

# GORDON & REES, LLP



---

**Los Angeles**  
Telephone: (213) 229-2080  
Fax: (213) 680-4470

**San Francisco**  
Telephone: (415) 986-5900  
Fax: (415) 986-8054

**San Diego**  
Telephone: (619) 696-6700  
Fax: (619) 696-7124

March 4, 2003

---

## **1999 DEVELOPMENTS IN CALIFORNIA INSURANCE CASE LAW**

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
Additional Insureds .....	1
Advertising Injury .....	1
Agents and Brokers .....	1
Allocation .....	1
Appeals .....	2
Arbitration .....	2
Arising Out Of .....	2
Bad Faith .....	2
Breach of Contract .....	3
Conflicts of Interest .....	3
Consent Clauses .....	3
Construction-Related Claims .....	4
Copyright .....	4
Damages: Attorneys' Fees .....	4
Damages: Emotional Distress .....	4
Damages: Punitive Damages .....	5
Discovery .....	5
Duty to Defend .....	5
Duty to Indemnify .....	5
Endorsements: Limited Worldwide Liability .....	6
Environmental Law .....	6

**TABLE OF CONTENTS (cont'd.)**

	<b><u>Page</u></b>
Excess Insurance .....	6
Exclusions: Automobiles .....	6
Exclusions: Household Residents .....	6
Exclusions: Illegal Acts .....	7
Exclusions: Injury to An Insured .....	7
Exclusions: Owned Property .....	7
Exclusions: Trademark Infringement .....	7
Exhaustion.....	7
First Party Insurance .....	7
Homeowner's Insurance .....	8
Indemnity Agreements.....	8
Insurance Regulations .....	9
Loss of Use .....	9
Mobile Equipment .....	9
Other Insurance .....	9
Pollution Exclusion .....	9
Procedure .....	9
Products Liability.....	10
Property Damage .....	10
Self-Insured Retentions.....	10
Settlements .....	10

**TABLE OF CONTENTS (cont'd.)**

	<b><u>Page</u></b>
Stipulated Judgments .....	10
Successor Liability .....	10
Underinsured Motorist Coverage.....	11
Waiver/Estoppel.....	11

**TABLE OF AUTHORITIES**

**Page**

**CASES**

<i>Acceptance Ins. Co. v. Syufy Enterprises, et al.</i> (1999) 69 Cal.App.4th 321 .....	1, 4
<i>Afrasiabi v. State Farm Fire &amp; Cas. Co.</i> (1999) 73 Cal.App.4th 1183 .....	5, 7
<i>Agricultural Ins. Co. v. Superior Court (MKDG/Rhodes)</i> (1999) 70 Cal.App.4th 385 .....	2
<i>Alpine Insurance Company v. Russell Planchon</i> (1999) 72 Cal.App.4th 1316 .....	2, 7, 9
<i>American Casualty Co. of Reading, Penn. v. Krieger et al.</i> (9th Cir. 1999) 181 F.3d 1113 .....	1, 2
<i>American Continental Ins. Co. v. American Cas. Co.</i> (1999) 73 Cal.App.4th. 508 .....	9
<i>American National Property &amp; Casualty Co. v. Rayburn</i> (1999) 76 Cal.App.4th 134 .....	11
<i>California Casualty Indemnity Exchange v. Frerichs</i> (1999) 74 Cal.App.4th 1446 .....	8
<i>California Pacific Homes, Inc. v. Scottsdale Ins. Co.</i> (1999) 70 Cal.App.4th 1187 .....	2, 8, 10
<i>Certain Underwriters at Lloyd's London v. Superior Court (Powerine)</i> (1999) 75 Cal.App.4th 1038 .....	6
<i>Commerce &amp; Industry Insurance Co. v. Chubb Custom Insurance Co.</i> (1999) 75 Cal.App.4th 739, petition for review filed 11/16/99 .....	9
<i>Connecticut Indemnity Co. v. Superior Court [City of Lodi]</i> (1999) 73 Cal.App.4th 540, review granted and cannot be cited as authority.....	5
<i>Erlich v. Menezes</i> (1999) 21 Cal.4th 543 .....	3, 5
<i>Farmers Ins. Exchange v. Smith</i> (1999) 71 Cal.App.4th 660 .....	8

