

# DIGEST OF INSURANCE LAW

## CALIFORNIA

Not Revised for this Edition

### CIVIL JUDICIAL SYSTEM

#### Courts of Original Jurisdiction

There is one class of courts, the superior courts.

Except as otherwise provided by statute, the superior court has original jurisdiction involving actions at law as well as equity jurisdiction. Where the amount involved does not exceed \$25,000, cases must be identified on the face sheet of the complaint as "limited jurisdiction." Where the amount involved is greater than \$25,000, cases must be identified on the face sheet of the complaint as "unlimited jurisdiction."

Superior courts have general original civil jurisdiction throughout the state as to any matters not given by statute to other trial courts. *See* Constitution, art. VI, §10 and C.C.P. §86.

The superior court has jurisdiction of proceedings under the probate court concerning the administration of a decedent's estate. Prob. C. §7050. The probate court is not a distinct tribunal but a department of the superior court. *Schlyen v. Schlyen*, 43 Cal. 2d 361, 368, 273 P.2d 897 (1954). Proceedings in probate court include probate of wills; administration of estates of decedents, incompetents and missing persons; and guardianship and conservatorship proceedings.

#### Appellate Courts

Courts of Appeal. Have appellate jurisdiction when superior courts have original jurisdiction and in causes of a type within the appellate jurisdiction of the courts of appeal as of June 30, 1995, and in other causes prescribed by statute, except death penalty cases. When appellate jurisdiction in civil causes is determined by the amount in controversy, the legislature may change this jurisdiction by changing the jurisdictional amount of controversy. Constitution, art. VI §11 (a). The state is divided into six appellate districts containing a varied number of divisions and varying numbers of justices. Govt. C. §69100-69106. Each division has a presiding justice.

Superior Court. Has appellate jurisdiction in causes prescribed by statute. *See* Constitution, art. VI, §11 and C.C.P. §911.

District Court of Appeal. There are six appellate districts in California, and most civil appeals are carried to those courts. Gov. Code §69100 and C.C.P. §901 *et seq.* Their decisions are subject to hearing in Supreme Court by petition or Supreme Court's own motion. C.R.C. Rule 28.

Supreme Court. Supreme Court consists of seven justices and has final appellate jurisdiction. *See* Constitution, art. VI, §2. Appeals in civil cases, in most instances, must be taken to District Courts of Appeal. C.C.P. §901 *et seq.* Within thirty days after a decision of a District Court of Appeal becomes final as to that court, the Supreme Court, on its own motion, or on petition, may grant rehearing of the case. A petition for rehearing must be filed within ten days after the District Court of Appeal decision becomes final as to that court. Granting of such hearing is not mandatory. C.R.C. Rule 28 (a) (b).

### LAW

#### Abbreviations

Bus. & Prof. C. – Business and Professional Code.  
Cal. – California Reports (Supreme Court).  
Cal. 2d – California Reports, Second Series.  
Cal. 3d – California Reports, Third Series.  
Cal. 4th – California Reports, Fourth Series.  
Cal. App. – California Appellate Reports.  
Cal. App. 2d – California Appellate Reports, Second Series.  
Cal. App. 3d – California Appellate Reports, Third Series.  
Cal. App. 4th – California Appellate Reports, Fourth Series.  
Cal. Rptr. – California Reporter.  
C.C. – Civil Code.  
C.C.P. – Code of Civil Procedure.  
C.R.C. – California Rules of Court.  
Evid. C. – Evidence Code.  
Fam. C. – Family Code.  
F. – Federal Reporter.  
F.2d – Federal Reporter, Second Series.  
F.3d – Federal Reporter, Third Series.  
Ins. C. – Insurance Code.  
Lab. C. – Labor Code.  
P. – Pacific Reporter.



P.2d – Pacific Reporter, Second Series.  
 P.C. – Political Code.  
 Pen. C. – Penal Code.  
 Prob. C. – Probate Code.  
 V.C. – Vehicle Code.

## ACCIDENT AND HEALTH INSURANCE

See “ACCIDENTAL MEANS” and “DISABILITY.”

**Contract Law Cancellation.** Defined in Ins. C. §660 (g). Cancellation provisions allow company to cancel a policy at any time upon written notice and return of unearned premium. Ins. C. §660 *et seq.* However, an insurer is not required to send notice of cancellation where insurer sent warning that coverage would end unless premium was paid before due date. *Kates v. Workman's Auto Ins. Co.*, 45 Cal. App. 4th 494, 502, 52 Cal. Rptr. 2d 852 (1996). Policy subject to cancellation where insured suffers serious illness prior to delivery of policy. *Cf. Security Life v. Booms*, 31 Cal. App. 119, 159 P. 1000 (1916). Surrender of policy or return of unearned premium unnecessary to cancellation. *Glens Falls v. Founders*, 209 Cal. App. 2d 157, 165, 25 Cal. Rptr. 753 (1962); *Firpo v. Slyter*, 95 Cal. App. 500, 504, 272 P. 1111 (1928). Insured may cancel policy and recover premium if conditions in policy differ from those in application. *Blunt v. Fidelity*, 145 Cal. 268, 270, 78 P. 729 (1904); *Burch v. Hartford*, 85 Cal. App. 542, 552, 259 P. 1108 (1927). Insured has duty to disclose any changes in his health from time of application to time of completion of contract unless representations in contract refer to earlier time. *Metropolitan Life v. Devore*, 66 Cal. 2d 129, 56 Cal. Rptr. 881 (1967). But insured must have knowledge of infirmity at time of acceptance or it will not be held against him. *Brubaker v. Benefit Life*, 130 Cal. App. 2d 340, 278 P.2d 966 (1955).

**Life insurance company** is not required to give notice of termination of policy for failure to pay premiums where policy clearly provided that coverage terminated for failure to pay premiums when due. *Silva v. National American Life*, 58 Cal. App. 3d 609, 612, 130 Cal. Rptr. 211 (1976). If insurer accepts premium payment after lapse of policy without requiring written application for reinstatement, policy is deemed reinstated. *Ryman v. American National*, 5 Cal. 3d 620, 628, 96 Cal. Rptr. 728 (1971).

**Renewal.** Defined in Ins. C. §660 (e). Manner of offering renewal set forth in Ins. C. §663. An express provision of an insurance contract stipulating that a default in payment renders policy void or causes it to lapse is valid, and a default in such payment ordinarily forfeits the policy where statutory provisions are not violated.

*Silva v. National Amer.*, 58 Cal. App. 3d 609, 614, 130 Cal. Rptr. 211 (1976). To effect renewal, there must be both an offer to renew and acceptance of the offer. *Fujimoto v. Western Pioneer*, 86 Cal. App. 3d 305, 313, 150 Cal. Rptr. 88 (1978).

**Disease Induced by Accident.** No statute. Recovery of death benefits may be allowed on accident insurance policy even if disease contributes to death if accident is prime or moving cause. *Brooks v. Metropolitan Life*, 27 Cal. 2d 305, 309, 163 P.2d 689 (1945). For example, where assured slipped, was struck on chest and abdomen by plank and death caused by hernia, *Hanna v. Interstate*, 41 Cal. App. 308, 182 P.771 (1919); Blood poisoning, caused by germs on dental instruments used in course of dental operation, *Horton v. Travelers*, 45 Cal. App. 462, 187 P. 1070 (1920); Blood poisoning, from cut on hand, *Frenzer v. Mutual Benefit*, 27 Cal. App. 2d 406, 81 P.2d 197 (1938); Death of nurse resulting from infection transmitted by patient suffering from blood poisoning, *Moore v. Fidelity & Cas. Co. of New York*, 203 Cal. 465, 265 P. 207 (1928); Apoplexy, where caused by accident and immediate cause of death by apoplexy was immaterial, *Justice v. Inter-Ocean*, 108 Cal. App. 267, 291 P. 436 (1930); Conflicting evidence of death from heart disease or as result of blow on head from capsizing rowboat, *Stout v. Pacific Mutual*, 130 Cal. 471, 62 P. 732 (1900); Death from embolism caused by operation for hernia induced by fall, held accidental, *Muzzy v. Supreme*, 129 Cal. App. 1, 18 P.2d 107 (1933); Death from acute dilation of heart caused by efforts of assured to extricate self from whirlpool, held to be accident, *Trueblood v. Maryland Assur. Co. of Baltimore*, 129 Cal. App. 102, 18 P.2d 90 (1933); Loss caused by disease excluded, but recovery allowed if disease was caused by accident where myocarditis was triggered by accidental brain concussion, *Clarke v. New Amsterdam*, 180 Cal. 76, 179 P. 195 (1919); Heart attack held accidental where policeman tripped and fell while chasing crime suspect and the resulting stress caused death from acute myocardial ischemia even though prior heart disease existed, since chase was accidental and prime or moving cause of heart attack, *Slobojan v. Western Travelers*, 70 Cal. 2d 432, 74 Cal. Rptr. 895 (1969).

Where insurance policy provides “insurance shall not cover injuries resulting wholly or partly from...disease in any form,” there is no recovery for death caused partly by disease and partly by accident. *Kellner v. Travelers*, 180 Cal. 326, 329, 181 P. 61 (1919); *see Ogilvie v. Aetna*, 189 Cal. 406, 209 P. 26 (1922). However, *Brooks v. Metropolitan*, 27 Cal. 2d 305, 309-310, 163 P.2d 689 (1945), held presence of disease will not relieve insurer if accident is proximate cause of death even if diseased condition renders insured less able to withstand injuries caused by accidental fire.



