



*Annual Insurance Law Report*

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Developments  
in  
Insurance Case Law 2008:  
Focus: California

A summary prepared by Gordon & Rees LLP of the holdings, alphabetized by topic, of the cases published in 2008 applying California law, as well as select cases from other jurisdictions, which address the rights and duties of the insurance industry.

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## Table of Contents

## Page

All Writs Act .....	1
Anti-Injunction Act .....	1
Appeals .....	1
Appeals: Interlocutory (Federal Court) .....	2
Appeals: Sanctions .....	2
Appeals: Standard Of Review .....	2
Appraisal.....	3
Arbitration .....	3
Arbitration: Discovery.....	6
Arbitration: Immunity .....	6
Arbitration: Petition To Compel.....	6
Arbitration: Review .....	6
Attorneys-In-Fact .....	7
Bad Faith .....	7
Bodily Injury .....	8
Breach Of Warranty .....	9
Burden Of Proof .....	9
California Business and Professions Code Sections 17200 et seq. ....	9
California Business and Professions Code Section 17203 .....	9
California Business and Professions Code Section 17204.....	9
California Civil Code Section 798.85 .....	9
California Civil Code Section 1542 .....	9
California Civil Code Section 1598 .....	10
California Civil Code Section 1599 .....	10

## Table of Contents

## Page

California Civil Code Section 2860 .....	10
California Civil Code Section 2860(a) .....	10
California Civil Code Section 2860(c) .....	10
California Civil Code Section 3287(a) .....	11
California Code Of Civil Procedure Section 998 .....	11
California Evidence Code Section 1119(c) .....	11
California Health and Safety Code Section 1361.1(b) .....	11
California Health and Safety Code Sections 1361.1(b) and (d) .....	12
California Insurance Code Section 530 .....	12
California Insurance Code Section 700 .....	12
California Insurance Code Section 1860.1 .....	12
California Insurance Code Section 2071 .....	12
California Insurance Code Sections 10101, 10102 .....	12
California Insurance Code Section 10290 .....	13
California Insurance Code Section 10291.5(f) .....	13
California Insurance Code Section 11580.2 .....	13
California Insurance Code Section 11580.2(f) .....	13
California Insurance Code Section 11580.2(p)(3) .....	14
California Insurance Code Section 11580.26(b) .....	14
California Insurance Code Sections 12800 et seq. ....	15
California Labor Code Section 3600(b) .....	15
California Rule of Court 3.1700(b)(1) .....	15
Cancellation .....	15
Civil Procedure .....	16

## Table of Contents

## Page

Contract Interpretation.....	16
Contract Interpretation: Ambiguity .....	20
Contract Interpretation: Course Of Conduct .....	22
Contract Interpretation: Extrinsic Evidence And Other Sources.....	22
Contract Interpretation: Judge v. Jury .....	23
Contract Interpretation: Jury Instruction .....	23
Contracts: Severability .....	23
Declaratory Relief .....	23
Default Judgment.....	24
Definition: Accident .....	24
Definition: Customer .....	25
Definition: Injury In Fact And Lost Money Or Property As A Result.....	25
Definition: Negligent Publication.....	25
Definition: Property Damage .....	26
Definition: Voluntary Payments.....	26
Demurrer.....	26
Disability: Total.....	26
Duty To Defend.....	26
Duty To Indemnify .....	28
Efficient Proximate Cause .....	28
Equitable Contribution .....	29
Equitable Subrogation v. Contribution.....	29
ERISA.....	29
ERISA: Breach Of Fiduciary Duty.....	31

## Table of Contents

	<u>Page</u>
ERISA: Preemption .....	32
Estoppel .....	33
Evidence: Stipulations .....	33
Excess Insurance .....	33
Exclusion .....	33
Exclusion: Agents And Brokers .....	34
Exclusion: Cross-suits .....	34
Exclusion: Exceptions .....	34
Exclusion: Field Of Entertainment Business .....	34
Exclusion: Flood.....	34
Exclusion: Pollution .....	35
Exclusion: Professional Services.....	35
Exclusion: Workers' Compensation.....	35
Exhaustion .....	36
Exhaustion Of Administrative Remedies .....	36
Federal Rule Of Civil Procedure 12(b)(6).....	37
Federal Rule Of Civil Procedure 32(a)(4)(B).....	37
Federal Rule Of Evidence 804(b)(1) .....	37
Fiduciary Duty .....	37
Fifth Amendment.....	37
Filed Rate Doctrine.....	38
Fixed Costs .....	38
Fraud.....	38
General Releases .....	38

**Table of Contents**

	<b><u>Page</u></b>
Health Care Plans .....	39
Hearsay .....	39
Illegal Insurance Contract: Enforcement.....	39
Indemnity Agreement .....	39
Independent Counsel .....	39
Insurance Agents .....	40
Insurance: Bodily Injury Liability .....	41
Insurance: Builder’s Risk .....	41
Insurance: Claims Made .....	41
Insurance: Employers Liability .....	42
Insurance: Fiscal Event.....	42
Insurance: Garage Operations .....	42
Insurance: Life.....	43
Insurance: Marine.....	43
Insurance: Primary And Excess.....	43
Insurance: Regulations .....	44
Insurance: Underinsured Motorist.....	44
Insurance: Uninsured Motorist .....	45
Insurance: Vessel Pollution .....	47
Insurance: Workers’ Compensation .....	47
Intervention: Permissive.....	48
Licensing .....	48
Limit Of Liability .....	48
Litigation Privilege.....	49

## Table of Contents

	<u>Page</u>
Mailed.....	49
Mediation.....	49
Mediation: Sanctions.....	50
Modification.....	50
Mootness (Federal Court).....	50
Mutual Insurers.....	50
Negligent Misrepresentation.....	51
Pari Delicto.....	51
Pro Se Litigation.....	51
Proposition 64.....	51
Public Policy Considerations.....	51
Punitive Damages.....	52
Reformation.....	52
Rule: Business Judgment.....	52
Rule: Genuine Dispute.....	53
Rule: No Direct Action.....	53
Rule: No Direct Action: Exceptions.....	53
Rule: Parol Evidence.....	53
Self-insured Retention.....	53
Standard Of Proof For Declaration Of No Coverage.....	54
Statutory Interpretation.....	54
Statutory Penalties.....	54
Stay.....	54
Stipulated Judgment.....	54

## Table of Contents

	<u>Page</u>
Subrogation.....	55
Subscription Agreements.....	55
Summary Judgment .....	55
Surety Bonds .....	56
Taxed Costs .....	56
Third Party Standing.....	57
Uberrimae Fidei.....	57
Unenforceable Settlement Offers .....	57
Unfair Competition Law.....	58
Unlicensed Insurer.....	58
Void v. Voidable .....	58
Waiver .....	58
Washington Law.....	59



**Table of Authorities**

**Page**

**Cases**

*American Casualty Co. of Reading, PA v. Miller*  
(2008) 159 Cal.App.4th 501 ..... 35, 54

*Bordeaux, Inc. v. American Safety Ins. Co.*  
(2008) 145 Wn.App. 687 ..... 53, 55, 59

*Bouton v. USAA Casualty Ins. Co.*  
(2008) 167 Cal.App.4th 412 ..... 4, 6, 13, 14, 24, 44, 45

*Brehm v. 21st Century Ins. Co.*  
(2008) 166 Cal.App.4th 1225 ..... 5, 7, 8, 14, 44, 45, 46, 53, 54

*Briggs v. Resolution Remedies*  
(2008) 168 Cal.App.4th 1395 ..... 1, 3, 4, 6, 45

*Campagnone v. Enjoyable Pools & Spas Service & Repairs, Inc.*  
(2008) 163 Cal.App.4th 566 ..... 2, 49, 50

*Certain Underwriters at Lloyds, London v. Totem Agencies Inc.*  
(9th Cir. 2008) 518 F.3d 645 ..... 57, 59

*Chen v. Interinsurance Exch. of the Automobile Club*  
(2008) 164 Cal.App.4th 117 ..... 9, 11, 38, 57

*City of Hollister v. Monterey Ins. Company*  
(2008) 165 Cal.App.4th 455 ..... 33, 44

*City of Hope National Medical Center v. Genentech, Inc.*  
(2008) 43 Cal.4th 375 ..... 18, 20, 22, 23, 33, 37, 52

*Compulink Management Center, Inc. v. St. Paul Fire & Marine Ins. Co.*  
(2008) 169 Cal.App.4th 289 ..... 10, 11, 39, 40

*Contractors Equipment Maintenance Co., Inc., ex rel. United States and United Coastal Ins. Co. v. Bechtel Hanford, Inc.*  
(9th Cir. 2008) 514 F.3d 899 ..... 17, 18, 56, 59

*Cornhusker Casualty Ins. Co. v. Kachman*  
(2008) 165 Wn.2d 404 ..... 16, 49, 59

*Crawford v. Weather Shield Mfg. Inc.*  
(2008) 44 Cal.4th 541 ..... 20, 27, 39

*Crowley Maritime Corp. v. Boston Old World Ins. Co.*  
(2008) 158 Cal.App.4th 1061 ..... 5, 29

## Table of Authorities

	<u>Page</u>
<i>De Bruyn v. Superior Court</i> (2008) 158 Cal.App.4th 1213.....	12, 20, 28, 29
<i>Devonwood Condominium Owners Ass'n. v. Farmers Ins. Exchange</i> (2008) 162 Cal.App.4th 1498.....	3
<i>Employers Mutual Casualty Company v. Philadelphia Indemnity Ins. Company</i> (2008) 169 Cal.App.4th 340.....	2, 9, 10, 11, 15, 21, 29, 38, 56, 57
<i>Everett v. State Farm General Ins. Co.</i> (2008) 162 Cal.App.4th 649.....	12, 13, 38, 41, 50, 51
<i>Explorer Ins. Co. v. Gonzalez</i> (2008) 164 Cal.App.4th 1258.....	46
<i>Fireman's Fund Ins. Co. v. Sizzler USA Real Property, Inc.</i> (2008) 169 Cal.App.4th 415.....	18, 55, 58
<i>Fogel v. Farmers Group, Inc.</i> (2008) 160 Cal.App.4th 1403.....	7, 12, 36, 38, 55
<i>Food Pro International, Inc. v. Farmers Ins. Exch.</i> (2008) 169 Cal.App.4th 976.....	35, 52
<i>GGIS Ins. Services, Inc. v. Superior Court</i> (2008) 168 Cal.App.4th 1493.....	21, 27, 34, 54
<i>Golden Gate Restaurant Ass'n v. City and County of San Francisco</i> (9th Cir. 2008) 546 F.3d 639.....	32, 33
<i>Great Western Drywall, Inc. v. Interstate Fire &amp; Casualty Co.</i> (2008) 161 Cal.App.4th 1033.....	20, 21, 34
<i>Hecht v. Paul Revere Life Ins. Co.</i> (2008) 168 Cal.App.4th 30.....	26
<i>Hill v. State Farm Mutual Automobile Ins. Co.</i> (2008) 166 Cal.App.4th 1438.....	50, 51, 52, 53
<i>Lambert v. Carneghi</i> (2008) 158 Cal.App.4th 1120.....	6, 12, 49
<i>Liberty Mutual Fire Ins. Co. v. LcL Administrators, Inc.</i> (2008) 163 Cal.App.4 <sup>th</sup> 1093.....	16
<i>Life Ins. Co. of N. Am. v. Ortiz</i> (9th Cir. 2008) 535 F.3d 990.....	43

**Table of Authorities**

**Page**

*Long v. Century Indem. Co.*  
(2008) 163 Cal.App.4th 1460..... 40

*Los Angeles Unified School Dist. v. Great American Ins. Company*  
(2008) 163 Cal.App.4th 944. Not citable. Review granted..... 1, 22, 23, 53

*Lyons v. Fire Ins. Exchange*  
(2008) 161 Cal.App.4th 880..... 20, 25, 28

*Manzarek v. St. Paul Fire Marine Ins. Co.*  
(9th Cir. 2008) 519 F.3d 1025..... 7, 8, 17, 20, 26, 27, 33, 34, 37

*Medina v. Safe-Guard Products, Int’l, Inc.*  
(2008) 164 Cal.App.4th 105..... 9, 10, 12, 15, 23, 25, 39, 48, 51, 54, 58

*Mercury Ins. Co. v. Pearson*  
(2008) 169 Cal.App.4th 1064..... 20, 40, 41, 52

*Metropolitan Life Ins. Co. v. Wanda Glenn*  
(2008) 128 S.Ct. 2343 ..... 31

*Monticello Ins. Co. v. Essex Ins. Co.*  
(2008) 162 Cal.App.4th 1376..... 27, 29, 39, 54

*Nationwide Life Ins. Co. v. Angelina Richards*  
(2008) 541 F.3d 903 ..... 37, 38, 39

*Negrete v. Allianz Life Ins. Co.*  
(9th Cir. 2008) 523 F.3d 1091 ..... 1, 2, 50

*Northrup Grumman Corp. v. Factory Mut. Ins. Co.*  
(9th Cir. 2008) 538 F.3d 1090..... 16, 17, 20, 22, 34, 44

*Otay Land Co. v. Royal Indem. Co.,*  
(2008) 169 Cal. App.4th 556..... 23, 24, 53

*Power Fabricating, Inc. v. State Comp. Ins. Fund*  
(2008) 167 Cal.App.4th 1446..... 21, 35, 36, 42, 47

*Qualcomm, Inc. v. Certain Underwriters at Lloyd’s, London*  
(2008) 161 Cal.App.4th 184..... 19, 21, 22, 33, 36, 48, 51

*Roberts v. Assurance Co. of Am.*  
(2008) 163 Cal.App.4th 1398..... 1, 28, 41, 56

*Royal Indem. Co. v. United Enterprises, Inc.*  
(2008) 162 Cal.App.4th 194..... 48, 57

**Table of Authorities**

**Page**

*Saffon v. Wells Fargo & Company Long Term Disability Plan*  
(9th Cir. 2008) 522 F.3d 863..... 13, 29, 30

*Simon v. Hartford Life, Inc.*  
(9th Cir. 2008) 546 F.3d 661 ..... 2, 31, 51

*Sony Computer Entertainment Am., Inc. v. Am. Home Assurance Co. and Am. Int’l Specialty Lines Ins. Co.*  
(9th Cir. 2008) 532 F.3d 1007 ..... 17, 22, 25, 26, 34

*Spangle v. Farmers Ins. Exchange*  
(2008) 166 Cal.App.4th 560..... 18, 21, 25, 28, 43, 55

*State Farm Fire and Casualty Co. v. Superior Court*  
(2008) 164 Cal.App.4th 317 ..... 9, 18, 19, 24, 25, 27

*The Upper Deck Co., et al. v. Am. Int’l Specialty Lines Ins. Co.*  
(9th Cir. 2008) 549 F.3d 1210..... 3, 9, 42

*Travelers Property Casualty v. ConocoPhillips*  
(9th Cir. 2008) 546 F.3d 1142..... 15, 26, 47

*Wedemeyer v. Safeco Ins. Co.*  
(2008) 160 Cal.App.4th 1297..... 41, 46

*Westrec Marina Management, Inc. v. Arrowood Indem. Co.*  
(2008) 163 Cal.App.4th 1387..... 3, 19, 41, 42

**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

**All Writs Act**

The All Writs Act authorizes federal courts to “issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” (28 U.S.C., § 1651(a).) But, there is no basis for a court to enjoin parties from participating in or settling actions against the same defendant in another federal court when there is no pending settlement in the enjoining court and no evidence of collusion in the other federal court and even though settlement may dispose of claims before the enjoining court. *Negrete v. Allianz Life Ins. Co.* (9th Cir. 2008) 523 F.3d 1091.

**Anti-Injunction Act**

The authority conferred upon federal courts by the All Writs Act is restricted by the Anti-Injunction Act, which prohibits federal courts from granting an injunction to stay proceedings in a state court, unless “expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.” 28 U.S.C., § 2283. None of the exceptions apply to settlement discussions in a state court action that would affect proceedings in the federal action, absent any pending settlement in the federal action or evidence of collusion in the state action. *Negrete v. Allianz Life Ins. Co.* (9th Cir. 2008) 523 F.3d 1091.

**Appeals**

It is judicial action and not judicial reasoning which is the subject of review. *Briggs v. Resolution Remedies* (2008) 168 Cal.App.4th 1395.

In its de novo review of a trial court’s summary judgment decision, the appellate court must “independently review the record” and “apply the same rules and standards” as the trial court. The trial court must grant the motion if “all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Cal. Code Civ. Proc., § 437c, subd. (c). “There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.” *Roberts v. Assurance Co. of Am.* (2008) 163 Cal.App.4th 1398.

When conducting its independent de novo review of a trial court’s summary judgment decision, the appellate court must consider “all the evidence set forth in the moving and opposition papers except that to which objections were made and sustained,” as well as all inferences reasonably drawn from that evidence.” *Roberts v. Assurance Co. of America* (2008) 163 Cal.App.4th 1398.

The trial court’s determination of whether or not a contract provision is ambiguous is a question of law, subject to de novo review on appeal. The trial court’s resolution of an ambiguity is a question of law if no extrinsic evidence is admitted to interpret the contract or if the extrinsic evidence is not in conflict. *Los Angeles Unified School Dist. v. Great American Ins. Company* (2008) 163 Cal.App.4th 944. Not citable. Review granted.

**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

**Appeals: Interlocutory (Federal Court)**

In determining whether the district court's order was an interlocutory order granting an injunction, the Ninth Circuit looks beyond the label given by the district court order, and instead, examines the "substantial effect" of the order. If the order (1) has the "practical effect" of granting an injunction, (2) has "serious, irreparable consequences, (3) which could "be effectively challenged only by immediate appeal," then the order is an injunction giving rise to an interlocutory appeal. *Negrete v. Allianz Life Ins. Co.* (9th Cir. 2008) 523 F.3d 1091.

**Appeals: Sanctions**

Court of Appeal has authority under the Appellate Rules of the California Rule of Court 8.276(a) to impose sanctions for violation of its own local rules. *Campagnone v. Enjoyable Pools & Spas Service & Repairs, Inc.* (2008) 163 Cal.App.4th 566.

**Appeals: Standard Of Review**

The Court of Appeals conducts a de novo review of dismissals for failure to state a claim under Fed. R. Civ. P. 12(b)(6). *Simon v. Hartford Life, Inc.* (9th Cir. 2008) 546 F.3d 661.

A decision on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) is reviewed de novo. *Manzarek v. . St. Paul Fire Marine Insurance Company* (9th Cir. 2008) 519 F.3d 1025.

Denial of leave to amend is reviewed for an abuse of discretion. *Manzarek v. . St. Paul Fire Marine Insurance Company* (9th Cir. 2008) 519 F.3d 1025.

Dismissal without leave to amend is improper unless it is clear, upon de novo review, that the complaint could not be saved by amendment. *Manzarek v. . St. Paul Fire Marine Insurance Company* (9th Cir. 2008) 519 F.3d 1025.

Contractual and statutory interpretations are questions of law reviewed de novo. *Employers Mutual Casualty Company v. Philadelphia Indemnity Ins. Company* (2008) 169 Cal.App.4th 340.

Questions of law submitted on stipulated facts are reviewed de novo but if stipulated facts leave an ultimate question of fact open for resolution, the substantial evidence rule applies. *Employers Mutual Casualty Company v. Philadelphia Indemnity Ins. Company* (2008) 169 Cal.App.4th 340.

Where the trial court makes a factual finding that attorney fees are a fixed cost its decision is reviewed for an abuse of discretion. *Employers Mutual Casualty Company v. Philadelphia Indemnity Insurance Company* (2008) 169 Cal.App.4th 340.

On an appeal from an order dismissing a complaint after the sustaining of a demurrer, the court of appeal independently reviews the pleading to determine whether the facts alleged state a cause of action under any possible legal theory. *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225.

**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

Absent a factual dispute, the interpretation of an insurance contract and its application to undisputed facts, are questions of law reviewed de novo. *Westrec Marina Management, Inc. v. Arrowood Indem. Co.* (2008) 163 Cal.App.4th 1387.

**Appraisal**

Judgment entered after issuance of appraisal award violated California Code of Civil Procedure section 1287.4 because it did not conform to the appraisal award upon which it is based. *Devonwood Condominium Owners Ass'n. v. Farmers Ins. Exchange* (2008) 162 Cal.App.4th 1498.