**TABLE OF AUTHORITIES (cont'd.)**

	<b><u>Page</u></b>
<i>Farmers Insurance Exchange v. Hurley</i> (1999) 76 Cal.App.4th 797 modified on denial of rehearing by 1999 WL 1207044 (Cal.App.4th Dist.).....	11
<i>Farmers Insurance Exchange v. Jacobs</i> (1999) 75 Cal.App.4th 373, ordered withdrawn from publication and cannot be cited as authority.....	2
<i>Filippo Industries, Inc. v. Sun Insurance Company</i> (1999) 74 Cal.App.4th 1429, modified by 75 Cal.App.4th 1037b petition for review filed 10/29/99 .....	3
<i>FRI Holdings, Inc. v. Hartford Casualty Ins. Co.</i> (1999) 70 Cal.App.4th 1023, ordered withdrawn from publication and cannot be cited as authority.....	3
<i>Hendrickson v. Zurich Am. Ins. Co. of Ill.</i> (1999) 72 Cal.App.4th 1084 .....	9, 10
<i>Heppler v. J.M. Peters Co.</i> (1999) 73 Cal.App.4th 1265 .....	4, 8
<i>Hunt v. Pasternack</i> (9th Cir. 1999) 192 F.3d 877 .....	4
<i>Industrial Indemnity Co. v. Apple Computer, Inc.</i> (1999) 71 Cal.App.4th 452, review granted and cannot be cited as authority.....	1, 6, 7
<i>Kazi v. State Farm Fire &amp; Cas. Co.</i> (1999) 70 Cal.App.4th 1288, review granted and cannot be cited as authority.....	10
<i>Kibbee v. Blue Ridge Ins. Co.</i> (1999) 69 Cal.App.4th 53 .....	5, 7, 8
<i>Kramer v. State Farm Insurance Company</i> (1999) 76 Cal.App.4th 332, modified on denial of rehearing by 1999 WL 1178589 (Cal.App.4th Dist).....	2, 8
<i>Kransco v. American Empire Surplus Lines Ins. Co.</i> (1997) 54 Cal.App.4th 1171, review granted and cannot be cited as authority.....	3
<i>Lakeside Non-Ferrous Metals, Inc. v. Hanover Ins. Co.</i> (9th Cir. 1999) 172 F.3d 702 .....	6, 10

**TABLE OF AUTHORITIES (cont'd.)**

	<b><u>Page</u></b>
<i>Levin v. Gulf Insurance Group</i> (1999) 69 Cal.App.4th 1282 .....	4
<i>Maxconn Inc. v. Truck Insurance Exchange</i> (1999) 74 Cal.App.4th 1267, petition for review filed 10/26/99 .....	1
<i>Mez Industries, Inc. v. Pacific National Insurance Company</i> (1999) 76 Cal.App.4th 856, modified by 1999 WL 1220141 (Cal.App.2 Dist.) .....	1
<i>Midiman v. Farmers Insurance Exchange</i> (1999) 76 Cal.App.4th 102 .....	3, 4
<i>Mitroff v. United Services Automobile Association</i> (1999) 72 Cal.App.4th 1230. ....	5, 7, 8
<i>Morrison Knudsen Corp v. Hancock, Rothert &amp; Bunshoft</i> (1999) 69 Cal.App.4th 223 .....	3
<i>Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.</i> (1999) 119 S.Ct. 1322.....	10
<i>National Union Fire Ins. Co. v. Nationwide Ins. Co.</i> (1999) 69 Cal.App.4th 709 .....	1, 4, 9
<i>Novak v. Low, Ball &amp; Lynch</i> (1999) ___ Cal.App.4th ___, 99 C.D.O.S. 10098.....	4
<i>Palmer v. Truck Insurance Exchange.</i> (1999) 21 Cal.4th 1109 .....	1
<i>PLCM Group Inc. v. Drexler</i> (1999) 72 Cal.App.4th 693, review granted and cannot be cited as authority .....	4
<i>PPG Industries, Inc. v. Transamerica Ins. Co.</i> (1999) 20 Cal.4th 310 .....	5, 10
<i>Reliance Nat'l. Indem. Co. v. General Star Indemn. Co.</i> (1999) 72 Cal.App.4th 1063 .....	6, 9
<i>Safeco Ins. Co. of America v. Robert S.</i> (1999) 70 Cal.App.4th 757, review granted and cannot be cited as authority.....	7, 8