See also *Miller v. United Ins. Co.*, 113 Cal. App. 2d 493, 499, 248 P.2d 113 (1952). Death proximately resulting from injury caused by sudden stopping of insured's car, although prior infirmity contributed thereto, justified recovery under travel accident policy. *Miller v. United*, 113 Cal. App. 2d 493, 248 P.2d 113 (1952).

**Excepted Risks.** Exclusion for death by intentional injuries inflicted by insured or any other person upheld where insured was shot by another person without provocation: "intentional" refers to intent of third party inflicting the injury. *Fischer v. Travelers*, 77 Cal. 246, 247, 19 P. 425 (1888). Exclusion for murder upheld and the intention to shoot the deceased insured sufficient because intention caused disability resulting in death. *Fox v. Federal Casualty Co.*, 106 Cal. App. 289, 292, 289 P. 175 (1930). Provision of accident policy excluding death or injuries not caused by accidental means, or result of design, either on part of insured or any other person, merely states a condition and does not include case where person striking insured did not intend to kill him, although blow produced death. *Richards v. Travelers*, 89 Cal. 170, 177, 26 P. 762 (1891). Words "without concurrence or will of person injured," as used in accident policy, refer to external violence and not to concurrence of injured person in consenting to operation. *Muzzy v. Supreme Court*, 129 Cal. App. 1, 7, 18 P.2d 107 (1933). Clause, "intentionally inflicted injuries," construed as intent of insured, not third party, since contract is between insured and insurer. *Housh v. Pacific*, 2 Cal. App. 2d 14, 18, 37 P.2d 741 (1934), *disapproved in part*, *Zuckerman v. Underwriters*, 42 Cal. 2d 460, 267 P.2d 777 (1954). Accident policy excepting from liability injury from "voluntary overexertion or voluntary exposure to unnecessary danger...or explosives of any kind" does not apply only to voluntary exposure to explosives; at least, where context as well as punctuation removes clause as to explosives from words "voluntary exposure." *Wilson v. Travelers*, 183 Cal. 65, 68, 190 P. 366 (1920). Voluntary exposure to unnecessary danger does not prevent recovery, unless danger be known and realized. *Davilla v. Liberty*, 114 Cal. App. 308, 318, 299 P. 831 (1931). Death resulting from violation of law not covered when insured's death resulted from act of self-defense of third party assaulted by insured. *Gray v. Western*, 214 Cal. 695, 8 P.2d 126 (1932). Policy excepting liability for any accident or death resulting wholly or partly from being in or on any moving conveyance not provided for transportation of passengers, construed to cover death of insured traveling temporarily as passenger upon locomotive part of train. *Berliner v. Travelers*, 121 Cal. 458, 53 P. 918 (1898). Policy excepting liability for "injury to insured if received by him while insane" prevented recovery where insane insured fell

against steam radiator and received injuries causing death. *Blunt v. Fidelity*, 145 Cal. 268, 78 P. 729 (1904).

**Simultaneous Death Law.** See Prob. C. §220 *et seq.* If division of property depends on priority of death and parties die "simultaneously," each will be deemed the survivor of the other. *Hahn v. Padre*, 235 F.2d 356, 359 (9th Cir. 1956).

**Change of beneficiary.** *Campbell v. Central Life*, 196 Cal. App. 2d 183; 16 Cal. Rptr. 383 (1961); Ins. C. §10350.12.

**Policy Territory.** Under War Risk Exclusion Rider excluding coverage for death from any cause, coverage for death from natural causes because insured was not in geographic area covered by the policy at the time of death excluded. *Coit v. Jefferson*, 28 Cal. 2d 1, 4, 168 P.2d 163 (1946).

**Notice and Proof of Loss.** Time of notice of claim, sufficiency of notice, proof of loss, and filing proof of loss covered in Standard Provisions Ins. C. §10320 *et seq.* Policy provisions as to notice of claim and proof of loss are conditions to recovery, but may be waived by insurer. Cases where waiver of condition requiring proof of loss: 1) Denial of liability. *Wilkinson v. Standard*, 180 Cal. 252, 258, 180 P. 607 (1919); *Dietlin v. General American Life*, 4 Cal. 2d 336, 350, 49 P.2d 590 (1935); *Greco v. Oregon Mut.*, 191 Cal. App. 2d 674, 12 Cal. Rptr. 802 (1961); 2) Denial that policy in force. *Paez v. Mutual Indem.*, 116 Cal. App. 654, 3 P.2d 69 (1931); 3) Offer by insurer to pay amount it claimed was due under policy. *Martin v. Postal Union*, 31 Cal. App. 2d 329, 334, 87 P.2d 897 (1939).

There is no waiver of any rights of defense by 1) acknowledgment of receipt of notice; 2) furnishing forms; 3) acceptance of proofs of loss; and 4) investigation of any claim. Ins. C. §10381.

**Notice/Proof provisions interpreted in following cases:** "As soon as reasonably possible." *Hill v. Mutual Benefit*, 136 Cal. App. 508, 29 P.2d 285 (1934). Receipt of due proof of loss that employee, "while insured hereunder, and prior to his sixtieth birthday," has become totally and permanently disabled construed to mean that policy must be in force at time of occurrence of disability, but need not be in force at time of furnishing due proof of loss. *Fritz v. Metropolitan*, 50 Cal. App. 2d 570, 574, 123 P.2d 622 (1942); See *Fohl v. Metropolitan*, 54 Cal. App. 2d 368, 129 P.2d 24 (1942). "Due proof" need not be in writing or on insurer's form. *Culley v. New York*, 27 Cal. 2d 187, 192, 163 P.2d 698 (1945).

False statements in proof of disability do not estop insured unless acted upon by insurer to its prejudice. See *Bebington v. California*, 30 Cal. 2d 157, 180 P.2d 673

(1947), *overruled in part*, *Zuckerman v. Underwriters*, 42 Cal. 2d 460, 267 P.2d 777 (1954). Without actual presentation of a claim by the insured in compliance with claims procedures contained in the policy, there is no duty on insurer to investigate claim. *California Shoppers v. Royal Globe*, 175 Cal. App. 3d 1, 57, 221 Cal. Rptr. 171 (1985); *Paulfrey v. Blue Chip Stamps*, 150 Cal. App. 3d 187, 199, 197 Cal. Rptr. 501 (1983). Notice of accident, injury or death may be given anytime within 20 days after event. Ins. C. §551. In absence of waiver or estoppel, failure to give notice may defeat recovery on policy. *See Aronson v. Frankfortg*, 9 Cal. App. 473, 99 P. 537 (1908). In such event notice is construed within a “reasonable” time to mean notice. Where policy’s notice period is less than statutory minimum, statute will not be written into policy. *Abrams v. American Fidelity*, 32 Cal. 2d 233, 237, 195 P.2d 797 (1948).

**Statute of Limitations.** All actions founded upon written instruments must be commenced within four years of accrual of cause of action. C.C.P. §337. Parties may stipulate for period of limitation shorter than statute if not unreasonable. *Tebbets v. Fidelity*, 155 Cal. 137, 138, 99 P. 501 (1909); *C&H Foods v. Hartford*, 163 Cal. App. 3d 1055, 1064, 211 Cal. Rptr. 765 (1984). One year limitation is held not unreasonable. *Prudential-LMI v. Superior Ct.*, 51 Cal. 3d 674, 274 Cal. Rptr. 387 (1990). A waiver exists whenever an insurer intentionally relinquishes its right to rely on a contractual provision limiting the time within which an action may be brought. *Id.* Actions by company for rescission must be prior to commencement of an action on the contract. Ins. C. §650. Suit by surviving spouse to enforce community property rights in life policy is not an action based on contract in writing and must be commenced in two years. *Meyers v. Guardian*, 20 Cal. App. 2d 268, 66 P.2d 753 (1937); C.C.P. §339; *Parker v. Walker*, 5 Cal. App. 4th 1173, 1190, 6 Cal. Rptr. 2d 908 (1992). Insurer estopped to rely on statute when requested time to complete medical investigation delayed filing of claim. *Benner v. I.A.C.*, 26 Cal. 2d 346, 349, 159 P.2d 24 (1945); *Lewis v. Superior Ct.*, 175 Cal. App. 3d 366, 220 Cal. Rptr. 594 (1985). Contention that erroneous interpretation of policy in denying liability constituted estoppel to set up statute of limitations denied. *Neff v. New York*, 30 Cal. 2d 165, 174, 180 P.2d 900 (1947); *See also Liberty Transport v. Harry W. Gorst Co.*, 229 Cal. App. 3d 417, 280 Cal. Rptr. 159 (1991). Although former C.C.P. §340 (3) provides a one year statute of limitations (now two years) for personal injuries, a four year statute of limitation applies to contract action seeking damages for emotional distress arising out of financial damage caused by breach of duty of good faith and fair dealing. *See Krieger v. Alexander*, 234 Cal. App. 3d 205, 221, 285 Cal. Rptr. 717 (1991); *Frazier v. Metropolitan*, 169

Cal. App. 3d 90, 102-103, 214 Cal. Rptr. 883 (1985). Waiver of statute of limitations (tolling agreement) must be in writing and signed by person obligated but not valid for more than four years. C.C.P. §360.5. Waiver of statute of limitations may be signed by attorneys representing parties. *Carlton Browne & Co. v. Superior Court*, 210 Cal. App. 3d 35 (1989).

