GORDON & REES LLP

DEVELOPMENTS FOR 2006 CALIFORNIA CASE LAW:

INSURANCE

A summary prepared by Gordon & Rees, LLP of the holdings, organized by topic, of cases published during 2006 which apply California law to issues bearing on the rights and duties of the insurance industry.

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2006 DEVELOPMENTS IN CALIFORNIA INSURANCE CASE LAW

Additional Insureds

Additional Insureds are not statutorily entitled to notice of the cancellation of a policy when the lender cancels the financed insurance policy because of the default of the insured under a premium payment loan agreement. *The Gorham Company, Inc. v. First Financial Insurance Company* (2006) 139 Cal.App.4th 1532.

The only "insured" entitled to notice of cancellation under Insurance Code Section 673 is "the person who has purchased or arranged to purchase an insurance contract and who enters into a premium finance agreement with a premium finance agency." The term "insured" does not encompass an additional named insured and, as such Section 673(d) does not require the lender to provide notice of cancellation to the additional named insured. *The Gorham Company, Inc. v. First Financial Insurance Company* (2006) 139 Cal.App.4th 1532.

Administrative Law

Although a court must independently evaluate the meaning of a statute, "great weight and respect" must be given to an administrative construction made by an agency charged with administering the statute and, accordingly, where Insurance Commissioner gives a thorough consideration, employs valid reasoning, and interprets a statute consistent with prior and subsequent pronouncements, appellate court's review is to determine whether the determination is unreasonable or conflicts with the legislative intent. *Ohio Cas. Ins. Co. v. Garamendi* (2006) 137 Cal.App.4th 64.

An insurer's right to petition the Workers' Compensation Appeals Board constitutes protected activity for purposes of a special motion to strike under the anti-SLAPP law, CCP section 425.16. *Premier Medical Management Systems, Inc. v. California Insurance Guarantee Association* (2006) 136 Cal.App.4th 464.

Advance Defense Costs

Gon v. First State Ins. Co. (9th Cir. 1989) 871 F.2d 863 and *Okada v. MGIC Indem. Corp*. (9th Cir. 1986) 823 F.2d 276, which involved an insurer's duty to contemporaneously advance defense costs for potentially covered claims, are not controlling where the insureds only seek reimbursement of costs after the underlying litigation has ended. *Pan Pacific Retail Properties, Inc. v. Gulf Insurance Company* (9th Cir. 2006) 466 F.3d 867.

Anti-SLAPP

Granting of Anti-SLAPP motion and award of attorneys' fees to defendant was proper, even after judgment on the pleadings granted in favor of defendant on other grounds, when allegations of complaint involved an act in furtherance of free speech rights and plaintiff could not prevail on the merits of its claim. *ARP Pharmacy Services, Inc. v. Gallagher Bassett Services, Inc.* (2006) 138 Cal.App.4th 1307. Not citable; depublished.

Appeal

Failure of certain individual claimants to preserve right to appeal determination of no coverage for bodily injury claims does not preclude reviewing court from determining coverage applicable to property damage claims, which were preserved by way of appeal. *Standard Fire Ins. Co. v. Spectrum Community Assn.* (2006) 141 Cal.App.4th 1117.

Argument raised for the first time in a reply brief need not be addressed because consideration would deprive respondent of opportunity to counter the argument. *Prince v. United National Ins. Co.* (2006) 142 Cal.App.4th 233.

Principle that a new theory cannot be asserted for the first time on appeal is particularly applicable to estoppel which has important factual elements. *State of California v. Underwriters at Lloyd's of London* (2006) ___ Cal.App.4th ___, 07 C.D.O.S. 17. (Unpublished portion of decision.)

Failure of certain individual claimants to preserve right to appeal determination of no coverage for bodily injury claims does not preclude reviewing court from determining coverage applicable to separate property damage claims, which were preserved by way of appeal. *Standard Fire Ins. Co. v. Spectrum Community Assn.* (2006) 141 Cal.App.4th 1117.

Applications

A company's gross misrepresentations of its financial condition when applying for primary and excess directors and officers (D&O) liability insurance is material to the acceptance of the risk as a matter of law. *TIG Insurance Company of Michigan v. Homestore, Inc.* (2006) 137 Cal.App.4th 749.

Appraisal

An appraisal panel appointed pursuant to Insurance Code section 2071 is empowered only to determine the amount of the actual cash value of a loss. The panel exceeds its authority by resolving coverage issues or engaging in policy interpretation. *Kacha v. Allstate Insurance Company* (2006) 140 Cal.App.4th 1023.

An insured does not waive his right to challenge an appraisal award merely by taking possession of indemnity checks from the insurer in payment of the award. *Kacha v. Allstate Insurance Company* (2006) 140 Cal.App.4th 1023.

Arbitration

A trial court's vacation of an arbitration award and order of further proceedings before the same arbitrator is improper as the court only has the option of denying the petition to vacate the award, or grant it and order a rehearing before a new arbitrator. *Allstate Ins. Co. v. Superior Court* (*Jessel*) (2006) 142 Cal.App.4th 356.

Where parties waive any right to appeal or otherwise challenge an arbitrator's decision, the parties relinquish their right to seek reconsideration of the award. *Allstate Ins. Co. v. Superior Court* (*Jessel*) (2006) 142 Cal.App.4th 356.

An arbitration clause must be included in the preliminary title report or in a document incorporated by reference therein in order to be enforceable. Title insurer could not compel arbitration because the preliminary report did not contain an arbitration clause, nor did it incorporate by reference the title insurance policy actually issued to the insured. *Kleveland v. Chicago Title Ins. Co.* (2006) 141 Cal.App.4th 761.

California Insurance Code section 11580.2(f) regarding automobile insurance policies, as interpreted by *Van Tassel v. Superior Court* (1974) 12 Cal.3d 624, requires arbitration of who is an insured under the policy despite exclusionary policy language to the contrary. *Bouton v. USAA Casualty Ins. Co.* (2006) 145 Cal.App.4th 1441.

The statutory right to arbitration who is an insured under an automobile insurance policy cannot be restricted or limited by policy language in light of California Insurance Code Section 11580.2(f) and cases interpreting this statutory provision. *Bouton v. USAA Casualty Ins. Co.* (2006) 145 Cal.App.4th 1441.

California Insurance Code section 11580.2(f), as interpreted by *Van Tassel v. Superior Court* (1974) 12 Cal.3d 624, requires arbitration of who is an insured under an automobile insurance policy and any language in the policy to the contrary is void and unenforceable. *Bouton v. USAA Casualty Ins. Co.* (2006) 145 Cal.App.4th 1441.

Arbitration of who is an insured under an automobile insurance policy is required because that dispute involves one of the "jurisdictional facts" subject to mandatory arbitration under California Insurance Code Section 11580.2(f) and cannot be restricted or limited by policy language. *Bouton v. USAA Casualty Ins. Co.* (2006) 145 Cal.App.4th 1441.

Disclosure of arbitration requirement in health insurance enrollment form is not "prominently displayed" and, therefore, does not comply with the terms of Health and Safety Code Section 1363.1, subdivision (b) where: it is printed in the same font or typeface as most of the form; the disclosure heading is in faint boldface type; the disclosure is the second of two single-spaced paragraphs of small, condensed type located at the bottom of the enrollment form; the two paragraphs are not separated from each other by any lines or spacing; neither the disclosure nor the preceding paragraph is indented; the disclosure is in the same font as the preceding paragraph; and it is not bolded, underlined or italicized. *Zembsch v. Superior Court (Health Net of California, Inc.)* (2006) ___ Cal.App.4th ___, 06 C.D.O.S. 11940

The Fourth District Court of Appeal upheld the trial court's order sustaining a demurrer that plaintiff was required to submit his underinsured motorist ("UIM") claim to arbitration despite having previously obtained judgment in an underlying action against the driver who caused plaintiff's injuries. The Court of Appeal found arbitration was the proper forum to determine the plaintiff's rights to UIM benefits under the terms of his policy. *O'Hanesian v. State Farm Mutual Automobile Insurance Company* (2006) 145 Cal.App.4th 1305.

Asbestos

Confirmation of Bankruptcy Plan under 11 U.S.C. § 524(g) was not actual trial of insured's liability for asbestos claims, and therefore did not trigger excess insurer's indemnity obligations. *Fuller-Austin Insulation Company v. Highlands Insurance Company* (2006) 135 Cal.App.4th 958.

Estimations of individual and aggregate value of present and future asbestos claims neither affixed nor accelerated excess insurer's indemnity obligations, and did not provide a bases for coverage of those claims to be presumed. *Fuller-Austin Insulation Company v. Highlands Insurance Company* (2006) 135 Cal.App.4th 958.

Attorneys' Fees

An insurer must pay attorneys' fees incurred by insured in proceedings to re-obtain insured aircraft where policy states it will reimburse insured for costs incurred in protecting "damaged property." *American Alternative Insurance Corporation, et al. v. Superior Court* (2006) 135 Cal.App.4th 1239.

Bad Faith

When proper adjustment of a claim turns on medical evaluation of the insured's condition the insurer may breach its duty to thoroughly investigate if it fails to have the insured examined by a doctor of its choice or consult with the insured's treating physician. *Wilson v. 21st Century Insurance Company* (2006) ___ Cal.App.4th ___. Not citable. Review granted.

Unreasonable withholding of policy benefits encompasses not only the failure to pay full benefits but unreasonable delay in their payment. *Wilson v. 21st Century Insurance Company* (2006) ___ Cal.App.4th ___. Not citable. Review granted.

The rule requiring thorough investigation of claims apples to coverage decisions as well as decisions about the amount of benefits due under a policy. *Wilson v. 21st Century Insurance Company* (2006) ___ Cal.App.4th ___. Not citable. Review granted.

An insurer's expressed willingness to reconsider decision does not satisfy an insurer's duty to thoroughly investigate claim where the insurer does not explore obvious avenues of inquiry in support of claim. *Wilson v. 21st Century Insurance Company* (2006) ___ Cal.App.4th ___. Not citable. Review granted.

The covenant of good faith and fair dealing places the burden on the insurer to seek information relevant to claim, and not merely to receive and consider information from insured. *Wilson v. 21st* Century *Insurance Company* (2006) ___ Cal.App.4th ___. Not citable. Review granted.

The genuine dispute doctrine is not available where the insurer fails to conduct a reasonable investigation, and that reasonable investigation would have made an insurer's actual doubts about a claim untenable. *Wilson v. 21st Century Insurance Company* (2006) ___ Cal.App.4th ___. Not citable. Review granted.

There is no *per se* requirement that an insurer consult with a personal injury attorney in evaluating a UIM claim; many claims adjusters are well-qualified to make the evaluation but the litigation value must be considered and in some cases consultation with counsel is required in order for the insurer to discharge its duty to perform a complete review of the claim. *Wilson v. 21st Century Insurance Company* (2006) ___ Cal.App.4th ___. Not citable. Review granted.

An insurer's failure to initially objectively evaluate evidence in support of a claim may be evidence of bad faith. *Wilson v. 21st Century Insurance Company* (2006) ___ Cal.App.4th ___. Not citable. Review granted.

The Second Appellate District cited *Waller v. Truck Ins. Exch.* (1995) 11 Cal.4th 1, 36 and *Love v. Fire Ins. Exch.* (1990) 221 Cal.App.3d 1136, 1151, and held that insurer State Farm satisfied its initial summary judgment burden of establishing it did not breach the insurance policy, and absent evidence from the insured creating a triable issue of material fact, the bad faith cause of action must also fail. *Lincoln Fountain Villas Homeowners Association v. State Farm Fire & Casualty Insurance Company* (2006) 136 Cal.App.4th 999.

CCP Section 340.9 does not preclude insurers from using other available defenses in lawsuits brought by their insureds. *Lincoln Fountain Villas Homeowners Association v. State Farm Fire & Casualty Insurance Company* (2006) 136 Cal.App.4th 999.

The Second Appellate District cited *Waller v. Truck Ins. Exch.* (1995) 11 Cal.4th 1, 36 and *Love v. Fire Ins. Exch.* (1990) 221 Cal.App.3d 1136, 1151, and held that insurer State Farm satisfied its initial summary judgment burden of establishing it did not breach the insurance policy, and absent evidence from the insured creating a triable issue of material fact, the bad faith cause of action must also fail. *Lincoln Fountain Villas Homeowners Association v. State Farm Fire & Casualty Insurance Company* (2006) 136 Cal.App.4th 999.

A policy provision that states an insurer "may enforce" subrogation rights of the insured is not an enforceable duty under the policy, but rather a right belonging to the insurer. Hence, an insurer cannot be liable for breach of contract or breach of the covenant of good faith and fair dealing for failing to diligently pursue such rights. *Tilbury Constructors, Inc. v. State Compensation Insurance Fund* (2006) 137 Cal.App.4th 466.

An insurer can only be liable for breach of the implied covenant of good faith and fair dealing if benefits were due under the policy and the insurer withheld the benefits without proper cause. *Benavides v. State Farm General Ins. Co., et. al.* (2006) 136 Cal.App.4th 1231.

The duty to defend and the implied covenant are the same primary right and cannot be split into two separate actions for damages. *Lincoln Property Company, N.C., Inc. v. Travelers Indemnity Company* (2006) 137 Cal.App.4th 905.

A claim for the breach of the duty to defend and a breach of the implied covenant of good faith and fair dealing are based on the same primary right. As such, where a duty to defend claim is litigated to judgment, a subsequent bad faith claim is barred under the doctrine of *res judicata*. *Lincoln Property Company, N.C., Inc. v. Travelers Indemnity Company* (2006) 137 Cal.App.4th 905.