**TABLE OF AUTHORITIES (cont'd.)**

	<b><u>Page</u></b>
<i>Safeco Ins. Co. of America v. Superior Court (McKinney)</i> (1999) 71 Cal.App.4th 782 .....	3, 4, 11
<i>Seretti v. Superior National Ins. Co.</i> (1999) 71 Cal.App.4th 920 .....	3
<i>Shaolian v. Safeco Ins. Co.</i> (1999) 71 Cal.App.4th 268 .....	8
<i>Spray, Gould &amp; Bowers v. Associated International Ins. Co.</i> (1999) 71 Cal.App.4th 1260 .....	9, 11
<i>St. Joe Minerals Corp. v. Zurich Ins. Co.</i> (1999) 75 Cal.App.4th 261 .....	2
<i>State Farm Mutual Automobile Ins. Co. v. Federal Ins. Co.</i> (1999) 72 Cal.App.4th 1422 .....	3
<i>Transportation Ins. Ltd. v. ShinMaywa Industries, Ltd.</i> (1999) 1999 Cal.Lexis 3202, 99 C.D.O.S. 3743, review granted and cannot be cited as authority .....	10
<i>United Service Auto Assn. v. Snappy Car Rental, Inc.</i> (1999) 74 Cal.App.4th 461 .....	6
<i>Vandenberg v. Superior Court of Sacramento County</i> (1999) 21 Cal.4th 815 .....	2, 3
<i>Wausau Underwriters Ins. Co. v. Unigard Security Ins. Co.</i> (1998) 68 Cal.App.4th 1030 .....	5, 6, 7
<i>Westoil Terminals Co. v. Harbor Ins. Co.</i> (1999) 73 Cal.App.4th 634 .....	11
<i>Ziman v. Fireman's Fund Ins. Co.</i> (1999) 73 Cal.App.4th 1382 .....	5

**1999 DEVELOPMENTS IN  
CALIFORNIA INSURANCE CASE LAW**

**Additional Insureds**

An additional insured endorsement required coverage for action against additional insured by employee of named insured for injuries sustained on the job. *Acceptance Ins. Co. v. Syufy Enterprises, et al.* (1999) 69 Cal.App.4th 321.

When a general contractor is solely at fault for injury, neither the subcontractor nor its insurer must indemnify the general contractor despite an additional insured endorsement issued to contractor. *National Union Fire Ins. Co. v. Nationwide Ins. Co.* (1999) 69 Cal.App.4th 709.

**Advertising Injury**

Exclusions for claims of infringement on a trade mark, service mark, or trade name, except for titles or slogans, applied to claims involving only trademark or trade name infringement and not any other, broader advertising conduct. *Industrial Indemnity Co. v. Apple Computer, Inc.* (1999) 71 Cal.App.4th 452, review granted and cannot be cited as authority.

Patent infringement does not constitute “infringement of title,” and thus a reasonable insured would not believe that patent infringement was covered under the advertising injury section of the policy. *Maxconn Inc. v. Truck Insurance Exchange* (1999) 74 Cal.App.4th 1267, petition for review filed 10/26/99.

There is no advertising injury coverage for a claim of inducement of patent infringement. *Mez Industries, Inc. v. Pacific National Insurance Company* (1999) 76 Cal.App.4th 856, modified by 1999 WL 1220141 (Cal.App.2 Dist.).

Advertising injury coverage provisions relating to liability caused by title or slogan infringement apply only to claims for infringement of names of literary or artistic works or infringement of slogans and not to “any name” or “legal right to property.” *Palmer v. Truck Insurance Exchange* (1999) 21 Cal.4th 1109.

**Agents and Brokers**

Independent broker may be ostensible agent of insurer if underwriter knew of broker’s practice of issuing certificates of insurance on standard forms. *American Casualty Co. of Reading, Penn. v. Krieger et al.* (9th Cir. 1999) 181 F.3d 1113 (applying California law).

**Allocation**

California Court of Appeal refuses to require horizontal exhaustion of self-insured retentions in case of continuing loss construction defect claim where loss is within limits of one policy. *California Pacific Homes, Inc. v. Scottsdale Ins. Co.* (1999) 70 Cal.App.4th 1187.

### **Appeals**

Summary adjudication order in favor of policyholder on duty to defend is not appealable as final order or as writ of mandate. *St. Joe Minerals Corp. v. Zurich Ins. Co.* (1999) 75 Cal.App.4th 261.