**Double Indemnity.** Policy provision that double indemnity not payable if death results concurrently from disease and accident upheld even through accidental bodily injury was proximate cause of death; clause is valid where it excluded death resulting wholly or partly from disease. *Johnson v. Aetna Life Ins. Co.*, 221 Cal. App. 2d 247, 258, 34 Cal. Rptr. 484 (1963). Beneficiary could not recover double indemnity where policy excluded injuries to insured while participating in felony assault and insured was killed in a street fight in which he was the aggressor. *Sweeney v. Metropolitan*, 30 Cal. App. 2d Supp. 767, 92 P.2d 1043 (1938). Insurer liable under policy “when in passenger elevator” where insured sustains injury while alighting from freight elevator used for carrying both passengers and freight. *Wilmarth v. Pacific Mutual*, 168 Cal. 536, 143 P. 780 (1914).

## ACCIDENTAL MEANS

**Definition.** No statute. The words “accident” and “accidental” have never acquired any technical meaning in the law and must be construed according to ordinary understanding and common usage. *Pilcher v. New York Life*, 25 Cal. App. 3d 717, 721, 102 Cal. Rptr. 82 (1972). For distinction between accident and accidental means, *see Hargreaves v. Metropolitan Life*, 104 Cal. App. 3d 701, 705, 163 Cal. Rptr. 857 (1980); *Ogilvie v. Aetna*, 189 Cal. 406, 411-412, 209 P.2d 26 (1922); *Weil v. Federal Kemper*, 7 Cal. 4th 125, 134-135, 27 Cal. Rptr. 2d 316 (1994).

**Accidental Occurrences.** The following have been held to be accidental means: 1) Death of insured caused by fall or by blow struck by third person. *Richards v. Travelers*, 89 Cal. 170, 26 P. 762 (1891); *Meyer v. Pacific*, 233 Cal. App. 2d 321, 43 Cal. Rptr. 542 (1965); 2) Death of insured thrown from motorcycle which skidded when insured swerved and applied brakes. *Davilla v. Liberty*, 114 Cal. App. 308, 299 P. 831 (1931); 3) Death from twisted intestine caused by jump. *Losleben v. California*, 119 Cal. App. 556, 6 P.2d 1012 (1932); *Ells v. Order of United Travelers*, 20 Cal. 2d 290, 125 P.2d 457 (1942); 4) Death from hernia caused by falling against iron support. *Muzzy v. Supreme*, 129 Cal. App. 1, 18 P.2d 107 (1933); 5) Falling out of window. *Byers v. Pacific*, 133 Cal. App. 632, 636, 24 P.2d 829 (1933) (when conflicting evidence of death by suicide or accident, pre-



sumption is accident); *but see Saecker v. Metropolitan*, 51 Cal. App. 2d 479, 125 P.2d 105 (1942) (Drowning); *Kinsey v. Pacific*, 178 Cal. 153, 156-157, 172 P. 1098 (1918); 6) Heart disease caused by concussion incurred in automobile accident. *Clarke v. New Amsterdam*, 180 Cal. 76, 79, 179 P. 195 (1919); 7) Death due to blood poisoning from septic dental instruments. *Horton v. Travelers*, 45 Cal. App. 462, 187 P. 1070 (1920); 8) Septicemia resulting from entrance of foreign body in hand. *Frenzer v. Mutual*, 27 Cal. App. 2d 406, 81 P.2d 197 (1938); 9) Death of nurse resulting from an infection communicated to her by a patient suffering from blood poisoning. *Moore v. Fidelity*, 203 Cal. 465, 265 P. 207 (1928); 10) Dilation of heart caused by accidentally falling into whirlpool of water. *Trueblood v. Maryland*, 129 Cal. App. 102, 18 P.2d 90 (1933); 11) Policeman tripped and fell while chasing crime suspect and the resulting stress caused death from acute myocardial ischemia. *Slobojan v. Western Travelers Life Ins. Co.*, 70 Cal. 2d 432, 74 Cal. Rptr. 895 (1969); 12) Death from gunshot wound. *Jenkin v. Pacific*, 131 Cal. 121, 63 P. 180 (1900).

Death caused by unintended overdose of drug constitutes accidental death, because unexpected and unintended. *Pilcher v. New York Life*, 25 Cal. App. 3d 717, 102 Cal. Rptr. P.82 (1972), *disapproved in Weil v. Federal*, 7 Cal. 4th 125, 142-143, 27 Cal. Rptr. 2d 316 (1994). But self-administered heroin injection done in usual manner, without any mishap, resulting in death of insured is not accidental means. *Hargreaves v. Metropolitan Life Ins. Co.*, 104 Cal. App. 3d 701, 708, 163 Cal. Rptr. 857 (1980).

### NON-ACCIDENTAL MEANS

The following have been held to be not accidental:

- 1) Death from gunshot wound where insured invited and brought on attack. *Price v. Occidental Life*, 169 Cal. 800, 803, 147 P. 1175 (1915);
- 2) Dilation of heart due to overexertion carrying casket. *Rock v. Travelers*, 172 Cal. 462, 156 P. 1029 (1916);
- 3) Where death natural result of insured's own acts as insured armed himself and went into a gambling house with the purpose of recovering money previously lost there, and was fatally shot during the attempt. *Postler v. Travelers*, 173 Cal. 1, 158 P. 1022 (1916), *overruled on other grounds, Zuckerman v. Underwriters*, 42 Cal. 2d 460, 267 P.2d 777 (1954);
- 4) Overexertion while swimming causing hemorrhage. *Olinsky v. Railway Mail Assn.*, 182 Cal. 669, 189 P. 835 (1920);
- 5) Rupture of heart caused by strain while plowing. *Ogilvie v. Aetna*, 189 Cal. 406, 209 P. 26 (1922);
- 6) Sunstroke. *Harloe v. California State*, 206 Cal. 141, 273 P. 560 (1928);
- 7) Rupture while pulling pipe out of sump hole. *Bennetts v. Occidental*, 39 Cal. App. 384, 178 P. 964 (1919);
- 8) Paralysis due to intro-cranial hemorrhage

caused by traumatic injury to head, age and diabetic condition. *Brown v. Standard*, 5 Cal. App. 2d 636, 43 P.2d 555 (1935).

Burden of Proof. Insured has burden to prove death caused by bodily injury effected through accidental means, i.e. ventricular fibrillation caused by excitement induced by commotion at wrestling match. Medical opinion founded on assumption of non-existing fact, not controlling. *Bristol v. Metropolitan Life*, 122 Cal. App. 2d 631, 265 P.2d 552 (1954). In action on accident policy as distinguished from action on life insurance policy, burden of establishing suicide not on insurer, as suicide provision not condition subsequent but is merely definitive of risk assumed; however, burden of proof on insurer to prove suicide. *Zuckerman v. Underwriters*, 42 Cal. 2d 460, 473, 267 P.2d 777 (1954); *White v. Aetna*, 198 Cal. App. 2d 370, 376-377, 17 Cal. Rptr. 914 (1961). Suicidal intent can be negated by proof that insured did not understand the consequences of his acts. *Searle v. Allstate*, 38 Cal. 3d 425, 437, 212 Cal. Rptr. 466; 696 P.2d 1308 (1985).

### ADJUSTERS

Governed by Ins. C. §14000 *et seq.* (Ins. Adjuster Act). Governed by Ins. C. §15000 *et seq.* (Public Adjusters Act).

License required. Ins. C. §14020

### AGE

See "AUTOMOBILES"; "LIABILITY INSURANCE"; "NEGLIGENCE"; "INFANTS."

A minor is under 18 years of age. Fam. C. §6500. An adult is 18 years of age or older. Fam. C. §6501.

