GORDON & REES LLP

DEVELOPMENTS FOR 2005 CALIFORNIA CASE LAW:

INSURANCE

A summary prepared by Gordon & Rees, LLP of the holdings, organized by topic, of cases published during 2005 which apply California law to issues bearing on the rights and duties of the insurance industry.

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2005 DEVELOPMENTS IN CALIFORNIA INSURANCE CASE LAW

Abstention

District court abstention is inappropriate where the federal suit concerns a state law contract dispute that will have to be resolved under California law because adjudication of the pertinent issues of California law, including whether to defer to insurance insolvency proceedings in other states, will not entail any more federal intrusion into state policy or federal disruption of a state regulatory scheme than in any other diversity case. *Hawthorne Savings F.S.B. v. Reliance Insurance Co.* (9th Cir. 2005) 421 F.3d 835.

Accident

To trigger insuring agreement under an accident-based policy, insured must establish unforeseen or unexpected happening that occurs suddenly with the accident and damage both in the policy period. *Lockheed Corporation v. Continental Insurance Company* (2005) 134 Cal.App.4th 187.

Additional Insured

The parties provided insurance to a movie company which, pursuant to an agreement between the movie company and the owner of property where a movie was being made, named the owner as an additional insured. That agreement included a requirement that the movie company indemnify the owner for liability arising out of the condition of the premises. An employee of the movie company was injured and recovered a judgment against the owner. The primary insurers paid the judgment, which was within the policy limits, and sought contribution or reimbursement from the excess insurer on the theory that Civil Code Section 2782(a) precluded enforcement of the indemnity agreement. The court rejected that argument, stating that the excess insurer had no liability unless and until the primary coverage had been exhausted. The case did not involve a dispute about the enforceability under Section 2782(a) of an indemnity provision in a construction contract, but rather a dispute involving the enforcement of an additional insured endorsement to a liability policy. The insurance policy was an entirely separate contract, and Section 2782(a) expressly stated that it did not limit enforcement of insurance contracts. *American Casualty Company Of Reading, PA v. General Star Indemnity Company* (2005) 125 Cal.App.4th 1510.

Advertising Injury

A plaintiff's allegations that a former franchisee/affiliate announced to plaintiff's customers and employees that he was starting a new company, and requested the customers' and employees' continued patronage, do not constitute covered "advertising injury" under a liability policy because personal customer "solicitation" did not constitute widespread promotional activities directed to the public at large. *Rombe Corporation v. Allied Insurance Company* (2005) 128 Cal.App.4th 482.

Allegations of wrongful solicitation of customers do not constitute "advertising injury" for purposes of personal liability coverage. *Hayward, et al. v. Centennial Insurance Co.* (9th Cir. 2005) 430 F.3d 989.

Advice of Counsel

An insurance company which seeks legal opinions from counsel, which are found to be untenable or indefensible, will not automatically be exempt from acting in reckless disregard of an insured's rights. *Reynolds v. Hartford Financial Services Group, Inc.* (9th Cir. 2005) 435 F.3d 1081.

Agency

An insurance broker may be an insurer's representative for purposes of California Code of Civil Procedure Section 340.9 where the insurance policy invited its insureds to report losses to brokers and the insurer's contractual agreement with brokers instructed them to forward loss claims to the insurer. Moreover, the legislature's use of the term "representative" in the revival statute manifested an intent for that term to have a different and broader meaning than the term "agent." *Arocho v. California Fair Plan Insurance Company* (2005) 134 Cal.App.4th 461.

Insurer owes a duty of due care to a third party even if the third party in not named on the policy or has no contact with the insurer if the third party is an intended beneficiary of the policy. *Business to Business Markets, Inc. v. Zurich Specialties, et. al.* (2005) 135 Cal.App.4th 165.

Annuities

Single-premium annuity may qualify for bankruptcy exemption as life insurance under California state law if primary purpose is insurance and not investment. *Estate of Short v. Payne (In re Payne)* (2005) 323 B. R. 723.

Appeals

Courts of Appeal have refused to dismiss appeals on the ground the appellate court might ultimately determine the appellant did not have standing to assert its claims in the trial court. An appellate court has jurisdiction to determine whether a party has standing in superior court to pursue a cause of action. *United Investors Life Ins. Co. v. Waddell & Reed, Inc.* (2005) 125 Cal.App.4th 1300.

A life insurance company whose state unfair competition claim was dismissed had standing to appeal the dismissal notwithstanding changes to Business and Professions Code section 17200 et seq. effected by the passing of Proposition 64 and enacted after the filing of the appeal. *United Investors Life Ins. Co. v. Waddell & Reed, Inc.* (2005) 125 Cal.App.4th 1300.

Where minute order granting summary judgment contained the words "IT IS SO ORDERED," separate judgment requirement of Federal Rule of Civil Procedure 58(a)(1) was deemed satisfied such that appeal filed within 150 days after entry of minute order on district court's docket was timely. *Ford v. MCI Communications Corporation Health and Welfare Plan, et al.* (9th Cir. 2005) 399 F.3d 1076.

When it is clear from the evidence that the objector knew he was obliged to produce the documents to plaintiff's lawyers, his repeated failures to do so were sanctionable, and when the procedure for filing a peremptory challenge to a judge, commissioner or referee are not followed, they must be dismissed, except in extraordinary circumstances. *Sears, Roebuck and Co. v. National Union Fire Insurance Co. of Pittsburgh* (2005) 131 Cal.App.4th 1342.

Arbitration Clause

A disability policy's provision that mandated arbitration of all disability claims, and which provided that the arbitration costs would be split equally among the parties, did not conflict with, and was not ambiguous in light of, the policy's "Service-of-Suit" clause, which provided that the insurer would submit to the jurisdiction of an appropriate United States court in the event of coverage litigation. The arbitration clause took precedence over the "Service-of-Suit" clause because it provided that it applied "notwithstanding any other item set forth herein," and was not unenforceable simply because it required the insured to pay arbitration costs and fees. *Boghos v. Certain Underwriters at Lloyd's of London* (2005) 36 Cal.4th 495.

Health care service plan contracts with binding arbitration clauses for dispute resolution are constitutional and do not violate the right to jury trial. *Viola v. Dept. of Managed Health Care* (2005) 133 Cal.App.4th 299.

An arbitration provision in an health plan enrollment form is unenforceable if it does not comply with sections 1363.1(b) and 1363.1(d) of the Health and Safety Code. Under section 1363.1(b), the arbitration provision must be "prominent," which means "readily noticeable." An arbitration provision that is of the same font and type as the rest of the text is not "prominent." Under section 1363.1(d), the arbitration provision must appear "immediately before" the signature line. Thus, an arbitration provision that does not appear before the signature line "without any intervening language," is unenforceable. *Robertson v. Health Net of California, Inc.* (2005) 132 Cal.App.4th 1419.

Attorney-Client Communications

An insurance company which seeks legal opinions from counsel, which are found to be untenable or indefensible, will not automatically be exempt from acting in reckless disregard of an insured's rights. *Reynolds v. Hartford* (9th Cir. 2005) 426 F.3d 1020.

An insurer is in reckless disregard of an insured's rights, and thus statutorily violates the Fair Credit and Reporting Act, when it relies on implausible legal opinions from counsel. *Reynolds v. Hartford* (9th Cir. 2005) 426 F.3d 1020.

Attorneys' Fees

Attorneys' fees awarded under 42 U.S.C. § 1988 are appropriate even if the award contains an unaddressed fee supporting claim as long as it is both substantial and arises from a common nucleus of operative fact. *Gerling Global Reinsurance Corporation of America v. Garamendi* (9th Cir. 2005) 400 F.3d 803.

In order to qualify as a prevailing party for purposes of an attorneys' fee award, a civil rights plaintiff must obtain at least some relief on the merits of the claim. The plaintiff must obtain an enforceable judgment against the defendant from whom the fees are sought, or comparable relief through a consent decree or settlement. *Gerling Global Reinsurance Corporation of America v. Garamendi* (9th Cir. 2005) 400 F.3d 803.

A plaintiff prevails on a claim for attorneys' fees when actual relief on the merits of the claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff. *Gerling Global Reinsurance Corporation of America v. Garamendi* (9th Cir. 2005) 400 F.3d 803.

The United States Supreme Court held that in determining whether a pendant constitutional claim can support an award of attorneys' fees, a court must decide if the claim for the fees meets the "substantiality test". If so, attorneys' fees may be allowed even though a court may decline to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim which arises from a "common nucleus of operative fact." *Gerling Global Reinsurance Corporation of America v. Garamendi* (9th Cir. 2005) 400 F.3d 803.

Automobile Insurance

The California Supreme Court withdrew from publication a decision by the California Court of Appeal holding that, pursuant to California Insurance Code section 11580.9(g), a Personal Umbrella Insurer was obligated to contribute to the costs of defense of an automobile accident case where the settlement exceeded the primary policy limits and the Umbrella Insurer had also contributed its policy limits to the settlement. *Mercury Insurance Company v. Allstate Insurance Company* (2004) 123 Cal.App.4th 1392, *ordered not published (2005), not citable*.

Proposition 103, the Insurance Rate Reduction and Reform Act, added provisions to the Insurance Code prescribing the factors insurers must consider in setting automobile insurance rates and premiums. The proposition permitted good driver discounts, but prohibited the "absence of prior automobile insurance coverage," in and of itself, as criteria either for determining eligibility for good driver discounts or, more generally, for rates, premiums, or insurability. *The Foundation for Taxpayer and Consumer Rights v. Garamendi* (2005) 132 Cal.App.4th 1354.

In *Barrera v. State Farm Mut. Auto Ins. Co.* (1969) 71 Cal.2d 659, the California Supreme Court held that automobile liability insurers have a duty, which inures directly to the benefit of those who may be injured by an insured, to make a reasonable investigation of insurability within a reasonable time of issuing a policy. If the insurer fails to do so, an injured party who obtains an unsatisfied judgment against the insured may recover the judgment from the insurer. Subsequent decisions have confirmed that *Barrera* is still good law as applied to automobile liability insurers in general. *Philadelphia Indemnity Ins. Co. v. Findley* (9th Cir. 2005) 395 F.3d 1046 (case withdrawn due to certification of question to California Supreme Court).

The Court of Appeal reversed the Los Angeles Superior Court's order granting summary judgment in favor of State Farm Mutual Automobile Insurance Company and Commercial

Underwriters Insurance Company, finding the operator of a cherry picker was not an insured and therefore an exclusion for bodily injury to an insured was not applicable. *Scottsdale Ins. Co. v. State Farm Mut. Auto. Ins. Co*. (2005) 130 Cal.App.4th 890.

Bad Faith

An insured tendered a suit to its two insurers, Golden Eagle Insurance Corp. and Federal Insurance Co. Both insurers initially accepted the tender, but Golden Eagle subsequently withdrew from the defense. Golden Eagle and Federal fully paid the insured's defense costs and Federal fully funded the settlement. However, the insured agreed to repay defense and settlement costs to Federal, but only from funds Golden Eagle actually paid to the insured in a subsequently filed bad faith suit. The court dismissed the insured's bad faith claim because the insured lacked any compensable losses and failed to prove an assignment of Federal's contribution claims. *Emerald Bay Community Ass'n v. Golden Eagle Ins. Corp.* (2005) 130 Cal.App.4th 1078.

An insurer who paid a claim for damage to rented equipment cannot be said to have acted in bad faith in seeking subrogation from a renter reasonably believed to have caused that damage. *McKinley v. XL Specialty Insurance Company* (2005) 131 Cal.App.4th 1572.

Insurer was estopped from denying coverage for an arbitration award after counsel it appointed to defend the insured induced claimants to dismiss claims and agree to binding arbitration by promising claimants that the insurer "will have no choice but to pay if a general verdict is issued by the arbitrator." The insurer was not, however, liable for punitive damages as a result of the insured's bad faith claim because (1) promissory estoppel cannot support such an award, and (2) the insurer's denial of coverage was objectively reasonable under the unsettled nature of the law on the issue of whether the arbitration award was covered. *CalFarm Insurance Company v. Krusiewicz* (2005) 131 Cal.App.4th 273.

Code of Civil Procedure Section 340.9 conditionally revived Northridge earthquake claims for a one-year period from January 1, 2001 to December 31, 2001. The statutory revivor does not preclude application of the doctrine of equitable estoppel. *Doheny Park Terrace Homeowners Assoc. v. Truck Ins. Exchange* (2005) 132 Cal.App.4th 1076.

CIGA is immune from tort liability for the tortious conduct of an insurer. *Berger v. California Insurance Guarantee Association* (2005) 128 Cal.App.4th 989.

Delay or denial of insurance claims is not sufficiently outrageous by itself for a third-party claimant to state a cause of action for intentional infliction of emotional distress. *Coleman v. Republic Indemnity Ins. Co. of California* (2005) 132 Cal.App.4th 403.

Because a liability insurer owes no duty of good faith and fair dealing to a third-party claimant, it also owes no duty giving rise to a claim of negligent infliction of emotional distress. Coleman *v. Republic Indemnity Ins. Co. of California* (2005) 132 Cal.App.4th 403, 05.

An insurer owes no duty of good faith and fair dealing to a third-party claimant, even if the insurer coincidentally insures the third-party claimant. *Coleman v. Republic Indemnity Ins. Co. of California* (2005) 132 Cal.App.4th 403.

State laws regarding bad faith apply to all contracts and are not specifically directed to the insurance industry so as to be saved from preemption by the ERISA saver provision. Further, an employee benefits plan is not deemed to be an insurance contract subject to California's laws regulating insurance so as to be saved from preemption by the ERISA deemer provision. *Cohen v. Health Net of California, Inc.* (2005) 129 Cal.App.4th 841, *rv. granted; not citable*.

Bankruptcy

Single-premium annuity may qualify for bankruptcy exemption as life insurance under California state law if primary purpose is insurance and not investment. *Estate of Short v. Payne (In re Payne)* (2005) 323 B. R. 723.

Brandt Fees

The Court of Appeal held that an insured may assign its right, established in *Brandt v. Superior Court* (1995) 37 Cal.3d 813, to recover as damages attorney fees incurred in obtaining the benefits of an insurance policy that were denied as a result of the insurer's bad faith (i.e., Brandt fees). *Essex Insurance Co. v. Five Star Dye House, Inc.* (2004) 125 Cal.App.4th 1459, r*v. granted; not citable*.

Broker

An insurance broker may be an insurer's representative for purposes of California Code of Civil Procedure Section 340.9 where the insurance policy invited its insureds to report losses to brokers and the insurer's contractual agreement with brokers instructed them to forward loss claims to the insurer. Moreover, the legislature's use of the term "representative" in the revival statute manifested an intent for that term to have a different and broader meaning than the term "agent." *Arocho v. California Fair Plan Insurance Company* (2005) 134 Cal.App.4th 461.

Insurer owes a duty of due care to a third party even if the third party in not named on the policy or has no contact with the insurer if the third party is an intended beneficiary of the policy. *Business to Business Markets, Inc. v. Zurich Specialties, et. al.* (2005) 135 Cal.App.4th 165.

Broker Negligence

Third Eye Blind alleged that their insurance broker and business manager breached their duty to notify them of the existence of a limiting endorsement to their comprehensive general liability policy and to advise them of the need to obtain "errors and omissions" insurance to protect them from a potential gap in coverage. Third Eye Blind also alleged that the lack of errors and omissions insurance forced them to assume their own defense of a suit brought against them by a third party, incurring attorney fees and other damages. They further alleged that their insurer was responsible for their losses. The trial court found that the policy provided coverage. The court, in reversing the judgment on the pleadings, ruled that the trial court's finding of coverage did not have a preclusive effect on the claims brought against their business manager

and insurance broker for independent breaches of duty, which were properly pleaded in the alternative. Moreover, the trial court erred in denying the clients' claim for attorney fees incurred in pursuing coverage under the policy. Code of Civil Procedure Section 1021 did not prevent the clients from seeking fees as an item of damages caused by the brokers' alleged negligence. *Third Eye Blind, Inc. v. Near North Entertainment Insurance Services* (2005) 127 Cal.App.4th 1311.

Burden of Proof

To trigger insuring agreement under an accident-based policy, insured must establish unforeseen or unexpected happening that occurs suddenly with the accident and damage both in the policy period. *Lockheed Corporation v. Continental Insurance Company* (2005) 134 Cal.App.4th 187.

