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2001 DEVELOPMENTS IN CALIFORNIA INSURANCE CASE LAW

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**2001 DEVELOPMENTS IN
CALIFORNIA INSURANCE CASE LAW**

Accident

The term "accident" as used in a CGL policy includes unintentional harm resulting from intentional conduct. *Commercial Underwriters Ins. Co. v. Superior Court (Gulf Underwriters Ins. Co.)* (2000) 84 Cal.App.4th 181, *not citable; ordered not published.*

General liability policy issued to a partnership did not cover claims made by one partner against another arising from dispute over respective liabilities for actual or potential partnership debts or losses, including losses involving construction defects; a claim for allocation of such losses does not constitute "property damage" and no accidental conduct was alleged. *Continental Casualty Co. v. Superior Court (Paragon Homes)* (2001) 92 Cal.App.4th 430.

Additional Insured Endorsements

When an additional insured is sued for both uncovered and potentially covered claims, the insurer issuing the additional insured endorsement must provide a defense to the entire action, not just the policyholder's share, even though the policy limits coverage to liability arising out of the work of the named insured. *Presley Homes, Inc. v. American States Insurance Co.* (2001) 90 Cal.App.4th 571.

An additional insured endorsement covering "liability arising out of" the named insured's work covers liability of the additional insured for bodily injury to an employee of the named insured, injured while working at the additional insured's premises, regardless of whether the injury is caused by the named insured or solely by the additional insured. *Fireman's Fund Insurance Companies v. Atlantic Richfield Company* (2001) 94 Cal.App.4th 842.

Advertising Injury

Insurer had a duty to defend insured against a trade dress infringement action where extrinsic facts known to the insurer at the time of the tender showed that the allegedly infringing product was included in the insured's catalog and exhibited at trade shows and that these acts potentially caused "advertising injury." *El-Com Hardware, Inc. v. Fireman's Fund Insurance Company* (2001) 92 Cal.App.4th 205.

Coverage for advertising injuries requires the presence of each of the following: (1) plaintiff must have been engaged in advertising activity; (2) the allegations and the underlying facts must have conveyed a potential for liability for one of the insured offenses; and (3) there must be a causal connection between the injury alleged and plaintiff's advertising activity. *Hameid v. National Fire Ins. of Hartford* (2001) ___ Cal.App.4th ___, 01 C.D.O.S. 10745, *superceded by grant of review; depublished and not citable.*

An insured's use of a competitor's client list to solicit new customers was "advertising injury" within meaning of business liability policy. *Hameid v. National Fire Ins. of Hartford* (2001) ___ Cal.App.4th ___, 01 C.D.O.S. 10745, *superceded by grant of review; depublished and not citable*.

Apportionment of Defense Costs

In dispute among co-insurers regarding the proper method of allocation of costs incurred in defending mutual insured, where one of insurer's policy was in effect for a small percentage of the total time the other policies were in effect, the Court of Appeal found the "time-on-risk" method of allocating defense costs was equitable and withstood review under an abuse of discretion standard. The Court of Appeal noted that a number of factors may lead to different equitable results. *Centennial Ins. Co. v. U.S. Fire Ins.* (2001) 88 Cal.App.4th 105.

Arising Out Of

An insurer, which issued coverage for liability "arising out of" a business, has a duty to defend a former employee's defamation claim arising from a sexual relationship with a supervisor. The employment practices exclusion, which bars coverage for injury "arising out of" employment practices, does not apply to eliminate coverage unless the defamatory statement is made "in the context of" the employment relationship, e.g., the statement must directly relate to employment or work performance. *Golden Eagle Ins. Corp. v. Rocky Cola Caf, Inc., et al.* (2001) 94 Cal.App.4th 120.

The court found that "arising out of" in the coverage grant should be given a broad meaning, but that the same phrase in an exclusion should be given a narrow meaning requiring a "direct and proximate" relationship. *Golden Eagle Ins. Corp. v. Rocky Cola Caf, Inc., et al.* (2001) 94 Cal.App.4th 120.

General liability policy issued to a partnership did not cover claims made by one partner against another arising from dispute over respective liabilities for actual or potential partnership debts or losses, including losses involving construction defects; allocation of such losses do not constitute and did not cause "property damage," even though construction defects are evidence of the losses, and no accidental conduct was alleged. *Continental Casualty Co. v. Superior Court (Paragon Homes)* (2001) ___ Cal.App.4th ___, 01 C.D.O.S. 8272.

Assignment

Absent an express agreement to the contrary between predecessor and successor corporations, a successor corporation is assigned by operation of law all rights to coverage under the predecessor's policies for liabilities transferred to the successor corporation despite the policy's provision prohibiting assignments without consent. *Henkel Corp. v. Lloyd's of London et al.*, 88 Cal.App.4th 876, *superceded by grant of review; depublished and not citable*.

Attorney-Client Privilege

Where attorney was retained to investigate client's possible involvement in a fatal hit-and-run accident, photographs and videotape of client's vehicle taken by attorney at request of client lacked "communicative content" and were not protected by the attorney-client privilege. *Magill v. Superior Court, County of Madera* (2001) 86 Cal.App.4th 61, *ordered not published*.

Although photographs and videotape taken by attorney's agent at request of client would likely lead to disclosure of client's identity, the evidence was not protected by the attorney-client privilege because disclosure was not "tantamount to a confidential professional communication" and did not constitute the "last link" in an existing chain of evidence likely to lead to the client's indictment. *Magill v. Superior Court, County of Madera* (2001) 86 Cal.App.4th 61, *ordered not published*.

An insured does not hold and cannot waive its insurer's claim of attorney-client privilege as to documents seized from the insurer's and the insurer's attorneys' files. *State Compensation Insurance Fund v. Superior Court* (2001) 91 Cal.App.4th 1080.

Bad Faith

The federal courts have exclusive jurisdiction over all claims arising from flood insurance policies issued pursuant to the National Flood Insurance Program. The exclusive scope of the jurisdiction includes state law tort claims, including claims for bad faith. The court observed that such claims may be preempted by the statutes controlling the program. *McCormick v. Travelers Ins. Co.*, (2001) 86 Cal.App.4th 404.

Surety which pays a third-party claims against the principal does not have a subrogation right against the principal's liability insurer for bad faith where the insurer's failure to pay did not cause any injury to the principal. *Gulf Ins. Co. v. TIG Ins. Co.* (2001) 86 Cal.App.4th 422.

A jury's finding that the insured did not suffer damages for breach of contract did not preclude its concurrent finding of damages for breach of the implied covenant of good faith and fair dealing because if the insurer owed benefits under the policy, then the jury was entitled to find that the insurer's initial denial of coverage was a breach of contract. *American Medical Int'l., Inc. v. National Union Fire Ins. Co. of Pittsburgh* (9th Cir. 2001) 244 F.3d 715.

The U.S. Court of Appeals barred an insured's action against the insurer for breach of the implied covenant of good faith and fair dealing since there was no coverage for claims brought by past, present or former directors and officers. The court relied on the decision in *Waller v. Truck Insurance Co.* (1995) 11 Cal.4th 1, 37, holding that "where there is no coverage of any kind under an insurance contract, the insured may not hold that insurer liable for breach of the implied covenant." *American Medical Int'l., Inc. v. National Union Fire Ins. Co. of Pittsburgh* (9th Cir. 2001) 244 F.3d 715.

Excess insurer's payment of benefits to one insured, with knowledge of another insured's competing claim, may breach the implied covenant of good faith and fair dealing. *Schwartz v. State Farm Fire and Casualty* (2001) 88 Cal.App.4th 1329.

Where there is a genuine factual, but not legal, issue as to the insurer's liability under the policy for the claim asserted by the insured, there can be no bad faith liability imposed on the insurer for advancing its side of that dispute. *Chateau Chamberay v. Associated International Ins. Co.* (2001) 90 Cal.App.4th 335.

No duty ran from the insurer of the common areas of a condominium complex to individual unit owners who were not parties to the insurance policy and therefore no negligence claim could be maintained by the unit owners against the insurer. *Adelman v. Associated Int'l.* (2001) 90 Cal.App.4th 352.