### AGENTS AND BROKERS

Definition of Brokers, Ins. C. §33 and §1623. Agents, Ins. C. §§31 and 1621; C.C. §2295, *et seq.*

For Whom. Under agency agreement, agent is deemed to act for insurer for all purposes of the agreement. Ins. C. §§1731, 1704; *See also Warren Ins. Agency v. Surpur Timber Co.*, 250 Cal. App. 2d 99, 104, 58 Cal. Rptr. 143 (1967). Insurer cannot limit responsibility of agent in negotiations leading up to consummation of contract so as to make such agents of insured as to all matters other than receipt of premium and delivery of policy, absent express policy provision to the contrary. *Silverberg v. Phenix Ins. Co.*, 67 Cal. 36, 40-41, 7 P. 38 (1885); *Skyways v. Stanton*, 242 Cal. App. 2d 272, 51 Cal. Rptr. 352 (1966); *see also Frasch v. London*, 213 Cal. 219, 2 P.2d 147 (1931). The powers of the agent are prima facie coextensive with the business entrusted to

his/her care, and limitations will not narrow the powers not communicated to the person with whom he/she deals. *Financial Indemnity Co. v. Murphy*, 223 Cal. App. 2d 621, 627, 35 Cal. Rptr. 913 (1963). Mere soliciting agent operating between insured and insurer is distinguishable from general agent and has authority only to initiate contracts and cannot bind his principal during preliminary negotiations. *Browne v. Commercial*, 30 Cal. App. 547, 554, 158 P. 765 (1916); *Parlier v. Fireman's*, 151 Cal. App. 2d 6, 311 P.2d 62 (1957). Where allegations were insufficient to charge insurer with responsibility for agent's knowledge or representations he made to insured, mistake not imputed to insurer. *Totten v. Underwriter's at Lloyd's London*, 176 Cal. App. 2d 440, 448, 1 Cal. Rptr. 520 (1959). Insured entitled to rely on agent's ostensible authority despite policy provisions where past dealings with agent instilled confidence the insurer would do what agent said it would. *Cf. Kazanteno v. California-Western States*, 137 Cal. App. 2d 361, 375, 290 P.2d 332 (1955); *Tomerlin v. Canadian*, 61 Cal. 2d. 638, 39 Cal. Rptr. 731 (1964). Agent, who requests insurance from company which he does not represent, acts for insured. *Solomon v. Federal*, 176 Cal. 133, 138, 167 P. 859 (1917); *Cf. Marsh v. LA*, 62 Cal. App. 3d 108, 132 Cal. Rptr. 796 (1976). For policy restrictions on agent's authority, see *Thompson v. Occidental*, 9 Cal. 3d 904, 109 Cal. Rptr. 473 (1973); *Iverson v. Metropolitan*, 151 Cal. 746, 91 P. 609 (1907); *Duarte v. Postal*, 75 Cal. App. 2d 557, 171 P.2d 574 (1946). Insurance salesman under control of insurer and acting at request of insurer constitutes prima facie agency and not as independent contractor. See *Lewis v. Constitution*, 96 Cal. App. 2d 191, 215 P.2d 55 (1950). Policy limitation does not apply to acts of agent prior to delivery of policy. *National v. I.A.C.*, 34 Cal. 2d 20, 26, 206 P.2d 841 (1949). Distinction made in case of general agent. See *Berliner v. Travelers*, 121 Cal. 451, 53 P. 922 (1898); *Knarston v. Manhattan*, 124 Cal. 74, 56 P. 773 (1899); *Pierre v. Metropolitan*, 22 Cal. App. 2d 346, 70 P.2d 985 (1937). An agent may assume additional duties by an express agreement or a holding out. *Jones v. Grewe*, 189 Cal. App. 3d 950, 954, 234 Cal. Rptr. 717 (1987). As broker is insured's agent, insurer is not vicariously liable for broker's negligence. *Gibson v. Government Employees*, 162 Cal. App. 3d 441, 208 Cal. Rptr. 511 (1984). Broker acts for insured, not insurer. *Maloney v. Rhode Island Ins.*, 115 Cal. App. 2d 238, 244, 251 P.2d 1027 (1953). Notice of loss given to broker is not notice to insurer, since broker is agent of insured. *Arthur v. London*, 78 Cal. App. 2d 198, 202, 177 P.2d 625 (1947). Knowledge of broker is not imputed to insurer where broker is acting as agent of insured. *Rizzuto v. National*, 92 Cal. App. 2d 143, 206 P.2d 431 (1949). Rules given for determining whether broker is agent of insurer or insured determined by what parties do and say, not name

they are given. See generally *Maloney v. Rhode Island*, 115 Cal. App. 2d 238, 251 P.2d 1027 (1953). Same person may be broker for insured and agent for insurer. *Ivey v. United Nat'l Indemnity*, 259 F.2d 205 (9th Cir. 1958). In administration of group insurance, employer is agent of insurer and not of employees. *Elfstrom v. New York Life Ins. Co.*, 67 Cal. 2d 503, 513, 432 P.2d 731 (1967). Control is a decisive factor. *St. Paul Ins. Co. v. Industrial Underwriters Ins. Co.*, 214 Cal. App. 3d 117, 122, 262 Cal. Rptr. 490 (1989). Employer acts as agent of employees in negotiating terms of group policy. See generally *Madden v. Kaiser Foundation Hospitals*, 17 Cal. 3d 699, 552 P.2d 1178, 131 Cal. Rptr. 882 (1976). Medical examiners who work for the insurer and who improperly complete the application omitting information relayed by insured are not agents of insured. *Lyon v. United Moderns*, 148 Cal. 470, 476, 83 P. 804 (1906), criticized in part by *Telford v. New York Life*, 9 Cal. 2d 103, 69 P.2d 835 (1937).

When truthful answers of insured given at time of application have been incorrectly entered by the general or soliciting agent, insurer is estopped to set up "falsity as policy defense." *Hart v. Prudential*, 47 Cal. App. 2d 298, 301, 117 P.2d 930 (1941).

Fraud by Agent. Generally, fraud of agent cannot be taken advantage of to defeat the policy. *Menk v. Home*, 76 Cal. 50, 18 P. 117 (1888); *Byrd v. Mutual Benefit*, 73 Cal. App. 2d 457, 463, 166 P.2d 901 (1946). Insured adopts misstatements in application if same is attached to policy when delivered and not repudiated; subject to the limitation that there should be no complicity on the part of applicant actual or implied. *Layton v. New York Life*, 55 Cal. App. 202, 206, 202 P. 958 (1921); but see *Telford v. New York*, 9 Cal. 2d 103, 69 P.2d 835 (1937). Application must be attached to policy in order for a company to rely on any provision in the application and this was codified in Ins. C. §10113. *Wilson v. Western National Life*, 235 Cal. App. 3d 981, 990, 1 Cal. Rptr. 2d 157 (1991). Mere soliciting agent who suggested that he retain possession of the insured's policies became insured's agent with respect to forgeries of loan applications and loan checks. *Shapiro v. Equitable*, 76 Cal. App. 2d 75, 172 P.2d 725 (1946). False answers written in application by agent must be promptly repudiated by insured, and delay of four months in repudiating is fatal to recovery. *Goldstone v. Columbia*, 33 Cal. App. 119, 124-125, 164 P. 416 (1917); Fraud of agent in inducing applicant to sign application imputed to insurer. See *LaMarche v. New York*, 126 Cal. 498, 502, 58 P. 1053 (1899). Insurance company may be estopped to assert the defense of material misrepresentations when soliciting agent tells insured information withheld need not be included in application. *Boggio v. Cal-Western States Life Ins. Co.*, 108 Cal. App. 2d 597, 599, 239 P.2d



144 (1952). Beneficiary's failure to read policy does not preclude recovery based on ignorance of agent's fraud where copy of application is not attached to policy delivered to beneficiary, and insurance company is estopped from asserting falsity of answers. *Hart v. Prudential*, 47 Cal. App. 2d 298, 300-301, 117 P.2d 930 (1941).

Knowledge of Agent. Imputed to principal as general rule. *Kruger v. Western*, 72 Cal. 91, 13 P. 156 (1887); *Ames v. Employers*, 16 Cal. App. 2d 255, 60 P.2d 347 (1936). Exception where agent requests insurance from company he does not represent. *Solomon v. Federal*, 176 Cal. 133, 139, 167 P. 859 (1917). Company estopped notwithstanding policy provision that agent cannot waive conditions. *Farnum v. Phoenix*, 83 Cal. 246, 23 P. 869 (1890); See *Marderosian v. National Cas.*, 96 Cal. App. 295, 273 P. 1093 (1929). Company is liable for a loss which may occur during a period of credit. *Phillips v. Reserve Life Ins. Co.*, 128 Cal. App. 2d 540, 547, 275 P.2d 554 (1954). Misstatements placed in application by agent without knowledge of insured did not invalidate policy. *LaMarche v. New York Life*, 126 Cal. 498, 58 P. 1053 (1899). Misrepresentations waived by knowledge of company's president. *Farrar v. Policyholders*, 3 Cal. App. 2d 87, 92, 39 P.2d 229 (1934); and see *Federal v. Cary*, 20 Cal. App. 2d 257, 67 P.2d 129 (1937). Insurer has the duty to exercise good faith in dealing with the insured. *Neff v. New York Life Ins. Co.*, 30 Cal. 2d 165, 172, 180 P.2d 900 (1947). Company estopped to claim fraud where misrepresentations was agent's mistake and company was later notified. *Irving v. Sunset Mutual*, 4 Cal. App. 2d 455, 41 P.2d 194 (1935). Compare this case carefully with *Layton v. New York*, *supra*. While case purports to approve and follow *Layton* case, rules of *Layton* case are actually transposed. Where false answers are written in application, it is duty of insured after delivery to notify insurer promptly of fraud, and where not done, fraudulent act of agent is approved, and recovery is barred. *Thompson v. Occidental*, 9 Cal. 3d 904, 927, 109 Cal. Rptr. 473, (1973) (dissenting opinion); *Goldstone v. Columbia*, 33 Cal. App. 119, 164 P. 416 (1917). Knowledge of soliciting agent and employees of insured's total and permanent disability does not constitute notice and proof of disability. *Cochens v. Prudential*, 4 Cal. App. 2d 172, 40 P.2d 902 (1935). Furnishing of proof of disability prior to any default in the payment of a premium is condition precedent to the waiver of payment of the premium where the disability has occurred prior to any default in the payment of a premium. *Morris v. New York Life Ins. Co.*, 6 Cal. App. 2d 30, 33, 43 P.2d 572 (1935); *American v. Yee Lim Shee*, 104 F.2d 688 (9th Cir. 1939), *cert. denied*, 308 U.S. 692, 693 (1939).