### **Arbitration**

Absent an agreement of the parties, contractual arbitration award may not be used for nonmutual issue preclusion in favor of third parties, such as the insurer here attempting to use against its insured findings during an arbitration between the insured and a claimant. *Vandenberg v. Superior Court of Sacramento County* (1999) 21 Cal.4th 815.

### **Arising Out Of**

Insured was entitled to coverage under a general liability policy for damages arising out of use of modified pick-up truck with a hydraulic lift because the truck constituted "mobile equipment." *Alpine Insurance Company v. Russell Planchon* (1999) 72 Cal.App.4th 1316.

Rape inflicted while insured was confined in vehicle did not arise from the use of the vehicle. *American National Property & Casualty Co. v. Rayburn* (1999) 76 Cal.App.4th 134.

Molestation of child by landlord did not arise out of the use of property where assaults occurred under landlord's homeowners policy. *Kramer v. State Farm Insurance Company* (1999) 76 Cal.App.4th 332, modified on denial of rehearing by 1999 WL 1178589 (Cal.App.4th Dist).

### **Bad Faith**

Carrier may only sue insured for bad faith and seek contract, not tort, remedies. *Agricultural Ins. Co. v. Superior Court (MKDG/Rhodes)* (1999) 70 Cal.App.4th 385.

A bad faith claim is not allowed where an insurer voluntarily undertakes the defense of an accident that occurred after the policy expired, regardless of the quality of the defense provided. *Farmers Insurance Exchange v. Jacobs* (1999) 75 Cal.App.4th 373, ordered withdrawn from publication and cannot be cited as authority.

A trial court's grant of *summary* judgment in favor of defendant insurance company does not establish, as a matter of law, the insurer's lack of bad faith. *Filippo Industries, Inc. v. Sun Insurance Company* (1999) 74 Cal.App.4th 1429, modified by 75 Cal.App.4th 1037b, petition for review filed 10/29/99.

California Supreme Court orders depublication of opinion holding trial court's summary judgment in favor of insurer precluded *bad* faith finding. *FRI Holdings, Inc. v. Hartford Casualty Ins. Co.* (1999) 70 Cal.App.4th 1023, ordered withdrawn from publication and cannot be cited as authority.

The California Supreme Court has limited the issue to be argued before it in *Kransco v. American Empire Surplus Lines Ins. Co.* to “whether an insurer may assert an affirmative defense of the insured’s comparative bad faith in a bad faith action brought against the insurer.” *Kransco v. American Empire Surplus Lines Ins. Co.* (1997) 54 Cal.App.4th 1171, review granted and cannot be cited as authority.

No cause of action for bad faith failure to settle accrues until and unless there is a judgment in excess of policy limits. *Safeco Ins. Co. of America v. Superior Court (McKinney)* (1999) 71 Cal.App.4th 782.

Shareholder of closely held corporation lacks standing to sue corporation’s insurer for bad faith unless they are an insured under the policy. *Seretti v. Superior National Ins. Co.* (1999) 71 Cal.App.4th 920.

### **Breach of Contract**

Negligent breach of contract in building a home which directly causes only economic injury and property damage cannot justify an award of damages for emotional distress absent special circumstances stemming from more personal undertakings the traumatic results of which were unavoidable. *Erlich v. Menezes* (1999) 21 Cal.4th 543.

Insurers can be liable for insureds’ breach of contract damages based on policies which state that the insurer will pay for sums the insured is “legally obligated to pay.” *Vandenberg v. Superior Court of Sacramento County* (1999) 21 Cal.4th 815.

### **Conflicts of Interest**

An actual conflict, as opposed to a potential conflict, must exist before insured is entitled to *Cumis* counsel. *Midiman v. Farmers Insurance Exchange* (1999) 76 Cal.App.4th 102.

Conflict of interest resulting in attorney disqualification properly found where “substantial relationship” existed between a former client and plaintiff in subsequent litigation. *Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft* (1999) 69 Cal.App.4th 223.

Insurer was current “client” of law firm representing insured without reservation of rights, automatically disqualifying law firm from adverse representation. *State Farm Mutual Automobile Ins. Co. v. Federal Ins. Co.* (1999) 72 Cal.App.4th 1422.