Apart from a breach of the implied covenant of good faith and fair dealing, a tortious breach of contract may be found only when (1) the breach is accompanied by a traditional common law tort, such as fraud or conversion; (2) the means used to breach the contract are tortious, involving deceit or undue coercion; or (3) one party intentionally breaches the contract intending or knowing that such breach will cause severe, unmitigable harm in the form of mental anguish, personal

hardship, or substantial consequential damages. *Benavides v. State Farm General Ins. Co., et. al.* (2006) 136 Cal.App.4th 1231.

Bankruptcy

Confirmation of Bankruptcy Plan under 11 U.S.C. § 524(g) was not actual trial of insured's liability, and therefore did not trigger excess insurer's indemnity obligations. *Fuller-Austin Insulation Company v. Highlands Insurance Company* (2006) 135 Cal.App.4th 958.

Estimations of individual and aggregate value of present and future asbestos claims neither affixed nor accelerated excess insurer's indemnity obligations, and did not provide a bases for coverage of those claims to be presumed. *Fuller-Austin Insulation Company v. Highlands Insurance Company* (2006) 135 Cal.App.4th 958.

In an exclusion precluding coverage for a person in an Outside Position for claims brought by or with "the solicitation, assistance or participation of the entity in which the Director or Officer serves in the Outside Position or any director, officer, trustee, regent, governor or employee of such entity," the term "trustee" does not refer to a bankruptcy trustee for said entity. *Unified Western Grocers, Inc., et. al. v. Twin City Fire Insurance Company* (9th Cir. 2006) 457 F.3d 1106.

Breach of Contract

A policy provision that states an insurer "may enforce" subrogation rights of the insured is not an enforceable duty under the policy, but rather a right belonging to the insurer. Hence, an insurer cannot be liable for breach of contract or breach of the covenant of good faith and fair dealing for failing to diligently pursue such rights. *Tilbury Constructors, Inc. v. State Compensation Insurance Fund* (2006) 137 Cal.App.4th 466.

An eight year delay in filing lawsuit for damages for alleged breach of insurer's obligation to adjust claim for damages arising from Northridge earthquake, following the voluntary withdrawal of claim by insured, results in substantial prejudice to insurer sufficient to bar claims for breach of contract and breach of the implied covenant of good faith and fair dealing. *1231 Euclid Homeowners Assoc. v. State Farm Fire & Cas. Co.* (2006) 135 Cal.App.4th 1008.

A policy provision that states an insurer "may enforce" subrogation rights of the insured is not an enforceable duty under the policy, but rather a right belonging to the insurer. Hence, an insurer cannot be liable for breach of contract or breach of the covenant of good faith and fair dealing for failing to diligently pursue such rights. *Tilbury Constructors, Inc. v. State Compensation Insurance Fund* (2006) 137 Cal.App.4th 466.

Insurer may be in breach of contract for its delay in making full payment of benefits due where the insured loses the use of its money as a result of the carrier's failure to make a prompt and thorough investigation and evaluation of the claim. *Wilson v. 21st Century Insurance Company* (2006) ___ Cal.App.4th ___. Not citable. Review granted.

Insurer had no coverage obligation to an insured that withdrew its claim arising out of the Northridge earthquake within a few weeks of submitting its claim in 1994. The insured's withdrawal of the claim had the same legal consequence as failing to file the claim in the first place.

Such total failure excuses the insurer liability due to the failure of a condition precedent. *1231 Euclid Homeowners Assoc. v. State Farm Fire & Cas. Co.* (2006) 135 Cal.App.4th 1008.

An action for rescission is based on the disaffirmance of the contract, whereas an action for breach of contract is based on the affirmance. Accordingly, the remedies sought pursuant to these two claims are inconsistent, and the election of one theory bars recovery under the other. *Akin v. Certain Underwriters at Lloyd's of London* (2006) 140 Cal.App.4th 291.

An insured who has been denied a defense is entitled to enter a reasonable, non-collusive settlement without the insurer's consent, and may assert or assign its claims for breach of contract and "bad faith." *Noya v. A.W. Coulter Trucking* (2006) 143 Cal.App.4th 838.

The name of a cause of action is not dispositive of the type of remedy sought. A claim for benefits under an insurance policy is a breach of contract claim. *Akin v. Certain Underwriters at Lloyd's of London* (2006) 140 Cal.App.4th 291.

Breach of Duty

An insurer does not breach any duty by refusing to pay benefits where it is undisputed that earthquake repair costs were significantly less than the policy deductible. *Cheviot Vista Homeowners Assoc. v. State Farm Fire & Cas. Co.* (2006) 143 Cal.App.4th 1486.

Burden of Proof

Insured is not required to allocate its liability for indivisible damage based on the cause of damage so long as there is a concurrent, contributing covered cause. *State of California v. Underwriters at Lloyd's of London* (2006) ___ Cal.App.4th ___, 07 C.D.O.S. 17.

To recover defense costs and expenses as element of loss under D&O policy, insured must show that the expenses at issue were related to claims that actually fell within the basic scope of coverage. *Pan Pacific Retail Properties, Inc. v. Gulf Insurance Company* (9th Cir. 2006) 466 F.3d 867.

Business and Professions Code Section 17200

The test for "unfairness" in consumer actions is governed by Section 5 of the Federal Trade Commission Act. *Camacho v. Automobile Club of S. Cal.* (2006) 142 Cal.App.4th 1394.

The test for "unfairness" in consumer actions is not whether the burden of the conduct is outweighed by the harm to the plaintiff. *Camacho v. Automobile Club of S. Cal.* (2006) 142 Cal.App.4th 1394.

California Civil Code Section 340.9

"Finality" in the *res judicata* sense is required before exception in Code of Civil Procedure section 340.9 applies. An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed. Thus, a judgment in California is not final for all purposes until all possibility of direct attack thereon by way of (1) appeal, (2) motion for a new trial, or (3) motion to vacate the judgment has been exhausted. *Mid-Century v. Superior Court* (*Bendek*) (2006) 138 Cal.App.4th 769.

California Civil Code Section 1692

California Civil Code Section 1692, which addresses relief for rescission, does not apply to claims for breach of contract. *Akin v. Certain Underwriters at Lloyd's of London* (2006) 140 Cal.App.4th 291.

The remedy intended in California Civil Code Section 1692 is rescission damages, not damages for breach of contract. *Akin v. Certain Underwriters at Lloyd's of London* (2006) 140 Cal.App.4th 291.

Although the provisions of California Civil Code Section 1692 entitles the aggrieved party to "complete relief," the statute does not authorize a claim based upon the affirmance of the contract, and limits the aggrieved party to rescission damages and related consequential damages. *Akin v. Certain Underwriters at Lloyd's of London* (2006) 140 Cal.App.4th 291.

California Civil Code Section 2527

Civil Code Section 2527's requirement that pharmaceutical drug claims processors report pharmacies retail fees to insurers violated claims processors' free speech rights by compelling their speech. The reporting requirement was not narrowly tailored to achieve the government's goal of encourage insurers to pay pharmacists a fair rate for dispensing drugs, and was therefore unconstitutional. *ARP Pharmacy Services, Inc. v. Gallagher Bassett Services, Inc.* 138 Cal.App.4th 1307. Not citable; depublished.

California Civil Code Section 3287

Although the general rule is against awarding prejudgment interest for an unliquidated claim, a trial court has discretion under Civil Code § 3287 to award prejudgment interest where factors such as unreasonable delay and principles of equity and fairness warrant it. *Wilson v. 21st Century Insurance Company* (2006) ___ Cal.App.4th ___. Not citable. Review granted.

California Code of Civil Procedure Section 340.9

Where the insured and insurer had resolved claim for damages arising out of Northridge Earthquake, California Code of Civil Procedure Section 340.9 cannot be used to revive the claim. *1231 Euclid Homeowners Assoc. v. State Farm Fire & Cas. Co.* (2006) 135 Cal.App.4th 1008.

The insured's withdrawal of its claim arising out of the Northridge earthquake, within a few weeks after submitting it, effectively resolved its original claim. A claim that is resolved between the insured and insurer ends the matter and will not be given new life by the provision of California Code of Civil Procedure section 340.9. *1231 Euclid Homeowners Assoc. v. State Farm Fire & Cas. Co.* (2006) 135 Cal.App.4th 1008.

An owner of property damaged in the Northridge earthquake could not rely on California Code of Civil Procedure section 340.9 to revive a previously resolved Northridge earthquake property damage claim. Section 340.9 revives certain time-barred claims for policy benefits against insurers for losses caused by the 1994 Northridge earthquake and provides a cause of action on such a claim may be brought within one year of the statute's January 1, 2001 effective date. The statute was enacted to remove the negative impact the one year limitations period was having on the ability

of insureds to obtain compensation from their insurers for property damage caused by the Northridge earthquake. *Lincoln Fountain Villas Homeowners Association v. State Farm Fire & Casualty Insurance Company* (2006) 136 Cal.App.4th 999.

California Code of Civil Procedure Section 340.9 allows otherwise time barred Northridge earthquake claims against insurance companies to go forward by extending the statute of limitations for certain lawsuits arising from the Northridge earthquake until December 31, 2001. It does not apply to any claim that has been litigated to finality in any court of competent jurisdiction prior to the effective date of Section 340.9. *Mid-Century v. Superior Court* (*Bendek*) (2006) 138 Cal.App.4th 769.

The one-year revival period for insurance claims arising out of the Northridge earthquake set forth in California Code of Civil Procedure Section 340.9 can be tolled by the insurer's agreement to reopen and reinvestigate the claim. *Ashou v. Liberty Mutual Fire Insurance Company* (2006) 138 Cal.App.4th 748.

California Code of Civil Procedure Section 340.9 does not impose on the insurer a new duty to investigate. *Cheviot Vista Homeowners Assoc. v. State Farm Fire & Cas. Co.* (2006) 143 Cal.App.4th 1486.

California Code of Civil Procedure Section 347c(h)

Denial of a summary judgment motion, or at least a continuance of the motion, is appropriate where a party demonstrates "facts essential" to an opposition may exist but cannot yet be presented. Such a demonstration should include the identification of information that might be obtained as a result of discovery that has not yet been completed, as well as an explanation of the relevance of such information. *Cheviot Vista Homeowners Assoc. v. State Farm Fire & Cas. Co.* (2006) 143 Cal.App.4th 1486.

California Code of Civil Procedure Section 387(a)

A motion to intervene under Code of Civil Procedure section 387(a) is "untimely" when it is filed after a settlement has been reached. *Noya v. A.W. Coulter Trucking* (2006) 143 Cal.App.4th 838.

A delay in moving to intervene can defeat the right to intervention when prejudice to the parties is shown. *Noya v. A.W. Coulter Trucking* (2006) 143 Cal.App.4th 838.

California Code of Civil Procedure Section 425.16

An insurer's right to petition the Workers' Compensation Appeals Board constitutes protected activity for purposes of a special motion to strike under the anti-SLAPP law, CCP section 425.16. *Premier Medical Management Systems, Inc. v. California Insurance Guarantee Association* (2006) 136 Cal.App.4th 464.

California Code of Civil Procedure Section 1368.3

California Code of Civil Procedure section 1368.3 allows a homeowners' association to sue project developers for construction defects. *Standard Fire Ins. Co. v. Spectrum Community Assn.* (2006) 141 Cal.App.4th 1117.

California Health and Safety Code Section 1363.1 (b):

A violation of Section 1363.1 renders an arbitration agreement unenforceable. *Zembsch v. Superior Court (Health Net of California, Inc.)* (2006) ___ Cal.App.4th ___, 06 C.D.O.S. 11940.

California Insurance Code

Negotiating the sale of insurance for a commission, even if incidental to a commercial transaction, is regulated under the Insurance Code. *Wayne v. Staples, Inc.* (2006) 135 Cal.App.4th 466.

California Insurance Code Section 35(d)

Transaction of business under Ins. Code § 35(d) includes the servicing of existing policies and is not limited to the underwriting of new or renewal policies for purposes of California FAIR Plan statute. *Ohio Cas. Ins. Co. v. Garamendi* (2006) 137 Cal.App.4th 64.

California Insurance Code Section 331

A Directors and Officers ("D&O") policy is subject to rescission pursuant to Insurance Code Section 331 where insured knew of material misrepresentations in application and where policy states: "[I]n the event that the Application, including materials submitted therewith, contains misrepresentations made with the actual intent to deceive, or contain misrepresentations which materially affect either the acceptance of the risk or the hazard assumed by the Insurer under this Policy, no coverage shall be afforded under this Policy[.]" *TIG Insurance Company of Michigan v. Homestore, Inc.* (2006) 137 Cal.App.4th 749.

Either party to insurance contract may rescind on basis of other party's negligent innocent material misrepresentation or concealment. Ins. Code §§ 331 (concealment) and 359 (misrepresentation). *Philadelphia Indemnity Ins. Co. v. Montes-Harris* (2006) 40 Cal. 4th 151.

California Insurance Code Section 359

Either party to insurance contract may rescind on basis of other party's negligent innocent material misrepresentation or concealment. Ins. Code §§ 331 (concealment) and 359 (misrepresentation). *Philadelphia Indemnity Ins. Co. v. Montes-Harris* (2006) 40 Cal. 4th 151.

California Insurance Code Section 533

California Insurance Code section 533, which bars indemnity for willful conduct, does not preclude coverage where an insured is sued for both negligent and willful conduct. *Unified Western Grocers, Inc., et. al. v. Twin City Fire Insurance Company* (9th Cir. 2006) 457 F.3d 1106.

California Insurance Code section 533 precludes indemnification of costs taxed against an insured even if the insurer has provided a defense to the underlying action. *Combs v. State Farm Fire & Casualty Company* (2006) 143 Cal.App.4th 1338.