Consistent with the standard form fire insurance policy and Insurance Code section 2071, an appraisal award is a binding determination of the "amount of loss." *Devonwood Condominium Owners Ass'n. v. Farmers Ins. Exchange* (2008) 162 Cal.App.4th 1498.

A party is not entitled to a judgment of an appraisal award under the California Arbitration Act for the amount stated in the award because the award itself did not determine liability. *Devonwood Condominium Owners Ass'n. v. Farmers Ins. Exchange* (2008) 162 Cal.App.4th 1498.

Appraisal award proceedings are subject to the arbitration provisions outlined in the California Arbitration Act. *Devonwood Condominium Owners Ass'n. v. Farmers Ins. Exchange* (2008) 162 Cal.App.4th 1498.

Function of an appraiser is to determine the amount of damage, not resolve questions of coverage and interpret policy provisions. *Devonwood Condominium Owners Ass'n. v. Farmers Ins. Exchange* (2008) 162 Cal.App.4th 1498.

**Arbitration**

Under the Federal Arbitration Act, when arbitrators are called to interpret a contract, their award must draw its essence from the parties' agreement. *The Upper Deck Co., et al. v. Am. Int'l Specialty Lines Ins. Co.* (9th Cir. 2008) 549 F.3d 1210.

Under the Federal Arbitration Act, review of an arbitration panel's contract interpretation is highly deferential and an award must be confirmed if the arbitrators even arguably construed or applied the contract and acted within the scope of their authority. Once the reviewing court finds that the award plausibly interpreted the contract, it should confirm the award without further inquiry. *The Upper Deck Co., et al. v. Am. Int'l Specialty Lines Ins. Co.* (9th Cir. 2008) 549 F.3d 1210.

Once a dispute is submitted to arbitration, the California Arbitration Act contemplates only limited, if any, judicial involvement. *Briggs v. Resolution Remedies* (2008) 168 Cal.App.4th 1395.

Typically, those who enter into arbitration agreements expect their dispute will be resolved without interference from the courts. *Briggs v. Resolution Remedies* (2008) 168 Cal.App.4th 1395.

**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

It is the responsibility of the arbitrator, not the court, to resolve all questions needed to determine the controversy, decide questions of procedure and discovery, and grant relief for delay in bringing an arbitration to resolution. *Briggs v. Resolution Remedies* (2008) 168 Cal.App.4th 1395.

When it has been determined that arbitration should be pursued and all judicial proceedings have been suspended until completion of the arbitration, it would be wholly incompatible with established policies of the law to permit the court thereafter to intervene in or with the arbitration. In large measure, it would not only preclude the parties from obtaining a resolution of their differences by a tribunal of their choosing, but it would also recreate the very delays incident to a civil action that the arbitration agreement was designed to avoid. *Briggs v. Resolution Remedies* (2008) 168 Cal.App.4th 1395.

If an arbitration commenced without need for a court order compelling arbitration, the courts lack jurisdiction and should not interfere with the arbitration proceedings. *Briggs v. Resolution Remedies* (2008) 168 Cal.App.4th 1395.

Arbitration pursuant to Insurance Code section 11580.2 is a form of contractual arbitration governed by the California Arbitration Act. *Briggs v. Resolution Remedies* (2008) 168 Cal.App.4th 1395.

The Civil Discovery Act applies to all civil actions and special proceedings of a civil nature including arbitration. *Bouton v. USAA Casualty Ins. Co.* (2008) 167 Cal.App.4th 412.

A trial court must allow discovery on the question of whether a petitioner seeking arbitration of a UIM dispute is an insured prior to making a determination of the petitioner's status as an insured. *Bouton v. USAA Casualty Ins. Co.* (2008) 167 Cal.App.4th 412.

A trial court should exercise its discretion to hear oral testimony at a hearing to determine whether a petitioner seeking arbitration of a UIM claim is an insured if affidavits, declarations, and other documentary evidence submitted by the parties are sharply conflicting on the question. *Bouton v. USAA Casualty Ins. Co.* (2008) 167 Cal.App.4th 412.

Insurance Code section 11580.2(f) requires an insurer and insured to arbitrate the amount of damages the insured is entitled to recover from an uninsured motorist. It does not require an arbitrator to determine whether a claimant is an insured under the insurance policy. Who is an insured should be determined by the court. *Bouton v. USAA Casualty Ins. Co.* (2008) 167 Cal.App.4th 412.

Insurance Code section 11580.2(f) requires arbitration of only two issues: "(1) whether the insured is entitled to recover against the uninsured motorist and (2) if so, the amount of the damages." *Bouton v. USAA Casualty Ins. Co.* (2008) 167 Cal.App.4th 412.

An insured's default judgment against an uninsured motorist is subject to arbitration pursuant to Insurance Code section 11580.2(f) because the statute requires an insured and his or her insurer to arbitrate the tortfeasor's liability and damages owed to the insured and the binding nature of a default judgment obtained against that tortfeasor falls squarely within those questions of liability and damages statutorily subject to arbitration. *Bouton v. USAA Casualty Ins. Co.* (2008) 167 Cal.App.4th 412.



**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

An insurer's contractual right to arbitrate uninsured motorist and underinsured motorist claims does not relieve it from its obligation to deal with its insured in good faith. *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225.

An insurer has an implied obligation to honestly assess its insured's claim and to make a reasonable effort to resolve any dispute with its insured as to the amount of damages before invoking its contractual right to arbitrate. *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225.

By failing to prominently display an arbitration clause pursuant to Health and Safety Code section 1363.1(b), a health care service provider cannot "substantially comply" with said section. *Burks v. Kaiser Foundation Health Plan, Inc.* (2008) 160 Cal.App.4th 1021.

To demonstrate compliance with the statutory requirements set forth in Health and Safety Code sections 1363.1(b) and (d), a health plan must be able to demonstrate something other than the placement of the disclosure of an arbitration clause above the signature line that makes it stand out from its surroundings. *Burks v. Kaiser Foundation Health Plan, Inc.* (2008) 160 Cal.App.4th 1021.

Substantial compliance with the prominence requirements with respect to the disclosure of an arbitration provision, as set forth in Health and Safety Code section 1361.1(b), means actual compliance. *Burks v. Kaiser Foundation Health Plan, Inc.* (2008) 160 Cal.App.4th 1021.

There is strong public policy in California and Federal law favoring arbitration. However, this public policy is based on the principle that arbitration assumes the parties elected to use it as an alternative to the judicial process. The public policy in favor of arbitration does not apply in situations where the parties have not all agreed to arbitrate. *Crowley Maritime Corp. v. Boston Old World Ins. Co.* (2008) 158 Cal.App.4th 1061.

Under California law, a non-signatory can be compelled to arbitrate under two circumstances: (1) where the non-signatory is a third party beneficiary of the contract containing the arbitration agreement; or (2) where a preexisting relationship existed between the non-signatory and one of the parties to the arbitration agreement. *Crowley Maritime Corp. v. Boston Old World Ins. Co.* (2008) 158 Cal.App.4th 1061.

The Federal Arbitration Act applies in transactions involving international commerce. An insurance contract between an American company and a foreign insurer qualifies as international commerce. *Crowley Maritime Corp. v. Boston Old World Ins. Co.* (2008) 158 Cal.App.4th 1061.

A non-signatory may be bound to an arbitration agreement pursuant to ordinary principles of contract law, including incorporation by reference, assumption and agency. In addition, non-signatories can enforce arbitration agreements as third party beneficiaries, but a direct benefit under the contract containing the arbitration agreement is required. *Crowley Maritime Corp. v. Boston Old World Ins. Co.* (2008) 158 Cal.App.4th 1061.

**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

**Arbitration: Discovery**

Civil Discovery Act applies to all civil actions and special proceedings of a civil nature including arbitration. *Bouton v. USAA Casualty Ins. Co.* (2008) 167 Cal.App.4th 412.

Trial court must allow discovery on the question of whether a petitioner seeking arbitration of a UIM dispute is an insured prior to making a determination of the petitioner's status as an insured. *Bouton v. USAA Casualty Ins. Co.* (2008) 167 Cal.App.4th 412.

**Arbitration: Immunity**

In private arbitration proceedings, an arbitrator is protected by the arbitral privilege because the role that she or he exercises is analogous to a judge. *Lambert v. Carneghi* (2008) 158 Cal.App.4th 1120.

Appraisers that determine the amount payable on a fire insurance policy pursuant to Insurance Code section 2071 are arbitrators within the meaning of Code of Civil Procedure section 1280. *Lambert v. Carneghi* (2008) 158 Cal.App.4th 1120.

**Arbitration: Petition To Compel**

Determining whether a claimant is insured under an uninsured motorist provision is not a question of the underinsured tortfeasor's liability or damages owed to the insured and is therefore not subject to arbitration under Insurance Code section 11580.2(f). *Bouton v. USAA Casualty Ins. Co.* (2008) 167 Cal.App.4th 412.

Questions of coverage, including whether the claimant is an insured, must be resolved before a petition to compel arbitration pursuant to section 11580.2(f) is granted. *Bouton v. USAA Casualty Ins. Co.* (2008) 167 Cal.App.4th 412.

Coverage questions can be determined by the trial court in determining whether to grant a petition to compel arbitration and need not be raised in a separate declaratory relief action. *Bouton v. USAA Casualty Ins. Co.* (2008) 167 Cal.App.4th 412.

Trial court should exercise its discretion to hear oral testimony at a hearing to determine whether a petitioner seeking arbitration of a UIM claim is an insured if affidavits, declarations, and other documentary evidence submitted by the parties are sharply conflicting on the question. *Bouton v. USAA Casualty Ins. Co.* (2008) 167 Cal.App.4th 412.

**Arbitration: Review**

Where an arbitrator has issued a final award, there are limited grounds upon which to vacate the award. *Briggs v. Resolution Remedies* (2008) 168 Cal.App.4th 1395.

The trial court may not set aside a final award even where it is based on mistakes of law. *Briggs v. Resolution Remedies* (2008) 168 Cal.App.4th 1395.

A trial court has no statutory authority to perform a de novo review of an arbitrator's interlocutory order. *Briggs v. Resolution Remedies* (2008) 168 Cal.App.4th 1395.

**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

**Attorneys-In-Fact**

Section 1860.1 does not preclude claims asserted against the attorney-in-fact for a reciprocal insurance exchange. *Fogel v. Farmers Group, Inc.* (2008) 160 Cal.App.4th 1403.

Chapter 9 of division 1, part 2, of the California Insurance Code does not regulate the collection of attorney-in-fact fees. *Fogel v. Farmers Group, Inc.* (2008) 160 Cal.App.4th 1403.

Where a policy authorizes the collection of attorney-in-fact fees, the insured is estopped from complaining of the collection of reasonable fees. *Fogel v. Farmers Group, Inc.* (2008) 160 Cal.App.4th 1403.

**Bad Faith**

Without a breach of the insurance contract, there can be no breach of the implied covenant of good faith and fair dealing. *Manzarek v. St. Paul Fire Marine Ins. Co.* (9th Cir. 2008) 519 F.3d 1025.

Breach of an express contract term is not a prerequisite to maintaining an action for breach of the implied covenant of good faith and fair dealing. *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225.

In every contract, including insurance policies, there is an implied covenant of good faith and fair dealing. *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225.

In the insurance context the implied covenant of good faith and fair dealing requires the insurer to refrain from injuring its insured's right to receive the benefits of the insurance agreement. *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225.

There can be no breach of the implied covenant of good faith and fair dealing if no benefits are due under the policy. *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225.

The principle that no breach of the covenant of good faith and fair dealing can occur if there is no coverage or potential for coverage under the policy is quite different from the argument that no breach of the implied covenant can occur if there is no breach of an express contractual provision. *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225.

An insurer's obligations extend beyond simply paying the benefits to which its insured is entitled. *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225.

Breach of the implied obligation to accept a reasonable offer to settle a claim against its insured exposes the insurer to liability in both contract and tort, regardless of its fulfillment of the express terms of the insurance policy. *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225.

A delay in payment of benefits due under an insurance policy gives rise to tort liability only if the insured can establish the delay was unreasonable. *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225.

**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

The genuine dispute rule cannot be invoked to protect an insurer's denial or delay in payment of benefits unless the insurer's position was both reasonable and reached in good faith.

*Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225.

An expert's testimony will not automatically insulate an insurer from a bad faith claim based on a biased investigation. *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225.

The implied covenant of good faith and fair dealing imposes on a contracting party not only a duty to refrain from acting in a manner that frustrates the purpose of the contract "but also the duty to do everything the contract presupposes that he will do to accomplish its purpose."

*Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225.

An insurer has an implied obligation to honestly assess its insured's claim and to make a reasonable effort to resolve any dispute with its insured as to the amount of damages before invoking the its contractual right to arbitrate. *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225.

An insurer's contractual right to arbitrate uninsured motorist and underinsured motorist claims does not relieve it from its obligation to deal with its insured in good faith. *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225.

Insurance Code section 11580.26(b) does not immunize an insurer from tort liability for the bad faith handling of a underinsured motorist claim. *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225.

The duty to attempt to agree before arbitrating, clearly imposed by the Legislature in Insurance Code sections 11580.2(f) and 11580.26(b), invokes a corresponding duty to do so in good faith. *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225.

Pursuant to Insurance Code section 11580.26(b), a bad faith action may not be based simply on the fact that, after failing to resolve an uninsured/underinsured motorist dispute, the insurer lost the arbitration or the insured recovered an award greater than the insurer's final settlement offer. *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225.

Insurance Code section 11580.26(b) precludes an evaluation of whether an insurer acted in good faith in attempting to resolve the dispute merely by considering, after-the-fact, the results of the arbitration proceeding. However, an insurer is not relieved of its obligation to act reasonably in attempting to settle any disagreement with its insured concerning an uninsured/underinsured motorist claim or its duty "not to withhold unreasonably payments due under a policy." *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225.

**Bodily Injury**

Allegations of damage to reputation are sufficient to raise the potential of an award of mental anguish or emotional distress damages, and therefore trigger duty to defend under "bodily injury" portions of policy. *Manzarek v. St. Paul Fire Marine Ins. Co.* (9th Cir. 2008) 519 F.3d 1025.

**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

**Breach Of Warranty**

Under New York law, a breach of warranty precludes coverage if such breach materially increases the risk of loss, damage or injury within the coverage of the contract. *The Upper Deck Co., et. al. v. Am. Int'l Specialty Lines Ins. Co.* (9th Cir. 2008) 549 F.3d 1210.

**Burden Of Proof**

In a declaratory relief action to determine the duty to defend, “the insured need only show that the underlying claim *may* fall within the policy coverage; the insurer must prove it *cannot*.” *State Farm Fire and Casualty Co. v. Superior Court* (2008) 164 Cal.App.4th 317.

**California Business and Professions Code Sections 17200 et seq.**

A plaintiff bringing an action under the Unfair Competition Law must show “injury in fact and lost money or property as a result” of the unfair competition. This does not include premiums paid if there is no allegation that the plaintiff did not want the contract, the contract was unsatisfactory, or the contract was worth less than what was paid for. *Medina v. Safe-Guard Products, Int'l, Inc.* (2008) 164 Cal.App.4th 105.

**California Business and Professions Code Section 17203**

A claimant must meet the standing requirements of Business and Professions Code section 17204, which includes a requirement that a plaintiff bringing an action under the Unfair Competition Law must show “injury in fact and lost money or property as a result” of the unfair competition. *Medina v. Safe-Guard Products, Internat., Inc.* (2008) 164 Cal.App.4th 105.

**California Business and Professions Code Section 17204**

A plaintiff bringing an action under the Unfair Competition Law must show “injury in fact and lost money or property as a result” of the unfair competition. This does not include premiums paid if there is no allegation that the plaintiff did not want the contract, the contract was unsatisfactory, or the contract was worth less than what was paid for. *Medina v. Safe-Guard Products, Internat., Inc.* (2008) 164 Cal.App.4th 105.

**California Civil Code Section 798.85**

Where litigation resolved via settlement that provided for the payment of \$3 million to plaintiffs, the plaintiffs were considered the prevailing parties entitled to attorney fees and costs under Civil Code section 798.85, even though the settlement did not specifically state the plaintiffs were the prevailing parties. *Employers Mutual Casualty Company v. Philadelphia Indemnity Ins. Company* (2008) 169 Cal.App.4th 340.

**California Civil Code Section 1542**

Under California Civil Code section 1542, a general release does not affect unknown claims. *Chen v. Interinsurance Exch. of the Automobile Club* (2008) 164 Cal.App.4th 117.

**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

**California Civil Code Section 1598**

Where a contract has a single object, and that object is unlawful, the entire contract is void. This section must be read in conjunction with Civil Code section 1599, which embodies the principle of severability. Together, the statutes preserve and enforce any lawful portion of a contract that might feasibly be severed. *Medina v. Safe-Guard Products, Internat., Inc.* (2008) 164 Cal.App.4th 105.

**California Civil Code Section 1599**

This section embodies the principle of severability of illegal contracts. Read in conjunction with Civil Code section 1598 (where a contract has a single object, and that object is unlawful, the entire contract is void), the statutes together work to preserve and enforce any lawful portion of a contract that might feasibly be severed. *Medina v. Safe-Guard Products, Internat., Inc.* (2008) 164 Cal.App.4th 105.

**California Civil Code Section 2860**

A general liability policy including a provision requiring the insurer to pay all reasonable “expenses” does not include a duty for the insurer to pay all reasonable independent counsel fees and does not exempt a dispute over these fees from mandatory arbitration required Code of Civil Procedure section 2860(c). *Compulink Management Center, Inc. v. St. Paul Fire & Marine Ins. Co.* (2008) 169 Cal.App.4th 289.

**California Civil Code Section 2860(a)**

An insurer paid attorney fees to independent counsel retained by its insured under Civil Code section 2860(a). This insurer prevailed in an action for contribution against another insurer that had denied coverage to the insured in the underlying action. On appeal the Court noted it was equitable for the insurer from which contribution was sought to share in the cost of the insured’s *Cumis* counsel because it stood to gain if the insurer that tendered the insured’s defense successfully challenged coverage. *Employers Mutual Casualty Company v. Philadelphia Indemnity Insurance Company* (2008) 169 Cal.App.4th 340.

**California Civil Code Section 2860(c)**

Based on the plain reading of Section 2860, subdivision (c), parties are required to arbitrate the portion of their dispute which relates to the amount of attorney’s fees owed or hourly rates when independent counsel is appointed even if the dispute is brought with other claims (e.g., breach of contract or bad faith). *Compulink Management Center, Inc. v. St. Paul Fire & Marine Ins. Co.* (2008) 169 Cal.App.4th 289.

Parties are required to arbitrate the portion of their dispute which relates to the amount of attorney’s fees owed or hourly rates when independent counsel is appointed unless the relevant insurance policy provides for another alternative dispute resolution procedure. *Compulink Management Center, Inc. v. St. Paul Fire & Marine Ins. Co.* (2008) 169 Cal.App.4th 289.

**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

Arbitration of attorney's fees disputes when independent counsel has been appointed is only mandatory in cases filed in state court. *Compulink Management Center, Inc. v. St. Paul Fire & Marine Ins. Co.* (2008) 169 Cal.App.4th 289.

**California Civil Code Section 3287(a)**

Civil Code section 3287(a) provides that "every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day." However, this section does not authorize prejudgment interest where the amount of damage, as opposed to the determination of liability, depends upon a judicial determination based upon conflicting evidence and is not ascertainable from truthful data supplied by the claimant to his debtor. *Employers Mutual Casualty Company v. Philadelphia Indemnity Ins. Company* (2008) 169 Cal.App.4th 340.

**California Code Of Civil Procedure Section 998**

A settlement offer conditioned on the release of "all claims" is ambiguous and thus invalid under California Code of Civil Procedure section 998 if plaintiff has a separate pending claim that is not part of the litigation. *Chen v. Interinsurance Exchange of the Automobile Club* (2008) 164 Cal.App.4th 117.

In California, a valid offer of compromise pursuant to California Code of Civil Procedure section 998 must not dispose of any claims beyond the claims at issue in the pending lawsuit. *Chen v. Interinsurance Exchange of the Automobile Club* (2008) 164 Cal.App.4th 117.