When an insured agrees to an insurer's settlement of a third-party claim, the insured waives any right to maintain a bad faith action against the insurer based on the settlement, unless the insured's agreement to the settlement was procured by coercion, duress, fraud or some other improper means. *United Servs. Auto. Ass'n. v. Alaska Ins. Co., et al.* (2001) 94 Cal.App.4th 638.

An excess liability insurer sued by an insured for its bad faith refusal to defend a third-party claim may not seek equitable subrogation or equitable indemnity based on the primary insurer's settlement of the underlying claim. Equitable indemnity and equitable subrogation come into play when an excess insurer has paid money to settle a third-party claim or satisfy a judgment against the insured for a covered risk. Money paid by an insurer to the insured or her assignee in settlement of the insured's bad faith claim cannot be treated as money paid to a third party on a claim against the insured. *United Servs. Auto. Ass'n. v. Alaska Ins. Co., et al.* (2001) 92 Cal.App.4th 638.

Breach of the covenant of good faith and fair dealing requires something more than negligence; the insurer must have acted unreasonably. *Hameid v. National Fire Ins. of Hartford* (2001) ___ Cal.App.4th ___, 01 C.D.O.S. 10745, *superceded by grant of review; depublished and not citable.*

Bodily Injury

Allegations of physical symptoms caused by emotional distress constitute "bodily injury." *Commercial Underwriters Ins. Co. v. Superior Court (Gulf Underwriters Ins. Co.)* (2000) 84 Cal.App.4th 181, *not citable, ordered not published.*

California Business & Professions Code § 17200 (Unfair Practices)

An insurer that restructures and assigns its liabilities to another company without the consent of affected policyholders can be sued under the Unfair Competition Law because such an assignment is an "unlawful" business practice that is actionable under Business & Professions

Code § 17200, *et seq.* *AICCO, Inc. v. Insurance Company of North America* (2001) 90 Cal.App.4th 579.

The Worker's Compensation Appeals Board is not precluded from hearing a claim alleging an employer's worker's compensation insurer's practices violated California's Unfair Competition Law because the action is in equity. The theory of relief asserted by an employee is irrelevant to the WCAB's exclusive jurisdiction, and there is no equitable claim exception. The court did not determine if such a claim was viable before the WCAB. *Hughes v. Argonaut Insurance Company* (2001) 88 Cal.App.4th 517.

An insurer's clear language in its policy and promotional material clearly and unambiguously outlining basic coverage did not lead a reasonable person to expect that the insurer would pay enhanced benefits beyond those available in the policy. *Richard Van Ness v. Blue Cross of California* (2001) 87 Cal.App.4th 364.

Insurers did not commit unlawful business practices under the Unfair Competition Law (UCL) by adjusting losses under property policies on the basis of "replacement cost value less depreciation" instead of "actual cash value". The court refused to find that a practice by one or more carriers using the "replacement cost less depreciation" valuation is an "unfair practice" under UCL. Relying on *People v. Casa Blanca Convalescent Homes, Inc.* (1994) 159 Cal.App.3d 509, 530, a business practice is unfair "when it offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Community Assisting Recovery, Inc. v. Aegis Security Insurance Co.* (2001) 92 Cal.App.4th 886.

"Community Service Statement" information relating to certain automobile and other insurers sales practices, volumes, and premiums, could assist the California Insurance Commissioner in detecting unfair or fraudulent business acts or practices violations, such as the prohibitions against discrimination in the sales of insurance codified in California Business and Professions Code sections 679.71 and 11628. *Farmers Insurance Exchange, et al. v. Harry W. Low, et al.* (2001) 93 Cal.App.4th 667, *superceded by grant of review; depublished and not citable.*

Insurers selling single uninsured motorist policies on multiple vehicles are not liable under the UCA for engaging in conduct mandated or authorized by California Insurance Code § 11580.2. However, insurers selling separate policies for each vehicle, if they refuse to recognize any waiver that does not apply to all of an insured's vehicles, may be liable under the UCA. Such a practice does not constitute an unlawful business activity but may well constitute an unfair business practice. *Smith et al. v. State Farm Mut. Ins. Co. et al.* (2001) 93 Cal.App.4th 700.

California Civil Code § 47(b)

The privilege set forth in California Civil Code § 47(b) applies to a report written without malice that is submitted to an insurer, transmitted to a state agency, and then used in Contractor's Licensing Board citation hearing by agency. *Rodas v. Spiegel* (2001) 87 Cal. App 4th 513.

California Civil Code § 1457

An insurer that restructures and assigns its liabilities to another company without the consent of affected policyholders can be sued under the Unfair Competition Law because such an assignment is an “unlawful” business practice that is actionable under Business & Professions Code § 17200, *et seq.* *AICCO, Inc. v. Insurance Company of North America* (2001) 90 Cal.App.4th 579.

California Civil Code § 1653

An “illegal act” exclusion in a homeowner's policy is invalid and unenforceable under Civil Code Section 1653 as it applies to coverage of a wrongful death action arising out of an accidental killing because it does not reasonably distinguish between acts that are negligent, grossly negligent or criminal. *Safeco Insurance Company v. Robert S., et al.* (2001) 26 Cal.4th 758.

California Code of Civil Procedure § 664.6

Trial court may not assume jurisdiction to enforce settlement obtained through private dispute resolution where there was no justiciable controversy before the trial court. Trial court may not enforce settlement pursuant to section 664.6 since statute requires a “pending litigation.” *The Housing Group v. United Nat’l Ins. Co.* (2001) 90 Cal.App.4th 1106.

California Code of Civil Procedure § 877.6

Insurer, subrogated to indemnity claim of its insured, is barred from pursuing claim where insured would have been barred by Code of Civil Procedure section 877.6 motion granted in favor of other tortfeasors. *Mid-Century Ins. Exchange v. Daimler-Chrysler Corp., et al.* (2001) 93 Cal.App.4th 310.

California Government Code § 6254

Section 6254, excluding subdivision (d), including subdivision (k) prohibiting privileged records from disclosure under California Evidence Code § 1060, may prevent public disclosure of “Record A” data filed with state which contains information relating to certain automobile and other insures sales practices, volumes, and premiums. *Farmers Insurance Exchange, et al. v. Harry W. Low, et al.* (2001) 93 Cal.App.4th 667, *superceded by grant of review; depublished and not citable.*

California Insurance Code § 530

Policy, which covered loss caused by weather conditions, but excluded loss caused by weather in combination with an uncovered cause of loss (earth movement), violated California

Insurance Code § 530. Relying on *Howell v. State Farm Fire & Casualty Co.* (1990) 218 Cal.App.3d 1446, the court stated that Hartford could not contractually exclude coverage when a covered peril is the efficient proximate cause of the loss regardless of other contributing causes. *Palub v. Hartford Underwriters Insurance Company* (2001) 92 Cal.App.4th 645.

California Insurance Code § 1861.07

Public disclosure, pursuant to Article 10 of the California Insurance Regulations, of “Record A” data filed with state, which contains information relating to certain automobile and other insurers sales practices, volumes, and premiums, may be prohibited from public disclosure by applicable exemptions provided in California Government Code Section 6254, with the specific exception of subdivision (d). *Farmers Insurance Exchange, et al. v. Harry W. Low, et al.* (2001) 93 Cal.App.4th 667, *superceded by grant of review; depublished and not citable.*

California Insurance Code § 2071

California Insurance Code § 2071, providing that actions be brought within one year after the date of loss, does not bar a claim brought by the insured more than one year after the damage was sustained but within one year of his discovery of the additional damage where insured reasonably relied on misrepresentation of fact in insurer’s denial of coverage. *Vu v. Prudential Property & Cas. Ins. Co.* (2001) 26 Cal.4th 1142.