California Insurance Code Section 650

Where insurer has rescinded policy in conformity with Ins. Code § 650 insurer can generally avoid liability to insured or party injured by insured. *Philadelphia Indemnity Ins. Co. v. Montes-Harris* (2006) 40 Cal. 4th 151.

California Insurance Code Section 673

Insurance Code Section 673 does not require an insurer to give notice to an additional named insured of cancellation of the policy when the lender cancels the financed insurance policy because of the default of the insured under a premium payment loan agreement. Termination of the policy under Section 673 is treated the same as termination at the request of the insured. *The Gorham Company, Inc. v. First Financial Insurance Company* (2006) 139 Cal.App.4th 1532.

The only "insured" entitled to notice of cancellation under Section 673 is "the person who has purchased or arranged to purchase an insurance contract and who enters into a premium finance agreement with a premium finance agency." The term "insured" does not encompass an additional named insured and, as such Section 673(d) does not require the lender to provide notice of cancellation to the additional named insured. *The Gorham Company, Inc. v. First Financial Insurance Company* (2006) 139 Cal.App.4th 1532.

Pursuant to Section 673(i), when an insurer terminates a policy after having received the industrial loan company's notice that that it is exercising the insured's right to cancel the policy, the insurer has no further duty to effect cancellation or to notify additional named insureds. *The Gorham Company, Inc. v. First Financial Insurance Company* (2006) 139 Cal.App.4th 1532.

California Insurance Code Section 677.2

Insurance Code Section 677.2 is not a statutory restriction that requires an insurer to give notice to an additional named insured of cancellation of the policy when the lender cancels the financed insurance policy due to the default of the insured under a premium payment loan agreement (under Section 673) because Section 677.2 applies only to termination of the policy other than at the insured's request and termination of the policy by the lender is treated the same as termination at the request of the insured. *The Gorham Company, Inc. v. First Financial Insurance Company* (2006) 139 Cal.App.4th 1532.

California Insurance Code Section 1063.1(c)

Plaintiff condominium association brought a declaratory relief against defendant California Insurance Guaranty Association ("CIGA") after settling a construction defect action it brought against its developer, whose primary insurer was insolvent. The settlement exhausted the developer's primary insurance, but not its excess insurance. Plaintiff sought a declaration that the settlement is a "covered claim" within the meaning of Insurance Code section 1063.1(c). CIGA argued the claim is not a "covered claim" because the developer's excess insurance, or "other insurance" as that term is used in Section 1063.1(c)(9), was available to pay the claim. The Court

of Appeal agreed with CIGA that the excess insurance constituted "other insurance" under Section 1063.1(c)(9). *Parkwoods Community Association v. California Insurance Guarantee Association* (2006) 141 Cal.App.4th 1362.

California Insurance Code Section 1063.1(c)(4)

A "covered claim" excludes obligations to the state. A lien held by the Employment Development Department is an obligation to the State and is not a "covered claim" CIGA is obligated to pay. *California Insurance Guarantee Association v. Workers' Compensation Appeals Board* (2006) 136 Cal.App.4th 1528.

California Insurance Code Section 1861.02

No private right of action exists to enforce Insurance Code section 1861.02, which limits those factors an insurer may consider in setting rates. Enforcement is within the Insurance Commissioner's administrative jurisdiction. *Farmers Insurance Exchange v. Superior Court (Ryan)* (2006) 137 Cal.App.4th 842.

California Insurance Code Section 1871.7

A claim cannot be stated against an insurer under Insurance Code § 1871.7(b) based on its alleged violation of Penal Code §§ 459, 550 and 551, as subdivision (b) is directed at "every person who violates any provision of this section or section 549, 550, or 551 of the Penal Code," not simply to "every person," and a straightforward reading of these statutes makes clear that the class of persons who violate these sections are those who submit false or fraudulent claims to insurers, and not the insurers themselves. *State of California ex rel. Nee v. Unumprovident Corp*. (2006) 140 Cal.App.4th 442.

California Insurance Code Section 2071

An appraisal panel appointed pursuant to Insurance Code section 2071 is empowered only to determine the amount of the actual cash value of a loss. The panel exceeds its authority by resolving coverage issues or engaging in policy interpretation. *Kacha v. Allstate Insurance Company* (2006) 140 Cal.App.4th 1023.

An insured does not waive his right to challenge an appraisal award merely by taking possession of indemnity checks from the insurer in payment of the award. *Kacha v. Allstate Insurance Company* (2006) 140 Cal.App.4th 1023.

California Insurance Code Section 10091

Construction of statutes within FAIR Plan statutory scheme, Ins. Code. § 10091, et seq., must be construed in context of the entire statutory framework, the policies and purposes of the statutes and, where possible, the language of the statutes should be read so as to conform to the spirit of the enactment. *Ohio Cas. Ins. Co. v. Garamendi* (2006) 137 Cal.App.4th 64.

California Insurance Code Section 11580.2

There is no per *se* requirement that an insurer consult with a personal injury attorney in evaluating a UIM claim; many claims adjusters are well-qualified to make the evaluation but the

litigation value must be considered and in some cases consultation with counsel is required in order for the insurer to discharge its duty to perform a complete review of the claim. *Wilson v. 21st Century Insurance Company* (2006) ___ Cal.App.4th ___. Not citable. Review granted.

Under Ins. Code section 11580.2(e) the amount paid under the insured's medical payments coverage may be offset against the damages the insured would be entitled to recover from the other driver, not necessarily the limits of the UIM coverage. *Wilson v. 21st Century Insurance Company* (2006) ___ Cal.App.4th ___. Not citable. Review granted.

California Insurance Code Section 11580.2(f)

The Fourth District Court of Appeal held Insurance Code section 11580.2(f)'s arbitration provisions apply to underinsured motorist ("UIM") claims. The insured was required to submit his UIM claim to arbitration despite having previously obtained judgment in an underlying action against the driver who caused plaintiff's injuries. *O'Hanesian v. State Farm Mutual Automobile Insurance Company* (2006) 145 Cal.App.4th 1305.

California Insurance Code Section 12976

Prejudgment interest on obligation to pay fines, assessments and penalties under Insurance Code accrues when assessment and fines are imposed not when Insurance Commissioner issues formal order directing payment. *Ohio Cas. Ins. Co. v. Garamendi* (2006) 137 Cal.App.4th 64.

California Labor Code Section 3351

Labor code section 3715(b) does not provide an "alternate" definition of employee to the definitions contained in sections 3351 and 3352 where the employer has obtained workers' compensation benefits. *California State Automobile Association Inter-Insurance Bureau v. Workers' Compensation Appeals Board* (*Jessel*) (2006) 142 Cal.App.4th 356.

California Labor Code Section 3352

Labor code section 3715(b) does not provide an "alternate" definition of employee to the definitions contained in sections 3351 and 3352 where the employer has obtained workers' compensation benefits. *California State Automobile Association Inter-Insurance Bureau v. Workers' Compensation Appeals Board* (*Jessel*) (2006) 142 Cal.App.4th 356.

California Labor Code Section 3715

The criteria for "residential employees" contained in Labor Code section 3715(b) apply only if the employer is uninsured. *California State Automobile Association Inter-Insurance Bureau v. Workers' Compensation Appeals Board* (*Jessel*) (2006) 142 Cal.App.4th 356.

Labor code section 3715(b) does not provide an "alternate" definition of employee to the definitions contained in sections 3351 and 3352 where the employer has obtained workers' compensation benefits. *California State Automobile Association Inter-Insurance Bureau v. Workers' Compensation Appeals Board* (*Jessel*) (2006) 142 Cal.App.4th 356.

California Penal Code Section 549

A claim cannot be stated against an insurer under Insurance Code § 1871.7(b) based on its alleged violation of Penal Code § 549, as the class of persons subject to this section of the Penal Code are those who submit false or fraudulent claims to insurers, and not the insurers themselves. *State of California ex rel. Nee v. Unumprovident Corp*. (2006) 140 Cal.App.4th 442.

California Penal Code Section 550

A claim cannot be stated against an insurer under Insurance Code § 1871.7(b) based on its alleged violation of Penal Code § 550, as the class of persons subject to this section of the Penal Code are those who submit false or fraudulent claims to insurers, and not the insurers themselves. *State of California ex rel. Nee v. Unumprovident Corp*. (2006) 140 Cal.App.4th 442.

California Penal Code Section 551

A claim cannot be stated against an insurer under Insurance Code § 1871.7(b) based on its alleged violation of Penal Code § 551, as the class of persons subject to this section of the Penal Code are those who submit false or fraudulent claims to insurers, and not the insurers themselves. *State of California ex rel. Nee v. Unumprovident Corp*. (2006) 140 Cal.App.4th 442.

CIGA

A "covered claim" excludes obligations to the state. A lien held by the Employment Development Department is an obligation to the State and is not a "covered claim" CIGA is obligated to pay. *California Insurance Guarantee Association v. Workers' Compensation Appeals Board* (2006) 136 Cal.App.4th 1528.

Plaintiff condominium association brought a declaratory relief against defendant California Insurance Guaranty Association ("CIGA") after settling a construction defect action it brought against its developer, whose primary insurer was insolvent. The settlement exhausted the developer's primary insurance, but not its excess insurance. Plaintiff sought a declaration that the settlement is a "covered claim" within the meaning of Insurance Code section 1063.1(c). CIGA argued the claim is not a "covered claim" because the developer's excess insurance, or "other insurance" as that term is used in Section 1063.1(c)(9), was available to pay the claim. The Court of Appeal agreed with CIGA that the excess insurance constituted "other insurance" under Section 1063.1(c)(9). *Parkwoods Community Association v. California Insurance Guarantee Association* (2006) 141 Cal.App.4th 1362.

A "covered claim" excludes obligations to the state. A lien held by the Employment Development Department is an obligation to the State and is not a "covered claim" CIGA is obligated to pay. *California Insurance Guarantee Association v. Workers' Compensation Appeals Board* (2006) 136 Cal.App.4th 1528.

Claims Handling

Absent coverage, an insurer cannot be held liable for allegedly negligent investigation of the insured's claim for benefits. *Benavides v. State Farm General Ins. Co., et. al.* (2006) 136 Cal.App.4th 1231.

Claims Made

The Third District Court of Appeal held the phrase "claim is first brought" in an errors and omissions policy was ambiguous and a claim is first "brought" at the place where it is first tendered or "made." *National Casualty Company v. Sovereign General Insurance Services, Inc.* (2006) 137 Cal.App.4th 812.

The Third District Court of Appeal held a written claim contained in a letter is ineffective until it is received, unlike a formal legal proceeding that is initiated the moment it is properly filed. The completed act of receipt of written claim determines both where and when the claim was brought. A claim was brought in California when the letter was received in Stockton, California, even though the arbitration action was filed and commenced in London three years after the letter was received. *National Casualty Company v. Sovereign General Insurance Services, Inc.* (2006) 137 Cal.App.4th 812.

Collateral Source

The collateral source rule, which may allow an injured party to receive compensation for losses from a wholly independent collateral source in addition to recovering damages from the wrongdoer, has been held inapplicable under California law to insurance coverage disputes. *Pan Pacific Retail Properties, Inc. v. Gulf Insurance Company* (9th Cir. 2006) 466 F.3d 867.

Colossus

The role a computer software program, such as Colossus, plays in the claims handling practices of an insurer is relevant and may be discoverable subject to other reasons for non-production, such as privilege or trade secret protection. *Wilson v. 21st Century Insurance Company* (2006) ___ Cal.App.4th ___. Not citable. Review granted.

Compromise and Settlement

If settlement is for claims covered by a D&O policy, then the defense costs reasonably related to the covered claims must also be reimbursed by the D & O policy. *Pan Pacific Retail Properties, Inc. v. Gulf Insurance Company* (9th Cir. 2006) 466 F.3d 867.

Concurrent Cause

Insured is entitled to coverage where indivisible damage is covered by concurrent covered and noncovered causes, i.e., sudden and accidental release and non-sudden and accidental releases of contaminants. *State of California v. Underwriters at Lloyd's of London* (2006) ___ Cal.App.4th ___, 07 C.D.O.S. 17.

Where damage is divisible, insurer can limit coverage obligation to covered cause. *State of California v. Underwriters at Lloyd's of London* (2006) ___ Cal.App.4th ___, 07 C.D.O.S. 17.

Conditions: Notice

Notice provisions in occurrence policies are designed to help insurer investigate, settle and defend third party claims. If an insured breaches a notice provision, resulting in substantial

prejudice to the defense, the insurer is relieved of liability. *American Int'l Specialty Lines Ins. Co. v. Continental Cas. Ins. Co.* (2006) 142 Cal.App.4th 1342.

Condominium Associations

Condo associations that voluntarily enter into contracts with contractors to construct, repair, remodel, or reconstruct and then refuse to pay those contractors cannot thereafter seek coverage for the contractor's third-party claim under the directors & officers liability provisions for wrongful acts because the dispute is contractual, and because to do so would unfairly shift the burden to the insurer and permit the association to reap a windfall. *Oak Park Calabasas Condominium Assn. v. State Farm Fire & Cas. Co.* (2006) 137 Cal.App.4th 557.

Continuous or Progressive Loss

The continuous trigger rule does not preclude the duty to defend, when damage initially occurs during a prior policy period of an occurrence-based policy, simply because the claim is not made until after the prior policy has ended. Such a rule would transform a policy into a "claims made" policy. *Standard Fire Ins. Co. v. Spectrum Community Assn.* (2006) 141 Cal.App.4th 1117.