Pursuant to California Code of Civil Procedure section 998, if a plaintiff rejects a defendant's offer to compromise and then fails to win a more favorable judgment, the plaintiff cannot recover its post-offer costs and must pay the defendant's post-offer costs. *Chen v. Interinsurance Exchange of the Automobile Club* (2008) 164 Cal.App.4th 117.

**California Evidence Code Section 1119(c)**

Communications, but not conduct, during mediation are confidential under Evidence Code section 1119 (c). Thus a party can be sanctioned for failing to attend a mediation, but not for failing to participate in the mediation "in good faith." *Campagnone v. Enjoyable Pools & Spas Service & Repairs, Inc.* (2008) 163 Cal.App.4th 566.

**California Health and Safety Code Section 1361.1(b)**

By failing to prominently display an arbitration clause pursuant to Health and Safety Code section 1363.1(b), a health care service provider cannot "substantially comply" with said section. *Burks v. Kaiser Foundation Health Plan, Inc.* (2008) 160 Cal.App.4th 1021.

Substantial compliance with the prominence requirements with respect to the disclosure of an arbitration provision, as set forth in Health and Safety Code section 1361.1(b), means actual compliance. *Burks v. Kaiser Foundation Health Plan, Inc.* (2008) 160 Cal.App.4th 1021.

**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

**California Health and Safety Code Sections 1361.1(b) and (d)**

To demonstrate compliance with the statutory requirements set forth in these sections, a health plan must be able to demonstrate something other than the placement of the disclosure of an arbitration clause above the signature line that makes it stand out from its surroundings. *Burks v. Kaiser Foundation Health Plan, Inc.* (2008) 160 Cal.App.4th 1021.

**California Insurance Code Section 530**

An insurer does not violate section 530 of the Insurance Code by attempting to limit coverage for some, but not all, manifestations of a peril, as long as a reasonable insured would readily understand from the policy language which are covered and which are not. For instance, a policy can provide coverage for water damage caused by a sudden and accidental release of water but exclude coverage for mold damage, even if it is caused by a sudden and accidental release of water. Coupled with a separate mold exclusion, a reasonable insured would understand the policy does not cover mold damage for any reason. *De Bruyn v. Superior Court* (2008) 158 Cal.App.4th 1213.

**California Insurance Code Section 700**

Every person who transacts any class of insurance business in California must have a license from the state Insurance Commissioner. Violations of this statute result in penalties of fines, imprisonment, or injunctions. An insurance contract issued by an unlicensed insurer is still enforceable despite the violation of this statute. *Medina v. Safe-Guard Products, Internat., Inc.* (2008) 164 Cal.App.4th 105.

**California Insurance Code Section 1860.1**

Insurance Code section 1860.1 precludes claims based on alleged excessive premiums. However, section 1860.1 does not preclude claims asserted against attorneys-in-fact. *Fogel v. Farmers Group, Inc.* (2008) 160 Cal.App.4th 1403.

**California Insurance Code Section 2071**

Under California's Insurance Code, an insurer is required to include the specific language of section 2071 pertaining to appraisals in each fire policy. *Lambert v. Carneghi* (2008) 158 Cal.App.4th 1120.

Pursuant to well established law, a fire insurance appraisal pursuant to Insurance Code section 2071 is an arbitration. *Lambert v. Carneghi* (2008) 158 Cal.App.4th 1120.

**California Insurance Code Sections 10101, 10102**

Insurance Code sections 10101 and 10102 do not require insurer to set policy limits that equal the cost to replace the property. *Everett v. State Farm General Ins. Co.* (2008) 162 Cal.App.4th 649.



**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

California Residential Property Insurance Disclosure statement provides it is the insured's burden to obtain sufficient coverage. *Everett v. State Farm General Ins. Co.* (2008) 162 Cal.App.4th 649.

**California Insurance Code Section 10290**

When the California Insurance Commissioner prohibited an insurer from issuing policies with discretionary authority clauses, and where the insurer elected not to request a hearing on this decision, the Commissioner's order became effective 91 days after publication. The insurer was no longer permitted to issue or deliver insurance policies with discretionary authority clauses in California, pursuant to California Insurance Code section 10290. *Saffon v. Wells Fargo & Company Long Term Disability Plan* (9th Cir. 2008) 522 F.3d 863.

**California Insurance Code Section 10291.5(f)**

California's Insurance Commissioner issued an order prohibiting disability insurers from issuing policies with discretionary authority clauses. Although federal law allows states to nullify an ERISA plan's grant of discretionary authority, California law does not authorize the Commissioner to do so retroactively, pursuant to California Insurance Code section 10291.5(f). *Saffon v. Wells Fargo & Company Long Term Disability Plan* (9th Cir. 2008) 522 F.3d 863.

**California Insurance Code Section 11580.2**

Determining whether a claimant is insured under an uninsured motorist provision is not a question of the underinsured tortfeasor's liability or damages owed to the insured and is therefore not subject to arbitration under Ins. Code § 11580.2(f). *Bouton v. USAA Casualty Ins. Co.* (2008) 167 Cal.App.4th 412.

Questions of coverage, including whether the claimant is an insured, must be resolved before a petition to compel arbitration pursuant to section 11580.2(f) is granted. *Bouton v. USAA Casualty Ins. Co.* (2008) 167 Cal.App.4th 412.

Coverage questions can be determined by the trial court in determining whether to grant a petition to compel arbitration and need not be raised in a separate declaratory relief action. *Bouton v. USAA Casualty Ins. Co.* (2008) 167 Cal.App.4th 412.

Although the term "bodily injury liability policies" is not defined in Insurance Code section 11580.2, it necessarily refers to the bodily injury provisions of a motor vehicle or automobile liability policy. *Wedemeyer v. Safeco Ins. Co.* (2008) 160 Cal.App.4th 1297.

**California Insurance Code Section 11580.2(f)**

Insurance Code section 11580.2(f) requires an insurer and insured to arbitrate the amount of damages the insured is entitled to recover from an uninsured motorist. It does not require an arbitrator to determine whether a claimant is an insured under the insurance policy. Who is an insured should be determined by the court. *Bouton v. USAA Casualty Ins. Co.* (2008) 167 Cal.App.4th 412.

**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

Insurance Code section 11580.2(f) requires arbitration of only two issues: “(1) whether the insured is entitled to recover against the uninsured motorist and (2) if so, the amount of the damages.” *Bouton v. USAA Casualty Ins. Co.* (2008) 167 Cal.App.4th 412.

An insured’s default judgment against an uninsured motorist is subject to arbitration pursuant to Insurance Code section 11580.2(f) because the statute requires an insured and his or her insurer to arbitrate the tortfeasor’s liability and damages owed to the insured and the binding nature of a default judgment obtained against that tortfeasor falls squarely within those questions of liability and damages statutorily subject to arbitration. *Bouton v. USAA Casualty Ins. Co.* (2008) 167 Cal.App.4th 412.

The duty to attempt to agree before arbitrating, clearly imposed by the Legislature in Insurance Code sections 11580.2(f) and 11580.26(b), invokes a corresponding duty to do so in good faith. *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225.

**California Insurance Code Section 11580.2(p)(3)**

Pursuant to California Insurance Code section 11580.1, et seq., an insured is only required to exhaust another insured’s motor vehicle or automobile liability limits before the insured is entitled to his underinsured motorist limits. The insured is not required to exhaust any business liability limits to obtain underinsured motorist coverage. *Wedemeyer v. Safeco Ins. Co. of America* (2008) 160 Cal.App.4th 1297.

**California Insurance Code Section 11580.26(b)**

Insurance Code section 11580.26(b) does not immunize an insurer from tort liability for the bad faith handling of a underinsured motorist claim. *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225.

The duty to attempt to agree before arbitrating, clearly imposed by the Legislature in Insurance Code sections 11580.2(f) and 11580.26(b), invokes a corresponding duty to do so in good faith. *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225.

Pursuant to Insurance Code section 11580.26(b), a bad faith action may not be based simply on the fact that, after failing to resolve an uninsured/underinsured motorist dispute, the insurer lost the arbitration or the insured recovered an award greater than the insurer’s final settlement offer. *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225.

Insurance Code section 11580.26(b) precludes an evaluation of whether an insurer acted in good faith in attempting to resolve the dispute merely by considering, after-the-fact, the results of the arbitration proceeding. However, an insurer is not relieved of its obligation to act reasonably in attempting to settle any disagreement with its insured concerning an uninsured/underinsured motorist claim or its duty “not to withhold unreasonably payments due under a policy.” *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225.

**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

**California Insurance Code Sections 12800 et seq.**

Insurance Code sections 12800 et seq. govern vehicle service contracts, which includes requiring providers to be licensed by the state Insurance Commissioner. *Medina v. Safe-Guard Products, Internat., Inc.* (2008) 164 Cal.App.4th 105.

**California Labor Code Section 3600(b)**

Under California Labor Code § 3600(b), a carrier has the right to a statutory credit against future workers' compensation benefits. *Travelers Property Casualty v. ConocoPhillips* (9th Cir. 2008) 546 F.3d 1142.

An insured can waive a workers' compensation benefits carrier's right to statutory credit against future workers' compensation benefits without the carrier's consent. *Travelers Property Casualty v. ConocoPhillips* (9th Cir. 2008) 546 F.3d 1142.

The statutory credit under California Labor Code section 3600(b) does not always have to be included when calculating the amount of "regular" workers' compensation benefits. *Travelers Property Casualty v. ConocoPhillips* (9th Cir. 2008) 546 F.3d 1142.

An insured's waiver of the statutory credit under California Labor Code section 3600(b) is not a voluntary assumption of an obligation in violation of the voluntary payments clause in a workers' compensation benefits policy because it is a "nonmonetary requirement." *Travelers Property Casualty v. ConocoPhillips* (9th Cir. 2008) 546 F.3d 1142.

The dual capacity doctrine was largely abrogated by the addition of Labor Code section 3602(a), which provides that where the conditions of compensation set forth in Section 3600 are met, workers' compensation is the exclusive remedy, and fact that either the employee or the employer also occupied another or dual capacity shall not permit the employee or his or her dependents to bring an action at law for damages against the employer. *Power Fabricating, Inc. v. State Comp. Ins. Fund* (2008) 167 Cal.App.4th 1446.

Under Section 3600, an employee or his dependents are barred by statute from bringing a negligence claim against an insured arising from a workers' compensation injury claim. *Power Fabricating, Inc. v. State Compensation Insurance Fund* (2008) 167 Cal.App.4th 1446.

**California Rule of Court 3.1700(b)(1)**

California Rule of Court 3.1700(b)(1) contemplates a motion to strike or tax objectionable costs that should be eliminated or reduced whereas the word "taxed" in Philadelphia's insurance policy refers to an assessment. *Employers Mutual Casualty Company v. Philadelphia Indemnity Ins. Company* (2008) 169 Cal.App.4th 340.

**Cancellation**

The Ninth Circuit Court of Appeals, applying Washington state law, held that proper notice of insurance policy cancellation depends on state law meaning of "mailed." Washington state law has not settled whether sending a cancellation via certified mail, without receipt by the

**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

insured, satisfies the notice requirement of an insurance policy. As a result, the issue was certified to the Washington State Supreme Court. *Cornhusker Casualty Ins. Co. v. Kachman* (2008) 514 F.3d 977.

An insurer's prior acceptance of late premium payment, which was postmarked prior to the cancellation date, does not estop the carrier from cancelling the policy after a subsequent late payment. *Cornhusker Casualty Ins. Co. v. Kachman* (2008) 165 Wn.2d 404.

**Civil Procedure**

For the trial court to impose terminating sanctions, a prior discovery order must have been violated and the violation must have been willful. *Liberty Mutual Fire Ins. Co. v. LcL Administrators, Inc.* (2008) 163 Cal.App.4<sup>th</sup> 1093

Willful violation of a discovery order may be shown by a party's "stonewalling" following an order to provide further discovery responses. *Liberty Mutual Fire Ins. Co. v. LcL Administrators, Inc.* (2008) 163 Cal.App.4<sup>th</sup>. 1093

A party need not intentionally conceal evidence in response to a discovery request before its discovery response may properly be considered "evasive" within the meaning of the Civil Discovery Act. *Liberty Mutual Fire Ins. Co. v. LcL Administrators, Inc.* (2008) 163 Cal.App.4<sup>th</sup>. 1093

Terminating sanctions may be imposed even though a party's discovery misconduct does not prejudice its opponent's "ability to go to trial." *Liberty Mutual Fire Ins. Co. v. LcL Administrators, Inc.* (2008) 163 Cal.App.4<sup>th</sup>. 1093

The purpose of discovery is to allow the parties to the dispute the ability to ascertain the evidence and issues that will be presented at trial. *Liberty Mutual Fire Ins. Co. v. LcL Administrators, Inc.* (2008) 163 Cal.App.4<sup>th</sup>. 1093

Terminating sanctions are not punitive where a trial court's prior efforts to enforce compliance with the Civil Discovery Act yield no results. *Liberty Mutual Fire Ins. Co. v. LcL Administrators, Inc.* (2008) 163 Cal.App.4<sup>th</sup>. 1093

When deciding whether to impose terminating sanctions, a trial court may consider a party's history as a repeat offender of his discovery obligations. *Liberty Mutual Fire Ins. Co. v. LcL Administrators, Inc.* (2008) 163 Cal.App.4<sup>th</sup>. 1093

**Contract Interpretation**

Despite having special features, insurance policies are contracts to which the general rules of contract interpretation apply. *Northrop Grumman Corp. v. Factory Mut. Ins. Co.* (9th Cir. 2008) 538 F.3d 1090.

Contract interpretation must give effect to the mutual intentions of the parties at the time the contract was formed. *Northrop Grumman Corp. v. Factory Mut. Ins. Co.* (9th Cir. 2008) 538 F.3d 1090.

**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

The intent of the parties to a contract is to be inferred when possible from the written provisions of the contract based on their ordinary and popular sense unless a technical or special meaning is given to them by their usage. *Northrop Grumman Corp. v. Factory Mut. Ins. Co.* (9th Cir. 2008) 538 F.3d 1090.

The context of the policy as a whole must be considered. *Northrop Grumman Corp. v. Factory Mut. Ins. Co.* (9th Cir. 2008) 538 F.3d 1090.

It is appropriate to consult dictionary definitions of the terms of a policy, including the term flood. *Northrop Grumman Corp. v. Factory Mut. Ins. Co.* (9th Cir. 2008) 538 F.3d 1090.

Although it is appropriate to construe policies in context, and court may consider the primary policy in construing and excess policy, primary and excess policies should not be construed as if they are one document. *Northrop Grumman Corp. v. Factory Mut. Ins. Co.* (9th Cir. 2008) 538 F.3d 1090.

While courts often consult dictionaries to derive the ordinary and popular meaning of an undefined term in an insurance contract, courts cannot disregard the policy as a whole in construing a term. *Sony Computer Entertainment Am., Inc. v. Am. Home Assurance Co. and Am. Int'l Specialty Lines Ins. Co.* (9th Cir. 2008) 532 F.3d 1007.

Courts may look to case law for further evidence of a proper meaning of an undefined term in an insurance contract. Courts may consider how other courts define the same term in a similar context. *Sony Computer Entertainment Am., Inc. v. Am. Home Assurance Co. and Am. Int'l Specialty Lines Ins. Co.* (9th Cir. 2008) 532 F.3d 1007.

Interpretations of insurance contracts under California law requires employment of general principles of contract interpretation. *Manzarek v. St. Paul Fire Marine Insurance Company* (9th Cir. 2008) 519 F.3d 1025.

Under California law, effect must be given to the mutual intention of the parties at the time the contract is formed. *Manzarek v. St. Paul Fire Marine Insurance Company* (9th Cir. 2008) 519 F.3d 1025.

Clear, explicit, and unambiguous contractual language governs. *Manzarek v. St. Paul Fire Marine Insurance Company* (9th Cir. 2008) 519 F.3d 1025.

Washington follows the “objective manifestation theory” of contract interpretation, focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties to ascertain intent. *Contractors Equipment Maintenance Co., Inc., ex rel. United States and United Coastal Ins. Co. v. Bechtel Hanford, Inc.* (9th Cir. 2008) 514 F.3d 899.

Under Washington law, where the meaning of specific contractual terms is unclear, extrinsic evidence may be considered such as: (1) the subject matter and objective of the contract, (2) all the circumstances surrounding the making of the contract, (3) the subsequent acts and conduct of the parties, and (4) the reasonableness of respective interpretations urged by the parties. *Contractors Equipment Maintenance Co., Inc., ex rel. United States and United Coastal Ins. Co. v. Bechtel Hanford, Inc.* (9th Cir. 2008) 514 F.3d 899.

**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

Reference to subcontractor in surety bond recital paragraph was not evidence that supersedes bond issued to subcontractor's performance bond surety intended also to assume liability for subcontractor. *Contractors Equipment Maintenance Co., Inc., ex rel. United States and United Coastal Ins. Co. v. Bechtel Hanford, Inc.* (9th Cir. 2008) 514 F.3d 899.

Conduct of the parties occurring between execution of the contract and a dispute about the meaning of the contract's terms may reveal what the parties understood and intended those terms to mean and therefore, evidence of such conduct, including concealment, is admissible to resolve ambiguities in the contract's language. *City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375.

Provisions of a contract will not be construed as conditions precedent in the absence of language plainly requiring such construction. *Fireman's Fund Ins. Co. v. Sizzler USA Real Property, Inc.* (2008) 169 Cal.App.4th 415.

The consideration for a lease, including all of its covenants, comprises the mutual promises of the parties, as a whole. A partial breach of a party's insurance obligation would not constitute a failure of consideration for the entire lease. *Fireman's Fund Ins. Co. v. Sizzler USA Real Property, Inc.* (2008) 169 Cal.App.4th 415.

When determining whether a particular policy provides for coverage, courts are to be guided by the principle that interpretation of an insurance policy is a question of law. *Spangle v. Farmers Ins. Exchange* (2008) 166 Cal.App.4th 560.

The fundamental goal of contract interpretation is to give effect to the mutual intention of the parties. *Spangle v. Farmers Ins. Exchange* (2008) 166 Cal.App.4th 560.

The mutual intention of the parties is to be inferred, if possible, solely from the written provisions of the contract. *Spangle v. Farmers Ins. Exchange* (2008) 166 Cal.App.4th 560.

Language in a contract must be construed in the context of that instrument as a whole, and in the circumstances of that case, and cannot be found to be ambiguous in the abstract. *Spangle v. Farmers Ins. Exchange* (2008) 166 Cal.App.4th 560.

Under the rules of policy interpretation, the court looks to the language of the contract to ascertain its plain meaning "or the meaning a layperson would ordinarily attach to it." *State Farm Fire and Casualty Co. v. Superior Court* (2008) 164 Cal.App.4th 317.

The court gives effect to the mutual intent of the parties at the time the contract was formed, inferable if possible, from the written policy. *State Farm Fire and Casualty Co. v. Superior Court* (2008) 164 Cal.App.4th 317.

The court's interpretation of the policy is controlled by the "clear and explicit" meaning of its provisions, interpreted in their "ordinary and popular sense," unless "used by the parties in a technical sense or a special meaning is given to them by usage." *State Farm Fire and Casualty Co. v. Superior Court* (2008) 164 Cal.App.4th 317.

**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

Coverage clauses are broadly construed in favor of the insured and express exclusions are strictly construed against the insurer. *State Farm Fire and Casualty Co. v. Superior Court* (2008) 164 Cal.App.4th 317.

The rules of contract interpretation are used to interpret an insurance policy. *Westrec Marina Management, Inc. v. Arrowood Indem. Co.* (2008) 163 Cal.App.4th 1387.

The mutual intention of the contracting parties at the time the contract was formed governs. *Westrec Marina Management, Inc. v. Arrowood Indem. Co.* (2008) 163 Cal.App.4th 1387.

The mutual intention of the parties is ascertained solely from the written contracts, but the circumstances under which the contract was made and the matter to which it relates are also considered. *Westrec Marina Management, Inc. v. Arrowood Indem. Co.* (2008) 163 Cal.App.4th 1387.

The contract is considered as a whole and the language construed in context. *Westrec Marina Management, Inc. v. Arrowood Indem. Co.* (2008) 163 Cal.App.4th 1387.

Words in a contract are interpreted in accordance with their ordinary and popular sense. *Westrec Marina Management, Inc. v. Arrowood Indem. Co.* (2008) 163 Cal.App.4th 1387.