California Insurance Code § 2701

There is no requirement that “actual cash value” is the only standard relevant to adjust properly losses. Under the Code, the insured has the initial burden to determine the amount of the loss of damage to property based on the “actual cash value” or “fair market value” of the property at the time of the loss. If the insurer offers to settle the loss based on the “replacement cost less depreciation” valuation, then the insured may demand an appraisal by a neutral appraiser. *Community Assisting Recovery, Inc. v. Aegis Security Insurance Co.* (2001) ___ Cal.App.4th ___, 01 C.D.O.S. 8687.

California Insurance Code § 11580

Absent a determination of coverage, perhaps including a final determination in California Insurance Code § 11580, an insurer cannot challenge an underlying judgment under California Code of Civil Procedure § 663. *Tomassi v. Scarff* (2001) 85 Cal.App.4th 1053.

Documents prepared in order to make an insurance claim are not protected as “in furtherance of rights to petition or engage in free speech” as protected by the anti-SLAPP statute. Thus, a complaint alleging fraud in preparation of such documents is not barred by the anti-SLAPP statute. *The People (20th Century Insurance Co.) v. Building Permit Consultants, Inc.* (2001) 86 Cal.App.4th 280.

Admission of judgment creditor about insured's intent binds judgment creditor in later direct action where insured's intent is at issue. *20th Century Ins. Co. v. Hugh D. Schurtz* (2001) 92 Cal.App.4th 1188.

California Insurance Code § 11580.2

Based on an analysis of statutory language and legislative history, the court found no provision in section 11580.2 for deleting coverage on a "per vehicle" basis so as to allow insured owners of multiple vehicles covered under a single liability policy to delete uninsured motorist coverage as to one or more of its vehicles. Where, however, an insured purchases a separate policy for each of several vehicles, the insured may waive uninsured motorist coverage as to any vehicle. Accordingly, insurers selling separate policies for each vehicle owned by an insured must allow the insured to waive coverage on a per vehicle basis. *Smith et al. v. State Farm Mut. Ins. Co. et al.* (2001) 93 Cal.App.4th 700.

Causation

General liability policy issued to a partnership did not cover claims made by one partner against another arising from dispute over respective liabilities for actual or potential partnership debts or losses, including losses involving construction defects; a claim for allocation of such losses does not constitute and did not cause "property damage," even though construction defects are evidence of the losses, and no accidental conduct was alleged. *Continental Casualty Co. v. Superior Court (Paragon Homes)* (2001) __ Cal.App.4th __, 01 C.D.O.S. 8272.

CERCLA 42 U.S.C. § 9601 et. seq.

Prior owners of contaminated property who did not "dispose" of contaminants within the plain meaning of "disposal" under CERCLA, 42 U.S.C., §9607(a)(2) et. seq. were not "potentially responsible parties" ("PRPs") and, thus not liable for clean-up costs. *Carson Harbor Village, Ltd. v. Unocal Corporation and City of Carson* (2001) 270 F.3d 863.

Challenging Underlying Judgments

California Code of Civil Procedure § 663, under which an "aggrieved" party may move to set aside a judgment that is unsupported by facts, cannot be used by an insurer prior to the determination of coverage. An insurer challenging a judgment which is only potentially covered does not have an interest that is "immediate, pecuniary, and substantial" enough to make it "aggrieved" under section 663. *Tomassi v. Scarff* (2001) 85 Cal.App.4th 1053.

Confidentiality of Mediation

There is no exception for sanctionable conduct to rule of confidentiality regarding mediation communications. *Foxgate Homeowners' Ass'n, Inc. v. Bramalea Cal., Inc.* (2001) 26 Cal.4th 1.

Contribution

Equitable contribution rather than subrogation applies and *Rossmoor v. Pylon* does not apply where defendant is named insured on one policy and defined as insured on a second policy issued to defendant's indemnitor. Equitable contribution apportions costs incurred among insurers who share the same level of liability on the same risk as to the same insured. *Travelers Casualty and Surety Company v. American Equity Insurance Company* (2001) 93 Cal.App.4th 1142.

Contract Formation

Lack of negotiated contract terms did not lead to lack of mutual assent. Lack of negotiated contract terms does not prevent contract formation. *Marin Storage & Trucking, Inc. v. Benco Contracting & Engineering, Inc.* (2001) 89 Cal.App.4th 1042.

Contract Interpretation

The general rule of construction for "other insurance" clauses applied and not *Rossmoor v. Pylon* where two insurers provide commercial general liability insurance for a defendant, a named insured on one policy and defined as an insured on a second policy issued to defendant's indemnitor. The court ignored the "other insurance" clauses and, thus entitled the primary insurers to share pro rata in the loss. *Travelers Casualty and Surety Company v. American Equity Insurance Company* (2001) 93 Cal.App.4th 1142.

Contribution

An insurer that issues additional insured endorsements and must provide a complete defense to an action involving covered and uncovered claims can choose to seek contribution from similarly situated insurers. *Presley Homes, Inc. v. American States Insurance Co.* (2001) 90 Cal.App.4th 571.

Coverage Grant v. Exclusion

Where a policy provides that it will defend and indemnify only a "protected person," language defining those classes of persons who are not "protected persons" is not an exclusion, but such language is an integral part of the insuring clause defining which persons are covered. *Vargas v. Athena Assurance Co., et al.* (2001) 95 Cal.App.4th 461.

Criminal Acts Exclusion

Court regarded the injuries resulting from the insured's discharge of a firearm to be foreseeable, and therefore excluded under the criminal acts exclusion. *Century National Insurance Company v. Glenn* (2001) 86 Cal.App.4th 1392.

Nolo contendere plea, although not collateral estoppel, constitutes evidence of committing crime described in criminal statute. *Century National Insurance Company v. Glenn* (2001) 86 Cal.App.4th 1392.

Exclusion barring coverage for criminal or intentional acts applies to defeat judgment creditor's direct action where insured enter *nolo contendere* plea and judgment creditor admitted in verified pleadings that act was both criminal and intentional. *20th Century Ins. Co. v. Hugh D. Schurtz* (2001) 92 Cal.App.4th 1188.

Cumis Counsel

An insurer's acceptance of coverage for certain claims and denial of others, the refusal to pursue an affirmative defense or prosecute a counterclaim and, reservation to seek reimbursement of defense fees and costs, did not require the appointment of *Cumis* counsel. *James 3 Corp. v. Truck Insurance Exchange* (2001) 91 Cal.App.4th 1093.

Damages

An affirmative defense seeking an offset of damages based on property damage seeks "damages" as required by a commercial general liability policy because it seeks money ordered by a court. *Construction Protective Services, Inc. v. TIG Specialty Ins. Co.* (2001) 90 Cal.App.4th 149, *superseded by grant of review; depublished and not citable.*

Defamation

An insurer, which issued coverage for liability "arising out of" a business, has a duty to defend a former employee's defamation claim arising from a sexual relationship with a supervisor. The employment practices exclusion, which bars coverage for injury "arising out of" employment practices, does not apply to eliminate coverage unless the defamatory statement is made "in the context of" the employment relationship, e.g., the statement must directly relate to employment or work performance. *Golden Eagle Ins. Corp. v. Rocky Cola Caf, Inc., et al.* (2001) 94 Cal.App.4th 120.

Default Judgment

Vacating a default judgment is appropriate where a defendant failed to respond during time of extreme personal difficulty. Such a failure amounts to neglect and does not constitute the

culpable conduct necessary to warrant a court's denial of a motion to set aside the default. *TCI Group Life Ins. Plan v. Knoebber* (9th Cir. 2001) 244 F.3d 691.

Director's & Officer's Liability

An "insured v. insured" exclusion of a director's & officer's liability policy, excluding coverage for claims brought by past, present, and former directors & officers, barred the insured's action for breach of the implied covenant of good faith and fair dealing. *American Medical Int'l., Inc. v. National Union Fire Ins. Co. of Pittsburgh* (9th Cir. 2001) 244 F.3d 715.

Duty to Defend

An insurer does not have a duty to defend an easement action where the insurance policy only affords coverage for damage to tangible property because an easement is not a tangible property right. *Kazi v. State Farm Fire & Cas., et al.* (2001) 24 Cal.4th 871.