Business & Professions Code Section 17200 et seq.

A life insurance company whose state unfair competition claim was dismissed had standing to appeal the dismissal notwithstanding changes to Business and Professions Code section 17200 et seq. effected by the passing of Proposition 64 and enacted after the filing of the appeal. *United Investors Life Ins. Co. v. Waddell & Reed, Inc.* (2005) 125 Cal.App.4th 1300.

There is no indication whatsoever that Proposition 64 in general, or the amendments to section 17204 in particular, were intended to affect appellate court jurisdiction to address the merits of standing to assert unfair competition claims in superior court. *United Investors Life Ins. Co. v. Waddell & Reed, Inc.* (2005) 125 Cal.App.4th 1300.

Proposition 64's amendments to the unfair competition laws of Business & Professions Code §17200, requiring that a private party suffer "actual injury" to bring a lawsuit under that statute, only apply prospectively. Therefore, Proposition 64 dos not affect, and the requirement that a private party suffer "actual injury" does not apply to, lawsuits filed before Proposition 64's effective date of November 3, 2004. *Californians for Disability Rights v. Mervyn's, LLC* (2005) 126 Cal.App.4th 386, *rv. granted; not citable.*

The California Court of Appeal, Second Appellate District, held that claims against a savings and loan association for unfair competition and false advertising, brought under Business and Professions Code sections 17200 and 17500, were not preempted by federal law. *Branick v. Downey Savings and Loan Association* (2005) 126 Cal.App.4th 828, *rv. granted; not citable*.

Plaintiffs must meet the standing requirements imposed by Proposition 64 for claims under Business and Professions Code section 17200 et. seq., even if the suit was filed and pending prior to November 3, 2004, the date Proposition 64 became effective. *Thornton v. Career Training Center, Inc.* (2005) 128 Cal.App.4th 116, *rv. granted; not citable*.

In an insurance case, a 17200 claim may withstand demurrer on facts alleged other than failure to provide coverage or policy benefits, including allegations that an insurer has a practice of improperly seeking 100% recovery of money paid to its insured. *Progressive West Insurance Company v. Superior Court* (2005) 135 Cal.App.4th 263.

Where a party brought suit under former Business & Professions Code section 17200 based on brokers having allegedly received "kickbacks" from insurers and did not allege he had suffered any injury, the amendments contained in Proposition 64 operated to eliminate any cause of action allowed under the former statute which had not yet vested. The right, which was created by statute, cannot vest until final judgment and could not vest here because the action was still pending. This is to be distinguished from rights based in common law where retroactive application is generally not given unless specifically set forth in the statutory amendment. *Hartford Fire Insurance Co. v. Superior Court* (2005) 134 Cal.App.4th 649, *rv. granted; not citable*.

The California Court of Appeal found that Proposition 64, which amended the standing requirements for causes of action under Business and Professions Code sections 17200 and 17500, applied retroactively to cases that had been filed, but not finally resolved as of date of its enactment, but remand to the trial court was required to determine whether to grant uninjured plaintiffs leave to amend to name injured party to prosecute action. *Branick v. Downey Savings and Loan Association* (2005) 126 Cal.App.4th 828, *rv. granted; not citable.*

The Attorney General may not seek restitution to recover the lost property on behalf of the insolvent insurer's creditors and policyholders under the Unfair Competition Law because this is within the exclusive province of the insurance commissioner. The Attorney General may, however, pursue civil penalties and injunctive relief if it does not interfere with the insurance commissioner's jurisdiction. *State of California v. Altus Finance* (2005) 36 Cal.App.4th 1284.

Business & Professions Code Section 17500

The California Court of Appeal held that claims against a savings and loan association for unfair competition and false advertising, brought under Business and Professions Code sections 17200 and 17500, were not preempted by federal law. *Branick v. Downey Savings and Loan Association* (2005) 126 Cal.App.4th 828, *rv. granted; not citable.*

California Insurance Guarantee Association (CIGA)

Except for worker's compensation claims, the maximum liability payable by CIGA with respect to a particular policy of an insolvent insurer is $500,000. *Mirpad v. CIGA* (2005) 132 Cal.App.4th 1058.

California Insurance Guarantee Association ("CIGA") was created by the Legislature to establish a fund from which insureds could obtain financial and legal assistance if their insurers became insolvent. CIGA's authority and liability are limited to paying "covered claims." *CIGA v. Workers Compensation Appeals Board (AMIC)* (2005) 128 Cal.App.4th 307.

Insurance Code section 1063.1(c)(1) defines covered claims as the obligations of an insolvent insurer including the obligation to provide workers' compensation benefits under the workers compensation law of the state of California. *CIGA v. Workers Compensation Appeals Board (AMIC)* (2005) 128 Cal.App.4th 307.

The California Insurance Guarantee Association ("CIGA") has no liability for claims made by other insurers in contexts other than those involving workers' compensation benefits. CIGA *v. Workers Compensation Appeals Board (AMIC)* (2005) 128 Cal.App.4th 307.

CIGA is immune from tort liability for the tortious conduct of an insurer. *Berger v. California Insurance Guarantee Association* (2005) 128 Cal.App.4th 989.

CIGA may be held liable for a Northridge earthquake claim that has been revived pursuant to California Code of Civil Procedure section 340.9. *Berger v. California Insurance Guarantee Association* (2005) 128 Cal.App.4th 989.

Insurance Code section 3602(d) was drafted with the intent to avoid duplicate insurance and premium by authorizing insurance coverage solely by the general employer's policy. Thus, California Insurance Guarantee Association, which administered claims on behalf of general employer's insurer which had been ordered into liquidation, is not relieved of statutory duties in workers compensation setting simply because special employer obtained its own workers compensation insurance policy. However, section 3602(d) does not preclude the special employer from obtaining alternative insurance protection for the special employee. *General Casualty Insurance v. Workers' Compensation Appeals Board* (2005) 131 Cal.App.4th 345, *ordered not published; not citable*.

California Supreme Court orders not to be published opinion by Court of Appeal, holding that although general and special employers are jointly and severally liable for injuries sustained by a special employee, special employer insurer did not constitute duplicate insurance to relieve CIGA of statutory duties. *General Casualty Ins. v. Workers' Comp. Appeals Board* (2005) 131 Cal.App.4th 345, *ordered not published; not citable.*

Insurer has no right to submit CIGA claim against insolvent insurer even if insurer obtains contractual contribution or reimbursement rights against insolvent insurer. *California Ins. Guarantee Assn. v. Workers' Compensation Appeals Board* (2005) 128 Cal.App.4th 569.

Certification to California Supreme Court

The United States Court of Appeals for the Ninth Circuit certified the following question to the California Supreme Court: "Does the duty of an insurer to investigate the insurability of an insured, as recognized by the California Supreme Court in *Barrera v. State Farm Mut. Auto Ins. Co.*, 71 Cal.2d 659 (1969) apply to an automobile liability insurer that issues an excess liability insurance policy in the context of a rental car transaction?" The question was certified because a decision could determine the outcome of the appeal and involves a question of significant public policy importance that has not been resolved by the California appellate courts. The certification means that all further proceedings in the case are stayed pending final action by the California Supreme Court and the case is withdrawn from submission until further order of the Ninth Circuit court. *Philadelphia Indemnity Ins. Co. v. Findley* (9th Cir. 2005) 395 F.3d 1046, (case withdrawn due to certification of question to California Supreme Court).

Civil Code § 2782(a)

The parties provided insurance to a movie company which, pursuant to an agreement between the movie company and the owner of property where a movie was being made, named the owner as an additional insured. That agreement included a requirement that the movie company indemnify the owner for liability arising out of the condition of the premises. An employee of the movie company was injured and recovered a judgment against the owner. The primary insurers paid the judgment, which was within the policy limits, and sought contribution or reimbursement from the excess insurer on the theory that Civil Code Section 2782(a) precluded enforcement of the indemnity agreement. The court rejected that argument, stating that the excess insurer had no liability unless and until the primary coverage had been exhausted. The case did not involve a dispute about the enforceability under Section 2782(a) of an indemnity provision in a construction contract, but rather a dispute involving the enforcement of an additional insured endorsement to a liability policy. The insurance policy was an entirely separate contract, and Section 2782(a) expressly stated that it did not limit enforcement of insurance contracts. *American Casualty Company Of Reading, PA v. General Star Indemnity Company* (2005) 125 Cal.App.4th 1510.

Civil Code § 2810

The issuer of a performance bond remained liable under the bond even after the contractor became insolvent and was unable to perform some of the improvements. Notwithstanding that a third party purchased the remaining undeveloped property and completed the improvements on behalf of the City, the City remained entitled to make demand on the bond and to pay the bond proceeds to the purchaser to defray his costs in completing the contractor's obligations. The City suffered damages even though the work had been performed, as the City continued to have a contractual right to look to the contractor to perform its share of the deferred work despite its agreement with the purchaser and the city's damages occurred when the contractor failed to perform. Additionally, California Civil Code Section 2810, which provides that a surety has no liability if its principal is not liable, did not apply as there was no authority for the proposition that the contractor had a valid defense to liability based on the purchaser's performance of the improvements. *City of Merced v. American Motorists Insurance Company* (2005) 126 Cal.App.4th 1316.

Claim or Suit

The California Supreme Court affirmed the decision of the Second District Court of Appeal finding that an excess/umbrella insurer that agreed to cover "all sums … the Insured shall be obligated to pay by reason of the liability … imposed … by law for damages … *and expenses*" was broad enough to include coverage for environmental cleanup and response costs ordered by administrative agencies. The Court concluded that the at-issue insuring agreements extended coverage beyond money "damages" ordered as a result of a suit because they incorporated the word "expenses" as well as the term "ultimate net loss" which was defined to include reference to "claims" in addition to "suits." *Powerine Oil Company, Inc. v. Superior Court* (2005) 37 Cal.4th 377.

No duty to defend Administrative Proceedings under policy language extending defense duty to "any suit or action." *Lockheed Corporation v. Continental Insurance Company* (2005) 134 Cal.App.4th 187.

Claims Made

California's traditional common law of contracts regarding forfeitures and condition precedents may operate to excuse the non-occurrence of a condition where non-occurrence works a forfeiture. In this case, non-compliance with the reporting requirement in a "claims made and reported" policy was excused because (1) the claim was made very late in the policy period, (2) the insured learned of the claim during the policy period, but under "highly ambiguous circumstances," (3) the insured immediately reported the claim as soon as he confirmed it, which was just two days after the policy expired, *and* (4) the insured was not given the opportunity to purchase an extended reporting period endorsement. *Root v. American Equity Specialty Insurance Company* (2005) 130 Cal.App.4th 926.

Code of Civil Procedure § 170.3(b)(4)

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

Code of Civil Procedure § 170.6

The California Supreme Court reversed a California Court of Appeal's decision which had overturned a trial court's order striking a peremptory challenge filed by an excess insurer on the ground that a previous challenge had been filed by a primary insurer and the two insurers were on the "same side." The Court held that the interests of primary and excess insurers are not necessarily adverse so as to place them on different "sides" of an action for purposes of a peremptory challenge under California Code of Civil Procedure Section 170.6 ("Section 170.6"). Only one such challenge is available "per side." *Home Ins. Co. v. Superior Court (Montrose Chemical)* (2005) 101 Cal.App.4th 1025.

Code of Civil Procedure § 337

Statute of limitations under Code of Civil Procedure Section 337 on an insured's claim for breach of the duty to defend accrues when the insurer refuses to defend, and is tolled until the underlying action is terminated by a final judgment. *Eaton Hydraulics, Inc. v. Continental Casualty Company* (2005) 132 Cal.App.4th 966.

Code of Civil Procedure § 340.9

The extended limitations period contained in Code of Civil Procedure Section 340.9 for Northridge Earthquake lawsuits did not revive a homeowner's lawsuit against her insurer arising out of that earthquake because, pursuant to Section 340.9(d)(2), plaintiff had entered into a prior

settlement and general release of her earthquake claims while represented by counsel. *Israel-Curley vs. California FAIR Plan* (2005) 126 Cal.App.4th 123.

Code of Civil Procedure Section 340.9 conditionally revived Northridge earthquake claims for a one-year period from January 1, 2001 to December 31, 2001. The statutory revivor does not preclude application of the doctrine of equitable estoppel. *Doheny Park Terrace Homeowners Assoc. v. Truck Ins. Exchange* (2005) 132 Cal.App.4th 1076.

The imposition of punitive damages under Code of Civil Procedure Section 340.9, which revives certain previously time-barred insurance claims, does not violate the federal Constitution's prohibition of ex post facto laws. The ex post facto clause only prohibits ex post facto penal legislation. The California state legislature intended to establish civil, not penal, proceedings in enacting Section 340.9. And, the statute is not so punitive in effect so as to outweigh the legislature's intent to establish civil proceedings. *21st Century Ins. Co. v. Superior Court (Schwartz)* (2005) 127 Cal.App.4th 1351.

The doctrines of equitable tolling and equitable estoppel are distinct. Equitable estoppel comes into play only after the limitations period has run. Equitable tolling extends the statute of limitations. *Cordova v. 21st Century Insurance Company* (2005) 129 Cal.App.4th 89.

Code of Civil Procedure Section 340.9 conditionally revived Northridge earthquake claims for a one-year period from January 1, 2001 to December 31, 2001. The statutory revivor does not preclude application of the doctrine of equitable estoppel. *Doheny Park Terrace Homeowners Assoc. v. Truck Ins. Exchange* (2005) 132 Cal.App.4th 1076.

An insurance broker may be an insurer's representative for purposes of California Code of Civil Procedure Section 340.9 where the insurance policy invited its insureds to report losses to brokers and the insurer's contractual agreement with brokers instructed them to forward loss claims to the insurer. Moreover, the legislature's use of the term "representative" in the revival statute manifested an intent for that term to have a different and broader meaning than the term "agent." *Arocho v. California Fair Plan Insurance Company* (2005) 134 Cal.App.4th 461.

CIGA may be held liable for a Northridge earthquake claim that has been revived pursuant to California Code of Civil Procedure section 340.9. *Berger v. California Insurance Guarantee Association* (2005) 128 Cal.App.4th 989.

Code of Civil Procedure § 437c

The court has the discretion to decide a motion for summary judgment adversely to a party who fails to comply with filing an adequate separate statement of undisputed material facts. However, even if there are procedural deficiencies, to the extent an opposing party clearly indicates which proposed undisputed material facts it disputes and provides references to supporting evidence, the proper response by the court is to allow for an amendment of the pleading. Granting the motion without considering the opposing party's evidence is an abuse of discretion. *Parkview Villas Association, Inc. v. State Farm Fire and Casualty Co.* (2005) 133 Cal.App.4th 1197.

Code of Civil Procedure § 664.6

When terms of settlement agreement are put on the record after mandatory settlement conference, the lack of objection to the settlement agreement by the carrier's attorneys and adjusters satisfies the requirements of California Code of Civil Procedure § 664.6 which permits the court to enter a judgment pursuant to the terms of the settlement. *Fiege v. Cooke* (2005) 125 Cal.App.4th 1350.

Code of Civil Procedure § 877.6

Absent a judicial good faith determination, pre-trial allocations contained in settlement agreements are not binding on the court for purposes of determining the amount of post-trial offsets. *Jones v. John Crane* (2005) 132 Cal.App.4th 990.

Code of Civil Procedure § 998

A passenger injured in a helicopter crash filed an action against the pilot and the pilot's employer. After the passenger recovered a judgment in excess of the offer rejected by the pilot, the trial court awarded the passenger fees, costs and interest against the pilot. The Pilot appealed. The court found that Code of Civil Procedure Section 998 does not require a plaintiff to make a global settlement offer to all defendants, and that the interests of the other defendant and the insurer of both parties did not affect the passenger's right to recover. The court explained that notwithstanding that Section 998 contains no express good faith or reasonable offer component, the legislature intended that only good faith settlement offers qualify as valid offers, and to qualify as a good faith offer, the offer must be reasonable under the circumstances and must carry with it some reasonable prospect of acceptance; reasonableness depends upon the information available to the parties. The fact that the passenger's settlement offer to one defendant did not relieve the other defendants of liability or that the defendant's employer might remain liable based on a theory of respondeat superior did not bar the passenger's recovery under Section 998. The court confirmed Section 998 provides for service of a pretrial settlement offer to a party, not to a party's insurer; service of a settlement offer on a party's insurer is not valid. A plaintiff making a Section 998 settlement offer cannot assume that the defendant's insurer is legally obligated to compromise the action or to act as the defendant's agent for purposes of settling the action. *Arno v. Helinet Corporation, et al*. (2005) 130 Cal.App.4th 1019.