The plain meaning of contractual language will govern if it is clear and explicit and does not involve an absurdity. *Westrec Marina Management, Inc. v. Arrowood Indem. Co.* (2008) 163 Cal.App.4th 1387.

Where there is no evidence the parties intended a special usage, words used in an insurance policy should be interpreted in their “ordinary and popular sense” as a layperson would use them, not as an attorney or insurance expert would interpret the words. *Qualcomm, Inc. v. Certain Underwriters at Lloyd’s, London* (2008) 161 Cal.App.4th 184.

It is appropriate to consider the terms of an insurance policy in the context of the coverage it provides. *Qualcomm, Inc. v. Certain Underwriters at Lloyd’s, London* (2008) 161 Cal.App.4th 184.

A court is bound to apply plain and unambiguous policy language, and policy considerations, including those favoring settlements, could not supersede that policy language. *Qualcomm, Inc. v. Certain Underwriters at Lloyd’s, London* (2008) 161 Cal.App.4th 184.

A court is bound to apply plain and unambiguous policy language, such that an insured’s objectively reasonable expectations that primary insurance would have to be exhausted before excess coverage would attach. *Qualcomm, Inc. v. Certain Underwriters at Lloyd’s, London* (2008) 161 Cal.App.4th 184.

An insured’s attempt to restrict the application of the “occurrence” definition to bodily injury and property damage coverage and to construe the “occurrence” definition as inapplicable to personal injury coverage would remove a necessary element of the policy’s basic coverage grant, and thus result in improperly rewriting the clear language of the contract, and also would be contrary to the rule that all words in a contract are to be given meaning with the

**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

language in the contract interpreted as a whole. *Lyons v. Fire Ins. Exchange* (2008) 161 Cal.App.4th 880.

An insurance policy must be interpreted to avoid redundancy. *Great Western Drywall, Inc. v. Interstate Fire & Casualty Co.* (2008) 161 Cal.App.4th 1033.

A court may not, for any purpose, rewrite the provisions of a contract. *Great Western Drywall, Inc. v. Interstate Fire & Casualty Co.* (2008) 161 Cal.App.4th 1033.

A technically unnecessary exception to a water damage exclusion in a homeowners policy for sudden and accidental discharges is neither irrelevant nor unclear, but plainly and precisely communicates to a reasonable insured that mold is not covered regardless of whether caused by a sudden discharge of water. *De Bruyn v. Superior Court* (2008) 158 Cal.App.4th 1213.

**Contract Interpretation: Ambiguity**

Ambiguous provisions are generally construed against insurers. *Northrop Grumman Corp. v. Factory Mut. Ins. Co.* (9th Cir. 2008) 538 F.3d 1090.

Policy provisions are ambiguous only where they are susceptible to two constructions, both of which are reasonable. *Northrop Grumman Corp. v. Factory Mut. Ins. Co.* (9th Cir. 2008) 538 F.3d 1090.

If there is an ambiguity, the terms must be interpreted to protect the objectively reasonable expectations of the insured. *Manzarek v. St. Paul Fire Marine Insurance Company* (9th Cir. 2008) 519 F.3d 1025.

Ambiguities in a policy of insurance are construed against the insurer, who generally drafted the policy, and who has received premiums to provide the agreed protection. The same is not necessarily true for other contexts. *Crawford v. Weather Shield Mfg. Inc.* (2008) 44 Cal.4th 541.

Ambiguities in insurance policy provisions are generally resolved against the insurer and in favor of coverage because the insurer typically drafts policy language, leaving the insured little or no meaningful opportunity or ability to bargain for modifications. *City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375.

Conduct of the parties occurring between execution of the contract and a dispute about the meaning of the contract's terms may reveal what the parties understood and intended those terms to mean and therefore evidence of such conduct, including concealment, is admissible to resolve ambiguities in the contract's language. *City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375.

There is no ambiguity where the plain language of a policy clearly distinguishes the benefits under uninsured motorist coverage between a named insured and an additional driver on the policy. *Mercury Ins. Co. v. Pearson* (2008) 169 Cal.App.4th 1064.

Ambiguities in an insurance policy are interpreted against the insurance company so that, if feasible, the policies will indemnify the loss to which the insurance relates. *Employers*



**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

*Mutual Casualty Company v. Philadelphia Indemnity Ins. Company* (2008) 169 Cal.App.4th 340.

Ambiguities in insurance policies are interpreted against the insurance companies to protect the insureds' reasonable expectations of coverage. Coverage clauses are interpreted broadly while exclusionary clauses are interpreted narrowly. *Employers Mutual Casualty Company v. Philadelphia Indemnity Ins. Company* (2008) 169 Cal.App.4th 340.

Policy language is ambiguous if it is susceptible to more than one reasonable interpretation in the context of the policy as a whole. Any ambiguity is resolved in favor of the reasonable expectations of the insured. *GGIS Ins. Services, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1493.

A policy provision will be considered ambiguous when it is capable of two or more constructions, both of which are reasonable. *Spangle v. Farmers Ins. Exchange* (2008) 166 Cal.App.4th 560.

If an asserted ambiguity is not eliminated by the language and context of the policy, courts then invoke the principle that ambiguities are to be construed against the party who caused the uncertainty to exist (i.e., the insurer) in order to protect the insured's reasonable expectation of coverage. *Spangle v. Farmers Ins. Exchange* (2008) 166 Cal.App.4th 560.

When a policy exclusion is ambiguous, courts must construe the exclusion narrowly in favor of coverage. *Spangle v. Farmers Ins. Exchange* (2008) 166 Cal.App.4th 560.

Rule of construction that ambiguities in policy language ordinarily should be resolved in favor of insured to protect reasonable expectation of coverage applies only when policy language is unclear. *Power Fabricating, Inc. v. State Comp. Ins. Fund* (2008) 167 Cal.App.4th 1446.

Policy provision is ambiguous when it is capable of two or more constructions, both of which are reasonable. *Power Fabricating, Inc. v. State Comp. Ins. Fund* (2008) 167 Cal.App.4th 1446.

Whether language in a contract is ambiguous is a question of law. *Power Fabricating, Inc. v. State Comp. Ins. Fund* (2008) 167 Cal.App.4th 1446.

Words in insurance policy must be read in their ordinary sense, and ambiguity cannot be based on a strained interpretation. *Power Fabricating, Inc. v. State Comp. Ins. Fund* (2008) 167 Cal.App.4th 1446.

An insurance policy is not ambiguous merely because it could have been drafted more clearly. *Great Western Drywall, Inc. v. Interstate Fire & Casualty Co.* (2008) 161 Cal.App.4th 1033.

An expectation of coverage does not create an ambiguity but is merely an interpretive aid to resolve an ambiguity that does exist. *Qualcomm, Inc. v. Certain Underwriters at Lloyd's, London* (2008) 161 Cal.App.4th 184.

**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

Language in an insurance policy must be interpreted in the context of the policy as a whole and cannot be found ambiguous in the abstract. *Qualcomm, Inc. v. Certain Underwriters at Lloyd's, London* (2008) 161 Cal.App.4th 184.

**Contract Interpretation: Course Of Conduct**

Conduct of the parties occurring between execution of the contract and a dispute about the meaning of the contract's terms may reveal what the parties understood and intended those terms to mean and therefore, evidence of such conduct, including concealment, is admissible to resolve ambiguities in the contract's language. *City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375.

**Contract Interpretation: Extrinsic Evidence And Other Sources**

It is appropriate to consult dictionary definitions of the terms of a policy, including the term flood. *Northrop Grumman Corp. v. Factory Mut. Ins. Co.* (9th Cir. 2008) 538 F.3d 1090.

While courts often consult dictionaries to derive the ordinary and popular meaning of an undefined term in an insurance contract, courts cannot disregard the policy as a whole in construing a term. *Sony Computer Entertainment Am., Inc. v. Am. Home Assurance Co. and Am. Int'l Specialty Lines Ins. Co.* (9th Cir. 2008) 532 F.3d 1007.

Courts may look to case law for further evidence of a proper meaning of an undefined term in an insurance contract. Courts may consider how other courts define the same term in a similar context. *Sony Computer Entertainment Am., Inc. v. Am. Home Assurance Co. and Am. Int'l Specialty Lines Ins. Co.* (9th Cir. 2008) 532 F.3d 1007.

Interpretation of a written instrument becomes solely a judicial function only when it is based on the words of the instrument alone, when there is no conflict in the extrinsic evidence, or a determination was based on incompetent evidence. *City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375.

Where ascertaining the intent of the parties at the time of the contract was executed depends on the credibility of extrinsic evidence, that credibility determination and the interpretation of the contract at issue are questions of fact that may properly be resolved by the jury. *City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375.

Conduct of the parties occurring between execution of the contract and a dispute about the meaning of the contract's terms may reveal what the parties understood and intended those terms to mean and therefore, evidence of such conduct, including concealment, is admissible to resolve ambiguities in the contract's language. *City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375.

Where the meaning of contract words is disputed, the trial court must provisionally receive any proffered extrinsic evidence which is relevant to show whether the contract is reasonably susceptible of a particular meaning urged by a party. *Los Angeles Unified School Dist. v. Great American Ins. Company* (2008) 163 Cal.App.4th 944. Not citable. Review granted.

**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

The decision whether to admit extrinsic evidence involves a two-step process. The court provisionally receives (without actually admitting) all credible evidence concerning the parties' intentions to determine "ambiguity," i.e., whether the language is "reasonably susceptible" to the interpretation urged by the party. If the court decides the extrinsic evidence shows the language is "reasonably susceptible" to the interpretation urged, the evidence is then admitted to aid in the second step—interpreting the contract. *Los Angeles Unified School Dist. v. Great American Ins. Company* (2008) 163 Cal.App.4th 944. Not citable. Review granted.

**Contract Interpretation: Judge v. Jury**

"Interpretation of a written instrument becomes solely a judicial function only when it is based on the words of the instrument alone, when there is no conflict in the extrinsic evidence, or a determination was based on incompetent evidence." *City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375.

Where "ascertaining the intent of the parties at the time the contract was executed depends on the credibility of extrinsic evidence, that credibility determination and the interpretation of the contract at issue are questions of fact that may properly be resolved by the jury." *City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375.

**Contract Interpretation: Jury Instruction**

Jury instruction stating: "[i]f, after considering the evidence in light of the foregoing rules of interpretation, there remains an uncertainty in the language of the contract, that language must be interpreted against the party who caused the uncertainty to exist" is proper instruction on the general rule of contract interpretation codified by Civil Code section 1654. *City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375.

**Contracts: Severability**

Civil Code section 1598 provides, where a contract has a single object, and that object is unlawful, the entire contract is void. This section must be read in conjunction with Civil Code section 1599, which embodies the principle of severability. Together, the statutes preserve and enforce any lawful portion of a contract that might feasibly be severed. *Medina v. Safe-Guard Products, Internat., Inc.* (2008) 164 Cal.App.4th 105.

**Declaratory Relief**

The fundamental basis of declaratory relief is the existence of an actual, present controversy over a proper subject. *Otay Land Co. v. Royal Indem. Co.* (2008) 169 Cal. App.4th 556.

Before a controversy is ripe for adjudication it must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising as to what the law would be upon a hypothetical state of facts. *Otay Land Co. v. Royal Indem. Co.* (2008) 169 Cal.App.4th 556.

**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

The courts do not issue advisory opinions about the rights and duties of the parties under particular agreements, if no actual, justiciable controversy has yet developed. *Otay Land Co. v. Royal Indem. Co.* (2008) 169 Cal.App.4th 556.

Even though a liability insurer has the option to join an injured party as a codefendant in the insurer's declaratory relief action against its insured to determine coverage, that does not mean that a third party claimant has equivalent rights to join such an action. *Otay Land Co. v. Royal Indem. Co.* (2008) 169 Cal.App.4th 556.

**Default Judgment**

An insured's default judgment against an uninsured motorist is subject to arbitration pursuant to Insurance Code section 11580.2(f) because the statute requires an insured and his or her insurer to arbitrate the tortfeasor's liability and damages owed to the insured and the binding nature of a default judgment obtained against that tortfeasor falls squarely within those questions of liability and damages statutorily subject to arbitration. *Bouton v. USAA Casualty Ins. Co.* (2008) 167 Cal.App.4th 412.

**Definition: Accident**

When an injury is an unexpected or unintended consequence of the insured's conduct, it may be characterized as an accident for which coverage exists. When the injury is expected or intended, coverage is denied. When one expect or intends an injury to occur, there is no "accident." *State Farm Fire and Casualty Co. v. Superior Court* (2008) 164 Cal.App.4th 317.

An "accident" can exist when either the cause is unintended or the effect is unanticipated. *State Farm Fire and Casualty Co. v. Superior Court* (2008) 164 Cal.App.4th 317.

An intentional act is not an "accident" within the plain meaning of the word. *State Farm Fire and Casualty Co. v. Superior Court* (2008) 164 Cal.App.4th 317.

Where the insured acts deliberately with the intent to cause injury, the conduct would not be deemed an accident. *State Farm Fire and Casualty Co. v. Superior Court* (2008) 164 Cal.App.4th 317.

Where the insured intended all of the acts that resulted in the victim's injury, the event may not be deemed an "accident" merely because the insured did not intend to cause injury. *State Farm Fire and Casualty Co. v. Superior Court* (2008) 164 Cal.App.4th 317.

An "accident" exists when any aspect in the causal series of events leading to the injury or damage was unintended by the insured and a matter of fortuity. *State Farm Fire and Casualty Co. v. Superior Court* (2008) 164 Cal.App.4th 317.

Some acts, like sexual assault, are so inherently harmful that the intent to commit the act and the intent to harm are one and the same. *State Farm Fire and Casualty Co. v. Superior Court* (2008) 164 Cal.App.4th 317.

The term "accident," as utilized in insurance law, encompasses a circumstance where the insured throws another person into a swimming pool intending to get that person wet, but

**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

mistakenly throws the person into the pool's cement step and causes injuries. *State Farm Fire and Casualty Co. v. Superior Court* (2008) 164 Cal.App.4th 317.

An alleged assailant's intended act of false imprisonment was not an accident, even if done under the mistaken belief that consent had been given, and thus the conduct did not trigger the insurer's coverage obligations. *Lyons v. Fire Ins. Exchange* (2008) 161 Cal.App.4th 880.

An "accident" requires unintentional acts or conduct. "Accidental" means arising from extrinsic causes; occurring unexpectedly or by chance; or happening without intent or through carelessness. An "accident" occurs when the event leading to the injury was "unintended by the insured and a matter of fortuity." *Lyons v. Fire Ins. Exchange* (2008) 161 Cal.App.4th 880.

Under California law, the term "accident" refers to the nature of the insured's conduct, not his state of mind. *Lyons v. Fire Ins. Exchange* (2008) 161 Cal.App.4th 880.

Whether negligent or not, the insured's conduct alleged to have given rise to claimant's injuries, unwanted detention while making sexual advances, is necessarily nonaccidental, not because any harm was intended, but simply because the conduct could not be engaged in by accident. Mistaken consent does not, as a matter of law, create an accident. *Lyons v. Fire Ins. Exchange* (2008) 161 Cal.App.4th 880.

**Definition: Customer**

Although not defined in the policy, the term "customer" as used in a garage operations policy includes one who purchases or who is a potential purchaser of a motor vehicle. *Spangle v. Farmers Ins. Exchange* (2008) 166 Cal.App.4th 560.

**Definition: Injury In Fact And Lost Money Or Property As A Result**

A plaintiff bringing an action under the Unfair Competition Law must show "injury in fact and lost money or property as a result" of the unfair competition. "As a result" imports a reliance or causation element into the statute. This does not include premiums paid if there is no allegation the plaintiff did not want the contract, the contract was unsatisfactory, or the contract was worth less than what was paid for. *Medina v. Safe-Guard Products, Internat., Inc.* (2008) 164 Cal.App.4th 105.

**Definition: Negligent Publication**

"Negligent publication" in a media liability policy refers to a very narrow tort in which the publication of material encourages or instructs readers to engage in harmful conduct. The term was not defined in the policy but followed a list of torts used to define covered "wrongful acts," including (a) defamation, (b) invasion of privacy or publicity, (c) infringement of copyright, title, slogan, trademark, or trade dress, (d) unfair competition, (e) unauthorized use of name or likeness, (f) unintentional failure to credit on a matter, and (g) defective advice, incitement, or "negligent publication." *Sony Computer Entertainment Am., Inc. v. Am. Home Assurance Co. and Am. Int'l Specialty Lines Ins. Co.* (9th Cir. 2008) 532 F.3d 1007.

**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

**Definition: Property Damage**

Policy defining “property damage” to include loss of use does not apply to allegations of defective PlayStation 2 manufactured by the insured. There was no allegation the game discs or DVDs were defective. While certain discs and DVDs did not play properly in the PlayStation 2, there was no suggestion they did not function properly in other devices. *Sony Computer Entertainment Am., Inc. v. Am. Home Assur. Co. and Am. Int’l Specialty Lines Ins. Co.* (9th Cir. 2008) 532 F.3d 1007.

**Definition: Voluntary Payments**

An insured’s waiver of the statutory credit under California Labor Code section 3600(b) is not a voluntary assumption of an obligation in violation of the voluntary payments clause in a workers’ compensation benefits policy because it is a “nonmonetary requirement.” *Travelers Property Casualty v. ConocoPhillips* (9th Cir. 2008) 546 F.3d 1142.

**Demurrer**

Complaints containing only conclusory allegations are vulnerable to demurrer, and plaintiff cannot resist a demurrer by simply stating she will amend to address any pleading deficiencies. If plaintiff is unable to show she can allege ultimate facts, not law, to support her claims, the demurrer should be sustained without leave to amend. *Long v. Century Indemnity Co.* (2008) 163 Cal.App.4th 1460.

**Disability: Total**

An insured who is still physically and mentally capable of performing a substantial portion of the work connected with his or her employment is not totally disabled. *Hecht v. Paul Revere Life Ins. Co.* (2008) 168 Cal.App.4th 30.

An insured whose job does not require substantial physical labor is not entitled to total disability coverage for being unable to perform physical tasks. *Hecht v. Paul Revere Life Insurance Co.* (2008) 168 Cal.App.4th 30.

**Duty To Defend**

Under California law, an insurer must defend its insured if the underlying complaint alleges potentially covered claims under the policy, or if the complaint might be amended to give rise to a liability that would be covered under the policy. *Manzarek v. St. Paul Fire Marine Insurance Company* (9th Cir. 2008) 519 F.3d 1025.

The determination of whether an insurer has a duty to defend is made by comparing the allegations of the complaint with the terms of the policy. *Manzarek v. St. Paul Fire Marine Insurance Company* (9th Cir. 2008) 519 F.3d 1025.

Any doubts as to whether there is a duty to defend are resolved in the insured’s favor. *Manzarek v. St. Paul Fire Marine Insurance Company* (9th Cir. 2008) 519 F.3d 1025.

**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

Allegations of complaint which broadly allege marketing of products and merchandise, without defining the types of products and merchandise, give rise to duty to defend notwithstanding policy's exclusion for field of entertainment business. *Manzarek v. St. Paul Fire Marine Insurance Company* (9th Cir. 2008) 519 F.3d 1025.

Allegations of damage to reputation are sufficient to raise the potential of an award of mental anguish or emotional distress damages, and therefore trigger duty to defend under "bodily injury" portions of policy. *Manzarek v. St. Paul Fire Marine Insurance Company* (9th Cir. 2008) 519 F.3d 1025.

A subcontractor has a contractual obligation to defend a suit against a developer whom it has agreed to indemnify even if it is later determined that the subcontractor was not negligent. *Crawford v. Weather Shield Mfg. Inc.* (2008) 44 Cal.4th 541.

An insurer has a duty to defend if facts alleged in the complaint, or other facts known to the insurer, potentially give rise to coverage. *GGIS Ins. Services, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1493.

The duty to defend arises upon tender to the insurer of a potentially covered claim and continues until the lawsuit is concluded. *GGIS Ins. Services, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1493.

In a declaratory relief action to determine the duty to defend, "the insured need only show that the underlying claim *may* fall within the policy coverage; the insurer must prove it *cannot*." *State Farm Fire and Casualty Co. v. Superior Court* (2008) 164 Cal.App.4th 317.

