co. v. Mendez*, 585 F.3d 1183 (9th Cir. 2009).

Appeals & Writs: Notice of Appeal

Rules of Court, Rule 8.100(a)(1) requires a party to properly file a notice of appeal if a specific claim for appeal is to be considered. *Bosetti v. U.S. Life Ins. Co.*, 175 Cal.App.4th 1208 (2009).

Appeals & Writs: Standard of Review

The denial of a motion to compel arbitration is reviewed de novo. *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042 (9th Cir. 2009).

The existence of subject matter jurisdiction is a question of law that is reviewed *de novo*. *Marin Gen. Hosp. v. Modesto & Empire Traction Co.*, 581 F.3d 941 (9th Circuit 2009).

A trial court's decision to not refer a claim to an administrative agency under doctrine of primary jurisdiction is reviewed under an abuse of discretion standard. *Blue Cross of California, Inc. v. Super. Ct.*, 180 Cal.App.4th 1237 (2009).

Where there is a conflict in the evidence of jurisdictional facts, resolution of the conflict by the trial court will not be disturbed on appeal if the determination is supported by substantial evidence. Where the evidence of jurisdictional facts is not conflicting, the

question of whether a defendant is subject to personal jurisdiction is one of law. *Elkman v. National States Ins. Co.*, 173 Cal.App.4th 1305 (2009).

A denial of a motion for reconsideration under Fed. Rule Civ. Proc. 59(e) will not be reversed on appeal absent a finding of abuse of discretion by the lower court, as provided under Rule 60(b). *United Nat'l Ins. Co. v. Spectrum Worldwide, Inc.*, 555 F.3d 772 (9th Cir. 2009).

A trial court's decision to abstain is reviewed under an abuse of discretion standard. *Blue Cross of California, Inc. v. Super. Ct.*, 180 Cal.App.4th 1237 (2009).

Discretion is abused whenever, in its exercise, the court exceeds the bounds of reason, all of the circumstances before it being considered. *Blue Cross of California, Inc. v. Super. Ct.*, 180 Cal.App.4th 1237 (2009).

The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power. *Blue Cross of California, Inc. v. Super. Ct.*, 180 Cal.App.4th 1237 (2009).

The Ninth Circuit Court of Appeals reviews "the district court's interpretation of an ERISA plan *de novo* and that court's factual findings for clear error." *Dupree v. Holman Prof'l. Counseling Ctrs*., 572 F.3d 1094 (9th Cir. 2009).

The appellate court reviews questions of statutory construction, such as the proper construction of the Healthcare Lien Act, independently. *Weston Reid, LLC v. American Ins. Group, Inc.*, 174 Cal.App.4th 940 (2009).

In reviewing a ruling on demurrer, appellate court is not concerned with plaintiff's ability to prove the allegations but only with the allegations' adequacy to state a cause of action. *Zhang v. Super. Ct.*, 178 Cal.App.4th 1081 (2009). ***Not citable. Review granted.***

In reviewing a ruling on demurrer, appellate court is required to give a generous interpretation of the pleading in favor of stating a cause of action. *Zhang v. Super. Ct.*, 178 Cal.App.4th 1081 (2009). ***Not citable. Review granted.***

In reviewing a trial court decision de novo, the court liberally construes the evidence in support of the party opposing summary judgment and resolves doubts concerning the evidence in favor of that party. *State of California v. Allstate Ins. Co.*, 45 Cal.4th 1008 (2009).

The Court of Appeals reviews *de novo* a district court's "choice and application" of the appropriate standard for reviewing benefits decisions made by an ERISA plan

administrator. *Sznewajs v. U.S. Bancorp Amended & Restated Supplemental Benefits Plan*, 572 F.3d 727 (9th Cir. 2009).

An appellate court will independently review a ruling on a motion to strike punitive damages allegations, assume the truth of the factual allegations in the complaint, and determine whether they could support an award of punitive damages. *Superior Dispatch, Inc. v. Ins. Corp. of New York*, 176 Cal.App.4th 12 (2009). ***Not citable***. ***Rehearing Granted.***

Orders for monetary sanctions are generally reviewed under the deferential abuse of discretion standard. *Vidrio v. Hernandez*, 172 Cal.App.4th 1443 (2009).

The proper interpretation of a statute or rule of court relied upon by the trial court as its authority to award sanctions is a question of law and reviewed *de novo*. *Vidrio v. Hernandez*, 172 Cal.App.4th 1443 (2009).

Whether policy language is ambiguous is a question of law reviewed *de novo*. *State Farm General Ins. Co. v. Mintarsih*, 175 Cal.App.4th 274 (2009).

Appeals & Writs: Waiver

"If a plaintiff chooses not to amend one cause of action but files an amended complaint containing the remaining causes of action . . . no waiver occurs and the plaintiff may challenge the intermediate ruling on the demurrer on an appeal from a subsequent judgment." *Nat'l Union Fire Ins. Co. v. Cambridge Integrated Services Group, Inc.*, 171 Cal.App.4th 35 (2009).

Appeals & Writs: Writs of Mandate – Adequate Remedy At Law

Petition for writ of mandate seeking review of a sanctions order is properly denied if the petitioner has an adequate remedy by way of appeal following entry of written order imposing sanctions. *Vidrio v. Hernandez*, 172 Cal.App.4th 1443 (2009).

Arbitration

Ninth Circuit affirms district court's denial of insurer's motion to compel arbitration on the grounds that: (1) insurer was not a party to the arbitration agreement; and (2) equitable estoppel was inapplicable where the insurance policy was not intertwined with the contract providing for arbitration and the contract providing for arbitration did not mention or incorporate by reference the insurance policy. *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042 (9th Cir. 2009).

In determining whether parties have agreed to arbitrate a dispute, Ninth Circuit applies general state law principles of contract interpretation, while giving due regard to the federal policy in favor of arbitration by resolving ambiguities as to the scope of

arbitration in favor of arbitration. *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042 (9th Cir. 2009).

The presumption in favor of arbitration does not apply if contractual language is plain that arbitration of a particular controversy is not within the scope of the arbitration provision. *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042 (9th Cir. 2009).

General contract and agency principles apply in determining the enforcement of an arbitration agreement by or against non-signatories. *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042 (9th Cir. 2009).

Among the principles applied in determining the enforcement of an arbitration agreement by or against non-signatories are: incorporation by reference; assumption; agency; veil-piercing/alter ego; and estoppel. *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042 (9th Cir. 2009).

A non-signatory can seek to enforce an arbitration agreement as a third party beneficiary. *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042 (9th Cir. 2009).

Assignees and Assignments

An assignee of a claim against an insurance company can have no stronger claim than the assignor. *Biltmore Assoc., LLC v. Twin City Fire Ins. Co.*, 572 F.3d 663 (9th Cir. 2009).

Insured's assignment of her bad faith claims to third party plaintiff before arbitration occurred was not itself evidence of collusion. *Safeco Ins. Co. v. Parks*, 170 Cal.App.4th 992 (2009).

Attorney Client Privilege

The attorney client privilege and work-product doctrine may bar disclosure, in a subsequent coverage action, of communications between an insurer and its coverage counsel and materials generated during the underlying litigation that gives rise to the coverage litigation. *Illinois Emcasco Ins. Co. v. Nationwide Mutual Ins. Co.*, 913 N.E.2d 1102 (Ill. 2009).

When the attorney client privilege and work-product doctrine are asserted in an insurance coverage matter, the trial court should conduct an *in camera* inspection of all of the requested documents in order to exclude from disclosure those documents entitled to protection. *Illinois Emcasco Ins. Co. v. Nationwide Mutual Ins. Co.*, 913 N.E.2d 1102 (Ill. 2009).

Attorney Client Privilege: Common Interest Doctrine

Under Illinois law, the common-interest doctrine does not automatically preclude an insurer from asserting the attorney client privilege and work product doctrine during discovery in a subsequent coverage action. *Illinois Emcasco Ins. Co. v. Nationwide Mutual Ins. Co., 913 N.E.2d 1102 (Ill. 2009).*

Attorney's Fees – See Also California Code of Civ. Proc. § 1038

Attorney's fee award was proper where policy limits were not exhausted until after jury verdict, even though policy limits were found to be higher at trial than those previously paid. *Major v. Western Home Ins. Co.*, 169 Cal.App.4th 1197 (2009).

Under Code of Civil Procedure section 1038, a defendant in a proceeding under the California Tort Claims Act or for express or implied indemnity or for equitable contribution who prevails on summary judgment may obtain all defense costs, including reasonable attorney's fees if the trial court determines the action was not brought in good faith. *Bosetti v. U.S. Life Ins. Co.*, 175 Cal.App.4th 1208 (2009).

Bad Faith

Insurer acted in bad faith when it failed to conduct a reasonable search for other policies it had issued after concluding there was no coverage under the tendered policy. *Safeco Ins. Co. v. Parks*, 170 Cal.App.4th 992 (2009).

The linchpin of a bad faith claim is that the denial of coverage was unreasonable. *McCoy v. Progressive West Ins. Co.*, 171 Cal.App.4th 785 (2009).

Before an insurer can be found to have acted in bad faith for its delay or denial in the payment of policy benefits, it must be shown that the insurer acted unreasonably or without proper cause. *McCoy v. Progressive West Ins. Co.*,171 Cal.App.4th 785 (2009).

In the insurance bad faith context, a dispute is not "legitimate" unless it is founded on a basis that is reasonable under all the circumstances. *McCoy v. Progressive West Ins. Co.*, 171 Cal.App.4th 785 (2009).

Punitive damages are proper in an insurance bad faith action. *McCoy v. Progressive West Ins. Co.*, 171 Cal.App.4th 785 (2009).

A disability insurer's failure to notify the insured of the specific basis for its approval of benefits at the time of approval is not bad faith where the insured cannot show she was harmed by that failure. *Bosetti v. U.S. Life Ins. Co.*, 175 Cal.App.4th 1208 (2009).

Bad faith cases are analyzed in a three step process: First, was there a breach at all so as to warrant contract damages? Second, was the breach unreasonable so as to warrant tort

damages? Third, was the breach so egregious that there is evidence of "oppression, fraud or malice" under Civil Code section 3294 subdivision (a) so as to warrant punitive damages? *Griffin Dewatering Corp. v. N. Ins. Co.*, 176 Cal.App.4th 172 (2009).

Insured's assignment of her bad faith claims to third party plaintiff before the arbitration occurred was not itself evidence of collusion. *Safeco Ins. Co. v. Parks*, 170 Cal.App.4th 992 (2009).

If an insurer's denial of coverage is reasonable, as show by substantial case law in favor of its position, there can be no bad faith even though the insurer's position is later rejected by the California Supreme Court. *Griffin Dewatering Corp. v. N. Ins. Co.*, 176 Cal.App.4th 172 (2009).

If the coverage decision is reasonable, no lawyer has power to charm a jury into awarding any tort damages against the insurance company based on that coverage decision. *Griffin Dewatering Corp. v. N. Ins. Co.*, 176 Cal.App.4th 172 (2009).

Where the reasonableness of the legal position taken by the insurer depends entirely on an analysis of legal precedent and statutory language, the issue is one of law to be determined by the court and not a fact to be determined by the jury. *Griffin Dewatering Corp. v. N. Ins. Co.,* 176 Cal.App.4th 172 (2009).

The basic rule of reasonability of a coverage decision holds for both first and third party insurance policies. *Griffin Dewatering Corp. v. N. Ins. Co.*, 176 Cal.App.4th 172 (2009).

In asserting a contractual position, an insurer must take a reasonable position under rules of contract interpretation, which rules generally favor insureds. *Griffin Dewatering Corp. v. N. Ins. Co.*, 176 Cal.App.4th 172 (2009).

A violation of the Fair Claims Settlement Practices Regulations does not, standing alone, prove the insurer acted unreasonably. However, the jury could rely on the regulation to infer unreasonableness. *Safeco Ins. Co. v. Parks*, 170 Cal.App.4th 992 (2009).

Compliance with the Fair Claims Settlement Practices Regulations is not alone sufficient to prove reasonable conduct. *Safeco Ins. Co. v. Parks*, 170 Cal.App.4th 992 (2009).

Bad Faith: Damages – *Brandt* (Attorney's) Fees

Brandt fees are clearly tort damages which cannot be awarded if an insurer acts reasonably, though incorrectly. *Griffin Dewatering Corp. v. N. Ins. Co.*, 176 Cal.App.4th 172 (2009).

Bad Faith: Damages – Emotional Distress

Emotional distress is recoverable in a bad faith action where the insureds meet a threshold showing of financial loss. *Major v. Western Home Ins. Co.*, 169 Cal.App.4th 1197 (2009).

Bad Faith: Genuine Dispute

There is no bad faith where there is a genuine dispute as to the denial of policy benefits. *Bosetti v. U.S. Life Ins. Co.*, 175 Cal.App.4th 1208 (2009).

Where there is a genuine issue as to the insurer's liability under the policy for the claim asserted by the insured, there can be no bad faith liability imposed on the insurer for advancing its side of that dispute. *McCoy v. Progressive West Ins. Co.*, 171 Cal.App.4th 785 (2009).

The "genuine dispute" doctrine may be applied where the insurer denies a claim based on the opinions of experts. *McCoy v. Progressive West Ins. Co.*, 171 Cal.App.4th 785 (2009).

Although an insurer may rely on experts, summary judgment on a bad faith claim must be denied where the evidence shows a dispute as to whether the insurer dishonestly selected its experts, the insurer's experts were unreasonable, or the insurer failed to conduct a thorough investigation. *McCoy v. Progressive West Ins. Co.*, 171 Cal.App.4th 785 (2009).

The genuine dispute rule does not relieve an insurer from its obligation to thoroughly and fairly investigate, process, and evaluate the insured's claim. A genuine dispute exists only where the insurer's position is maintained in good faith and on reasonable grounds. *McCoy v. Progressive West Ins. Co.*, 171 Cal.App.4th 785 (2009).

If a trial court provides instructions to the jury on the issue of reasonableness pursuant to CACI 2331 and 2332, it does not commit error by refusing to provide special jury instructions on the genuine dispute doctrine. *McCoy v. Progressive West Ins. Co.*, 171 Cal.App.4th 785 (2009).

Burden of Proof

To the extent an insured can show a covered risk (e.g. "sudden and accidental" releases of pollution) proximately caused indivisible damage for which it was held liable, the insured is contractually entitled to indemnity for that liability even if an excluded risk is a concurrent proximate cause. *State of California v. Allstate Ins. Co.*, 45 Cal.4th 1008 (2009).

It is the plaintiff's burden to prove the propriety of class certification. *Kaldenbach v. Mutual of Omaha Life Ins. Co.*, 178 Cal. App. 4th 830 (2009).

Standing to assert an Unfair Competition Law cause of action requires the plaintiff to prove he or she personally suffered an invasion or injury to a legally protected interest. *Troyk v. Farmers Group Inc.,* 171 Cal.App.4th 1305 (2009).

California Business & Professions Code Section 16720: Cartwright Act

Prices negotiated by an insurer and a direct automobile repair provider do not constitute a forbidden conspiracy to destroy competition. *Walker v. USAA Cas. Ins. Co.*, 558 F.3d 1025 (9th Cir. 2009).

California Business & Professions Code Section 17200, et seq.: Unfair Competition Law (The UCL)

A business practice is fraudulent if a plaintiff can show that members of the public are likely to be deceived. *Kaldenbach v. Mutual of Omaha Life Ins. Co.,* 178 Cal.App.4th 830 (2009).

The UCL, which on its face applies to all "businesses" and does not expressly except or exempt insurers, does authorize any injured person to sue for the violation of its requirements and/or prohibitions – that is, for "unfair competition." *Zhang v. Super. Ct.*, 178 Cal. App. 4th 1081 (2009). ***Not citable. Review granted.***

"Unfair competition" is defined in Business and Professions Code section 17200 to "include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue, or misleading advertising. . . ." *Zhang v. Super. Ct.*, 178 Cal. App. 4th 1081 (2009). ***Not citable. Review granted.***

False advertising and fraud are recognized basis for suit under the UCL both expressly as provided in the statutes and in case law. *Zhang v. Super. Ct.*, 178 Cal. App. 4th 1081 (2009) . ***Not citable. Review granted.***

No reason appears why an insurer company should not be subject to liability under the UCL if it engages in false advertising. *Zhang v. Super. Ct.*, 178 Cal. App. 4th 1081 (2009). ***Not citable. Review granted.***

An insurer's allegedly fraudulent conduct in violation of the Unfair Insurance Practices Act may give rise to a private civil cause of action under the UCL. *Zhang v. Super. Ct.*, 178 Cal. App. 4th 1081 (2009). ***Not citable. Review granted.***

California Business & Professions Code Section 17200 et seq.: UCL - Remedies

Although a private citizen can sue under Section 17200 et seq., only equitable remedies are available (e.g., injunction, restitution) and damages are not an available remedy. *Kaldenbach v. Mutual of Omaha Life Ins. Co*., 178 Cal.App.4th 830 (2009).

Enhanced remedy available under Section 3345 in senior citizen suit alleging unfair practices was also applicable to action seeking restitution for unfair competition. *Clark v. Super. Ct.*, 174 Cal.App.4th 82 (2009). ***Not citable. Review granted.***

California Business & Professions Code section 17206.1 is not superfluous to Civil Code section 3345. *Clark v. Super. Ct.*, 174 Cal.App.4th 82 (2009). ***Not citable. Review granted.***

Applying Civil Code section 3345 to treble restitution remedy does not violate rule against awarding damages in unfair competition claims. *Clark v. Super. Ct.*, 174 Cal.App.4th 82 (2009). ***Not citable. Review granted.***

Restitution is intended to deter unfair competition. *Clark v. Super. Ct.*, 174 Cal.App.4th 82 (2009). ***Not citable. Review granted.***

Court has discretion as to the amount of restitution to award, based on consideration of the equities. *Clark v. Super. Ct.*, 174 Cal.App.4th 82 (2009). ***Not citable. Review granted.***

The fact that there are alternative remedies under a specific statute does not preclude claims under the unfair competition and false advertising laws, unless the statute itself provides that the remedy is to be exclusive. *Blue Cross of California, Inc. v. Super. Ct.*, 180 Cal.App.4th 1237 (2009).

California Business & Professions Code Section 17200 et seq.: UCL - Standing

Plaintiff must establish injury-in-fact and loss of money or property in order to have standing to assert a claim for unfair competition. *Walker v. USAA Cas. Ins. Co.*, 558 F.3d 1025 (9th Cir. 2009).

A private person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements and complies with Code of Civil Procedure section 382. *Kaldenbach v. Mutual of Omaha Life Ins. Co*., 178 Cal.App.4th 830 (2009).

A private person has standing to sue only if he or she has suffered injury in fact and has lost money or property as a result of such unfair competition. *Kaldenbach v. Mutual of Omaha Life Ins. Co*., 178 Cal.App.4th 830 (2009).

The city attorney has express statutory authority to file suit on behalf of the people of California under the statutory unfair competition laws. *Blue Cross of California, Inc. v. Super. Ct.*, 180 Cal.App.4th 1237 (2009).

The city attorney has authority to sue under the unfair competition and false advertising laws for violation of Health and Safety Code section 1389.3 (i.e., the Knox-Keene Act's prohibition of post-claims underwriting) because there is no statute that expressly precludes the city attorney from doing so. *Blue Cross of California, Inc. v. Super. Ct.*, 180 Cal.App.4th 1237 (2009).

When a statute grants enforcement authority to a particular government agency and does not grant it to anyone else, a local law enforcement official can still pursue unfair competition and false advertising claims based on conduct made unlawful by the statute. *Blue Cross of California, Inc. v. Super. Ct.*, 180 Cal.App.4th 1237 (2009).

The contention that a plaintiff does not have standing to prosecute an Unfair Competition Law cause of action can be raised at any time, including on appeal because it goes to the existence of the cause of action. *Troyk v. Farmers Group Inc.,* 171 Cal.App.4th 1305 (2009).

Standing to assert an Unfair Competition Law cause of action requires the plaintiff to prove he or she personally suffered an invasion or injury to a legally protected interest. *Troyk v. Farmers Group Inc.,* 171 Cal.App.4th 1305 (2009).

A summary allegation of causation of damages is sufficient for pleading purposes (although a more specific factual allegation regarding causation is preferable). *Troyk v. Farmers Group Inc.,* 171 Cal.App.4th 1305 (2009).

California Civil Code Section 1750 (Consumer Legal Remedies Act)

Life insurance policies are neither "goods" nor "services" under the Consumers Legal Remedies Act. Thus, consumers do not have a valid claim against the issuers of their life insurance policies under the terms of the Consumers Legal Remedies Act. *Fairbanks v. Super. Ct.*, 46 Cal.4th 56 (2009).

California Civil Code Section 3045.2 (Hospital Lien Act)

The Hospital Lien Act was, by it own terms, not intended to include first party insurance coverage, such as uninsured motorist coverages. *Weston Reid, LLC v. American Ins. Group, Inc.*, 174 Cal.App.4th 940 (2009).

The purpose of the Hospital Lien Act is to secure part of the patient's recovery from liable third persons to pay his or her hospital bill, while ensuring that the patient retains sufficient funds to address other losses resulting from the tortious injury. *Weston Reid, LLC v. American Ins. Group, Inc.*, 174 Cal.App.4th 940 (2009).

California Civil Code section 3045.2 creates a statutory non-possessory lien in favor of a hospital against third persons liable for the patient's injuries. *Weston Reid, LLC v. American Ins. Group, Inc.*, 174 Cal.App.4th 940 (2009).

Hospital lien arises because of, and applies to, a payor fund created by the liability of a third party tortfeasor for the injures which gave rise to the needed medical services. *Weston Reid, LLC v. American Ins. Group, Inc.*, 174 Cal.App.4th 940 (2009).

California Civil Code Section 3294 – See Also Punitive Damages

In a civil case not arising from the breach of a contractual obligation, the jury may award punitive damages "where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice." *Roby v. McKesson Corp.*, 47 Cal.4th 686 (2009).

Malice is defined as intentional injury or "despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." Cal. Civ. Code section 3294. *Roby v. McKesson Corp.*, 47 Cal.4th 686 (2009).

Oppression is defined as "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." Cal. Civ. Code section 3294. *Roby v. McKesson Corp.*, 47 Cal.4th 686 (2009).

California Code of Civil Procedure Section 382 (Class Actions) - See Also Class Actions: Class Certification

Code of Civil Procedure section 382 authorizes class suits in California when the question is one of a common or general interest of many persons or when the parties are numerous and it is impracticable to bring them all before the court. *Kaldenbach v. Mutual of Omaha Life Ins. Co.*, 178 Cal.App.4th 830 (2009).

To obtain certification under California Code of Civil Procedure section 382, a party must establish the existence of both an ascertainable class and a well–defined community of interest among the class members. The community of interest requirement involves three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class. *Kaldenbach v. Mutual of Omaha Life Ins. Co.*, 178 Cal. App.4th 830 (2009).

It is the plaintiff's burden to prove the propriety of class certification. *Kaldenbach v. Mutual of Omaha Life Ins. Co.*, 178 Cal.App.4th 830 (2009).

The requisites for class certification are numerosity, ascertainability, typicality and commonality. It is the plaintiff's burden to prove the propriety of class certification. *Kaldenbach v. Mutual of Omaha Life Ins. Co.*, 178 Cal.App.4th 830 (2009).

Class certification is inappropriate where individualized issues predominate over common ones. *Kaldenbach v. Mutual of Omaha Life Ins. Co.*, 178 Cal.App.4th 830 (2009).

A private person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements and complies with Code of Civil Procedure section 382. *Kaldenbach v. Mutual of Omaha Life Ins. Co.*, 178 Cal.App.4th 830 (2009).

It is the plaintiff's burden to prove the propriety of class certification. *Kaldenbach v. Mutual of Omaha Life Ins. Co.*, 178 Cal. App. 4th 830 (2009).