Liability of Agent. Agent liable for failure to provide adequate insurance. *Mid-Century v. Hutsel*, 10 Cal.

App. 3d 1065, 1068, 1069, 89 Cal. Rptr. 421 (1970). Broker is liable to insurer where credit is extended and may recover from insured. *Nisbet v. Rhinehart*, 2 Cal. 2d 477, 42 P.2d 71 (1935); *Warren Agency v. Surpur Timber*, 250 Cal. App. 2d 99, 58 Cal. Rptr. 143 (1967). Measure of damages for agent or broker in failing to procure proper insurance is amount which would have been due if it had been obtained. *Valdez v. Raylor*, 129 Cal. App. 2d 810, 822-823, 278 P.2d 91 (1954). No liability for placing insurance with admitted insurer who is insolvent or financially impaired. *Wilson v. All Services Ins.*, 91 Cal. App. 3d 793, 797-798, 153 Cal. Rptr. 121 (1979). However, issue is contested for non-admitted insurers, see Ins. C. §1610 *et seq.*, 1765.1.

Licensing and Regulation. Licensing and regulation license required. Ins. C. §1631 *et seq.*

### ARBITRATION

Any action filed in the superior court is subject to non-binding judicial arbitration if court determines that the amount in controversy is less than \$50,000. C.C.P. §1141.11; C.R.C. Rule 1600 *et seq.* But in a superior court with 10 or more judges, or 18 or more judges in a county in which there is no municipal court, limited civil cases need not be submitted to arbitration. C.C.P. §1141.11. Any action in any court regardless of amount in controversy may be arbitrated upon stipulation. C.R.C. 1600 (a). A court may not dismiss an action because of a party's failure to participate in an arbitration proceeding. *Salowitz v. Traditional Indus.*, 219 Cal. App. 3d 797, 268 Cal. Rptr. 493 (1990).

Arbitrator has authority to determine what is an arbitrable issue. *Morris v. Zuckerman*, 69 Cal. 2d 686, 690, 72 Cal. Rptr. 880 (1968). Department of Managed Health Care's approval of health care contracts which include binding arbitration clauses does not violate right to jury trial. *Viola v. California Department of Managed Health Care*, 133 Cal. App. 4th 299, 34 Cal. Rptr. 3d 626 (2005). Arbitration award shall be vacated by court if arbitrator exceeds powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted. C.C.P. §1286.2 (d).

### ATTORNEYS

Appointment and Authority. Attorneys are licensed and regulated by the Bus. & Prof. C. §6000 *et seq.*; Rules of Professional Conduct 1-100 through 8-101, inclusive; C.R.C. 951 *et seq.*

Conflict of Interest. If attorney has/had relationship with another party interested in the representation, or has interest in its subject matter, attorney cannot accept or continue representation without affected clients' in-

formed written consent. Rules of Professional Conduct 3-310 (A). Without consent to dual representation, attorney must terminate relationship with new client if representation conflicts with duties owed to former client. *Pennix v. Winton*, 61 Cal. App. 2d 761, 143 P.2d 940 (1944). Attorney cannot enter into business transaction or acquire interest adverse to client unless terms are fair to client and fully disclosed in writing, client is advised in writing she can seek independent legal advice, and client consents in writing to terms. Rules of Professional Conduct 3-300. If attorney interviews and receives confidential information from one side in litigation and later becomes associated for other side in litigation both associated counsel and original attorney must be disqualified. *Pound v. DeMera*, 135 Cal. App. 4th 70, 36 Cal. Rptr. 3d 922 (2005). To avoid disqualification where attorney transitions from firm representing defendant to firm representing plaintiff on the same matter, attorney has the burden of showing that he lacked actual exposure to confidential information, but does not have to show that he had no opportunity to acquire that information. *Ochoa v. Fordel, Inc.*, 146 Cal. App. 4th 898, 53 Cal. Rptr. 3d 277 (2006).

**Legal Malpractice.** Legal malpractice constitutes both a tort and breach of contract. *Jackson v. Rogers & Wells*, 210 Cal. App. 3d 336, 342, 259 Cal. Rptr. 454 (1989). Examples of actionable malpractice include legal advice negligently given, *Perkins v. West Coast*, 129 Cal. 427, 62 P. 57 (1900); failing to follow client's instructions, *Lally v. Kuster*, 177 Cal. 783, 171 P. 961 (1918); failing to prosecute appeal from questionable judgment, *Pete v. Henderson*, 124 Cal. App. 2d 487, 269 P.2d 78 (1954); negligently preparing or causing entry of a judgment or verdict, *Chavez v. Carter*, 256 Cal. App. 2d 577, 64 Cal. Rptr. 350 (1967); failing to appreciate consequences of a post-testamentary marriage, *Heyer v. Flaig*, 70 Cal. 2d 223, 229, 74 Cal. Rptr. 225 (1969). To establish a claim for legal malpractice, plaintiff need only establish that he or she would have been willing to settle but for attorney's advice to pursue litigation; a plaintiff need not allege, but may have to prove up at trial, that opposing party would have agreed to settlement terms acceptable to plaintiff. *Charnay v. Cobert*, 145 Cal. App. 4th 170, 51 Cal. Rptr. 3d 471 (2006).

Attorney who receives privileged documents (inadvertently) is subject to disqualification, if attorney reads the documents more closely than is necessary to ascertain that the documents are privileged and uses the privileged documents to that attorney's client's advantage. *Rico v. Mitsubishi Motors Corp.*, 42 Cal. 4th 807, 68 Cal. Rptr. 3d 758 (2007). Substitution of attorney does not conclude representation for purposes of initiating statute of limitations in legal malpractice action, if attorney continues to provide legal advice to client. *Nielsen v. Beck*,

157 Cal. App. 4th 1041, 69 Cal. Rptr. 3d 435 (2007). Defenses for legal malpractice are statute of limitations, C.C.P. §340.6; client's contributory negligence, *Theobald v. Byers*, 193 Cal. App. 2d 147, 13 Cal. Rptr. 864 (1961); client's unclean hands, *Blain v. Doctor's Co.*, 222 Cal. App. 3d 1048, 272 Cal. Rptr. 250 (1990).

Fees. Measure and mode of compensation is left to agreement of parties unless provided by statute. C.C.P. §1021. Fee contracts strictly construed against attorney. *Severson v. Bolinger*, 235 Cal. App. 3d 1569, 1572, 1 Cal. Rptr. 2d 531 (1991). In cases other than contingency, where expense to client exceeds statute, contract must be in writing and contain fees/rates, nature of legal services, duties of attorney and client. Bus. & Prof. C. §6148 (a). Person liable for fee is person who employs attorney, not person who receives benefit of legal services. *Manning v. Gavin*, 37 Cal. App. 2d 591, 100 P.2d 350 (1940); *Cullinan v. McColgan*, 87 Cal. App. 684, 263 P.353 (1927).

## ASSIGNMENT

See also "FIRE INSURANCE."

An insurance policy, including a life or disability policy, may be assigned by the insured to a third person. *Sullivan v. Union Oil Co.*, 16 Cal. 2d 229, 237, 105 P.2d 922 (1940); *In Re Sears' Estate*, 182 Cal. App. 2d 525, 6 Cal. Rptr. 148 (1960). A policy may be assigned without the consent of the insurer (*Bibend v. Liverpool*, 30 Cal. 78 (1866); *Quemetco v. Pacific Auto*, 24 Cal. App. 4th 494, 29 Cal. Rptr. 2d 627 (1994)) unless the policy provides contrary, which renders assignment without consent ineffective. *Shuggart v. Lycoming*, 55 Cal. 408, (1880); *Greco v. Oregon Mutual*, 191 Cal. App. 2d 674, 12 Cal. Rptr. 802 (1961). However, assignment after loss is valid without consent of insurer. *Vierneisel v. Rhode Island*, 77 Cal. App. 2d 229, 232, 175 P.2d 63 (1946). The assignment of the insured's right to cancel a policy to a lender must be in writing, and executed by, or on behalf of, the insured. *Pacific Auto Ins. Co. v. Wolff*, 72 Cal. App. 3d 537, 541, 140, Cal. Rptr. 164 (1977); *Ins. C. §673 (a)*. The law does not require any particular form of assignment of a policy. *Estate of Ferrero*, 142 Cal. App. 2d 473, 298 P.2d 604 (1956). Assignment transfers the policy for all purposes, substituting the assignee as insured. *Bergson v. Builders' Ins.*, 38 Cal. 541 (1869); *Xebec v. National Union*, 12 Cal. App. 4th 501, 15 Cal. Rptr. 2d 726 (1993). In a conflict between the assignee and representatives of the deceased insured, the insurer is not bound to determine who is entitled to benefits, but may resort to interpleader. *Mutual Life v. Henes*, 8 Cal. App. 2d 306, 47 P.2d 513 (1935). A first party bad faith claim is not fully assignable; the insured's claim for emotional distress or punitive damages cannot



be assigned. *Bush v. Superior Court*, 10 Cal. App. 4th 1374, 1382, fn. 2, 13 Cal. Rptr. 2d 382 (1992).