It has long been a fundamental rule of law that an insurer has a duty to defend an insured if it becomes aware of, or if the third party lawsuit pleads, facts giving rise to the potential for coverage under the insuring agreement. *State Farm Fire and Casualty Co. v. Superior Court* (2008) 164 Cal.App.4th 317.

The duty to defend is broader than the duty to indemnify and turns not upon the ultimate adjudication of coverage under its policy of insurance, but upon those facts known by the insurer at the inception of a third party lawsuit. *State Farm Fire and Casualty Co. v. Superior Court* (2008) 164 Cal.App.4th 317.

An insurer is not required to speculate about extraneous facts regarding potential liability in evaluating a duty to defend. *Monticello Ins. Co. v. Essex Ins. Co.* (2008) 162 Cal.App.4th 1376.

Although facts extrinsic to a complaint may give rise to a duty to defend, the duty cannot be established based on facts learned by the insurer after the litigation has been completed. *Monticello Ins. Co. v. Essex Ins. Co.* (2008) 162 Cal.App.4th 1376.

The potential for coverage creates the insurer's duty to defend. The insurer must defend a suit which potentially seeks damages within the coverage of the policy. Thus, the insurer is excused from its defense obligation only when the third party complaint can by no conceivable theory raise a single issue which could bring it within the policy coverage. The

**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

insured need only show that the underlying claim may fall within policy coverage; the insurer must prove it cannot. *Lyons v. Fire Ins. Exchange* (2008) 161 Cal.App.4th 880.

Any doubt as to whether the facts give rise to a duty to defend is resolved in the insured's favor. Even a single claim which does not predominate, but for which there is potential coverage, will trigger the insurer's duty to defend. *Lyons v. Fire Ins. Exchange* (2008) 161 Cal.App.4th 880.

Where the extrinsic facts eliminate the potential for coverage, the insurer may decline to defend even when the bare allegations in the complaint suggest potential liability. *Lyons v. Fire Ins. Exchange* (2008) 161 Cal.App.4th 880.

The insurer has a duty to defend when the policy is ambiguous and the insured would reasonably expect the insurer to defend against the suit based on the nature and kind of risk covered by the policy. Where there is no ambiguity or uncertainty in the coverage provisions, the insured cannot reasonably expect a defense of claims which are based on risks clearly not covered or conspicuously excluded under the policy. *Lyons v. Fire Ins. Exchange* (2008) 161 Cal.App.4th 880.

**Duty To Indemnify**

The insurer is entitled to summary adjudication that no potential for indemnity exists if the evidence establishes as a matter of law that there is no coverage. *Spangle v. Farmers Ins. Exchange* (2008) 166 Cal.App.4th 560.

**Efficient Proximate Cause**

Where plaintiffs' partially constructed home was badly damaged in a landslide, there were triable issues of fact as to the efficient proximate cause of the loss raised by plaintiff's contention that the efficient proximate cause of the loss was concealment of the ancient landslide by the developer. *Roberts v. Assurance Co. of Am.* (2008) 163 Cal.App.4th 1398.

California law holds the efficient proximate cause is "the predominating" or "most important cause of the loss." *Roberts v. Assurance Co. of Am.* (2008) 163 Cal.App.4th 1398.

The proximate efficient cause doctrine applies only when two or more conceptually distinct perils combine to cause the loss. *Roberts v. Assurance Co. of America* (2008) 163 Cal.App.4th 1398.

The insurer is prohibited from drafting policy language to circumvent the efficient proximate cause doctrine. *De Bruyn v. Superior Court* (2008) 158 Cal.App.4th 1213.

The insurer does not violate the efficient proximate cause doctrine just because the insurer limits coverage for some, but not all, manifestations of a peril, as long as a reasonable insured would readily understand from the policy language which are covered and which are not. For instance, a policy can provide coverage for water damage caused by a sudden and accidental release of water but exclude coverage for mold damage, even if it is caused by a sudden and accidental release of water. Coupled with a separate mold exclusion, a reasonable insured



**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

would understand the policy does not cover mold damage for any reason. *De Bruyn v. Superior Court* (2008) 158 Cal.App.4th 1213.

**Equitable Contribution**

Where an insurance policy provided an insurer would pay all costs taxed against an insured in a suit and the word “taxed” was undefined in the policy, the Court of Appeal held the term was ambiguous and could narrowly refer to a judicial assessment of costs or broadly to any levy of an assessment, but held it was required to construe the term broadly. *Employers Mutual Casualty Company v. Philadelphia Indemnity Ins. Company* (2008) 169 Cal.App.4th 340.

Where an insurer settled an action that included an agreement to pay \$1.8 million in statutory attorney fees and sought contribution from another insurer, the appeals court held the \$1.8 million sum represented a taxed cost and required the insurer from which contribution was sought to pay \$400,000 for its share of statutory attorney fees. *Employers Mutual Casualty Company v. Philadelphia Indemnity Ins. Company* (2008) 169 Cal.App.4th 340.

Taxed costs can include attorney fees paid in a settlement. *Employers Mutual Casualty Company v. Philadelphia Indemnity Ins. Company* (2008) 169 Cal.App.4th 340.

If taxed costs did not include anticipated costs in a settlement insurers would be discouraged from settling cases with high costs because they would be barred from seeking contribution. Thus, as a matter of policy, an insurer may settle an action and seek contribution of taxed costs. *Employers Mutual Casualty Company v. Philadelphia Indemnity Ins. Company* (2008) 169 Cal.App.4th 340.

In order to establish entitlement to equitable contribution of defense costs in a settled action, the insurer must establish there was a potential for coverage under the other insurer’s policy. *Monticello Ins. Co. v. Essex Ins. Co.* (2008) 162 Cal.App.4th 1376.

**Equitable Subrogation v. Contribution**

In the insurance context, equitable subrogation involves the substitution of the insurer in the position of its insured to seek reimbursement from responsible third parties. In equitable subrogation, the insurer “stands in the shoes of the insured.” Equitable contribution, on the other hand, is the right to seek contribution from a co-obligor who shares liability with the party seeking contribution, as when multiple insurers insure the same loss and one insurer has paid more than its share to the insured. *Crowley Maritime Corp. v. Boston Old World Ins. Co.* (2008) 158 Cal.App.4th 1061.

**ERISA**

Where ERISA plan beneficiary alleges claims against a claim administrator, pursuant to 29 U.S.C. § 1132(a), for withheld benefits, attorney’s fees, and a declaration that he or she is disabled, the court reviews the claim administrator’s decision de novo unless it finds the plan gives discretionary authority to the claim administrator to interpret plan terms. *Saffon v. Wells Fargo & Company Long Term Disability Plan* (9th Cir. 2008) 522 F.3d 863.

**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

When a claim administrator denies a claim for long term disability benefits, it must provide the beneficiary with a description of any additional material or information needed for the beneficiary to perfect his or her claim, and do so in terms understood by the claimant. *Saffon v. Wells Fargo & Company Long Term Disability Plan* (9th Cir. 2008) 522 F.3d 863.

Plan administrators must provide plan participants with adequate notice of the reasons for denial of benefits, and a full and fair review of the participant's claim. *Saffon v. Wells Fargo & Company Long Term Disability Plan* (9th Cir. 2008) 522 F.3d 863.

Where a plan administrator adds a new reason for denying claim benefits in its final decision, it precludes the beneficiary from responding to the denial at the administrative level and violates ERISA. This insulates the new rationale from administrative review, and is a procedural ERISA violation that must be weighed by the court when deciding whether an administrator abused its discretion. *Saffon v. Wells Fargo & Company Long Term Disability Plan* (9th Cir. 2008) 522 F.3d 863.

When a plan administrator presents a "new" reason for denying disability benefits in its final claim decision, this bears on whether the claim administrator's decision was the result of an impartial evaluation or colored by a conflict of interest. *Saffon v. Wells Fargo & Company Long Term Disability Plan* (9th Cir. 2008) 522 F.3d 863.

When reviewing a plan administrator's decision to terminate disability benefits, the court held individual pain reactions are subjective and not easily determined. Thus, denial of disability benefits based on failure to produce evidence that simply is not available, may bear on the degree of deference the court accords a plan administrator's decision and its ultimate disability determination. *Saffon v. Wells Fargo & Company Long Term Disability Plan* (9th Cir. 2008) 522 F.3d 863.

When the court reviews an ERISA plan administrator's denial of disability benefits under the abuse of discretion standard of review, it must consider the administrator's course of dealing with the beneficiary and his or her doctors, and whether the administrator fulfilled its duty to engage in a meaningful dialogue with the plan participant. *Saffon v. Wells Fargo & Company Long Term Disability Plan* (9th Cir. 2008) 522 F.3d 863.

Once the court determines the degree of deference for an ERISA plan administrator's decision denying disability benefits, the court must evaluate the disability determination. The court considers evidence in the administrative record. The court must also consider evidence plaintiff may present regarding an issue that was newly raised in the plan administrator's final decision, and any contrary evidence presented by the plan administrator. *Saffon v. Wells Fargo & Company Long Term Disability Plan* (9th Cir. 2008) 522 F.3d 863.

If an ERISA plan beneficiary submits significant new evidence in response to a newly raised issue in a plan administrator's final denial letter, the court must consider the new evidence when determining if the beneficiary is permanently disabled. It may be unnecessary for the court to determine the degree of deference for a plan reviewer's decision, because the admission of significant new evidence requires de novo reconsideration of the disability decision. *Saffon v. Wells Fargo & Company Long Term Disability Plan* (9th Cir. 2008) 522 F.3d 863.

**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

Following *Firestone Tire & Rubber Co. v. Bruch* (1989) 489 U.S. 101 standard of review does not change when a conflict of interest exists because the plan administrator is responsible for evaluating and paying claims. *Metropolitan Life Ins. Co. v. Wanda Glenn* (2008) 128 S.Ct. 2343.

When a plan administrator both determines whether benefits are payable (discretionary authority) and pays those benefits out of its own pocket, a conflict of interest exists. *Metropolitan Life Ins. Co. v. Wanda Glenn* (2008) 128 S.Ct. 2343.

If a plan administrator is responsible for evaluating and paying claims, a conflict of interest exists that will weigh as a factor in determining whether the administrator abused its discretion denying benefits. This conflict of interest would be more important when circumstances suggest a higher likelihood the conflict affected the benefits decision but should be less important where the administrator has taken steps to reduce potential bias and to promote accuracy. *Metropolitan Life Ins. Co. v. Wanda Glenn* (2008) 128 S.Ct. 2343.

A plan administrator's insistence that a claimant seek Social Security Disability Benefits (based on the claimant's inability to perform work), and later denial of the claimant's disability claim, may be important factors in a court's review of a benefits decision. These seemingly inconsistent positions not only suggest procedural unreasonableness but they may also justify the court giving more weight to the administrator's conflict of interest if the administrator both evaluates and pays claims. *Metropolitan Life Ins. Co. v. Wanda Glenn* (2008) 128 S.Ct. 2343.

**ERISA: Breach Of Fiduciary Duty**

29 U.S.C. § 1132 authorizes ERISA plan participants, the Secretary of Labor, plan beneficiaries, and fiduciaries to bring an action for violation of Section 1109(a). *Simon v. Hartford Life, Inc.* (9th Cir. 2008) 546 F.3d 661.

Section 1109(a) provides for the personal liability of ERISA plan fiduciaries to make good to such plans on losses and for other equitable relief, including removal of the fiduciary. *Simon v. Hartford Life, Inc.* (9th Cir. 2008) 546 F.3d 661.

A claim for breach of fiduciary duty by an ERISA plan fiduciary under 29 U.S.C. § 1109(a) "inures to the benefit of the [ERISA] plan as a whole." (Citations omitted.) *Simon v. Hartford Life, Inc.* (9th Cir. 2008) 546 F.3d 661.

A claim under 29 U.S.C. § 1109(a) belongs to the ERISA plan, not an individual participant or beneficiary. *Simon v. Hartford Life, Inc.* (9th Cir. 2008) 546 F.3d 661.

An ERISA plan participant cannot bring a 29 U.S.C. § 1109(a) cause of action for breach of fiduciary duty unless the participant is represented by licensed counsel. *Simon v. Hartford Life, Inc.* (9th Cir. 2008) 546 F.3d 661.

**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

**ERISA: Preemption**

ERISA does not preempt city ordinance requiring employers to make required health care expenditures either directly or to the city. *Golden Gate Restaurant Ass'n v. City and County of San Francisco* (9th Cir. 2008) 546 F.3d 639.

ERISA has two primary purposes: (1) to protect employees against abuse and mismanagement of funds accumulated to provide employee benefits and; (2) to provide a uniform regulatory regime over employee benefit plans to ease administrative burdens on employers and plan administrators. *Golden Gate Restaurant Ass'n v. City and County of San Francisco* (9th Cir. 2008) 546 F.3d 639.

State and local laws are subject to a presumption against preemption when they operate in a field traditionally occupied by state and local government such as regulation of health care. *Golden Gate Restaurant Ass'n v. City and County of San Francisco* (9th Cir. 2008) 546 F.3d 639.

Presumption against preemption applies to ERISA. *Golden Gate Restaurant Ass'n v. City and County of San Francisco* (9th Cir. 2008) 546 F.3d 639.

A law is preempted by ERISA when it relates to an employee benefit plan such that it has either: (1) a connection with or; (2) a reference to such a plan. *Golden Gate Restaurant Ass'n v. City and County of San Francisco* (9th Cir. 2008) 546 F.3d 639.

Meaning of “relate to” under ERISA § 514(a) was potentially almost limitless and therefore could not be interpreted literally. *Golden Gate Restaurant Ass'n v. City and County of San Francisco* (9th Cir. 2008) 546 F.3d 639.

Dual objectives of ERISA (protection of employees from mismanagement of funds accumulated for their benefits and protection of employers from administrative burden of complying with multiple statutory schemes) should be a guide in considering whether a law relates to an ERISA plan. *Golden Gate Restaurant Ass'n v. City and County of San Francisco* (9th Cir. 2008) 546 F.3d 639.

An ERISA plan is a “plan, fund or program” that is established or maintained by an employer through the purchase of insurance or otherwise. *Golden Gate Restaurant Ass'n v. City and County of San Francisco* (9th Cir. 2008) 546 F.3d 639.

Whether a law has a “connection with” an employee benefit plan depends on whether the law interferes with ERISA’s uniform regulatory regime. *Golden Gate Restaurant Ass'n v. City and County of San Francisco* (9th Cir. 2008) 546 F.3d 639.

Law that does not require employer to establish or modify an ERISA plan does not interfere with ERISA’s regulatory scheme. *Golden Gate Restaurant Ass'n v. City and County of San Francisco* (9th Cir. 2008) 546 F.3d 639.

To determine whether a law has a “reference” to ERISA plans requires analysis of: (1) whether the law acts upon ERISA plans; and (2) whether the existence of ERISA plans is

**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

essential to the law's operation. *Golden Gate Restaurant Ass'n v. City and County of San Francisco* (9th Cir. 2008) 546 F.3d 639.

Law that affords realistic option to employer other than establishment or modification of ERISA plan is not preempted by ERISA. *Golden Gate Restaurant Ass'n v. City and County of San Francisco* (9th Cir. 2008) 546 F.3d 639.

**Estoppel**

A finding of fraudulent conduct is not necessary before equitable estoppel may be imposed. *City of Hollister v. Monterey Ins. Company* (2008) 165 Cal.App.4th 455.

Equitable estoppel may be imposed if the party to be estopped has engaged in "blameworthy or inequitable conduct," causing another disadvantage, and warranting a conclusion that the first party should not be permitted to exploit the disadvantage. *City of Hollister v. Monterey Ins. Company* (2008) 165 Cal.App.4th 455.

General contract principles endorse the use of equitable estoppel where one contracting party fails to reasonably cooperate with another contracting party with regard to the performance of a condition precedent. *City of Hollister v. Monterey Ins. Company* (2008) 165 Cal.App.4th 455.

**Evidence: Stipulations**

Stipulation pertaining to the admission of evidence, absent an express limitation, apply to a later trial of the same action, unless the trial court allows the stipulation to be withdrawn. *City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375.

**Excess Insurance**

In interpreting an excess insurance policy, an insured's objectively reasonable expectations were that primary insurance would have to be exhausted before excess coverage would attach. *Qualcomm, Inc. v. Certain Underwriters at Lloyd's, London* (2008) 161 Cal.App.4th 184.

**Exclusion**

Exclusionary clauses are interpreted narrowly against the insurer. *Manzarek v. St. Paul Fire Marine Insurance Company* (9th Cir. 2008) 519 F.3d 1025.

An exclusionary clause must be conspicuous, plain, and clear, especially when the coverage portion of the insurance policy would lead an insured to reasonably expect coverage for the claim purportedly excluded. *Manzarek v. St. Paul Fire Marine Insurance Company* (9th Cir. 2008) 519 F.3d 1025.

An insured cannot be deemed to reasonably understand the terms of a policy he or she has not seen or fully comprehend the exclusionary language of a policy that has not yet been issued. *Manzarek v. St. Paul Fire Marine Insurance Company* (9th Cir. 2008) 519 F.3d 1025.

**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

Allegations of complaint which broadly allege marketing of products and merchandise, without defining the types of products and merchandise, give rise to duty to defend notwithstanding policy's exclusion for field of entertainment business. *Manzarek v. St. Paul Fire Marine Insurance Company* (9th Cir. 2008) 519 F.3d 1025.

**Exclusion: Agents And Brokers**

An Insurance Agents and Brokers Professional Liability Policy which excludes "any Claim, Loss, or Defense Expenses" for certain matters, specifically including "any actual or alleged comingling of, or inability or failure to pay, collect, safeguard or return any money or failure to perform any actuarial service," bars coverage for claims by an insurance commissioner for the insured's return of money. *GGIS Ins. Services, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1493.

**Exclusion: Cross-suits**

There is no duty to defend an insured subcontractor against the named insured contractor's cross-complaint where the policy excluded suits between insureds and there was no third party lawsuit. *Great Western Drywall, Inc. v. Interstate Fire & Casualty Co.* (2008) 161 Cal.App.4th 1033.

The language in the exception to the cross suit exclusion "has been sued" requires that the cross-complaint be preceded by a third party lawsuit. *Great Western Drywall, Inc. v. Interstate Fire & Casualty Co.* (2008) 161 Cal.App.4th 1033.

**Exclusion: Exceptions**

An exception to an exclusion cannot create coverage where none originally existed. It merely restores already-existing coverage. *Sony Computer Entertainment Am., Inc. v. Am. Home Assurance Co. and Am. Int'l Specialty Lines Ins. Co.* (9th Cir. 2008) 532 F.3d 1007.

**Exclusion: Field Of Entertainment Business**

Allegations of complaint which broadly allege marketing of products and merchandise, without defining the types of products and merchandise, give rise to duty to defend notwithstanding policy's exclusion for field of entertainment business. *Manzarek v. St. Paul Fire Marine Insurance Company* (9th Cir. 2008) 519 F.3d 1025.

**Exclusion: Flood**

Absence of phrase "whether driven by wind or not" in excess policy definition of "flood," and inclusion of phrase in primary policy definition did not evince an intention to limit the flood exclusion in the excess policy to flood waters not driven by wind or create an ambiguity. *Northrop Grumman Corp. v. Factory Mut. Ins. Co.* (9th Cir. 2008) 538 F.3d 1090.

It is appropriate to consult dictionary definitions of the terms of a policy, including the term flood. *Northrop Grumman Corp. v. Factory Mut. Ins. Co.* (9th Cir. 2008) 538 F.3d 1090.

**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

**Exclusion: Pollution**

Unless it expressly states otherwise, a CGL policy's pollution exclusion only excludes coverage for injuries arising from events commonly thought of as environmental pollution. *American Casualty Co. of Reading, PA v. Miller* (2008) 159 Cal.App.4th 501.

A CGL policy's standard pollution exclusion may exclude coverage for either intentional or negligent discharge of pollutants. *American Casualty Co. of Reading, PA v. Miller* (2008) 159 Cal.App.4th 501.

The application of a CGL policy's standard pollution exclusion is not limited to catastrophic events constituting large scale environmental pollution. *American Casualty Co. of Reading, PA v. Miller* (2008) 159 Cal.App.4th 501.