California Code of Civil Procedure Section 1038 (Attorney's Fees) – See Also Attorney's Fees

Under Code of Civil Procedure section 1038, a defendant in a proceeding under the California Tort Claims Act or for express or implied indemnity or for equitable contribution who prevails on summary judgment may obtain all defense costs, including reasonable attorney's fees if the trial court determines the action was not brought in good faith. *Bosetti v. U.S. Life Ins. Co.*, 175 Cal.App.4th 1208 (2009).

California Code of Regulations, Title 10, Section 2695.1, et seq. (Fair Claims Settlement Practices Regulations)

Fair Claims Settlement Practices Regulations delineate certain minimum standards for the settlement of claims, but do not provide "the exclusive definition of all unfair claims settlement practices." *Safeco Ins. Co. v. Parks*, 170 Cal.App.4th 992 (2009).

A violation of the Fair Claims Settlement Practices Regulations does not, standing alone, prove the insurer acted unreasonably. However, the jury could rely on the regulation to infer unreasonableness. *Safeco Ins. Co. v. Parks*, 170 Cal.App.4th 992 (2009).

Compliance with the Fair Claims Settlement Practices Regulations is not alone sufficient to prove reasonable conduct. *Safeco Ins. Co. v. Parks*, 170 Cal.App.4th 992 (2009).

Fair Claims Settlement Practices Regulations do not necessarily confine insurers' disclosure requirements solely to the policy under which the claim is tendered. *Safeco Ins. Co. v. Parks*, 170 Cal.App.4th 992 (2009).

California Corporations Code Section 6020

Surviving corporation, following merger by employer corporation with affiliate corporations as a result of an internal restructuring of a family group of corporations, succeeds to rights of employer corporation, and is subject to all of employer corporation's debts and liabilities, and is responsible for workers' compensation benefits owed to

injured employee of employer corporation. *Catholic Healthcare West v. Cal. Ins. Guarantee Ass'n.*, 178 Cal.App.4th 15 (2009).

California Evidence Code Section 1271 (Hearsay - Business Records Exception)

Documents are not admissible pursuant to the business records exception to the hearsay rule. There was no evidence (1) the documents were made in the regular course of a business, (2) the documents were made at or near the time of the conditions they purported to record, and (3) that the sources of information, method of preparation, and time of preparation indicated the documents were trustworthy. *State of California v. Continental Ins. Co.*, 169 Cal.App.4th 1114 (2009). ***Not citable. Review granted.***

California Evidence Code Section 1331 (Hearsay-Ancient Documents Exception)

Documents are not admissible pursuant to the ancient documents exception to the hearsay rule where there was no evidence the statements were generally acted upon as true or that the witness had an interest in whether the statements were true. *State of California v. Continental Ins. Co.*, 169 Cal.App.4th 1114 (2009). ***Not citable. Review granted.***

No published decision has interpreted Evidence Code section 1331. *State of California v. Continental Ins. Co.*, 169 Cal.App.4th 1114 (2009). ***Not citable. Review granted.***

California Health & Safety Code Section 1371.4 (Knox-Keene Act)

Codified as Health & Safety Code section 1371.4, the Knox-Keene Act requires a plan or insurer to reimburse the provider of emergency care to an insured. *Coast Plaza Doctors Hospital v. Blue Cross of California*, 173 Cal.App.4th 1179 (2009).

Knox-Keene Act requires a plan or insurer to reimburse the provider of emergency care to an insured or plan beneficiary. *Coast Plaza Doctors Hospital v. Blue Cross of California*, 173 Cal.App.4th 1179 (2009).

California Health & Safety Code section 1371.4, of the Knox-Keene Act requiring a plan or insurer to reimburse the provider of emergency care to an insured or plan beneficiary, comes under the saving clause of ERISA and is therefore not preempted because it is specifically directed toward the insurance industry and substantially affects the risk pooling arrangement between the insurer and insured. *Coast Plaza Doctors Hospital v. Blue Cross of California*, 173 Cal.App.4th 1179 (2009).

California Health & Safety Code Section 1389.3 (Knox-Keene Act – Post-Claims Underwriting)

The city attorney has authority to sue under the unfair competition and false advertising laws for violation of Health and Safety Code section 1389.3 (i.e., the Knox-Keene Act's prohibition of postclaims underwriting) because there is no statute that expressly

precludes the city attorney from doing so. *Blue Cross of California, Inc. v. Super. Ct.*, 180 Cal.App.4th 1237 (2009).

When a statute grants enforcement authority to a particular government agency and does not grant it to anyone else, a local law enforcement official can still pursue unfair competition and false advertising claims based on conduct made unlawful by the statute. *Blue Cross of California, Inc. v. Super. Ct.*, 180 Cal.App.4th 1237 (2009).

<u>California Insurance Code Section 381(f) (Premiums)</u>

"[T]he clear and unambiguous meaning of the term 'premium,' as used in [Insurance Code] section 381, subdivision (f), includes a service charge imposed for payment in full of the stated insurance premium for a one-month term policy." *Troyk v. Farmers Group Inc.,* 171 Cal.App.4th 1305 (2009).

Insurance Code section 381 is "presumably" a consumer protection statute that must be interpreted from the perspective of the consumer (i.e., the insured). *Troyk v. Farmers Group Inc.,* 171 Cal.App.4th 1305 (2009).

Insurance Code section 381(f) requires that service charges, as part of premium, must be expressly disclosed in the policy. *Troyk v. Farmers Group Inc.,* 171 Cal.App.4th 1305 (2009).

Insurance Code section 381(f) is a mandatory statute which "is one that is essential to the promotion of the overall statutory design and thus does not permit substantial compliance." *Troyk v. Farmers Group Inc.,* 171 Cal.App.4th 1305 (2009).

Insurance Code section 381(f) "requires an express statement in an insurance policy of the premium charged by an insurer and does so presumably to protect consumers from confusion regarding the premium charged and to discourage insurers from misleading consumers regarding the amount of premium charged." *Troyk v. Farmers Group Inc.,* 171 Cal.App.4th 1305 (2009).

Insurance Code section 381(f) "allows a consumer to easily compare … premiums charged by … insurers for the same coverage, thereby promoting healthy comparison-shopping by consumers and presumably encouraging insurers to offer competitive premiums for their insurance." *Troyk v. Farmers Group Inc.,* 171 Cal.App.4th 1305 (2009).

There is a possible violation of the unfair competition laws where an insurer fails to disclose a service charge that is part of a premium as required by Insurance Code section 381(f). *Troyk v. Farmers Group Inc.,* 171 Cal.App.4th 1305 (2009).

California Insurance Code Section 530 -- See Efficient Proximate Cause Doctrine

California Insurance Code Section 533 (Willful Acts)

The insured cannot recover any portion of loss it has willfully caused. *State of California v. Continental Ins. Co.*, 169 Cal.App.4th 1114 (2009). ***Not citable. Review granted.***

Insurance Code section 533 provides that an insurer has no duty to indemnify a loss caused by the insured's willful act. *State Farm General Ins. Co. v. Mintarsih*, 175 Cal.App.4th 274 (2009).

An act is willful if the insured intended to commit the act and either intended the act to cause harm or the act was inherently harmful. *State Farm General Ins. Co. v. Mintarsih*, 175 Cal.App.4th 274 (2009).

The deprivation of a person's freedom for the purpose of exploiting him or her as a domestic servant, while depriving him or her of the wages to which he or she is entitled, is inherently harmful. *State Farm General Ins. Co. v. Mintarsih*, 175 Cal.App.4th 274 (2009).

Insurance Code section 533 precludes indemnity for willful false imprisonment, even when policy expressly promises indemnity for false imprisonment. *State Farm General Ins. Co. v. Mintarsih*, 175 Cal.App.4th 274 (2009).

Insurance Code section 533 precludes indemnity for a loss caused by conduct that, standing alone, could be characterized as negligent rather than intentional, but is so closely related to intentional misconduct as to be inseparable from such conduct. *State Farm General Ins. Co. v. Mintarsih*, 175 Cal.App.4th 274 (2009).

California Insurance Code Section 758.5

A Repair Satisfaction Vehicle Program ("RSVP") Damage Only policy which covers 100 percent of "the fair and responsible charges" for repairs performed at affiliated "RSVP" auto repair shops, but limits coverage for repairs performed at non-RSVP shops to 80 percent of the reasonable repair costs, does not violate Insurance Code section 758.5, because the coverage limitation is not "based on charges that would have been incurred had the vehicle been repaired by the insurer's chosen shop." *Maystruk v. Infinity Ins. Co.*, 175 Cal.App.4th 881 (2009).

Insurance Code section 758.5 does not require insurers to pay 100 percent of a vehicle's repair cost regardless of whether the insured took the vehicle to a recommended shop because, if the Legislature had so intended, it would have expressly said so in the text of the statute. *Maystruk v. Infinity Ins. Co.*, 175 Cal.App.4th 881 (2009).

Because Insurance Code section 758.5 is clear and unambiguous, legislative history stating that the legislative intent of the section was to prohibit insurers from steering insureds to particular repair shops by requiring insurers to "pay the cost of repair charged by the insured's chosen shop without discount, if the amount charged for the repairs is reasonable" may not be considered in determining the meaning of the statute. *Maystruk v. Infinity Ins. Co.*, 175 Cal.App.4th 881 (2009)

When not based on any facts stated in the complaint, a legal theory that insurer estimated reasonable costs of repairs, required insurer-recommended shops to accept such estimates, and then paid non-insurer-recommended shops chosen by the insured the same estimate at a discount, thus violating Insurance Code section 758.5, may not be grounds for granting leave to amend because such a theory would be based on mere suspicions regarding the calculation of reasonable repair costs. *Maystruk v. Infinity Ins. Co.*, 175 Cal.App.4th 881 (2009)

California Insurance Code Section 790.03 (Unfair Insurance Practices Act)

Insurance Code section 790.03 does not create a private right of action against "insurers who commit the unfair practices enumerated in that provision." *Zhang v. Super. Ct.*, 178 Cal.App.4th 1081 (2009). ***Not citable. Review granted.***

If a plaintiff relies on conduct that violates the Unfair Insurance Practices Act but is *not otherwise prohibited*, a civil action under the Unfair Competition Law is barred. *Zhang v. Super. Ct.*, 178 Cal.App.4th 1081 (2009). ***Not citable. Review granted.***

To construe the Unfair Insurance Practices Act as immunizing insurers from the consequence of misconduct that other business must suffer would simply make no sense. *Zhang v. Super. Ct.*, 178 Cal.App.4th 1081 (2009). ***Not citable. Review granted.***

California Insurance Code Section 1063.1 (California Insurance Guarantee Act – CIGA)

Phrase "original claimant under the insurance policy in his or her own name," set forth in statute, was included to limit CIGA's liability to those individuals or entities that were named in the policy as well as members of the public injured by a named insured. *Catholic Healthcare West v. Cal. Ins. Guarantee Ass'n.*, 178 Cal.App.4th 15 (2009).

The surviving corporation of a merger between two unaffiliated entities was not an original claimant under an insurance policy in the name of the disappearing corporation. *Catholic Healthcare West v. Cal. Ins. Guarantee Ass'n.*, 178 Cal.App.4th 15 (2009).

The phrase "original claimant under the insurance policy in his or her own name" includes affiliate corporations into which the employer corporation merged as a result of an internal restructuring of a family group of corporations. *Catholic Healthcare West v. Cal. Ins. Guarantee Ass'n.*, 178 Cal.App.4th 15 (2009).

"Covered claim" includes amounts paid on "claims by any person other than the original claimant under the insurance policy in his or her own name" where the employer corporation merged with affiliate corporations as a result of an internal restructuring of a family group of corporations. *Catholic Healthcare West v. Cal. Ins. Guarantee Ass'n.*, 178 Cal.App.4th 15 (2009).

Treating surviving corporation as continuation of original employer corporation, following merger by employer corporation with affiliate corporations as a result of an internal restructuring of a family group of corporations, does not expand CIGA's protection under the statute. *Catholic Healthcare West v. Cal. Ins. Guarantee Ass'n.*, 178 Cal.App.4th 15 (2009).

Purpose of CIGA is to provide a limited form of protection for insureds and the public, not to provide a fund to protect insurers. *Catholic Healthcare West v. Cal. Ins. Guarantee Ass'n.*, 178 Cal. App. 4th 15 (2009).

<u>California Insurance Code Section 1850.4, et seq. (Proposition 103)</u>

Assuming for purposes of argument that an award of compensation is limited to expenses incurred in proceedings "permitted or established" pursuant to California Insurance Code sections 1850.4, *et seq*., judicial review of a Proposition 103 regulation is such a proceeding. *Ass'n of California Ins. Co. v. Poizner*, 180 Cal.App.4th 1029 (2009).

Proposition 103 regulations allowing recovery of compensation by consumer interveners for their participation in rate proceedings other than public rate hearings, are consistent with Proposition 103 and thus valid. *Ass'n of California Ins. Co. v. Poizner*, 180 Cal.App.4th 1029 (2009).

The absence of specific statutory provisions in Proposition 103 relating to the resolution of a rate application without a public hearing (e.g., as by way of a settlement) does not mean that regulations permitting such resolution exceed statutory authority, but only that the electorate deferred to and relied the expertise of the Insurance Commissioner as to such matters. *Ass'n of California Ins. Co. v. Poizner*, 180 Cal.App.4th 1029 (2009).

California Insurance Code section 1861.05(c) only sets out the circumstances under which a rate change application may be deemed approved without a rate hearing; it does not address the proceedings that may occur after the Insurance Commissioner determines to hold a hearing or after an intervener submits a petition to intervene or a petition for a hearing. *Ass'n of California Ins. Co. v. Poizner*, 180 Cal.App.4th 1029 (2009).

The only statutory requirements for receiving compensation for participation in the rate-setting process established by Proposition 103, codified as section 1861.01, *et seq*. are stated in subdivision (b) of California Insurance Code section 1861.10: that the intervener represent consumers' interests and make a "substantial contribution" to the outcome of the process. *Ass'n of California Ins. Co. v. Poizner*, 180 Cal.App.4th 1029 (2009).

California Insurance Code section 1861.10(b) does not expressly or by implication require that the order, regulation, or decision of the Insurance Commissioner be adopted only after a public hearing, or only after any specific procedure. *Ass'n of California Ins. Co. v. Poizner*, 180 Cal.App.4th 1029 (2009).

Pursuant to California Insurance Code section 1861.10(b), a compensation award must be paid by the insurer where the award is for advocacy that occurs in response to a rate change application; in all other circumstances, whether the award is payable by the insurer is discretionary. *Ass'n of California Ins. Co. v. Poizner*, 180 Cal.App.4th 1029 (2009).

Insurance Code section 12979 is not intended to shift liability for compensation, awarded pursuant to section 1861.10(b), from insurers to the Department of Insurance because Section 12979 deals only with administrative and operational costs of the Department, and not awards of compensation for expenses of consumer interveners. *Ass'n of California Ins. Co. v. Poizner*, 180 Cal.App.4th 1029 (2009).

California Insurance Code Section 11580.9, subd. (b)

The Legislature revised the California Insurance Code to remove the phrase from section 11580.9, subdivision (b) "engaged in the business of renting or leasing motor vehicles without operators," and replaced it with "who in the course of his or her business rents or leases motor vehicles without operators." This eliminated any ambiguity as to whether leasing must be a regular part of the insured's business. *Sentry Select Ins. v. Fidelity & Guaranty Ins. Co.*, 46 Cal.4th 204 (2009).

California Insurance Code Section 12979

Insurance Code section 12979 is not intended to shift liability for compensation, awarded pursuant to section 1861.10(b), from insurers to the Department of Insurance because section 12979 deals only with administrative and operational costs of the Department, and not awards of compensation for expenses of consumer interveners. *Ass'n of California Ins. Co. v. Poizner*, 180 Cal.App.4th 1029 (2009).

Claims Made Policies

Claims made prior to purchase are not covered when the purchased policy specifically provides coverage only for "Claims First Made. . . During the Policy Period," *Evanston Ins. Co. v. OEA, Inc.*, 566 F.3d 915 (9th Cir. 2009).

Class Actions: Class Certification – See Also California Civ. Code § 382

Code of Civil Procedure section 382 authorizes class suits in California when the question is one of a common or general interest of many persons, or when the parties are

numerous and it is impracticable to bring them all before the court. *Kaldenbach v. Mutual of Omaha Life Ins. Co.*, 178 Cal.App.4th 830 (2009).

To obtain certification under Code of Civil Procedure section 382, a party must establish the existence of both an ascertainable class and a well–defined community of interest among the class members. The community of interest requirement involves three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class. *Kaldenbach v. Mutual of Omaha Life Ins. Co.*, 178 Cal.App.4th 830 (2009).

The requisites for class certification are numerosity, ascertainability, typicality and commonality. It is the plaintiff's burden to prove the propriety of class certification. *Kaldenbach v. Mutual of Omaha Life Ins. Co.*, 178 Cal.App.4th 830 (2009).

Class certification is inappropriate where individualized issues predominate over common ones. *Kaldenbach v. Mutual of Omaha Life Ins. Co.*, 178 Cal.App.4th 830 (2009).

A private person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements and complies with Code of Civil Procedure section 382. *Kaldenbach v. Mutual of Omaha Life Ins. Co.*, 178 Cal.App.4th 830 (2009).

It is the plaintiff's burden to prove the propriety of class certification. *Kaldenbach v. Mutual of Omaha Life Ins. Co.*, 178 Cal. App. 4th 830 (2009).

Collateral Estoppel

The trial court erred by concluding that insurer's obligation to pay damages for a "loss" was to be measured by the existence of a prior judgment or award rendered in a proceeding binding on the insurer under the doctrine of collateral estoppel. The right of insurer to reopen and relitigate the liability of its insured for covered losses and resulting damages should not be examined under principles of privity or collateral estoppel, but under well-settled principles of contractual indemnity. *Executive Risk Indem., Inc. v. Jones,* 171 Cal.App.4th 319 (2009).

Collateral Source Rule

The collateral source rule applies when an injured party obtains compensation for medical expenses from an independent source. *Howell v. Hamilton Meats & Provisions, Inc.*, 179 Cal. App.4th 686 (2009). ***Not citable. Review granted.***

Application of the collateral source rule results in a plaintiff being awarded the amount of money paid, for example, by the plaintiff's health insurer, notwithstanding the fact that the plaintiff did not pay that money. *Howell v. Hamilton Meats & Provisions, Inc.*, 179 Cal. App.4th 686 (2009). ***Not citable. Review granted.***

Collusion

Insured's assignment of bad faith claims to third party plaintiff before arbitration occurred was not itself evidence of collusion. *Safeco Ins. Co. v. Parks*, 170 Cal.App.4th 992 (2009).

Common Fund Rule

The common fund rule requires the insurer to pay a pro-rata portion of the insured's attorney's fees and costs when the insured recovers a subsidy in a third-party payment. *21st Century Ins. Co. v. Super. Ct.*, 47 Cal.4th 511 (2009).

Pro-rata allocation of attorney's fees to insurer and insured furthers the ability of the insured to receive medical payments at lower premiums and allows the insured to keep payments even if the insured recovered nothing in actions against third parties. 21st Century Ins. Co. v. Super. Ct., 47 Cal.4th 511 (2009).

Completed Operations Coverage

Under completed operations coverage which defines "completed operations" as the date "the work has been put to its intended use. . .," "the point at which a job site has been put to its intended use is a question of fact to be determined under the conditions and circumstances of each case." *North Am. Capacity Ins. Co. v. Claremont Liab. Ins. Co.*, 177 Cal.App.4th 272 (2009).

Under completed operations coverage which defines "completed operations" as the date "the work has been put to its intended use. . .," "it is logical that a residence might be partially inhabited prior to the date of completion, and not yet be put to its 'intended use' because the owner does not have full use of the facilities." *North Am. Capacity Ins. Co. v. Claremont Liab. Ins. Co.*, 177 Cal.App.4th 272 (2009).

Concurrent Causes – See Also Efficient Proximate Cause Doctrine (California Insurance Code Section 530)

To the extent an insured can show a covered risk (e.g. "sudden and accidental" releases of pollution) proximately caused indivisible damage for which it was held liable, the insured is contractually entitled to indemnity for that liability even if an excluded risk is a concurrent proximate cause. *State of California v. Allstate Ins. Co.*, 45 Cal.4th 1008 (2009).

The insurer may counter the insured's evidence of indivisibility with its own evidence that the damages are divisible and that only a limited portion of damages resulted from covered events. *State of California v. Allstate Ins. Co.*, 45 Cal.4th 1008 (2009).

Only if the insured can identify particular, sudden and accidental events and prove they contributed substantially to causing indivisible property damage for which the insured bore liability is the insurer obliged to indemnify its insured for the entirety of the damages. Indemnity is not proper in situations where the insured can do no more than speculate that some events may have occurred suddenly and accidentally or where such events contributed only trivially to the property damage from pollution. *State of California v. Allstate Ins. Co.*, 45 Cal.4th 1008 (2009).

Cases have properly held against indemnity where the insured can make only unsubstantiated claims of sudden and accidental discharges in the face of repeated, continuous discharges in the course of business. *State of California v. Allstate Ins. Co.*, 45 Cal.4th 1008 (2009).

The concurrent proximate cause doctrine applies to third party coverage, but only where there are two negligent acts or omissions of the insured, one of which, independent of the excluded cause, renders the insured liable for the resulting injuries. *City of Carlsbad v. Ins. Co. of the State of Pennsylvania*, 180 Cal.App.4th 176 (2009).

Insured's negligence in abandoning passenger on the side of the highway was an independent, concurrent cause of passenger's injuries that was connected to, but not dependent on, insured's use of the car. *Safeco Ins. Co. v. Parks*, 170 Cal.App.4th 992 (2009).

While coverage under both first and third party insurance is a matter of contract, the contractual scope of third party liability insurance coverage, as reflected in the policy language, depends on the tort law source of the insured's liability. *State of California v. Allstate Ins. Co.*, 45 Cal.4th 1008 (2009).

If a covered act or event subjected the insured to liability for the disputed property damage or injury and suffices, in itself, to render the insured fully liable for the resulting damage or injury, then the insurer is obligated to indemnify the insured even if other excluded causes contributed to the damage or injury. *State of California v. Allstate Ins. Co.*, 45 Cal.4th 1008 (2009).

Conditions Precedent to Coverage

Contractors warranty endorsement which provides coverage "shall not" apply "unless" its terms are satisfied "patently is in the nature of a condition precedent to coverage, not an exclusion from coverage." *North Am. Capacity Ins. Co. v. Claremont Liab. Ins. Co.*, 177 Cal.App.4th 272 (2009).

"A condition precedent refers to an act, condition or event that must occur before the insurance contract becomes effective or binding on the parties…." *North Am. Capacity Ins. Co. v. Claremont Liab. Ins. Co.*, 177 Cal.App.4th 272 (2009).

In general, "conditions neither confer nor exclude coverage for a particular risk but, rather, impose certain duties on the insured in order to obtain the coverage provided by the policy." *North Am. Capacity Ins. Co. v. Claremont Liab. Ins. Co.*, 177 Cal.App.4th 272 (2009).

Constructive Notice

The law charges a party with notice of all facts the party might have ascertained had it diligently pursued the requisite inquiry. *OneBeacon Am. Ins. Co. v. Fireman's Fund Ins. Co.*, 175 Cal.App.4th 183 (2009).

Consumer Legal Remedies Act – See California Civil Code § 1750

Contract Interpretation

A contract must be interpreted to give effect to the mutual intention of the parties at the time of contract. The mutual intention must be inferred, if possible, solely from the written provisions of the contract. *State of California v. Continental Ins. Co.*, 169 Cal.App.4th 1114 (2009). ***Not citable. Review granted.***

The court's goal in construing insurance contracts, as with contracts generally, is to give effect to the parties' mutual intentions. *State of California v. Allstate Ins. Co.*, 45 Cal.4th 1008 (2009).