Contract Interpretation

The Fourth District Court of Appeal rejected the insured's argument that his policy was ambiguous and should not be read to require him to arbitrate his underinsured motorist ("UIM") claim. The Court of Appeal held the insurer's policy language regarding resolution of UIM claim disputes over entitlement and amount of damages conformed to the statutory language of Insurance Code section 11580.2. Thus, the principle that ambiguities in insurance policies must be construed against the insurer did not apply. In reaching its conclusion, the Court of Appeal looked to other California courts which have interpreted 11580.2(f) as applying to UIM claims. *O'Hanesian v. State Farm Mutual Automobile Insurance Company* (2006) 145 Cal.App.4th 1305.

Intent of unambiguous policy terms is to be inferred solely from written provisions of the contract. *State of California v. Underwriters at Lloyd's of London* (2006) ___ Cal.App.4th___, 07 C.D.O.S. 17. (Unpublished portion of decision.)

An insurer's right to rescind a policy does not "take[] away or limit[] coverage reasonably expected by the insured" and therefore does not trigger the requirements for a "conspicuous, plain and clear" statement. *TIG Insurance Company of Michigan v. Homestore, Inc.* (2006) 137 Cal.App.4th 749.

Fact that a term in a policy is undefined does not make it ambiguous nor does the fact that there is disagreement as to its meaning or that, isolated from its context, the term is susceptible of more than one meaning. *CDM Investors v. Travelers Casualty and Surety Co.* (2006) 139 Cal.App.4th 1251.

If a term in an insurance contract has been judicially construed it is not ambiguous and the judicial construction should be read into the policy unless the parties express a contrary intent. *CDM Investors v. Travelers Casualty and Surety Co.* (2006) 139 Cal.App.4th 1251.

Public policy cannot be used to justify the rewriting of any contract, including an insurance contract. To do so would deny the parties the freedom of contract and might have untoward consequences. *CDM Investors v. Travelers Casualty and Surety Co.* (2006) 139 Cal.App.4th 1251.

The plain language of the employment related practices exclusion limits its application to employer insureds and, when read as a whole, limit application to situations regarding employment, former employment, or prospective employment. *North American Building Maintenance, Inc. v. Fireman's Fund Insurance Company* (2006) 137 Cal.App.4th 627.

The Third District Court of Appeal held the phrase "claim is first brought" in an errors and omissions policy was ambiguous and a claim is first "brought" at the place where it is first tendered or "made." *National Casualty Company v. Sovereign General Insurance Services, Inc.* (2006) 137 Cal.App.4th 812.

The Third District Court of Appeal recognized it is generally accepted a suit is brought whenever it is filed in court. A "claim" does not necessarily involve any formal legal action and may consist merely of a written demand for damages. The Court of Appeal held the "bringing" of a claim does not necessarily imply the formal institution of a legal action. *National Casualty Company v. Sovereign General Insurance Services, Inc.* (2006) 137 Cal.App.4th 812.

Where one insurance policy consists of two separate forms that are subject to their own terms and definitions, those terms and definitions are not interchangeable between the two forms. *Century Surety Company v. Polisso et al.*(2006) 139 Cal.App.4th 922. (Opinion modified)

The doctrine of *ejusdem generis* cannot be used to limit the reach of a definition when context makes it plain that a list included in the definition is illustrative of the term's broad reach, and not included to limit the definition. *Ortega Rock Quarry v. Golden Eagle Ins. Corp.* (2006) 141 Cal.App.4th 969.

Contractual Suit Limitations

The *gravamen* of a complaint, not the name of a cause of action given by the plaintiff, determines whether the contractual suit limitations provision in a policy will apply. Accordingly, if a plaintiff seeks benefits under a policy, notwithstanding that the cause of action is styled as one for improper rescission, the contractual suit limitations provision in the policy will apply. *Akin v. Certain Underwriters at Lloyd's of London* (2006) 140 Cal.App.4th 291.

Contribution

A prior settlement between an insurer and an insured does not prevent a contribution action by other insurers who did not participate in the earlier settlement. *Employers Insurance Company of Wausau, et al. v. The Travelers Indemnity Company, et al.* (2006) 141 Cal.App.4th 398.

In an action for equitable contribution by a settling insurer against a nonparticipating insurer, once the settling insurer satisfies its *prima facie* burden that there is a potential for coverage, the burden of proof shifts to the nonparticipating insurer to prove the absence of actual coverage. *Safeco Ins. Co. of America v. Superior Court (Century Surety Company)* (2006) 140 Cal.App.4th 874.

In an action for equitable contribution by a settling insurer against a nonparticipating insurer, the nonparticipating insurer is presumptively liable for both the costs of defense and settlement once a duty to defend in shown. *Safeco Ins. Co. of America v. Superior Court (Century Surety Company)* (2006) 140 Cal.App.4th 874.

In an action for equitable contribution by a settling insurer against a nonparticipating insurer, the absence of coverage is an affirmative defense for which the nonparticipating insurer has the burden of proof. *Safeco Ins. Co. of America v. Superior Court (Century Surety Company)* (2006) 140 Cal.App.4th 874.

Voluntary payment by the settling insurers, without co-insurer's consent, extinguished co-insurer's liability for equitable contribution. *American Int'l Specialty Lines Ins. Co. v. Continental Cas. Ins. Co.* (2006) 142 Cal.App.4th 1342.

Non-settling co-insurer owed no contribution or indemnity to settling insurers because it received no notice of the underlying action or the settlement from the insured or the settling insurers. *American Int'l Specialty Lines Ins. Co. v. Continental Cas. Ins. Co.* (2006) 142 Cal.App.4th 1342.

Because equitable considerations vary, the California Supreme Court has declined to formulate a definitive rule for when contribution should be compelled between insurers. In determining whether one insurer is entitled to contribution from other, courts should consider the nature of the claim, the relation of the insured to the insurers, and particulars of each policy and any other equitable considerations. *American Int'l Specialty Lines Ins. Co. v. Continental Cas. Ins. Co.* (2006) 142 Cal.App.4th 1342.

Notice provisions in occurrence policies are designed to help insurer investigate, settle and defend third party claims. If an insured breaches a notice provision, resulting in substantial prejudice to the defense, the insurer is relieved of liability. *American Int'l Specialty Lines Ins. Co. v. Continental Cas. Ins. Co.* (2006) 142 Cal.App.4th 1342.

The decision in *Truck Ins. Exchange v. Unigard Ins. Co.*, (2000) 79 Cal. App. 4th 966, does not establish a general rule on equitable contribution. Equity is flexible, and the factors considered in Unigard must be considered on a case-by-case basis. *American Int'l Specialty Lines Ins. Co. v. Continental Cas. Ins. Co.* (2006) 142 Cal.App.4th 1342.

Absent compelling equitable considerations to the contrary, it is unfair and inequitable to saddle insurers on the risk with contribution if those insurers do not have notice of potential liability. Insurers with notice will be able to handle task of identifying coinsurers without distracting insurer's attention from claims handling. *American Int'l Specialty Lines Ins. Co. v. Continental Cas. Ins. Co.* (2006) 142 Cal.App.4th 1342.

Damages

The name of a cause of action is not dispositive of the type of remedy sought. A claim for benefits under an insurance policy is a breach of contract claim. *Akin v. Certain Underwriters at Lloyd's of London* (2006) 140 Cal.App.4th 291.

The name of a cause of action is not dispositive of the type of remedy sought. A claim to return a party to an insurance contract to the position they were in before the policy was issued (i.e. return premiums) is a claim for rescission, and does not entitle the plaintiff to contract damages. *Akin v. Certain Underwriters at Lloyd's of London* (2006) 140 Cal.App.4th 291.

An action for rescission is based on the disaffirmance of the contract, whereas an action for breach of contract is based on the affirmance. Accordingly, the remedies sought pursuant to these two claims are inconsistent, and the election of one theory bars recovery under the other. *Akin v. Certain Underwriters at Lloyd's of London* (2006) 140 Cal.App.4th 291.

Definition: "Bodily Injury"

Failure of certain individual claimants to preserve right to appeal determination of no coverage for bodily injury claims does not preclude reviewing court from determining coverage applicable to separate property damage claims, which were preserved by way of appeal. *Standard Fire Ins. Co. v. Spectrum Community Assn.* (2006) 141 Cal.App.4th 1117.

Definition: "Claim"

The Third District Court of Appeal recognized it is generally accepted a suit is brought whenever it is filed in court. A "claim" does not necessarily involve any formal legal action and may consist merely of a written demand for damages. The Court of Appeal held the "bringing" of a claim does not necessarily imply the formal institution of a legal action. *National Casualty Company v. Sovereign General Insurance Services, Inc.* (2006) 137 Cal.App.4th 812.

Definition: "Covered Claim"

A "covered claim" excludes obligations to the state. A lien held by the Employment Development Department is an obligation to the State and is not a "covered claim" CIGA is obligated to pay. *California Insurance Guarantee Association v. Workers' Compensation Appeals Board* (2006) 136 Cal.App.4th 1528.

Plaintiff condominium association brought a declaratory relief against defendant California Insurance Guaranty Association ("CIGA") after settling a construction defect action it brought against its developer, whose primary insurer was insolvent. The settlement exhausted the developer's primary insurance, but not its excess insurance. Plaintiff sought a declaration that the settlement is a "covered claim" within the meaning of Insurance Code section 1063.1(c). CIGA argued the claim is not a "covered claim" because the developer's excess insurance, or "other insurance" as that term is used in Section 1063.1(c)(9), was available to pay the claim. The Court of Appeal agreed with CIGA that the excess insurance constituted "other insurance" under Section 1063.1(c)(9). *Parkwoods Community Association v. California Insurance Guarantee Association* (2006) 141 Cal.App.4th 1362.

Definition: "Insured"

A spouse who is not specifically named as an insured in an insurance policy has standing to sue the insurer for breach of contract and bad faith where the policy defines an "insured" as the individual named in the policy, as well as his or her spouse. *Century Surety Company v. Polisso et al.* (2006) 139 Cal.App.4th 922.

Definition: "Loss"

There is no coverage under a directors' and officers' liability policy for claims arising out of the insured's default on municipal bond payments where the definition of "Loss" excludes damages arising out of breach of any contract. *Medill, et al. v. Westport Ins. Corp.* (2006) 143 Cal.App.4th 819.

Definition: "Occurrence"

Whether there was an occurrence under the applicable policy period is based not upon who suffered damage, but on the fact of damages allegedly occurring at least in part during the policy period. *Standard Fire Ins. Co. v. Spectrum Community Assn.* (2006) 141 Cal.App.4th 1117.

Definition: "Property Damage"

Failure of certain individual claimants to preserve right to appeal determination of no coverage for bodily injury claims does not preclude reviewing court from determining coverage applicable to separate property damage claims, which were preserved by way of appeal. *Standard Fire Ins. Co. v. Spectrum Community Assn.* (2006) 141 Cal.App.4th 1117.

Definition: "Residential Employee"

Painter injured on his first day of work did not qualify as a "residential employee" and was thus ineligible for workers' compensation benefits. *California State Automobile Association Inter-Insurance Bureau v. Workers' Compensation Appeals Board* (*Jessel*) (2006) 142 Cal.App.4th 356.

Definition: "Suit"

Policies' definition of "suit," including alternative dispute resolution with insurers' consent, did not apply to EPA administrative action under Clean Water Act where insurers' consent was neither sought nor granted. *Ortega Rock Quarry v. Golden Eagle Ins. Corp*. (2006) 141 Cal.App.4th 969.

Definition: "Trustee"

In an exclusion precluding coverage for a person in an Outside Position for claims brought by or with "the solicitation, assistance or participation of the entity in which the Director or Officer serves in the Outside Position or any director, officer, trustee, regent, governor or employee of such entity," the term "trustee" does not refer to a bankruptcy trustee for said entity. *Unified Western Grocers, Inc., et. al. v. Twin City Fire Insurance Company* (9th Cir. 2006) 457 F.3d 1106.

Definition: "Under Construction"

The term "under construction," as used in the vacancy exclusion in a commercial property policy, was intended as the functional equivalent of "construction, renovation or addition" as used in the exception to a cancellation endorsement. *TRB Investments, Inc., et al. v. Fireman's Fund Insurance Company* (2006) 40 Cal.4th 19

Definition: "Wrongful Act"

As this term is used in D&O policies, requires tortious conduct, and if the term "negligent" is used in the definition, the term is to be applied to each and every act in the definition, i.e. if the

definition is "negligent act, omission or breach of duty," the omission or breach must be negligent as well. *Oak Park Calabasas Condominium Assn. v. State Farm Fire & Cas. Co.* (2006) 137 Cal.App.4th 557.

Discovery

The role a computer software program, such as Colossus, plays in the claims handling practices of an insurer is relevant and may be discoverable subject to other reasons for non-production, such as privilege or trade secret protection. *Wilson v. 21st Century Insurance Company* (2006) ___ Cal.App.4th ___. Not citable. Review granted.

Doctrine Of Superior Equities

Doctrine of superior equities did not preclude property insurer's subrogation claim where adjacent property owner's negligence contributed to fire's spread. *State Farm General Ins. Co. v. Wells Fargo, N.A., et al* (2006) 143 Cal.App.4th 1098.

Drug Claims Processors

Civil Code section 2527's requirement that pharmaceutical drug claims processors report pharmacies retail fees to insurers violated claims processors' free speech rights by compelling their speech. The reporting requirement was not narrowly tailored to achieve the government's goal of encourage insurers to pay pharmacists a fair rate for dispensing drugs, and was therefore unconstitutional. *ARP Pharmacy Services, Inc. v. Gallagher Bassett Services, Inc.* 138 Cal.App.4th 1307. Not citable; depublished.

Duty to Defend

Employment-related practices exclusion does not eliminate duty to defend claims asserted by non-employees. *North American Building Maintenance, Inc. v. Fireman's Fund Insurance Company* (2006) 137 Cal.App.4th 627.