The application of a CGL policy's standard pollution exclusion is not dependent on the extent of the injury or environmental damage caused by the discharge of the pollutant. *American Casualty Co. of Reading, PA v. Miller* (2008) 159 Cal.App.4th 501.

Coverage for bodily injury resulting from the discharge of a chemical, methylene chloride, into a public sewer was excluded by a CGL policy's pollution exclusion. *American Casualty Co. of Reading, PA v. Miller* (2008) 159 Cal.App.4th 501.

**Exclusion: Professional Services**

Professional consultant's presence at site of industrial accident does not necessarily trigger "professional services" exclusion in comprehensive general liability policy. *Food Pro International, Inc. v. Farmers Ins. Exch.* (2008) 169 Cal.App.4th 976.

To apply the professional services exclusion, "the act that precipitated the injury need not have been one of professional malpractice, as long as the plaintiff was injured in the performance of the professional service." *Food Pro International, Inc. v. Farmers Ins. Exch.* (2008) 169 Cal.App.4th 976.

**Exclusion: Workers' Compensation**

Injured worker may not sue non-negligent joint venturer for injuries sustained due to employer's negligence. *Power Fabricating, Inc. v. State Comp. Ins. Fund* (2008) 167 Cal.App.4th 1446.

Insured cannot invoke coverage under employers' liability insurance if a trier of fact determined a joint venture, as an entity separate from the insured, employed the injured employee at the time of the accident. *Power Fabricating, Inc. v. State Comp. Ins. Fund* (2008) 167 Cal.App.4th 1446.

In the vast majority of cases where an employee is injured in the course and scope of employment, workers' compensation exclusivity excludes ELI coverage. *Power Fabricating, Inc. v. State Comp. Ins. Fund* (2008) 167 Cal.App.4th 1446.

**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

Employers' liability insurance is a "gap-filler," providing protection to employer where the employee has a right to bring a tort action or employee is not subject to the workers' compensation law. *Power Fabricating, Inc. v. State Comp. Ins. Fund* (2008) 167 Cal.App.4th 1446.

The dual capacity doctrine was largely abrogated by the addition of Labor Code section 3602(a), which provides that where conditions of compensation set forth in Section 3600 are met, workers' compensation is the exclusive remedy, and fact that either the employee or the employer also occupied another capacity shall not permit the employee or his or her dependents to bring civil action for damages against the employer. *Power Fabricating, Inc. v. State Comp. Ins. Fund* (2008) 167 Cal.App.4th 1446.

Employer liability insurance coverage is not triggered unless the employee's injury arises out of and in the course of his or her employment by the specific insured seeking the coverage, and workers' compensation law either does not apply or the employer may be sued in a capacity other than as an employer. *Power Fabricating, Inc. v. State Comp. Ins. Fund* (2008) 167 Cal.App.4th 1446.

Under Section 3602, a claim against insured based on its dual capacity as employer and as a joint venturer of a joint venture, without more, does not qualify as an exception to workers' compensation exclusivity. *Power Fabricating, Inc. v. State Comp. Ins. Fund* (2008) 167 Cal.App.4th 1446.

**Exhaustion**

In interpreting an excess insurance policy, an insured's objectively reasonable expectations were that primary insurance would have to be exhausted before excess coverage would attach. *Qualcomm, Inc. v. Certain Underwriters at Lloyd's, London* (2008) 161 Cal.App.4th 184.

The phrase "have paid ... the full amount of underlying limits," contained in an excess insurance policy, cannot have any other reasonable meaning than actual payment of no less than the underlying limit. *Qualcomm, Inc. v. Certain Underwriters at Lloyd's, London* (2008) 161 Cal.App.4th 184.

In interpreting an excess insurance policy, even if the phrase "held liable to pay" is susceptible to more than one reasonable meaning and includes responsibility for payment under settlement agreement, a settlement for less than the underlying primary limits did not require the primary insurer to pay its policy limit. *Qualcomm, Inc. v. Certain Underwriters at Lloyd's, London* (2008) 161 Cal.App.4th 184.

**Exhaustion Of Administrative Remedies**

The exhaustion of administrative remedies defense does not apply to complaints regarding the collection of attorney-in-fact fees because the administrative processes of Chapter 9 of the California Insurance Code do not apply to the collection of attorney-in-fact fees. *Fogel v. Farmers Group, Inc.* (2008) 160 Cal.App.4th 1403.



**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

**Federal Rule Of Civil Procedure 12(b)(6)**

When reviewing a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a court can generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice. *Manzarek v. St. Paul Fire Marine Insurance Company* (9th Cir. 2008) 519 F.3d 1025.

Dismissal without leave to amend is improper unless it is clear, upon de novo review, that the complaint could not be saved by amendment. *Manzarek v. St. Paul Fire Marine Insurance Company* (9th Cir. 2008) 519 F.3d 1025.

An outright refusal to grant leave to amend without justifying a reasons is an abuse of discretion. *Manzarek v. St. Paul Fire Marine Insurance Company* (9th Cir. 2008) 519 F.3d 1025.

**Federal Rule Of Civil Procedure 32(a)(4)(B)**

Deposition testimony of witness who resided more than 100 miles from place of trial as of date of trial may be admitted under Federal Rule of Civil Procedure 32(a)(4)(B) over hearsay objection. *Nationwide Life Ins. Co. v. Angelina Richards* (2008) 541 F.3d 903.

**Federal Rule Of Evidence 804(b)(1)**

Proponent of deposition testimony properly admitted under Federal Rule of Civil Procedure 32(a)(4)(B) need not satisfy requirements of Federal Rule of Evidence 804(b)(1). *Nationwide Life Ins. Co. v. Angelina Richards* (2008) 541 F.3d 903.

**Fiduciary Duty**

Parties' agreement to develop, patent, and commercially exploit secret scientific discovery in exchange for payment of royalties did not impose fiduciary obligation as matter of law. *City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375.

Before a person can be charged with a fiduciary obligation, he must either knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship which imposed that undertaking as a matter of law. *City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375.

**Fifth Amendment**

Trial court has discretion to draw an adverse inference in a civil case from a party's assertion of the Fifth Amendment privilege against self-incrimination where facts establish that other party is prejudiced by assertion of that privilege. *Nationwide Life Ins. Co. v. Angelina Richards* (2008) 541 F.3d 903.

Absent compelling circumstances, trial courts should be hesitant to draw adverse inference in a civil case from a party's assertion of the Fifth Amendment privilege against self-incrimination. *Nationwide Life Ins. Co. v. Angelina Richards* (2008) 541 F.3d 903.

**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

A party may be precluded from offering testimony at trial as to matters on which that party previously invoked her Fifth Amendment privilege against self-incrimination at deposition or at a related criminal trial. *Nationwide Life Ins. Co. v. Angelina Richards* (2008) 541 F.3d 903.

Effect of right to assert Fifth Amendment privilege against self-incrimination must be carefully balanced against the prejudice to the party against whom the privilege is invoked. *Nationwide Life Ins. Co. v. Angelina Richards* (2008) 541 F.3d 903.

Where evidence that was introduced at trial leads to finding that it was more probable than not that party was guilty of crime at issue, preventing that party from testifying at trial as to matters on which she previously asserted her Fifth Amendment privilege against self-incrimination was harmless error. *Nationwide Life Ins. Co. v. Angelina Richards* (2008) 541 F.3d 903.

**Filed Rate Doctrine**

The federal filed rate doctrine does not apply to the collection of attorney-in-fact fees in California. *Fogel v. Farmers Group, Inc.* (2008) 160 Cal.App.4th 1403.

**Fixed Costs**

The Court of Appeal affirmed the trial's court's decision finding a \$1.8 million sum paid to the plaintiffs as statutory attorney fees to be a fixed rather than a variable cost because it never varied in any way that could be controlled by the defendant's insurers. *Employers Mutual Casualty Company v. Philadelphia Indemnity Ins. Company* (2008) 169 Cal.App.4th 340.

Where statutory attorney fees were determined to be a fixed cost the Court of Appeal affirmed the trial court's decision that there should be no pro rata reductions to the reimbursements due on this fixed cost. *Employers Mutual Casualty Company v. Philadelphia Indemnity Ins. Company* (2008) 169 Cal.App.4th 340.

Where the trial court makes a factual finding that attorney fees are a fixed cost its decision is reviewed for an abuse of discretion. *Employers Mutual Casualty Company v. Philadelphia Indemnity Ins. Company* (2008) 169 Cal.App.4th 340.

**Fraud**

Insured could not rely upon agent representations of coverage after insured was notified of change in her coverage by insurer. *Everett v. State Farm General Ins. Co.* (2008) 162 Cal.App.4th 649.

**General Releases**

Under Civil Code section 1542, a general release does not affect unknown claims. *Chen v. Interinsurance Exchange of the Automobile Club* (2008) 164 Cal.App.4th 117.

**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

**Health Care Plans**

By failing to prominently display an arbitration clause pursuant to Health and Safety Code section 1363.1(b), a health care service provider cannot “substantially comply” with said section. *Burks v. Kaiser Foundation Health Plan, Inc., et al.* (2008) 160 Cal.App.4th 1021.

To demonstrate compliance with the statutory requirements set forth in Health and Safety Code sections 1361.1(b) and (d), a health plan must be able to demonstrate something other than the placement of the disclosure of an arbitration clause above the signature line that makes it stand out from its surroundings. *Burks v. Kaiser Foundation Health Plan, Inc., et al.* (2008) 160 Cal.App.4th 1021.

Substantial compliance with the prominence requirements with respect to the disclosure of an arbitration provision, as set forth in Health and Safety Code section 1361.1(b), means actual compliance. *Burks v. Kaiser Foundation Health Plan, Inc., et al.* (2008) 160 Cal.App.4th 1021.

**Hearsay**

Witness who resided out-of-state as of date of trial is deemed “unavailable” under Federal Rule of Civil Procedure 32(a)(4)(B), and deposition testimony may be introduced over hearsay objection. *Nationwide Life Ins. Co. v. Angelina Richards* (2008) 541 F.3d 903.

**Illegal Insurance Contract: Enforcement**

The court will allow an illegal contract to be enforced so long as the party seeking its enforcement is “less morally blameworthy” than the party against whom the contract is being asserted, and there is no overriding public interest to be served by voiding the agreement (the “pari delicto” exception). A purchaser of an insurance contract from an unlicensed insurer is “less morally blameworthy” than the insurer and the contract will be enforceable. *Medina v. Safe-Guard Products, Internat., Inc.* (2008) 164 Cal.App.4th 105.

**Indemnity Agreement**

An indemnity agreement includes an obligation to defend which is triggered immediately upon tender and does not depend on whether ultimate negligence or liability is found. *Kirk Crawford et al. v. Weather Shield Mfg. Inc.* (2008) 44 Cal.App.4th 541.

**Independent Counsel**

A general liability policy including a provision requiring the insurer to pay all reasonable “expenses” does not include a duty for the insurer to pay all reasonable independent counsel fees and does not exempt a dispute over these fees from mandatory arbitration required Code of Civil Procedure section 2860(c). *Compulink Management Center, Inc. v. St. Paul Fire & Marine Ins. Co.* (2008) 169 Cal.App.4th 289.

Based on the plain reading of Section 2860, subdivision (c), parties are required to arbitrate the portion of their dispute which relates to the amount of attorney’s fees owed or hourly rates when independent counsel is appointed even if the dispute is brought with other claims (e.g.,

**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

breach of contract or bad faith). *Compulink Management Center, Inc. v. St. Paul Fire & Marine Ins. Co.* (2008) 169 Cal.App.4th 289.

Parties are required to arbitrate the portion of their dispute which relates to the amount of attorney's fees owed or hourly rates when independent counsel is appointed unless the relevant insurance policy provides for another alternative dispute resolution procedure. *Compulink Management Center, Inc. v. St. Paul Fire & Marine Ins. Co.* (2008) 169 Cal.App.4th 289.

Arbitration of attorney's fees disputes when independent counsel has been appointed is only mandatory in cases filed in state court. *Compulink Management Center, Inc. v. St. Paul Fire & Marine Ins. Co.* (2008) 169 Cal.App.4th 289.

A conflict triggering independent counsel pursuant to Civil Code section 2860 (*Cumis* counsel) does not require an insurer to retain counsel to represent its interests. *Long v. Century Indem. Co.* (2008) 163 Cal.App.4th 1460.

*Cumis* counsel or an insured must petition to compel arbitration if an insurer refuses to voluntarily participate. *Long v. Century Indem. Co.* (2008) 163 Cal.App.4th 1460.

An insurer's refusal to voluntarily participate in arbitration does not confer jurisdiction to the courts to hear a Civil Code section 2860 fee dispute. *Long v. Century Indem. Co.* (2008) 163 Cal.App.4th 1460.

*Cumis* counsel and the insured owe a statutory duty to the insurer "to disclose to the insurer all information concerning the action except privileged materials relevant to coverage disputes, and timely to inform and consult with the insurer on all matters relating to the action." *Long v. Century Indemnity Co.* (2008) 163 Cal.App.4th 1460.

An insurer's reservation of the right to seek reimbursement of defense costs allocable to noncovered claims does not trigger the insurer's duty to appoint independent counsel. *Long v. Century Indemnity Company* (2008) 163 Cal.App.4th 1460.

### **Insurance Agents**

Insurance agents that are agents for several companies and either select the company with which to place the insurance or pick an insurer at the insured's direction, are the agent of the insured, not the insurer. *Mercury Ins. Co. v. Pearson* (2008) 169 Cal.App.4th 1064.

Even if an insurance agent is considered a dual agent between the insurance company and the insured, any alleged negligence by the agent in procuring insurance requested by the insured is, as a matter of law, committed in the agent's capacity as the insured's agent and the insurer is not therefore vicariously liable for this negligence, absent evidence of authorization or ratification. *Mercury Ins. Co. v. Pearson* (2008) 169 Cal.App.4th 1064.

Insurer cannot as a matter of law be held to have authorized or ratified alleged misrepresentations of an agent regarding policy coverage where the policy expressly states it embodies all agreements between the insured and the insurer, that any oral statements by the agent do not change the terms of the policy, and the policy includes a provision cautioning the

**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

insured not to sign the agreement until he has read and understand its terms. *Mercury Ins. Co. v. Pearson* (2008) 169 Cal.App.4th 1064.

The policy integration clause and provision barring modification by oral agreement precludes claim agent misrepresented coverage. *Everett v. State Farm General Ins. Co.* (2008) 162 Cal.App.4th 649.

**Insurance: Bodily Injury Liability**

Although the term “bodily injury liability policies” is not defined in Insurance Code section 11580.2, it necessarily refers to the bodily injury provisions of a motor vehicle or automobile liability policy. *Wedemeyer v. Safeco Ins. Co.* (2008) 160 Cal.App.4th 1297.

**Insurance: Builder’s Risk**

“Collapse coverage” in builder’s risk policy does not apply where there was no contention an improper method was used to place the fill soil on the slope, but rather plaintiffs’ geotechnical expert “failed to adequately survey, design or site the project.” Loss was a design error and not a defective method in construction. Thus the collapse coverage provision did not apply. *Roberts v. Assurance Co. of America* (2008) 163 Cal.App.4th 1398.

**Insurance: Claims Made**

The ordinary meaning of a “demand” when used in the context of “a written demand for civil damages...” is a request for something under an assertion of right or an insistence on some course of action. *Westrec Marina Management, Inc. v. Arrowood Indem. Co.* (2008) 163 Cal.App.4th 1387.

A mere request for an explanation, expression of dissatisfaction, or lodging of a grievance that falls short of an insistence is not a demand. *Westrec Marina Management, Inc. v. Arrowood Indem. Co.* (2008) 163 Cal.App.4th 1387.

A letter clearly expressing an intent to sue if an appropriate settlement could not be reached is a settlement demand seeking monetary compensation. *Westrec Marina Management, Inc. v. Arrowood Indem. Co.* (2008) 163 Cal.App.4th 1387.

An express demand for payment or reference to a specific amount is unnecessary to constitute a demand if it was clear that absent some negotiated compensation, a lawsuit would be commenced. *Westrec Marina Management, Inc. v. Arrowood Indem. Co.* (2008) 163 Cal.App.4th 1387.

Insistence on compensation by way of settlement in lieu of litigation constitutes a demand for “civil damages or other relief” within the ordinary meaning of those words. *Westrec Marina Management, Inc. v. Arrowood Indem. Co.* (2008) 163 Cal.App.4th 1387.

A policy provision regarding a “circumstance which may reasonably be expected to give rise to a Claim” does not suggest that a written settlement demand is not a claim. *Westrec Marina Management, Inc. v. Arrowood Indem. Co.* (2008) 163 Cal.App.4th 1387.

**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

In policy which states that all claims arising from the same events or series of related facts are deemed a single claim, a lawsuit based on and arising from the same events and the same or related series of facts as those contained in a settlement demand, constitute a single claim. *Westrec Marina Management, Inc. v. Arrowood Indem. Co.* (2008) 163 Cal.App.4th 1387.

References to claims “first made” suggest that the same claim can be made more than once, which means that two events each constituting a claim under the policy definition can constitute a single claim made more than once. *Westrec Marina Management, Inc. v. Arrowood Indem. Co.* (2008) 163 Cal.App.4th 1387.

**Insurance: Employers Liability**

Construing employers liability insurance to apply to liability in absence of employer relationship contravenes statutory prohibition against general liability insurance including workers’ compensation insurance and Insurance Commissioner’s rule that other classes of insurance not be included in same policy providing workers’ compensation and employers liability insurance. *Power Fabricating, Inc. v. State Comp. Ins. Fund* (2008) 167 Cal.App.4th 1446.

Dual recovery for employee of one entity under single policy of workers’ compensation and employers’ liability insurance contrary to both plain meaning of policy, and concept of employers’ liability insurance. *Power Fabricating, Inc. v. State Comp. Ins. Fund* (2008) 167 Cal.App.4th 1446.

Employers’ liability insurance coverage is not triggered unless the employee’s injury arises out of and in the course of his or her employment by the specific insured seeking the coverage, and workers’ compensation law either does not apply or the employer may be sued in a capacity other than as an employer. *Power Fabricating, Inc. v. State Comp. Ins. Fund* (2008) 167 Cal.App.4th 1446.

In the vast majority of cases where an employee is injured in the course and scope of employment, workers’ compensation exclusivity excludes employer’s liability insurance coverage. *Power Fabricating, Inc. v. State Comp. Ins. Fund* (2008) 167 Cal.App.4th 1446.

Employers’ liability insurance is a ‘gap-filler,’ providing protection to employer where the employee has a right to bring a tort action or employee is not subject to the workers’ compensation law. *Power Fabricating, Inc. v. State Comp. Ins. Fund* (2008) 167 Cal.App.4th 1446.

**Insurance: Fiscal Event**

An insured’s abandonment of its insured tax strategy may constitute a breach of warranty and preclude recovery for losses under fiscal event insurance policy. *The Upper Deck Co., et. al. v. Am. Int’l Specialty Lines Ins. Co.* (2008) 549 F.3d 1210.

**Insurance: Garage Operations**

The definition of the term “garage operations” includes three components of coverage: (1) there is coverage for liability arising from “the ownership maintenance or use of the

**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

locations” utilized as the garage business; (2) there is coverage for the “ownership, maintenance or use of the autos” specified in the policy as covered vehicles; and (3) coverage is available for “all operations necessary or incidental to a garage business.” *Spangle v. Farmers Ins. Exchange* (2008) 166 Cal.App.4th 560.

There is no requirement that there be a link between an accident causing injury and the policyholders’ “garage operations” in order for coverage to exist under such as policy, so long as the accident resulted from the “use” of a “covered auto” by an “insured.” *Spangle v. Farmers Ins. Exchange* (2008) 166 Cal.App.4th 560.

Although not defined in the policy, the term “customer” as used in a garage operations policy includes one who purchases or who is a potential purchaser of a motor vehicle. *Spangle v. Farmers Ins. Exchange* (2008) 166 Cal.App.4th 560.

**Insurance: Life**

The court must look to the language of the property settlement agreement to determine whether the agreement extinguishes the expectancy interests of life insurance beneficiaries. Where the language of the settlement is not broad enough to encompass a life insurance expectancy the spouse may still take as beneficiary if the policy so provides. *Life Ins. Co. of N. Am v. Ortiz* (9th Cir. 2008) 535 F.3d 990.