If contractual language is clear and explicit, it governs. *State of California v. Allstate Ins. Co.*, 45 Cal.4th 1008 (2009).

However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract. *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042 (9th Cir. 2009).

The court of appeal is "not at liberty to rewrite the policy to achieve the result" a party seeks. *Kwok v. Transnation Title Ins. Co.*, 170 Cal.App.4th 1562 (2009).

The terms of an insurance policy must be interpreted "in context" and effect must be given "to every part" of the policy with "'each clause helping to interpret the other.'" *Kwok v. Transnation Title Ins. Co.*, 170 Cal.App.4th 1562 (2009).

A policy cannot be interpreted so that a term is deprived of all meaning. *Kwok v. Transnation Title Ins. Co.*, 170 Cal.App.4th 1562 (2009).

"Notwithstanding that insurance policies have special features, they are still contracts, to which ordinary rules of contractual interpretation apply." *North Am. Capacity Ins. Co. v. Claremont Liab. Ins. Co.*, 177 Cal.App.4th 272 (2009).

"The 'clear and explicit' meaning of the contractual provisions (Civ. Code, section 1638), interpreted in their 'ordinary and popular sense' (Civ. Code, section 1644), governs judicial interpretation (Civ. Code, section 1638), unless the words are 'used by the parties in a technical sense' or a 'special meaning' is given to them by usage (Civ. Code, section 1644)." *North Am. Capacity Ins. Co. v. Claremont Liab. Ins. Co.*, 177 Cal.App.4th 272 (2009).

That an ERISA plan exclusion violates the Internal Revenue Code does not permit the court to rewrite the plan or to enlarge benefits beyond the clear, unambiguous language of the plan. *Bellah v. American Airlines, Inc.,* 656 F. Supp. 2d 1207 (E.D. Cal. 2009).

An ERISA beneficiary was not entitled to recover benefits under an equitable estoppel theory where the language of the plan was clear and unambiguous, notwithstanding subsequent miscommunications between the beneficiary and plan administrator regarding the beneficiary's eligibility for benefits. *Bellah v. American Airlines, Inc.*, 656 F. Supp. 2d 1207 (E.D. Cal. 2009).

An exclusion providing that an employee not at work because of a disability at the time coverage becomes effective is not covered for Long Term Disability benefits "until you return to work and deductions are taken from your pay," clearly and unambiguously excludes an employee who was on disability leave at the time the Long Term Disability plan became effective; therefore, subsequent miscommunications between the plan administrator and the beneficiary regarding her benefits were irrelevant. *Bellah v. American Airlines, Inc*., 656 F. Supp. 2d 1207 (E.D. Cal. 2009).

When reviewing an ERISA plan courts "'apply contract principles derived from state law . . . guided by the policies expressed in ERISA and other federal labor laws'" which require courts to "look to the [policy's] language in context and construe each provision in a manner consistent with the whole such that none is rendered nugatory." Where a policy unambiguously covers only treatment received from a contracted residential treatment center, the insurer correctly denies coverage for an insured's stay at a non-contracted residential treatment center. *Dupree v. Holman Prof'l. Counseling Ctrs*., 572 F.3d 1094 (9th Cir. 2009).

An ERISA plan's repeated assertion that certain activities are not covered creates a "default presumption of no coverage that must be then overcome by a showing of" coverage. An insurer's specific inclusion of names of affiliated (contracted) medical treatment centers, created a presumption that the insured's decision to select and seek treatment from non-contracted treatment center was deemed not covered under the plan. *Dupree v. Holman Prof'l. Counseling Ctrs*., 572 F.3d 1094 (9th Cir. 2009).

An insurance policy is interpreted using the same rules of interpretation applicable to other contracts. *State Farm General Ins. Co. v. Mintarsih*, 175 Cal.App.4th 274 (2009).

The mutual intention of the contracting parties at the time the contract was formed governs interpretation. *State Farm General Ins. Co. v. Mintarsih*, 175 Cal.App.4th 274 (2009).

The mutual intention of the parties is ascertained solely from the written contract if possible, but consideration is also given to the circumstances under which the contract was made and the matter to which it relates. *State Farm General Ins. Co. v. Mintarsih*, 175 Cal.App.4th 274 (2009).

The court considers the contract as a whole and interprets its language in context, rather than interpreting a provision in isolation. *State Farm General Ins. Co. v. Mintarsih*, 175 Cal.App.4th 274 (2009).

Words are interpreted in accordance with their ordinary and popular sense, unless the words are used in a technical sense or a special meaning is given to them by usage. *State Farm General Ins. Co. v. Mintarsih*, 175 Cal.App.4th 274 (2009).

If contractual language is clear and explicit and does not involve an absurdity, the plain meaning governs. *State Farm General Ins. Co. v. Mintarsih*, 175 Cal.App.4th 274 (2009).

Whether policy language is ambiguous is a question of law reviewed *de novo*. *State Farm General Ins. Co. v. Mintarsih*, 175 Cal.App.4th 274 (2009).

The interpretation of a contract, including the resolution of any ambiguity, is solely a judicial function, unless the interpretation turns on the credibility of extrinsic evidence. *State Farm General Ins. Co. v. Mintarsih*, 175 Cal.App.4th 274 (2009).

Generally, coverage clauses are interpreted broadly, and exclusionary clauses are interpreted narrowly. *City of Carlsbad v. Ins. Co. of the State of Pennsylvania*, 180 Cal.App.4th 176 (2009).

To evaluate an exclusionary clause, a court first considers the “plain meaning” a layperson would attach to the language of the exclusion. *City of Carlsbad v. Ins. Co. of the State of Pennsylvania*, 180 Cal.App.4th 176 (2009).

“Any” is interpreted to be broad, general and all embracing and means “for the foregoing purposes and every of them.” *City of Carlsbad v. Ins. Co. of the State of Pennsylvania*, 180 Cal.App.4th 176 (2009).

“Reason” is interpreted as synonymous with “cause.” *City of Carlsbad v. Ins. Co. of the State of Pennsylvania*, 180 Cal.App.4th 176 (2009).

Contract Interpretation: Ambiguity

If the terms of a policy are ambiguous, they are interpreted to protect the objectively reasonable expectations of the insured. *State of California v. Allstate Ins. Co.*, 45 Cal.4th 1008 (2009).

Because terms like "release," "escape," "dispersal," and "discharge" in a pollution exclusion have potentially broad literal meanings and connotations in common usage, the pollution exclusion in the context of a waste disposal site and in certain other contexts (e.g. *MacKinnon v. Truck Ins. Exchange*, 31 Cal.4th 635 (2003)) is ambiguous as to its exact scope of application. *State of California v. Allstate Ins. Co.*, 45 Cal.4th 1008 (2009).

A split in authority regarding interpretation of a policy provision does not necessarily render the provision ambiguous. *United Nat'l Ins. Co. v. Spectrum Worldwide, Inc.*, 555 F.3d 772 (9th Cir. 2009).

If there is an ambiguity in an insurance policy provision, the insurance company must interpret the ambiguity in favor of the insured. *Griffin Dewatering Corp. v. N. Ins. Co*., 176 Cal.App.4th 172 (2009).

Third-party negligence provisions in a policy were not "insufficiently clear," as defined in *De Bruyn v. Super. Ct.*, 158 Cal.App.4th 1213 (2008), where the language of the provisions clearly excluded the perils of contractor-negligence-induced corrosion and water leaks, such that "'[a] reasonable insured would readily understand from the policy language which perils are covered and which are not.'" *Freedman v. State Farm Ins. Co.*, 173 Cal.App.4th 957 (2009).

Where the size of the hole through which water leaked was small, and the amount of water damage was extensive, a water damage exclusion that did not specify how long a leak has to exist to be deemed "continuous," or how many times it has to start and stop to be considered "repeated," was not ambiguous as applied because such leak had lasted long enough to be deemed "continuous," or had stopped and started enough times to count as "repeated," under any reasonable construction of those terms. *Freedman v. State Farm Ins. Co.*, 173 Cal.App.4th 957 (2009).

Even when insurance provisions are not found ambiguous, those provisions may still be interpreted in accordance with the insured's alleged reasonable expectation of coverage. *DEB Associates v. Greater N.Y. Mutual Ins. Co.*, 970 A.2d 1074 (N.J. 2009).

Policy language is ambiguous if it is susceptible of more than one reasonable interpretation in the context of the policy as a whole. *State Farm General Ins. Co. v. Mintarsih*, 175 Cal.App.4th 274 (2009).

Any ambiguity must be resolved in a manner consistent with the objectively reasonable expectations of the insured in light of the nature and kind of risks covered by the policy. *State Farm General Ins. Co. v. Mintarsih*, 175 Cal.App.4th 274 (2009).

The term "indebtedness" in a title insurance policy does not require any qualifying language and is not ambiguous. *First Am. Title Ins. Co. v. Xwarehouse Lending Corp.*, 177 Cal.App.4th 106 (2009).

Just because language in a policy could be more precise or explicit does not mean it is ambiguous. *City of Carlsbad v. Ins. Co. of the State of Pennsylvania*, 180 Cal.App.4th 176 (2009).

Contract Interpretation: Contra Proferentum

If an ERISA plan is ambiguous, it must be "'construed against the drafter and in favor of the insured;'" however "[i]f a reasonable interpretation favors the insurer and any other interpretation would be strained, no compulsion exists to torture or twist the language of the policy." An insurer's interpretation of the ERISA plan to exclude treatment with non-contracted facilities was reasonable. *Dupree v. Holman Prof'l. Counseling Ctrs.*, 572 F.3d 1094 (9th Cir. 2009).

Contract Interpretation: Coverage Provisions

Exceptions to exclusions, like the "sudden and accidental" exception to the pollution exclusion, act to reinstate coverage where it would otherwise be barred by the exclusion, and, as coverage provisions, exceptions should be construed broadly in favor of the insured. *State of California v. Allstate Ins. Co.*, 45 Cal.4th 1008 (2009).

Generally, coverage clauses are interpreted broadly, and exclusionary clauses are interpreted narrowly. *City of Carlsbad v. Ins. Co. of the State of Pennsylvania*, 180 Cal.App.4th 176 (2009).

Contract Interpretation: Exclusions

If a policy exclusion is not "conspicuous, plain and clear," it will be "strictly construed" in favor of the insured. *United Nat'l Ins. Co. v. Spectrum Worldwide, Inc.*, 555 F.3d 772 (9th Cir. 2009).

Generally, coverage clauses are interpreted broadly, and exclusionary clauses are interpreted narrowly. *City of Carlsbad v. Ins. Co. of the State of Pennsylvania*, 180 Cal.App.4th 176 (2009).

To evaluate an exclusionary clause, a court first considers the "plain meaning" a layperson would attach to the language of the exclusion. *City of Carlsbad v. Ins. Co. of the State of Pennsylvania*, 180 Cal.App.4th 176 (2009).

Contract Interpretation: Reasonable Expectations of Insured Doctrine

The doctrine of the reasonable expectations of the insured stems from the law of adhesion contracts and construction of ambiguities in insurance policies and applies only to insurance contracts, including ERISA insurance contracts. *Scharff v. Raytheon Co. Short Term Disability Plan*, 581 F.3d 899 (9th Cir. 2009).

If the terms of a policy are ambiguous, they are interpreted to protect the objectively reasonable expectations of the insured. *State of California v. Allstate Ins. Co.*, 45 Cal.4th 1008 (2009).

Even when insurance provisions are not found ambiguous, those provisions may still be interpreted in accordance with the insured's alleged reasonable expectation of coverage. *DEB Associates v. Greater N.Y. Mutual Ins. Co*., 970 A.2d 1074 (N.J. 2009).

Contractors Warranty Endorsements

The contractors warranty endorsement which provides coverage "shall not" apply "unless" its terms are satisfied "patently is in the nature of a condition precedent to coverage, not an exclusion from coverage." *North Am. Capacity Ins. Co. v. Claremont Liab. Ins. Co.*, 177 Cal.App.4th 272 (2009).

The terms "will receive" and "will obtain" in an umbrella policy's contractors warranty endorsement are interpreted to apply to all times an insured seeks coverage for operations performed or to be performed on its behalf by an independent contractor whether or not the subcontracts were already in existence at the policy's inception. *North Am. Capacity Ins. Co. v. Claremont Liab. Ins. Co.*, 177 Cal.App.4th 272 (2009).

Contractual Suit Limitations

Under California Department of Insurance Regulations, an insurer has a duty to notify its insured of contractual limitations provisions whether or not the insured is represented by counsel, and the failure to do so may form the basis of estoppel to assert the provision. *Superior Dispatch, Inc. v. Ins. Corp. of New York*, 176 Cal.App.4th 12 (2009). ***Not citable. Rehearing granted.***

Whether a plaintiff was reasonable in failing to ascertain that a one year suit provision was part of its insurance policy, and where the insurer fails to notify the insured of the existence of the provision, a triable question of fact exists on the issue of estoppel sufficient to defeat summary judgment, even where the plaintiff was represented by counsel before the one year suit provision had run. *Superior Dispatch, Inc. v. Ins. Corp. of New York*, 176 Cal.App.4th 12 (2009). ***Not citable. Rehearing granted.***

Coverage Provisions

Generally, coverage clauses are interpreted broadly, and exclusionary clauses are interpreted narrowly. *City of Carlsbad v. Ins. Co. of the State of Pennsylvania*, 180 Cal.App.4th 176 (2009).

Damages - See Also Bad Faith

An injured plaintiff in a tort action cannot recover more than the amount of medical expenses he or she paid or incurred, even if the reasonable value of those services might be a greater sum. *Howell v. Hamilton Meats & Provisions, Inc.*, 179 Cal. App.4th 686 (2009). ***Not citable. Review granted.***

Application of the collateral source rule allows the plaintiff to be paid money for "medical expenses" over and above the amount her insurance carrier paid to fully compensate her medical providers for their expenses. *Howell v. Hamilton Meats & Provisions, Inc.*, 179 Cal. App.4th 686 (2009). ***Not citable. Review granted.***

Damages: Emotional Distress

Emotional distress is recoverable in a bad faith action where the insureds meet a threshold showing of financial loss. *Major v. Western Home Ins. Co.*, 169 Cal.App.4th 1197 (2009).

Emotional distress award equal to twice the economic damages was not excessive. *Major v. Western Home Ins. Co.*, 169 Cal.App.4th 1197 (2009).

Declaratory Relief: Stay

The key issue to be resolved in connection with an insured's motion to stay a declaratory relief action because of a pending underlying matter is whether there are any issues to be resolved in the declaratory relief action which would overlap with factual issues to be resolved in the underlying matter. *Great Am. Ins. Co. v. Super. Ct.*, 178 Cal.App.4th 221 (2009).

If factual issues to be resolved in a declaratory relief action filed by an insurer overlap with factual issues to be resolved in the underlying litigation, a trial court must stay the declaratory relief action. *Great Am. Ins. Co. v. Super. Ct.*, 178 Cal.App.4th 221 (2009).

If there is no factual overlap between the issues to be resolved in a declaratory relief action filed by an insurer and factual issues to be resolved in underlying third-party litigation against the insured, the trial court has discretion whether to grant a stay of the declaratory relief action and should consider the possibility of prejudice to both parties. *Great Am. Ins. Co. v. Super. Ct.*, 178 Cal.App.4th 221 (2009).

An insured may be prejudiced by the filing of a declaratory relief action by its insurer while underlying litigation against the insured remains pending if the insurer joins forces with the plaintiffs in the underlying action as a means to defeat coverage; however, this only arises in situations of factual overlap between the declaratory relief and underlying actions. *Great Am. Ins. Co. v. Super. Ct.*, 178 Cal. App.4th 221 (2009).

An insured may be prejudiced by the filing of a declaratory relief action by its insurer while underlying litigation against the insured remains pending when the insured is compelled to "fight a two-front war," doing battle with the plaintiff in the third party litigation while spending money and resources to litigate coverage issues. *Great Am. Ins. Co. v. Super. Ct.*, 178 Cal.App.4th 221 (2009).

An insured may be prejudiced by the filing of a declaratory relief action by its insurer while underlying litigation against the insured remains pending, based on the potential collateral estoppel effect of adverse factual issues decided in the declaratory relief action before trial in the underlying action. *Great Am. Ins. Co. v. Super. Ct.*, 178 Cal.App.4th 221 (2009).

In determining whether to stay a declaratory relief action filed by an insurer against its insured, the trial court should also consider the possible prejudice to the insurer, and may require the insurer to pay defense costs until the declaratory relief action is resolved. *Great Am. Ins. Co. v. Super. Ct.*, 178 Cal.App.4th 221 (2009).

Definition: Accident

To accept that any interpretation of the policy term "accident" should be based solely on whether the injury-causing event was expected, foreseen, or designed by the injured party would mean that intentional acts that by no stretch could be considered accidental would nevertheless fall within the policy's coverage of an "accident." *Delgado v. Interinsurance Exch. of The Auto. Club of S. California*, 47 Cal.4th 302 (2009).

Under California law, the term "accident" in the coverage clause of a liability policy refers to the conduct of the insured for which liability is sought to be imposed on the insured. *Delgado v. Interinsurance Exch. of The Auto. Club of S. California*, 47 Cal.4th 302 (2009).

An accidental discharge is one the insured neither intended nor expected to happen. A discharge is considered "expected" only when the insured subjectively knew or believed it was highly likely to occur. *State of California v. Allstate Ins. Co.*, 45 Cal.4th 1008 (2009).

Courts have, in insurance cases, rejected the notion that an insured's mistake of fact or law transforms a knowingly and purposefully inflicted harm into an accidental injury. *Delgado v. Interinsurance Exch. of The Auto. Club of S. California*, 47 Cal.4th 302 (2009).

An insured's unreasonable belief in the need for self defense does not turn the resulting purposeful and intentional act of assault and battery into an "accident" within the policy's coverage clause. *Delgado v. Interinsurance Exch. of The Auto. Club of S. California*, 47 Cal.4th 302 (2009).

Definition: Arising Out Of

Injury that resulted when a pedestrian was struck on freeway over a mile from, and more than fifteen minutes after, he had unloaded from a car was an insufficient nexus for the injury to be deemed "arising out of the . . . use, loading or unloading of" the vehicle because the negligent "use, loading or unloading" of the car that was "operated by" or "loaned to" the insured was not a predominating cause or substantial factor in causing the injuries. *Safeco Ins. Co. v. Parks*, 170 Cal.App.4th 992 (2009).

Definition: Insured

The transfer of title to property from a named insured LLC to nonmember trustees terminates coverage under the title policy. *Kwok v. Transnation Title Ins. Co.*, 170 Cal.App.4th 1562 (2009).

An insurer's duty to defend the "insured" includes both the named insureds and anyone else included in the policy's definition of "insured," including vicarious insureds. *American States Ins. Co. v. Progressive Casualty Ins. Co.*, 180 Cal.App.4th 18 (2009).

Definition: Occurrence

For purposes of determining whether there is coverage within the policy period, the time of the relevant occurrence or accident is not when the wrongful act was committed but when the complaining party was actually damaged. *State of California v. Continental Ins. Co.*, 169 Cal.App.4th 1114 (2009). ***Not citable. Review granted.***

Definition: Watercourse

The definition of "watercourse" for the purpose of applying an exclusion for pollution "into or upon any watercourse" is "the channel through which the water of a particular district or watershed usually or periodically flows." (*Phillips v. Burke*, 133 Cal.App.2d 700, 703. (1955)). *State of California v. Allstate Ins. Co.*, 45 Cal.4th 1008 (2009).

Demurrer

A third party claims administrator can successfully demur to a breach of contract action by an insured where no contract exists between the insured and the third party administrator. *Bosetti v. U.S. Life Ins. Co.*, 175 Cal.App.4th 1208 (2009).

When not based on any facts stated in the complaint, a legal theory that insurer estimated reasonable costs of repairs, required insurer-recommended shops to accept such estimates, and then paid non-insurer-recommended shops chosen by the insured the same estimate at a discount, thus violating Insurance Code section 758.5, may not be grounds for granting leave to amend because such a theory would be based on mere suspicions regarding the calculation of reasonable repair costs. *Maystruk v. Infinity Ins. Co.*, 175 Cal.App.4th 881 (2009).

Disability: Fibromyalgia

Fibromyalgia is a disease presenting various symptoms including chronic soft tissue pain. Afflicted individuals subjectively suffer differing amounts of pain, while objective evidence of the disease is more difficult to establish. *Minton v. Deloitte and Touche USA LLP Plan*, 631 F. Supp. 2d 1213 (N.D. Cal . 2009).

Disability: Mental or Emotional Disorders

A provision in a disability policy which limit benefits for mental or emotional disorders is ambiguous and does not apply to a situation where the claimant suffers disability with both physical and mental components. *Bosetti v. U.S. Life Ins. Co*, 175 Cal.App.4th 1208 (2009).

Disability: Subjective Evidence of Pain

Subjective evidence of pain caused by fibromyalgia is sufficient to qualify the suffering individual for total disability insurance benefits. *Minton v. Deloitte and Touche USA LLP Plan*, 631 F. Supp. 2d 1213 (N.D. Cal . 2009).

Fibromyalgia is a disease presenting various symptoms including chronic soft tissue pain. Afflicted individuals subjectively suffer differing amounts of pain, while objective evidence of the disease is more difficult to establish. *Minton v. Deloitte and Touche USA LLP Plan*, 631 F. Supp. 2d 1213 (N.D. Cal . 2009).

Disclaimers

The adequacy of a disclaimer in the context of an action for fraud is judged by reference to the plaintiff's knowledge and experience. *Broberg v. Guardian Life Ins. Co.*, 171 Cal.App.4th 912 (2009).

To be enforceable, disclaimer language in a policy must be "conspicuous, plain and clear." *Broberg v. the Guardian Life Ins. Co.*, 171 Cal.App.4th 912 (2009).

Disclaimer language is "conspicuous" when it: (1) includes a heading in capitals; and (2) is in a larger or contrasting type, color or font. *Broberg v.Guardian Life Ins. Co.*, 171 Cal.App.4th 912 (2009).

Discrimination

Most states have statutory schemes regulating the business of insurance including prohibiting unfair discrimination in the premium charged for insurance. *Ojo v. Farmers Group, Inc.*, 565 F.3d 1175 (9th Cir. 2009). ***Not citable. Rehearing, en banc, granted.***

Divisible Damage Or Injury

When the damages for which the insured is liable relate to distinct, divisible injuries or items of property damage, the insured has the burden of proving which of those are attributable to causes within the exclusion's exception. *State of California v. Allstate Ins. Co.*, 45 Cal.4th 1008 (2009).

Directors & Officers Liability Coverage

The insured versus insured exclusion of a directors and officers liability policy bars coverage for claims against directors and officers for breaches of fiduciary duties originally brought by the corporation and later assigned to a creditors' trust in Chapter 11 bankruptcy proceedings. *Biltmore Assoc., LLC v. Twin City Fire Ins. Co.*, 572 F.3d 663 (9th Cir. 2009).

Duty of Insured to Read Policy

The proposition that an insured has a duty to read his policy and is bound by its conspicuous terms does not apply as a matter of law in the context of an agent holding himself or herself out as an expert in the field of insurance being sought by the insured. *Williams v. HILB, Rogal & Hobbs Ins. Services*, 177 Cal.App.4th 624 (2009).

An insured's failure to read his policy does not, as a matter of law, make his reliance on his agent's representations unjustifiable as a matter of law. *Williams v. HILB, Rogal & Hobbs Ins. Services*, 177 Cal.App.4th 624 (2009).

Duty to Defend

To prevail in an action seeking declaratory relief on the question of the duty to defend, the insured must prove the existence of a potential for coverage, while the insurer must establish the absence of any such potential. *Delgado v. Interinsurance Exch. of The Auto. Club of S. California*, 47 Cal.4th 302 (2009).