### AUTOMOBILES

Age. Minimum age limits are: restricted junior permit, 14 years; provisional permit, 16 years; operator's license, 18 years; chauffeur's license, 18 years. V.C. §§12513-12516; 17700-17701. License applications for minors less than 18 years must be signed by parents, guardian, if no guardian or parent by person having custody, or minor's employer, V.C. §§17700-17706. However, if minor is emancipated other than by marriage, he/she may sign for him/herself with proof of ability to respond in damages. V.C. §17705.

Agency. Ownership of car gives rise to inference of agency of driver but is not presumptive. *Montanya v. Brown*, 31 Cal. App. 2d 642, 645, 88 P.2d 745 (1939); *Ceranski v. Muensch*, 60 Cal. App. 2d 751, 753, 141 P.2d 750 (1943). V.C. §§17150-17157 creates no liability on wife by reason of community property interest in vehicle driven by husband. *Hooper v. Romero*, 262 Cal. App. 2d 574, 578, 68 Cal. Rptr. 749 (1968); *Cox v. Kaufman*, 77 Cal. App. 2d 449, 452, 175 P.2d 260 (1946); Though car registered in joint names with no indication that owners are husband and wife, no presumption that community property and ownership liability applies to wife. *Wilcox v. Berry*, 32 Cal. 2d 189, 192, 195 P.2d 414 (1948); *Caccamo v. Swanston*, 94 Cal. App. 2d 957, 964, 212 P.2d 246 (1949). Minor's negligence in operating vehicle is imputed to signatory of application, parent, or person or guardian having custody who has given implied or expressed consent to drive. Limits are \$5,000 property damage, \$15,000 personal injury or death damage to any one person, and \$30,000 any one accident. V.C. §§17707-17710. Signatory may be released from further liability on application, V.C. §17711. When the parent is signatory, parent is not relieved from liability under V.C. §§17700-17705, even if minor is driving against instructions and license has been suspended. *Sleeper v. Woodmansee*, 11 Cal. App. 2d 595, 598, 54 P.2d 519 (1936). License is a mere privilege and subject to revocation. *Johnson v. Department of Motor Vehicles*, 177 Cal. App. 2d 440, 445, 2 Cal. Rptr. 235 (1960). Parents not relieved of liability for son's unlawful or negligent operation of a vehicle while his license was suspended. *Hamilton v. Dick*, 254 Cal. App. 2d 123, 125, 61 Cal. Rptr. 894 (1967). Teacher giving minor permission to drive is not liable as person having custody. *Hathoway v. Siskiyou*, 66 Cal. App. 2d 103, 151 P.2d 861 (1944). A person having custody of a minor means a person having permanent legal custody and not one whose control is limited in time and scope. *Hughes v. Wardwell*, 117 Cal. App. 2d 406, 408, 255 P.2d 881 (1953). Parent cannot recover from third person if minor

son's negligence contributed to accident, as negligence is imputed to parent. *Solloway v. Watts*, 58 Cal. App. 2d 595, 597, 137 P.2d 477 (1943); V.C. §§17707-17709.

Bailee of automobile, not driving car at time of injury, is not liable as "owner." *Jacobs v. Bazzani*, 109 Cal. App. 2d 681, 689, 241 P.2d 642 (1952). No owner's liability on part of bailee to injured person created by V.C. §§17150-17157. *Overgard v. Beaverson*, 89 Cal. App. 2d 449, 201 P.2d 67 (1948). Unconditional delivery, transfer, and endorsement and delivery of ownership certificate relieves owner from liability. *Woods v. Eastbridge*, 99 Cal. App. 2d 625, 630, 222 P.2d 296 (1950); *Hetton v. Stewart*, 198 Cal. App. 2d 114, 17 Cal. Rptr. 524 (1961). Conditional vendor liable as owner until transfer registered. *Guillot v. Hagman*, 30 Cal. App. 2d 582, 587, 86 P.2d 745, 865 (1939). Compliance with applicable statutes necessary in order for owner to be "relieved" of liability. *Enis v. Specialty Auto Sales*, 83 Cal. App. 3d 928, 935-936, 148 Cal. Rptr. 255 (1978). Compliance with the applicable statutes pertaining to notice of transfer as prescribed by V.C. §5602 was necessary in order for owner to be "relieved" of liability. *Enis v. Specialty Auto Sales*, 83 Cal. App. 3d 928, 935-936, 148 Cal. Rptr. 255 (1978); *Durbin v. Fletcher*, 165 Cal. App. 3d 334, 341, 211 Cal. Rptr. 483 (1985). Owner's liability limited to \$5,000 property damage, \$15,000 personal injury to any one person and \$30,000 for any one accident. V.C. §17151. Permissive use coverage mandatory. Ins. C. §11580.1 (b) (4). If permissive user and driver allow another to drive in furtherance of loan use, third person is permissive user even though terms of loan directed no one else to drive. *Souza v. Corti*, 22 Cal. 2d 454, 461, 139 P.2d 645 (1943). Permissive use statutes are interpreted as holding where a vehicle owner entrusts his car to one person and that person in turn permits a third party to drive, the third party is driving "with the permission" of the owner both for purposes of imposing vicarious liability and finding insurance coverage only if the third party's use was within the owner's contemplation. *Sandoval v. Mercury Ins. Group*, 229 Cal. App. 3d 1, 7-8, 278 Cal. Rptr. 533 (1991). Use by employee of employer's car gives rise to inference that it is permissive use. *Blank v. Coffin*, 20 Cal. 2d 457, 460, 126 P.2d 868 (1942); *Hartford v. Abdullah*, 94 Cal. App. 3d 81, 156 Cal. Rptr. 254 (1979); *Elkinton v. California State*, 173 Cal. App. 2d 338, 343 P.2d 396 (1959). "Permissive use" further defined as that use expressly or implicitly within the scope of permission as to time, place and purpose as granted by owner. *Hartford Accident v. Abdullah*, 94 Cal. App. 3d 81, 88, 156 Cal. Rptr. 254 (1979). Permission to use implied from consent to use on prior occasions. *Garrison v. Booth*, 10 Cal. App. 2d 738, 741-742, 52 P.2d 535 (1935). Carelessness in leaving key in car or car unlocked does not imply per-



mission to user. *Mucci v. Winter*, 103 Cal. App. 2d 627, 630, 230 P.2d 22 (1951). Where implied permissive use is involved, the general relationship existing between the owner and operator is of paramount importance. *Elkington v. Cal. State Auto Assoc.*, 173 Cal. App. 2d 338, 344, 343 P.2d 396 (1959); *Northwestern v. Monarch*, 256 Cal. App. 2d 63, 66, 63 Cal. Rptr. 802 (1967). Agreement of sale with transfer of possession is consent and permission to prospective purchaser to use automobile for customary and reasonable purposes. *Bardin v. Case*, 99 Cal. App. 2d 137, 148, 221 P.2d 292 (1950).

**Comparative/Contributory Negligence.** Contributory negligence no longer applies. Doctrine of comparative negligence is now in force. *Li v. Yellow Cab*, 13 Cal. 3d 804, 812-813, 532 P.2d 1226 (1975); *DaFonte v. UpRight*, 2 Cal. 4th 593, 7 Cal. Rptr. 2d 238 (1992).

**Compulsory Insurance Coverage.** Compulsory insurance coverage is not required but every driver and owner of motor vehicle shall be able to establish financial responsibility under V.C. §§16020-16021.

**Alcohol/DWI.** Presumption of driving under the influence of alcoholic beverage if alcohol in the persons blood was 0.08% or more. V.C. §§23152, 23153 and 23155.

**Damages.** Auto insurance covers replaced vehicle under replacement cover provision. *Patterson v. INA*, 6 Cal. App. 3d 310, 316, 85 Cal. Rptr. 665 (1970); *Hames Ready-Mix v. Transit Gas Co.*, 260 Cal. App. 2d 173, 174-175, 66 Cal. Rptr. 898 (1968).

**Excess Verdict Over Policy.** Automobile liability insurer's unwarranted refusal to settle within policy limits makes it liable for judgment against insured including excess over policy limits, whether or not it defends. *Comunale v. Travelers*, 50 Cal. 2d 654, 328 P.2d 198 (1958); *Gruenberg v. Aetna*, 9 Cal. 3d 566, 573, 108 Cal. Rptr. 480 (1973). In deciding whether a claim should be compromised, insurer must give insured's interest at least as much consideration as its own interest. *Ivy v. Pacific*, 156 Cal. App. 2d 652, 659, 320 P.2d 140 (1958); *Garner v. American Mut.*, 31 Cal. App. 3d 843, 847, 107 Cal. Rptr. 604 (1973). Driver's intoxication may justify award of punitive damages. *People v. Phillips*, 168 Cal. App. 3d 642, 646, 214 Cal. Rptr. 417 (1985).