Code of Civil Procedure § 1021

Third Eye Blind alleged that their insurance broker and business manager breached their duty to notify them of the existence of a limiting endorsement to their comprehensive general liability policy and to advise them of the need to obtain "errors and omissions" insurance to protect them from a potential gap in coverage. Third Eye Blind also alleged that the lack of errors and omissions insurance forced them to assume their own defense of a suit brought against them by a third party, incurring attorney fees and other damages. They further alleged that their insurer was responsible for their losses. The trial court found that the policy provided coverage. The court, in reversing the judgment on the pleadings, ruled that the trial court's finding of coverage did not have a preclusive effect on the claims brought against their business manager and insurance broker for independent breaches of duty, which were properly pleaded in the

alternative. Moreover, the trial court erred in denying the clients' claim for attorney fees incurred in pursuing coverage under the policy. Code of Civil Procedure Section 1021 did not prevent the clients from seeking fees as an item of damages caused by the brokers' alleged negligence. *Third Eye Blind, Inc. v. Near North Entertainment Insurance Services* (2005) 127 Cal.App.4th 1311.

Code of Civil Procedure § 2017

Documents relating to a non-party insurer's financial condition including reserve and reinsurance information were not discoverable in an action against the insured-defendant. The plaintiffs sought this information in order to determine whether the insurer could meet its coverage obligations to the insured-defendant which, plaintiffs argued, would facilitate settlement discussions. The appellate court determined that the information was not relevant, admissible, or likely to lead to the discovery of admissible evidence under California Code of Civil Procedure Section 2017(a) and was not related to the "existence and contents" of the defendant's insurance which is discoverable under Section 2017(b). *Catholic Mutual Relief Society v. Superior Court* (2005) 128 Cal.App.4th 879, *rv. granted; not citable*.

Code of Regulations 2646.6

California Code of Regulations 2646.6, which requires community service statements and Record A data to be filed with the Insurance Commissioner and allows public disclosure of that information is valid and does not contain a trade secret exception to the public disclosure provision. *State Farm Mutual Automobile Insurance Company v. Garamendi* (2005) 32 Cal.4th 1420.

Comity

Comity does not require a district court to dismiss a suit where a reciprocal state under the UILA has issued a stay pending rehabilitation and liquidation. *Hawthorne Savings F.S.B. v. Reliance Insurance Co.* (9th Cir. 2005) 421 F.3d 835.

Common Fund Doctrine

The common law made-whole rule and common fund doctrine apply to limit an insurer's recovery of payments from an insured, but failure to follow the doctrines does not state a cause of action for breach of contract or breach of the implied covenant of good faith and fair dealing. *Progressive West Insurance Company v. Superior Court* (2005) 135 Cal.App.4th 263.

Conditions Precedent

California's traditional common law of contracts regarding forfeitures and condition precedents may operate to excuse the non-occurrence of a condition where non-occurrence works a forfeiture. In this case, non-compliance with the reporting requirement in a "claims made and reported" policy was excused because (1) the claim was made very late in the policy period, (2) the insured learned of the claim during the policy period, but under "highly ambiguous circumstances," (3) the insured immediately reported the claim as soon as he confirmed it, which was just two days after the policy expired, *and* (4) the insured was not given

the opportunity to purchase an extended reporting period endorsement. *Root v. American Equity Specialty Insurance Company* (2005) 130 Cal.App.4th 926.

Conflict of Interest

A disability/life insurer can simultaneously serve as the administrator of the fund as well as the funding source without any conflict of interest or breach of fiduciary duty. *Abatie v. Alta Health & Life Insurance Co.* (9th Cir. 2005) 421 F.3d 1053.

Constitutional Law: Legislative Authority

Because legislative power is practically absolute, constitutional limitations on legislative power are strictly construed and may not be given effect as against the general power of the Legislature, unless such limitations clearly inhibit the act in question. *The Foundation for Taxpayer and Consumer Rights v. Garamendi* (2005) 132 Cal.App.4th 1354.

Under the California Constitution, the Legislature is authorized to repeal or amend initiative statutes such as Proposition 103 only where the statute expressly permits amendment or repeal without the electors' approval. Although the electors expressly authorized the Legislature to amend Proposition 103, such amendments are only permitted to "further the proposition's purposes." *The Foundation for Taxpayer and Consumer Rights v. Garamendi* (2005) 132 Cal.App.4th 1354.

The constitutional limitation on the Legislature's power to amend initiative statutes is designed to protect the people's initiative powers by precluding the Legislature from undoing what the people have done, without the electorate's consent. *The Foundation for Taxpayer and Consumer Rights v. Garamendi* (2005) 132 Cal.App.4th 1354.

Statute allowing automobile insurers to grant a discount on the basis of whether an applicant was previously insured by any insurer violates Proposition 103, the Insurance Rate Reduction and Reform Act. The statute improperly divested the Insurance Commissioner of discretion to set optional rating factors regarding persistency of insurance coverage, an authority expressly vested with the Commissioner, not the Legislature, under Proposition 103. *The Foundation for Taxpayer and Consumer Rights v. Garamendi* (2005) 132 Cal.App.4th 1354.

Contract Interpretation

The Court relied on the "same meaning rule" to find that the word "person" as used in the United Pacific policy necessarily refers to a natural person, not an organization or corporate claimant. The Court of Appeal held that the word "person" as used in the context of the offense of "wrongful eviction" was supported by noting the places from which the eviction must take place are places where people live – "a room, … a dwelling; or …a premises." *Mirpad v. CIGA* (2005) 132 Cal.App.4th 1058.

The Court held the plain meaning rule of policy interpretation may be established by considering disputed language as used in the context of the entire policy to interpret the term "person" in the policy not to include a corporate tenant, in the context of whether there was

personal injury coverage for wrongful eviction of the corporate tenant. *Mirpad v. CIGA* (2005) 132 Cal.App.4th 1058.

The rules of construction require the court to determine the mutual intention of the parties. To do so, the court must decide if the contract language is clear and unambiguous. A term is only ambiguous where it is capable of two or more reasonable constructions. The term "damages" has only one ordinary meaning – monetary judgments order by a court. *County of San Diego v. Ace Property & Casualty Insurance Company, et. al.* (2005) 37 Cal.4th 406.

Defense Costs

The insured was sued by a competitor for allegedly stealing trade secrets and engaging in fraud. The insurer defended the insured under a reservation of rights, including "[t]he right to seek reimbursement of defense fees paid toward defending causes of action which raise no potential for coverage, as authorized by the California Supreme Court in *Buss v. Superior Court (Transamerica Ins. Co.)* (1997) 16 Cal.4th 35." While the third party action was pending, the insurer filed a declaratory relief action against the insured. The trial court found a potential for coverage for the underlying claims asserted against the insured. The insurer appealed, arguing that "advertising," as used in standard CGL policies covering advertising injury, was limited to "widespread promotional activities directed to the public at large" and did not include one-on-one solicitation of individual customers through a competitive bidding process for tailor-made services. The Court of Appeal disagreed and affirmed the judgment. The insurer appealed to the California Supreme Court, which remanded the case back to the Court of Appeal in light of the court's decision in *Hameid v. National Fire Ins. of Hartford* (2003) 31 Cal.4th 16, interpreting "advertising injury," to mean "widespread promotional activities usually directed to the public at large." Upon reconsideration, the Court of Appeal concluded there was no potential for coverage but that the insurer was not entitled to reimbursement because its no-potential-coverage determination "extinguished" the insurer's duty to defend only from that time forward. The California Supreme Court disagreed, concluding that "an insurer under a standard CGL policy, having properly reserved its rights, may advance sums to defend its insured against a third party lawsuit, and may thereafter recoup such costs from the insured if it is determined, as a matter of law, that no duty to defend ever arose because the third party suit never suggested the possibility of a covered claim." *Scottsdale Ins. Co. v. MV Transportation* (2005) 36 Cal. 4th 643.

Definition: "Accidental Bodily Injury"

Injury resulting from the repetitive stress of typing did not constitute an "accidental bodily injury." *Gin v. Pennsylvania Life Insurance Company* (2005) 134 Cal.App.4th 939.

Definition: "Covered Claims"

Insurance Code section 1063.1(c)(1) defines covered claims as the obligations of an insolvent insurer including the obligation to provide workers' compensation benefits under the workers compensation law of the state of California. *CIGA v. Workers Compensation Appeals Board (AMIC)* (2005) 128 Cal.App.4th 307.

Under Insurance Code section 1063.1, "covered claims" does not include claims by persons other than the original claimant under the insurance policy in his or her own name…and does not include any claims asserted by an assignee or one claiming by right of subrogation. *CIGA v. Workers Compensation Appeals Board (AMIC)* (2005) 128 Cal.App.4th 307.

Definition: "Damages"

The term "damages" limits an excess carriers' duty to indemnify to monetary judgments ordered by a court pursuant to *Powerine I. County of San Diego v. Ace Property & Casualty Insurance Company, et. al.* (2005) 37 Cal.4th 406.

The rules of construction require the court to determine the mutual intention of the parties. To do so, the court must decide if the contract language is clear and unambiguous. A term is only ambiguous where it is capable of two or more reasonable constructions. The term "damages" has only one ordinary meaning – monetary judgments order by a court. *County of San Diego v. Ace Property & Casualty Insurance Company, et. al.* (2005) 37 Cal.4th 406.

Definition: "Occurrence"

Claim for sale or transfer of real property which took place after expiration of the policy period but alleged defects which may have occurred during the policy period constitutes an "occurrence." *Davis v. Farmers Insurance Group* (2005) 134 Cal.App.4th 100.

Definition: "Ultimate Net Loss"

Where an ultimate net loss definition is not included in the insuring agreement, the term "damages" is limited to monetary judgments imposed by a court. *County of San Diego v. Ace Property & Casualty Insurance Company, et. al.* (2005) 37 Cal.4th 406.

The California Insurance Guarantee Association ("CIGA") has no liability for claims made by other insurers in contexts other than those involving workers' compensation benefits. *CIGA v. Workers Compensation Appeals Board (AMIC)* (2005) 128 Cal.App.4th 307.

Delayed Discovery

Insured homeowners association which suffered damage to its condominium complex from the 1994 Northridge earthquake had sufficient notice of damage and was required to diligently investigate for full extent of damage. Insured therefore could not rely on a "delayed discovery" argument to overcome a defense that the limitations periods expired. *Doheny Park Terrace Homeowners Assoc. v. Truck Ins. Exchange* (2005) 132 Cal.App.4th 1076.

De Novo Review

De novo is the standard of review for an order granting summary adjudication where the order is based on the interpretation and application of an insurance policy. *County of San Diego v. Ace Property & Casualty Insurance Company, et. al.* (2005) 37 Cal.4th 406.

Disability

To qualify for a waiver of premiums for life insurance policies for total disability, an insured must be totally disabled, meaning that his condition is not improving, or he is not seeking treatment. *Abatie v. Alta Health & Life Insurance Co.* (9th Cir. 2005) 421 F.3d 1053.

Disability Claims

The ERISA statute imposes a fiduciary duty on employers to provide employees with timely notification of the cancellation of an employee benefits plan, such as a long-term disability plan. However, no monetary remedies exist under ERISA for the breach of such a duty, as ERISA does not make monetary remedies available for procedural reporting and disclosure violations. *Peralta v. Hispanic Business, Inc.* (9th Cir. 2005) 419 F.3d 1064.

A disability policy's provision that mandated arbitration of all disability claims, and which provided that the arbitration costs would be split equally among the parties, did not conflict with, and was not ambiguous in light of, the policy's "Service-of-Suit" clause, which provided that the insurer would submit to the jurisdiction of an appropriate United States court in the event of coverage litigation. The arbitration clause took precedence over the "Service-of-Suit" clause because it provided that it applied "notwithstanding any other item set forth herein," and was not unenforceable simply because it required the insured to pay arbitration costs and fees. *Boghos v. Certain Underwriters at Lloyd's of London* (2005) 36 Cal.4th 495.

Discovery

Documents relating to a non-party insurer's financial condition including reserve and reinsurance information were not discoverable in an action against the insured-defendant. The plaintiffs sought this information in order to determine whether the insurer could meet its coverage obligations to the insured-defendant which, plaintiffs argued, would facilitate settlement discussions. The appellate court determined that the information was not relevant, admissible, or likely to lead to the discovery of admissible evidence under California Code of Civil Procedure Section 2017(a) and was not related to the "existence and contents" of the defendant's insurance which is discoverable under Section 2017(b). Catholic Mutual Relief Society v. Superior Court (2005) 128 Cal.App.4th 879, *rv. granted; not citable*.

Discovery Referee

When the procedure for filing a peremptory challenge to a judge, commissioner or referee are not followed, an appeal must be dismissed as a writ of mandate is the only avenue of appeal available except in extraordinary circumstances. *Sears, Roebuck and Co. v. National Union Fire Insurance Co. of Pittsburgh* (2005) 131 Cal.App.4th 1342.

Discovery Sanctions

When it is clear from the evidence that the objector knew he was obliged to produce the documents to plaintiff's lawyers, his reliance on a typographical error was not in good faith and his repeated failures to produce the documents were sanctionable. *Sears, Roebuck and Co. v. National Union Fire Insurance Co. of Pittsburgh* (2005) 131 Cal.App.4th 1342.

Discrimination/Employment

When healthcare coverage plan distinctions apply equally to all employees, there is no discrimination on the part of the employer offering the healthcare plan. *Knight v. Hayward Unified School District* (2005) 131 Cal.App.4th 121.

Diversity Jurisdiction

Where removal itself could not possibly impair another state's liquidation proceedings, the diversity statute 28 U.S.C. 1332, is not reverse-preempted by the McCarran-Ferguson Act. *Hawthorne Savings F.S.B. v. Reliance Insurance Co.* (9th Cir. 2005) 421 F.3d 835.

Doctrine of Substantial Compliance

The doctrine of substantial compliance excuses literal noncompliance only when there has been "actual compliance in respect to the substance essential to every reasonable objective of the statute." With respect to sections 1363.1(b) and 1363.1(d) of the Health and Safety Code, there is no actual compliance when the arbitration provision is in the same font and type as the rest of the document and there is intervening language between the arbitration provision and signature line. This "leaves in doubt" whether the person signing the agreement "knowingly" waived his or her right to a jury trial. Accordingly, there can be no substantial compliance with Health and Safety Code sections 1363.1(b) and (d). *Robertson v. Health Net of California, Inc.* (2005) 132 Cal.App.4th 1419.

Duty of Care To Third Parties

Insurer owes a duty of due care to a third party even if the third party in not named on the policy or has no contact with the insurer if the third party is an intended beneficiary of the policy. *Business to Business Markets, Inc. v. Zurich Specialties, et. al.* (2005) 135 Cal.App.4th 165.

Duty to Defend

The insured was sued by a competitor for allegedly stealing trade secrets and engaging in fraud. The insurer defended the insured under a reservation of rights, including "[t]he right to seek reimbursement of defense fees paid toward defending causes of action which raise no potential for coverage, as authorized by the California Supreme Court in *Buss v. Superior Court (Transamerica Ins. Co.)* (1997) 16 Cal.4th 35." While the third party action was pending, the insurer filed a declaratory relief action against the insured. The trial court found a potential for coverage for the underlying claims asserted against the insured. The insurer appealed, arguing that "advertising," as used in standard CGL policies covering advertising injury, was limited to "widespread promotional activities directed to the public at large" and did not include one-on-one solicitation of individual customers through a competitive bidding process for tailor-made services. The Court of Appeal disagreed and affirmed the judgment. The insurer appealed to the California Supreme Court, which remanded the case back to the Court of Appeal in light of the court's decision in *Hameid v. National Fire Ins. of Hartford* (2003) 31 Cal.4th 16, interpreting "advertising injury," to mean "widespread promotional activities usually directed to the public at large." Upon reconsideration, the Court of Appeal concluded there was no potential for coverage

but that the insurer was not entitled to reimbursement because its no-potential-coverage determination "extinguished" the insurer's duty to defend only from that time forward. The California Supreme Court disagreed, concluding that "an insurer under a standard CGL policy, having properly reserved its rights, may advance sums to defend its insured against a third party lawsuit, and may thereafter recoup such costs from the insured if it is determined, as a matter of law, that no duty to defend ever arose because the third party suit never suggested the possibility of a covered claim." *Scottsdale Ins. Co. v. MV Transportation* (2005) 36 Cal. 4th 643.