Where the language of a California divorce judgment does not demonstrate waiver of a spouse’s expectancy in life insurance proceeds, a court should consider the decedent’s post-divorce intent only after it determines the language of the divorce decree terminated the expectancy interest. *Life Ins. Co. of N. Am. v. Ortiz* (9th Cir. 2008) 535 F.3d 990.

As a general rule, California requires a change to a beneficiary designation to be made in accordance with the terms of the policy. The three exceptions to this rule are: (1) when the insurer waives strict compliance with its own rules regarding the change; (2) when it is beyond the insured’s power to comply literally with the insurer’s requirement; or (3) when the insured has done all that he or she could to effect the change but dies before the change is actually made. Under the third exception, one’s intent to change a beneficiary designation must be clearly manifested and put into motion as much as practicable. *Life Ins. Co. of N. Am. v. Ortiz* (9<sup>th</sup> Cir. 2008) 535 F.3d 990.

**Insurance: Marine**

In the Ninth Circuit, the doctrine of *uberrimae fidei*, not state law, applies to maritime insurance and imposes the utmost duty of good faith on both parties to the contract. *Certain Underwriters at Lloyds, London v. Totem Agencies Inc.* (9th Cir. 2008) 518 F.3d 645.

California has codified the doctrine of *uberrimae fidei* for marine insurance. *Certain Underwriters at Lloyds, London v. Totem Agencies Inc.* (9th Cir. 2008) 518 F.3d 645.

**Insurance: Primary And Excess**

Although it is appropriate to construe policies in context, and court may consider the primary policy in construing and excess policy, primary and excess policies should not be construed as

**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

if they are one document. *Northrop Grumman Corp. v. Factory Mut. Ins. Co.* (9th Cir. 2008) 541 F.3d 903.

Different definitions of terms in primary and excess policy does not create ambiguity. *Northrop Grumman Corp. v. Factory Mut. Ins. Co.* (9th Cir. 2008) 541 F.3d 903.

**Insurance: Regulations**

An insurer that violates insurance claims practices regulations may be estopped to argue forfeiture of benefits by policyholders if the insurer's conduct caused the failure of a condition to coverage. *City of Hollister v. Monterey Ins. Company* (2008) 165 Cal.App.4th 455.

An insurer is obligated to bring to the insured's attention relevant information so as to enable the insured to take action to secure rights afforded by the policy. *City of Hollister v. Monterey Ins. Company* (2008) 165 Cal.App.4th 455.

**Insurance: Underinsured Motorist**

Insurance Code section 11580.2(f) requires an insurer and insured to arbitrate the amount of damages the insured is entitled to recover from an uninsured motorist. It does not require an arbitrator to determine whether a claimant is an insured under the insurance policy. Who is an insured should be determined by the court. *Bouton v. USAA Casualty Ins. Co.* (2008) 167 Cal.App.4th 412.

Insurance Code section 11580.2(f) requires arbitration of only two issues: "(1) whether the insured is entitled to recover against the uninsured motorist and (2) if so, the amount of the damages." *Bouton v. USAA Casualty Ins. Co.* (2008) 167 Cal.App.4th 412.

An insured's default judgment against an uninsured motorist is subject to arbitration pursuant to Insurance Code section 11580.2(f) because the statute requires an insured and his or her insurer to arbitrate the tortfeasor's liability and damages owed to the insured and the binding nature of a default judgment obtained against that tortfeasor falls squarely within those questions of liability and damages statutorily subject to arbitration. *Bouton v. USAA Casualty Ins. Co.* (2008) 167 Cal.App.4th 412.

An insurer's contractual right to arbitrate uninsured motorist and underinsured motorist claims does not relieve it from its obligation to deal with its insured in good faith. *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225.

An insurer has an implied obligation to honestly assess its insured's claim and to make a reasonable effort to resolve any dispute with its insured as to the amount of damages before invoking its contractual right to arbitrate. *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225.

Insurance Code section 11580.26(b) does not immunize an insurer from tort liability for the bad faith handling of a underinsured motorist claim. *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225.



**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

The duty to attempt to agree before arbitrating, clearly imposed by the Legislature in Insurance Code sections 11580.2(f) and 11580.26(b), invokes a corresponding duty to do so in good faith. *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225.

Pursuant to Insurance Code section 11580.26(b), a bad faith action may not be based simply on the fact that, after failing to resolve an uninsured/underinsured motorist dispute, the insurer lost the arbitration or the insured recovered an award greater than the insurer's final settlement offer. *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225.

Insurance Code section 11580.26(b) precludes an evaluation of whether an insurer acted in good faith in attempting to resolve the dispute merely by considering, after-the-fact, the results of the arbitration proceeding. However, an insurer is not relieved of its obligation to act reasonably in attempting to settle any disagreement with its insured concerning an uninsured/underinsured motorist claim or its duty "not to withhold unreasonably payments due under a policy." *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225.

The determination of whether a motor vehicle is underinsured is based on simply comparing the limits and potential recovery under the insurance policies of the injured person and the tortfeasor, not what is actually recovered in a particular case. *Explorer Ins. Co. v. Gonzalez* (2008) 164 Cal.App.4th 1258.

**Insurance: Uninsured Motorist**

All disputes arising under the uninsured motorist coverage should be subject to decision by the arbitrator. *Briggs v. Resolution Remedies* (2008) 168 Cal.App.4th 1395.

Determining whether a claimant is insured under an uninsured motorist provision is not a question of the underinsured tortfeasor's liability or damages owed to the insured and is therefore not subject to arbitration under Ins. Code section 11580.2(f). *Bouton v. USAA Casualty Ins. Co.* (2008) 167 Cal.App.4th 412.

Questions of coverage, including whether the claimant is an insured, must be resolved before a petition to compel arbitration pursuant to section 11580.2(f) is granted. *Bouton v. USAA Casualty Ins. Co.* (2008) 167 Cal.App.4th 412.

Coverage questions can be determined by the trial court in determining whether to grant a petition to compel arbitration and need not be raised in a separate declaratory relief action. *Bouton v. USAA Casualty Ins. Co.* (2008) 167 Cal.App.4th 412.

A trial court must allow discovery on the question of whether a petitioner seeking arbitration of a UIM dispute is an insured prior to making a determination of the petitioner's status as an insured. *Bouton v. USAA Casualty Ins. Co.* (2008) 167 Cal.App.4th 412.

A trial court should exercise its discretion to hear oral testimony at a hearing to determine whether a petitioner seeking arbitration of a UIM claim is an insured in the event affidavits, declarations, and other documentary evidence submitted by the parties are sharply conflicting on the question. *Bouton v. USAA Casualty Ins. Co.* (2008) 167 Cal.App.4th 412.

**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

An insurer's contractual right to arbitrate uninsured motorist and underinsured motorist claims does not relieve it from its obligation to deal with its insured in good faith. *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225.

An insurer has an implied obligation to honestly assess its insured's claim and to make a reasonable effort to resolve any dispute with its insured as to the amount of damages before invoking the its contractual right to arbitrate. *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225.

An insurer has an implied obligation to honestly assess its insured's claim and to make a reasonable effort to resolve any dispute with its insured as to the amount of damages before invoking the its contractual right to arbitrate. *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225.

Insurance Code section 11580.26(b) does not immunize an insurer from tort liability for the bad faith handling of a underinsured motorist claim. *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225.

The duty to attempt to agree before arbitrating, clearly imposed by the Legislature in Insurance Code sections 11580.2(f) and 11580.26(b), invokes a corresponding duty to do so in good faith. *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225.

Pursuant to Insurance Code section 11580.26(b), a bad faith action may not be based simply on the fact that, after failing to resolve an uninsured/underinsured motorist dispute, the insurer lost the arbitration or the insured recovered an award greater than the insurer's final settlement offer. *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225.

Insurance Code section 11580.26(b) precludes an evaluation of whether an insurer acted in good faith in attempting to resolve the dispute merely by considering, after-the-fact, the results of the arbitration proceeding. However, an insurer is not relieved of its obligation to act reasonably in attempting to settle any disagreement with its insured concerning an uninsured/underinsured motorist claim or its duty "not to withhold unreasonably payments due under a policy." *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225.

California takes a "narrow coverage view" of uninsured/underinsured benefits focusing on placing the insured in the position he or she would have been if the underinsured motorist had liability coverage equal to the insured's underinsured motorist limits. *Explorer Ins. Co. v. Gonzalez* (2008) 164 Cal.App.4th 1258.

An injured person's uninsured motorist coverage is not triggered if the combined single limits of the tortfeasor's policy are not less than the injured person's bodily injury coverage. *Explorer Ins. Co. v. Gonzalez* (2008) 164 Cal.App.4th 1258.

Pursuant to California Insurance Code section 11580.2, an insured is only required to exhaust another insured's motor vehicle or automobile liability limits before the insured is entitled to his underinsured motorist limits. The insured is not required to exhaust any business liability limits to obtain underinsured motorist coverage. *Wedemeyer v. Safeco Ins. Co. of America* (2008) 160 Cal.App.4th 1297.

**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

**Insurance: Vessel Pollution**

Under Washington law, stand alone vessel pollution insurance is marine insurance and is subject to the doctrine of *uberrimae fidei*. *Certain Underwriters at Lloyds, London v. Totem Agencies Inc.* (9th Cir. 2008) 518 F.3d 645.

**Insurance: Workers' Compensation**

An insured can waive a workers' compensation benefits carrier's right to statutory credit against future workers' compensation benefits without the carrier's consent. *Travelers Property Casualty v. ConocoPhillips* (9th Cir. 2008) 546 F.3d 1142.

The statutory credit under California Labor Code section 3600(b) does not always have to be included when calculating the amount of "regular" workers' compensation benefits. *Travelers Property Casualty v. ConocoPhillips* (9th Cir. 2008) 546 F.3d 1142.

A carrier who cannot obtain a statutory credit for a settlement made by the insured against future workers' compensation benefits is making regularly provided workers' compensation benefits when paying a claim and not "excess" payments in violation of a excess payments clause. *Travelers Property Casualty v. ConocoPhillips* (9th Cir. 2008) 546 F.3d 1142.

An insured's waiver of the statutory credit under California Labor Code section 3600(b) is not a voluntary assumption of an obligation in violation of the voluntary payments clause in a workers' compensation benefits policy because it is a "nonmonetary requirement." *Travelers Property Casualty v. ConocoPhillips* (9th Cir. 2008) 546 F.3d 1142.

The dual capacity doctrine was largely abrogated by the addition of Labor Code section 3602(a), which provides that where the conditions of compensation set forth in Section 3600 are met, workers' compensation is the exclusive remedy, and fact that either the employee or the employer also occupied another or dual capacity shall not permit the employee or his or her dependents to bring an action at law for damages against the employer. *Power Fabricating, Inc. v. State Comp. Ins. Fund* (2008) 167 Cal.App.4th 1446.

Worker compensation exclusivity prevents other joint venturers from obtaining indemnity against the employer joint venturer. *Power Fabricating, Inc. v. State Compensation Insurance Fund* (2008) 167 Cal.App.4th 1446.

Under Section 3600, an employee or his dependents are barred by statute from bringing a negligence claim against an insured arising from a workers' compensation injury claim. *Power Fabricating, Inc. v. State Compensation Insurance Fund* (2008) 167 Cal.App.4th 1446.

Under Section 3602, a claim against insured based on its dual capacity as employer and as a joint venturer of a joint venture, without more, does not qualify as an exception to workers' compensation exclusivity. *Power Fabricating, Inc. v. State Compensation Insurance Fund* (2008) 167 Cal.App.4th 1446.

**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

**Intervention: Permissive**

In California, the proposed intervener must show direct and immediate interest in the litigation to support permissive intervention. *Royal Indem. Co. v. United Enterprises, Inc.* (2008) 162 Cal.App.4th 194.

The federal rules allow permissive intervention where the party's claim and the main action have a question of law or fact in common and intervention will not unduly prejudice or delay the rights of the original parties. *Royal Indem. Co. v. United Enterprises, Inc.* (2008) 162 Cal.App.4th 194.

California's requirement of direct and immediate interest for permissive intervention means the interest must be of such a direct and immediate nature that the moving party will either gain or lose by the direct legal operation and effect of judgment. *Royal Indem. Co. v. United Enterprises, Inc.* (2008) 162 Cal.App.4th 194.

**Licensing**

Under Insurance Code section 700, every person who transacts any class of insurance business in California must have a license from the state Insurance Commissioner. Violations of this statute result in penalties of fines, imprisonment, or injunctions. An insurance contract issued by an unlicensed insurer is still enforceable despite the violation of this statute. *Medina v. Safe-Guard Products, Internat., Inc.* (2008) 164 Cal.App.4th 105.

**Limit Of Liability**

The phrase "have paid ... the full amount of underlying limits," contained in an excess insurance policy, cannot have any other reasonable meaning than actual payment of no less than the underlying limit. *Qualcomm v. Certain Underwriters at Lloyd's* (2008) 161 Cal. App. 4th 184.

In interpreting an excess insurance policy, even if the phrase "held liable to pay" is susceptible to more than one reasonable meaning and includes responsibility for payment under settlement agreement, a settlement for less than the underlying primary limits did not require the primary insurer to pay its policy limit. *Qualcomm v. Certain Underwriters at Lloyd's* (2008) 161 Cal. App. 4th 184.

The limit of liability provision in an excess insurance policy, which provided that the excess insurer was liable only after the primary insurers "have paid or have been held liable to pay the full amount of the Underlying Limit of Liability" was not ambiguous. *Qualcomm v. Certain Underwriters at Lloyd's* (2008) 161 Cal. App. 4th 184.

In interpreting an excess insurance policy, an insured's objectively reasonable expectations were that primary insurance would have to be exhausted before excess coverage would attach. *Qualcomm v. Certain Underwriters at Lloyd's* (2008) 161 Cal. App. 4th 184.

**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

**Litigation Privilege**

Several policies underlie the litigation privilege. First, it affords litigants free access to the courts to secure and defend their rights without fear of harassment by later suits. Second, the courts rely on the privilege to prevent the proliferation of lawsuits after the first one is resolved. Third, the privilege facilitates crucial functions of the trier of fact. *Lambert v. Carneghi* (2008) 158 Cal.App.4th 1120.

The litigation privilege protects statements made in private, contractual arbitration proceedings in order to encourage witnesses to provide open and candid testimony and has been used to protect the expert witness of a party opponent, as well as experts jointly hired by parties, but it does not apply to prevent a party from suing his own expert witness, even if that suit is based upon the expert's testimony. *Lambert v. Carneghi* (2008) 158 Cal.App.4th 1120.

**Mailed**

The Ninth Circuit Court of Appeals, applying Washington state law, held that proper notice of insurance policy cancellation depends on state law meaning of "mailed." Washington state law has not settled whether sending a cancellation via certified mail, without receipt by the insured, satisfies the notice requirement of an insurance policy. As a result, the issue was certified to the Washington State Supreme Court. *Cornhusker Casualty Ins. Co. v. Kachman* (2008) 514 F.3d 977.

**Mediation**

Communications, but not conduct, during mediation are confidential under Evidence Code section 1119 (c). Thus a party can be sanctioned for failing to attend a mediation, but not for failing to participate in the mediation "in good faith." *Campagnone v. Enjoyable Pools & Spas Service & Repairs, Inc.* (2008) 163 Cal.App.4th 566.

Court cannot adjudicate claim of failure to participate in mediation in good faith where basis for advancing claim is confidential communications. *Campagnone v. Enjoyable Pools & Spas Service & Repairs, Inc.* (2008) 163 Cal.App.4th 566.

An insurer may be ordered to pay sanctions for its unauthorized failure to have a representative attend, with full settlement authority, a court-ordered mediation of claims for which its policy potentially affords coverage where such attendance is required by a local rule of court. *Campagnone v. Enjoyable Pools & Spas Service & Repairs, Inc.* (2008) 163 Cal.App.4th 566.

Excess carrier is within scope of local rule requiring attendance of carrier at mediation of case which for which it affords potential insurance coverage where amount in controversy is close to the point of attachment of the carrier's limits. *Campagnone v. Enjoyable Pools & Spas Service & Repairs, Inc.* (2008) 163 Cal.App.4th 566.

Failure to notify a carrier with potential insurance coverage for claims subject to a court-ordered mediation, and of the requirement the carrier to send a representative with full settlement authority, is grounds for sanctions if rule or court opinion interpreting rule clearly

**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

so provides. *Campagnone v. Enjoyable Pools & Spas Service & Repairs, Inc.* (2008) 163 Cal.App.4th 566.

An insurer is considered a “party” to a mediation for the purposes of having sanctions imposed against it if it fails to comply with a local rule requiring insurers with potential insurance coverage to send authorized representatives to court-ordered mediations. *Campagnone v. Enjoyable Pools & Spas Service & Repairs, Inc.* (2008) 163 Cal.App.4th 566.

**Mediation: Sanctions**

An insurer may be ordered to pay sanctions for its unauthorized failure to have a representative attend, with full settlement authority, a court-ordered mediation of claims for which its policy potentially affords coverage where such attendance is required by a local rule of court. *Campagnone v. Enjoyable Pools & Spas Service & Repairs, Inc.* (2008) 163 Cal.App.4th 566.

Excess carrier is within scope of local rule requiring attendance of carrier at mediation of case which for which it affords potential insurance coverage where amount in controversy is close to the point of attachment of the carrier’s limits. *Campagnone v. Enjoyable Pools & Spas Service & Repairs, Inc.* (2008) 163 Cal.App.4th 566.

Failure to notify a carrier with potential insurance coverage for claims subject to a court-ordered mediation, and of the requirement the carrier to send a representative with full settlement authority, is grounds for sanctions if rule or court opinion interpreting rule clearly so provides. *Campagnone v. Enjoyable Pools & Spas Service & Repairs, Inc.* (2008) 163 Cal.App.4th 566.

**Modification**

The policy integration clause and provision barring modification by oral agreement precludes claim that agent misrepresented coverage. *Everett v. State Farm General Ins. Co.* (2008) 162 Cal.App.4th 649.

**Mootness (Federal Court)**

As long as an order is not withdrawn by the district court, it continues to be “viable and enforceable.” As such, an appeal of the order is not considered moot, despite assurances from the district court that it would not enforce the order. *Negrete v. Allianz Life Ins. Co.* (9th Cir. 2008) 523 F.3d 1091.

**Mutual Insurers**

Under Illinois law, absent language in the policy to the contrary, a policyholder of a mutual insurer does not have a right to any amount of dividends; rather, the mutual insurer merely is obligated to consider from time to time whether dividends should be declared. *Hill v. State Farm Mutual Automobile Ins. Co.* (2008) 166 Cal.App.4th 1438.

**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

Under Illinois law, a mutual insurer need not explain to its policyholders the specifics of its dividend practices, especially whether the board expressly retains discretion in the matter. *Hill v. State Farm Mutual Automobile Ins. Co.* (2008) 166 Cal.App.4th 1438.

**Negligent Misrepresentation**

Insured could not rely upon agent representations of coverage after insured was notified of change in her coverage by insurer. *Everett v. State Farm General Ins. Co.* (2008) 162 Cal.App.4th 649.

**Pari Delicto**

The court will allow an illegal contract to be enforced so long as the party seeking its enforcement is “less morally blameworthy” than the party against whom the contract is being asserted, and there is no overriding public interest to be served by voiding the agreement. A consumer who purchases an insurance contract from an unlicensed insurer is “less morally blameworthy” than the insurer and the contract will be enforceable. *Medina v. Safe-Guard Products, Internat., Inc.* (2008) 164 Cal.App.4th 105.

**Pro Se Litigation**

The causes of action on which civil litigants may proceed without counsel are limited by 28 U.S.C. § 1654. *Simon v. Hartford Life, Inc.* (9th Cir. 2008) 546 F.3d 661.

28 U.S.C. § 1654 allows parties to conduct their “own” cases “personally” but does not permit parties to conduct litigation without counsel when they are not the real party in interest. *Simon v. Hartford Life, Inc.* (9th Cir. 2008) 546 F.3d 661.

The right to represent oneself is unique to the litigant and does not extend to third parties. *Simon v. Hartford Life, Inc.* (9th Cir. 2008) 546 F.3d 661.

In the absence of congressional authority, a litigant that brings a claim in a representative capacity must be represented by licensed counsel. *Simon v. Hartford Life, Inc.* (9th Cir. 2008) 546 F.3d 661.