The duty to defend exists if the insurer becomes aware of, or if a third party lawsuit pleads, facts giving rise to the potential for coverage under the insuring agreement. *Delgado v. Interinsurance Exch. of The Auto. Club of S. California*, 47 Cal.4th 302 (2009).

Defense provided to insured by an insurer did not excuse other insurer's duty to defend because the insurer who accepted the defense had a policy limit far below the amount claimed, and far lower than that of the insurer who declined the defense. *Safeco Ins. Co. v. Parks*, 170 Cal.App.4th 992 (2009).

The duty an insurer owes to its insured arises on tender of defense and continues until the lawsuit is concluded or there is a showing of no potential for coverage. *OneBeacon Am. Ins. Co. v. Fireman's Fund Ins. Co.*, 175 Cal.App.4th 183 (2009).

The requirement of constructive notice but not an actual tender by the insured in equitable contribution cases does not undermine the typical policy provision prohibiting voluntary payments. *OneBeacon Am. Ins. Co. v. Fireman's Fund Ins. Co.*, 175 Cal.App.4th 183 (2009).

An insurer's duty to defend claims for which there is at least potential coverage under the policy is contractual. *State Farm General Ins. Co. v. Mintarsih*, 175 Cal.App.4th 274 (2009).

The contractual duty to defend extends to all claims at least potentially covered under the policy, but no further. *State Farm General Ins. Co. v. Mintarsih*, 175 Cal.App.4th 274 (2009).

An insurer has no contractual duty to defend claims for which there is no potential coverage, but a duty to defend such claims is implied in law if there is at least potential coverage for, and therefore a duty to defend, another claim in the action. *State Farm General Ins. Co. v. Mintarsih*, 175 Cal.App.4th 274 (2009).

In a "mixed" action, an insurer has a duty to defend the action in its entirety to ensure that the defense of claims that are at least potentially covered will be both meaningful and immediate. *State Farm General Ins. Co. v. Mintarsih*, 175 Cal.App.4th 274 (2009).

Normally, an insurer must defend its insured until an underlying action is resolved by settlement or judgment. However, circumstances may change such that there is no longer a potential for coverage because of exhaustion of the policy. *Great Am. Ins. Co. v. Super. Ct.*, 178 Cal.App.4th 221 (2009).

An insurer may bring a declaratory relief action while defending the insured in pending litigation when there is no longer a potential for coverage. *Great Am. Ins. Co. v. Super. Ct.*, 178 Cal.App.4th 221 (2009).

An insurer has a duty to defend if any facts stated or fairly inferable in the complaint, or otherwise known or discovered by the insurer, suggest a claim covered by the policy. *Kim Seng Co. v. Great Am. Ins. Co.,* 179 Cal.App.4th 186 (2009).

Once the insurer's duty to defend is triggered, the duty is not extinguished until the insurer negates all facts suggesting potential coverage. *Kim Seng Co. v. Great Am. Ins. Co.,* 179 Cal.App.4th 186 (2009).

If, as a matter of law, neither the complaint nor the known extrinsic facts indicate any basis for potential coverage, the duty to defend does not arise in the first instance. *Kim Seng Co. v. Great Am. Ins. Co.,* 179 Cal.App.4th 186 (2009).

Existence of a legal dispute does not create a potential for coverage. *Griffin Dewatering Corp. v. N. Ins. Co.*, 176 Cal.App.4th 172 (2009).

Where the third party suit never presented any potential for policy coverage, the duty to defend does not arise in the first instance and the insurer may properly deny a defense. *Griffin Dewatering Corp. v. N. Ins. Co.*, 176 Cal.App.4th 172 (2009).

The potential for coverage cannot be based on an unresolved legal dispute concerning policy interpretation that is ultimately resolved in favor of the insurer. The interpretation of an insurance policy is a question of law. *Kim Seng Co. v. Great Am. Ins. Co.,* 179 Cal. App. 4th 186 (2009).

The duty to defend groundless claims applies only to claims covered by the policy. Consequently, while the insured contended the claims against it were groundless, the claims were for damages caused by pollution and therefore were not covered as the result of the policy's pollution exclusion. *Venoco, Inc. v. Gulf Underwriters Ins. Co.*, 175 Cal.App.4th 750 (2009).

When an insurer (1) is duly notified of the underlying claim against its insured, and (2) is given a full opportunity to protect its interests, the resulting judgment – if obtained without fraud or collusion – is binding against the insurer in any later coverage litigation on the claim involving its insured. This rule applies regardless of whether the insurer has a contractual duty to defend, or whether or not its refusal to participate in the underlying proceedings is legally justified. *Executive Risk Indem., Inc. v. Jones,* 171 Cal.App.4th 319 (2009).

Duty to Defend: Tender

A tender can be constructive or formal. Constructive notice arises when the circumstances are such that, had the insurer made diligent inquiry, it would have concluded the insured had made a tender. *OneBeacon Am. Ins. Co. v. Fireman's Fund Ins. Co.*, 175 Cal.App.4th 183 (2009).

The duty an insurer owes to its insured arises on tender of defense and continues until the lawsuit is concluded or there is a showing of no potential for coverage. *OneBeacon Am. Ins. Co. v. Fireman's Fund Ins. Co.*, 175 Cal.App.4th 183 (2009).

Imposing constructive notice of a tender without an express request for a defense imposes on insurer only the non-onerous requirement of asking the insured if the insurer's involvement is desired. *OneBeacon Am. Ins. Co. v. Fireman's Fund Ins. Co.*, 175 Cal.App.4th 183 (2009).

Imposing a duty of inquiry on insurers when they have notice of a lawsuit from an insured obviates uncertainty and reflects the likelihood that an insured may not be aware of the particular language the insurer requires to invoke the duty to defend. *OneBeacon Am. Ins. Co. v. Fireman's Fund Ins. Co.*, 175 Cal.App.4th 183 (2009).

The requirement of constructive notice, but not an actual tender by the insured, in equitable contribution cases does not undermine the typical policy provision prohibiting voluntary payments. *OneBeacon Am. Ins. Co. v. Fireman's Fund Ins. Co.*, 175 Cal.App.4th 183 (2009).

Duty to Defend: Termination

An insurer may bring a declaratory relief action while defending the insured in a pending litigation when there are circumstances such that there is no longer a potential for coverage. *Great Am. Ins. Co. v. Super. Ct.*, 178 Cal.App.4th 221 (2009).

The duty an insurer owes to its insured arises on tender of defense and continues until the lawsuit is concluded or there is a showing of no potential for coverage. *OneBeacon Am. Ins. Co. v. Fireman's Fund Ins. Co.*, 175 Cal.App.4th 183 (2009).

Normally, an insurer must defend its insured until an underlying action is resolved by settlement or judgment. However, circumstances may change such that there is no longer a potential for coverage because of exhaustion of the policy. *Great Am. Ins. Co. v. Super. Ct.*, 178 Cal.App.4th 221 (2009).

An insurer may bring a declaratory relief action while defending the insured in pending litigation when there is no longer a potential for coverage. *Great Am. Ins. Co. v. Super. Ct.*, 178 Cal.App.4th 221 (2009).

Once the insurer's duty to defend is triggered, the duty is not extinguished until the insurer negates all facts suggesting potential coverage. *Kim Seng Co. v. Great Am. Ins. Co.,* 179 Cal.App.4th 186 (2009).

Duty to Mitigate

The doctrine of mitigation of damages holds that a plaintiff who suffers damage as a result of either a breach of contract or a tort has a duty to take reasonable steps to mitigate those damages and will not be able to recover for any losses which could have been avoided. A duty to mitigate damages normally applies to damages resulting from the

defendant's wrongful conduct. *State of California v. Continental Ins. Co.*, 169 Cal.App.4th 1114 (2009). ***Not citable. Review granted.***

When amount an insurer argues the insured failed to mitigate was not a consequence of the insurer's breach doctrine of mitigation does not apply. *State of California v. Continental Ins. Co.*, 169 Cal.App.4th 1114 (2009). ***Not citable. Review granted.***

Breach of the duty to mitigate may prevent the insured from recovering the portion of the loss which compliance with the mitigation duty could have prevented. *State of California v. Continental Ins. Co.*, 169 Cal.App.4th 1114 (2009). ***Not citable. Review granted.***

The duty to mitigate damages does not apply to third party liability coverage. *State of California v. Continental Ins. Co.*, 169 Cal.App.4th 1114 (2009). ***Not citable. Review granted.***

Third party liability insurance should apply not only to the insured's initial negligence that causes the loss, but also to any negligence that aggravates or fails to mitigate the loss. *State of California v. Continental Ins. Co.*, 169 Cal.App.4th 1114 (2009). ***Not citable. Review granted.***

Efficient Proximate Cause Doctrine (California Ins. Code § 530) - See Also Concurrent Cause

Insurance Code section 530 is a codification of the efficient proximate cause doctrine and provides that an insurer is liable for a loss of which a peril insured against was the proximate cause even though there may be another peril not contemplated by the contract which is a remote cause, but the insurer is not liable for a loss of which the peril insured against was only a remote cause. *City of Carlsbad v. Ins. Co. of the State of Pennsylvania*, 180 Cal.App.4th 176 (2009).

The efficient proximate cause doctrine only applies to first party coverage. *City of Carlsbad v. Ins. Co. of the State of Pennsylvania*, 180 Cal.App.4th 176 (2009).

The efficient proximate cause doctrine does not prohibit an insurer from excluding some manifestations of a covered peril, provided the insurer "plainly and precisely" communicates to the insured which manifestations the policy does not cover. *City of Carlsbad v. Ins. Co. of the State of Pennsylvania*, 180 Cal.App.4th 176 (2009).

Under the proximate cause doctrine, first party property insurance policy provided coverage for costs associated with bringing undamaged portions of a damaged structure up to current construction code standards. *DEB Associates v. Greater N.Y. Mutual Ins. Co.*, 970 A.2d 1074 (N.J. 2009).

When an insured was required to bring non-damaged floors of its building into compliance with building code after a windstorm caused covered damage to one floor,

the cost of such compliance was covered under insured's property insurance policy, even though the policy explicitly excluded pre-existing code violations. *DEB Associates v. Greater N.Y. Mutual Ins. Co.*, 970 A.2d 1074 (N.J. 2009).

To the extent an insured can show a covered risk (e.g. “sudden and accidental” releases of pollution) proximately caused indivisible damage for which it was held liable, the insured is contractually entitled to indemnity for that liability even if an excluded risk is a concurrent proximate cause. *State of California v. Allstate Ins. Co.*, 45 Cal.4th 1008 (2009).

An exclusion which denies coverage for third party negligence only when that negligence interacts with an excluded peril (or perils), applies regardless of which specific peril is the efficient proximate cause (i.e. the predominate or most important cause) of the loss because in such an instance, both possible efficient proximate causes are excluded perils, despite the fact that third party negligence would otherwise be a covered peril. *Freedman v. State Farm Ins. Co.*, 173 Cal.App.4th 957 (2009).

Equitable Contribution

“The application of equitable considerations must be made on a case-by-case basis, ‘in light of varying equitable considerations which may arise, and which affect the insured and the primary and excess carriers, and which depend upon the particular policies of insurance, the nature of the claim made, and the relation of the insured to the insurers.’” *North Am. Capacity Ins. Co. v. Claremont Liab. Ins. Co.*, 177 Cal.App.4th 272 (2009).

“In the absence of compelling equitable reasons otherwise, the courts should not impose an obligation on an insurer that contravenes a provision in its insurance policy.” *North Am. Capacity Ins. Co. v. Claremont Liab. Ins. Co.*, 177 Cal.App.4th 272 (2009).

“The fundamental lesson to be drawn from existing authorities is that there are no ‘hard and fast “bright line’’ rules for the proper method of allocating defense costs among coinsurers, which is a matter left to the sound equitable discretion of the trial court. It is for the trial court to devise ‘the most equitable result based on the given facts and circumstances of a particular case.’” *North Am. Capacity Ins. Co. v. Claremont Liab. Ins. Co.*, 177 Cal.App.4th 272 (2009).

The requirement of constructive notice, but not an actual tender by the insured, in equitable contribution cases does not undermine the typical policy provision prohibiting voluntary payments. *OneBeacon Am. Ins. Co. v. Fireman’s Fund Ins. Co.*, 175 Cal.App.4th 183 (2009).

When there is a continuous loss spanning multiple policy periods, any insurer that covered any policy period is liable for the entire loss, up to the limits of its policy. Insurer that pays more than its equitable share of loss can seek contribution against

additional insurers covering the loss. *State of California v. Continental Ins. Co.*, 169 Cal.App.4th 1114 (2009). ***Not citable. Review granted.***

An insurer's obligation for equitable contribution of defense costs arises when, after notice of a lawsuit, a diligent inquiry would reveal the potential exposure to a claim for equitable contribution and thus provide the insurer the opportunity to investigate and participate in the defense of the lawsuit. *OneBeacon Am. Ins. Co. v. Fireman's Fund Ins. Co.*, 175 Cal.App.4th 183 (2009).

The requirement of constructive notice, but not an actual tender by the insured, in equitable contribution cases does not undermine the typical policy provision prohibiting voluntary payments. *OneBeacon Am. Ins. Co. v. Fireman's Fund Ins. Co.*, 175 Cal.App.4th 183 (2009).

Equitable rights among co-insurers are not controlled by the terms of the policy issued by the recalcitrant insurer but by equitable principles, so long as they do not run afoul of policy provisions. *OneBeacon Am. Ins. Co. v. Fireman's Fund Ins. Co.*, 175 Cal.App.4th 183 (2009).

Where multiple insurers insured the same insured for the same risk, each insurer has independent standing to assert a cause of action against its coinsurers for equitable contribution when it has undertaken the defense or indemnification of the common insured. *OneBeacon Am. Ins. Co. v. Fireman's Fund Ins. Co.*, 175 Cal.App.4th 183 (2009).

Equitable contribution is the right to recover from a co-obligor that shares liability with the party seeking contribution. In the insurance context, contribution rights arise when two or more insurers are obligated to defend or indemnify for the same loss but one insurer has paid more than its fair share. *OneBeacon Am. Ins. Co. v. Fireman's Fund Ins. Co.*, 175 Cal.App.4th 183 (2009).

The purpose of equitable contribution is to accomplish substantial justice by equalizing the common burden shared by coinsurers and to prevent one insurer from profiting at the expense of others. *OneBeacon Am. Ins. Co. v. Fireman's Fund Ins. Co.*, 175 Cal.App.4th 183 (2009).

Equitable contribution allows for reimbursement to the insurer that pays more than its fair share on the theory the debt was equally and concurrently owed by others and should be shared "pro rata in proportion to their respective coverage of the risk." *OneBeacon Am. Ins. Co. v. Fireman's Fund Ins. Co.*, 175 Cal.App.4th 183 (2009).

An insurer seeking contribution does not "stand in the shoes" of the insured as would be the case if equitable subrogation were sought. *OneBeacon Am. Ins. Co. v. Fireman's Fund Ins. Co.*, 175 Cal.App.4th 183 (2009).

As stated in *Truck Ins. Exchange v. Unigard Ins. Co.*, 79 Cal.App.4th 966, 974 (2000) "absent compelling equitable reasons, courts should not impose an obligation on an insurer that contravenes a provision of its insurance policy." *OneBeacon Am. Ins. Co. v. Fireman's Fund Ins. Co.*, 175 Cal.App.4th 183 (2009).

In deciding claims of equitable contribution, no definitive rule governs. Rather, courts should consider the nature of the claim, the relation of the insurer to its insurers and the particulars of each policy and other equitable considerations. *OneBeacon Am. Ins. Co. v. Fireman's Fund Ins. Co.*, 175 Cal.App.4th 183 (2009).

Notice to potential insurers is required to state a claim for equitable contribution. It is unfair to seek contribution from an insurer that had no opportunity to investigate a claim and decide whether to join in its defense. *OneBeacon Am. Ins. Co. v. Fireman's Fund Ins. Co.*, 175 Cal.App.4th 183 (2009).

Notice of a possible contribution claim should be given sooner rather than later, e.g., promptly after the insurer agrees to provide a defense. *OneBeacon Am. Ins. Co. v. Fireman's Fund Ins. Co.*, 175 Cal.App.4th 183 (2009).

Where an insurer has decided to investigate and settle a lawsuit without the involvement of another insurer, it should not be allowed to seek payment from the other insurer after the fact. *OneBeacon Am. Ins. Co. v. Fireman's Fund Ins. Co.*, 175 Cal.App.4th 183 (2009).

Equitable Estoppel

Equitable estoppel precludes a party from claiming the benefits of a contract while simultaneously attempting to avoid the burdens that contract imposes. *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042 (9th Cir. 2009).

A defendant may be equitably estopped from asserting a statutory or contractual limitations period as a defense if the defendant's act or omission caused the plaintiff to refrain from filing a timely suit and the plaintiff's reliance on the defendant's conduct was reasonable. *Superior Dispatch, Inc. v. Ins. Corp. of New York*, 176 Cal.App.4th 12 (2009). ***Not citable. Rehearing granted.***

The defendant need not intend to deceive the plaintiff to give rise to an equitable estoppel. *Superior Dispatch, Inc. v. Ins. Corp. of New York*, 176 Cal.App.4th 12 (2009). Rehearing Granted. ***Not citable. Rehearing granted.***

A nondisclosure is a cause of injury if the plaintiff would have acted so as to avoid injury had the plaintiff known the concealed fact. The plaintiff's reliance on a nondisclosure was reasonable if the plaintiff's failure to discover the concealed fact was reasonable in light of the plaintiff's knowledge and experience. *Superior Dispatch, Inc. v. Ins. Corp. of New York*, 176 Cal.App.4th 12 (2009). ***Not citable. Rehearing granted.***

Whether a plaintiff was reasonable in failing to ascertain that a one year suit provision was part of its insurance policy, and where the insurer fails to notify the insured of the existence of the provision, a triable question of fact exists on the issue of estoppel sufficient to defeat summary judgment, even where the plaintiff was represented by counsel before the one year suit provision had run. *Superior Dispatch, Inc. v. Ins. Corp. of New York*, 176 Cal.App.4th 12 (2009). ***Not citable. Rehearing granted.***

An ERISA beneficiary was not entitled to recover benefits under an equitable estoppel theory where the language of the plan was clear and unambiguous, notwithstanding subsequent miscommunications between the beneficiary and plan administrator regarding the beneficiary's eligibility for benefits. *Bellah v. American Airlines, Inc.*, 656 F. Supp. 2d 1207 (E.D. Cal. 2009).

Under Department of Insurance Regulations, an insurer has a duty to notify its insured of contractual limitations provisions whether or not the insured is represented by counsel and the failure to do so may form the basis of estoppel to assert the provision. *Superior Dispatch, Inc. v. Ins. Corp. of New York*, 176 Cal.App.4th 12 (2009). ***Not citable. Rehearing granted.***

Among the principles applied in determining the enforcement of an arbitration agreement by or against non-signatories are: incorporation by reference; assumption; agency; veil-piercing/alter ego; and estoppel. *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042 (9th Cir. 2009).

Equitable Subrogation

Equitable subrogation permits a party who has been required to satisfy a loss created by a third party's wrongful act to "step into the shoes" of the loser and pursue recovery from the responsible wrongdoer. *Nat'l Union Fire Ins. Co. v. Cambridge Integrated Services Group, Inc.*, 171 Cal.App.4th 35 (2009).

Subrogation rights are purely derivative. An insurer cannot acquire anything by subrogation to which the insured has no right and can claim no right the insured does not have. *Nat'l Union Fire Ins. Co. v. Cambridge Integrated Services Group, Inc.*, 171 Cal.App.4th 35 (2009).

An insurer, whose insured is a victim of grand theft, can bring civil actions for reimbursement against the defendant or the victim, notwithstanding a prior criminal order of restitution. *Vigilant Ins. Co. v. Chiu,* 175 Cal.App.4th 438 (2009).

ERISA

ERISA's statutory scheme allows plan administrators to look at the plan documents and records conforming to them to get clear distribution instructions without going into court. *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865 (2009).

ERISA's statutory scheme allows plan administrators to distribute plan benefits in accordance with plan documents and without being forced to examine a multitude of external documents that might purport to affect the dispensation of benefits. *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865 (2009).

Where a designated ERISA plan beneficiary waived her right to plan benefits in a divorce decree but failed to disclaim her right to plan benefits via the manner provided by the plan, the plan administrator acted properly when it distributed plan benefits to her. *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865 (2009).

The summary plan description constitutes part of the plan documents and must be considered by the court in determining plan requirements. *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865 (2009).

After *Abatie v. Alta Health & Life Insurance Co*., 458 F.3d. 955 (9th Cir. 2006), district courts are required to weigh evidence according to the traditional rules of summary judgment. As such, evidence outside the administrative record submitted by a party must be examined in the light most favorable to the non-moving party. *Nolan v. Heald College*, 551 F.3d 1148 (9th Cir. 2009).

ERISA does not explicitly define "marital property rights." *Owens v. Automotive Machinists Pension Trust*, 551 F.3d 1138 (9th Cir. 2009).

Under ERISA, a qualified domestic relations order ("QDRO") is defined as a domestic relations order that creates or recognizes the existence of an alternate payee's right to receive benefits with respect to a participant under a plan. A "domestic relations order" applies to: any judgment or order that relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child or other dependent of a participant, and is issued pursuant to a state domestic relations law. (29 U.S.C. section 1056(d)(3)(B)(ii)(I).) *Owens v. Automotive Machinists Pension Trust*, 551 F.3d 1138 (9th Cir. 2009).

Congress did not intend, under 26 U.S.C. section 410 or 414, to expand employee rights to benefits under ERISA. *Bellah v. American Airlines, Inc*., 656 F. Supp. 2d 1207 (E.D. Cal. 2009).

The tax qualification provisions of the Internal Revenue Code, and the Treasury Regulations promulgated thereunder, do not modify an ERISA benefit plan to mandate inclusion of employees whom the plan has permissibly excluded. *Bellah v. American Airlines, Inc*., 656 F. Supp. 2d 1207 (E.D. Cal. 2009).

A letter from the plan administrator stating that "the company will provide benefits for you at active rates," but which letter does not mention the LTD policy or any modification of the LTD policy, did not constitute a "representation" to a beneficiary that she would be eligible for LTD benefits for which she was not otherwise eligible under the

terms of the LTD plan. *Bellah v. American Airlines, Inc*., 656 F. Supp. 2d 1207 (E.D. Cal. 2009).

That a plan exclusion violates the Internal Revenue Code does not permit the court to rewrite the plan or to enlarge benefits beyond the clear, unambiguous language of the plan. *Bellah v. American Airlines, Inc*., 656 F. Supp. 2d 1207 (E.D. Cal. 2009).

An ERISA beneficiary was not entitled to recover benefits under an equitable estoppel theory where the language of the plan was clear and unambiguous, notwithstanding subsequent miscommunications between the beneficiary and plan administrator regarding the beneficiary's eligibility for benefits. *Bellah v. American Airlines, Inc*., 656 F. Supp. 2d 1207 (E.D. Cal. 2009).

An exclusion providing that an employee not at work because of a disability at the time coverage becomes effective is not covered for LTD benefits "until you return to work and deductions are taken from your pay," clearly and unambiguously excludes an employee who was on disability leave at the time the LTD plan became effective; therefore, subsequent miscommunications between the plan administrator and the beneficiary regarding her benefits were irrelevant. *Bellah v. American Airlines, Inc*., 656 F. Supp. 2d 1207 (E.D. Cal. 2009).

An ERISA top hat plan is an unfunded plan maintained by an employer primarily to provide "deferred compensation for a select group of management or highly compensated employees." *Sznewajs v. U.S. Bancorp Amended & Restated Supplemental Benefits Plan*, 572 F.3d 727 (9th Cir. 2009).