Insurer's duty to defend under advertising injury insuring agreement not triggered by allegations asserting wrongful solicitation of customers. *Hayward, et al. v. Centennial Insurance Co.* (9th Cir. 2005) 430 F.3d 989.

Statute of limitations under Code of Civil Procedure Section 337 on an insured's claim for breach of the duty to defend accrues when the insurer refuses to defend, and is tolled until the underlying action is terminated by a final judgment. *Eaton Hydraulics, Inc. v. Continental Casualty Company* (2005) 132 Cal.App.4th 966.

No duty to defend Administrative Proceedings under policy language extending defense duty to "any suit or action." *Lockheed Corporation v. Continental Insurance Company* (2005) 134 Cal.App.4th 187.

Duty to Indemnify

The California Supreme Court affirmed the decision of the Second District Court of Appeal finding that an excess/umbrella insurer that agreed to cover "all sums … the Insured shall be obligated to pay by reason of the liability … imposed … by law for damages … *and expenses*" was broad enough to include coverage for environmental cleanup and response costs ordered by administrative agencies. The Court concluded that the at-issue insuring agreements extended coverage beyond money "damages" ordered as a result of a suit because they incorporated the word "expenses" as well as the term "ultimate net loss" which was defined to include reference to "claims" in addition to "suits." *Powerine Oil Company, Inc. v. Superior Court* (2005) 37 Cal.4th 377**.**

Insurer is not obligated to indemnify an insured for expenses for compliance with administrative agency clean-up orders or sums incurred for settlement in absence of a lawsuit where an excess policy only requires indemnification of "damages" pursuant to *Powerine I. County of San Diego v. Ace Property & Casualty Insurance Company, et. al.* (2005) 37 Cal.4th 406.

Equitable Contribution

Equitable contribution permits reimbursement to the insurer that paid on the loss for the excess it paid over its proportionate share of the obligation, on the theory that the debt it paid was equally and concurrently owed by the other insurers and should be shared by them pro rata in proportion to their respective coverage of the risk. The purpose of this rule of equity is to accomplish substantial justice by equalizing the common burden shared by coinsurers, and to

prevent one insurer from profiting at the expense of others. *Carmel Development Company v. RLI Insurance Company* (2005) 126 Cal.App.4th 502.

Insurer has no right to submit CIGA claim against insolvent insurer even if insurer obtains contractual contribution and/or reimbursement rights against insolvent insurer. *California Ins. Guarantee Assn. v. Workers' Compensation Appeals Board* (2005) 128 Cal.App.4th 569.

The California Insurance Guarantee Association ("CIGA") has no liability for claims made by other insurers in contexts other than those involving workers' compensation benefits. *CIGA v. Workers Compensation Appeals Board (AMIC)* (2005) 128 Cal.App.4th 307.

Equitable Tolling

The doctrines of equitable tolling and equitable estoppel are distinct. Equitable estoppel comes into play only after the limitations period has run. Equitable tolling extends the statute of limitations. *Cordova v. 21st Century Insurance Company* (2005) 129 Cal.App.4th 89.

ERISA

A health plan subscriber could not assert an ERISA claim against an HMO for a third-party service provider's erroneous bills. The claims were preempted by ERISA, were subject to the exclusive remedy provisions of the California Department of Managed Health Care ("DMHC"), or had no merit. *Cohen v. Health Net of California, Inc.* (2005) 129 Cal.App.4th 841, *rv. granted; not citable*.

ERISA establishes a comprehensive regulatory scheme for employee benefits plans, providing appropriate remedies and expansive preemption under federal law. ERISA preemption has three provisions which operate as follows: If a state law relates to employee benefit plans, it is preempted. The "saver" clause excepts from the preemption clause those laws that regulate insurance. The "deemer" clause clarifies that an employee benefit plan cannot be deemed to be an insurance company or insurer subject to state laws purporting to regulate insurance. *Cohen v. Health Net of California, Inc.* (2005) 129 Cal.App.4th 841, *rv. granted; not citable*.

State laws regarding bad faith apply to all contracts and are not specifically directed to the insurance industry so as to be saved from preemption by the ERISA saver provision. Further, an employee benefits plan is not deemed to be an insurance contract subject to California's laws regulating insurance so as to be saved from preemption by the ERISA deemer provision. *Cohen v. Health Net of California, Inc.* (2005) 129 Cal.App.4th 841, *rv. granted; not citable*.

The language in the ERISA regulations to the effect that a request for a benefits review is "deemed denied" if a plan administrator exceeds the time limit allowed simply provides plan beneficiaries with a final administrative decision from which to appeal in court, but it does not change the District Court's standard of review of the administrative decision to *de novo*. *Gatti v. Reliance Standard Life Ins. Co.* (9th Cir 2005) 409 F.3d 1061, *amended and superseded by Gatti v. Reliance Standard Life Ins. Co.* (9th Cir. 2005) 415 F.3d 978.

ERISA Plan estopped from asserting contractual limitations defense by Plan administrator's actions in lulling claimant into believing her claim is being considered and failing to rely upon contractual limitations provisions in the plan. District Court erroneously applied treating physician rule giving deference to claimant's treating physicians. *LaMantia v. Hewlett-Packard* (9th Cir. 2005) 401 F.3d 1114.

An ERISA plan administrator does not abuse its discretion when it provides additional reasons for denial of benefits while the claim is on appeal. *Abatie v. Alta Health & Life Insurance Co.* (9th Cir. 2005) 421 F.3d 1053.

The ERISA statute imposes a fiduciary duty on employers to provide employees with timely notification of the cancellation of an employee benefits plan, such as a long-term disability plan. However, no monetary remedies exist under ERISA for the breach of such a duty, as ERISA does not make monetary remedies available for procedural reporting and disclosure violations. *Peralta v. Hispanic Business, Inc.* (9th Cir. 2005) 419 F.3d 1064.

ERISA plan administrators do not abuse their discretion merely by relying on the medical opinion of one expert regarding the insured's disability even if there are several expert opinions to the contrary. *Brent Boyd v. Bert Bell/Pete Rozelle NFL Players Retirement Plan* (9th Cir. 2005) 410 F.3d 1173.

Estoppel

ERISA Plan estopped from asserting contractual limitations defense by Plan administrator's actions in lulling claimant into believing her claim is being considered and failing to rely upon contractual limitations provisions in the plan. District Court erroneously applied treating physician rule giving deference to claimant's treating physicians. *LaMantia v. Hewlett-Packard* (9th Cir. 2005) 401 F.3d 1114.

Insurer was estopped from denying coverage for an arbitration award after counsel it appointed to defend the insured induced claimants to dismiss claims and agree to binding arbitration by promising claimants that the insurer "will have no choice but to pay if a general verdict is issued by the arbitrator." *CalFarm Insurance Company v. Krusiewicz* (2005) 131 Cal.App.4th 273.

Equitable estoppel can be used to allow a Northridge Earthquake claim after applicable statute of limitations has run. *Cordova v. 21st Century Insurance Company* (2005) 129 Cal.App.4th 89.

Code of Civil Procedure Section 340.9 conditionally revived Northridge earthquake claims for a one-year period from January 1, 2001 to December 31, 2001. The statutory revivor does not preclude application of the doctrine of equitable estoppel. *Doheny Park Terrace Homeowners Assoc. v. Truck Ins. Exchange* (2005) 132 Cal.App.4th 1076.

The doctrines of equitable tolling and equitable estoppel are distinct. Equitable estoppel comes into play only after the limitations period has run. Equitable tolling extends the statute of limitations. *Cordova v. 21st Century Insurance Company* (2005) 129 Cal.App.4th 89.

An insurer may be equitably estopped from asserting a policy provision limiting the time to sue where its conduct has caused the insured to delay filing suit until after expiration of the time period. *Doheny Park Terrace Homeowners Assoc. v. Truck Ins. Exchange* (2005) 132 Cal.App.4th 1076.

Excess Insurance

The parties provided insurance to a movie company which pursuant to an agreement between the movie company and the owner of property where a movie was being made, named the owner as an additional insured. That agreement included a requirement that the movie company indemnify the owner for liability arising out of the condition of the premises. An employee of the movie company was injured and recovered a judgment against the owner. The primary insurers paid the judgment, which was within the policy limits, and sought contribution or reimbursement from the excess insurer on the theory that Civil Code Section 2782(a) precluded enforcement of the indemnity agreement. The court rejected that argument, stating that the excess insurer had no liability unless and until the primary coverage had been exhausted. The case did not involve a dispute about the enforceability under Section 2782(a) of an indemnity provision in a construction contract, but rather a dispute involving the enforcement of an additional insured endorsement to a liability policy. The insurance policy was an entirely separate contract, and Section 2782(a) expressly stated that it did not limit enforcement of insurance contracts. *American Casualty Company Of Reading, PA v. General Star Indemnity Company* (2005) 125 Cal.App.4th 1510.

Excessive Punitive Damages

An award of $1.7 million in punitive damages is excessive and in violation of the due process clause where the compensatory damages due to economic injury resulting from promissory fraud total $5,000. *Simon v. San Paolo U.S. Holding Company, Inc.* (2005) 35 Cal.4th 1159.

Exclusion: Motorcycles

An exclusion to UIM and UM coverage for insureds riding motorcycles is void as against public policy because it is not one of the eight statutory exemptions list in Insurance Code section 11580.2. The statutory exemptions listed for section 11580.1, which addresses liability coverage, do not apply to section 11580.2, which is a first party coverage. "[S]ection 11580.2 mandates UM and UIM coverage to the named insured regardless of whether the individual is in a motor vehicle or on a horse, motorcycled, bicycle or stilts when injured by an uninsured or underinsured motorist, so long as one of the statutory exclusions does not apply." *Daun v. USAA Casualty Insurance Company* (2005) 125 Cal.App.4th 599.

Exclusion: Owned Property

The owned property exclusion is consistent with the distinction between a policy's first party coverage, applying to physical damage to the insured's property, and its liability coverage, applying to property damage to a third party's property. *McKinley v. XL Specialty Insurance Company* (2005) 131 Cal.App.4th 1572.

Exclusion: Pollution

Silica dust as an incidental by-product of industrial sandblasting operations is what is 'commonly thought of as pollution' and 'environmental pollution' within the scope of the pollution exclusion. *Garamendi v. Golden Eagle Insurance Co.* (2005) 127 Cal.App.4th 480, 486.

Exclusion: Premises-Operations

Premises-operations exclusion not applicable to preclude defense obligation in insurer contribution actions. *Travelers Casualty And Surety Company v. Employers Insurance Of Wausau* (2005) 130 Cal.App.4th 99.

Exclusion: Sale of Real Property

An exclusion for sale or transfer of real property will apply to claims for bodily injury or property damage resulting from certain known or unknown defects in the real property after real property is sold or transferred. *Davis v. Farmers Insurance Group* (2005) 134 Cal.App.4th 100.

Exclusion: Sudden and Accidental Pollution

Where combination of Sudden and Accidental and gradual pollution, insured must establish the former caused an appreciable amount of contamination "over and above" the gradual pollution. *Lockheed Corporation v. Continental Insurance Company* (2005) 134 Cal.App.4th 187.

Exclusion: Total Pollution

Under a "total pollution exclusion endorsement", there is no coverage for any claims for bodily injury as a result of exposure to silica-containing dust, even if the products liability claims apply to claimant. The total pollution exclusion applies to any bodily injury which would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal...of pollutants at any time. Even if the claimant's alleged liability is based on the sale of defective products that contributed to personal injuries caused by silica dust, the injuries would not have occurred but for the discharge of the pollutant, and thus are excluded. *Garamendi v. Golden Eagle Ins. Co.* (2005) 127 Cal.App.4th 480.

Exclusion: Vacancy

A building under renovation is not considered to be "under construction" to come under an exception to a vacancy exclusion in a property insurance policy. "Construction" and "renovation" are not synonymous. "Construction" in its "ordinary and popular" sense means "the creation of something new, as distinguished from the repair or improvement of something existing." *TRB Investments, Inc. v. Fireman's Fund Insurance Company* (2005) 130 Cal.App.4th 1594, *rv. granted; not citable*.

Exclusion: Weather Conditions

Insureds brought suit against Hartford for breach of contract, breach of the implied covenant of good faith and fair dealing and intentional infliction of emotional distress after Hartford denied coverage for damage to their home after a landslide caused a tree to crash into it. Hartford denied coverage for "loss caused directly or indirectly by…Earth Movement, meaning…landslide; mudflow; earth sinking, rising or shifting…Water Damage…[and] Weather Conditions" that "contribute in any way with" another excluded cause or event. The trial court granted Hartford's motion for summary judgment, and the Court of Appeal affirmed. The California Supreme Court rejected the insureds' argument that Insurance Code section 530 and the efficient proximate cause doctrine prohibit Hartford from invoking the exclusion where the weather condition of rain causes a landslide. The Supreme Court also rejected plaintiffs' argument that because the policy is an "open peril" policy, all perils not expressly excluded by the policy are covered. In sum, the Supreme Court held: "[T]he weather conditions clause excludes the peril of rain inducing a landslide and that as applied here the clause does not violate section 530 or the efficient proximate cause doctrine. Because the policy effectively excludes the perils of earth movement, third party negligence, and rain inducing a landslide, and the [insureds] produced no evidence that a different peril was the efficient proximate cause of their loss, we agree with the Court of Appeal that the trial court did not err in granting Hartford summary judgment." *Julian v. Hartford Underwriters Ins. Co*. (2005) 35 Cal.4th 747.

Excuse

California's traditional common law of contracts regarding forfeitures and condition precedents may operate to excuse the non-occurrence of a condition where non-occurrence works a forfeiture. In this case, non-compliance with the reporting requirement in a "claims made and reported" policy was excused because (1) the claim was made very late in the policy period, (2) the insured learned of the claim during the policy period, but under "highly ambiguous circumstances," (3) the insured immediately reported the claim as soon as he confirmed it, which was just two days after the policy expired, *and* (4) the insured was not given the opportunity to purchase an extended reporting period endorsement. *Root v. American Equity Specialty Insurance Company* (2005) 130 Cal.App.4th 926.

False Claims Act

The Attorney General may not pursue an action under the California False Claims Act ("CFCA") concerning the assets of an insolvent insurance carrier held in trust by the insurance commissioner because the assets are not "state funds" within the meaning of the CFCA. *State of California v. Altus Finance* (2005) 36 Cal.App.4th 1284.

Federal Tort Claims Act

The Federal Tort Claims Act waives the sovereign immunity of the United States and provides a cause of action against the government for persons injured as a result of "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under the circumstances where the United States, if a private person,

would be liable to the claimant in accordance with the law of the place where the act or omission occurred. *Nationwide Mutual Ins. Co. v. Liberatore, et al.* (9th Cir. 2005) 408 F.3d 1158.

Fiduciary Duty

The ERISA statute imposes a fiduciary duty on employers to provide employees with timely notification of the cancellation of an employee benefits plan, such as a long-term disability plan. However, no monetary remedies exist under ERISA for the breach of such a duty, as ERISA does not make monetary remedies available for procedural reporting and disclosure violations. *Peralta v. Hispanic Business, Inc.* (9th Cir. 2005) 419 F.3d 1064.

Fire Insurance

A fire insurer may rescind a fire insurance policy based on an insured's negligent, or inadvertent misrepresentations contained in an insurance application pursuant to California Insurance Code sections 331 and 359, despite Insurance Code sections 2070 and 2071 requiring a willful and knowing misrepresentation. *Mitchell v. United Nat'l. Ins. Co.* (2005) 127 Cal.App.4th 457.

Forfeiture

California's traditional common law of contracts regarding forfeitures and condition precedents may operate to excuse the non-occurrence of a condition where non-occurrence works a forfeiture. In this case, non-compliance with the reporting requirement in a "claims made and reported" policy was excused because (1) the claim was made very late in the policy period, (2) the insured learned of the claim during the policy period, but under "highly ambiguous circumstances," (3) the insured immediately reported the claim as soon as he confirmed it, which was just two days after the policy expired, *and* (4) the insured was not given the opportunity to purchase an extended reporting period endorsement. *Root v. American Equity Specialty Insurance Company* (2005) 130 Cal.App.4th 926.