An insurer has no duty to defend insured for pollution claims alleged to occur after the termination of the effective dates of the insurance policies. *Buena Vista Mines, Inc. v. Industrial Indemnity Company, et al.* (2001) 87 Cal.App.4th 482.

No duty to defend director of named insured corporation for alleged defamation against the corporation which was not performed in director's capacity as a director. Absent approval for the defamation against the corporation by the corporation's board of directors, such an act could not be deemed in fulfillment of the director's duties. *Lomes v. Hartford Financial Serv. Group Inc.* (2001) 88 Cal.App.4th 127.

Absent an express agreement to the contrary between predecessor and successor corporations, an insurer has a duty to defend and indemnify a successor corporation for covered liabilities which were transferred to the successor corporation. *Henkel Corp. v. Lloyd's of London et al.* (2001) 88 Cal. App 4th 876, *superceded by grant of review; depublished and not citable.*

An insurer has a duty to defend an insured which is a plaintiff under a commercial general liability policy where a third party's answer to a complaint by the insured pleads an affirmative defense which seeks damages arising out of property damage and these damages are distinct from the initial action for outstanding fees. *Construction Protective Services, Inc. v. TIG Specialty Ins. Co.* (2001) 90 Cal.App.4th 149, *superceded by grant of review; depublished and not citable.*

Where underlying complaint alleges elements of a covered claim, potential for coverage arises even if covered claim not specifically pleaded. *Barnett v. Fireman's Fund Ins. Co.* (2001) 90 Cal.App.4th 500.

Insurer required to defend suit by named insured against additional insured if potential for coverage otherwise exists. *Barnett v. Fireman's Fund Ins. Co.* (2001) __ Cal.App.4th __, 01 C.D.O.S. 5705.

The duty to defend is broader than the duty to indemnify and an insurer must provide a defense to the entire action when an additional insured is sued for both uncovered and potentially covered claims. *Presley Homes, Inc. v. American States Insurance Co.* (2001) 90 Cal.App.4th 571.

Insurer's duty to defend was triggered where, at the time of tender, the insurer was put on notice via catalog photocopies that advertising of an allegedly infringing product potentially took place; and where later evidence that trade shows took place prior to the tender confirmed that advertising occurred. *El-Com Hardware, Inc. v. Fireman's Fund Insurance Company* (2001) 92 Cal.App.4th 205.

An insurer has the duty to defend a claim for advertising injury where the insured is engaged in advertising activity, the third-party complaint and the underlying facts convey a potential for liability for one of the insured offenses, and the complaint alleges a causal connection between the alleged injury and the advertising activity. *Hameid v. National Fire Ins. of Hartford* (2001) __ Cal.App.4th __, 01 C.D.O.S. 10745, *superceded by grant of review; depublished and not citable.*

Duty to Indemnify

Insurer has no duty to indemnify where no lawsuit against insured because duty to indemnify no broader than duty to defend and insured not "legally obligated to pay as damages." *Certain Underwriters at Lloyd's, London v. Superior Court (Powerine)* (2001) 24 Cal.4th 945.

Absent an express agreement to the contrary between predecessor and successor corporations, an insurer has a duty to defend and indemnify a successor corporation for covered liabilities which were transferred to the successor corporation. *Henkel Corp. v. Lloyd's of London et al.* (2001) 88 Cal. App 4th 876, *superceded by grant of review; depublished and not citable.*

Employment Practices Exclusion

An insurer, which issued coverage for liability "arising out of" a business, has a duty to defend a former employee's defamation claim arising from a sexual relationship with a supervisor. The employment practices exclusion, which bars coverage for injury "arising out of" employment practices, does not apply to eliminate coverage unless the defamatory statement is made "in the context of" the employment relationship, e.g., the statement must directly relate to employment or work performance. *Golden Eagle Ins. Corp. v. Rocky Cola Caf, Inc., et al.* (2001) 94 Cal.App.4th 120.

Enforceability of Contract

For a contract to be unenforceable under doctrine of unconscionability, the contract must be both procedurally and substantively unconscionable. Lack of negotiated contract terms makes a contract one of adhesion and hence procedurally unconscionable. Lack of negotiated contract terms, by itself, is not substantively unconscionable. The test for substantive unconscionability is that contract must “shock the conscience.” *Marin Storage & Trucking, Inc. v. Benco Contracting & Engineering, Inc.* (2001) 89 Cal.App.4th 1042.

A contract is not unenforceable under doctrine of defeated expectations for lack of negotiated contract terms if there are prior dealings between the contracting parties with similar adhesion contracts. *Marin Storage & Trucking, Inc. v. Benco Contracting & Engineering, Inc.* (2001) ___ Cal.App.4th ___, 01 C.D.O.S. 4786.

Environmental Coverage Law

City ordinance authorizing the municipal investigation and remediation of environmental nuisances was not preempted by federal (CERCLA) or state law in every particular. Preemption did apply to direct actions under California Insurance Code § 11580, contribution protection, and the burden of proof in allocation among PRP’s. *Fireman’s Fund Ins. Co. v. City of Lodi* (9th Cir. 2001) 271 F.3d 911, *opinion withdrawn*.

Equitable Contribution

In a case of first impression, the Court found that, although nurse was covered by her own insurance as well as by that of employer hospital, nurse’s insurer was not liable under the doctrine of equitable contribution for a share of defense and indemnity costs of settlement where claimant sued hospital and nurse was not named as a defendant. *American Continental Ins. Co. v. American Casualty Co. of Reading, Pa.* (2001) 86 Cal.App.4th 929.

Equitable contribution rather than subrogation applies and *Rossmoor v. Pylon* does not apply where defendant is named insured on one policy and defined as insured on a second policy issued to defendant’s indemnitor. Equitable contribution apportions costs incurred among insurers who share the same level of liability on the same risk as to the same insured. *Travelers Casualty and Surety Co. v. American Equity Insurance Co.* (2001) 93 Cal.App.4th 1142.

Equitable Subrogation

Equitable contribution rather than subrogation applies and *Rossmoor v. Pylon* does not apply where defendant is named insured on one policy and defined as insured on a second policy issued to defendant’s indemnitor. Equitable subrogation allows an insurer who paid indemnity or defense costs to be placed in the insured’s position and pursue full recovery from another insurer not primarily responsible for the loss. *Travelers Casualty and Surety Company v. American Equity Insurance Company* (2001) 93 Cal.App.4th 1142.

ERISA

For purposes of ERISA preemption of state law claims, a company's disability insurance plan not originally subject to ERISA is not converted into an ERISA plan at such time as the company offers an unrelated health insurance plan to its employees. *LaVenture v. The Prudential Insurance Company of America*, 237 F.3d 1042.

Claims under ERISA §1132(a)(1)(B) for recovery of benefits are limited to suits against ERISA plans or plan administrators. No claim may be brought under this section directly against the plan's insurer if the insurer is not acting as the plan administrator. *Everhart v. Allmerica Financial Life Insurance Company* (9th Cir. 2001) 275 F.3d 751.

ERISA Preemption

Addressing a state law invasion of privacy claim, the Ninth Circuit held that where an ERISA claimant's state tort claim does not derive from or depend on his ERISA benefits claim in a meaningful way, the tort claim is not pre-empted. *Dishman v. UNUM Life Ins. Co. of America* (9th Cir. 2001) 269 F.3d 974.

Estoppel

An adjuster's misrepresentation of fact was not the same as an unconditional denial of coverage for purposes of the insured's assertion that the insurer was estopped from later raising the statute of limitations defense to an untimely claim. *Vu v. Prudential Property & Cas. Ins. Co.* (2001) 26 Cal.4th 1142.

Where an insured reasonably relies on the insurer's misrepresentations of fact upon which a denial of coverage is based, the insurer is estopped from asserting a statute of limitations defense to an untimely claim. *Vu v. Prudential Property & Cas. Ins. Co.* (2001) 26 Cal.4th 1142.