The duty to defend and the implied covenant are the same primary right and cannot be split into two separate actions for damages. *Lincoln Property Company, N.C., Inc. v. Travelers Indemnity Company* (2006) 137 Cal.App.4th 905.

A claim for the breach of the duty to defend and a breach of the implied covenant of good faith and fair dealing are based on the same primary right. As such, where a duty to defend claim is litigated to judgment, a subsequent bad faith claim is barred under the doctrine of *res judicata*. *Lincoln Property Company, N.C., Inc. v. Travelers Indemnity Company* (2006) 137 Cal.App.4th 905.

Under an occurrence-based liability policy, potential for coverage may exist even where claimant does not assert claim until after policy period has ended, provided property damage allegedly occurred at least in part during policy period. *Standard Fire Ins. Co. v. Spectrum Community* Assn. (2006) 141 Cal.App.4th 1117.

Where a setoff affirmative defense could have constituted a suit seeking damages if independently asserted in a court of law and falls within the scope of coverage it may be the

"functional equivalent" of an affirmative claim for damages and trigger the duty to defend. But, where an affirmative defense is purely defensive and simply reimposes on an insured what the insured is already legally obligated for it is not the functional equivalent of a suit. *CDM Investors v. Travelers Casualty and Surety Co.* (2006) 139 Cal.App.4th 1251.

Even when an insurance carrier has denied a defense, and the insured enters a settlement without the insurer's consent, in a subsequent suit asserting the insured's rights the insurer may still challenge the reasonableness of the insured's settlement, and may present evidence to rebut the presumption that the settlement reflected insured's actual amount of liability. *Noya v. A.W. Coulter Trucking* (2006) 143 Cal.App.4th 838.

Duty to Defend – "Suit" Requirement

Pursuant to *Foster-Gardner, Inc. v. National Union Fire Ins. Co.* (1998) 18 Cal.4th 857, language providing that an insurer has a "right and duty to defend any suit against the insured seeking damages . . . and may make such investigation and settlement of any claim or suit as it deems expedient" limits the duty to defend to a civil action prosecuted in a court. *CDM Investors v. Travelers Casualty and Surety Co.* (2006) 139 Cal.App.4th 1251.

Duty to Indemnify

Indemnity obligation of insurer is a contractual duty to indemnify its insured for its liability in tort; where insured's tort liability because of covered damage also extends to non-covered damage insurer's duty to indemnify is co-extensive with insured's liability. *State of California v. Underwriters at Lloyd's of London* (2006) ___ Cal.App.4th ___, 07 C.D.O.S. 17.

Duty to Indemnify – "Damages" Requirement

Pursuant to *Certain Underwriters at Lloyd's of London v. Superior Court* (2001) 24 Cal.4th 945, 960, 964, (*Powerine I)* the indemnification provision of primary CGL policies providing that the insurer has a duty to pay "all sums that the insured becomes legally obligated to pay as damages" is limited to money ordered by a court. *CDM Investors v. Travelers Casualty and Surety Co.* (2006) 139 Cal.App.4th 1251.

Umbrella policy providing coverage for "ultimate net loss . . . which the insured shall become legally obligated to pay as damages" where "ultimate net loss" was defined to include more than simply "damages" does not broaden coverage to apply to administratively-required response costs because the insuring agreement is limited to "ultimate net loss" "as damages." *CDM Investors v. Travelers Casualty and Surety Co.* (2006) 139 Cal.App.4th 1251.

Where an insuring clause contains an "as damages" limitation standing alone, without express reference to expenses and does not purport to further define the scope of coverage by reference to the "ultimate net loss" provision, government response costs are not covered. *CDM Investors v. Travelers Casualty and Surety Co.* (2006) 139 Cal.App.4th 1251.

Duty to Investigate

Section 340.9 did not impose on insurer a new duty to investigate after it had already investigated and paid for all earthquake damage found by the insurer and claimed by the

homeowners association. *Lincoln Fountain Villas Homeowners Association v. State Farm Fire & Casualty Insurance Company* (2006) 136 Cal.App.4th 999.

Whether an insurer has conducted a timely and reasonable investigation of insurability is generally a question of fact which depends on a number of factors including cost and availability of information and the administrative burden of undertaking further investigation and whether the insurer engaged in a regular practice of delaying investigation until a claim is made on the policy. *Philadelphia Indemnity Ins. Co. v. Montes-Harris* (2006) 40 Cal. 4th 151.

The duty to conduct a prompt reasonable investigation of insurability is was informed by three public policy rationales: (1) the quasi public nature of the insurance business generally; (2) the public policy represented by the Financial Responsibility Law; and (3) the extracontractual duty of all insurers to act promptly in accepting or rejecting applications for insurance. *Philadelphia Indemnity Ins. Co. v. Montes-Harris* (2006) 40 Cal. 4th 151.

Economic Loss Rule

Analysis of economic loss rule under first-party property insurance contracts has no application to third-party liability policies. *Standard Fire Ins. Co. v. Spectrum Community Assn.* (2006) 141 Cal.App.4th 1117.

EDD Lien

A "covered claim" excludes obligations to the state. A lien held by the Employment Development Department is an obligation to the State and is not a "covered claim" CIGA is obligated to pay. *California Insurance Guarantee Association v. Workers' Compensation Appeals Board* (2006) 136 Cal.App.4th 1528.

Ejusdem Generis

The doctrine of *ejusdem generis* cannot be used to limit the reach of a definition when context makes it plain that a list included in the definition is illustrative of the term's broad reach, and not included to limit the definition. *Ortega Rock Quarry v. Golden Eagle Ins. Corp.* (2006) 141 Cal.App.4th 969.

Endorsement: Cancellation

The term "under construction," as used in the vacancy exclusion in a commercial property policy, was intended as the functional equivalent of "construction, renovation or addition" as used in the exception to a cancellation endorsement. *TRB Investments, Inc., et al. v. Fireman's Fund Insurance Company* (2006) 40 Cal.4th 19.

The cancellation endorsement in a commercial property policy serves to protect the insurer against the increased risk of loss that occurs when the premises are vacant for an extended period of time. *TRB Investments, Inc., et al. v. Fireman's Fund Insurance Company* (2006) 40 Cal.4th 19.

Equitable Estoppel

Equitable estoppel did not preclude insurer from relying on one-year limitation of Code of Civil Procedure Section 340.9, even when it continued reinvestigating insured's claim after the year

expired, because insurer had explicitly reserved all of its rights under policy. *Ashou v. Liberty Mutual Fire Insurance Company* (2006) 138 Cal.App.4th 748.

Insurer's failure to advise insured of date within which she was entitled to bring suit based on denial of claim did not equitably estop insurer to rely on limitations provision of Code of Civil Procedure Section 340.9 because insured had actual knowledge of statutory provisions limiting time to bring suit. *Ashou v. Liberty Mutual Fire Insurance Company* (2006) 138 Cal.App.4th 748.

Equitable Subrogation

Doctrine of superior equities did not preclude property insurer's subrogation claim where adjacent property owner's negligence contributed to fire's spread. *State Farm General Ins. Co. v. Wells Fargo, N.A., et al* (2006) 143 Cal.App.4th 1098.

Equitable Tolling

Insured's request for reconsideration of claim under Code of Civil Procedure Section 340.9 will equitably toll suit limitation provision of that statute if insurer accepts request and reopens claim, but not if insurer refuses to reconsider claim or fails to act on request that it do so. *Ashou v. Liberty Mutual Fire Insurance Company* (2006) 138 Cal.App.4th 748.

Excess Insurance

Confirmation of Bankruptcy Plan under 11 U.S.C. § 524(g) was not actual trial of insured's liability, and therefore did not trigger excess insurer's indemnity obligations. *Fuller-Austin Insulation Company v. Highlands Insurance Company* (2006) 135 Cal.App.4th 958.

Estimations of individual and aggregate value of present and future asbestos claims neither affixed nor accelerated excess insurer's indemnity obligations, and did not provide a bases for coverage of those claims to be presumed. *Fuller-Austin Insulation Company v. Highlands Insurance Company* (2006) 135 Cal.App.4th 958.

Exclusion: Absolute Pollution

When dirt and rocks are deposited in a waterway, thus comprising "pollutants" under the Clean Water Act, they are "pollutants" for purposes of the absolute pollution exclusion. *Ortega Rock Quarry v. Golden Eagle Ins. Corp*. (2006) 141 Cal.App.4th 969.

Absolute pollution exclusion applicable to "[a]ny loss, cost, or expense arising out of any governmental direction or request that you test for . . . . pollutants" is "non-specific and all-encompassing." *CDM Investors v. Travelers Casualty and Surety Co.* (2006) 139 Cal.App.4th 1251.

Exclusion: Auto

Auto exclusion does not apply where there are two negligent acts or omission of an insured and one of which, independent of the excluded cause, renders the insured liable. *Prince v. United National Ins. Co.* (2006) 142 Cal.App.4th 233.

Negligence may be auto-dependent in a variety of situations that do not involve the actual operation of a vehicle. *Prince v. United National Ins. Co.* (2006) 142 Cal.App.4th 233.

A vehicle need not be moving or even running for the auto exclusion to apply. *Prince v. United National Ins. Co.* (2006) 142 Cal.App.4th 233.

California case law takes an expansive view of the term "use" in the context of the auto exclusion and courts are generally disinclined to find coverage under a general liability policy where there would be overlapping coverage under an auto policy. *Prince v. United National Ins. Co.* (2006) 142 Cal.App.4th 233.

Although a car being the mere "situs" of an injury is not sufficient to bring a claim within the scope of an auto exclusion, where the car is a predominating cause and substantial factor in causing the injury the exclusion applies. *Prince v. United National Ins. Co.* (2006) 142 Cal.App.4th 233.

Insured's negligence in leaving two small children unattended inside car on hot day was not independent of the "use" of a car and, as a result, auto exclusion applied to preclude coverage. *Prince v. United National Ins. Co.* (2006) 142 Cal.App.4th 233.

Exclusion: Employment Related Practices

Employment-Related Practices Exclusion Does Not Eliminate Duty To Defend Claims Asserted By Non-Employees. *North American Building Maintenance, Inc. v. Fireman's Fund Insurance Company* (2006) 137 Cal.App.4th 627.

The plain language of the employment related practices exclusion limits its application to employer insureds and, when read as a whole, limit application to situations regarding employment, former employment, or prospective employment. *North American Building Maintenance, Inc. v. Fireman's Fund Insurance Company* (2006) 137 Cal.App.4th 627.

Exclusion: Failure to Pay on Financial Instruments

There is no coverage under a directors' and officers' liability policy for claims arising out of the insured's default on municipal bond payments where the policy excludes coverage for claims arising out of the failure to pay on financial instruments. *Medill, et al. v. Westport Ins. Corp.* (2006) 143 Cal.App.4th 819.

Exclusion: Issuance of Bonds

There is no coverage under a directors' and officers' liability policy for claims arising out of the insured's default on municipal bond payments where the policy excludes coverage for claims arising out of the issuance of bonds. *Medill, et al. v. Westport Ins. Corp.* (2006) 143 Cal.App.4th 819.

Exclusion: (j)(5)

Exclusion (j)(5) provides that "property damage" does not include injury to "[t]hat particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the 'property damage' arises out of those

operations." The Court found that completion of PDC's work did not occur before November 25, 1997, the date the policy cancellation was effective. Rather, PDC worked on the project until July 8, 1998, when it was terminated by Gorham. Under Exclusion (j)(5), damage caused by PDC's ongoing construction operations was not covered. *The Gorham Company, Inc. v. First Financial Insurance Company* (2006) 139 Cal.App.4th 1532.

Exclusion: (j)(6)

Exclusion (j)(6) provides that "property damage" does not include injury to "[t]hat particular part of any property that must be restored, repaired or replaced because 'your [PDC' s] work' was incorrectly performed on it." By its terms, this exclusion exempts coverage for restoration, repair, or replacement caused by PDC's "incorrectly performed" work. There is, however, an "exclusion to the exclusion" of paragraph (j)(6): the policy states that (j)(6) "does not apply to 'property damage' included in the 'products-completed operations hazard.'" Under (j)(6), the policy does not cover restoration, repair or replacement caused by PDC's "incorrectly performed" work; but because the "products-completed operations hazard" is not excluded by (j)(6), the policy *does* cover restoration, repair or replacement caused by PDC's "incorrect work," if the work *has been completed.* However, the work had not been completed. *The Gorham Company, Inc. v. First Financial Insurance Company* (2006) 139 Cal.App.4th 1532.

Exclusion: Pollution

Insured is not required to allocate its liability for indivisible damage based on the cause of damage so long as there is a concurrent, contributing covered cause. *State of California v. Underwriters at Lloyd's of London* (2006) ___ Cal.App.4th ___, 07 C.D.O.S. 17.

Relevant discharge for insured held liable for negligent design, construction, and operation of waste site may be releases from site. *State of California v. Underwriters at Lloyd's of London* (2006) ___ Cal.App.4th ___, 07 C.D.O.S. 17. (Unpublished portion of decision.)

Qualified or "sudden and accidental" pollution exclusion was added to standard CGL policy in 1970. The standard CGL policy was modified in 1985 to delete the "sudden and accidental" exception to the pollution exclusion. *State of California v. Underwriters at Lloyd's of London* (2006) ___ Cal.App.4th ___, 07 C.D.O.S. 17. (Unpublished portion of decision.)

Qualified or "sudden and accidental" pollution exclusion has temporal requirement that release be abrupt as well as unintended and unexpected. *State of California v. Underwriters at Lloyd's of London* (2006) ___ Cal.App.4th ___, 07 C.D.O.S. 17. (Unpublished portion of decision.)