Fraud

Lessee's purported reliance on representations made during commercial lease negotiations regarding other commercial tenants' occupancy in a shopping center was contradicted by his failure to inquire or to seek contract modification when negotiating his commercial lease, and because the lease expressly repudiated any such reliance. *Hinesley v. Poakshade Town Center* (2005) 135 Cal.App.4th 289.

Full Faith and Credit

A California court does not have to give full faith and credit to another state's rehabilitation and liquidation orders where the other state's court lacked in personam jurisdiction over the party in the proceedings in which the orders were issued. Moreover, state courts may never enjoin in personam proceedings in the federal courts. *Hawthorne Savings F.S.B. v. Reliance Insurance Co.* (9th Cir. 2005) 421 F.3d 835.

Health & Safety Code § 1340

The Knox-Keene Act, California Health and Safety Code section 1340, et seq., does not grant the Department of Managed Health Care, which approves health case service plan contracts, authority to mandate health care service plan contracts that provide a choice between arbitration and trial by jury. *Viola v. Dept. of Managed Health Care* (2005) 133 Cal.App.4th 299.

Health & Safety Code § 1363.1

An arbitration provision in an health plan enrollment form is unenforceable if it does not comply with sections 1363.1(b) and 1363.1(d) of the Health and Safety Code. Under section 1363.1(b), the arbitration provision must be "prominent," which means "readily noticeable." An arbitration provision that is of the same font and type as the rest of the text is not "prominent." Under section 1363.1(d), the arbitration provision must appear "immediately before" the signature line. Thus, an arbitration provision that does not appear before the signature line "without any intervening language," is unenforceable. *Robertson v. Health Net of California, Inc.* (2005) 132 Cal.App.4th 1419.

The doctrine of substantial compliance excuses literal noncompliance only when there has been "actual compliance in respect to the substance essential to every reasonable objective of the statute." With respect to sections 1363.1(b) and 1363.1(d) of the Health and Safety Code, there is no actual compliance when the arbitration provision is in the same font and type as the rest of the document and there is intervening language between the arbitration provision and signature line. This "leaves in doubt" whether the person signing the agreement "knowingly" waived his or her right to a jury trial. Accordingly, there can be no substantial compliance with Health and Safety Code sections 1363.1(b) and (d). *Robertson v. Health Net of California, Inc.* (2005) 132 Cal.App.4th 1419.

Health Care Service Plans

A health plan subscriber could not assert an ERISA claim against an HMO for a third-party service provider's erroneous bills. The claims were preempted by ERISA, were subject to the exclusive remedy provisions of the California Department of Managed Health Care ("DMHC"), or had no merit. *Cohen v. Health Net of California, Inc.* (2005) 129 Cal.App.4th 841, *rv. granted; not citable*.

The Knox-Keene Health Care Service Plan Act of 1975 creates a distinct statutory enforcement scheme regulating HMO's. The power to enforce the Act is entrusted exclusively to the California Department of Managed Health Care ("DMHC"). A health plan subscriber cannot seek to enforce provisions of the Act that govern the DMHC in exercise of its regulatory powers over health plan benefits materials. *Cohen v. Health Net of California, Inc.* (2005) 129 Cal.App.4th 841, *rv. granted; not citable.*

Health Care

The Knox-Keene Act, California Health and Safety Code section 1340, et seq., does not grant the Department of Managed Health Care, which approves health care service plan contracts, authority to mandate health care service plan contracts that provide a choice between arbitration and trial by jury. *Viola v. Dept. of Managed Health Care* (2005) 133 Cal.App.4th 299.

Health Insurance

Employers do not discriminate against certain disabled employees when offering medical care plans that do not include health care coverage for certain types of treatment as the Americans With Disabilities Act and Fair Employment and Housing Act were not designed to prohibit "treatment based" discrimination with regard to health insurance coverage. *Knight v. Hayward Unified School District* (2005) 132 Cal.App.4th 121.

When healthcare coverage plan distinctions apply equally to all employees, there is no discrimination on the part of the employer offering the healthcare plan. *Knight v. Hayward Unified School District* (2005) 132 Cal.App.4th 121.

Holocaust Claims

California law allowing actions relating to holocaust era insurance claims is preempted by federal foreign policy. *Steinberg v. International Commission on Holocaust Era Insurance Claims* (2005) 133 Cal.App.4th 689.

Inception of Loss

The limitations period imposed by insurance policy terms begins to run at the inception of the loss. That term has been construed to mean the point in time when appreciable damage occurs and is or should be known to the insured such that a reasonable insured would be aware of an obligation to notify the insurer. *Doheny Park Terrace Homeowners Assoc. v. Truck Ins. Exchange* (2005) 132 Cal.App.4th 1076.

Insolvency

Insured is entitled to uninsured motorist coverage from insurer when the at-fault driver's insurer is insolvent, even if the insolvent insurer was not ordered insolvent by a formal declaration from a court. *Romano v. Mercury Insurance Company* (2005) 128 Cal.App.4th 1333.

The Attorney General may not pursue an action under the California False Claims Act ("CFCA") concerning the assets of an insolvent insurance carrier held in trust by the insurance commissioner because the assets are not "state funds" within the meaning of the CFCA. *State of California v. Altus Finance* (2005) 36 Cal.App.4th 1284.

Insolvent Insurer

The Attorney General may not seek restitution to recover the lost property on behalf of the insolvent insurer's creditors and policyholders under the Unfair Competition Law because this is within the exclusive province of the insurance commissioner. The Attorney General may, however, pursue civil penalties and injunctive relief if it does not interfere with the insurance commissioner's jurisdiction. *State of California v. Altus Finance* (2005) 36 Cal.App.4th 1284.

The Attorney General may not pursue an action under the California False Claims Act ("CFCA") concerning the assets of an insolvent insurance carrier held in trust by the insurance commissioner because the assets are not "state funds" within the meaning of the CFCA. *State of California v. Altus Finance* (2005) 36 Cal.App.4th 1284.

Insurance Application Misrepresentation

Stephen Ward appealed a declaratory judgment that West Coast Life Insurance Co. ("WCL") properly rescinded a life insurance policy covering the life of his wife, Lois Ward, based on two inaccuracies in her insurance application. In response to one question, she indicated she did not have any other pending application for life insurance. In response to a separate question, she identified two pending life insurance policies, each in the amount of $1 million. After Lois Ward died and WCL obtained Stephen Ward's statement, WCL rescinded the policy on the ground that the application contained material misrepresentations about other life insurance in force. WCL then filed a complaint for declaratory relief. The trial court granted WCL's motion for summary judgment. Stephen Ward did not contest the trial court's ruling on the basis that Lois Ward's failure to disclose other current insurance policies in her application was material to WCL's decision to issue the policy but, instead, relied entirely on a theory of waiver. Insurance Code section 336 provides in pertinent part: "The right to information of material facts may be waived…by neglect to make inquiries as to such facts, where they are distinctly implied in other facts of which information is communicated." The factual basis for Stephen Ward's waiver claim rested on evidence that, before issuing the policy, WCL received information through First Financial Underwriting Services that should have prompted WCL to inquire as to the actual facts. The Court concluded the error on the application was immaterial because "the existence of a single policy of $500,000 [that was not identified on the application] did not implicate the underwriting guidelines and was not material to WCL's decision to issue the policy." The Court then concluded that the discovery of the immaterial omission did not imply the existence of material nondisclosures and affirmed the judgment in favor of WCL. *West Coast Life Ins. Co. v. Ward* (2005) 132 Cal. App. 4th 181.

Insurance Code §§ 5 and 19

Insurance Code section 19 which provides a statutory definition of "person" was intended to govern the construction and interpretation of the Insurance Code (Ins. Code, § 5), not insurance policy interpretation. *Mirpad v. CIGA* (2005) 132 Cal.App.4th 1058.

Insurance Code § 331

A fire insurer may rescind a fire insurance policy based on an insured's negligent, or inadvertent misrepresentations contained in an insurance application pursuant to California Insurance Code sections 331 and 359, despite Insurance Code sections 2070 and 2071 requiring a willful and knowing misrepresentation. *Mitchell v. United Nat'l. Ins. Co.* (2005) 127 Cal.App.4th 457.

Insurance Code § 336

Stephen Ward appealed a declaratory judgment that West Coast Life Insurance Co. ("WCL") properly rescinded a life insurance policy covering the life of his wife, Lois Ward, based on two inaccuracies in her insurance application. In response to one question, she indicated she did not have any other pending application for life insurance. In response to a separate question, she identified two pending life insurance policies, each in the amount of $1 million. After Lois Ward died and WCL obtained Stephen Ward's statement, WCL rescinded the policy on the ground that the application contained material misrepresentations about other life insurance in force. WCL then filed a complaint for declaratory relief. The trial court granted WCL's motion for summary judgment. Stephen Ward did not contest the trial court's ruling on the basis that Lois Ward's failure to disclose other current insurance policies in her application was material to WCL's decision to issue the policy but, instead, relied entirely on a theory of waiver. Insurance Code section 336 provides in pertinent part: "The right to information of material facts may be waived…by neglect to make inquiries as to such facts, where they are distinctly implied in other facts of which information is communicated." The factual basis for Stephen Ward's waiver claim rested on evidence that, before issuing the policy, WCL received information through First Financial Underwriting Services that should have prompted WCL to inquire as to the actual facts. The Court concluded the error on the application was immaterial because "the existence of a single policy of $500,000 [that was not identified on the application] did not implicate the underwriting guidelines and was not material to WCL's decision to issue the policy." The Court then concluded that the discovery of the immaterial omission did not imply the existence of material nondisclosures and affirmed the judgment in favor of WCL. *West Coast Life Ins. Co. v. Ward* (2005) 132 Cal. App. 4th 181.

Insurance Code § 359

A fire insurer may rescind a fire insurance policy based on an insured's negligent, or inadvertent misrepresentations contained in an insurance application pursuant to California Insurance Code sections 331 and 359, despite Insurance Code sections 2070 and 2071 requiring a willful and knowing misrepresentation. *Mitchell v. United Nat'l. Ins. Co.* (2005) 127 Cal.App.4th 457.

Insurance Code § 530

Insureds brought suit against Hartford for breach of contract, breach of the implied covenant of good faith and fair dealing and intentional infliction of emotional distress after Hartford denied coverage for damage to their home after a landslide caused a tree to crash into it. Hartford denied coverage for "loss caused directly or indirectly by…Earth Movement,

meaning…landslide; mudflow; earth sinking, rising or shifting…Water Damage…[and] Weather Conditions" that "contribute in any way with" another excluded cause or event. The trial court granted Hartford's motion for summary judgment, and the Court of Appeal affirmed. The California Supreme Court rejected the insureds' argument that Insurance Code section 530 and the efficient proximate cause doctrine prohibit Hartford from invoking the exclusion where the weather condition of rain causes a landslide. The Supreme Court also rejected plaintiffs' argument that because the policy is an "open peril" policy, all perils not expressly excluded by the policy are covered. In sum, the Supreme Court held: "[T]he weather conditions clause excludes the peril of rain inducing a landslide and that as applied here the clause does not violate section 530 or the efficient proximate cause doctrine. Because the policy effectively excludes the perils of earth movement, third party negligence, and rain inducing a landslide, and the [insureds] produced no evidence that a different peril was the efficient proximate cause of their loss, we agree with the Court of Appeal that the trial court did not err in granting Hartford summary judgment." *Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747.

Insurance Code § 1063.1

Insurance Code section 1063.1(c)(1) defines covered claims as the obligations of an insolvent insurer including the obligation to provide workers' compensation benefits under the workers compensation law of the state of California. *CIGA v. Workers Compensation Appeals Board (AMIC)* (2005) 128 Cal.App.4th 307.

Under Insurance Code section 1063.1, "covered claims" does not include claims by persons other than the original claimant under the insurance policy in his or her own name…and does not include any claims asserted by an assignee or one claiming by right of subrogation. *CIGA v. Workers Compensation Appeals Board (AMIC)* (2005) 128 Cal.App.4th 307.

Insurance Code section 1063.1(c)(1) defines covered claims as the obligations of an insolvent insurer including the obligation to provide workers' compensation benefits under the workers compensation law of the state of California. *CIGA v. Workers Compensation Appeals Board (AMIC)* (2005) 128 Cal.App.4th 307.

Except for workers' compensation claims, the maximum liability payable by CIGA with respect to a particular policy of an insolvent insurer is $500,000. *Mirpad v. CIGA* (2005) 132 Cal.App.4th 1058.

Insurance Code § 1861.07

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

Insurance Code § 1877.3

If a workers' compensation insurer learns of a fraudulent claim, the insurer is obligated to notify the local district attorney and the Bureau of Fraudulent Claims of the Department of Insurance. Ins. Code § 1877.3(b)(1); *Leegin Creative Leather Products v. Diaz* (2005) 131 Cal.App.4th 1517.

Insurance Code § 2070

A fire insurer may rescind a fire insurance policy based on an insured's negligent, or inadvertent misrepresentations contained in an insurance application pursuant to California Insurance Code sections 331 and 359, despite Insurance Code sections 2070 and 2071 requiring a willful and knowing misrepresentation. *Mitchell v. United Nat'l. Ins. Co.* (2005) 127 Cal.App.4th 457.

Insurance Code § 2071

The doctrines of equitable tolling and equitable estoppel are distinct. Equitable estoppel comes into play only after the limitations period has run. Equitable tolling extends the statute of limitations. *Cordova v. 21st Century Insurance Company* (2005) 129 Cal.App.4th 89.

Although the statute of limitations for breach of contract is ordinarily four years, when the contract is an insurance policy and the insured has a property damage claim there is a contractual limitations period imposed by the terms of the policy. For fire policies, the term is one year, which begins to run at the inception of loss, as dictated by Ins. Code section 2071. *Doheny Park Terrace Homeowners Assoc. v. Truck Ins. Exchange* (2005) 132 Cal.App.4th 1076.

A fire insurer may rescind a fire insurance policy based on an insured's negligent, or inadvertent misrepresentations contained in an insurance application pursuant to California Insurance Code sections 331 and 359, despite Insurance Code sections 2070 and 2071 requiring a willful and knowing misrepresentation. *Mitchell v. United Nat'l. Ins. Co.* (2005) 127 Cal.App.4th 457.

Insurance Code § 3602

Insurance Code section 3602(d) was drafted with the intent to avoid duplicate insurance and premium by authorizing insurance coverage solely by the general employer's policy. Thus, California Insurance Guarantee Association, which administered claims on behalf of general employer's insurer which had been ordered into liquidation, is not relieved of statutory duties in workers compensation setting simply because special employer obtained its own workers compensation insurance policy. However, section 3602(d) does not preclude the special employer from obtaining alternative insurance protection for the special employee. *General Casualty Insurance v. Workers' Compensation Appeals Board* (2005) 131 Cal.App.4th 345, *ordered not published; not citable*.

A general and special employer's joint and several liability for workers compensation, for injuries sustained by a special employee, is not extinguished by Insurance Code section 11663 or

section 3602(d). *General Casualty Insurance v. Workers' Compensation Appeals Board* (2005) 123 Cal.App.4th 202, *ordered not published; not citable*.

Insurance Code § 11580(b)(2)

Mediator cannot issue an order purporting to meet the actual trial requirements of Insurance Code § 11580(b)(2) because a mediator, as a neutral, is not entitled to make factual findings and legal determinations. *Travelers Casualty & Surety Company v. Superior Court* (2005) 126 Cal.App.3d 1131.

Insurance Code § 11580.1

An exclusion to UIM and UM coverage for insureds riding motorcycles is void as against public policy because it is not one of the eight statutory exemptions listed in Insurance Code section 11580.2. The statutory exemptions listed for section 11580.1, which addresses liability coverage, do not apply to section 11580.2, which is a first party coverage. "[S]ection 11580.2 mandates UM and UIM coverage to the named insured regardless of whether the individual is in a motor vehicle or on a horse, motorcycled, bicycle or stilts when injured by an uninsured or underinsured motorist, so long as one of the statutory exclusions does not apply." *Daun v. USAA Casualty Insurance Company* (2005) 125 Cal.App.4th 599.