An unconditional denial of coverage, even if phrased as a "representation" that the policy does not cover the insured's claim, or words to that effect, offers no grounds for estopping the insurer from raising a statute of limitations defense. *Vu v. Prudential Property & Cas. Ins. Co.* (2001) 26 Cal.4th 1142.

Excess Insurance

Excess insurer's payment of benefits to one insured, with knowledge of another insured's competing claim, may breach the implied covenant of good faith and fair dealing. *Schwartz v. State Farm Fire and Casualty* (2001) __Cal.App.4th__, 01C.D.O.S. 3747.

When an excess insurer denies excess coverage for a third-party claim, it waives the right to challenge the reasonableness of the primary insurer's settlement of the claim. *United Servs. Auto. Ass'n. v. Alaska Ins. Co., et al.* (2001) 92 Cal.App.4th 638.

An excess liability insurer sued by an insured for its bad faith refusal to defend a third-party claim may not seek equitable subrogation or equitable indemnity based on the primary insurer's settlement of the underlying claim. Equitable indemnity and equitable subrogation come into play when an excess insurer has paid money to settle a third-party claim or satisfy a judgment against the insured for a covered risk. Money paid by an insurer to the insured or her assignee in settlement of the insured's bad faith or breach of contract claims cannot be treated as money paid to a third party on a claim against the insured. *United Servs. Auto. Ass'n. v. Alaska Ins. Co., et al.* (2001) 92 Cal.App.4th 638.

Excess Insurance (Arizona Law)

Under Arizona law, an insurance policy will not be considered a true excess policy where it does not expressly state that it attaches only after exhaustion of all primary insurance, does not charge premiums based on the existence of all available primary insurance, and does not cover the same risk as available primary insurance. *AMHS Insurance Company v. Mutual Insurance Company of Arizona (Arizona law)* (9th Cir. 2001) 258 F.3d 1090.

Exclusion: Illegal Act

An "illegal act" exclusion in a homeowner's policy is invalid and unenforceable under California Civil Code section 1653 as it applies to coverage of a wrongful death action arising out of an accidental killing because it does not reasonably distinguish between acts that are negligent, grossly negligent or criminal. *Safeco Insurance Company v. Robert S., et al.* (2001) 26 Cal.4th 758.

Exclusion: Insured v. Insured

An "insured v. insured" exclusion of a director's & officer's liability policy, excluding coverage for claims brought by past, present or future directors & officers, barred the insured's action for breach of the implied covenant of good faith and fair dealing. *American Medical Int'l., Inc. v. National Union Fire Ins. Co. of Pittsburgh* (9th Cir. 2001) 244 F.3d 715.

Exclusion: Perils

A property insurer has the right to exclude a category of peril from coverage under its policy. The fact that the exclusion contains an exception does not transform it into a grant of coverage that would permit recovery under the policy. *Palub v. Hartford Underwriters Ins. Co.* (2001) 92 Cal.App.4th 645, *decision decided 9/27/01, opinion certified for partial publication. Review denied 12/12/01. Julian v. Hartford Underwriters Ins. Co.* (2002) 100 Cal.App.4th 811, *superseded by grant of review; depublished and not citable.*

Exclusion: Professional Services

Professional services exclusion precludes coverage where all underlying allegations occurred with the scope of a business relationship. *Commercial Underwriters Ins. Co. v. Superior Court (Gulf Underwriters Ins. Co.)* (2000) 84 Cal.App.4th 181, *not citable; ordered not published*.

Fiduciary Duty

Counsel who associate to concurrently represent clients do not owe each other a fiduciary duty. A fiduciary duty between co-counsel would interfere with the duty of undivided loyalty owed to the client. *American Equity Ins. Co. v. Beck* (2001) 90 Cal.App.4th 162, *superseded by grant of review; depublished and not citable*.

Although the insurer has “special and heightened” duties to the insured, the insurer-insured relationship is not a true “fiduciary relationship” in the same sense as the relationship between trustee and beneficiary, or attorney and client. *Vu v. Prudential Property & Cas. Ins. Co.* (2001) 26 Cal.4th 1142.

First Party Coverage – Proximate Cause of Loss

A property insurer cannot contractually exclude coverage when a covered peril is the efficient proximate cause of loss regardless of other contributing causes since it violates California Insurance Code § 530 providing that an insurer is liable whenever a covered risk is the direct cause of loss. *Palub v. Hartford Underwriters Insurance Company* (2001) 92 Cal.App.4th 645.

First Party Property Claim Adjusting

Insurers did not commit unlawful business practices under the Unfair Competition Law (UCL) by adjusting losses under property policies on the basis of “replacement cost value less depreciation” instead of “actual cash value”. *Community Assisting Recovery, Inc. v. Aegis Security Insurance Co.* (2001) ___ Cal.App.4th ___, 01 C.D.O.S. 8687.

Forum Non Conveniens

Dismissal or stay of an action based on *forum non conveniens* motion is only proper where the moving party shows that all defendants in the action are subject to jurisdiction in an alternate forum. *American Cemwood Corporation v. American Home Assurance Company* (2001) 87 Cal. App 4th 431.

Good Faith Settlements

The finding of a good-faith settlement under California Code of Civil Procedure § 877.6 is appealable. *Wilshire Ins. Co. v. Tuff Boy Holding, Inc.* (2001) 86 Cal.App.4th 627.

California Code of Civil Procedure § 877.6, controlling good-faith settlements, applies to cases in which there are no non-settling defendants. *Wilshire Ins. Co. v. Tuff Boy Holding, Inc.* (2001) ___ Cal.App.4th ___, 01 C.D.O.S. 754.

Hidden Decay

Where policy does not otherwise limit coverage for decay due to rot or organic deterioration, insured had a reasonable expectation of coverage for collapse due to “hidden decay” broadly construed as the gradual deterioration in strength or soundness or a progressive physical deterioration, even absent a finding of rot. *Stamm Theatres, Inc., et al. v. Hartford Casualty Insurance Company*, 93 Cal.App.4th 531.

Homeowner’s Insurance

Homeowner’s insurance policy covered injuries stemming from an accident involving an undriveable van with an expired registration that was being used as a tool shed on the insureds’ premises in spite of an automobile exclusion. *Meraz v. Farmers Insurance Exchange* (2001) 92 Cal.App.4th 321.

Indemnity

In an action for indemnity under a third party general liability policy, causation and the amount of damage incurred during each policy period are essential to proving breach of the indemnity contract. *Golden Eagle Refinery Company, Inc., et al. v. Associated International Insurance Company* (2001) 85 Cal.App.4th 1300.

An architect not a party to the contract between owner and construction manager cannot enforce the owner’s contractual right to indemnity where the contract limits enforcement of any of its terms to the contracting parties. *The Ratcliff Architects v. Vanir Construction Management* (2001) 88 Cal.App.4th 595.

Associated co-counsel, as distinct from successor counsel, are not barred from seeking equitable indemnity for acts of malpractice by associated co-counsel. *Musser v. Provencher* (2001) 90 Cal. App 4th 545.

Insurable Interest

Attempted transfer of vehicle’s title to deceased relative does not necessarily divest transferor of insurable interest in vehicle for purposes of determining insurance coverage. Other

indicia of ownership, such as the right to use and control of the vehicle, must also be considered. *Liberty Mutual Fire Insurance Company v. McKenzie*, (2001) 88 Cal.App.4th 681.

Insurance Code § 11580.1

Insurance Code section 11580.1(b)(4) specifically requires that permissive users of vehicles be afforded coverage to the same extent as the named insured, but only with respect to vehicles “owned or leased” by the named insured. *Vargas v. Athena Assurance Co., et al.* (2001) 95 Cal.App.4th 461.

Joint Venture

There is no joint venture between counsel who associate to concurrently represent clients because a joint venture requires the existence of a fiduciary relationship. Since a fiduciary relationship between co-counsel would interfere with the duty of loyalty owed to the client, there cannot exist a fiduciary relationship between co-counsel. Unless there is a fiduciary relationship, there is no joint venture. Also, the contemplated loss here – liability for attorney malpractice – is not the type of loss normally contemplated as a business loss. *American Equity Ins. Co. v. Beck* (2001) 90 Cal.App.4th 162.