Overflow of contaminants from waste site caused by extreme rainfall qualifies as sudden and accidental release in absence of prior releases over long period of time. History of prior rain-induced release, in conjunction with subsequent unheeded recommendations to prevent later rain-induced releases, renders resulting subsequent releases not accidental and therefore excluded by qualified pollution exclusion. *State of California v. Underwriters at Lloyd's of London* (2006) ___ Cal.App.4th ___, 07 C.D.O.S. 17. (Unpublished portion of decision.)

Exclusion: Vacancy

For purposes of applying a construction exception to a vacancy exclusion in a property policy, any building endeavor, including the renovation of an existing building, constitutes "construction," as long as that endeavor requires the substantial and continuing presence of workers at the premises. *TRB Investments, Inc., et al. v. Fireman's Fund Insurance Company* (2006) 40 Cal.4th 19.

The term "under construction," as used in a construction exception to a vacancy exclusion in a property policy, means any building endeavor, including the renovation of an existing building, so long as that endeavor requires the substantial and continuing presence of workers at the premises. *TRB Investments, Inc., et al. v. Fireman's Fund Insurance Company* (2006) 40 Cal.4th 19.

The term "under construction," as used in the vacancy exclusion in a commercial property policy, was intended as the functional equivalent of "construction, renovation or addition" as used in the exception to a cancellation endorsement. *TRB Investments, Inc., et al. v. Fireman's Fund Insurance Company* (2006) 40 Cal.4th 19.

The vacancy exclusion in a commercial property policy serves to protect the insurer against the increased risk of loss that occurs when the premises are vacant for an extended period of time. *TRB Investments, Inc., et al. v. Fireman's Fund Insurance Company* (2006) 40 Cal.4th 19.

Exclusion: Watercourse

Watercourse exclusion does not apply to releases into groundwater, only body of water contained within defined boundaries. *State of California v. Underwriters at Lloyd's of London* (2006) ___ Cal.App.4th ___, 07 C.D.O.S. 17. (Unpublished portion of decision.)

Watercourse exclusion is ambiguous as to whether the only relevant discharge is the initial discharge to the watercourse or whether it also applies to subsequent discharges from a watercourse to soil and, therefore, will be construed in favor of coverage such that a discharge that damages soil even if it initially entered a watercourse is covered. *State of California v. Underwriters at Lloyd's of London* (2006) ___ Cal.App.4th ___, 07 C.D.O.S. 17. (Unpublished portion of decision.)

Exclusion: Work Performed

Exclusion (j)(5) provides that "property damage" does not include injury to "[t]hat particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the 'property damage' arises out of those operations." The Court found that completion of PDC's work did not occur before November 25, 1997, the date the policy cancellation was effective. Rather, PDC worked on the project until July 8, 1998, when it was terminated by Gorham. Under Exclusion (j)(5), damage caused by PDC's ongoing construction operations was not covered. *The Gorham Company, Inc. v. First Financial Insurance Company* (2006) 139 Cal.App.4th 1532.

Exclusion (j)(6) provides that "property damage" does not include injury to "[t]hat particular part of any property that must be restored, repaired or replaced because 'your [PDC's] work' was incorrectly performed on it." By its terms, this exclusion exempts coverage for restoration, repair, or replacement caused by PDC's "incorrectly performed" work. There is, however, an "exclusion

to the exclusion" of paragraph (j)(6): the policy states that (j)(6) "does not apply to 'property damage' included in the 'products-completed operations hazard.'" Under (j)(6), the policy does not cover restoration, repair or replacement caused by PDC's "incorrectly performed" work; but because the "products-completed operations hazard" is not excluded by (j)(6), the policy *does* cover restoration, repair or replacement caused by PDC's "incorrect work," if the work *has been completed.* However, the work had not been completed. *The Gorham Company, Inc. v. First Financial Insurance Company* (2006) 139 Cal.App.4th 1532.

Extrinsic Evidence

Intent of unambiguous policy terms is to be inferred solely from written provisions of the contract. *State of California v. Underwriters at Lloyd's of London* (2006) ___ Cal.App.4th ___, 07 C.D.O.S. 17. (Unpublished portion of decision.)

FAIR Plan

Property insurer that withdraws from California insurance market is obligated to pay FAIR Plan assessments for two years following surrender of certificate of authority and the cessation of underwriting activity in the California market. *Ohio Cas. Ins. Co. v. Garamendi* (2006) 137 Cal.App.4th 64.

Requiring insurers withdrawing from the insurance market to satisfy their FAIR Plan obligations for the two years after they commence withdrawal is not an undue burden on the withdrawal process. *Ohio Cas. Ins. Co. v. Garamendi* (2006) 137 Cal.App.4th 64.

"Finality" of Litigation

"Finality" in the *res judicata* sense is required before exception in Code of Civil Procedure section 340.9 applies. An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed. Thus, a judgment in California is not final for all purposes until all possibility of direct attack thereon by way of (1) appeal, (2) motion for a new trial, or (3) motion to vacate the judgment has been exhausted. *Mid-Century v. Superior Court* (*Bendek*) (2006) 138 Cal.App.4th 769.

Fraud

The Second Appellate District held that California Code Civil Procedure section 340.9 revives claims against insurers for breach of contract and breach of the implied covenant of good faith and fair dealing, which are based on the insurance contract, but not claims for fraud, which do not rest on the insurers' failure to perform under the insurance policy. *Lincoln Fountain Villas Homeowners Association v. State Farm Fire & Casualty Insurance Company* (2006) 136 Cal.App.4th 999.

Genuine Dispute Doctrine

This doctrine is usually applied in first party cases and has been applied in third party indemnity cases. Regardless of the type of case, under the genuine dispute doctrine, the reasonableness of an insurer's decision to deny benefits must be evaluated as of the time it was made. Accordingly, an insurer cannot invoke the genuine dispute doctrine based upon reasons

never asserted when the insurer initially denied coverage. *Century Surety Company v. Polisso et al.*(2006) 139 Cal.App.4th 922.

The genuine dispute doctrine is not available where the insurer fails to conduct a reasonable investigation, and that reasonable investigation would have made an insurer's actual doubts about a claim untenable. *Wilson v. 21st Century Insurance Company* (2006) ___ Cal.App.4th ___. Not citable. Review granted.

Homeowners' Associations

California Code of Civil Procedure section 1368.3 allows a homeowners' association to sue project developers for construction defects. *Standard Fire Ins. Co. v. Spectrum Community Assn.* (2006) 141 Cal.App.4th 1117.

Insurance: Automobile

Automobile liability insurers have a nondelegable duty to investigate insurability within reasonable time after the issuance of policy in order to preserve right to rescind policy for misrepresentation and avoid liability to third party injured by insured. *Philadelphia Indemnity Ins. Co. v. Montes-Harris* (2006) 40 Cal. 4th 151.

Nondelegable duty to investigate insurability within a reasonable period of the issuance of policy inures directly to class of potential victims of insured. *Philadelphia Indemnity Ins. Co. v. Montes-Harris* (2006) 40 Cal. 4th 151.

Insurer that satisfies a judgment notwithstanding misrepresentation by insured concerning insurability retains the right to prosecute insured for damages caused by his or her misrepresentations and may also raise the misrepresentation as a defense in a claim by the insured. *Philadelphia Indemnity Ins. Co. v. Montes-Harris* (2006) 40 Cal. 4th 151.

Automobile liability insurer that fails to investigate insurability within reasonable period of the issuance of policy may not avoid liability to in order to preserve right to rescind policy for misrepresentation and avoid liability to third party injured by insured. *Philadelphia Indemnity Ins. Co. v. Montes-Harris* (2006) 40 Cal. 4th 151.

Excess automobile liability insurer that sells supplemental coverage in excess of minimum statutory requirements satisfies any duty to investigate insurability in context of rental car transaction where insurer, or rental car company acting as agent, complies with license inspection and signature verification requirements of Veh. Code § 14608. *Philadelphia Indemnity Ins. Co. v. Montes-Harris* (2006) 40 Cal. 4th 151.

Whether an insurer has conducted a timely and reasonable investigation of insurability is generally a question of fact which depends on a number of factors including cost and availability of information and the administrative burden of undertaking further investigation and whether the insurer engaged in a regular practice of delaying investigation until a claim is made on the policy. *Philadelphia Indemnity Ins. Co. v. Montes-Harris* (2006) 40 Cal. 4th 151.

The duty to conduct a prompt reasonable investigation of insurability is was informed by three public policy rationales: (1) the quasi public nature of the insurance business generally; (2) the public policy represented by the Financial Responsibility Law; and (3) the extracontractual duty of all insurers to act promptly in accepting or rejecting applications for insurance. *Philadelphia Indemnity Ins. Co. v. Montes-Harris* (2006) 40 Cal. 4th 151.

Insurance: D&O

Gon v. First State Ins. Co. (9th Cir. 1989) 871 F.2d 863 and *Okada v. MGIC Indem. Corp*. (9th Cir. 1986) 823 F.2d 276, which involved an insurer's duty to contemporaneously advance defense costs for potentially covered claims, are not controlling where the insureds only seek reimbursement of costs after the underlying litigation has ended. *Pan Pacific Retail Properties, Inc. v. Gulf Insurance Company* (9th Cir. 2006) 466 F.3d 867.

Condo associations that voluntarily enter into contracts with contractors to construct, repair, remodel, or reconstruct and then refuse to pay those contractors cannot thereafter seek coverage for the contractor's third-party claim under the directors & officers liability provisions for wrongful acts because the dispute is contractual, and because to do so would unfairly shift the burden to the insurer and permit the association to reap a windfall. *Oak Park Calabasas Condominium Assn. v. State Farm Fire & Cas. Co.* (2006) 137 Cal.App.4th 557.

D&O policy provisions relating to "wrongful acts" only provides coverage for tortious conduct, and not contractual obligations. Condo associations that voluntarily enter into contracts with contractors to construct, repair, remodel, or reconstruct and then refuse to pay those contractors cannot thereafter seek coverage for the contractor's third-party claim under the directors & officers liability provisions for wrongful acts because the dispute is contractual, and because to do so would unfairly shift the burden to the insurer and permit the association to reap a windfall. *Oak Park Calabasas Condominium Assn. v. State Farm Fire & Cas. Co.* (2006) 137 Cal.App.4th 557.

As this term is used in D&O policies, requires tortious conduct, and if the term "negligent" is used in the definition, the term is to be applied to each and every act in the definition, i.e. if the definition is "negligent act, omission or breach of duty," the omission or breach must be negligent as well. *Oak Park Calabasas Condominium Assn. v. State Farm Fire & Cas. Co.* (2006) 137 Cal.App.4th 557.

D&O policy provisions relating to "wrongful acts" only provides coverage for tortious conduct, and not contractual obligations. *Oak Park Calabasas Condominium Assn. v. State Farm Fire & Cas. Co.* (2006) 137 Cal.App.4th 557.

D&O policy is subject to rescission with respect to insureds who did not sign the application and were unaware of the misrepresentations and where the policy states: "... this Policy in its entirety shall be void and of no effect whatsoever if such misrepresentations were known to be untrue on the inception date of the Policy by one or more of the individuals who signed the Application." *TIG Insurance Company of Michigan v. Homestore, Inc.* (2006) 137 Cal.App.4th 749.

There is no coverage under a directors' and officers' liability policy for claims arising out of the insured's default on municipal bond payments where the definition of "Loss" excludes damages arising out of breach of any contract. *Medill, et al. v. Westport Ins. Corp.* (2006) 143 Cal.App.4th 819.

There is no coverage under a directors' and officers' liability policy for claims arising out of the insured's default on municipal bond payments where the policy excludes coverage for claims arising out of the issuance of bonds. *Medill, et al. v. Westport Ins. Corp.* (2006) 143 Cal.App.4th 819.

There is no coverage under a directors' and officers' liability policy for claims arising out of the insured's default on municipal bond payments where the policy excludes coverage for claims arising out of the failure to pay on financial instruments. *Medill, et al. v. Westport Ins. Corp.* (2006) 143 Cal.App.4th 819.

If settlement is for claims covered by a D&O policy, then the defense costs reasonably related to the covered claims must also be reimbursed by the D & O policy. *Pan Pacific Retail Properties, Inc. v. Gulf Insurance Company* (9th Cir. 2006) 466 F.3d 867.

To recover defense costs and expenses as element of loss under D&O policy, insured must show that the expenses at issue were related to claims that actually fell within the basic scope of coverage. *Pan Pacific Retail Properties, Inc. v. Gulf Insurance Company* (9th Cir. 2006) 466 F.3d 867.

As a general rule, if a lawsuit only seeks damages that are uninsurable under the policy, then the insurer is not obligated to reimburse any defense costs spent defending these claims, even if the claims are eventually determined to be meritless. *Pan Pacific Retail Properties, Inc. v. Gulf Insurance Company* (9th Cir. 2006) 466 F.3d 867.

Insurance: First-Party Property

Case law analyzing coverage under first party property policies, which draw on the relationship between perils that are either covered or excluded in the contract, are inapplicable to coverage analysis under third party liability policies, which provide coverage for a broader spectrum of risk. *Standard Fire Ins. Co. v. Spectrum Community Assn.* (2006) 141 Cal.App.4th 1117.

Insurance: Liability v. Indemnity

An insurance policy may be either for liability or for indemnity. In a liability contract, the insurer agrees to cover liability for damages. If the insured is liable, the insurance company must pay the damages. In an indemnity contract, by contrast, the insurer agrees to reimburse expenses to the insured that the insured is liable to pay and has paid. *Pan Pacific Retail Properties, Inc. v. Gulf Insurance Company* (9th Cir. 2006) 466 F.3d 867.