Insurance Code § 11580.2

An exclusion to UIM and UM coverage for insureds riding motorcycles is void as against public policy because it is not one of the eight statutory exemptions listed in Insurance Code section 11580.2. The statutory exemptions listed for section 11580.1, which addresses liability coverage, do not apply to section 11580.2, which is a first party coverage. "[S]ection 11580.2 mandates UM and UIM coverage to the named insured regardless of whether the individual is in a motor vehicle or on a horse, motorcycled, bicycle or stilts when injured by an uninsured or underinsured motorist, so long as one of the statutory exclusions does not apply." *Daun v. USAA Casualty Insurance Company* (2005) 125 Cal.App.4th 599.

The Legislature did not intend "because of insolvency" to require a formal declaration an insurer is an "insolvent insurer" by court order. Because the Legislature prescribed the phrase "because of insolvency" in what is expected of uninsured motorist coverage, and used a different phrase, "insolvent insurer" in the scheme setting up CIGA, it intended different meanings. *Romano v. Mercury Insurance Company* (2005) 128 Cal.App.4th 1333.

Insurance Code § 11580.9(g)

The California Supreme Court withdrew from publication a decision by the California Court of Appeal holding that, pursuant to California Insurance Code section 11580.9(g), a Personal Umbrella Insurer was obligated to contribute to the costs of defense of an automobile accident case where the settlement exceeded the primary policy limits and the Umbrella Insurer had also contributed its policy limits to the settlement. *Mercury Insurance Company v. Allstate Insurance Company* (2004) 123 Cal.App.4th 1392, *ordered not published (2005), not citable*.

Insurance Code § 11663

A general and special employer's joint and several liability for workers compensation, for injuries sustained by a special employee, is not extinguished by Insurance Code section 11663 or section 3602(d). *General Casualty Insurance v. Workers' Compensation Appeals Board* (2005) 123 Cal.App.4th 202, *ordered not published; not citable*.

Insurance Code § 12340.1

The First Appellate District Court of Appeal affirmed the San Francisco Superior Court's denial of Appellant Radian Guaranty, Inc.'s ("Radian") petition for writ of administrative mandamus challenging the cease and desist order issued by California's Insurance Commissioner ("Commissioner") prohibiting Radian from selling its Radian Lien Protection policy ("RLP"). The Court of Appeal held Radian, a monoline mortgage guaranty insurer lacked authority to sell policies that provided lenders with protection from borrower's Default For Loss Due To Undisclosed Liens. The RLP provided lenders with protection from a borrower's default for a range of losses, including coverage for a "Loss due to Undisclosed Liens." The Commissioner found the RLP's coverage constitutes title insurance under Insurance Code section 12340.1 and because Radian does not have the requisite certificate of authority to transact title insurance, it cannot sell the RLP. *Radian Guaranty, Inc. v. Garamendi* (2005) 127 Cal.App.4th 1280.

Insurance Commissioner

The Attorney General may not seek restitution to recover the lost property on behalf of the insolvent insurer's creditors and policyholders under the Unfair Competition Law because this is within the exclusive province of the insurance commissioner. The Attorney General may, however, pursue civil penalties and injunctive relief if it does not interfere with the insurance commissioner's jurisdiction. *State of California v. Altus Finance* (2005) 36 Cal.App.4th 1284.

The Attorney General may not pursue an action under the California False Claims Act ("CFCA") concerning the assets of an insolvent insurance carrier held in trust by the insurance commissioner because the assets are not "state funds" within the meaning of the CFCA. *State of California v. Altus Finance* (2005) 36 Cal.App.4th 1284.

Insurer In Conservation

In an order to show cause regarding claims against an insurance company placed in conservation, the trial court may consider evidentiary material not considered by the Insurance Commissioner in ruling on extrinsic issues, such as the fairness and thoroughness of the commissioner's procedures, but in evaluating the commissioner's ruling on the merits of a claim the trial court is restricted to evidence that was actually before the commissioner. *Garamendi v. Golden Eagle Ins. Co.* (2005) 127 Cal.App.4th 480.

The insurance code authorizes the Insurance Commissioner to take over the assets and act as conservator of an insurer where further business transactions would be hazardous to policyholders, creditors or the public. The trial court overseeing the conservatorship is vested with substantial authority to aid the commissioner in the conduct of the troubled insurer's

business or liquidation, including the power to enjoin the prosecution of pending actions against the insurer. Once liquidation is ordered, potential creditors may file claims by providing specific information required by the commissioner. Unlike under federal bankruptcy laws, where the trustee acts as an advocate for the debtor and the judge determines the claims after a formal evidentiary hearing, the insurance commissioner acts as both trustee and adjudicator of claims. The commissioner may determine claims on an informal basis without a hearing, and the trial court acting on an OSC must affirm unless there is an abuse of discretion, i.e., if the commissioner fails to provide a full and fair determination, if the decision is not supported by substantial evidence, or if the commissioner applies an improper legal standard. *Garamendi v. Golden Eagle Ins. Co.* (2005) 127 Cal.App.4th 480.

Intended Beneficiaries

Insurer owes a duty of due care to a third party even if the third party in not named on the policy or has no contact with the insurer if the third party is an intended beneficiary of the policy. *Business to Business Markets, Inc. v. Zurich Specialties, et. al.* (2005) 135 Cal.App.4th 165.

Intentional Infliction of Emotional Distress

Delay or denial of insurance claims is not sufficiently outrageous by itself for a third-party claimant to state a cause of action for intentional infliction of emotional distress. *Coleman v. Republic Indemnity Ins. Co. of California* (2005) 132 Cal.App.4th 403.

Interindemnity Agreement

Doctors forming interindemnity arrangement to provide alternative to medical malpractice insurance could not seek to defect assessments imposed by liquidating receiver through rescission. *Gill v. Rich* (2005) 128 Cal.App.4th 1254.

Intervention

Because insurer obtained partial subrogation rights against third parties as a result of paying a portion of its insured's claims for property damage to their home, the insurer had a statutory right to intervene in the insureds' construction defect lawsuit against the third party tortfeasors pursuant to C.C.P. § 387(b). *Hodge v. Kirkpatrick Development, Inc.* (2005) 130 Cal.App.4th 540.

An insurer is entitled to pursue a subrogation claim against its own insured if the policy does not cover the insured for the particular loss or liability. *McKinley v. XL Specialty Insurance Company* (2005) 131 Cal.App.4th 1572.

Labor Code § 3761

If, while a workers' compensation claim is pending, the employer has actual knowledge of facts that would tend to disprove any aspect of the employee's claim, the employer must promptly notify its workers' compensation insurer in writing. Lab. Code § 3761(b); *Leegin Creative Leather Products v. Diaz* (2005) 131 Cal.App.4th 1517.

Labor Code § 5400

An employer must report work-related injury claims to its workers' compensation insurer. Lab. Code § 5401(c); *Leegin Creative Leather Products v. Diaz* (2005) 131 Cal.App.4th 1517.

The workers' compensation insurer must accept or reject the claim within 90 days after the claim form is filed or the injury will be presumed compensable. Lab. Code § 5402(b); *Leegin Creative Leather Products v. Diaz* (2005) 131 Cal.App.4th 1517.

Labor Code § 5500.5

An insurer held liable for workers compensation benefits is entitled to pursue a civil action for reimbursement against an unlawfully uninsured employer, pursuant to Labor Code section 5500.5 subsection (a). *Graphic Arts Mutual Insurance Co. v. Time Travel International, Inc.* (2005) 126 Cal. App. 4th 405.

Land Insurance - Monoline Insurers

The First Appellate District Court of Appeal affirmed the San Francisco Superior Court's denial of Appellant Radian Guaranty, Inc.'s ("Radian") petition for writ of administrative mandamus challenging the cease and desist order issued by California's Insurance Commissioner ("Commissioner") prohibiting Radian from selling its Radian Lien Protection policy ("RLP"). The Court of Appeal held Radian, a monoline mortgage guaranty insurer lacked authority to sell policies that provided lenders with protection from borrower's Default For Loss Due To Undisclosed Liens. The RLP provided lenders with protection from a borrower's default for a range of losses, including coverage for a "Loss due to Undisclosed Liens." The Commissioner found the RLP's coverage constitutes title insurance under Insurance Code section 12340.1 and because Radian does not have the requisite certificate of authority to transact title insurance, it cannot sell the RLP. *Radian Guaranty, Inc. v. Garamendi* (2005) 127 Cal.App.4th 1280.

Life Insurance

Where a life insurance policy requires an insured to apply for a waiver of premium, and the insured fails to do so, the insurer can properly deny life insurance benefits. *Abatie v. Alta Health & Life Insurance Co.* (9th Cir. 2005) 421 F.3d 1053.

Limitations Periods

Although the statute of limitations for breach of contract is ordinarily four years, when the contract is an insurance policy and the insured has a property damage claim there is a contractual limitations period imposed by the terms of the policy. For fire policies, the term is one year, which begins to run at the inception of loss, as dictated by Ins. Code section 2071. *Doheny Park Terrace Homeowners Assoc. v. Truck Ins. Exchange* (2005) 132 Cal.App.4th 1076.

The running of the limitations period will be tolled from the time the insured files a timely notice to the time the insurer formally denies the claim in writing. Where the insurer advises in writing that the damages do not exceed the deductible, the tolling period is terminated

even if the letter from the insurer does not contain the words "deny" or "denial." *Doheny Park Terrace Homeowners Assoc. v. Truck Ins. Exchange* (2005) 132 Cal.App.4th 1076.

Code of Civil Procedure Section 340.9 conditionally revived Northridge earthquake claims for a one-year period from January 1, 2001 to December 31, 2001. The section applies to contractual as well as statutory limitations periods. *Doheny Park Terrace Homeowners Assoc. v. Truck Ins. Exchange* (2005) 132 Cal.App.4th 1076.

Loan Receipt Agreement

HOA's breach of contract and bad faith suit against its CGL insurer dismissed because the HOA lacked any compensable losses, despite agreement between HOA and its D&O insurer requiring HOA to repay D&O insurer defense and indemnity costs from proceeds of HOA's suit against the CGL insurer. *Emerald Bay Community Ass'n v. Golden Eagle Ins. Corp.* (2005) 130 Cal.App.4th 1078.

Made-Whole Rule

The common law made-whole rule and common fund doctrine apply to limit an insurer's recovery of payments from an insured, but failure to follow the doctrines does not state a cause of action for breach of contract or breach of the implied covenant of good faith and fair dealing. *Progressive West Insurance Company v. Superior Court* (2005) 135 Cal.App.4th 263.

Mandatory Arbitration

The Knox-Keene Act, California Health and Safety Code section 1340, et seq., permits establishment of health care service plan contracts with mandatory arbitration clauses. *Viola v. Dept. of Managed Health Care* (2005) 133 Cal.App.4th 299.

Mediation

A mediator cannot abandon his position as a neutral fact finder in an effort to meet the public policy goals of facilitating settlement. *Travelers Casualty & Surety Company v. Superior Court* (2005) 126 Cal.App.3d 1131.

Monetary Remedies

The ERISA statute imposes a fiduciary duty on employers to provide employees with timely notification of the cancellation of an employee benefits plan, such as a long-term disability plan. However, no monetary remedies exist under ERISA for the breach of such a duty, as ERISA does not make monetary remedies available for procedural reporting and disclosure violations. *Peralta v. Hispanic Business, Inc.* (9th Cir. 2005) 419 F.3d 1064.

Negligent Infliction of Emotional Distress

Because a liability insurer owes no duty of good faith and fair dealing to a third-party claimant, it also owes no duty giving rise to a claim of negligent infliction of emotional distress. *Coleman v. Republic Indemnity Ins. Co. of California* (2005) 132 Cal.App.4th 403.

"No-Action" Provision

The "no-action" provision limits the insurer's duty to indemnify to judgments ordered by a court. *County of San Diego v. Ace Property & Casualty Insurance Company, et. al.* (2005) 37 Cal.4th 406.

Northridge Earthquake

C.C.P. Section 340.9, the revivor statute for insurance claims arising out of the Northridge Earthquake, did not revive a claim that had been extinguished by a release signed by the insured. *Rosenblum v. Safeco Ins. Co.* (2005) 126 Cal.App.4th 847.

The doctrines of equitable tolling and equitable estoppel are distinct. Equitable estoppel comes into play only after the limitations period has run. Equitable tolling extends the statute of limitations. *Cordova v. 21st Century Insurance Company* (2005) 129 Cal.App.4th 89.

CIGA may be held liable for a Northridge earthquake claim that has been revived pursuant to California Code of Civil Procedure section 340.9. *Berger v. California Insurance Guarantee Association* (2005) 128 Cal.App.4th 989.

Offset

A criminal defendant may be required to pay restitution to his or her victim, without any offset even if the defendant's insurer has already made insurance payments to the victim. *In re: Tommy A* (2005) 131 Cal.App.4th 1580.

Absent a judicial good faith determination, pre-trial allocations contained in settlement agreements are not binding on the court for purposes of determining the amount of post-trial offsets. *Jones v. John Crane* (2005) 132 Cal.App.4th 990.

Other Insurance Clauses

Conflicting excess-only "other insurance" clauses did not warrant equitable contribution among excess insurers when excess insurers did not insure same risk at the same level of coverage. *Carmel Development Company v. RLI Insurance Company* (2005) 126 Cal.App.4th 502.

Court often compare "other insurance" clauses to determine if the principle of equitable contribution should apply. Although courts generally honor coverage terms including "other insurance" clauses, whenever possible, where the policies of two or more insurers of a common insured, providing the same level of coverage for the same risk, contain conflicting other insurance clauses, if one insurer pays more than its share of the loss or defense costs without participation from the other insurer, a right to contribution arises. *Carmel Development Company v. RLI Insurance Company* (2005) 126 Cal.App.4th 502.

The general rule when multiple policies share the same risk but have inconsistent "other insurance" clauses, is to prorate according to the policy limits. Even when one "other insurance" clause provides for pro rata coverage while the other purports to be excess only, courts generally

favor proration because the prevailing judicial view is that imposing the entire liability for a loss on the former would annul that policy's language, and create the anomaly that courts will enforce proration between policies only when they both have conflicting "excess other insurance" barring proration'." *Carmel Development Company v. RLI Insurance Company* (2005) 126 Cal.App.4th 502.

Peremptory Challenge

The California Supreme Court reversed a California Court of Appeal's decision which had overturned a trial court's order striking a peremptory challenge filed by an excess insurer on the ground that a previous challenge had been filed by a primary insurer and the two insurers were on the "same side." The Court held that the interests of primary and excess insurers are not necessarily adverse so as to place them on different "sides" of an action for purposes of a peremptory challenge under California Code of Civil Procedure Section 170.6 ("Section 170.6"). Only one such challenge is available "per side." *Home Ins. Co. v. Superior Court (Montrose Chemical)* (2005) 101 Cal.App.4th 1025.

When the procedure for filing a peremptory challenge to a judge, commissioner or referee are not followed, an appeal must be dismissed as a writ of mandate is the only avenue of appeal available except in extraordinary circumstances. *Sears, Roebuck and Co. v. National Union Fire Insurance Co. of Pittsburgh* (2005) 131 Cal.App.4th 1342.

Performance Bond: Damages Requirement

The issuer of a performance bond remained liable under the bond even after the contractor became insolvent and was unable to perform some of the improvements. Notwithstanding that a third party purchased the remaining undeveloped property and completed the improvements on behalf of the City, the City remained entitled to make demand on the bond and to pay the bond proceeds to the purchaser to defray his costs in completing the contractor's obligations. The City suffered damages even though the work had been performed, as the City continued to have a contractual right to look to the contractor to perform its share of the deferred work despite its agreement with the purchaser and the city's damages occurred when the contractor failed to perform. Additionally, California Civil Code Section 2810, which provides that a surety has no liability if its principal is not liable, did not apply as there was no authority for the proposition that the contractor had a valid defense to liability based on the purchaser's performance of the improvements. *City of Merced v. American Motorists Insurance Company* (2005) 126 Cal.App.4th 1316.

Personal Injury Coverage

Physical injury to property due to pollution falls outside personal injury coverage. *Lockheed Corporation v. Continental Insurance Company* (2005) 134 Cal.App.4th 187.