### **Consent Clauses**

A defending insurer is not bound by a stipulated judgment entered into without its consent. *Safeco Ins. Co. of America v. Superior Court (McKinney)* (1999) 71 Cal.App.4th 782.

### Construction-Related Claims

Additional insured endorsement required coverage for action against additional insured by employee of named insured for injuries sustained on the job. *Acceptance Ins. Co. v. Syufy Enterprises, et al.* (1999) 69 Cal.App.4th 321.

Indemnity clauses in general/subcontract agreements were triggered only by negligence on the part of the subcontractor. *Heppler v. J.M. Peters Co.* (1999) 73 Cal.App.4th 1265.

When general contractor is solely at fault for injury, neither subcontractor nor its insurer must indemnify despite additional insured endorsement issued to contractor. *National Union Fire Ins. Co. v. Nationwide Ins. Co.* (1999) 69 Cal.App.4th 709.

### Copyright

As long as an architectural work is represented on drawings, the copyright in the work is protected under the Architectural Works Copyright Protection Act of 1990 even if the work has never been built. *Hunt v. Pasternack* (9th Cir. 1999) 192 F.3d 877 (construing U.S. statute).

### Cumis Counsel

An actual conflict, as opposed to a potential conflict, must exist before insured is entitled to *Cumis* counsel. *Midiman v. Farmers Insurance Exchange* (1999) 76 Cal.App.4th 102.

Comment: This Cumis Counsel is manually marked for table. (Because of underline problem.with Cumis)

Counsel for insurer must not exclude *Cumis* counsel when negotiating settlement of the only covered cause of action. Counsel for insurer also held to be counsel "provided by" the insurer under Civil Code § 2860. *Novak v. Low, Ball & Lynch* (1999) \_\_\_ Cal.App.4th \_\_\_, 99 C.D.O.S. 10098.

### Damages: Attorneys' Fees

An insurer and the insurer-retained defense attorney are liable for intentional interference with the prospective economic advantage of a discharged attorney when, despite having notice of the lien for attorney fees and costs, payment was made to the former client and his new attorney in settlement of judgment. *Levin v. Gulf Insurance Group* (1999) 69 Cal.App.4th 1282.

Where an insurance policy has an attorneys' fees provision for suits to recover amounts advanced on behalf of the insured, an insurer may recover as attorneys' fees the market value of legal services performed by its in-house counsel to prosecute the action. *PLCM Group Inc. v. Drexler* (1999) 72 Cal.App.4th 693, review granted and cannot be cited as authority.

### Damages: Emotional Distress

Negligent breach of contract in the construction of a house which directly causes only economic injury and property damage cannot justify an award of damages for emotional distress absent mental anguish stemming from more personal undertakings, the traumatic results of which were unavoidable. *Erllich v. Menezes* (1999) 21 Cal.4th 543.

**Damages: Punitive Damages**

Insurance company that negligently fails to settle case within policy limits is not responsible for punitive damages awarded against the insured. *PPG Industries, Inc. v. Transamerica Ins. Co.* (1999) 20 Cal.4th 310.

**Discovery**

City's prelitigation subpoena of insurers' files not justified when weighed against privacy interests of the insured and where the request would exceed scope of discovery if the matter was in litigation. *Connecticut Indemnity Co. v. Superior Court [City of Lodi]* (1999) 73 Cal.App.4th 540, review granted and cannot be cited as authority.

**Duty to Defend**

No duty to defend bodily injuries to adult boarder living with his uncle where boarder is an insured and injuries to insureds are excluded. *Afrasiabi v. State Farm Fire & Cas. Co.* (1999) 73 Cal.App.4th 1183.

Insurer had no duty to defend or indemnify a suit for a stepmother's alleged negligence in supervision of six-year-old child based on its finding that the child was not a "resident" of his stepmother's household for purposes of the "resident relative" exclusion, when child drowned off the shore of Cabo San Lucas, Mexico. *Kibbee v. Blue Ridge Ins. Co.* (1999) 69 Cal.App.4th 53.

"Injury-to-an-insured" exclusion not ambiguous and policy clearly excluded coverage for bodily injury to the resident spouse of an insured. *Mitroff v. United Services Automobile Association* (1999) 72 Cal.App.4th 1230 .

Duty to defend existed because extrinsic facts available at time of tender did not "conclusively eliminate" potential for off-site contamination. *Wausau Underwriters Ins. Co. v. Unigard Security Ins. Co.* (1998) 68 Cal.App.4th 1030.