Judicial Estoppel

A change in position regarding a point of law is not egregious and does not provide a basis for invoking judicial estoppel. *California Amplifier, Inc. v. RLI Ins. Co.* (2001) 94 Cal.App.4th 102.

Jurisdiction

The federal courts have exclusive jurisdiction over all claims arising from flood insurance policies issued pursuant to the National Flood Insurance Program. The exclusive scope of the jurisdiction includes state law tort claims, including claims for bad faith. The court observed that such claims may be preempted by the statutes controlling the program. *McCormick v. Travelers Ins. Co.* (2001) 86 Cal.App.4th 404.

Exercise of federal diversity jurisdiction over declaratory action is proper where *Buss* reimbursement claim is also alleged. *United National Ins. Co. v. R&D Latex* (9th Cir. 2001) 242 F.3d 1102.

Malpractice

Associated co-counsel, as distinct from successor counsel, are not barred from seeking equitable indemnity for acts of malpractice by associated co-counsel. *Musser v. Provencher* (2001) 90 Cal. App 4th 545.

Misrepresentation

An insurer can rescind an insurance policy based on an insured's material, yet innocent, misrepresentation in the application. *Freeman v. Allstate Life Insurance* (9th Cir. 2001) 253 F.3d 533.

Motion for Summary Judgment

After an insurer has proved application of an exclusion, to sustain its burden at summary judgment where damages in the case result from both covered and uncovered events, the insured must prove that its damages were "divisible": i.e., the insured must be able to distinguish between covered damages arising from "sudden and accidental" discharges, and those from known or intended discharges, whose damages are not covered by the policy. Consequently, the insured's inability to distinguish between covered and uncovered damages prompted the court to grant the insurer's motion for summary judgment. *Golden Eagle Refinery Company, Inc., et al. v. Associated International Insurance Company* (2001) 85 Cal.App.4th 1300.

Motions for Summary Judgment, Evidence

A conclusory expert declaration is inadequate as evidence to shift the burden of proof in a motion for summary judgment. The opinion must be supported by reasons or explanations to suffice. *Golden Eagle Refinery Company, Inc., et al. v. Associated International Insurance Company* (2001) 85 Cal.App.4th 1300.

Negligence

A construction manager has no duty to prevent an architect from suffering economic loss where both parties are working on a construction project. *The Ratcliff Architects v. Vanir Construction Management* (2001) 88 Cal.App.4th 595.

Number of Occurrences

"Anti-stacking" rule enunciated in *FMC Corp. v. Plaisted & Companies* (1998) 61 Cal.App.4th 1132, does not apply where one occurrence results in claims of distinct bodily injuries in multiple policy periods. *Alpha Therapeutic Corp. v. The Home Ins. Co.*, 90 Cal.App.4th 1330, *depublished and not citable*.

Other Insurance

In a case of first impression, the Court found that, although nurse was covered by her own insurance as well as by that of employer hospital, nurse's insurer was not liable under the doctrine of equitable contribution for a share of defense and indemnity costs of settlement where

claimant sued hospital and nurse was not named as a defendant. *American Continental Ins. Co. v. American Casualty Co. of Reading, Pa.* (2001) 86 Cal.App.4th 929.

Other Insurance Clauses

Primary policies share pro rata in loss, while the “other insurance” clauses in the policies and *Rossmoor v. Pylon* does not apply where defendant is named insured on one policy and defined as insured on a second policy issued to defendant’s indemnitor. *Travelers Casualty and Surety Company v. American Equity Insurance Company* (2001) 93 Cal.App.4th 1142.

Primary policies share pro rata in loss ignoring the “other insurance” clauses in the policies and *Rossmoor v. Pylon* does not apply where defendant is named insured on one policy and defined as insured on a second policy issued to defendant’s indemnitor. *Travelers Casualty and Surety Company v. American Equity Insurance Company* (2001) 93 Cal.App.4th 1142 C.D.O.S. 9831.

Pollution Exclusion – Applying Oregon Law

The Ninth Circuit Court of Appeals held that under Oregon law, the hostile fire exception to the pollution exclusion applies only if allegations in the complaint provide a basis for concluding that the bodily injury or property damage were caused by a fire which was uncontrollable or which broke out from where it was intended to be. *Indiana Lumbermens Mutual Ins. Co. v. West Oregon Wood Products, Inc.* (9th Cir. 2001) 268 F.3d 639.

Primary and Excess

When an excess insurer denies excess coverage for a third-party claim, it waives the right to challenge the reasonableness of the primary insurer’s settlement of the claim. *United Servs. Auto. Ass’n. v. Alaska Ins. Co., et al.* (2001) 92 Cal.App.4th 638.

Property Damage

Interference with an easement does not constitute damage to tangible property. *Kazi v. State Farm Fire & Cas., et al.* (2001) 24 Cal.4th 871.

General liability policy issued to a partnership did not cover claims made by one partner against another arising from dispute over respective liabilities for actual or potential partnership debts or losses, including losses involving construction defects; a claim for allocation of such losses does not constitute and did not cause “property damage,” even though construction defects are evidence of the losses, and no accidental conduct was alleged. *Continental Casualty Co. v. Superior Court (Paragon Homes)* (2001) __ Cal.App.4th __, 01 C.D.O.S. 8272.

Primary v. Excess

“Anti-stacking” rule enunciated in *FMC Corp. v. Plaisted & Companies* (1998) 61 Cal.App.4th 1132, does not apply where one occurrence results in claims of distinct bodily injuries in multiple policy periods. *Alpha Therapeutic Corp. v. The Home Ins. Co.*, 90 Cal.App.4th 1330, *depublished and not citable*.

Proposition 103: Regulations and Administrative Authority

By promulgating California Code of Regulations, title 10, section 2646.6, Insurance Commissioner did not exceed authority in making certain automobile and other insurer’s “Community Service Statement,” which contains data on sales practices, volumes, and premiums, available for public inspection. *State Farm Mut. Auto. Ins. Co. v. Low* (2001) 92 Cal.App.4th 1169.

Regulation not found to violate the directive of article 10 of California Insurance Code § 1861.07 or Evidence Code section 1060. *State Farm Mut. Auto. Ins. Co. v. Low* (2001) 92 Cal.App.4th 1169.

Punitive Damages

Clear and convincing standard applies to evidence regarding punitive damages at issue in summary judgment or summary adjudication motion. Delay of more than two years in tendering policy limits did not rise to the level required to receive punitive damages. *Basich v. Allstate Ins. Co.* (2001) 87 Cal.App.4th 1112.

Punitive damages may be awarded if an insurer’s refusal to defend is in conscious disregard of the rights of the insured, constituting fraud, oppression, or malice, and is committed willfully or with an intent to injure the plaintiff. *Hameid v. National Fire Ins. of Hartford* (2001) ___ Cal.App.4th ___, 01 C.D.O.S. 10745, *superceded by grant of review; depublished and not citable*.

Rental Dwelling Policies

Addressing a liability policy limited to liability “arising from” a specified rental dwelling with personal injury coverage including slander, the Court of Appeal held that a logical causal connection must exist between an underlying defamation action and the insured property. No logical causal connection was found to exist where the rental property was only mentioned during an argument that led to an arrest of the insureds during which the insureds made statements about a police officer who later sued them for slander. *Turner v. State Farm Fire and Casualty Co.* (2001) 92 Cal.App.4th 681.

Rescission

An insurer can rescind an insurance policy based on an insured's material, yet innocent, misrepresentation in the application. *Freeman v. Allstate Life Insurance* (9th Cir. 2001) 253 F.3d 533.

Retroactive Application of Decision

The U.S. Court of Appeals reversed the verdict of the district court and set aside the jury's \$12 million award against the insurer based on an intervening court decision, which came down after the district court had ruled. The court relied on *Montgomery v. Cal. Accountant's Mutual Insurance Co.* (1998) 61 Cal. App.4th 854, which was decided after the district court had ruled. *American Medical Int'l., Inc. v. National Union Fire Ins. Co. of Pittsburgh* (9th Cir. 2001) 244 F.3d 715.