**Family Purpose Doctrine.** No longer applies. *See Spence v. Fisher*, 184 Cal. 209, 193 P. 255 (1920). In absence of statute, there is no liability on parents for negligence of son driving family car based upon mere facts that son was a minor, vehicle purchased for family purposes, and minor driving with consent of parents within purpose for which vehicle was purchased. *Ide-moto v. Scheideker*, 193 Cal. 653, 658, 226 P. 922

(1924); *Sleeper v. Woodmanese*, 11 Cal. App. 2d 595, 598, 54 P.2d 519 (1936) (old V.C. §62 in effect). A prima facie case of agency is established from fact that husband owns car and wife is driving at his request. *Perry v. McLaughlin*, 212 Cal. 1, 13, 14, 297 P. 554 (1931). A similar rule applies to minor dependent children performing tasks generally performed by parents. *Johnson v. Peterson*, 38 Cal. App. 3d 619, 113 Cal. Rptr. 445 (1974).

**Guests.** Host driver is liable for ordinary negligence. *Brown v. Merlo*, 8 Cal. 3d 855, 870, 506 P.2d 212 (1973). The right to sue for negligence-inflicted injuries has been specifically held not to constitute a fundamental right. *Kite v. Campbell*, 142 Cal. App. 3d 793, 800, 191 Cal. Rptr. 363 (1983), *rejected on other grounds*, *Young v. Haines*, 41 Cal. 3d 883 (1986). Injured owner-occupant may also sue driver of vehicle for ordinary negligence. *Cooper v. Bray*, 21 Cal. 3d 841, 582 P.2d 604, 148 Cal. Rptr. 148, (1978). Guests are also liable if they exercise control over car (driving away from accident scene). *People v. Green*, 96 Cal. App. 2d 283, 290, 215 P.2d 127 (1950).

**Imputed Negligence/Joint Enterprise.** In following cases, doctrine of respondeat superior was held applicable: 1) Outside insurance salesman on commission and salary basis, driving own car to attend agents' meeting. *Richards v. Metro Life*, 19 Cal. 2d 236, 120 P.2d 650 (1941); *Huntsinger v. Fell*, 22 Cal. App. 3d 803, 99 Cal. Rptr. 666 (1972); *See also Lazar v. Thermal*, 148 Cal. App. 3d 458, 195 Cal. Rptr. 890 (1983); and *Ducey v. Argo*, 25 Cal. 3d 707, 159 Cal. Rptr. 835 (1979); 2) Attorney investigating an accident for insurer told to see agent at vicinity of accident to obtain leads and contacts. *Casselman v. Hartford A.I.*, 36 Cal. App. 2d 700, 712, 98 P.2d 539 (1940).

An attorney may act as an employee for his employer in carrying out non-legal functions. *Lynn v. Sup. Ct.*, 180 Cal. App. 3d 346, 349, 225 Cal. Rptr. 427 (1986); *Merritt v. Reserve Ins.*, 34 Cal. App. 3d 858, 881, 110 Cal. Rptr. 511 (1973). For example: 1) Outside salesman and collector called for collection, left for dinner and to take friend home, and accident occurred on return from friend's home to make collection. *Loper v. Morrison*, 23 Cal. 2d 600, 145 P.2d 1 (1944). Master will be held responsible where servant is combining his own business with that of his master, unless it clearly appears the servant could not have been directly or indirectly serving his master. *Gipson v. Davis Realty Co.*, 215 Cal. App. 2d 190, 210, 30 Cal. Rptr. 253 (1963); 2) Under city ordinance making contracting garbage collector liable for injuries, subletting of contract did not relieve original contractor. *Taylor v. Oakland Seavengers*, 17 Cal. 2d 594, 604, 110 P.2d 1044 (1941); *See also Ma-*

*loney v. Rath*, 69 Cal. 2d 442, 71 Cal. Rptr. 897 (1968); 3) Original contractor remains subject to liability for harm caused by the negligence of the independent contractor employed to do the work. *Millsap v. Federal Express Corp.*, 227 Cal. App. 3d 425, 434, 277 Cal. Rptr. 807 (1991); 4) Unusual result reached as to private arrangement to pick up alleged master every evening as showing understanding between them as to personal services. *Prickett v. Whapples*, 10 Cal. App. 2d 701, 52 P.2d 972 (1935); 5) Son driving his father to his office. *Solloway v. Watts*, 58 Cal. App. 2d 595, 137 P.2d 477 (1943). The doctrine of respondeat superior was held inapplicable where garageman's employee drove car on test run and it was held that it cannot be imputed to owner of car. *Clendenin v. Benson*, 117 Cal. App. 674, 677, 4 P.2d 616 (1931). Where set place of work, and going to or leaving work, there is no respondeat superior. *Vaden v. Holmes*, 39 Cal. App. 2d 580, 581-582, 103 P.2d 1002 (1940). Salesman on commission was subject to control as to results only, not means. *Fuller v. Liebenbaum*, 29 Cal. App. 2d 227, 232, 84 P.2d 155 (1938). Car sales corporation under arrangement with convoy commander to deliver cars at \$65.00 each, plus gasoline and oil expenses, and corporation designated route of where to have oil changed, etc., was considered to have insufficient "control," and therefore no respondeat superior. *Brooks v. Johnson*, 22 Cal. App. 2d 618, 621-622, 72 P.2d 194 (1937). There is no respondeat superior where employee goes beyond point required in employer's business for personal reasons. *Bayless v. Mull*, 50 Cal. App. 2d 66, 122 P.2d 608 (1942); *See also Helm v. Zaches*, 94 Cal. App. 2d 625, 211 P.2d 329 (1949). The "Lunch break" rule, for example, bars recovery. *Tryer v. Ojai Valley Sch.*, 9 Cal. App. 4th 1476, 1482, 12 Cal. Rptr. 2d 114 (1992).

Last Clear Chance. Defense abolished by *Li v. Yellow Cab*, 13 Cal. 3d 804, 829, 119 Cal. Rptr. 858 (1975).

Ownership/Title. "Owner" as used in V.C. §17150 for the purpose of creating liability is not synonymous with that word as used in the ordinary sense of referring to person (s) whose title is good as against all other; under the V.C. there may be several "owners" at any one time and all may be liable to injured third person. *Brennan v. Gordon Ball*, 163 Cal. App. 3d 832, 835, 210 Cal. Rptr. 32 (1985).

Pedestrians. Defined in V.C. §467. Driver must yield right of way to pedestrian in a marked crosswalk at intersection or elsewhere. V.C. §21950. However, pedestrian must yield to drive if crossing between intersections. V.C. §21954.

No-fault Legislation has not been enacted to date despite numerous attempts to pass such legislation in past few years.

Motorized bicycles must comply with federal motor vehicle safety standards established under the National Traffic and Motor Vehicle Act of 1966.

Seat Belts required pursuant to V.C. §27315.

Service of Process. Operation of motor vehicle on highways by non-resident owner, his agent, or by any person with owner's express or implied permission, is equivalent to an appointment by such non-resident of Director of Motor Vehicles to be his attorney upon whom process may be served in any action growing out of accident resulting from operation of said vehicle on highways. Summons and complaint is served upon Director at Sacramento and notice of such service, with copy of summons and complaint, sent by registered mail to non-resident defendant. V.C. §§17450-17463. Retention of driver's license by former resident confers jurisdiction for accidents arising in California. V.C. §17460.

Speed Limit. Except as provided by statute, no person may drive a vehicle on a highway at speed greater than 65 mph. V.C. §§22349, 22366. However, notwithstanding any provision of law, the speed limit of a two-lane highway is 55 mph, unless posted otherwise. V.C. §22349(b). The "basic speed law" provides no person may drive on highway at a speed greater than is reasonable or prudent under the conditions (road, weather, etc.) V.C. §22350. As of the end of 1995, the maximum speed limit was increased to 65 m.p.h. upon any state highway, and 70 m.p.h. subject to the approval of the California Highway Patrol and §22406 of the Vehicle Code. V.C. §22356.

Trailers/Weight Limits. *See* V.C. §§35550, 35551.

Uninsured and Underinsured Endorsements. Uninsured and underinsured motorist coverage is mandatory. Ins. C. §§11580.2 (a) (1), 11580.2 (p) (7). However, insured may elect to delete coverage entirely or with respect to person designated by name. *Id.* An uninsured motor vehicle includes an underinsured motor vehicle as defined in Ins. C §11580.2 (p). "Uninsured motor vehicle" means a motor vehicle for which there is no bodily injury insurance or bond applicable, or if so the company writing insurance or bond denies coverage, or liability insurer is insolvent or vehicle is underinsured. Ins. C. §11580.2 (b). "Underinsured motor vehicle" means a motor vehicle that is insured but for an amount that is less than the uninsured motorist limits carried on the motor vehicle of the injured person. Ins. C. §11580.2 (p) (2).

## AVIATION

Aircraft Financial Responsibility Act - Pub. Util. C. §§24230-24410. Act establishes minimum standards for aircraft financial responsibility (Put. Util. C. §24410).

Act is designed to provide coverage protection to ground victims otherwise unable to foresee or guard against risk of loss or injury due to small aircraft in flight. *Franks v. Amelia Reid Aviation*, 163 Cal. App. 3d 1207, 1209, 210 Cal. Rptr. 127 (1985). Act does not apply to U.S. controlled aircraft (Pub. Util. C. §24243 (a,b,c); commercial air operator (Pub. Util. C. §24243 (d); aircraft/operator regulated by Agriculture Code (Pub. Util. C. §24243 (e); and/or any person insured under Pub. Util. C. §24350 (Pub. Util. C. §24243 (f). Act does not contain sanction of license suspension, but does impose criminal penalties on those who fail to comply (Pub. Util. C. §24400 *et seq.*).