No duty to defend under the advertising injury clause of a general liability policy because the display of a painting in a building's lobby during attempts to lease office space does not constitute advertising. *Ziman v. Fireman's Fund Ins. Co.* (1999) 73 Cal.App.4th 1382.

**Duty to Indemnify**

Insurer's duty to indemnify insured for all sums it becomes "legally obligated to pay as damages" only extends to damages imposed by a court of law and does not extend to costs incurred in complying with environmental administrative cleanup orders. *Certain Underwriters at Lloyd's London v. Superior Court (Powerine)* (1999) 75 Cal.App.4th 1038.

**Endorsements: Limited Worldwide Liability**

Limited Worldwide Liability endorsement did not apply where the insured's wrongful conduct may have taken place in the coverage territory, but advertising injury was sustained outside of it. *Industrial Indemnity Co. v. Apple Computer, Inc.* (1999) 71 Cal.App.4th 452, review granted and cannot be cited as authority .

**Environmental Law**

On January 1, 1999 key portions of California's Superfund Program expired, leaving California's Department of Toxic Substance Control ("DTSC") without authority to issue cleanup orders, initiate cost recovery actions or otherwise respond to contamination. Thereafter, California Governor Gray Davis signed "urgency" legislation re-enacting the state Superfund Program. The legislation restores the DTSC's power to respond to contamination caused by hazardous substances and also adds new provisions to the Superfund law.

Nuisance and trespass claims rooted in pollution-based property damage excluded from coverage by the pollution exclusion do not fall within the personal injury coverage of a CGL policy. *Lakeside Non-Ferrous Metals, Inc. v. Hanover Ins. Co.* (9th Cir. 1999) 172 F.3d 702 (applying California law).

Duty to defend existed because extrinsic facts available at time of tender did not "conclusively eliminate" potential for off-site contamination. *Wausau Underwriters Ins. Co. v. Unigard Security Ins. Co.* (1998) 68 Cal.App.4th 1030.

**Excess Insurance**

An excess carrier has no obligation to contribute to settlement until the primary insurance available from primary insurers is exhausted. *Reliance Nat'l. Indem. Co. v. General Star Indemn. Co.* (1999) 72 Cal.App.4th 1063.

Car rental agency's deposit of cash with DMV together with rental vehicle registration card or car rental agreement did not constitute primary automobile liability insurance. *United Service Auto Assn. v. Snappy Car Rental, Inc.* (1999) 74 Cal.App.4th 461.

**Exclusions: Automobiles**

Modified pickup truck with hydraulic lift is "mobile equipment" -- not an "auto" -- and thus covered under CGL policy notwithstanding "auto" exclusion. *Alpine Insurance Company v. Russell Planchon* (1999) 72 Cal.App.4th 1316.

**Exclusions: Household Residents**

No duty to defend bodily injuries to adult boarder living with his uncle where boarder is an insured and injuries to insureds are excluded. *Afrasiabi v. State Farm Fire & Cas. Co.* (1999) 73 Cal.App.4th 1183.

Insurer had no duty to defend or indemnify a suit for a stepmother's alleged negligence in supervision of six-year-old child based on its finding that the child was not a "resident" of his stepmother's household for purposes of the "resident relative" exclusion, when child drowned off the shore of Cabo San Lucas, Mexico. *Kibbee v. Blue Ridge Ins. Co.* (1999) 69 Cal.App.4th 53.

**Exclusions: Illegal Acts**

California Supreme Court will review case holding homeowners policy "illegal acts" exclusion defeats coverage for unintentional homicide. *Safeco Ins. Co. of America v. Robert S.* (1999) 70 Cal.App.4th 757, review granted and cannot be cited as authority.

**Exclusions: Injury to An Insured**

"Injury-to-an-insured" exclusion not ambiguous and policy clearly excluded coverage for bodily injury to the resident spouse of an insured. *Mitroff v. United Services Automobile Association* (1999) 72 Cal.App.4th 1230.

**Exclusions: Owned Property**

Duty to defend existed because extrinsic facts available at time of tender did not "conclusively eliminate" potential for off-site contamination. *Wausau Underwriters Ins. Co. v. Unigard Security Ins. Co.* (1998) 68 Cal.App.4th 1030.