Right to Reimbursement

An insurer may recover settlement payments for non-covered claims made over the insured's objection if the insurer satisfies these prerequisites: (1) a timely and express reservation of rights; (2) an express notification to the insureds of the insurer's intent to accept the proposed settlement offer; and (3) an express offer to the insureds that they may assume their own defense when the insurer and insureds disagree whether to accept the proposed settlement. The insurer can seek reimbursement even if the insureds do not agree that the insurer may settle the claim under reservation of rights. *Blue Ridge Ins. Co. v. Jacobsen* (2001) 25 Cal.4th 489.

Rule 11 Sanctions

The district court's *sua sponte* imposition of Rule 11 sanctions is reserved only for attorney conduct that is akin to contempt of court. *United National Ins. Co. v. R&D Latex* (9th Cir. 2001) 242 F.3d 1102.

Rules of Construction

"Our reason was that we do not rewrite any provision of any contract, including the standard policy underlying any individual policy, for any purpose." *Certain Underwriters at Lloyd's, London v. Superior Court (Powerine)* (2001) ___ Cal.4th ___, 01 C.D.O.S. ___.

Insurance policies are governed by ordinary rules of contract formation whereby the court will look to the four corners of the policy. Where the policy terms are uncertain or ambiguous, the court will determine whether coverage is consistent with the insured's reasonable expectation. Where the terms consist of the plain and ordinary vocabulary of the average lay person, there is no reasonable expectation by the insured that the terms have any meaning other

than their ordinary coverage exists beyond that afforded in the insurance contract. *Richard Van Ness v. Blue Cross of California* (2001) 87 Cal.App.4th 364.

An "illegal act" exclusion in a homeowner's policy is invalid and unenforceable under Civil Code § 1653 as it applies to coverage of a wrongful death action arising out of an accidental killing because it does not reasonably distinguish between acts that are negligent, grossly negligent or criminal. *Safeco Insurance Company v. Robert S., et al.* (2001) 26 Cal.4th 758.

The general rule of construction for "other insurance" clauses applied and not *Rossmoor v. Pylon* where two insurers provide commercial general liability insurance for a defendant, a named insured on one policy and defined as an insured on a second policy issued to defendant's indemnitor. The court ignored the "other insurance" clauses and, thus ordered the primary insurers to share pro rata in the loss. *Travelers Casualty and Surety Co. v. American Equity Insurance Co.* (2001) 93 Cal.App.4th 1142.

To determine whether one is liable for remediation costs under CERCLA 42 U.S.C. § 9601 *et. seq.* requires an analysis of whether the clean-up was "necessary" meaning there is an actual threat to human health or the environment and whether the parties are a Potentially Responsible Party (PRP). To determine the latter requires a determination of whether the party "disposed" of hazardous substances during its ownership of the contaminated property. To determine whether one "disposed" of hazardous substances under CERCLA 42 U.S.C., § 6903(3) requires the court to apply a "plain meaning construction" of the term "disposal" found in the statute. *Carson Harbor Village, Ltd. v. Unocal Corporation and City of Carson* (2001) 270 F.3d 863.

Disposal means "discharge, deposit, injection, dispersion, spilling, leaking or placing of any solid waste." Gradual passive migration that is characterized as "spreading", "seeping", "leaching" and "oozing" is not within the meaning of "disposal" under CERCLA. Therefore, a prior owner of contaminated property who did not "dispose" of hazardous substances within the meaning of the statute is not a PRP, thus not liable for remediation costs under CERCLA. *Carson Harbor Village, Ltd. v. Unocal Corporation and City of Carson* (2001) 270 F.3d 863.

The court rejected insurer's argument that weather caused earth movement and it was earth movement, an excluded cause of loss, which was the efficient proximate cause of damage to the insured's house. The court found that the policy provision excluding loss caused by weather in combination with an uncovered cause of loss violated California Insurance Code § 530 providing that an insurer is liable whenever a covered risk is the direct cause of loss. Relying on *Howell v. State Farm Fire & Casualty Co.* (1990) 218 Cal.App.3d 1446, the court stated that Hartford could not contractually exclude coverage when a covered peril is the efficient proximate cause of the loss regardless of other contributing causes. *Palub v. Hartford Underwriters Insurance Company* (2001) 92 Cal.App.4th 645.

Selection of Arbitrators and Appraisers

Appraisers, like arbitrators, must be disinterested. Disqualifying factors include any prior or ongoing substantial business relationships with one of the parties, having a pecuniary interest in the matter or in one of the parties, and/or business dealings related to the proceeding. *Michael v. Aetna Life & Casualty* (2001) 88 Cal. App 4th 925.

Party-Selected Appraiser Must, Like Arbitrators, Make CCP § 1281.9(e) Disclosures When A Person Aware of Facts Could Reasonably Entertain A Doubt that the Appraiser Would be Impartial; The Failure to Do so Constitutes “Corruption” and Provides Grounds To Vacate the Appraisal Award Pursuant to CCP § 1286.2(b). *Michael v. Aetna Life & Casualty* (2001) ___ Cal. App 4th ___, 01 C.D.O.S. 3431.

Despite failure to disclose his firm’s prior business dealings with client, Appraiser was nevertheless “disinterested” because such dealings were at arms-length, and because appraiser lacked a pecuniary interest and connection to both the pending matter and the client. *Michael v. Aetna Life & Casualty* (2001) ___ Cal. App 4th ___, 01 C.D.O.S. 3431.

Settlement

Trial court may not assume jurisdiction to enforce settlement obtained through private dispute resolution where there was no justiciable controversy before the trial court. Trial court may not enforce settlement pursuant to section 664.6 since statute requires a “pending litigation.” *The Housing Group v. United Nat’l Ins. Co.* (2001) 90 Cal.App.4th 1106.

Stacking

“Anti-stacking” rule enunciated in *FMC Corp. v. Plaisted & Companies* (1998) 61 Cal.App.4th 1132, does not apply where one occurrence results in claims of distinct bodily injuries in multiple policy periods. *Alpha Therapeutic Corp. v. The Home Ins. Co.*, 90 Cal.App.4th 1330, *depublished and not citable.*

Statute of Limitations

Code of Civil Procedure § 340.9, which extends for one year the limitations period for certain claims arising from the 1994 Northridge earthquake, does not impair an insurer’s right of contract or deny substantive due process rights. *20th Century Insurance Company v. Superior Court (Ahles)* (2001) 90 Cal.App.4th 1247.

Code of Civil Procedure § 340.9, which extends for one year the limitations period for certain claims arising from the 1994 Northridge earthquake, applies to claims governed by either statutory or contractual statute of limitation. *Hellinger v. Farmers Insurance Exchange* (2001) 106 Cal.App.4th 1049.

California Insurance Code § 2071, providing for a one year statute of limitations, does not bar a claim brought by the insured more than one year after the damage was sustained but within one year of his discovery of the additional damage where insured reasonably relied on misrepresentation of fact in insurer's denial of coverage. *Vu v. Prudential Property & Cas. Ins. Co.* (2001) 26 Cal.4th 1142.

Subrogation

An insurer can subrogate to the rights of an insured attorney for equitable indemnity against co-counsel even where the underlying claim was for legal malpractice. *Musser v. Provencher* (2001) 90 Cal. App.4th 545.

Equitable contribution rather than subrogation applies and *Rossmoor v. Pylon* does not apply where defendant is named insured on one policy and defined as insured on a second policy issued to defendant's indemnitor. Equitable subrogation allows an insurer who paid indemnity or defense costs to be placed in the insured's position and pursue full recovery from another insurer not primarily responsible for the loss. *Travelers Casualty and Surety Company v. American Equity Insurance Company* (2001) 93 Cal.App.4th 1142.