Personal Umbrella

The California Supreme Court withdrew from publication a decision by the California Court of Appeal holding that, pursuant to California Insurance Code Section 11580.9(g), a

Personal Umbrella Insurer was obligated to contribute to the costs of defense of an automobile accident case where the settlement exceeded the primary policy limits and the Umbrella Insurer had also contributed its policy limits to the settlement. *Mercury Insurance Company v. Allstate Insurance Company* (2004) 123 Cal.App.4th 1392, *ordered not published (2005), not citable*.

Plain Meaning Rule

The Court held the plain meaning rule of policy interpretation may be established by considering disputed language as used in the context of the entire policy to interpret the term "person" in the policy not to include a corporate tenant, in the context of whether there was personal injury coverage for wrongful eviction of the corporate tenant. *Mirpad v. CIGA* (2005) 132 Cal.App.4th 1058.

Preemption

California law allowing actions relating to holocaust era insurance claims is preempted by federal foreign policy. *Steinberg v. International Commission on Holocaust Era Insurance Claims* (2005) 133 Cal.App.4th 689.

Prejudice

California's traditional common law of contracts regarding forfeitures and condition precedents may operate to excuse the non-occurrence of a condition where non-occurrence works a forfeiture. In this case, non-compliance with the reporting requirement in a "claims made and reported" policy was excused because (1) the claim was made very late in the policy period, (2) the insured learned of the claim during the policy period, but under "highly ambiguous circumstances," (3) the insured immediately reported the claim as soon as he confirmed it, which was just two days after the policy expired, *and* (4) the insured was not given the opportunity to purchase an extended reporting period endorsement. *Root v. American Equity Specialty Insurance Company* (2005) 130 Cal.App.4th 926.

Primary v. Excess Insurance

The California Supreme Court reversed a California Court of Appeal's decision which had overturned a trial court's order striking a peremptory challenge filed by an excess insurer on the ground that a previous challenge had been filed by a primary insurer and the two insurers were on the "same side." The Court held that the interests of primary and excess insurers are not necessarily adverse so as to place them on different "sides" of an action for purposes of a peremptory challenge under California Code of Civil Procedure Section 170.6 ("Section 170.6"). Only one such challenge is available "per side." *Home Ins. Co. v. Superior Court (Montrose Chemical)* (2005) 101 Cal.App.4th 1025.

Professional Liability Policies

A professional liability policy which was issued to a company who sells mortgage guaranty insurance to residential mortgage lenders covered allegations regarding kickback schemes. *PMI Mortgage Ins. Co. v. AISLIC* (9th Cir. 2005) 394 F.3d 761.

Under California law, insurance policies covering "Professional Services" reach only those acts committed by the insured in his or her capacity as a professional-they do not cover general administrative activities that occur in all types of businesses. *PMI Mortgage Ins. Co. v. AISLIC* (9th Cir. 2005) 394 F.3d 761.

The Ninth Circuit Court of Appeals held that allegations regarding kickback schemes are not administrative matters which would not be considered "Professional Malpractice" or involve the rendering of "Professional Services" as defined in a professional liability policy. The Ninth Circuit Court held that the allegations of kickback schemes goes to the very heart of a financial company's business and as such, would be covered under the policy. *PMI Mortgage Ins. Co. v. AISLIC* (9th Cir. 2005) 394 F.3d 761.

Proposition 64

The California Court of Appeal, Second Appellate District, found that Proposition 64, which amended the standing requirements for causes of action under Business and Professions Code sections 17200 and 17500, applied retroactively to cases that had been filed, but not finally resolved as of date of its enactment, but remand to the trial court was required to determine whether to grant uninjured plaintiffs leave to amend to name injured party to prosecute action. *Branick v. Downey Savings and Loan Association* (2005) 126 Cal.App.4th 828, *rv. granted; not citable*.

The California Court of Appeal, Fourth Appellate District, finding that Proposition 64, which amended the standing requirements for causes of action under Business & Professions Code section 17200, applied retroactively to pending cases, remanded to the trial court for consideration of whether plaintiff could plead and prove standing. *Benson v. Kwikset Corporation* (2005) 126 Cal.App.4th 887, *rv. granted; not citable*.

Where a party brought suit under former Business & Professions Code section 17200 based on brokers having allegedly received "kickbacks" from insurers and did not allege he had suffered any injury, the amendments contained in Proposition 64 operated to eliminate any cause of action allowed under the former statute which had not yet vested. The right, which was created by statute, cannot vest until final judgment and could not vest here because the action was still pending. This is to be distinguished from rights based in common law where retroactive application is generally not given unless specifically set forth in the statutory amendment. *Hartford Fire Insurance Co. v. Superior Court* (2005) 134 Cal.App.4th 649, *rv. granted; not citable*.

Proposition 103

Proposition 103, the Insurance Rate Reduction and Reform Act, added provisions to the Insurance Code prescribing the factors insurers must consider in setting automobile insurance rates and premiums. The proposition permitted good driver discounts, but prohibited the "absence of prior automobile insurance coverage," in and of itself, as criteria either for determining eligibility for good driver discounts or, more generally, for rates, premiums, or insurability. *The Foundation for Taxpayer and Consumer Rights v. Garamendi* (2005) 132 Cal.App.4th 1354.

Proximate Cause

Insureds brought suit against Hartford for breach of contract, breach of the implied covenant of good faith and fair dealing and intentional infliction of emotional distress after Hartford denied coverage for damage to their home after a landslide caused a tree to crash into it. Hartford denied coverage for "loss caused directly or indirectly by…Earth Movement, meaning…landslide; mudflow; earth sinking, rising or shifting…Water Damage…[and] Weather Conditions" that "contribute in any way with" another excluded cause or event. The trial court granted Hartford's motion for summary judgment, and the Court of Appeal affirmed. The California Supreme Court rejected the insureds' argument that Insurance Code section 530 and the efficient proximate cause doctrine prohibit Hartford from invoking the exclusion where the weather condition of rain causes a landslide. The Supreme Court also rejected plaintiffs' argument that because the policy is an "open peril" policy, all perils not expressly excluded by the policy are covered. In sum, the Supreme Court held: "[T]he weather conditions clause excludes the peril of rain inducing a landslide and that as applied here the clause does not violate section 530 or the efficient proximate cause doctrine. Because the policy effectively excludes the perils of earth movement, third party negligence, and rain inducing a landslide, and the [insureds] produced no evidence that a different peril was the efficient proximate cause of their loss, we agree with the Court of Appeal that the trial court did not err in granting Hartford summary judgment." *Julian v. Hartford Underwriters Ins. Co*. (2005) 35 Cal.4th 747.

Punitive Damages

The potential harm that is properly included in the due process analysis of determining whether punitive damages are appropriate or excessive is harm that is likely to occur, or foreseeable, from the defendant's conduct. *Simon v. San Paolo U.S. Holding Company, Inc.* (2005) 35 Cal.4th 1159.

In a case alleging breach of contract, the punitive damages award cannot be based on the benefit of the bargain where it is determined that no contract existed, therefore, no contract was breached. *Simon v. San Paolo U.S. Holding Company, Inc.* (2005) 35 Cal.4th 1159.

As held in *State Farm Mut. Auto Ins. v. Campbell* (2003) 538 U.S. 408, the constitutional "guideposts" for a court to utilize in reviewing a punitive damages award to determine whether violative of the due process clause are: (1) degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *Simon v. San Paolo U.S. Holding Company, Inc.* (2005) 35 Cal.4th 1159.

Punitive damages may not be calculated on a disgorgement theory, but may be based on how the scale and profitability of Defendant's repeated conduct reflects on its reprehensibility. *Johnson v. Ford Motor Company* (2005) 35 Cal.4th 1191.

An insurance company which seeks legal opinions from counsel, which are found to be untenable or indefensible, will not automatically be exempt from acting in reckless disregard of an insured's rights. *Reynolds v. Hartford* (9th Cir. 2005) 426 F.3d 1020.

An insurer is in reckless disregard of an insured's rights, and thus statutorily violates the Fair Credit and Reporting Act, when it relies on implausible legal opinions from counsel. *Reynolds v. Hartford* (9th Cir. 2005) 426 F.3d 1020.

An insurance company which seeks legal opinions from counsel, which are found to be untenable or indefensible, will not automatically be exempt from acting in reckless disregard of an insured's rights. *Reynolds v. Hartford Financial Services Group, Inc.* (9th Cir. 2005) 435 F.3d 1081.

Receivership

Doctors forming interindemnity arrangement to provide alternative to medical malpractice insurance could not seek to defect assessments imposed by liquidating receiver through rescission. *Gill v. Rich* (2005) 128 Cal.App.4th 1254.

Reimbursement of Defense Costs

The insured was sued by a competitor for allegedly stealing trade secrets and engaging in fraud. The insurer defended the insured under a reservation of rights, including "[t]he right to seek reimbursement of defense fees paid toward defending causes of action which raise no potential for coverage, as authorized by the California Supreme Court in *Buss v. Superior Court (Transamerica Ins. Co.)* (1997) 16 Cal.4th 35." While the third party action was pending, the insurer filed a declaratory relief action against the insured. The trial court found a potential for coverage for the underlying claims asserted against the insured. The insurer appealed, arguing that "advertising," as used in standard CGL policies covering advertising injury, was limited to "widespread promotional activities directed to the public at large" and did not include one-on-one solicitation of individual customers through a competitive bidding process for tailor-made services. The Court of Appeal disagreed and affirmed the judgment. The insurer appealed to the California Supreme Court, which remanded the case back to the Court of Appeal in light of the court's decision in *Hameid v. National Fire Ins. of Hartford* (2003) 31 Cal.4th 16, interpreting "advertising injury," to mean "widespread promotional activities usually directed to the public at large." Upon reconsideration, the Court of Appeal concluded there was no potential for coverage but that the insurer was not entitled to reimbursement because its no-potential-coverage determination "extinguished" the insurer's duty to defend only from that time forward. The California Supreme Court disagreed, concluding that "an insurer under a standard CGL policy, having properly reserved its rights, may advance sums to defend its insured against a third party lawsuit, and may thereafter recoup such costs from the insured if it is determined, as a matter of law, that no duty to defend ever arose because the third party suit never suggested the possibility of a covered claim." *Scottsdale Ins. Co. v. MV Transportation* (2005) 36 Cal. 4th 643.

Removal

Removal is proper and timely within 30 days of when complete diversity between parties first becomes ascertainable, even if it is after the first 30 days of receiving the initial pleading. *Harris v. Bankers Life and Casualty Co.* (9th Cir. 2005) 425 F. 3d 689.

Rescission

Doctors forming interindemnity arrangement to provide alternative to medical malpractice insurance could not seek to defect assessments imposed by liquidating receiver through rescission. *Gill v. Rich* (2005) 128 Cal.App.4th 1254.

Stephen Ward appealed a declaratory judgment that West Coast Life Insurance Co. ("WCL") properly rescinded a life insurance policy covering the life of his wife, Lois Ward, based on two inaccuracies in her insurance application. In response to one question, she indicated she did not have any other pending application for life insurance. In response to a separate question, she identified two pending life insurance policies, each in the amount of $1 million. After Lois Ward died and WCL obtained Stephen Ward's statement, WCL rescinded the policy on the ground that the application contained material misrepresentations about other life insurance in force. WCL then filed a complaint for declaratory relief. The trial court granted WCL's motion for summary judgment. Stephen Ward did not contest the trial court's ruling on the basis that Lois Ward's failure to disclose other current insurance policies in her application was material to WCL's decision to issue the policy but, instead, relied entirely on a theory of waiver. Insurance Code section 336 provides in pertinent part: "The right to information of material facts may be waived…by neglect to make inquiries as to such facts, where they are distinctly implied in other facts of which information is communicated." The factual basis for Stephen Ward's waiver claim rested on evidence that, before issuing the policy, WCL received information through First Financial Underwriting Services that should have prompted WCL to inquire as to the actual facts. The Court concluded the error on the application was immaterial because "the existence of a single policy of $500,000 [that was not identified on the application] did not implicate the underwriting guidelines and was not material to WCL's decision to issue the policy." The Court then concluded that the discovery of the immaterial omission did not imply the existence of material nondisclosures and affirmed the judgment in favor of WCL. *West Coast Life Ins. Co. v. Ward* (2005) 132 Cal. App. 4th 181.

A fire insurer may rescind a fire insurance policy based on an insured's negligent, or inadvertent misrepresentations contained in an insurance application pursuant to California Insurance Code sections 331 and 359, despite Insurance Code sections 2070 and 2071 requiring a willful and knowing misrepresentation. *Mitchell v. United Nat'l. Ins. Co.* (2005) 127 Cal.App.4th 457.

Reserves

Documents relating to a non-party insurer's financial condition including reserve and reinsurance information were not discoverable in an action against the insured-defendant. The plaintiffs sought this information in order to determine whether the insurer could meet its coverage obligations to the insured-defendant which, plaintiffs argued, would facilitate settlement discussions. The appellate court determined that the information was not relevant, admissible, or likely to lead to the discovery of admissible evidence under California Code of Civil Procedure Section 2017(a) and was not related to the "existence and contents" of the defendant's insurance which is discoverable under Section 2017(b). *Catholic Mutual Relief Society v. Superior Court* (2005) 128 Cal.App.4th 879, *rv. granted; not citable.*

Reinsurance

Documents relating to a non-party insurer's financial condition including reserve and reinsurance information were not discoverable in an action against the insured-defendant. The plaintiffs sought this information in order to determine whether the insurer could meet its coverage obligations to the insured-defendant which, plaintiffs argued, would facilitate settlement discussions. The appellate court determined that the information was not relevant, admissible, or likely to lead to the discovery of admissible evidence under California Code of Civil Procedure Section 2017(a) and was not related to the "existence and contents" of the defendant's insurance which is discoverable under Section 2017(b). *Catholic Mutual Relief Society v. Superior Court* (2005) 128 Cal.App.4th 879, *rv. granted; not citable*.

Respondeat Superior

Under California law of *respondeat superior*, employers are liable for acts of their employees occurring within the scope of their employment. The California Supreme Court has held that an employee is acting within the scope of his employment when in the context of the particular enterprise an employee's conduct is not so unusual or startling that it would seem unfair to include the loss from it among other costs of the employer's business. *Nationwide Mutual Ins. Co. v. Liberatore, et al.* (9th Cir. 2005) 408 F.3d 1158.

Restitution

The Attorney General may not seek restitution to recover the lost property on behalf of the insolvent insurer's creditors and policyholders under the Unfair Competition Law because this is within the exclusive province of the insurance commissioner. The Attorney General may, however, pursue civil penalties and injunctive relief if it does not interfere with the insurance commissioner's jurisdiction**.** *State of California v. Altus Finance* (2005) 36 Cal.App.4th 1284.

Restitution By Criminal

A criminal defendant is entitled to an offset in a restitution order for the amount paid by the criminal defendant's insurer in a related civil proceeding for those losses subject to the restitution order. However, the defendant must be an insured, and thus, have a contractual right to have the insurer make payments to the victim on his behalf. *People v. Jennings* (2005) 128 Cal.App.4th 42.

A criminal defendant may be required to pay restitution to his or her victim, without any offset even if the defendant's insurer has already made insurance payments to the victim. *In re: Tommy A* (2005) 131 Cal.App.4th 1580.

Retrospective Application of Statutory Amendments

The California Court of Appeal, Second Appellate District, found that Proposition 64, which amended the standing requirements for causes of action under Business and Professions Code sections 17200 and 17500, applied retroactively to cases that had been filed, but not finally resolved as of date of its enactment, but remand to the trial court was required to determine whether to grant uninjured plaintiffs leave to amend to name injured party to prosecute action.

Branick v. Downey Savings and Loan Association (2005) 126 Cal.App.4th 828, *rv. granted; not citable*.

Where a party brought suit under former Business & Professions Code section 17200 based on brokers having allegedly received "kickbacks" from insurers and did not allege he had suffered any injury, the amendments contained in Proposition 64 operated to eliminate any cause of action allowed under the former statute which had not yet vested. The right, which was created by statute, cannot vest until final judgment and could not vest here because the action was still pending. This is to be distinguished from rights based in common law where retroactive application is generally not given unless specifically set forth in the statutory amendment. *Hartford Fire Insurance Co. v. Superior Court* (2005) 134 Cal.App.4th 649, *rv. granted; not citable*.