Insurance Regulation

Transaction of business under Ins. Code § 35(d) includes the servicing of existing policies and is not limited to the underwriting of new or renewal policies for purposes of California FAIR Plan statute. *Ohio Cas. Ins. Co. v. Garamendi* (2006) 137 Cal.App.4th 64.

Insurance: Third-Party Liability

Case law analyzing coverage under first party property policies, which draw on the relationship between perils that are either covered or excluded in the contract, are inapplicable to coverage analysis under third party liability policies, which provide coverage for a broader spectrum of risk. *Standard Fire Ins. Co. v. Spectrum Community Assn.* (2006) 141 Cal.App.4th 1117.

Insurance: Title

An arbitration clause must be included in the preliminary title report or in a document incorporated by reference therein in order to be enforceable. Title insurer could not compel arbitration because the preliminary report did not contain an arbitration clause, nor did it incorporate by reference the title insurance policy actually issued to the insured. *Kleveland v. Chicago Title Ins. Co.* (2006) 141 Cal.App.4th 761.

Intervention

A motion to intervene under Code of Civil Procedure section 387(a) is "untimely" when it is filed after a settlement has been reached. *Noya v. A.W. Coulter Trucking* (2006) 143 Cal.App.4th 838.

A delay in moving to intervene can defeat the right to intervention when prejudice to the parties is shown. *Noya v. A.W. Coulter Trucking* (2006) 143 Cal.App.4th 838.

Judgment on the Pleadings

A court must review documents attached to pleadings to determine if the pleadings state facts sufficient to support a cause of action. *Camacho v. Automobile Club of S. Cal.* (2006) 142 Cal.App.4th 1394.

Judgment Satisfaction

A judgment is satisfied as soon as defendant deposited the funds into class counsel's trust account, not when the class members actually received payment. *Bell v. Farmers Insurance Exchange* (2006) 137 Cal.App.4th 835.

Judicial Estoppel

Judicial estoppel prohibits a party from taking inconsistent positions in the same or different judicial proceedings, especially where the party against whom the doctrine is asserted prevailed when initially asserting a totally inconsistent position. *State of California v. Underwriters at Lloyd's of London* (2006) ___ Cal.App.4th ___, 07 C.D.O.S. 17. (Unpublished portion of decision.)

Loss-Payable Clause

Loss-payable clause is a condition of coverage and cannot be read to either expand or limit coverage. *CDM Investors v. Travelers Casualty and Surety Co.* (2006) 139 Cal.App.4th 1251.

Medical Liens

Medical providers have an affirmative duty to demonstrate that they are licensed and accredited before being allowed medical liens under workers' compensation laws. *Zenith Insurance Co. v. Workers' Compensation Appeals Board* (2006) 138 Cal.App.4th 373.

Workers' Compensation Appeals Board allowed medical liens submitted by providers Beach Cities and Pain Intervention Therapy of San Diego even though they had not demonstrated that they were licensed and accredited facilities. The California Court of Appeal held that before collecting their liens, the providers had an affirmative duty to demonstrate that they were licensed and accredited facilities. Therefore, the court remanded the action for further proceedings. *Zenith Insurance Co. v. Workers' Compensation Appeals Board* (2006) 138 Cal.App.4th 373.

Misrepresentation

A company's gross misrepresentations of its financial condition when applying for primary and excess directors and officers (D&O) liability insurance is material to the acceptance of the risk as a matter of law. *TIG Insurance Company of Michigan v. Homestore, Inc.* (2006) 137 Cal.App.4th 749.

Allegations of unfair business practices do not, by themselves, state facts sufficient to support a cause of action for misrepresentation and justifiable reliance. *Camacho v. Automobile Club of S. Cal.* (2006) 142 Cal.App.4th 1394.

Multiple Recoveries

California law is reluctant to allow an insured to obtain a double recovery based on its insurance contracts. *Pan Pacific Retail Properties, Inc. v. Gulf Insurance Company* (9th Cir. 2006) 466 F.3d 867.

Noerr-Pennington Doctrine

An insurer's activities encompassed in its petition the Workers' Compensation Appeals Board constitute protected activity under the Noerr-Pennington doctrine which provides general immunity from antitrust liability for those who petition the government for redress. *Premier Medical Management Systems, Inc. v. California Insurance Guarantee Association* (2006) 136 Cal.App.4th 464.

Northridge Earthquake

The voluntary withdrawal by an insured of a claim for damages arising from Northridge earthquake precluded a later action by the insured for breach of contract and breach of the implied covenant of good faith and fair dealing. *1231 Euclid Homeowners Assoc. v. State Farm Fire & Cas. Co.* (2006) 135 Cal.App.4th 1008.

The voluntary withdrawal by an insured of a damage claim has the same legal consequence as the failure to file any claim at all or, after filing the claim, the failure or refusal to provide to the insurer the information necessary to adjust the claim. *1231 Euclid Homeowners Assoc. v. State Farm Fire & Cas. Co.* (2006) 135 Cal.App.4th 1008.

Where the insured and insurer had resolved claim for damages arising out of Northridge Earthquake, California Code of Civil Procedure Section 340.9 cannot be used to revive the claim. *1231 Euclid Homeowners Assoc. v. State Farm Fire & Cas. Co.* (2006) 135 Cal.App.4th 1008.

An eight year delay in filing lawsuit for damages for alleged breach of insurer's obligation to adjust claim for damages arising from Northridge earthquake, following the voluntary withdrawal of claim by insured, results in substantial prejudice to insurer sufficient to bar claims for breach of contract and breach of the implied covenant of good faith and fair dealing. *1231 Euclid Homeowners Assoc. v. State Farm Fire & Cas. Co.* (2006) 135 Cal.App.4th 1008.

The one-year revival period for insurance claims arising out of the Northridge earthquake set forth in Code of Civil Procedure Section 340.9 can be tolled by the insurer's agreement to reopen and reinvestigate the claim. *Ashou v. Liberty Mutual Fire Insurance Company* (2006) 138 Cal.App.4th 748.

Offset

California law states that an insurer may offset its contractual obligation to pay the insured against any previous payments made by other parties that have already compensated the insured for its loss. *Pan Pacific Retail Properties, Inc. v. Gulf Insurance Company* (9th Cir. 2006) 466 F.3d 867.

California case law states that an insurer may offset its contractual obligation to pay the insured against any previous payments made by other parties that have already compensated the insured for its loss. *Pan Pacific Retail Properties, Inc. v. Gulf Insurance Company* (9th Cir. 2006) 466 F.3d 867.

Prejudgment Interest

Interest rate applicable to breach of statutory obligation is seven percent per annum under Cal. Const., art. XV, § 1 not 10 percent, applicable to contractual breaches, under Civ. Code § 3289(b). *Ohio Cas. Ins. Co. v. Garamendi* (2006) 137 Cal.App.4th 64.

Although the general rule is against awarding prejudgment interest for an unliquidated claim, a trial court has discretion under Civil Code § 3287 to award prejudgment interest where factors such as unreasonable delay and principles of equity and fairness warrant it. *Wilson v. 21st Century Insurance Company* (2006) ___ Cal.App.4th ___. Not citable. Review granted.

Prejudgment interest on obligation to pay fines, assessments and penalties under Insurance Code accrues when assessment and fines are imposed not when Insurance Commissioner issues formal order directing payment. *Ohio Cas. Ins. Co. v. Garamendi* (2006) 137 Cal.App.4th 64.

Primary Rights

The duty to defend and the implied covenant are the same primary right and cannot be split into two separate actions for damages. *Lincoln Property Company, N.C., Inc. v. Travelers Indemnity Company* (2006) 137 Cal.App.4th 905.

Property Damage

Pursuant to *FMC Corp. v. Plaisted & Companies* (1998) 61 Cal.App.4th 1132, 1142, environmental contamination is property damage and amounts an insured is required to pay to reimburse a government agency or to comply with government orders under CERCLA and similar statutes following the release of hazardous substances are sums the insured is legally obligated to pay because of liability for property damage. *CDM Investors v. Travelers Casualty and Surety Co.* (2006) 139 Cal.App.4th 1251.

Public Policy

Restitutionary relief is not insurable as a matter of California public policy. *Pan Pacific Retail Properties, Inc. v. Gulf Insurance Company* (9th Cir. 2006) 466 F.3d 867.

Punitive Damages

A comparison between punitive damages and civil sanctions involves a question of law. Accordingly, a court is not required to instruct a jury regarding comparable civil sanctions when giving instructions on punitive damages. Moreover, a court is not required to allow evidence regarding comparable civil sanctions in a punitive damages phase of a jury trial. *Century Surety Company v. Polisso et al.* (2006) 139 Cal.App.4th 922.

A court may instruct a jury to consider a party's financial condition when determining an amount for punitive damages against that party. *Century Surety Company v. Polisso et al.* (2006) 139 Cal.App.4th 922.

Evidence regarding a party's net worth may be used to help establish a floor for punitive damages against that party. *Century Surety Company v. Polisso et al.* (2006) 139 Cal.App.4th 922.

Punitive damages against an insurance company are not unconstitutionally excessive where the insurance company engages in a course of intentional and malicious conduct over a five year period that leads to economic, emotional, and physical harm; the ratio of punitive to compensatory damages is 3.2 to 1; and the punitive damages constitute only 3.1% of the insurer's net worth. *Century Surety Company v. Polisso et al.* (2006) 139 Cal.App.4th 922.

The failure to thoroughly investigate and evaluate a claim is not, in and of itself, sufficient to support a claim for punitive damages. *Wilson v. 21st Century Insurance Company* (2006) ___ Cal.App.4th ___. Not citable. Review granted.

Regulatory Estoppel

Regulatory estoppel has not been considered by a published California decision, but its validity as a general principle of law is questionable. *State of California v. Underwriters at Lloyd's of London* (2006) ___ Cal.App.4th ___, 07 C.D.O.S. 17. (Unpublished portion of decision.)

Regulatory estoppel cannot be based on generic drafting history, but requires a showing of representations relied on by regulators in forum state. *State of California v. Underwriters at Lloyd's of London* (2006) ___ Cal.App.4th ___, 07 C.D.O.S. 17. (Unpublished portion of decision.)

Reimbursement of Defense Costs

To recover defense costs and expenses as element of loss under D&O policy, insured must show that the expenses at issue were related to claims that actually fell within the basic scope of coverage. *Pan Pacific Retail Properties, Inc. v. Gulf Insurance Company* (9th Cir. 2006) 466 F.3d 867.

As a general rule, if a lawsuit only seeks damages that are uninsurable under the policy, then the insurer is not obligated to reimburse any defense costs spent defending these claims, even if the claims are eventually determined to be meritless. *Pan Pacific Retail Properties, Inc. v. Gulf Insurance Company* (9th Cir. 2006) 466 F.3d 867.

Res Judicata

A claim for the breach of the duty to defend and a breach of the implied covenant of good faith and fair dealing are based on the same primary right. As such, where a duty to defend claim is litigated to judgment, a subsequent bad faith claim is barred under the doctrine of *res judicata*. *Lincoln Property Company, N.C., Inc. v. Travelers Indemnity Company* (2006) 137 Cal.App.4th 905.

Rescission

A Directors and Officers ("D&O") policy is subject to rescission pursuant to Insurance Code Section 331 where insured knew of material misrepresentations in application and where policy states: "[I]n the event that the Application, including materials submitted therewith, contains misrepresentations made with the actual intent to deceive, or contain misrepresentations which materially affect either the acceptance of the risk or the hazard assumed by the Insurer under this Policy, no coverage shall be afforded under this Policy[.]" *TIG Insurance Company of Michigan v. Homestore, Inc.* (2006) 137 Cal.App.4th 749.

A request for payment under an insurance policy is inconsistent with a claim for rescission damages. *Akin v. Certain Underwriters at Lloyd's of London* (2006) 140 Cal.App.4th 291.

Either party to insurance contract may rescind on basis of other party's negligent innocent material misrepresentation or concealment. Ins. Code §§ 331 (concealment) and 359 (misrepresentation). *Philadelphia Indemnity Ins. Co. v. Montes-Harris* (2006) 40 Cal. 4th 151.

Where insurer has rescinded policy in conformity with Ins. Code § 650 insurer can generally avoid liability to insured or party injured by insured. *Philadelphia Indemnity Ins. Co. v. Montes-Harris* (2006) 40 Cal. 4th 151.

An insurer's right to rescind a policy does not "take[] away or limit[] coverage reasonably expected by the insured" and therefore does not trigger the requirements for a "conspicuous, plain and clear" statement. *TIG Insurance Company of Michigan v. Homestore, Inc.* (2006) 137 Cal.App.4th 749.

An action for rescission is based on the disaffirmance of the contract, whereas an action for breach of contract is based on the affirmance. Accordingly, the remedies sought pursuant to these two claims are inconsistent, and the election of one theory bars recovery under the other. *Akin v. Certain Underwriters at Lloyd's of London* (2006) 140 Cal.App.4th 291.

Restitution

California case law and public policy precludes indemnification and reimbursement of claims that seek the restitution of an ill-gotten gain. However, to the extent an insured is sued for both the restitution of an ill-gotten gain and other damages as well, indemnification and reimbursement for those other damages are not precluded. *Unified Western Grocers, Inc., et. al. v. Twin City Fire Insurance Company* (9th Cir. 2006) 457 F.3d 1106.

Right v. Duty

A policy provision that states an insurer "may enforce" subrogation rights of the insured is not an enforceable duty under the policy, but rather a right belonging to the insurer. Hence, an insurer cannot be liable for breach of contract or breach of the covenant of good faith and fair dealing for failing to diligently pursue such rights. *Tilbury Constructors, Inc. v. State Compensation Insurance Fund* (2006) 137 Cal.App.4th 466.