**Proposition 64**

Proposition 64 amended Business and Professions Code section 17204 to require a plaintiff bringing an action under the Unfair Competition Law to show “injury in fact and lost money or property as a result” of the unfair competition. This does not include payments made on the contract if there is no allegation that the plaintiff did not want the contract, the contract was unsatisfactory, or the contract was worth less than what was paid for. *Medina v. Safe-Guard Products, Internat., Inc.* (2008) 164 Cal.App.4th 105.

**Public Policy Considerations**

A court is bound to apply plain and unambiguous policy language, and policy considerations, including those favoring settlements, could not supersede that policy language. *Qualcomm, Inc. v. Certain Underwriters at Lloyd’s, London* (2008) 161 Cal.App.4th 184.

**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

**Punitive Damages**

Punitive damages cannot be awarded for breaching a contract. *City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375.

Insured failed to show by clear and convincing evidence insurer acted with malice, fraud or gross negligence when its coverage denial was based on two separate coverage opinions regarding the applicability of an exclusion. *Food Pro International, Inc. v. Farmers Ins. Exch.* (2008) 169 Cal.App.4th 976.

**Reformation**

No reformation of the insurance policy is allowed where the insured receives a clear legal warning asking him to sign the policy only after reading and understanding its terms. *Mercury Ins. Co. v. Pearson* (2008) 169 Cal.App.4th 1064.

**Rule: Business Judgment**

Under Illinois law, absent a showing of fraud, the business judgment rule will protect a decision reached by the Board of Directors of a mutual insurer, where the Board was sufficiently advised, and relied on information provided, by its management and actuarial department in its deliberative process. *Hill v. State Farm Mutual Automobile Ins. Co.* (2008) 166 Cal.App.4th 1438.

Under Illinois law, the business judgment rule is a defense to an alleged breach of the duty of care by a board of directors, including an alleged breach of contract. *Hill v. State Farm Mutual Automobile Ins. Co.* (2008) 166 Cal.App.4th 1438.

Under Illinois law, where there is no conscious decision by directors to act or refrain from acting, the business judgment rule has no application. The absence of board action, therefore, makes it impossible to perform the essential inquiry—whether the directors have acted in conformity with the business judgment rule in approving the challenged transaction. The rule does not apply when the directors did not actually make a decision. *Hill v. State Farm Mutual Automobile Ins. Co.* (2008) 166 Cal.App.4th 1438.

Under Illinois law, the business judgment rule requires that the directors become sufficiently informed to make an independent business decision. The directors have the duty to inform themselves of the material facts necessary to exercise their judgment. They may not close their eyes to what is going on about them in corporate business, and must in appropriate circumstances make such reasonable inquiry. The standard for judging the informational component of the directors' decision-making does not mean that the Board must be informed of every fact. The Board is responsible for considering only material facts that are reasonably available, not those that are immaterial or out of the Board's reasonable reach. *Hill v. State Farm Mutual Automobile Ins. Co.* (2008) 166 Cal.App.4th 1438.

Under Illinois law, whether a decision of a board of directors has merit is not an exception to application of the business judgment rule. The rule focuses on whether the process used to reach the decision was tainted by fraud, oppression, illegality, or the like, and the rule will



**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

preclude liability for a company's mistakes, errors, and mere negligence. *Hill v. State Farm Mutual Automobile Ins. Co.* (2008) 166 Cal.App.4th 1438.

The way in which the parties moving for, and opposing, summary judgment may each carry their burden of persuasion and/or production depends on which party would bear what burden of proof at trial. The business judgment rule creates a presumption that the Board acted properly and applies to both directors and officers. The presumption is rebuttable and may be overcome by evidence supporting an exception to the rule. Although courts have stated that a plaintiff has a "stringent" or "heavy" task in defeating the business judgment rule, the Court does not regard such statements as imposing a heightened burden of proof but rather as a recognition of the rule's practical success. *Hill v. State Farm Mutual Automobile Ins. Co.* (2008) 166 Cal.App.4th 1438.

**Rule: Genuine Dispute**

The genuine dispute rule cannot be invoked to protect an insurer's denial or delay in payment of benefits unless the insurer's position was both reasonable and reached in good faith. *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225.

**Rule: No Direct Action**

An injured third party, not in contractual privity with the tortfeasor's insurer, is generally prohibited from suing the tortfeasor's insurer for failing to defend or indemnify the tortfeasor against the claim. *Otay Land Co. v. Royal Indem. Co.* (2008) 169 Cal.App.4th 556.

**Rule: No Direct Action: Exceptions**

There are three well-accepted exceptions to the "no-direct action" rule: 1) where the third party plaintiff has a judgment against the insured; 2) where the insurer has sued the third party in its own declaratory relief action; and 3) where the insured has assigned its rights under the policy to the third party. *Otay Land Co. v. Royal Indem. Co.* (2008) 169 Cal.App.4th 556.

**Rule: Parol Evidence**

The parol evidence rule does not prohibit the introduction of extrinsic evidence to explain the meaning of a written contract if the meaning urged is one to which the written contract terms are reasonably susceptible. *Los Angeles Unified School Dist. v. Great American Ins. Company* (2008) 163 Cal.App.4th 944. Not citable. Review granted.

**Self-insured Retention**

Self-insured retentions do not constitute insurance under Washington law. *Bordeaux, Inc. v. American Safety Ins. Co.* (2008) 145 Wn.App. 687.

Absent specific policy language, a single payment may satisfy the self-insured retention of multiple policies. *Bordeaux, Inc. v. American Safety Ins. Co.* (2008) 145 Wn.App. 687.

**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

**Standard Of Proof For Declaration Of No Coverage**

To obtain a declaration that an insurer owes no duty to defend or indemnify an insured under the language of a CGL policy, the insurer must prove the absence of any potential that the claim is covered under the policy. *American Casualty Co. of Reading, PA v. Miller* (2008) 159 Cal.App.4th 501.

**Statutory Interpretation**

The fundamental task of statutory interpretation is to determine the Legislature's intent so as to effectuate the purpose of the law. *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225.

**Statutory Penalties**

As a general rule, the courts will not impose additional penalties for statutory violations beyond those that are expressly or by necessary implication included in the statute itself. *Medina v. Safe-Guard Products, Internat., Inc.* (2008) 164 Cal.App.4th 105.

**Stay**

A stay of a coverage action is unwarranted where the court resolves the coverage question as a matter of law without making factual determinations that would prejudice the insured in the third party action. *GGIS Ins. Services, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1493.

The concern that factual determinations in a coverage action could become binding on the insured in the third party action is present whenever there is litigation between an insurer and its insured and is not limited to declaratory relief actions. *GGIS Ins. Services, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1493.

A coverage action should not proceed if it may result in factual determinations that would prejudice the insured in the third party action. The concern is that factual determinations in a coverage action could become binding on the insured in the third party action under collateral estoppel or create the possibility of inconsistent factual determinations. *GGIS Ins. Services, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1493.

**Stipulated Judgment**

A stipulated judgment, executed for the purpose of facilitating an immediate appeal, does not bar standing to appeal. *Monticello Ins. Co. v. Essex Ins. Co.* (2008) 162 Cal.App.4th 1376.

A summary judgment that results in a stipulated judgment is subject to de novo review on appeal, as is an order from the court denying summary judgment. *Monticello Ins. Co. v. Essex Ins. Co.* (2008) 162 Cal.App.4th 1376.

**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

**Subrogation**

Absent specific policy language, an insurer does not have the right to recover funds through subrogation prior to the insured being made whole. *Bordeaux, Inc. v. American Safety Ins. Co.* (2008) 145 Wn.App. 687.

A subrogation waiver in the leases between a landlord and tenant bars claims by landlord's insurer. *Fireman's Fund Ins. Co. v. Sizzler USA Real Property, Inc.* (2008) 169 Cal.App.4th 415.

Waivers of subrogation often appear together with or on account of waivers or releases of rights between contracting parties, with respect to claims covered by insurance. *Fireman's Fund Ins. Co. v. Sizzler USA Real Property, Inc.* (2008) 169 Cal.App.4th 415.

Waiver of subrogation provisions exist as part and parcel of a risk allocation agreement whereby liability is shifted to the insurance carriers of the parties to the agreement. Such an agreement is necessarily premised on the procurement of insurance by the parties. Without the procurement of insurance, however, the shifting envisioned under the agreement cannot take place, and the agreement is frustrated. Therefore, the breaching party is not entitled to enforcement of the waiver provisions in the lease. *Fireman's Fund Ins. Co. v. Sizzler USA Real Property, Inc.* (2008) 169 Cal.App.4th 415.

Where an agreement plainly provides that liability and subrogation will be waived as to all risks covered by "any insurance policies carried by the parties," a party's failure to perform insurance requirements does not prevent the shifting of risk to insurance that underlies a subrogation waiver. In such instances, terms of the agreement reflect that parties did not intend waiver to be premised on a party's procurement of full insurance. *Fireman's Fund Ins. Co. v. Sizzler USA Real Property, Inc.* (2008) 169 Cal.App.4th 415.

**Subscription Agreements**

Subscription agreements are not incorporated into policies unless the policy identifies the subscription agreement by title. *Fogel v. Farmers Group, Inc.* (2008) 160 Cal.App.4th 1403.

**Summary Judgment**

The insurer is entitled to summary adjudication that no potential for indemnity exists if the evidence establishes as a matter of law that there is no coverage. *Spangle v. Farmers Ins. Exchange* (2008) 166 Cal.App.4th 560.

On appeal, an appellant is no more entitled than is a respondent to entry of judgment on an issue that remains to be decided. *Spangle v. Farmers Ins. Exchange* (2008) 166 Cal.App.4th 560.

In its de novo review of a trial court's summary judgment decision, the appellate court must "independently review the record" and "apply the same rules and standards" as the trial court. The trial court must grant the motion if "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) "There is a triable issue of material fact if, and

**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.” *Roberts v. Assurance Co. of America* (2008) 163 Cal.App.4th 1398.

When conducting its independent de novo review of a trial court’s summary judgment decision, the appellate court must consider “all the evidence set forth in the moving and opposition papers except that to which objections were made and sustained,” as well as all inferences reasonably drawn from that evidence. *Roberts v. Assurance Co. of America* (2008) 163 Cal.App.4th 1398.

An insurer may “seek [] summary judgment on the ground the claim is excluded, in which case it has “the burden ... to prove that the claim falls within an exclusion.” To satisfy its burden, an insurer need not “disprove every possible cause of the loss” and once the insurer establishes the claim is excluded, the burden shifts to the insured to show a triable issue of material fact exists. *Roberts v. Assurance Co. of America* (2008) 163 Cal.App.4th 1398.

An insured has the burden of proving its claim falls within the scope of the policy’s basic coverage, even where the insurer brings a motion for summary judgment. *Roberts v. Assurance Co. of America* (2008) 163 Cal.App.4th 1398.

**Surety Bonds**

Washington law governed the interpretation of surety bonds. *Contractors Equipment Maintenance Co., Inc., ex rel. United States and United Coastal Ins. Co. v. Bechtel Hanford, Inc.* (9th Cir. 2008) 514 F.3d 899.

Supersedeas bond executed by performance bond surety for subcontractor named only performance bond surety as principal. Bond therefore covered only liability of performance bond surety and not liability of subcontractor, under Washington law. *Contractors Equipment Maintenance Co., Inc., ex rel. United States and United Coastal Ins. Co. v. Bechtel Hanford, Inc.* (9th Cir. 2008) 514 F.3d 899.

**Taxed Costs**

Where an insurance policy provided an insurer would pay all costs taxed against an insured in a suit and the word “taxed” was undefined in the policy, the Court of Appeal held the term was ambiguous and could narrowly refer to a judicial assessment of costs or broadly to any levy of an assessment, but held it was required to construe the term broadly. *Employers Mutual Casualty Company v. Philadelphia Indemnity Ins. Company* (2008) 169 Cal.App.4th 340.

Where an insurer settled an action that included an agreement to pay \$1.8 million in statutory attorney fees and sought contribution from another insurer, the appeals court held the \$1.8 million sum represented a taxed cost and required the insurer from which contribution was sought to pay \$400,000 for its share of statutory attorney fees. *Employers Mutual Casualty Company v. Philadelphia Indemnity Ins. Company* (2008) 169 Cal.App.4th 340.

Taxed costs can include attorney fees paid in a settlement. *Employers Mutual Casualty Company v. Philadelphia Indemnity Ins. Company* (2008) 169 Cal.App.4th 340.

**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

If taxed costs did not include anticipated costs in a settlement insurers would be discouraged from settling cases with high costs because they would be barred from seeking contribution. Thus, as a matter of policy, an insurer may settle and action and seek contribution of taxed costs. *Employers Mutual Casualty Company v. Philadelphia Indemnity Ins. Company* (2008) 169 Cal.App.4th 340.

**Third Party Standing**

A third party assignee of an insured's claims has standing to sue the insurer. *Royal Indem. Co. v. United Enterprises, Inc.* (2008) 162 Cal.App.4th.

Where an insurer joins the injured third party as a codefendant in a declaratory relief action to determine coverage, the third party may raise coverage issues in that coverage action. *Royal Indem. Co. v. United Enterprises, Inc.* (2008) 162 Cal.App.4th.

Under Insurance Code section 11580, an injured third party who is a judgment creditor has standing to seek payment under an insurance policy. *Royal Indem. Co. v. United Enterprises, Inc.* (2008) 162 Cal.App.4th.

A third party who is not in privity of contract with an insurer normally lacks standing to sue the insurer to resolve coverage questions on policy to an insured. *Royal Indem. Co. v. United Enterprises, Inc.* (2008) 162 Cal.App.4th.

**Uberrimae Fidei**

The doctrine of *uberrimae fidei* requires a marine insurance applicant to voluntarily reveal every fact within the applicant's knowledge that is material to the risk, even if not asked by the prospective insurer. *Certain Underwriters at Lloyds, London v. Totem Agencies Inc.* (9th Cir. 2008) 518 F.3d 645.

Under *uberrimae fidei*, an insurer may rescind a marine policy if it can show either intentional misrepresentation of a fact, regardless of materiality, or nondisclosure of a fact material to the risk, regardless of intent. *Certain Underwriters at Lloyds, London v. Totem Agencies Inc.* (9th Cir. 2008) 518 F.3d 645.

**Unenforceable Settlement Offers**

A settlement offer conditioned on the release of "all claims" is ambiguous and thus invalid under California Code of Civil Procedure section 998 if plaintiff has a separate pending claim that is not part of the litigation. *Chen v. Interinsurance Exchange of the Automobile Club* (2008) 164 Cal.App.4th 117.

In California, a valid offer of compromise pursuant to California Code of Civil Procedure section 998 must not dispose of any claims beyond the claims at issue in the pending lawsuit. *Chen v. Interinsurance Exchange of the Automobile Club* (2008) 164 Cal.App.4th 117.

**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

**Unfair Competition Law**

A plaintiff bringing an action under the Unfair Competition Law must show “injury in fact and lost money or property as a result” of the unfair competition. This does not include payments made on the contract if there is no allegation that the plaintiff did not want the contract, the contract was unsatisfactory, or the contract was worth less than what was paid for. *Medina v. Safe-Guard Products, Internat., Inc.* (2008) 164 Cal.App.4th 105.

**Unlicensed Insurer**

Under Insurance Code section 700, every person who transacts any class of insurance business in California must have a license from the state Insurance Commissioner. Violations of this statute result in penalties of fines, imprisonment, or injunctions. An insurance contract issued by an unlicensed insurer is still enforceable despite the violation of this statute. *Medina v. Safe-Guard Products, Internat., Inc.* (2008) 164 Cal.App.4th 105.

**Void v. Voidable**

A contract found void under Civil Code section 1598 is a circumstance distinct from a contract that is voidable under principles of rescission which require the parties to return all benefits conferred. *Medina v. Safe-Guard Products, Internat., Inc.* (2008) 164 Cal.App.4th 105.

**Waiver**

A subrogation waiver in the leases between a landlord and tenant bars landlord’s insurer’s claim. *Fireman’s Fund Ins. Co. v. Sizzler USA Real Property, Inc.* (2008) 169 Cal.App.4th 415.

Waivers of subrogation often appear together with or on account of waivers or releases of rights between contracting parties, with respect to claims covered by insurance. *Fireman’s Fund Ins. Co. v. Sizzler USA Real Property, Inc.* (2008) 169 Cal.App.4th 415.

Waiver of subrogation provisions exist as part and parcel of a risk allocation agreement whereby liability is shifted to the insurance carriers of the parties to the agreement. Such an agreement is necessarily premised on the procurement of insurance by the parties. Without the procurement of insurance, however, the shifting envisioned under the agreement cannot take place, and the agreement is frustrated. Therefore, the breaching party is not entitled to enforcement of the waiver provisions in the lease. *Fireman’s Fund Ins. Co. v. Sizzler USA Real Property, Inc.* (2008) 169 Cal.App.4th 415.

Where an agreement plainly provides that liability and subrogation will be waived as to all risks covered by “any insurance policies carried by the parties,” a party’s failure to perform insurance requirements does not prevent the shifting of risk to insurance that underlies a subrogation waiver. In such instances, terms of the agreement reflect that parties did not intend waiver to be premised on a party’s procurement of full insurance. *Fireman’s Fund Ins. Co. v. Sizzler USA Real Property, Inc.* (2008) 169 Cal.App.4th 415.

**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009

**Washington Law**

The doctrine of *uberrimae fidei* requires a marine insurance applicant to voluntarily reveal every fact within the applicant's knowledge that is material to the risk, even if not asked by the prospective insurer. *Certain Underwriters at Lloyds, London v. Totem Agencies Inc.* (9th Cir. 2008) 518 F.3d 645.

Under *uberrimae fidei*, an insurer may rescind a marine policy if it can show either intentional misrepresentation of a fact, regardless of materiality, or nondisclosure of a fact material to the risk, regardless of intent. *Certain Underwriters at Lloyds, London v. Totem Agencies Inc.* (9th Cir. 2008) 518 F.3d 645.

In the Ninth Circuit, the doctrine of *uberrimae fidei*, not state law, applies to maritime insurance and imposes the utmost duty of good faith on both parties to the contract. *Certain Underwriters at Lloyds, London v. Totem Agencies Inc.* (9th Cir. 2008) 518 F.3d 645.

California has codified the doctrine of *uberrimae fidei* for marine insurance. *Certain Underwriters at Lloyds, London v. Totem Agencies Inc.* (9th Cir. 2008) 518 F.3d 645.

Stand alone vessel pollution insurance is marine insurance and is subject to the doctrine of *uberrimae fidei*. *Certain Underwriters at Lloyds, London v. Totem Agencies Inc.* (9th Cir. 2008) 518 F.3d 645.

Washington law governed the interpretation of surety bonds. *Contractors Equipment Maintenance Co., Inc., ex rel. United States and United Coastal Ins. Co. v. Bechtel Hanford, Inc.* (9th Cir. 2008) 514 F.3d 899.

An insurer's prior acceptance of late premium payment, which was postmarked prior to the cancellation date, does not estop the carrier from cancelling the policy after a subsequent late payment. *Cornhusker Casualty Ins. Co. v. Kachman* (2008) 165 Wn.2d 404.

The Ninth Circuit Court of Appeals, applying Washington state law, held that proper notice of insurance policy cancellation depends on state law meaning of "mailed." Washington state law has not settled whether sending a cancellation via certified mail, without receipt by the insured, satisfies the notice requirement of an insurance policy. As a result, the issue was certified to the Washington State Supreme Court. *Cornhusker Casualty Ins. Co. v. Kachman* (2008) 514 F.3d 977.

Self-insured retentions do not constitute insurance under Washington law. *Bordeaux, Inc. v. American Safety Ins. Co.* (2008) 145 Wn.App. 687.

Absent specific policy language, a single payment may satisfy the self-insured retention of multiple policies. *Bordeaux, Inc. v. American Safety Ins. Co.* (2008) 145 Wn.App. 687.

Absent specific policy language, an insurer does not have the right to recover funds through subrogation prior to the insured being made whole. *Bordeaux, Inc. v. American Safety Ins. Co.* (2008) 145 Wn.App. 687.

**DEVELOPMENTS IN CALIFORNIA &  
SELECT OTHER JURISDICTION  
CASE LAW 2008: INSURANCE**

---

February 2009



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