Reverse Preemption

Where removal itself could not possibly impair another state's liquidation proceedings, the diversity statute 28 U.S.C. 1332, is not reverse-preempted by the McCarran-Ferguson Act. *Hawthorne Savings F.S.B. v. Reliance Insurance Co.* (9th Cir. 2005) 421 F.3d 835.

Right to Settle

If the policy terms permit the insurer to settle, within policy limits, without the consent of the insured and to bind the insured to the settlement, then the absence of the insured at any settlement conferences or as signatories to settlement agreements does not prejudice the substantial rights of the insured. *Fiege v. Cooke* (2005) 125 Cal.App.4th 1350.

Rules of Court, Rule 342

The court has the discretion to decide a motion for summary judgment adversely to a party who fails to comply with filing an adequate separate statement of undisputed material facts. However, even if there are procedural deficiencies, to the extent an opposing party clearly indicates which proposed undisputed material facts it disputes and provides references to supporting evidence, the proper response by the court is to allow for an amendment of the pleading. Granting the motion without considering the opposing party's evidence is an abuse of discretion. *Parkview Villas Association, Inc. v. State Farm Fire and Casualty Co.* (2005) 133 Cal.App.4th 1197.

Same Meaning Rule

The Court relied on the "same meaning rule" to find that the word "person" as used in the United Pacific policy necessarily refers to a natural person, not an organization or corporate claimant. The Court of Appeal held that the word "person" as used in the context of the offense of "wrongful eviction" was supported by noting the places from which the eviction must take place are places where people live – "a room, … a dwelling; or …a premises." *Mirpad v. CIGA* (2005) 132 Cal.App.4th 1058.

Scope of Employment

Whether a member of the armed services of the United States was acting within the scope of his employment at the time of an alleged negligent or wrongful act depends on whether the individual was "acting in line of duty." 26 U.S.C. § 2671 The scope of employment inquiry, including, in the military context, whether the employee was acting in line of duty is defined by the applicable state law of respondeat superior. *Nationwide Mutual Ins. Co. v. Liberatore, et al.* (9th Cir. 2005) 408 F.3d 1158.

To determine whether the employer should be held vicariously liable for the acts of the employee, the inquiry should be whether the risk was one that may fairly be regarded as typical of or broadly incidental to the enterprise undertaken by the employer. *Nationwide Mutual Ins. Co. v. Liberatore, et al.* (9th Cir. 2005) 408 F.3d 1158.

"Service-of-Suit" Clause

A disability policy's provision that mandated arbitration of all disability claims, and which provided that the arbitration costs would be split equally among the parties, did not conflict with, and was not ambiguous in light of, the policy's "Service-of-Suit" clause, which provided that the insurer would submit to the jurisdiction of an appropriate United States court in the event of coverage litigation. The arbitration clause took precedence over the "Service-of-Suit" clause because it provided that it applied "notwithstanding any other item set forth herein," and was not unenforceable simply because it required the insured to pay arbitration costs and fees. *Boghos v. Certain Underwriters at Lloyd's of London* (2005) 36 Cal.4th 495.

Service Plan Disputes

The Knox-Keene Act, California Health and Safety Code section 1340, et seq., does not grant the Department of Managed Health Care, which approves health care service plan contracts, authority to mandate health care service plan contracts that provide a choice between arbitration and trial by jury. *Viola v. Dept. of Managed Health Care* (2005) 133 Cal.App.4th 299.

Settlement

A settlement reached at a mandatory settlement conference which was attended by the insurer's attorneys and adjusters, but not by the named insureds, was enforceable against the named insureds even though they did not sign the settlement agreement. *Fiege v. Cooke* (2005) 125 Cal.App.4th 1350.

When terms of settlement agreement are put on the record after mandatory settlement conference, the lack of objection to the settlement agreement by the carrier's attorneys and adjusters satisfies the requirements of California Code of Civil Procedure § 664.6 which permits the court to enter a judgment pursuant to the terms of the settlement. *Fiege v. Cooke* (2005) 125 Cal.App.4th 1350.

Settling without the Consent of the Insured

It is common practice for insurance counsel and an adjuster to handle the negotiation of insurance-funded settlements without the superfluous involvement of a fully protected insured. Many people regard the ability to let the insurance carrier handle insured incidents without inconvenience to the insured as one of the benefits gained by purchasing insurance. *Fiege v. Cooke* (2005) 125 Cal.App.4th 1350.

Statute of Limitations

The doctrines of equitable tolling and equitable estoppel are distinct. Equitable estoppel comes into play only after the limitations period has run. Equitable tolling extends the statute of limitations. *Cordova v. 21st Century Insurance Company* (2005) 129 Cal.App.4th 89.

Statute of limitations under Code of Civil Procedure Section 337 on an insured's claim for breach of the duty to defend accrues when the insurer refuses to defend, and is tolled until the underlying action is terminated by a final judgment. *Eaton Hydraulics, Inc. v. Continental Casualty Company* (2005) 132 Cal.App.4th 966.

Statutory Interpretation

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

The determination of whether a program serves a public purpose is generally vested in the Legislature, and courts give legislative findings great weight. Moreover, courts presume the constitutionality of legislative acts and resolve all doubts in favor of the act. Thus, a purported conflict between a statute and a state or federal constitution must be clear and unquestionable. *The Foundation for Taxpayer and Consumer Rights v. Garamendi* (2005) 132 Cal.App.4th 1354.

Statutory Repeal Rule

Where a party brought suit under former Business & Professions Code section 17200 based on brokers having allegedly received "kickbacks" from insurers and did not allege he had suffered any injury, the amendments contained in Proposition 64 operated to eliminate any cause of action allowed under the former statute which had not yet vested. The right, which was created by statute, cannot vest until final judgment and could not vest here because the action was still pending. This is to be distinguished from rights based in common law where retroactive application is generally not given unless specifically set forth in the statutory amendment. *Hartford Fire Insurance Co. v. Superior Court* (2005) 134 Cal.App.4th 649, *rv. granted; not citable*.

Subrogation

Because insurer obtained partial subrogation rights against third parties as a result of paying a portion of its insured's claims for property damage to their home, the insurer had a statutory right to intervene in the insureds' construction defect lawsuit against the third party tortfeasors pursuant to C.C.P. § 387(b). *Hodge v. Kirkpatrick Development, Inc.* (2005) 130 Cal.App.4th 540.

An insurer is entitled to pursue a subrogation claim against its own insured if the policy does not cover the insured for the particular loss or liability. *McKinley v. XL Specialty Insurance Company* (2005) 131 Cal.App.4th 1572.

The California Insurance Guarantee Association ("CIGA") has no liability for claims made by other insurers in contexts other than those involving workers' compensation benefits. *CIGA v. Workers Compensation Appeals Board (AMIC)* (2005) 128 Cal.App.4th 307.

Summary Judgment

The beneficiary of a decedent's life insurance policy sued the insurer to rescind the policy and denying the beneficiary's claim on the ground that the insured had concealed her cigarette smoking in the 36-month period preceding her application in order to obtain the "preferred nonsmoker rate." The trial court granted the insurer's summary judgment, and the beneficiary appealed. The Court of Appeal affirmed, and the Supreme Court granted the beneficiary's petition for review. The Supreme Court held that a material issue of fact remained on whether the insured concealed her smoking and that the agent's knowledge of the insured's smoking was imputed to the insurer. *O'Riordan v. Federal Kemper Life Assurance Co.* (2005) 36 Cal.4th 281.

The Separate Statement of Undisputed Material Facts in support of a motion for summary judgment serves two functions: to give the parties notice of the material facts at issue and to permit the trial court to focus on whether those facts are truly undisputed. Where a party opposing a motion for summary judgment fails to file an adequate separate statement, but the two functions are still served, the proper response is to allow the opposing party to file an amended separate statement rather than entering judgment against them based on the procedural error. The opposing party will also be required to reimburse the fees incurred by the other side as a result of the supplemental briefing and appearance. *Parkview Villas Association, Inc. v. State Farm Fire and Casualty Co.* (2005) 133 Cal.App.4th 1197.

Where a party opposing a motion for summary judgment makes the procedural error of failing to specify the nature of its dispute, failing to describe the evidence that supported its position, and failing to include page and line number citations in its Separate Statement of Undisputed Material Facts, it is certainly unacceptable and makes the trial court's task more difficult. However, to the extent the opposing party clearly indicates which proposed undisputed material facts it disputes and provides references to supporting evidence, the proper response by the court is to allow for an amendment of the pleading. Granting the motion without considering the opposing party's evidence is an abuse of discretion. *Parkview Villas Association, Inc. v. State Farm Fire and Casualty Co.* (2005) 133 Cal.App.4th 1197.

Since a grant of summary judgment ends the case, the court's exercise of discretion to *deny* summary judgment due to a procedural error will be more readily affirmed. *Parkview Villas Association, Inc. v. State Farm Fire and Casualty Co.* (2005) 133 Cal.App.4th 1197.

Granting summary judgment based on a procedural error by the opposing party should be treated as a terminating sanction. Such sanctions have been held to be an abuse of discretion unless the violation was willful or preceded by a history of abuse of pretrial procedures. Where the procedural error is a curable defect from which the party filing the motion suffers no prejudice, the opposing party should be given the opportunity to cure the defect before the court rules on the motion. *Parkview Villas Association, Inc. v. State Farm Fire and Casualty Co.* (2005) 133 Cal.App.4th 1197.

Third-Party Claimant

An insurer owes no duty of good faith and fair dealing to a third-party claimant, even if the insurer coincidentally insures the third-party claimant. *Coleman v. Republic Indemnity Ins. Co. of California* (2005) 132 Cal.App.4th 403.

Trade Secrets

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

Treating Physician Rule

ERISA Plan estopped from asserting contractual limitations defense by Plan administrator's actions in lulling claimant into believing her claim is being considered and failing to rely upon contractual limitations provisions in the plan. District Court erroneously applied treating physician rule giving deference to claimant's treating physicians. *LaMantia v. Hewlett-Packard* (9th Cir. 2005) 401 F.3d 1114.

Trigger

To trigger insuring agreement under an accident-based policy, insured must establish unforeseen or unexpected happening that occurs suddenly with the accident and damage both in the policy period. *Lockheed Corporation v. Continental Insurance Company* (2005) 134 Cal.App.4th 187.

Tolling

Statute of limitations under Code of Civil Procedure Section 337 on an insured's claim for breach of the duty to defend accrues when the insurer refuses to defend, and is tolled until the underlying action is terminated by a final judgment. *Eaton Hydraulics, Inc. v. Continental Casualty Company* (2005) 132 Cal.App.4th 966.

Underinsured Motorist Coverage

An exclusion to UIM and UM coverage for insureds riding motorcycles is void as against public policy because it is not one of the eight statutory exemptions listed in Insurance Code section 11580.2. The statutory exemptions listed for section 11580.1, which addresses liability coverage, do not apply to section 11580.2, which is a first party coverage. "[S]ection 11580.2 mandates UM and UIM coverage to the named insured regardless of whether the individual is in a motor vehicle or on a horse, motorcycled, bicycle or stilts when injured by an uninsured or underinsured motorist, so long as one of the statutory exclusions does not apply." *Daun v. USAA Casualty Insurance Company* (2005) 125 Cal.App.4th 599.

Uninsured Motorist Coverage

In an uninsured motorist arbitration, an insurer is liable for attorneys fees and prejudgment interest under Code of Civil Procedure Section 998 and Civil Code Section 3291 if the insured obtains an award of compensatory damages exceeding the insured's pre-arbitration settlement offer. The fees and interest can be awarded either by the arbitrator or the trial court confirming the arbitral award, and the fees and interest can be awarded even if, combined with the compensatory damages award, they exceed the policy's uninsured motorist coverage limits. *Pilimai v. Farmers Insurance Exchange Company* (2005) 127 Cal.App.4th 1093, *rv. granted; not citable*.

An exclusion to UIM and UM coverage for insureds riding motorcycles is void as against public policy because it is not one of the eight statutory exemptions listed in Insurance Code section 11580.2. The statutory exemptions listed for section 11580.1, which addresses liability coverage, do not apply to section 11580.2, which is a first party coverage. "[S]ection 11580.2 mandates UM and UIM coverage to the named insured regardless of whether the individual is in a motor vehicle or on a horse, motorcycled, bicycle or stilts when injured by an uninsured or underinsured motorist, so long as one of the statutory exclusions does not apply." *Daun v. USAA Casualty Insurance Company* (2005) 125 Cal.App.4th 599.

Void Contract Provisions

An exclusion to UIM and UM coverage for insureds riding motorcycles is void as against public policy because it is not one of the eight statutory exemptions listed in Insurance Code section 11580.2. The statutory exemptions listed for section 11580.1, which addresses liability coverage, do not apply to section 11580.2, which is a first party coverage. "[S]ection 11580.2 mandates UM and UIM coverage to the named insured regardless of whether the individual is in a motor vehicle or on a horse, motorcycled, bicycle or stilts when injured by an uninsured or underinsured motorist, so long as one of the statutory exclusions does not apply." *Daun v. USAA Casualty Insurance Company* (2005) 125 Cal.App.4th 599.

Welfare and Institution Code § 730.6

A criminal defendant may be required to pay restitution to his or her victim, without any offset even if the defendant's insurer has already made insurance payments to the victim. *In re: Tommy A* (2005) 131 Cal.App.4th 1580.

Workers' Compensation

A general and special employer's joint and several liability for workers compensation, for injuries sustained by a special employee, is not extinguished by Insurance Code section 11663 or section 3602(d). *General Casualty Insurance v. Workers' Compensation Appeals Board* (2005) 123 Cal.App.4th 202, *ordered not published; not citable*.

An employer must report work-related injury claims to its workers compensation insurer, which then assumes responsibility for adjusting the claim. The insurer must accept or reject the claim within 90 days after the claim form is filed or the injury will be presumed compensable. If the insurer decides to reject the claim, it must send a notice denying liability for all compensation benefits within 14 days after the decision to deny, stating the reasons for the denial, and stating the claimant's remedies. *Leegin Creative Leather Products v. Diaz* (2005) 131 Cal.App.4th 1517.

Workers' Compensation Benefits

An insurer held liable for workers compensation benefits is entitled to pursue a civil action for reimbursement against an unlawfully uninsured employer, pursuant to Labor Code section 5500.5 subsection (a). *Graphic Arts Mutual Insurance Co. v. Time Travel International, Inc.* (2005) 126 Cal. App. 4th 405.

Workers' Compensation: Fraud

The workers' compensation system provides the proper vehicle for an employer to raise a claim of fraud and to protect itself from the damages (higher insurance premiums) caused by a fraudulent claim. *Leegin Creative Leather Products v. Diaz* (2005) 131 Cal.App.4th 1517.

Employer was required by law and insurance policy terms to report workers' compensation claim to insurer, so there was no detrimental reliance on employee's misrepresentations and thus no fraud. *Leegin Creative Leather Products v. Diaz* (2005) 131 Cal.App.4th 1517.

If an employer has actual knowledge of facts that would tend to disprove any aspect of an employee's workers' compensation claim while the claim is pending, the employer must promptly notify its workers' compensation insurer in writing. This is consistent with the general principle that it is the insurer who investigates a claim and decides whether or not to contest or settle it. *Leegin Creative Leather Products v. Diaz* (2005) 131 Cal.App.4th 1517.

If an employer provides the workers' compensation insurer with written notice questioning the validity of a claim, the Workers' Compensation Appeals Board may not approve a compromise and release agreement or stipulation that provides compensation to the employee unless the insurer notifies the employer of the hearing at which the compromise and release agreement or stipulation is to be approved. *Leegin Creative Leather Products v. Diaz* (2005) 131 Cal.App.4th 1517.

When an employer properly notifies its insurer of any facts suggesting a fraudulent workers' compensation claim and the Workers' Compensation Appeals Board thereafter

determines that the employee is not entitled to compensation, the insurer shall reimburse the employer for any premium paid solely due to the inclusion of the successfully challenged payments in the calculation of the employer's experience modification. *Leegin Creative Leather Products v. Diaz* (2005) 131 Cal.App.4th 1517.

If a workers' compensation insurer learns of a fraudulent claim, the insurer is also obligated to notify the local district attorney and the Bureau of Fraudulent Claims of the Department of Insurance. *Leegin Creative Leather Products v. Diaz* (2005) 131 Cal.App.4th 1517.

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