Settlement

Error for court to determine that settlement was only for restitutionary amounts, when conflicting evidence, including declarations submitted by attorneys for insureds that participated in settlement negotiations, suggested that settlement could have been for insurable "exposures or claims." *Pan Pacific Retail Properties, Inc. v. Gulf Insurance Company* (9th Cir. 2006) 466 F.3d 867.

Even when an insurance carrier has denied a defense, and the insured enters a settlement without the insurer's consent, in a subsequent suit asserting the insured's rights the insurer may still challenge the reasonableness of the insured's settlement, and may present evidence to rebut the presumption that the settlement reflected insured's actual amount of liability. *Noya v. A.W. Coulter Trucking* (2006) 143 Cal.App.4th 838.

Standing

Homeowner' association may have cause of action against developer for damage to common areas even if it was not in existence at time of construction. *Standard Fire Ins. Co. v. Spectrum Community Assn.* (2006) 141 Cal.App.4th 1117.

In a subrogation action, an insurer does not have standing to sue for sums beyond what it paid its insured, and thus cannot seek to recover the insured's deductible. *Pacific Gas & Electric Co. v. Superior Court (American Guarantee And Liability Ins. Co.)* (2006) 144 Cal.App.4th 19

Statutory Interpretation

Published materials or periodicals are irrelevant to the construction of statutes enacted by voter initiative absent evidence that the electorate was aware of statements made in the publications

before the election. *Farmers Insurance Exchange v. Superior Court (Ryan)* (2006) 137 Cal.App.4th 842.

Construction of statutes within FAIR Plan statutory scheme, Ins. Code. § 10091, et seq., must be construed in context of the entire statutory framework, the policies and purposes of the statutes and, where possible, the language of the statutes should be read so as to conform to the spirit of the enactment. *Ohio Cas. Ins. Co. v. Garamendi* (2006) 137 Cal.App.4th 64.

Where uncertainty regarding the meaning of a statute exists the court should look to the consequences that would flow from the proferred interpretation. Where interpretation of FAIR Plan statutes would result in destabilization of insurance market it should be rejected. *Ohio Cas. Ins. Co. v. Garamendi* (2006) 137 Cal.App.4th 64.

Administrative interpretation cannot alter a statutory scheme and, to the extent that FAIR Plan of Operation could be read to do so, it was void. *Ohio Cas. Ins. Co. v. Garamendi* (2006) 137 Cal.App.4th 64.

Legislative history and statements of legislative intent have little relevance where the statute is clearly inapplicable on its face. *California State Automobile Association Inter-Insurance Bureau v. Workers' Compensation Appeals Board et. al.* (*Jessel*) (2006) 142 Cal.App.4th 356.

Courts are not prohibited from determining whether the literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute. The meaning of a statute may not be determined from a single word or sentence; rather, the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible. *State of California ex rel. Nee v. Unumprovident Corp*. (2006) 140 Cal.App.4th 2006 442.

An administrative agency's view of a statute is not controlling, since (1) the courts must independently judge the text of the statute; (2) where the agency does not have a long-standing interpretation of the statute and has not adopted a formal regulation interpreting the statute, the courts may simply disregard the opinion offered by the agency; and (3) an administrative agency such as the Department of Insurance does not have the authority to "alter or amend" a statute, or "enlarge or impair its scope." *State of California ex rel. Nee v. Unumprovident Corp*. (2006) 140 Cal.App.4th 2006 442.

Although a court must independently evaluate the meaning of a statute, "great weight and respect" must be given to an administrative construction made by an agency charged with administering the statute and, accordingly, where Insurance Commissioner gives a thorough consideration, employs valid reasoning, and interprets a statute consistent with prior and subsequent pronouncements, appellate court's review is to determine whether the determination is unreasonable or conflicts with the legislative intent. *Ohio Cas. Ins. Co. v. Garamendi* (2006) 137 Cal.App.4th 64.

An insurer's right to petition the Workers' Compensation Appeals Board constitutes protected activity for purposes of a special motion to strike under the anti-SLAPP law, CCP section

425.16. *Premier Medical Management Systems, Inc. v. California Insurance Guarantee Association* (2006) 136 Cal.App.4th 464.

Subrogation

A policy provision that states an insurer "may enforce" subrogation rights of the insured is not an enforceable duty under the policy, but rather a right belonging to the insurer. Hence, an insurer cannot be liable for breach of contract or breach of the covenant of good faith and fair dealing for failing to diligently pursue such rights. *Tilbury Constructors, Inc. v. State Compensation Insurance Fund* (2006) 137 Cal.App.4th 466.

In a subrogation action, an insurer does not have standing to sue for sums beyond what it paid its insured, and thus cannot seek to recover the insured's deductible. *Pacific Gas & Electric Co. v. Superior Court (American Guarantee And Liability Ins. Co.)* (2006) 144 Cal.App.4th 19.

Subsequent Purchases

Whether there was an occurrence under the applicable policy period is based not upon who suffered damage, but on the fact of damages allegedly occurring at least in part during the policy period. *Standard Fire Ins. Co. v. Spectrum Community Assn.* (2006) 141 Cal.App.4th 1117.

Summary Judgment

The Second Appellate District cited *Waller v. Truck Ins. Exch.* (1995) 11 Cal.4th 1, 36 and *Love v. Fire Ins. Exch.* (1990) 221 Cal.App.3d 1136, 1151, and held that insurer State Farm satisfied its initial summary judgment burden of establishing it did not breach the insurance policy, and absent evidence from the insured creating a triable issue of material fact, the bad faith cause of action must also fail. *Lincoln Fountain Villas Homeowners Association v. State Farm Fire & Casualty Insurance Company* (2006) 136 Cal.App.4th 999.

Trade Secret

The role a computer software program, such as Colossus, plays in the claims handling practices of an insurer is relevant and may be discoverable subject to other reasons for non-production, such as privilege or trade secret protection. *Wilson v. 21st Century Insurance Company* (2006) ___ Cal.App.4th ___. Not citable. Review granted.

Trigger of Coverage

Whether there was an occurrence under the applicable policy period is based not upon who suffered damage, but on the fact of damages allegedly occurring at least in part during the policy period. *Standard Fire Ins. Co. v. Spectrum Community Assn.* (2006) 141 Cal.App.4th 1117.

Under an occurrence-based liability policy, potential for coverage may exist even where claimant does not assert claim until after policy period has ended, provided property damage allegedly occurred at least in part during policy period. *Standard Fire Ins. Co. v. Spectrum Community Assn.* (2006) 141 Cal.App.4th 1117.

The critical question for determining if coverage is triggered under an occurrence-based liability policy is when the property damage occurred, not when the claimant comes into existence. *Standard Fire Ins. Co. v. Spectrum Community Assn.* (2006) 141 Cal.App.4th 1117.

Whether there was an occurrence under the applicable policy period is based not upon who suffered damage, but on the fact of damages allegedly occurring at least in part during the policy period. *Standard Fire Ins. Co. v. Spectrum Community Assn.* (2006) 141 Cal.App.4th 1117.

Unauthorized Practice of Law

Fostering collection of debt, is not the practice of law where no documents were drafted for the client and no in court representations were made. *Camacho v. Automobile Club of S. Cal.* (2006) 142 Cal.App.4th 1394.

Uninsured/Underinsured Motorist Coverage

When proper adjustment of a claim turns on medical evaluation of the insured's condition the insurer may breach its duty to thoroughly investigate if it fails to have the insured examined by a doctor of its choice or consult with the insured's treating physician. *Wilson v. 21st Century Insurance Company* (2006) ___ Cal.App.4th ___. Not citable. Review granted.

There is no per *se* requirement that an insurer consult with a personal injury attorney in evaluating a UIM claim; many claims adjusters are well-qualified to make the evaluation but the litigation value must be considered and in some cases consultation with counsel is required in order for the insurer to discharge its duty to perform a complete review of the claim. *Wilson v. 21st Century Insurance Company* (2006) ___ Cal.App.4th ___. Not citable. Review granted.

Under Ins. Code section 11580.2(e) the amount paid under the insured's medical payments coverage may be offset against the damages the insured would be entitled to recover from the other driver, not necessarily the limits of the UIM coverage. *Wilson v. 21st Century Insurance Company* (2006) ___ Cal.App.4th ___. Not citable. Review granted.

The Fourth District Court of Appeal upheld the trial court's order sustaining a demurrer that plaintiff was required to submit his underinsured motorist ("UIM") claim to arbitration despite having previously obtained judgment in an underlying action against the driver who caused plaintiff's injuries. The Court of Appeal found arbitration was the proper forum to determine the plaintiff's rights to UIM benefits under the terms of his policy. *O'Hanesian v. State Farm Mutual Automobile Insurance Company* (2006) 145 Cal.App.4th 1305.

Voluntary Payments

Condo associations that voluntarily enter into contracts with contractors to construct, repair, remodel, or reconstruct and then refuse to pay those contractors cannot thereafter seek coverage for the contractor's third-party claim under the directors & officers liability provisions for wrongful acts because the dispute is contractual, and because to do so would unfairly shift the burden to the insurer and permit the association to reap a windfall. *Oak Park Calabasas Condominium Assn. v. State Farm Fire & Cas. Co.* (2006) 137 Cal.App.4th 557.

Voluntary Withdrawal of Claim

The voluntary withdrawal by an insured of a claim for damages arising from Northridge earthquake precluded a later action by the insured for breach of contract and breach of the implied covenant of good faith and fair dealing. *1231 Euclid Homeowners Assoc. v. State Farm Fire & Cas. Co.* (2006) 135 Cal.App.4th 1008.

The voluntary withdrawal by an insured of a damage claim has the same legal consequence as the failure to file any claim at all or, after filing the claim, the failure or refusal to provide to the insurer the information necessary to adjust the claim. *1231 Euclid Homeowners Assoc. v. State Farm Fire & Cas. Co.* (2006) 135 Cal.App.4th 1008.

The voluntary withdrawal by an insured of its claim terminates the insurer's obligation to investigate and adjust the claim. *1231 Euclid Homeowners Assoc. v. State Farm Fire & Cas. Co.* (2006) 135 Cal.App.4th 1008.

An eight year delay in filing lawsuit for damages for alleged breach of insurer's obligation to adjust claim for damages arising from Northridge earthquake, following the voluntary withdrawal of claim by insured, results in substantial prejudice to insurer sufficient to bar claims for breach of contract and breach of the implied covenant of good faith and fair dealing. *1231 Euclid Homeowners Assoc. v. State Farm Fire & Cas. Co.* (2006) 135 Cal.App.4th 1008.

Waiver

Estoppel must be raised in trial court and supported by evidence to be asserted on appeal. *State of California v. Underwriters at Lloyd's of London* (2006) ___ Cal.App.4th ___, 07 C.D.O.S. 17. (Unpublished portion of decision.)

An insured does not waive his right to challenge an appraisal award merely by taking possession of indemnity checks from the insurer. *Kacha v. Allstate Insurance Company* (2006) 140 Cal.App.4th 1023.

An insured does not waive the jurisdiction limits imposed on appraisals to not resolve coverage issues or interpret the policy where the insured disputes the appraiser's authority during the appraisal process. *Kacha v. Allstate Insurance Company* (2006) 140 Cal.App.4th 1023.

Withdrawal By Insurer From Market

Property insurer that withdraws from California insurance market is obligated to pay FAIR Plan assessments for two years following surrender of certificate of authority and the cessation of underwriting activity in the California market. *Ohio Cas. Ins. Co. v. Garamendi* (2006) 137 Cal.App.4th 64.

Requiring insurers withdrawing from the insurance market to satisfy their FAIR Plan obligations for the two years after they commence withdrawal is not an undue burden on the withdrawal process. *Ohio Cas. Ins. Co. v. Garamendi* (2006) 137 Cal.App.4th 64.

Withdrawal of Claims

Insurer had no coverage obligation to an insured that withdrew its claim arising out of the Northridge earthquake within a few weeks of submitting its claim in 1994. The insured's withdrawal of the claim had the same legal consequence as failing to file the claim in the first place. Such total failure excuses the insurer liability due to the failure of a condition precedent. *1231 Euclid Homeowners Assoc. v. State Farm Fire & Cas. Co.* (2006) 135 Cal.App.4th 1008.

Workers' Compensation

Painter injured on his first day of work did not qualify as a "residential employee" and was thus ineligible for workers' compensation benefits. *California State Automobile Association Inter-Insurance Bureau v. Workers' Compensation Appeals Board* (*Jessel*) (2006) 142 Cal.App.4th 356.

The criteria for "residential employees" contained in Labor Code section 3715(b) apply only if the employer is uninsured. *California State Automobile Association Inter-Insurance Bureau v. Workers' Compensation Appeals Board* (*Jessel*) (2006) 142 Cal.App.4th 356.

Labor code section 3715(b) does not provide an "alternate" definition of employee to the definitions contained in sections 3351 and 3352 where the employer has obtained workers' compensation benefits. *California State Automobile Association Inter-Insurance Bureau v. Workers' Compensation Appeals Board* (*Jessel*) (2006) 142 Cal.App.4th 356.

Workers' Compensation Appeals Board allowed medical liens submitted by providers Beach Cities and Pain Intervention Therapy of San Diego even though they had not demonstrated that they were licensed and accredited facilities. The California Court of Appeal held that before collecting their liens, the providers had an affirmative duty to demonstrate that they were licensed and accredited facilities. Therefore, the court remanded the action for further proceedings. *Zenith Insurance Co. v. Workers' Compensation Appeals Board* (2006) 138 Cal.App.4th 373.

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