**Exclusions: Trademark Infringement**

Exclusions for claims of infringement on a trade mark, service mark, or trade name, except for titles or slogans applied to claims involving only trademark or trade name infringement and not any other, broader advertising conduct. *Industrial Indemnity Co. v. Apple Computer, Inc.* (1999) 71 Cal.App.4th 452, review granted and cannot be cited as authority.

**Exhaustion**

Court of Appeal refuses to require horizontal exhaustion of self-insured retentions in case of continuing loss construction defect claim where loss is within limits of one policy. *California Pacific Homes, Inc. v. Scottsdale Ins. Co.* (1999) 70 Cal.App.4th 1187.

**First Party Insurance**

Insurance policy's reimbursement provision did not create an equitable lien on settlement proceeds absent detrimental reliance or unjust enrichment. *Farmers Ins. Exchange v. Smith* (1999) 71 Cal.App.4th 660.

### Homeowner's Insurance

An adult son housesitting while his parents are away is not a "resident of the household" for purposes of coverage under parents' homeowners policy. *California Casualty Indemnity Exchange v. Frerichs* (1999) 74 Cal.App.4th 1446.

Insurer had no duty to defend or indemnify a suit for a stepmother's alleged negligence in supervision of six-year-old child based on its finding that the child was not a "resident" of his stepmother's household for purposes of the "resident relative" exclusion, when child drowned off the shore of Cabo San Lucas, Mexico. *Kibbee v. Blue Ridge Ins. Co.* (1999) 69 Cal.App.4th 53.

No coverage for child molestation under homeowner's policy because injuries did not arise out of the "ownership, maintenance, or use of" the insured dwelling. *Kramer v. State Farm Insurance Company* (1999) 76 Cal.App.4th 332, modified on denial of rehearing by 1999 WL 1178589 (Cal.App.4th Dist).

"Injury-to-an-insured" exclusion not ambiguous and policy clearly excluded coverage for bodily injury to the resident spouse of an insured. *Mitroff v. United Services Automobile Association* (1999) 72 Cal.App.4th 1230.

California Supreme Court will review case holding homeowners policy "illegal acts" exclusion defeats coverage for unintentional homicide. *Safeco Ins. Co. of America v. Robert S.* (1999) 70 Cal.App.4th 757, review granted and cannot be cited as authority .

An adjudication of insured's fault required before injured third-party has standing to make a claim for benefits under homeowner's medical payments coverage. *Shaolian v. Safeco Ins. Co.* (1999) 71 Cal.App.4th 268.

### Indemnity Agreements

Indemnity clauses in general/subcontract agreements were triggered only by negligence on the part of the subcontractor. *Heppler v. J.M. Peters Co.* (1999) 73 Cal.App.4th 1265.

When general contractor is solely at fault for injury, neither subcontractor nor its insurer must indemnify despite an additional insured endorsement issued to contractor. *National Union Fire Ins. Co. v. Nationwide Ins. Co.* (1999) 69 Cal.App.4th 709.

The plain language of the "other insurance" clauses, not the indemnity agreement, controlled a dispute between an indemnitee's primary carrier and an indemnitor's excess carrier and *Rossmoor Sanitation v. Pylon* was not applicable. *Reliance Nat'l. Indem. Co. v. General Star Indemn. Co.* (1999) 72 Cal.App.4th 1063.

### **Insurance Regulations**

An insurer's violation of administrative regulations on claims handling requiring notice to an insured of the one year "suit" provision may provide a basis of estoppel against the insurer's use of the contractual limitation as a defense. *Spray, Gould & Bowers v. Associated International Ins. Co.* (1999) 71 Cal.App.4th 1260.

### **Loss of Use**

Loss of strawberry crop and loss of use of land planted with defective strawberries constitute "property damage." *Hendrickson v. Zurich Am. Ins. Co. of Ill.* (1999) 72 Cal.App.4th 1084.

### **Mobile Equipment**

Modified pickup truck with hydraulic lift is "mobile equipment" -- not an "auto" -- and thus covered under CGL policy notwithstanding "auto" exclusion. *Alpine Insurance Company v. Russell Planchon* (1999) 72 Cal.App.4th 1316.

### **Other Insurance**

As between two primary liability insurers, the one with an "excess other insurance" clause need only pay the amount above the other carrier's limits. *American Continental Ins. Co. v. American Cas. Co.* (1999) 73 Cal.App.4th 508.