Suit

A third party's affirmative defense in answer to a complaint by the insured falls within the "suit" definition of a commercial general liability policy as it involves actual court proceedings initiated by a complaint. *Construction Protective Services, Inc. v. TIG Specialty Ins. Co.* (2001) 90 Cal.App.4th 149, *superceded by grant of review; depublished and not citable.*

Summary Adjudication

To prevail on a motion for summary adjudication, plaintiff must show there is no affirmative defense or no merit to an affirmative defense to a cause of action. *Hameid v. National Fire Ins. of Hartford* (2001) ___ Cal.App.4th ___, 01 C.D.O.S. 10745, *superceded by grant of review; depublished and not citable.*

Summary Judgment

Clear and convincing standard applies to evidence regarding punitive damages at issue in summary judgment or summary adjudication motion. Delay of more than two years in tendering policy limits did not present triable issue of material fact regarding punitive damages. *Basich v. Allstate Ins. Co.* (2001) 87 Cal.App.4th 1112.

Where there is a genuine factual, but not legal, issue as to the insurer's liability, a court can conclude as a matter of law that an insurer's denial of a claim is not unreasonable and was, therefore, not done in bad faith. To establish reasonableness, the insurer must present detailed evidence of a legitimate coverage dispute. Expert opinions may be relied upon, and even a

substantial disparity between the opinions of the parties' experts does not establish that the insurer acted in bad faith. As long as the insurer has not misrepresented the nature of the investigation, lied to the insured, dishonestly selected experts, used unreasonable experts, or failed to thoroughly investigate the claim, the opinions of independent experts can be the basis for summarily adjudicating a bad faith claim in the insurer's favor. *Chateau Chamberay v. Associated International Ins. Co.* (2001) ___ Cal.App.4th ___, 01 C.D.O.S. 5573.

The California standards for granting summary conform almost entirely with federal standards. The moving party bears the burden of persuading the court that no triable issue of fact exists. The nonmoving party then bears the burden of producing evidence showing the dispute of a material fact. In California, unlike in the federal courts, meeting the burden of production requires evidence and cannot be met with only argument. *Aguilar v. Atlantic Richfield Co.*, (2001) 25 Cal.4th 826.

Surety

Surety which pays a third-party claims against the principal does not have a subrogation right against the principal's liability insurer for bad faith where the insurer's failure to pay did not cause any injury to the principal. *Gulf Ins. Co. v. TIG Ins. Co.* (2001) 86 Cal.App.4th 422.

Trade Secret

Community Service Statement listing: the number of direct mail and telephone solicitations for new insurance business; applications for each line of insurance; applications denying coverage; and the race, national origin and gender of each applicant for each ZIP code; are public records subject to public inspection. *State Farm Mut. Auto. Ins. Co. v. Low* (2001) 92 Cal.App.4th 1169.

Trigger of Coverage

An insurer has no duty to defend insured for pollution claims alleged to occur after the termination of the effective dates of the insurance policies. *Buena Vista Mines, Inc. v. Industrial Indemnity Company, et al.* (2001) 87 Cal.App.4th 482.

Uninsured Motorist Coverage

Uninsured motorist policies with different monetary limits are not "similar" for the purposes of California Insurance Code § 11580.2(c). Therefore, passengers who have uninsured motorist coverage under a personal policy and who are riding in a vehicle protected by another policy have coverage up to the higher limit of the two policies, but policies pro rate the loss. *Calfarm Ins. Co. v. Wolf* (2001) 86 Cal.App.4th 811.

Based on an analysis of statutory language and legislative history, the court found no provision in section 11580.2 for deleting coverage on a "per vehicle" basis so as to allow insured

owners of multiple vehicles covered under a single liability policy to delete uninsured motorist coverage as to one or more of its vehicles. Where, however, an insured purchases a separate policy for each of several vehicles, the insured may waive uninsured motorist coverage as to any vehicle. Accordingly, insurers selling separate policies for each vehicle owned by an insured must allow the insured to waive coverage on a per vehicle basis *Smith et al. v. State Farm Mut. Ins. Co. et al.* (2001) 93 Cal.App.4th 700.

Who is an Insured

A director of an insured corporation is not acting in fulfillment of his duties as a director for purposes of being an insured under the policy when he acts against the corporation's interests and without approval of the board of directors. *Lomes v. Hartford Financial Serv. Group Inc.* (2001) ___ Cal.App.4th ___, 01 C.D.O.S. 2607.

Ratification by the named insured of an impermissible use of a vehicle cannot create coverage under an insurance policy which provides coverage for permissive users of a vehicle. *Allied Mutual Insurance Company v. Webb* (2001) 91 Cal.App.4th 1190.

Work Product Doctrine

The attorney work product doctrine, which protects from disclosure any product of the attorney's effort, research, and thought in the preparation of his case, could not prevent disclosure of unredacted photographs and videotape prepared by attorney, in part because the evidence was voluntarily produced to police investigating a hit-and-run accident. Conditional protection might have been available had the attorney asserted the doctrine and proved that circumstances of the case outweighed the need for disclosure. *Magill v. Superior Court, County of Madera* (2001) 86 Cal.App.4th 61, *ordered not published*.

Workers' Compensation

The exclusive remedy provisions of the Workers' Compensation Act were established to effectuate the "compensation bargain" in which the employer assumes liability for work related injury regardless of fault in exchange for limitations on the amount of that liability. Where alleged acts are a normal part of the employment relationship or workers' compensation claims process, or where the motive behind these acts does not violate public policy then a cause of action is barred by the exclusive remedy provisions. *Vacanti v. State Compensation Insurance Fund* (2001) 24 Cal.4th 800.

Medical providers' allegations against workers' compensation insurers in claims of fraud and abuse of process are closely connected to a normal insurer activity—the processing and payment of medical lien claims—and so are encompassed within the compensation bargain and thus barred. *Vacanti v. State Compensation Insurance Fund* (2001) 24 Cal.4th 800.

Claims of unfair competition and tortious interference are barred by the exclusivity provisions to the extent that the alleged acts are a normal part of the employment relationship or workers' compensation claims process, or where the motive behind these acts does not violate public policy. *Vacanti v. State Compensation Insurance Fund* (2001) ___ Cal.4th ___, Daily Journal D.A.R. 191.

Plaintiffs' antitrust and RICO racketeering claims against workers' compensation insurers were not barred by the exclusivity provisions of the Workers' Compensation Act because they alleged acts and motives that were not encompassed within the "compensation bargain" of the workers' compensation scheme. The antitrust claim was not barred because insurers' alleged efforts to interject themselves into lien claims they did not insure was not a normal part of the claims process. Similarly, the alleged RICO act of engaging in systematic and long-term criminal activities bound by common purposes, results, participants, victims, or methods of commission always falls outside the scope of the compensation bargain. *Vacanti v. State Compensation Insurance Fund* (2001) ___ Cal.4th ___, Daily Journal D.A.R. 191.

An insured's section 132a liability for retaliatory discharge is covered under a workers' compensation policy. Coverage for such liability is not limited by the "accident" limitation of a workers' compensation policy nor the public policy against providing insurance for willful acts. *Melton v. Industrial Indemnity Company* (2001) 86 Cal.App.4th 222, *ordered not published*.

California Insurance Code § 11758 does not immunize workers' compensation insurer from civil liability where insureds' financial information is misallocated and results in higher premiums for insureds. *State Compensation Insurance Fund v. Superior Court* (2001) 24 Cal. 4th 930.

The Workers' Compensation Appeals Board has exclusive subject matter jurisdiction over claims arising out of workers' compensation claims process including setting reasonable attorney fees and costs for recovery on a lien when an employee settles a claim with a third party. *Hughes v. Argonaut Insurance Company* (2001) 88 Cal.App.4th 517.

Insurer who sets reserves far beyond the claims' reasonably-expected values is liable for bad faith because test is not what another "reasonable insurer" might do, but is whether carrier set reserves at the reasonable expectation of the claim's value. *Lance Camper Mfg. Corp. v. Republic Indemnity Co. of America* (2001) 90 Cal.App.4th 1511.