An ERISA plan participant or beneficiary may enforce his or her rights by bringing a cause of action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." Thus, a claim rises or falls according to the terms of the plan, Section 1132(a)(1)(B). *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865 (2009).

The Ninth Circuit Court of Appeals reviews "the district court's interpretation of an ERISA plan *de novo* and that court's factual findings for clear error." *Dupree v. Holman Prof'l.Counseling Ctrs*., 572 F.3d 1094 (9th Cir. 2009).

A letter from the plan administrator stating that "the company will provide benefits for you at active rates," but which letter does not mention the Long Term Disability policy or any modification of the Long Term Disability policy, did not constitute a "representation" to a beneficiary that she would be eligible for Long Term Disability benefits for which she was not otherwise eligible under the terms of the Long Term Disability plan. *Bellah v. American Airlines, Inc*., 656 F. Supp. 2d 1207 (E.D. Cal. 2009).

When reviewing an ERISA plan, courts "'apply contract principles derived from state law . . . guided by the policies expressed in ERISA and other federal labor laws'" which require courts to "look to the [policy's] language in context and construe each provision in a manner consistent with the whole such that none is rendered nugatory." Where a policy unambiguously covers only treatment received from a contracted residential treatment center, the insurer correctly denies coverage for an insured's stay at a non-contracted residential treatment center. *Dupree v. Holman Prof'l.Counseling Ctrs.*, 572 F.3d 1094 (9th Cir. 2009).

An ERISA plan's repeated assertion that certain activities are not covered creates a "default presumption of no coverage that must be then overcome by a showing of" coverage. An insurer's specific inclusion of names of affiliated (contracted) medical treatment centers, created a presumption that the insured's decision to select and seek treatment from non-contracted treatment center was deemed not covered under the plan. *Dupree v. Holman Prof'l.Counseling Ctrs.*, 572 F.3d 1094 (9th Cir. 2009).

If an ERISA plan is ambiguous, it must be "'construed against the drafter and in favor of the insured;'" however "[i]f a reasonable interpretation favors the insurer and any other interpretation would be strained, no compulsion exists to torture or twist the language of the policy." An insurer's interpretation of the ERISA plan to exclude treatment with non-contracted facilities was reasonable. *Dupree v. Holman Prof'l. Counseling Ctrs.*, 572 F.3d 1094 (9th Cir. 2009).

ERISA's remedial system emphasizes a balance between protecting employees' right to benefits and incentivizing employers to offer benefit plans. *Standard Ins. Co. v. Morrison*, 584 F.3d 837 (9th Cir. 2009).

The reasonable expectations doctrine was adopted into ERISA federal common law for the interpretation of insured plans. Self-funded employee benefits plans are not insurance policies and the Ninth Circuit law on the application of the doctrine to self-funded plans is uncertain. *Scharff v. Raytheon Co. Short Term Disability Plan*, 581 F.3d 899 (9th Cir. 2009).

Where a self-funded ERISA disability plan contains a one year contractual statute of limitations provision and the provision meets ERISA's statutory and regulatory requirements and meets the average plan participant's reasonable expectations, the provision is enforceable to bar the plaintiff's claims as untimely. *Scharff v. Raytheon Co. Short Term Disability Plan*, 581 F.3d 899 (9th Cir. 2009).

While an estate seeking the decedent's pension benefits suggested a plan administrator could resolve such disputes by interpleader actions, requiring a plan administrator to do so "would destroy a plan administrator's ability to look at the plan documents and records conforming to them to get clear distribution instructions, without going into court." *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865 (2009).

When an ERISA plan administrator has discretionary authority to construe plan terms and interprets an ambiguous plan term reasonably, the court must resolve the ambiguity in favor of the administrator's interpretation. *Sznewajs v. U.S. Bancorp Amended & Restated Supplemental Benefits Plan*, 572 F.3d 727 (9th Cir. 2009).

When reviewing a claim administrator's decision, the court must give full effect to the entire pension plan, including provisions granting the administrator discretionary authority over interpretation of plan provisions. *Sznewajs v. U.S. Bancorp Amended & Restated Supplemental Benefits Plan*, 572 F.3d 727 (9th Cir. 2009).

A district court may award pre-judgment interest on past-due benefits in ERISA cases when a balancing of the equities so provides. Prejudgment interest is calculated at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment. *Minton v. Deloitte and Touche USA LLP Plan*, 631 F. Supp. 2d 1213 (N.D. Cal . 2009).

The doctrine of the reasonable expectations of the insured stems from the law of adhesion contracts and construction of ambiguities in insurance policies and applies only to insurance contracts, including ERISA insurance contracts. *Scharff v. Raytheon Co. Short Term Disability Plan*, 581 F.3d 899 (9th Cir. 2009).

ERISA: Anti-Alienation Provision

Where the designated beneficiary of an ERISA plan waived her right to such benefits in a divorce decree, her waiver was simply a disclaimer of benefits. It did not operate as an assignment or alienation of benefits, such that it was made void by ERISA's anti-alienation provision under section 1056(d)(1). *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865 (2009).

ERISA's anti-alienation provision does not nullify a disclaimer or waiver of benefits where no attempt is made to transfer or assign benefits to another. *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865 (2009).

ERISA: Civil Actions

If a participant or beneficiary believes that benefits promised to him under the terms of the plan are not provided, he can bring suit under section 502(a)(1)(B) seeking provision of those benefits. *Marin Gen. Hosp. v. Modesto & Empire Traction Co.*, 581 F.3d 941 (9th Cir. 2009).

Under section 502(a)(1)(B) a participant or beneficiary can also bring suit to enforce his rights under the plan or to clarify any of his rights to future benefits. *Marin Gen. Hosp. v. Modesto & Empire Traction Co.*, 581 F.3d 941 (9th Cir. 2009).

An ERISA plan participant or beneficiary may enforce his or her rights by bringing a cause of action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." Thus, a claim rises or falls according to the terms of the plan, section 1132(a)(1)(B). *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865 (2009).

ERISA: Conflict of Interest

Where a plan administrator operates under a conflict of interest, the conflict must be weighed as a factor in determining whether there is an abuse of discretion and the proper standard is to temper the abuse of discretion standard with skepticism commensurate with the conflict. *Nolan v. Heald College*, 551 F.3d 1148 (9th Cir. 2009).

A district court can consider evidence outside the record to decide a conflict of interest's effect on the decision-making process by the plan administrator. *Nolan v. Heald College*, 551 F.3d 1148 (9th Cir. 2009).

A plaintiff is entitled to have evidence of bias outside the administrative record examined by the district court at a bench trial for a full and detailed inquiry. *Nolan v. Heald College*, 551 F.3d 1148 (9th Cir. 2009).

A structural conflict of interest is present where the plan administrator is also the payor of benefits. *Montour v. Hartford Life & Accident Ins. Co.*, 582 F.3d 933 (9th Cir. 2009).

Structural conflict of interest occurs where language in the insurance plan grants discretionary authority to the administrator, and the plan is administered and funded by the insurance carrier as described in *Abatie v. Alta Health & Life Insurance Co*., 458 F.3d. 955 (9th Cir. 2006). Structural conflict of interest is weighed as a factor in determining whether an insurance carrier has abused its discretion in denying disability benefits. The district court will review the insurance carrier's decision under an abuse of discretion standard with moderate skepticism to temper the administrator's incentive to pay as little in benefits as possible to plan participants. *Minton v. Deloitte and Touche USA LLP Plan*, 631 F. Supp. 2d 1213 (9th Cir. 2009).

ERISA: Effect of Contrary Decision by Social Security Administration

A plan administrator for an ERISA governed plan is not bound by any determination of the Social Security Administration. However, complete disregard is improper and a plan administrator should explain why it reached a different conclusion. *Montour v. Hartford Life & Accident Ins. Co.*, 582 F.3d 933 (9th Cir. 2009).

ERISA: Plan Administration

ERISA generally obligates administrators to manage ERISA plans "in accordance with the documents and instruments governing them," (section 1104(a)(1)(D)) and ERISA provide no exemption for this duty when it comes to the payment of benefits. *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865 (2009).

ERISA general requirement that administrators manage ERISA plans "in accordance with the documents and instruments governing them," (section 1104(a)(1)(D)), applies even when those documents call for the payment of benefits to a designated beneficiary that waived benefits in a divorce decree when that decree is not a qualified domestic relations order, Section 1056(d)(3). *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865 (2009).

ERISA: Preemption

A provision of state law may "relate to" an ERISA benefit plan, and may therefore be conflict preempted under section 514(a) of ERISA. *Marin Gen. Hosp. v. Modesto & Empire Traction Co.*, 581 F.3d 941 (9th Cir. 2009).

The question whether a law or claim "relates to" an ERISA plan is not the test for complete preemption under section 502(a)(1)(B), but rather is the test for conflict preemption under section 514(a). *Marin Gen. Hosp. v. Modesto & Empire Traction Co.*, 581 F.3d 941 (9th Cir. 2009).

The general rule is that a defense of federal preemption of a state-law claim, even conflict preemption under section 514(a) of ERISA, is an insufficient basis for original federal question jurisdiction under section 1331(a) and removal jurisdiction under section 1441(a). *Marin Gen. Hosp. v. Modesto & Empire Traction Co.*, 581 F.3d 941 (9th Cir. 2009).

If the doctrine of complete preemption does not apply, even if the defendant has a defense of "conflict preemption" within the meaning of section 514(a) of ERISA because the plaintiff's claims "relate to" an ERISA plan, the district court is without subject matter jurisdiction. *Marin Gen. Hosp. v. Modesto & Empire Traction Co.*, 581 F.3d 941 (9th Cir. 2009).

A state law cause of action is completely preempted if (1) plaintiff, at some point in time, could have brought the claim under ERISA section 502(a)(1)(B), and (2) where there is no other independent legal duty that is implicated by a defendant's actions. *Marin Gen. Hosp. v. Modesto & Empire Traction Co.*, 581 F.3d 941 (9th Cir. 2009).

The two prong test for complete preemption is conjunctive and a state law cause of action is preempted by section 502(a)(1)(B) only if both prongs of the test are satisfied. *Marin Gen. Hosp. v. Modesto & Empire Traction Co.*, 581 F.3d 941 (9th Cir. 2009).

If there is some other independent legal duty beyond that imposed by an ERISA plan, a claim based on that duty is not completely preempted under section 502(a)(1)(B). *Marin Gen. Hosp. v. Modesto & Empire Traction Co.*, 581 F.3d 941 (9th Cir. 2009).

If claims were not brought, and could not have been brought, under section 502(a)(1)(B), there can be no complete preemption. *Marin Gen. Hosp. v. Modesto & Empire Traction Co.*, 581 F.3d 941 (9th Cir. 2009).

There is no complete preemption where health care provider asserts state law claims for payment that are not based on provisions of an ERISA plan but are based on independent obligations arising from an alleged oral contract. *Marin Gen. Hosp. v. Modesto & Empire Traction Co.*, 581 F.3d 941 (9th Cir. 2009).

Complete preemption under section 502(a) is really a jurisdictional rather than a preemption doctrine as it confers exclusive federal jurisdiction in certain instances where Congress intended the scope of a federal law to be so broad as to entirely replace any state law claim. *Marin Gen. Hosp. v. Modesto & Empire Traction Co.*, 581 F.3d 941 (9th Cir. 2009).

Complete preemption removal is an exception to the otherwise applicable rule that a plaintiff is ordinarily entitled to remain in state court so long as its complaint does not, on its face, affirmatively allege a federal claim. *Marin Gen. Hosp. v. Modesto & Empire Traction Co.*, 581 F.3d 941 (9th Cir. 2009).

While federal preemption is ordinarily a federal defense to the plaintiff's suit, Congress had clearly manifested an intent to make causes of action within the scope of the civil enforcement provisions of section 502(a) removable to federal court. *Marin Gen. Hosp. v. Modesto & Empire Traction Co.*, 581 F.3d 941 (9th Cir. 2009).

A party seeking removal based on federal question jurisdiction must show either that the state law causes of action are completely preempted by section 502(a) of ERISA, or that some other basis exists for federal question jurisdiction. *Marin Gen. Hosp. v. Modesto & Empire Traction Co.*, 581 F.3d 941 (9th Cir. 2009).

Where the court found a self-funded plan containing a one year contractual statute of limitations provision met ERISA's statutory and regulatory requirements, it held ERISA preempted state insurance regulation of self-funded plans pursuant to ERISA's deemer clause, and refused to adopt the California state insurance regulation, California Code of Regulations, Title, 10, section 2695.4(a), which requires insurers to provide notice of any time limits that may apply to the claim presented by the claimant. *Scharff v. Raytheon Co. Short Term Disability Plan*, 581 F.3d 899 (9th Cir. 2009).

With certain exceptions, ERISA preempts any and all state laws insofar as they may now or in the future relate to any [covered] employee benefit plan. *Standard Ins. Co. v. Morrison*, 584 F.3d 837 (9th Cir. 2009).

A state insurance commissioner's practice of disapproving insurance policies with discretionary clauses is not preempted by ERISA's exclusive remedial scheme. *Standard Ins. Co. v. Morrison*, 584 F.3d 837 (9th Cir. 2009).

Three provisions of ERISA address preemption issues: 1) the preemption clause under section 514(a); 2) the savings clause under section 514(b)(2)(A); and 3) the deemer clause under section 514(b)(2)(B). *Coast Plaza Doctors Hospital v. Blue Cross of California*, 173 Cal.App.4th 1179 (2009).

ERISA and the Federal Employee Health Benefits Act ("FEHBA"), 5 U.S.C. section 8901, are different federal statutes but their preemption provisions are analytically similar. *Marin Gen. Hosp. v. Modesto & Empire Traction Co.*, 581 F.3d 941 (9th Cir. 2009).

ERISA's savings clause protects from preemption any state law that regulates insurance, banking, or securities. *Standard Ins. Co. v. Morrison*, 584 F.3d 837 (9th Cir. 2009).

The historic police powers of the states were not meant to be superseded by ERISA. Federal courts have also interpreted ERISA as directing them to make substantive law as well. *Standard Ins. Co. v. Morrison*, 584 F.3d 837 (9th Cir. 2009).

To fall under the savings clause within ERISA, a regulation must meet a two prong test. First, the regulation must be specifically directed toward the entities engaged in insurance. Second, the regulation must substantially affect the risk pooling arrangement between the insurer and the insured. *Standard Ins. Co. v. Morrison*, 584 F.3d 837 (9th Cir. 2009).

The U.S. Supreme Court has established a two-part test to determine whether a state law is subject to the savings clause under ERISA to avoid preemption. First, the state law must be specifically directed toward entities engaged in insurance and second, the state law must substantially affect the risk pooling arrangement between the insurer and insured. *Coast Plaza Doctors Hospital v. Blue Cross of California*, 173 Cal.App.4th 1179 (2009).

Health & Safety Code section 1371.4, of the Knox-Keene Act requiring a plan or insurer to reimburse the provider of emergency care to an insured or plan beneficiary, comes under the savings clause of ERISA and is therefore not preempted because it is specifically directed toward the insurance industry and substantially affects the risk pooling arrangement between the insurer and insured. *Coast Plaza Doctors Hospital v. Blue Cross of California*, 173 Cal.App.4th 1179 (2009).

The deemer clause of ERISA prevents the saving clause from applying to state laws that regulate self-funded ERISA plans. A self-funded plan is one that does not purchase an insurance policy from any insurance company in order to satisfy its obligations. *Coast Plaza Doctors Hospital v. Blue Cross of California*, 173 Cal.App.4th 1179 (2009).

ERISA: Standard of Review

A plan administrator's decision is reviewed *de novo* unless the benefit plan gives the administrator discretionary authority to determine eligibility for benefits. *Montour v. Hartford Life & Accident Ins. Co.*, 582 F.3d 933 (9th Cir. 2009).

When there is no conflict of interest, the vesting of discretion in the plan administrator requires a straightforward application of the abuse of discretion standard. In such circumstances, the administrator's decision can be upheld if is grounded on any reasonable basis, including a single persuasive medical opinion. *Montour v. Hartford Life & Accident Ins. Co.*, 582 F.3d 933 (9th Cir. 2009).

Structural conflict of interest occurs where language in the insurance plan grants discretionary authority to the administrator, and the plan is administered and funded by the insurance carrier as described in *Abatie v. Alta Health & Life Insurance Co*., 458 F.3d. 955 (9th Cir. 2006). Structural conflict of interest is weighed as a factor in determining whether an insurance carrier has abused its discretion in denying disability benefits. The district court will review the insurer's decision under an abuse of discretion standard with moderate skepticism to temper the administrator's incentive to pay as little in benefits as possible to plan participants. *Minton v. Deloitte and Touche USA LLP Plan*, 631 F. Supp. 2d 1213 (9th Cir. 2009).

If an insurance contract contains a discretionary clause, the decisions of the insurer are reviewed under an abuse of discretion standard. Absent a discretionary clause, review is *de novo. Standard Ins. Co. v. Morrison*, 584 F.3d 837 (9th Cir. 2009).

Where an ERISA plan administrator denied a plaintiff's request to be recognized as the surviving spouse of her ex-husband's life annuity, the administrator's decision was reasonable and was not tainted by financial self-interest since it was actuarially neutral at the time it was made. *Sznewajs v. U.S. Bancorp Amended & Restated Supplemental Benefits Plan*, 572 F.3d 727 (9th Cir. 2009).

When a plan assigns discretionary authority to an administrator to make claim determinations, the court applies an informed abuse of discretion standard of review, which requires discounting the amount of deference given to the administrator's decision to the extent that decision appears to have been influenced by a conflict of interest. *Sznewajs v. U.S. Bancorp Amended & Restated Supplemental Benefits Plan*, 572 F.3d 727 (9th Cir. 2009).

An ERISA plan administrator's decision must be upheld under the abuse of discretion standard of review if it was made in good faith and based upon a reasonable interpretation of plan terms. *Sznewajs v. U.S. Bancorp Amended & Restated Supplemental Benefits Plan*, 572 F.3d 727 (9th Cir. 2009).

When an ERISA top hat plan grants a claim administrator discretionary authority to determine eligibility for benefits and construe plan terms, the administrator's decision is reviewed for an abuse of discretion. *Sznewajs v. U.S. Bancorp Amended & Restated Supplemental Benefits Plan*, 572 F.3d 727 (9th Cir. 2009).

When the administrator of an ERISA top hat plan has discretionary authority to make claim determinations and its interpretation of an ambiguous Plan term is reasonable, the court must resolve the ambiguity favor of the administrator's interpretation. *Sznewajs v. U.S. Bancorp Amended & Restated Supplemental Benefits Plan*, 572 F.3d 727 (9th Cir. 2009).

Where a plan grants the administrator unambiguous discretion to interpret the Plan and determine eligibility, the proper standard of review is abuse of discretion. *Nolan v. Heald College*, 551 F.3d 1148 (9th Cir. 2009).

Where a plan administrator operates under a conflict of interest, the conflict must be weighed as a factor in determining whether there is an abuse of discretion and the proper standard is to temper the abuse of discretion standard with skepticism commensurate with the conflict. *Nolan v. Heald College*, 551 F.3d 1148 (9th Cir. 2009).

Where a conflict of interest is present and appears to have influenced the claim review process, a modicum of evidence supporting a plan administrator's decision is insufficient against the conflict of interest presented. A more complex analysis taking multiple factors into consideration is appropriate. *Montour v. Hartford Life & Accident Ins. Co.*, 582 F.3d 933 (9th Cir. 2009).

Where there is a conflict of interest, the district court must consider the following factors in determining whether the plan administrator abused its discretion in making a benefits determination: the extent to which the conflict motivates an administrator's decision, quality and quantity of medical evidence, whether there was an in-person medical evaluation or only file review of medical records, whether the administrator provided its experts with all the evidence, and whether the administrator considered a contrary determination by the Social Security Administration. *Montour v. Hartford Life & Accident Ins. Co.*, 582 F.3d 933 (9th Cir. 2009).

Failure of administrator to submit extrinsic evidence of its efforts to achieve claims administration neutrality may be considered. *Montour v. Hartford Life & Accident Ins. Co.*, 582 F.3d 933 (9th Cir. 2009).

Extrinsic evidence of bias can include rate of claims denials and the frequency with which insurer contracted with the file reviewers it employs. *Montour v. Hartford Life & Accident Ins. Co.*, 582 F.3d 933 (9th Cir. 2009).

When an ERISA plan administrator has discretionary authority to construe plan terms and interprets an ambiguous plan term reasonably, the court must resolve the ambiguity in

favor of the administrator's interpretation. *Sznewajs v. U.S. Bancorp Amended & Restated Supplemental Benefits Plan*, 572 F.3d 727 (9th Cir. 2009).

When reviewing a claim administrator's decision, the court must give full effect to the entire pension plan, including provisions granting the administrator discretionary authority over interpretation of plan provisions. *Sznewajs v. U.S. Bancorp Amended & Restated Supplemental Benefits Plan*, 572 F.3d 727 (9th Cir. 2009).

ERISA: Summary Plan Description

ERISA benefit plans must provide plan participants with a Summary Plan Description, which is an employee's primary source of information regarding benefits and the statutorily established means of informing participants of the terms of the plan and its benefits. *Scharff v. Raytheon Co. Short Term Disability Plan*, 581 F.3d 899 (9th Cir. 2009).

Where a one year contractual statute of limitations provision in a Summary Plan Description was placed at the end of the disability chapter, after the discussion of disability benefits, it met ERISA regulatory requirements under 29 C.F.R. section 2520.102-2(b), which provide that limitations must to be disclosed in close conjunction to benefits provisions in the Summary Plan Description. *Scharff v. Raytheon Co. Short Term Disability Plan*, 581 F.3d 899 (9th Cir. 2009).

Where a one year contractual statute of limitations provision contained in an Summary Plan Description was placed in the chapter entitled Disability, under the large-typeface, bolded and italicized heading, **"*Claims Appeal Procedure*,"** the court held it was not obscured or relegated to fine print and satisfied 29 U.S.C. section 022(b), which requires any description of limitations to plan benefits not be minimized in the Summary Plan Description. *Scharff v. Raytheon Co. Short Term Disability Plan*, 581 F.3d 899 (9th Cir. 2009).

A one year contractual limitations provision in an ERISA plan falls within the purview of 29 U.S.C. section 1022(b), requiring Summary Plan Description to contain information regarding any "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits" and must therefore satisfy 29 U.S.C. section 1022(a). *Scharff v. Raytheon Co. Short Term Disability Plan*, 581 F.3d 899 (9th Cir. 2009).

The summary plan description constitutes part of the plan documents and must be considered by the court in determining plan requirements. *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865 (2009).

Exclusions

The California Supreme Court has yet to decide whether a policy's exclusionary clause applies individually to each insured if the policy has a severability-of-interests clause,

even if the exclusionary clause suggests otherwise. *Minkler v. Safeco Ins. Co.*, 561 F.3d 1033 (9th Cir. 2009). ***Certified question pending before California Supreme Court.***

An exclusion providing that an employee not at work because of a disability at the time coverage becomes effective is not covered for Long Term Disability benefits "until you return to work and deductions are taken from your pay," clearly and unambiguously excludes an employee who was on disability leave at the time the Long Term Disability plan became effective; therefore, subsequent miscommunications between the plan administrator and the beneficiary regarding her benefits were irrelevant. *Bellah v. American Airlines, Inc.,* 656 F. Supp. 2d 1207(E.D. Cal. 2009).

An ERISA plan's repeated assertion that certain activities are not covered creates a "default presumption of no coverage that must be then overcome by a showing of" coverage. An insurer's specific inclusion of names of affiliated (contracted) medical treatment centers, created a presumption that the insured's decision to select and seek treatment from non-contracted treatment center was deemed not covered under the plan. *Dupree v. Holman Prof'l.Counseling Ctrs*., 572 F.3d 1094 (9th Cir. 2009).