Extrinsic evidence may be disregarded and a loss prorated between two insurers with competing "Other Insurance" provisions, where one is an "excess only" clause and the other a "prorata/escape" clause. *Commerce & Industry Insurance Co. v. Chubb Custom Insurance Co.* (1999) 75 Cal.App.4th 739, petition for review filed 11/16/99.

The plain language of the "other insurance" clauses, not the indemnity agreement, controlled a dispute between an indemnitee's primary carrier and an indemnitor's excess carrier. *Reliance Nat'l. Indem. Co. v. General Star Indemn. Co.* (1999) 72 Cal.App.4th 1063.

### **Pollution Exclusion**

Nuisance and trespass claims rooted in pollution-based property damage excluded from coverage by the pollution exclusion do not fall within the personal injury coverage of a CGL policy. *Lakeside Non-Ferrous Metals, Inc. v. Hanover Ins. Co.* (9th Cir. 1999) 172 F.3d 702 (applying California law).

### **Procedure**

U.S. Supreme Court rules that 30-day period to remove cases to Federal court runs from service of complaint, not from receipt of courtesy copy. *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.* (1999) 119 S.Ct. 1322.

### **Products Liability**

No coverage under a product liability policy where the defective product did not physically injure the product into which it was incorporated. *Transportation Ins. Ltd. v. ShinMaywa Industries, Ltd.* (1999) 1999 Cal.Lexis 3202, 99 C.D.O.S. 3743, review granted and cannot be cited as authority .

### **Property Damage**

Loss of strawberry crop and loss of use of land planted with defective strawberries constitute "property damage." *Hendrickson v. Zurich Am. Ins. Co. of Ill.* (1999) 72 Cal.App.4th 1084.

California Supreme Court grants review on limited issues of case which held insurers must defend claim that driveway violates common easement and trespasses because it alleges "property damage." *Kazi v. State Farm Fire & Cas. Co.* (1999) 70 Cal.App.4th 1288, review granted and cannot be cited as authority .

California Supreme Court grants review to decide whether incorporation of a defective component is property damage to finished product. *Transportation Ins. Ltd. v. ShinMaywa Industries, Ltd.* (1999) 1999 Cal.Lexis 3202, 99 C.D.O.S. 3743, review granted and cannot be cited as authority.

### **Self-Insured Retentions**

Court of Appeal refuses to require horizontal exhaustion of self-insured retentions in case of continuing loss construction defect claim where loss is within limits of one policy. *California Pacific Homes, Inc. v. Scottsdale Ins. Co.* (1999) 70 Cal.App.4th 1187.

### **Settlements**

Insurance company that negligently fails to settle case within policy limits is not responsible for punitive damages awarded against the insured. *PPG Industries, Inc. v. Transamerica Ins. Co.* (1999) 20 Cal.4th 310.

### **Stipulated Judgments**

A defending insurer is not bound by a stipulated judgment entered into without its consent. *Safeco Ins. Co. of America v. Superior Court (McKinney)* (1999) 72 Cal.App.4th 782.

### **Successor Liability**

Successor company is covered under dissolved corporate predecessor's insurance where *de facto* merger had occurred, since it had same operations, name, equity interests, and control. *Westoil Terminals Co. v. Harbor Ins. Co.* (1999) 73 Cal.App.4th 634.

**Underinsured Motorist Coverage**

No coverage under uninsured motorist policy for insured's injuries from rape inflicted while insured was confined in vehicle because "use of" the vehicle was not a substantial factor in bringing about the injuries suffered. *American National Property & Casualty Co. v. Rayburn* (1999) 76 Cal.App.4th 134.

Underinsured motorist coverage is not available until the limits of the underinsured's policy are exhausted by actual payment of a judgment or a settlement. *Farmers Insurance Exchange v. Hurley*, (1999) 76 Cal.App.4th 797, modified on denial of rehearing by 1999 WL 1207044 (Cal.App.4th Dist.).

**Waiver/Estoppel**

An insurer's violation of *administrative* regulations on claims handling requiring notice to an insured of the one year "suit" provision may provide a basis of estoppel against the insurer's use of the contractual limitation as a defense. *Spray, Gould & Bowers v. Associated International Ins. Co.* (1999) 71 Cal.App.4th 1260.

MGT\NA\18019v1