Exclusions: Auto

Auto exclusion did not apply to injuries incurred by pedestrian who was struck by a car while walking along the highway, over a mile and more than fifteen minutes after unloading from insured's vehicle. Pedestrian's injuries did not arise out of insured's use, loading or unloading of a vehicle. *Safeco Ins. Co. v. Parks*, 170 Cal.App.4th 992 (2009).

Exclusions: Contract Interpretation

Generally, coverage clauses are interpreted broadly, and exclusionary clauses are interpreted narrowly. *City of Carlsbad v. Ins. Co. of the State of Pennsylvania*, 180 Cal.App.4th 176 (2009).

If a policy exclusion is not "conspicuous, plain and clear," it will be "strictly construed" in favor of the insured. *United Nat'l Ins. Co. v. Spectrum Worldwide, Inc.*, 555 F.3d 772 (9th Cir. 2009).

To evaluate an exclusionary clause, a court first considers the "plain meaning" a layperson would attach to the language of the exclusion. *City of Carlsbad v. Ins. Co. of the State of Pennsylvania*

Exclusions: First Publication

Insurer's "first publication" exclusion, which excludes coverage for advertising injury arising from a publication of material whose first publication was before the policy period, unambiguously applies to trade infringement claims. *United Nat'l Ins. Co. v. Spectrum Worldwide, Inc.*, 555 F.3d 772 (9th Cir. 2009).

Prior publication exclusion applies to trademark infringement claims. *Kim Seng Co. v. Great Am. Ins. Co.,* 179 Cal.App.4th 186 (2009).

Prior publication exclusion applying to any "advertising injury" without limitation is applicable to each and every offense included in the policy definition of "advertising injury." *Kim Seng Co. v. Great Am. Ins. Co.,* 179 Cal.App.4th 186 (2009).

Prior publication exclusion – excluding coverage for "advertising injury" arising out of "material" first published before the policy period – refers to the infringing trademark; that is the "material" covered by the prior-publication exclusion. It would make "no sense" to limit the exclusion to specific packaging or label and not to the infringing trademark that is the subject of the underlying action. *Kim Seng Co. v. Great Am. Ins. Co.,* 179 Cal.App.4th 186 (2009).

Prior publication exclusion bars coverage of any insured's continuous or repeated publication of substantially the same offending material published prior to the policy's inception. Thus, the exclusion applies where the claimed offending words at issue in the underlying action both before and during the policy period are identical. The additions of words or logos do not change the fact that the claimed offending words are identical. *Kim Seng Co. v. Great Am. Ins. Co.,* 179 Cal.App.4th 186 (2009).

Exclusions: Insured v. Insured

For purposes of the insured versus insured exclusion in a directors and officers liability policy, the pre-bankruptcy company and the company as debtor in possession in Chapter 11 are the same entity. Thus, the debtor in possession is also barred by the insured versus insured exclusion just as the pre-bankruptcy company would be. *Biltmore Assoc., LLC v. Twin City Fire Ins. Co.*, 572 F.3d 663 (9th Cir. 2009).

Creditors may bring a suit for mismanagement only derivatively, on behalf of the corporation. Thus, a creditor may not overcome the insured versus insured exclusion in a directors and officers liability policy because the suit would be on behalf of the corporation. *Biltmore Assoc., LLC v. Twin City Fire Ins. Co.*, 572 F.3d 663 (9th Cir. 2009).

The insured versus insured exclusion in a directors and officers liability policy bars coverage for claims against directors and officers for breaches of fiduciary duties originally brought by the corporation and later assigned to a creditors' trust in Chapter 11 bankruptcy proceedings. *Biltmore Assoc., LLC v. Twin City Fire Ins. Co.*, 572 F.3d 663 (9th Cir. 2009).

The insured versus insured exclusion of a directors and officers liability policy only bars coverage for claims which are "brought or maintained on behalf of an Insured in any capacity." *Biltmore Assoc., LLC v. Twin City Fire Ins. Co.*, 572 F.3d 663 (9th Cir. 2009).

<u>Exclusions: Intentional Acts</u>

The Ninth Circuit Court of Appeal requested certification of the following issue from the California Supreme Court: Where a contract of liability insurance covering multiple insureds contains a severability-of-interests clause in the "Conditions" section of the policy, does an exclusion barring coverage for injuries arising out of the intentional acts of "an insured" bar coverage for claims that one insured negligently failed to prevent the intentional acts of another insured? *Minkler v. Safeco Ins. Co.*, 561 F.3d 1033 (9th Cir. 2009). ***Certified question pending before California Supreme Court.***

<u>Exclusions: Mental Or Emotional Disorders</u>

A provision in a disability policy which limit benefits for mental or emotional disorders is ambiguous and does not apply to a situation where the claimant suffers disability with both physical and mental components. *Bosetti v. U.S. Life Ins. Co.*, 175 Cal.App.4th 1208 (2009).

<u>Exclusions: Pollution</u>

Cases have properly held against indemnity where the insured can make only unsubstantiated claims of sudden and accidental discharges in the face of repeated, continuous discharges in the course of business. *State of California v. Allstate Ins. Co.*, 45 Cal.4th 1008 (2009).

In construing the "sudden and accidental" exception to a pollution exclusion, the relevant discharge is determined by identifying the discharge that forms the basis for the insured's liability. *State of California v. Allstate Ins. Co.*, 45 Cal.4th 1008 (2009).

When, as in *Standun, Inc. v. Fireman's Fund Ins. Co.*, 62 Cal.App.4th 882 (1998), pollutants are deposited directly onto land or into water, without any attempt at containment, their further migration may reasonably be viewed as an aspect of property damage rather than an additional release or discharge; arguably the only "discharge" to be considered in such a case is the initial deposit. *State of California v. Allstate Ins. Co.*, 45 Cal.4th 1008 (2009).

When hazardous wastes are placed into areas intended and expected to contain them (regardless of how poorly sited or designed the areas are for that purpose), the initial deposit is not itself a "discharge, dispersal, release, or escape" within the meaning of the pollution exclusion. The relevant discharge is the release of pollutants into surrounding soils and groundwater. *State of California v. Allstate Ins. Co.*, 45 Cal.4th 1008 (2009).

Seepage and overflows are merely aspects of property damage if they are not the liability-causing events (as in *Standun, Inc. v. Fireman's Fund Ins. Co*. 62 Cal.App.4th 882 (1998).). *State of California v. Allstate Ins. Co.*, 45 Cal.4th 1008 (2009).

Because terms like "release," "escape," "dispersal," and "discharge" in a pollution exclusion have potentially broad literal meanings and connotations in common usage, the pollution exclusion in the context of a waste disposal site and in certain other contexts (e.g. *MacKinnon v. Truck Ins. Exchange*, 31 Cal.4th 635 (2003)) is ambiguous as to its exact scope of application. *State of California v. Allstate Ins. Co.*, 45 Cal.4th 1008 (2009).

A reasonable insured would not understand an exclusion for "release" of pollutants to apply where wastes are deposited into intended containment ponds and do not behave as environmental pollutants until they are later released or discharged from those ponds. *State of California v. Allstate Ins. Co.*, 45 Cal.4th 1008 (2009).

Where an insured orders or conducts controlled releases only to prevent a larger, uncontrolled, discharge of wastes which would be "accidental," the intentional release may still be covered under the sudden and accidental exception to the pollution exclusion. *State of California v. Allstate Ins. Co.*, 45 Cal.4th 1008 (2009).

Evidence in a given case may establish the insured was aware of a risk so great that no reasonable person could find the insured did not expect the event. However, evidence that an insured knew a disaster was likely and should have taken additional measures against it is insufficient to prove expectation. *State of California v. Allstate Ins. Co.*, 45 Cal.4th 1008 (2009).

An insured can defeat summary judgment if there are disputed facts as to a specific "sudden and accidental" release that was a "substantial factor" in causing indivisible damage. The insured need not show the particular amount of damage caused by such release. *State of California v. Allstate Ins. Co.*, 45 Cal.4th 1008 (2009).

An exception to a pollution exclusion requiring the insured to notify the insurer of a claim within 60-days does not violate public policy or California's notice-prejudice rule. *Venoco, Inc. v. Gulf Underwriters Ins. Co.*, 175 Cal.App.4th 750 (2009).

An accidental discharge is one the insured neither intended nor expected to happen. A discharge is considered "expected" only when the insured subjectively knew or believed it was highly likely to occur. *State of California v. Allstate Ins. Co.*, 45 Cal.4th 1008 (2009).

To the extent an insured can show a covered risk (e.g. "sudden and accidental" releases of pollution) proximately caused indivisible damage for which it was held liable, the insured is contractually entitled to indemnity for that liability even if an excluded risk is a concurrent proximate cause. *State of California v. Allstate Ins. Co.*, 45 Cal.4th 1008 (2009).

Only if the insured can identify particular, sudden and accidental events and prove they contributed substantially to causing indivisible property damage for which the insured

bore liability is the insurer obliged to indemnify its insured for the entirety of the damages. Indemnity is not proper in situations where the insured can do no more than speculate that some events may have occurred suddenly and accidentally or where such events contributed only trivially to the property damage from pollution. *State of California v. Allstate Ins. Co.*, 45 Cal.4th 1008 (2009).

Cases have properly held against indemnity where the insured can make only unsubstantiated claims of sudden and accidental discharges in the face of repeated, continuous discharges in the course of business. *State of California v. Allstate Ins. Co.*, 45 Cal.4th 1008 (2009).

Exclusions: Pollution Exclusion – Buy-Back Provision

A 60-day reporting requirement in a pollution buy-back provision is not against public policy. An extension of reporting time would be tantamount to an extension of coverage for which the insurer has not bargained. Such an extension would rewrite the contract between the two parties, which the court "cannot and will not do." *Venoco, Inc. v. Gulf Underwriters Ins. Co.*, 175 Cal.App.4th 750 (2009).

Pollution buy-back provisions do not cover damage claims for long-term toxic exposure. *Venoco, Inc. v. Gulf Underwriters Ins. Co.*, 175 Cal.App.4th 750 (2009).

A 60-day reporting requirement in a pollution buy-back provision does not have to be in bold face to be conspicuous and valid. Requirement is "not hidden in fine print nor placed in an unusual part of the policy. . . when it stands out as a separate paragraph and is clear and explicit" and is preceded by "a bold-faced heading phrased as a time limit clause: 'SEEPAGE AND POLLUTION BUY-BACK 7 DAY CLAUSE (LAND BASED OPERATIONS).'" *Venoco, Inc. v. Gulf Underwriters Ins. Co.*, 175 Cal.App.4th 750 (2009).

An exception to a pollution exclusion requiring the insured to notify the insurer of a claim within 60-days does not violate public policy or California's notice-prejudice rule. *Venoco, Inc. v. Gulf Underwriters Ins. Co.*, 175 Cal.App.4th 750 (2009).

Exclusions: Subsidence

The only reasonable interpretation of the exclusionary clause, "[f]or property damage arising out of land subsidence for any reason whatsoever," is that it bars coverage for all property damage caused by landslide, regardless of the cause of subsidence. *City of Carlsbad v. Ins. Co. of the State of Pennsylvania*, 180 Cal.App.4th 176 (2009).

Exclusions: Third-Party Negligence

The exclusion of third party negligence that interacts with the excluded risks of corrosion and continuous water leakage is enforceable as applied to a loss resulting from a

contractor for accidentally puncturing the insured's bathroom pipe. *Freedman v. State Farm Ins. Co.*, 173 Cal.App.4th 957 (2009).

Third-party negligence provisions in a policy were not "insufficiently clear," as defined in *De Bruyn v. Super. Ct.,* 158 Cal.App.4th 1213 (2008), where the language of the provisions clearly excluded the perils of contractor-negligence-induced corrosion and water leaks such that "'[a] reasonable insured would readily understand from the policy language which perils are covered and which are not.'" *Freedman v. State Farm Ins. Co.*, 173 Cal.App.4th 957 (2009).

An exclusion which denies coverage for third party negligence only when that negligence interacts with an excluded peril or perils applies regardless of which specific peril is the efficient proximate cause (i.e. the predominate or most important cause) of the loss because in such an instance, both possible efficient proximate causes are excluded perils, despite the fact that third party negligence would otherwise be a covered peril. *Freedman v. State Farm Ins. Co.*, 173 Cal.App.4th 957 (2009).

A mold endorsement providing coverage for losses caused by "fungus" if the fungus was "caused by or directly result[ed] from" a peril not otherwise excluded, did not cover mold damage caused by a water leak which resulted from corrosion caused by a nail through the pipe, where contractor-negligence-induced corrosion and contractor-negligence-induced continuous water leakage are excluded perils. *Freedman v. State Farm Ins. Co.*, 173 Cal.App.4th 957 (2009).

An exclusion which denies coverage for third party negligence only when that negligence interacts with an excluded peril (or perils), applies regardless of which specific peril is the efficient proximate cause (i.e. the predominate or most important cause) of the loss because in such an instance, both possible efficient proximate causes are excluded perils, despite the fact that third party negligence would otherwise be a covered peril. *Freedman v. State Farm Ins. Co.*, 173 Cal.App.4th 957 (2009).

Exclusions: Water Damage

A policy which excludes coverage for any loss caused by continuous water damage, regardless of whether that leakage "arises from natural or external forces" is inconsistent with the interpretation that the exclusion applies only to "normal deterioration of the plumbing system" and not to leaks "caused by some force other than deterioration." Such a policy expressly provides that leaks are excluded regardless of whether they are caused by natural forces such as normal deterioration or external forces such as third party negligence. *Freedman v. State Farm Ins. Co.*, 173 Cal.App.4th 957 (2009).

Where the size of the hole through which water leaked was small, and the amount of water damage was extensive, a water damage exclusion that did not specify how long a leak has to exist to be deemed "continuous," or how many times it has to start and stop to be considered "repeated," was not ambiguous as applied because such leak had lasted

long enough to be deemed "continuous," or had stopped and started enough times to count as "repeated," under any reasonable construction of those terms. *Freedman v. State Farm Ins. Co.*, 173 Cal.App.4th 957 (2009).

A mold endorsement providing coverage for losses caused by "fungus," if the fungus was "caused by or directly result[ed] from" a peril not otherwise excluded, did not cover mold damage caused by a water leak which resulted from corrosion that was caused by a nail through the pipe, where contractor-negligence-induced corrosion and contractor-negligence-induced continuous water leakage are both excluded perils. *Freedman v. State Farm Ins. Co.*, 173 Cal.App.4th 957 (2009).

Exclusions: Watercourse Pollution

The definition of "watercourse" for the purpose of applying an exclusion for pollution "into or upon any watercourse" is "the channel through which the water of a particular district or watershed usually or periodically flows." (*Phillips v. Burke*, 133 Cal.App.2d 700, 703 (1955)). *State of California v. Allstate Ins. Co.*, 45 Cal.4th 1008 (2009).

To establish its entitlement to summary judgment on basis that a watercourse pollution exclusion applies, the insurer must show by undisputed evidence that the relevant overflow was confined to the regular channel of a watercourse. Evidence that contaminants flowed onto land drained by a stream or creek, by itself, is insufficient. *State of California v. Allstate Ins. Co.*, 45 Cal.4th 1008 (2009).

The watercourse pollution exclusion could in theory be applied in part to discharges that were partly, but not wholly, confined to a watercourse. *State of California v. Allstate Ins. Co.*, 45 Cal.4th 1008 (2009).

Evidence

In order to introduce tapes, transcripts and summaries of recorded statements provided by an insured during the course of the insurer's investigation of a claim, the insurer must lay a proper foundation, including a showing that the items are admissible under the business records exception to the hearsay rule. *McCoy v. Progressive West Ins. Co.*, 171 Cal.App.4th 785 (2009).

An insurer may not introduce its claims file wholesale into evidence; rather, the insurer must establish that the file, and each item it contains, is relevant and admissible under the business records exception to the hearsay rule and that the probative value of the file and its individual contents outweighs any prejudice that might flow from its admission. *McCoy v. Progressive West Ins. Co.*, 171 Cal.App.4th 785 (2009).

Evidence: Hearsay - Ancient Documents Exception

Documents are not admissible pursuant to the ancient documents exception to the hearsay rule where there was no evidence the statements were generally acted upon as true or that the witness had an interest in whether the statements were true. *State of California v. Continental Ins. Co.*, 169 Cal.App.4th 1114 (2009). ***Not citable. Review granted.***

Evidence: Hearsay - Business Record Exception

Documents are not admissible pursuant to the business records exception to the hearsay rule where there was no evidence (1) the documents were made in the regular course of a business, (2) the documents were made at or near the time of the conditions they purported to record, and (3) that the sources of information, method of preparation, and time of preparation indicated the documents were trustworthy. *State of California v. Continental Ins. Co.*, 169 Cal.App.4th 1114 (2009). ***Not citable. Review granted.***

Failure to Investigate – See Also Bad Faith

Insurer's failure to conduct a reasonable search for other policies it had issued, after concluding there was no coverage under the tendered policy, breached duties arising under an undiscovered policy to reasonably investigate and settle insured's claim. *Safeco Ins. Co. v. Parks*, 170 Cal.App.4th 992 (2009).

The common law duty of good faith and fair dealing did not confine insurer's duty to investigate solely to the policy referenced by insured's claim. *Safeco Ins. Co. v. Parks*, 170 Cal.App.4th 992 (2009).

Insurer could not rely on its breach of the duty to conduct a reasonable investigation to shield itself from liability for breach of the related duty to accept a reasonable settlement demand. *Safeco Ins. Co. v. Parks*, 170 Cal.App.4th 992 (2009).

Federal Pleading Requirements: Well-Pleaded Complaint Rule

Generally speaking, a cause of action arises under federal law only when the plaintiff's well-pleaded complaint raises issues of federal law. *Marin Gen. Hosp. v. Modesto & Empire Traction Co.*, 581 F.3d 941 (9th Cir. 2009).

The well-pleaded complaint rule is the basic principle marking the boundaries of the federal question jurisdiction of the federal district courts. *Marin Gen. Hosp. v. Modesto & Empire Traction Co.*, 581 F.3d 941 (9th Cir. 2009).

There is an exception to the well-pleaded complaint rule for state-law causes of action that are completely preempted by section 502(a) of ERISA. *Marin Gen. Hosp. v. Modesto & Empire Traction Co.*, 581 F.3d 941 (9th Cir. 2009).

Fiduciary Duty

Insurers do not stand in a fiduciary relationship with insureds, though the unique nature of insurance contracts may make the relationship "akin" to a fiduciary one. *Griffin Dewatering Corp. v. N. Ins. Co.*, 176 Cal.App.4th 172 (2009).

An insurer retains the power to give its interests consideration equal to that it gives the interests of its insured and is not required to disregard the interests of its shareholders and other insureds when evaluating claims. *Griffin Dewatering Corp. v. N. Ins. Co.*, 176 Cal.App.4th 172 (2009).

An insurer is not required to pay non-covered claims, even though payment would be in the best interests of its insured. *Griffin Dewatering Corp. v. N. Ins. Co*., 176 Cal.App.4th 172 (2009).

Fraud: Reliance

A non-party to an insurance contract cannot state a claim for fraud where there is no possibility the non-party would detrimentally change its position based on the insurer's representations. *Mega Life And Health Ins. Co. v. Super. Ct.*, 172 Cal.App.4th 1522 (2009).

Horizontal Exhaustion

As a general rule, California requires horizontal exhaustion. Vertical exhaustion applies if, and only if, the excess policy provides that it is excess to a specified primary policy. *State of California v. Continental Ins. Co.*, 169 Cal.App.4th 1114 (2009). ***Not citable. Review granted.***

"[U]nder the California rule of 'horizontal exhaustion,' all primary insurance must be exhausted before an excess insurer must 'drop down' to defend an insured, particularly in cases of continuing loss." *North Am. Capacity Ins. Co. v. Claremont Liab. Ins. Co.*, 177 Cal.App.4th 272 (2009).

Hospital Lien Act – See California Civ. Code § 3045.2

Independent Contractors: Peculiar Risk Doctrine

Although the general rule is that an employer of an independent contractor is not liable for contractor's (or its employees') negligence, the "peculiar risk" doctrine provides an exception to this rule. *American States Ins. Co. v. Progressive Casualty Ins. Co.*, 180 Cal.App.4th 18 (2009).

The "peculiar risk" doctrine provides that an employer of an independent contractor is liable to third persons injured as a proximate result of the independent contractor's

negligence where there is a "peculiar" risk particular to the work to be done, *i.e.*, a risk arising out of the place where it was to be done, and against which a reasonable man would recognize the necessity of taking precautions. *American States Ins. Co. v. Progressive Casualty Ins. Co.*, 180 Cal.App.4th 18 (2009).

An employer liable under the "peculiar risk" doctrine is liable whether or not an agreement exists between the employer and independent contractor under which the independent contractor is required to take special precautions. *American States Ins. Co. v. Progressive Casualty Ins. Co.*, 180 Cal.App.4th 18 (2009).

The "peculiar risk" doctrine is essentially a doctrine of vicarious liability. *American States Ins. Co. v. Progressive Casualty Ins. Co.*, 180 Cal.App.4th 18 (2009).

A person held liable under the "peculiar risk" doctrine is entitled to equitable indemnity from the independent contractor. *American States Ins. Co. v. Progressive Casualty Ins. Co.*, 180 Cal.App.4th 18 (2009).

Insurability: Successors

Members of a limited liability company never hold "an ownership interest in the property to which the LLC held title." The company holds the ownership interest and the member owns has a legal interest in the company. *Kwok v. Transnation Title Ins. Co.*, 170 Cal.App.4th 1562 (2009).

"The transfer of property by an insured into a family trust is a voluntary act and not one that arises by operation of law." *Kwok v. Transnation Title Ins. Co.*, 170 Cal.App.4th 1562 (2009).

The transfer of the property's title from a limited liability company as the named insured to the nonmember trustees terminates coverage under the title policy. *Kwok v. Transnation Title Ins. Co.*, 170 Cal.App.4th 1562 (2009).

Insurance: Automobile

A Repair Satisfaction Vehicle Program ("RSVP") auto Damage Only policy which covers 100 percent of "the fair and responsible charges" for repairs performed at affiliated RSVP auto repair shops, but limits coverage for repairs performed at non-RSVP shops to 80 percent of the reasonable repair costs, does not violate Insurance Code section 758.5, because the coverage limitation is not "based on charges that would have been incurred had the vehicle been repaired by the insurer's chosen shop." Cal. Ins. Code section 758.5(d)(2). *Maystruk v. Infinity Ins. Co.*, 175 Cal.App.4th 881 (2009).

Insurance Code section 758.5 does not require insurers to pay 100 percent of a vehicle's repair cost regardless of whether the insured took the vehicle to a recommended shop

because, if the Legislature had so intended, it would have expressly said so in the text of the statute. *Maystruk v. Infinity Ins. Co.*, 175 Cal.App.4th 881 (2009).

Because Insurance Code section 758.5 is clear and unambiguous, legislative history stating that the legislative intent of the section was to prohibit insurers from steering insureds to particular repair shops by requiring insurers to "pay the cost of repair charged by the insured's chosen shop without discount, if the amount charged for the repairs is reasonable" may not be considered in determining the meaning of the statute. *Maystruk v. Infinity Ins. Co.*, 175 Cal.App.4th 881 (2009)

When not based on any facts stated in the complaint, a legal theory that insurer estimated reasonable costs of repairs, required insurer-recommended shops to accept such estimates, and then paid non-insurer-recommended shops chosen by the insured the same estimate at a discount, thus violating Insurance Code section 758.5, may not be grounds for granting leave to amend because such a theory would be based on mere suspicions regarding the calculation of reasonable repair costs. *Maystruk v. Infinity Ins. Co.*, 175 Cal.App.4th 881 (2009)

Insurance Credit Scoring

Federal law does not reverse-preempt a claim of disparate impact race discrimination in insurer's practice of computing insured's credit scoring for purposes of determining premiums. *Ojo v. Farmers Group, Inc.*, 565 F.3d 1175 (9th Cir. 2009). ***Not citable. Rehearing, en banc, granted.***

In Texas and other states, laws that prohibit insurers from unfairly discriminating against insureds through a credit scoring system, an insured may maintain a lawsuit for violation of the federal Fair Housing Act. *Ojo v. Farmers Group, Inc.*, 565 F.3d 1175 (9th Cir. 2009). ***Not citable. Rehearing, en banc, granted.***

Insureds

A health insurer does not owe a legal duty to the non-party spouse of the insured. *Mega Life and Health Ins. Co. v. Super. Ct.*, 172 Cal. App.4th 1522 (2009).

Insureds: Omnibus Clause

An "omnibus clause" in an insurance policy may make a person or entity that is potentially vicariously liable under the peculiar risk doctrine an "insured" and thereby entitled to a defense pursuant to the policy. *American States Ins. Co. v. Progressive Casualty Ins. Co.*, 180 Cal.App.4th 18 (2009).

In the context of a commercial automobile liability policy, insureds are not necessarily limited to those who are responsible for placing the driver behind the wheel. *American States Ins. Co. v. Progressive Casualty Ins. Co.*, 180 Cal.App.4th 18 (2009).

An "omnibus clause" which provides an insured a defense under the "peculiar risk" doctrine does not insulate the vicariously liable insured from liability for its own negligence. The vicarious insurer providing a defense may have a right to be reimbursed for defense costs allocable to claims for which there was no potential vicarious coverage under the policy. *American States Ins. Co. v. Progressive Casualty Ins. Co.*, 180 Cal.App.4th 18 (2009).

Internal Revenue Code

The tax qualification provisions of the Internal Revenue Code, and the Treasury Regulations promulgated thereunder, do not modify an ERISA benefit plan to mandate inclusion of employees whom the plan has permissibly excluded. *Bellah v. American Airlines, Inc.,* 656 F. Supp. 2d 1207 (E.D. Cal. 2009).

Congress did not intend, under 26 U.S.C. section 410 or 414, to expand employee rights to benefits under ERISA. *Bellah v. American Airlines, Inc.*, 656 F. Supp. 2d 1207 (E.D. Cal. 2009).

Interpleader

While an estate seeking the decedent's pension benefits suggested a plan administrator could resolve such disputes by interpleader actions, the Supreme Court held this merely restated the problem with the estate's position, i.e., "it would destroy a plan administrator's ability to look at the plan documents and records conforming to them to get clear distribution instructions, without going into court." *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865 (2009).

Intervention

An injured third-party has the right to intervene and defend a declaratory relief action where the insured fails to participate. *Westchester Fire Ins. Co. v. Mendez*, 585 F.3d 1183 (9th Cir. 2009).

Although an injured third-party has the right to intervene and defend a declaratory relief action where the insured fails to participate, it is unresolved whether an injured third-party's defense of the case will excuse the failure of the insured to participate in litigation. *Westchester Fire Ins. Co. v. Mendez*, 585 F.3d 1183 (9th Cir. 2009).

Judgment Binding on Insurer

When an insurer (1) is duly notified of the underlying claim against its insured; and (2) is given a full opportunity to protect its interests, the resulting judgment – if obtained without fraud or collusion – is binding against the insurer in any later coverage litigation on the claim involving its insured. This rule applies regardless of whether the insurer has a contractual duty to defend, or whether or not its refusal to participate in the underlying

proceedings is legally justified. *Executive Risk Indem., Inc. v. Jones,* 171 Cal.App.4th 319 (2009).

Judicial Council Authority

The Judicial Council's constitutional authority to adopt rules for court administration, practice and procedure "[t]o improve the administration of justice" (Cal. Const., art. VI, section 6, subd. (d)), includes the concomitant authority to create the means to enforce those rules, provided only that "[t]he rules adopted shall not be inconsistent with the statute." *Vidrio v. Hernandez*, 172 Cal.App.4th 1443 (2009).

The Judicial Council's constitutional rule-making power plainly extends to the adoption of a rule requiring individuals or entities with authority to consent to the settlement of a case to participate in a mandatory settlement conference, as does CRC, Rule 3.1380(b). *Vidrio v. Hernandez*, 172 Cal.App.4th 1443 (2009).

Judicial Estoppel

Judicial estoppel prevents a party from making an argument which is clearly inconsistent with a previous argument made by the same party and accepted by the court and would result in an unfair advantage for that party. *United Nat'l Ins. Co. v. Spectrum Worldwide, Inc.*, 555 F.3d 772 (9th Cir. 2009).

Judicial Estoppel functions such that a party cannot "game" the courts into allowing it to prevail on the very position it discredited in an earlier judicial determination. *United Nat'l Ins. Co. v. Spectrum Worldwide, Inc.*, 555 F.3d 772 (9th Cir. 2009).

Jurisdiction

Where a nonresident defendant challenges jurisdiction by way of a motion to quash, the plaintiff bears the burden of establishing by a preponderance of the evidence that minimum contacts exist between the defendant and the forum state to justify imposition of personal jurisdiction. The plaintiff must present facts demonstrating that conduct of defendant related to the pleaded causes of action is sufficient to constitute constitutionally cognizable "minimum contacts." *Elkman v. National States Ins. Co.*, 173 Cal.App.4th 1305 (2009).

A nonresident insurer does not subject itself to personal jurisdiction in a forum state merely by accepting premium payments from insureds in the forum state and by processing and paying claims submitted by its insureds for treatment rendered in the forum state. *Elkman v. National States Ins. Co.*, 173 Cal.App.4th 1305 (2009).

A court may exercise specific jurisdiction over a nonresident defendant only if (1) the defendant has purposefully availed himself or herself of forum benefits; (2) the controversy is related to or arises out of the defendant's contacts with the forum; and (3)

the assertion of personal jurisdiction would comport with fair play and substantial justice. *Elkman v. National States Ins. Co.*, 173 Cal.App.4th 1305 (2009).

Knox-Keene Act – See California Health & Safety Code §§ 1371.4 and 1389.3

Life Insurance

Life insurance policies are neither "goods" nor "services" under the Consumers Legal Remedies Act ("CLRA"). Thus, consumers do not have a valid claim against the issuers of their life insurance policies under the terms of the CLRA. *Fairbanks v. Super. Ct.*, 46 Cal.4th 56 (2009).

Made-Whole Rule

The made-whole rule prevents insureds from receiving double recovery from the insured and the third party. The insured is entitled to be made whole from the recovery from a third party and/or insurance proceeds, but not receive double recovery. *21st Century Ins. Co. v. Super. Ct.*, 47 Cal.4th 511 (2009).

Misrepresentation – See Also Rescission

A misrepresentation or concealment of a material fact in connection with an application for insurance is grounds for rescission of the insurance contract. Such a misrepresentation can also provide a defense in an action by the insured on the contract. *Superior Dispatch, Inc. v. Ins. Corp. of New York*, 176 Cal.App.4th 12 (2009). ***Not citable. Rehearing granted.***

A letter from the plan administrator stating that "the company will provide benefits for you at active rates," but which letter does not mention the LTD policy or any modification of the LTD policy, did not constitute a "representation" to a beneficiary that she would be eligible for LTD benefits for which she was not otherwise eligible under the terms of the LTD plan. *Bellah v. American Airlines, Inc.*, 656 F. Supp. 2d 1207 (E.D. Cal. 2009).

An ERISA beneficiary was not entitled to recover benefits under an equitable estoppel theory where the language of the plan was clear and unambiguous, notwithstanding subsequent miscommunications between the beneficiary and plan administrator regarding the beneficiary's eligibility for benefits. *Bellah v. American Airlines, Inc.*, 656 F. Supp. 2d 1207 (E.D. Cal. 2009).

An exclusion providing that an employee who is not at work because of a disability at the time coverage becomes effective is not covered for LTD benefits "until you return to work and deductions are taken from your pay" clearly and unambiguously excludes an employee who was on disability leave at the time the LTD plan became effective; therefore, subsequent miscommunications between the plan administrator and the

beneficiary regarding her benefits were irrelevant. *Bellah v. American Airlines, Inc.*, 656 F. Supp. 2d 1207 (E.D. Cal. 2009).

Mold Endorsement

A mold endorsement providing coverage for losses caused by "fungus," if the fungus was "caused by or directly result[ed] from" a peril not otherwise excluded, did not cover mold damage caused by a water leak, which resulted from corrosion that was caused by a nail through the pipe, where contractor-negligence-induced corrosion and contractor-negligence-induced continuous water leakage are excluded perils. *Freedman v. State Farm Ins. Co.*, 173 Cal.App.4th 957 (2009).

Notice-Prejudice Rule

California's "notice-prejudice" rule operates to bar insurers from disavowing coverage on the basis of lack of timely notice unless the insurer can show actual prejudice from the delay. However, this rule does not apply to every time limit in a policy. A 60-day reporting requirement in a pollution buy-back provision does not violate this rule because the provision is extending coverage for an otherwise uncovered claim. The court held, "where the policy provides that special coverage for a particular type of claim is conditioned on express compliance with a reporting requirement, the time limit is enforceable without proof of prejudice." *Venoco, Inc. v. Gulf Underwriters Ins. Co.*, 175 Cal.App.4th 750 (2009).

Insured's failure to comply with the notice provisions of the policy did not excuse insurer's duties because insurer could not show a substantial likelihood that, with timely notice, and notwithstanding a denial of coverage or reservation of rights, it would have settled the claim for less or taken steps that would have reduced or eliminated the insured's liability. *Safeco Ins. Co. v. Parks*, 170 Cal.App.4th 992 (2009).

Number of Occurrences

For purposes of an insurer's limitation of liability to a certain amount for each covered occurrence, an occurrence has generally been held to mean the underlying cause of the injury rather than the injury or claim itself. *State of California v. Continental Ins. Co.*, 169 Cal.App.4th 1114 (2009). ***Not citable. Review granted.***

Under the cause test, there is a single occurrence when there is but one proximate, uninterrupted, and continuing cause which resulted in all the injuries and damage. When all injuries emanate from a common source or process, there is only a single occurrence for purposes of coverage. It is irrelevant that there are multiple injuries or injuries of different magnitudes, or that the injuries extend over a period of time. Conversely, when a cause is interrupted, or when there are several autonomous causes, there are multiple occurrences for purposes of determining policy limits and assessing deductibles. *State of*

California v. Continental Ins. Co., 169 Cal.App.4th 1114 (2009). ***Not citable. Review granted.***

Pleading

A plaintiff must recover, if at all, upon a cause of action set out in the complaint, and not on some other cause of action which may be developed by the proofs. *Griffin Dewatering Corp. v. N. Ins. Co.*, 176 Cal.App.4th 172 (2009).

Policy Modification

Amounts paid in excess of the extended replacement cost policy limits were not "courtesy benefits," but were owed because, per policy's original terms, an inspection report appraising the property at a price higher than the policy limits modified the policy. *Major v. Western Home Ins. Co.*, 169 Cal.App.4th 1197 (2009).

No new consideration was necessary to support modification of an extended replacement cost policy because an inspection report was necessary to comply with the original terms of the policy and the inspection report increased the policy limits. *Major v. Western Home Ins. Co.*, 169 Cal.App.4th 1197 (2009).

Insurer's failure to modify a policy to reflect the correct coverage per an inspection report could not shield insurer from liability. *Major v. Western Home Ins. Co.*, 169 Cal.App.4th 1197 (2009).

Post Claims Underwriting – See California Health & Safety Code § 1389.3 (Knox-Keene Act)

Prejudgment Interest

Prejudgment interest is applicable in the insurer-insured context. *Evanston Ins. Co. v. OEA, Inc.*, 566 F.3d 915 (9th Cir. 2009).

A district court may award pre-judgment interest on past-due benefits in ERISA cases when a balancing of the equities so provides. Prejudgment interest is calculated at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment. *Minton v. Deloitte and Touche USA LLP Plan*, 631 F. Supp. 2d 1213 (N.D. Cal . 2009).

Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to receive such damages is vested in him on a particular day, is entitled to also recover interest thereon from that day. *Evanston Ins. Co. v. OEA, Inc.*, 566 F.3d 915 (9th Cir. 2009).

Premiums – See California Ins. Code § 381(f)

Preventative Actions

Liability policies have been held to cover damages resulting from an act undertaken to prevent a covered source of injury from coming into action, even if that act would otherwise not be covered. *State of California v. Allstate Ins. Co.*, 45 Cal.4th 1008 (2009).

An insured who takes out a policy providing coverage for property damage would expect to be covered for sums incurred in mitigating damages to that property from covered causes. *State of California v. Allstate Ins. Co.*, 45 Cal.4th 1008 (2009).

Primary v. Excess Insurance

Primary coverage "is defined as 'insurance coverage whereby, under the terms of the policy, liability attaches immediately upon the happening of the occurrence that gives rise to liability.'" *North Am. Capacity Ins. Co. v. Claremont Liab. Ins. Co.*, 177 Cal.App.4th 272 (2009).

"In the context of liability insurance, a primary insurer generally has the primary duty to defend and to indemnify the insured, unless otherwise excused or excluded by specific policy language." *North Am. Capacity Ins. Co. v. Claremont Liab. Ins. Co.*, 177 Cal.App.4th 272 (2009).

"Excess insurance provides coverage after other identified insurance is no longer on the risk. 'Excess' coverage means 'coverage whereby, under the terms of the policy, liability attaches only after a predetermined amount of primary coverage has been exhausted.'" *North Am. Capacity Ins. Co. v. Claremont Liab. Ins. Co.*, 177 Cal.App.4th 272 (2009).

"[U]nder the California rule of 'horizontal exhaustion,' all primary insurance must be exhausted before an excess insurer must 'drop down' to defend an insured, particularly in cases of continuing loss." *North Am. Capacity Ins. Co. v. Claremont Liab. Ins. Co.*, 177 Cal.App.4th 272 (2009).

Primary Jurisdiction Doctrine

A trial court's decision to not refer a claim to an administrative agency under doctrine of primary jurisdiction is reviewed under an abuse of discretion standard. *Blue Cross of California, Inc. v. Super. Ct.*, 180 Cal.App.4th 1237 (2009).

The doctrine of primary jurisdiction comes into play whenever enforcement of claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views. *Blue Cross of California, Inc. v. Super. Ct.*, 180 Cal.App.4th 1237 (2009).

The doctrine of primary jurisdiction applies to claims properly cognizable in court that contain some issue within the special competence of an administrative agency. It requires the court to enable a "referral" to the agency, staying further proceedings so as to give the parties reasonable opportunity to seek an administrative ruling. *Blue Cross of California, Inc. v. Super. Ct.*, 180 Cal.App.4th 1237 (2009).

The doctrine of primary jurisdiction is subject to a futility exception: It is improper to invoke the primary jurisdiction of an administrative agency if it is clear that further proceedings within that agency would be futile. *Blue Cross of California, Inc. v. Super. Ct.*, 180 Cal.App.4th 1237 (2009).

Proposition 103 – See California Ins. Code § 1850.4, *et seq.*

Punitive Damages – See Also California Civ. Code § 3294

Employees of insurer can bind insurer for purposes of punitive damages where employees possess a degree of discretion in making decisions that ultimately determine corporate policy. *Major v. Western Home Ins. Co.*, 169 Cal.App.4th 1197 (2009).

When insurer's employees dispose of insureds' claims with little, if any, supervision, they possess sufficient discretion for the law to impute their actions concerning those claims to the insurer. *Major v. Western Home Ins. Co.*, 169 Cal.App.4th 1197 (2009).

Award of punitive damages against insurer was appropriate where insurer acted with oppression; malice was not required to award punitive damages. *Major v. Western Home Ins. Co.*, 169 Cal.App.4th 1197 (2009).

Punitive damages are proper in an insurance bad faith action. *McCoy v. Progressive West Ins. Co.*, 171 Cal.App.4th 785 (2009).

In a civil case not arising from the breach of a contractual obligation, the jury may award punitive damages "where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice." Cal. Civ. Code section 3294. *Roby v. McKesson Corp.*, 47 Cal.4th 686 (2009).

Malice is defined as intentional injury or "despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." Cal. Civ. Code section 3294. *Roby v. McKesson Corp.*, 47 Cal.4th 686 (2009).

Oppression is defined as "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." Cal. Civ. Code section 3294. *Roby v. McKesson Corp.*, 47 Cal.4th 686 (2009).

Punitive Damages: Due Process

The due process clause of the Fourteenth Amendment to the United States Constitution places constraints on state court awards of punitive damages. The imposition of grossly excessive or arbitrary awards is constitutionally prohibited, for due process entitles a tortfeasor to fair notice of the conduct that will subject him to punishment and of the severity of the penalty that a state may impose. *Roby v. McKesson Corp.*, 47 Cal.4th 686 (2009).

Reasonable Expectations of the Insured Doctrine – See Contract Interpretation

Reimbursement

Recovery of Medical Payment benefits from recipient's third party action against tortfeasor must be reduced by pro rata share of attorneys' fees incurred, in relation to the total amount of Medical Payment recovered, without consideration of overall attorneys' fees paid by insured. *21st Century Ins. Co. v. Super. Ct.*, 47 Cal.4th 511 (2009).

An insurer may reserve its right to seek reimbursement from the insured of any defense costs that can be attributed solely to claims that were not potentially covered under the policy. *State Farm General Ins. Co. v. Mintarsih*, 175 Cal.App.4th 274 (2009).

An insurer may not seek reimbursement from an insured of defense costs attributable to claims that were at least potentially covered. *State Farm General Ins. Co. v. Mintarsih*, 175 Cal.App.4th 274 (2009).

An insurer's right to reimbursement of defense costs for claims for which there was no potential for coverage is implied in law to avoid unjust enrichment. *State Farm General Ins. Co. v. Mintarsih*, 175 Cal.App.4th 274 (2009).

An insured could have no objectively reasonable expectation to retain the windfall of payment for the defense of claims for which there was no potential coverage. *State Farm General Ins. Co. v. Mintarsih*, 175 Cal.App.4th 274 (2009).

Insurer reimbursement claims are not only acceptable, but encouraged, because equitable principles tend to place the loss on the wrongdoing defendant, to preclude a windfall recovery by the victim, and reimburse the third party. *Vigilant Ins. Co. v. Chiu*, 175 Cal.App.4th 438 (2009).

The right of recoupment, under *Buss v. Super. Ct.*, 16 Cal.4th 35 (1977), is necessarily predicated on the proposition that the insurance company has expended funds on the insured's behalf that were never even potentially covered under the insurance contract. *Griffin Dewatering Corp. v. N. Ins. Co.*, 176 Cal.App.4th 172 (2009).

By definition, and as a matter of law, an insurance company's only hope of reimbursement is if the insured has received a benefit that the insured never paid for in the first place. *Griffin Dewatering Corp. v. N. Ins. Co*., 176 Cal.App.4th 172 (2009).

The right of an insurance company to obtain reimbursement is not contractual. *Griffin Dewatering Corp. v. N. Ins. Co*., 176 Cal.App.4th 172 (2009).

An insurer's right to reimbursement for defenses costs for claims that were never even potentially covered is predicated on a legal right implied in law as quasi-contractual, not as a matter of any agreement between the parties. *Griffin Dewatering Corp. v. N. Ins. Co*., 176 Cal.App.4th 172 (2009).

Because the insurer's assertion of reimbursement rights was necessarily not a matter of contract, the assertion of a reimbursement right by the insurer could not deprive the insured of any benefits under the contract. *Griffin Dewatering Corp. v. N. Ins. Co*., 176 Cal.App.4th 172 (2009).

In order to have any claim for reimbursement, the insurance company must affirmatively reserve its right to seek it. It is not enough, if an insurance company is to have any viable claim for reimbursement, simply to craft an incomplete withdrawal of a previous reservation. *Griffin Dewatering Corp. v. N. Ins. Co*., 176 Cal.App.4th 172 (2009).

Removal

The burden of establishing federal subject matter jurisdiction falls on the party invoking removal. *Marin Gen. Hosp. v. Modesto & Empire Traction Co.*, 581 F.3d 941 (9th Cir. 2009).

Rescission – See Also Misrepresentation

A misrepresentation or concealment of a material fact in connection with an application for insurance is grounds for rescission of the insurance contract. Such a misrepresentation can also provide a defense in an action by the insured on the contract. *Superior Dispatch, Inc. v. Ins. Corp. of New York*, 176 Cal.App.4th 12 (2009). ***Not citable. Rehearing granted.***

Restitution

Where related insurance entities receive improper benefits from service charge payments paid to a third party administrator, those related insurance entities may be liable for restitution of the service charges. *Troyk v. Farmers Group Inc.,* 171 Cal.App.4th 1305 (2009).

California Penal Code section 1202.4, which authorizes a criminal trial court to award a victim restitution, does not preclude the victim or the victim's assignee from pursuing a

separate civil action based on the same facts from which the criminal conviction arose. *Vigilant Ins. Co. v. Chiu,* 175 Cal.App.4th 438 (2009).

A restitution order under the penal code is not a civil judgment, does not resolve civil liability and is not a substitute for civil damages. *Vigilant Ins. Co. v. Chiu,* 175 Cal.App.4th 438 (2009).

Reverse Preemption and McCarran-Ferguson Act

"Where state and federal 'regulatory goals are in harmony,' reverse-preemption is not triggered." *Ojo v. Farmers Group, Inc.*, 565 F.3d 1175 (9th Cir. 2009). ***Not citable. Rehearing, en banc, granted.***

The McCarran-Ferguson Act "establishes a form of inverse preemption" preventing a "federal law of general applicability from inadvertently impairing state laws regulating the business of insurance." *Ojo v. Farmers Group, Inc.*, 565 F.3d 1175 (9th Cir. 2009). ***Not citable. Rehearing, en banc, granted.***

Three requirements must be met before a state insurance law preempts a federal statute under the McCarran-Ferguson Act: "(1) the federal law in question must not be specifically directed at insurance regulation; (2) there must exist a particular state law (or declared regulatory policy) enacted for the purposes of regulating insurance; and (3) application of federal law to the controversy in question must invalidate, impair or supersede that state law." *Ojo v. Farmers Group, Inc.*, 565 F.3d 1175 (9th Cir. 2009). ***Not citable. Rehearing, en banc, granted.***

Rule of Lenity

The meaning of "premium" in Insurance Code section 381(f) is not reasonably susceptible to two interpretations requiring consideration of the rule of lenity which applies "[w]hen language of a criminal statute is reasonably susceptible to two interpretations, the rule of lenity ordinarily supports an interpretation of that language favorable to a party who may be subject to criminal prosecution or penalties." *Troyk v. Farmers Group Inc.,* 171 Cal.App.4th 1305 (2009).

Sanctions

California courts have inherent power to "take appropriate action to secure compliance with its orders, to punish contempt, and to control its proceedings." *Vidrio v. Hernandez*, 172 Cal.App.4th 1443 (2009).

Trial courts have no inherent power to impose monetary sanctions. *Vidrio v. Hernandez*, 172 Cal.App.4th 1443 (2009).

No statute authorizes the imposition of sanctions against a nonparty insurer for its purported failure to participate in good faith in a mandatory settlement conference. *Vidrio v. Hernandez*, 172 Cal.App.4th 1443 (2009).

Code of Civil Procedure section 177.5, which provides sanctions may be awarded against a "person," defined to include "a witness, a party, a party's attorney, or both," does not apply to a nonparty insurer. *Vidrio v. Hernandez*, 172 Cal.App.4th 1443 (2009).

Code of Civil Procedure section 575.2 authorizes the superior courts to provide by local rule for sanctions, including monetary sanctions in the form of reasonable attorney fees, for failure to comply with any of the requirements of properly promulgated local rules. *Vidrio v. Hernandez*, 172 Cal.App.4th 1443 (2009).

Neither Code of Civil Procedure section 575.2 nor Los Angeles Superior Court Local Rules 7.13 and 8.0 include the authority to sanction a nonparty insurer. *Vidrio v. Hernandez*, 172 Cal.App.4th 1443 (2009).

Los Angeles Superior Court Local Rules 7.9(d) and 7.9(e), which govern the conduct of settlement conferences, do not require the participants, once present, to negotiate with each other. *Vidrio v. Hernandez*, 172 Cal.App.4th 1443 (2009).

California Rule of Court 2.30 expressly authorizes the court to order payment of reasonable monetary sanctions to the court, an aggrieved person or both not only by a party or the party's attorney but also by "an insurer or any other individual or entity whose consent is necessary for the disposition of the case" for any failure without good cause to comply with applicable provisions of the California Rules of Court. *Vidrio v. Hernandez*, 172 Cal.App.4th 1443 (2009).

Prior to the amendments following the decision in *Trans-Action Commercial Investors v. Firmaterr,* 60 Cal.App.4th 352, 366–367 (1997), effective January 1, 2001, former California Rule of Court 227 provided the "failure to participate in good faith in any conference" required by court rule or court order was sanctionable conduct. That language was eliminated by the January 1, 2001 amendments, and neither current California Rule of Court 2.30 nor any other Rule of Court purports to require good faith negotiation by participants in settlement conferences. *Vidrio v. Hernandez*, 172 Cal.App.4th 1443 (2009).

The failure to increase a settlement offer or to otherwise participate meaningfully in settlement negotiations violates no rule of court and is not a proper basis for an award of sanctions against a nonparty insurer. *Vidrio v. Hernandez*, 172 Cal.App.4th 1443 (2009).

Setoff

Issue of setoff is moot when the insured admits its loss greatly exceeds all recoverable insurance. *State of California v. Continental Ins. Co.*, 169 Cal.App.4th 1114 (2009). ***Not citable. Review granted.***

Settlement

The Judicial Council's constitutional rulemaking power plainly extends to the adoption of a rule requiring individuals or entities with authority to consent to the settlement of a case to participate in a mandatory settlement conference, as does CRC, Rule 3.1380(b). *Vidrio v. Hernandez*, 172 Cal.App.4th 1443 (2009).

The failure to increase a settlement offer or to otherwise participate meaningfully in settlement negotiations violates no rule of court and is not a proper basis for an award of sanctions against a nonparty insurer. *Vidrio v. Hernandez*, 172 Cal.App.4th 1443 (2009).

No statute authorizes the imposition of sanctions against a nonparty insurer for its purported failure to participate in good faith in a mandatory settlement conference. *Vidrio v. Hernandez*, 172 Cal.App.4th 1443 (2009).

Prior to the amendments following the decision in *Trans-Action Commercial Investors v. Firmaterr,* 60 Cal.App.4th 352, 366–367 (1997), effective January 1, 2001, former California Rule of Court 227 provided the "failure to participate in good faith in any conference" required by court rule or court order was sanctionable conduct. That language was eliminated by the January 1, 2001 amendments, and neither current California Rule of Court 2.30 nor any other rule of court purports to require good faith negotiation by participants in settlement conferences. *Vidrio v. Hernandez*, 172 Cal.App.4th 1443 (2009).

Settlement Agreements

The language "any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against… any or all members of the Settling Insurer Group based upon, arising out of or relating to any or all of the Policies" includes third-party claims asserted against an insurer. *The Travelers Indemnity Co. v. Bailey*, 129 S. Ct. 2195 (2009).

Severability-Of-Interests Clause

The California Supreme Court has yet to decide whether a policy's exclusionary clause applies individually to each insured if the policy has a severability-of-interests clause, even if the exclusionary clause suggests otherwise. *Minkler v. Safeco Ins. Co.*, 561 F.3d 1033 (9th Cir. 2009). ***Certified question pending before California Supreme Court.***

Stacking of Limits of Liability

Insured State was entitled to stack policy limits of all applicable policies across all applicable policy periods, disagreeing with *FMC Corp. v. Plaisted & Companies*, 61 Cal.App.4th 1132 (1998). *State of California v. Continental Ins. Co.*, 169 Cal.App.4th 1114 (2009). ***Not citable. Review granted.***

Standing

An injured-third party has standing to file an appeal of a court's declaratory relief judgment as between the insurer and its insured. *Westchester Fire Ins. Co. v. Mendez*, 585 F.3d 1183 (9th Cir. 2009).

A non-party to a health insurance contract, including a surviving spouse, lacks standing to sue for fraud. *The Mega Life And Health Ins. Co. v. Super. Ct.*, 172 Cal.App.4th 1522 (2009).

Stare Decisis: Undetermined Issue

A court is bound to follow the decisions of the state's highest court, but where the state supreme court has not spoken on an issue, the court must determine what result the court would reach based on state appellate court opinions, statutes, and treatises. *Evanston Ins. Co. v. OEA, Inc.*, 566 F.3d 915 (9th Cir. 2009).

Statute Of Limitations

The statute of limitations begins to run when the cause of action is complete with all of its elements including injury or harm. *Williams v. HILB, Rogal & Hobbs Ins. Services*, 177 Cal.App.4th 624 (2009).

A cause of action for an agent's negligence in procuring liability or workers compensation insurance does not accrue until a non-covered judgment is entered against the insured because that is when harm becomes appreciable. *Williams v. HILB, Rogal & Hobbs Ins. Services*, 177 Cal.App.4th 624 (2009).

Statute of Limitations: Delayed Discovery

When a plaintiff should have discovered facts for purposes of accrual of a cause of action is generally a question of fact but is, properly decided as a matter of law on demurrer if the allegations in the complaint and the facts properly subject to judicial notice can support only one reasonable conclusion. *Broberg v.Guardian Life Ins. Co.*, 171 Cal.App.4th 912 (2009).

Statutes: Validity

A facial challenge is "the most difficult challenge to mount successfully," since the challenger must establish that no set of circumstances exists under which the law would be valid. *Ass'n of California Ins. Co. v. Poizner*, 180 Cal.App.4th 1029 (2009).

A moving party that raises a facial challenge to the validity of a statute or regulation must show that the challenged statutes or regulations "inevitably pose a present total and fatal conflict" with applicable prohibitions. *Ass'n of California Ins. Co. v. Poizner*, 180 Cal.App.4th 1029 (2009).

Unfair Competition Laws – See California Bus. & Prof. Code § 17200

Statutory Interpretation

In statutory construction, the fundamental task is to ascertain the Legislature's intent and thereby effectuate the purpose of the statute. *Clark v. Super. Ct.*, 174 Cal.App.4th 82 (2009). ***Not citable. Review granted.***

The statutory language is generally the most reliable indication of legislative intent. If there is no ambiguity in the statutory language, then courts presume the lawmakers meant what they said, and the plain meaning of the language governs. *Clark v. Super. Ct.*, 174 Cal.App.4th 82 (2009). ***Not citable. Review granted.***

Only if the statutory language is ambiguous may the court look to extrinsic sources for statutory construction, including the ostensible objects to be achieved by the statute and the legislative history. *Clark v. Super. Ct.*, 174 Cal.App.4th 82 (2009). ***Not citable. Review granted.***

When a statute is ambiguous, courts must consider all laws *in pari materia*, meaning they are to consider all laws related to the subject of the act and the general system of legislation of which the act forms a part. *Ojo v. Farmers Group, Inc.*, 565 F.3d 1175 (9th Cir. 2009). ***Not citable. Rehearing, en banc, granted.***

"The cardinal principle of statutory construction is to save and not to destroy. It is the court's duty to give effect, if possible, to every clause and word of a statute, rather than to emasculate an entire section . . . ." *Ojo v. Farmers Group, Inc.*, 565 F.3d 1175 (9th Cir. 2009). ***Not citable. Rehearing, en banc, granted.***

The fundamental task of statutory interpretation is to ascertain and give effect to the intent of the Legislature. *Weston Reid, LLC v. American Ins. Group, Inc.*, 174 Cal.App.4th 940 (2009).

In determining the Legislature's intent, a court must look first to the words of the statute, giving to the language its usual, ordinary import and according significance, if possible,

to every word, phrase and sentence in pursuance of the legislative purpose. *Weston Reid, LLC v. American Ins. Group, Inc.*, 174 Cal.App.4th 940 (2009).

The words of the statute must be construed in context, keeping in mind the statutory purpose. *Weston Reid, LLC v. American Ins. Group, Inc.*, 174 Cal.App.4th 940 (2009).

Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent. *Weston Reid, LLC v. American Ins. Group, Inc.*, 174 Cal.App.4th 940 (2009).

The rule that a specific statute prevails over a general one applies only if the two provisions cannot be reconciled. *Superior Dispatch, Inc. v. Ins. Corp. of New York*, 176 Cal.App.4th 12 (2009). ***Not citable. Rehearing granted.***

The court must construe two statutes dealing with the same subject in a way that harmonizes them, avoids conflict, and avoids rendering any part of either statute surplusage, if feasible. *Superior Dispatch, Inc. v. Ins. Corp. of New York*, 176 Cal.App.4th 12 (2009). ***Not citable. Rehearing granted.***

The absence of specific statutory provisions in Proposition 103 (codified as California Insurance Code sections 1861.01, *et seq.*) relating to the resolution of a rate application without a public hearing (e.g., as by way of a settlement) does not mean that regulations permitting such resolution exceed statutory authority, but only that the electorate deferred to and relied upon the expertise of the Insurance Commissioner as to such matters. *Ass'n of California Ins. Co. v. Poizner*, 180 Cal.App.4th 1029 (2009).

A facial challenge to a statute is "the most difficult challenge to mount successfully," since the challenger must establish that no set of circumstances exists under which the law would be valid. *Ass'n of California Ins. Co. v. Poizner*, 180 Cal.App.4th 1029 (2009).

A moving party that raises a facial challenge to the validity of a statute or regulation must show that the challenged statutes or regulations "inevitably pose a present total and fatal conflict" with applicable prohibitions. *Ass'n of California Ins. Co. v. Poizner*, 180 Cal.App.4th 1029 (2009).

Summary Judgment

Under California Code of Civil Procedure section 437c, subd. (c), a trial court properly grants a motion for summary judgment only if no issues of triable fact appear and the moving party is entitled to judgment as a matter of law. *State of California v. Allstate Ins. Co.*, 45 Cal.4th 1008 (2009).

The moving party bears the burden of showing the court that the plaintiff has not established, and cannot reasonably expect to establish, the elements of his or her cause of action. *State of California v. Allstate Ins. Co.*, 45 Cal.4th 1008 (2009).

An insured can defeat summary judgment if there are disputed facts as to a specific "sudden and accidental" release that was a "substantial factor" in causing indivisible damage. The insured need not show the particular amount of damage caused by such release. *State of California v. Allstate Ins. Co.*, 45 Cal.4th 1008 (2009).

The traditional rules of summary judgment require the court to view evidence in the light most favorable to the non-moving party. *Nolan v. Heald College*, 551 F.3d 1148 (9th Cir. 2009).

After *Abatie v. Alta Health & Life Insurance Co*., 458 F.3d. 955 (9th Cir. 2006), district courts are required to weigh evidence according to the traditional rules of summary judgment . As such, evidence outside the administrative record submitted by a party must be examined in the light most favorable to the non-moving party. *Nolan v. Heald College*, 551 F.3d 1148 (9th Cir. 2009).

Whether a plaintiff was reasonable in failing to ascertain that a one year suit provision was part of its insurance policy, and where the insurer fails to notify the insured of the existence of the provision, a triable question of fact exists on the issue of estoppel sufficient to defeat summary judgment, even where the plaintiff was represented by counsel before the one year suit provision had run. *Superior Dispatch, Inc. v. Ins. Corp. of New York*, 176 Cal.App.4th 12 (2009). ***Not citable. Rehearing granted.***

A defendant moving for summary judgment must show that one or more elements of the plaintiff's cause of action cannot be established or that there is a complete defense. A defendant can satisfy this burden by presenting evidence that negates an element of the cause of action or evidence that the plaintiff does not possess and cannot reasonably expect to obtain the evidence needed to support an element of the cause of action. *Superior Dispatch, Inc. v. Ins. Corp. of New York*, 176 Cal.App.4th 12 (2009). ***Not citable. Rehearing granted.***

The appellate court cannot affirm a summary judgment based on a matter that is not alleged in the pleadings. *Superior Dispatch, Inc. v. Ins. Corp. of New York*, 176 Cal.App.4th 12 (2009). ***Not citable. Rehearing granted.***

The jury's unique competence in applying the reasonable man standard ordinarily precludes summary judgment but contention that reasonableness is always a question of fact that precludes summary judgment has been squarely rejected. *Evanston Ins. Co. v. OEA, Inc.*, 566 F.3d 915 (9th Cir. 2009).

Reasonableness is a question of law and it loses its triable character if undisputed facts leave no room for a reasonable difference of opinion. *Evanston Ins. Co. v. OEA, Inc.*, 566 F.3d 915 (9th Cir. 2009).

Supplementary Payments Provision

Under policies providing coverage for costs taxed against an insured in suits the insurer defends, the insurer's obligation to pay an award of costs against the insured is dependent on the defense duty. *State Farm General Ins. Co. v. Mintarsih*, 175 Cal.App.4th 274 (2009).

Courts have interpreted the word "costs" consistent with its use in Code of Civil Procedure section 1033.5, subdivision (a)(1), which provides that attorney fees authorized by contract, statute, or law are allowable as costs to the prevailing party under section 1032. *State Farm General Ins. Co. v. Mintarsih*, 175 Cal.App.4th 274 (2009).

The language "suits we defend" is interpreted by reference to the defense duty set forth in the policy. *State Farm General Ins. Co. v. Mintarsih*, 175 Cal.App.4th 274 (2009).

The contractual obligation to pay costs awarded against an insured arises only if there is a contractual duty to defend. *State Farm General Ins. Co. v. Mintarsih*, 175 Cal.App.4th 274 (2009).

Attorney fees awarded as costs against the insured can be allocated solely to claims that were not even potentially covered if (1) the fees were incurred solely to defend against claims that were not even potentially covered or (2) the right to recover fees arose solely from the claims that were not even potentially covered. *State Farm General Ins. Co. v. Mintarsih*, 175 Cal.App.4th 274 (2009).

Policies obligating an insurer to pay "interest on the entire judgment which accrues after entry of the judgment…which does not exceed the limit of liability that applies," contemplate a covered claim and are necessarily tied to and depend upon the insurer's indemnity obligation. *State Farm General Ins. Co. v. Mintarsih*, 175 Cal.App.4th 274 (2009).

The "limits of liability" in the supplementary payments provision apply to liability coverage under the policy, not to the supplemental payments obligation. Therefore, they tie the obligation to pay post-judgment interest on the "entire judgment" to the failure to pay indemnity for a covered claim. *State Farm General Ins. Co. v. Mintarsih*, 175 Cal.App.4th 274 (2009).

The obligation to pay post-judgment interest on "the entire judgment" does not arise if the policy provides no coverage for the damages awarded against the insured. *State Farm General Ins. Co. v. Mintarsih*, 175 Cal.App.4th 274 (2009).

Third Party Administrators

Where a third party administrator is acting like the insurer's agent in billing and collecting premiums and service charges from insureds, the insurer, as the principal, may be liable for restitution for service charges paid by the insureds to the insurer's agent under the Unfair Competition Law. *Troyk v. Farmers Group Inc.,* 171 Cal.App.4th 1305 (2009).

Where insurer and third party administrator act as a single enterprise, insurer may be liable for Unfair Competition Law restitution for acts of third party administrator. *Troyk v. Farmers Group Inc.,* 171 Cal.App.4th 1305 (2009).

There is substantial evidence that an insurer's third party administrator is a mere shell or conduit for the performance of the billing and forwarding functions for insurer where: the third party administrator is a wholly owned subsidiary of the insurer, all of its directors are officers or employees of the insurer, the third party administrator fulfills most of its billing and forwarding activities by using the insurer's equipment and personnel and pays the insurer for such use, and the insurer designed and effected the scheme whereby any insured who selected a certain policy would be required by the insurer to enter into a payment agreement with the third party administrator. *Troyk v. Farmers Group Inc.,* 171 Cal.App.4th 1305 (2009).

A third party claims administrator can successfully demur to a breach of contract action by an insured where no contract exists between the insured and the third party administrator. *Bosetti v. U.S. Life Ins. Co.*, 175 Cal.App.4th 1208 (2009).

Third Party Beneficiary

A contract need not be exclusively for the benefit of the third party in order to permit enforcement, and the third party does not need to be the sole or primary beneficiary or even named in the contract to be a beneficiary. *Nat'l Union Fire Ins. Co. v. Cambridge Integrated Services Group, Inc.*, 171 Cal.App.4th 35 (2009).

The fact that the contract, if not carried out in its terms, would injure the third party's benefit, is insufficient to entitle him to demand enforcement. *Nat'l Union Fire Ins. Co. v. Cambridge Integrated Services Group, Inc.*, 171 Cal.App.4th 35 (2009).

Title Insurance

A mortgage lending company that purchased two fraudulent loans, from which the named borrowers never received the proceeds and therefore had no existing indebtedness, was not an insured under the title insurance policies issued in connection with the loans. Consequently, the title insurer had no duty to defend or indemnify the lending company for its losses and litigation defense costs relating to the loans. *First Am. Title Ins. Co. v. Xwarehouse Lending Corp.*, 177 Cal.App.4th 106 (2009).

In interpreting coverage under a title policy insuring only against the invalidity or unenforceability of the insured mortgage lien, the court held that such a title policy does not cover losses that are sustained due to the lack of an existing indebtedness between the named borrower and the lender. *First Am. Title Ins. Co. v. Xwarehouse Lending Corp.*, 177 Cal.App.4th 106 (2009).

Title insurance is a contract for indemnity under which the insurer is obligated to indemnify the insured against losses sustained in the event that a specific contingency such as the discovery of a lien or encumbrance affecting title occurs. Accordingly, when the contingency insured against occurs, the title insurer is not by that fact alone liable to the insured for damages in contract or tort, but rather is obligated to indemnify the insured under the terms of the policy. When the policy insures the lien of a deed of trust and the insured lien is junior to a lien undisclosed but insured against by the policy, the compensable loss is limited by the terms and conditions of the policy. *First Am. Title Ins. Co. v. Xwarehouse Lending Corp.*, 177 Cal.App.4th 106 (2009).

Trigger Of Coverage

Bodily injury and property damage that is continuous or progressively deteriorating throughout several policy periods is potentially covered by all policies in effect during those periods. *State of California v. Continental Ins. Co.*, 169 Cal.App.4th 1114 (2009). ***Not citable. Review granted.***

Unfair Competition Law - See California Bus. & Prof. Code § 17200

Uninsured/Underinsured Motorist Coverage

The theory behind uninsured motorist coverage is to place the injured insured motorist in approximately the same position as he or she would have been had the tortfeasor complied with the law and carried at least the minimum statutorily required insurance coverage. *Weston Reid, LLC v. American Ins. Group, Inc.*, 174 Cal.App.4th 940 (2009). Because uninsured motorist coverage is a proxy for the coverage that would have been provided to the tortfeasor if the tortfeasor had insurance, the insurer may, adverse to its own insured, assert any defenses that could have been raised by the tortfeasor himself or herself, to reduce or defeat the uninsured motorist claim. *Weston Reid, LLC v. American Ins. Group, Inc.*, 174 Cal.App.4th 940 (2009).

Uninsured and underinsured motorist coverage is not third party coverage. Thus coverage is strictly first party coverage because the insurer's duty is to compensate its own insured for his or her losses, rather than to indemnify against liability claims from others. *Weston Reid, LLC v. American Ins. Group, Inc.*, 174 Cal.App.4th 940 (2009).

Voluntary Payments

The requirement of constructive notice, but not an actual tender by the insured, in equitable contribution cases does not undermine the typical policy provision prohibiting voluntary payments. *OneBeacon Am. Ins. Co. v. Fireman's Fund Ins. Co.*, 175 Cal.App.4th 183 (2009).

Willful Acts - See California Ins. Code § 533

Illinois Law

The attorney-client privilege and work-product doctrine may bar disclosure of communications between an insurer and its coverage counsel and materials generated during the underlying litigation that gives rise to the coverage litigation in a subsequent coverage action. *Illinois Emcasco Ins. Co. v. Nationwide Mutual Ins. Co.*, 913 N.E.2d 1102 (IL 2009).

When the attorney-client privilege and work-product doctrine are asserted in an insurance coverage matter, the trial court should conduct an *in camera* inspection of all of the requested documents in order to exclude from disclosure those documents entitled to protection. *Illinois Emcasco Ins. Co. v. Nationwide Mutual Ins. Co.*, 913 N.E.2d 1102 (IL 2009).

The attorney-client privilege and work-product doctrine may bar disclosure, in a subsequent coverage action, of communications between an insurer and its coverage counsel and materials generated during the underlying litigation that gives rise to the coverage litigation. *Illinois Emcasco Ins. Co. v. Nationwide Mutual Ins. Co.*, 913 N.E.2d 1102 (IL 2009).

Under Illinois law, the common-interest doctrine does not automatically preclude an insurer from asserting the attorney-client privilege and work product doctrine during discovery in a subsequent coverage action. *Illinois Emcasco Ins. Co. v. Nationwide Mutual Ins. Co.*, 913 N.E.2d 1102 (IL 2009).

New Jersey Law

Under the proximate cause test, first party property insurance policy provided coverage for costs associated with bringing undamaged portions of a damaged structure up to current construction code standards. *DEB Associates v. Greater N.Y. Mutual Ins. Co.*, 970 A.2d 1074 (N.J. 2009).

When an insured was required to bring non-damaged floors of its building into compliance with building code after a windstorm caused covered damage to one floor, the cost of such compliance was covered under insured's property insurance policy, even

though the policy explicitly excluded pre-existing code violations. *DEB Associates v. Greater N.Y. Mutual Ins. Co.*, 970 A.2d 1074 (N.J. 2009).

Even when insurance provisions are not found ambiguous, those provisions may still be interpreted in accordance with the insured's alleged reasonable expectation of coverage. *DEB Associates v. Greater N.Y. Mutual Ins. Co.*, 970 A.2d 1074 (N.J. 2009).

Washington Law

The State of Washington recognizes quasi-marital relationships for the purposes of property division. *Owens v. Automotive Machinists Pension Trust*, 551 F.3d 1138 (9th Cir. 2009).

Washington law limits property distributed at the end of a quasi-marital relationship to that which would have been categorized as community property if the couple been married. *Owens v. Automotive Machinists Pension Trust*, 551 F.3d 1138 (9th Cir. 2009).

ERISA does not explicitly define "marital property rights." *Owens v. Automotive Machinists Pension Trust*, 551 F.3d 1138 (9th Cir. 2009).

Under ERISA, a Qualified Domestic Relations Order ("QDRO") is defined as a domestic relations order that creates or recognizes the existence of an alternate payee's right to receive benefits with respect to a participant under a plan. A QDRO applies to any judgment or order that relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child or other dependent of a participant, and is issued pursuant to a state domestic relations law. (29 U.S.C. section 1056(d)(3)(B)(ii)(I).) *Owens v. Automotive Machinists Pension Trust*, 551 F.3d 1138 (9th Cir. 2009).

"Dependent" is defined as an individual, other than a spouse, that for the taxable year of the taxpayer shares the same principal place of abode with the taxpayer and is a member of the taxpayer's household. (I.R.C. section 152(d)(2(H).) *Owens v. Automotive Machinists Pension Trust*, 551 F.3d 1138 (9th Cir. 2009).

"The Internal Revenue Code ("IRC) defines dependant as: "[a]n individual (other than … the spouse … of the taxpayer) who, for the taxable year of the taxpayer, has the same principal place of abode as the taxpayer and is a member of the taxpayer's household." *Owens v. Automotive Machinists Pension Trust*, 551 F.3d 1138 (9th Cir. 2009).

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