**Limits to Liability.** Liability of aircraft owner limited to \$15,000 for injury or death of one person, \$30,000 for more than one, \$5,000 for property damage. Pub. Util. C. §21404.1 (a). Punitive damages cannot be imputed to owner, but damages may be imposed for owner's own wrongful conduct. *See* Pub. Util. C. §21404.1 (b). Vending machine air life and accident policy, limiting liability to travel on scheduled air carrier, covers death on non-scheduled plane where passenger transferred due to interruption of flight. *Steven v. Fidelity and Cas. Co.*, 58 Cal. 2d 862, 27 Cal. Rptr. 172 (1962).

**Service of Process.** Department of Aeronautics in the Business & Transportation Agency is deemed appointed as attorney who may be served with legal process on behalf of owner or operator of aircraft flying over this state. Pub. Util. C. §24254 (a). Service of process. Pub. Util. C. §24254 (b). Proof of service of process. Pub. Util. C. §24254 (c).

**Policy Exclusions.** Life insurer had burden to prove death occurred within exclusion clause as to travel other than in commercial planes though proof of loss stated insured died in military airplane crash. *Bebbington v. California*, 30 Cal. 2d 157, 159, 180 P.2d 673 (1947); *Distinguished in Zuckerman v. Underwriters*, 42 Cal. 2d 460, 474, 267 P.2d 777 (1954); *limited in Aydin Corp. v. First State*, 18 Cal. App. 4th 1183, 1189, 959 P.2d 1213 (1998). Burden on beneficiary of Accident Policy to prove insurer had passenger status in aircraft to avoid aviation exclusion. *Heller v. Bankers Life and Cas. Co.*, 220 Cal. App. 2d 184, 187-188, 33 Cal. Rptr. 586 (1963). Nor does Aviation Exclusion Rider preclude recovery where after crash in desert, insured apparently died from exposure. *Chambers v. Kansas City Life*, 156 Cal. App. 2d 265, 268-269, 319 P.2d 387 (1957).

## BROKERS

See "AGENTS AND BROKERS."

## BURGLARY INSURANCE

Burglary insurance includes insurance against loss by burglary or theft or both. *See* Ins. C. §112; *H. Liebes & Co. v. United States. Cas. Co.*, 59 Cal. App. 758, 211 P. 842 (1922). For proof of loss *see Nixon v. Indemnity*, 117 Cal. App. 410, 412, 3 P.2d 968 (1931). Although burglary insurance insures against criminal acts, strict rules of criminal law do not necessarily govern contract interpretation; instead such policies are construed according to principles of contract law. *Granger v. New Jersey Ins.*, 108 Cal. App. 290, 293, 291 P. 698 (1930).

## CANCELLATION

See "ACCIDENT AND HEALTH INSURANCE, Contracts"; "LIABILITY INSURANCE"; "FIRE INSURANCE, Contracts."

## CHATTEL MORTGAGE

See "FIRE INSURANCE."

## CONSTRUCTION OF POLICY

**Ambiguity of Terms.** Insured favored when construing ambiguous language in insurance policies, but when clear, court cannot change contract by forced construction. *Pacific Emp. Ins. Co. v. American Mut. Liab. Ins. Co.*, 65 Cal. 2d 318, 323-324, 54 Cal. Rptr. 385 (1966) 1007-1003; *McGreehan v. California State Auto Ass'n*, 235 Cal. App. 3d 997, 1002, 1 Cal. Rptr. 2d 235 (1991). Words are to be taken in their plain, ordinary and popular sense. *Reserve Ins. Co. v. Pisciotto*, 30 Cal. 3d 800, 807, 180 Cal. Rptr. 628 (1982); *Bank of West v. Sup. Ct.*, 2 Cal. 4th 1254, 1265, 10 Cal. Rptr. 2d 538 (1992). Uncertainties or ambiguities should be construed most strongly against insurer. Doctrine of "reasonable expectation of coverage" applied where ambiguity found. *Harris v. Glens Falls*, 6 Cal. 3d 699, 100 Cal. Rptr. 133 (1972). Any person upon affidavit showing his interest in a policy may apply to the Insurance Commissioner for a certificate of facts or information. Ins. C. §12950. If insurer fails to disclose within 90 days the Commissioner shall revoke its certificate of authority. Ins. C. §12953.

**Conditional Receipt.** Life policy is issued on completion of application and payment of first premium, and may and generally does become immediately effective, unless rejected. *Ransom v. Pennsylvania Mut. Life*, 43 Cal. 2d 420, 425, 274 P.2d 633 (1954); *See also Metropolitan Life v. Grant*, 268 F.2d 307 (9th Cir. 1959); *Metropolitan Life v. Wood*, 302 F.2d 802 (9th Cir. 1952); *Wilson v. Western*, 235 Cal. App. 3d 981, 985, 1 Cal. Rptr. 2d 157 (1991). The same applies to a disability policy. *Brunt v. Occidental Life*, 223 Cal. App. 2d 179,



35 Cal. Rptr. 492 (1963). If conditional receipt contains true conditions precedent then there is no liability prior to acceptance of risk. *See Young v. Metropolitan Life*, 272 Cal. App. 2d 453, 458, 77 Cal. Rptr. 382 (1969). But those conditions must be brought to attention of applicant. *See Young v. Metropolitan Life*, 20 Cal. App. 3d 777, 782, 98 Cal. Rptr. 77 (1971); *see also Thompson v. Occidental Life*, 9 Cal. 3d 904, 912, 109 Cal. Rptr. 473 (1973); *Smith v. Westland*, 15 Cal. 3d 111, 122, 123 Cal. Rptr. 649 (1975). When analyzed properly, all conditions are conditions precedent and only purpose of distinction is to allocate burden of proof between the parties. *Logan v. John Hancock Mut. Life Ins. Co.*, 41 Cal. App. 3d 988, 994, 116 Cal. Rptr. 528 (1974). Contract of insurance created by conditional receipt is not terminated by rejection of insured's application unless applicant notified of rejection and premium payment refunded to him. *Smith v. Westland Life*, 15 Cal. 3d 111, 120, 123 Cal. Rptr. 649 (1975). Language in conditional receipt which required finding that coverage was afforded by that receipt also required finding that insurability was measured at time of receipt, not at time of subsequent medical examination. *See Miller v. Republic*, 714 F.2d 958, 960-961 (9th Cir. Cal. 1983).

**Inconsistent Policy Terms and Endorsements.** To the extent that the two cases are inconsistent, new rule holds that provision in homeowner's policy providing for automobile related accidents on immediately adjoining ways does not transform policy into an automobile policy. *Gray v. Zurich*, 65 Cal. 2d 263, 54 Cal. Rptr. 104 (1966); *Merrill & Seeley v. Admiral Ins. Co.*, 225 Cal. App. 3d 624, 275 Cal. Rptr. 280 (1990). If meaning layperson would ascribe to language in insurance contract is not ambiguous, courts apply that meaning. *AIU Ins. v. Sup. Ct.*, 51 Cal. 3d 807, 822, 274 Cal. Rptr. 820 (1990).

**Incontestable clause after lapse of time specified prevents nullification of the contract for any cause not excepted by the clause.** *New York Life v. Hollender*, 38 Cal. 2d 73, 77, 237 P.2d 510 (1951); *Schaefer v. Cal-West.*, 262 Cal. App. 2d 840, 69 Cal. Rptr. 183 (1968). Exclusions from coverage, including exclusions from coverage afforded by group insurance policies, must be brought to attention of insured. *Jones v. Crown Life Ins. Co.*, 86 Cal. App. 3d 630, 639, 150 Cal. Rptr. 375 (1978). Insured must receive notice of "reductions" in coverage or insurer is bound by greater coverage in earlier policy. Notice of the specific reductions in coverage must be set forth in separate brochure. *Davis v. U.S.A.A.*, 223 Cal. App. 3d 1322, 1332, 273 Cal. Rptr. 224 (1990). Endorsement (aka rider) forms part of the insurance contract. *American Bldg. Maint. v. Indemnity Ins.*, 214 Cal. 608, 7 P.2d 305 (1932). If policy terms and endorsement conflict, endorsement controls. *Southwestern Funding v. Motors Ins.*, 59 Cal. 2d 91, 94, 28 Cal. Rptr. 161 (1963);

*Mission Nat'l v. Coachella Valley*, 210 Cal. App. 3d 484, 497, 258 Cal. Rptr. 639 (1989).

**Oral Binder.** "Binder" is temporary contract of insurance. An oral contract of insurance is merged into a subsequent written contract if not a continuing collateral agreement. *Dutton D. Co. v. USF&G*, 136 Cal. App. 574, 579, 29 P.2d 316 (1934).

## DAMAGES

**Appellate Review - Excessive Verdicts.** Large award could not be justified when injuries were minor or temporary. *Van Derhoof v. Chambon*, 121 Cal. App. 118, 132, 8 P.2d 925 (1932); *Thompson v. Strona*, 5 Cal. App. 3d 705, 712, 85 Cal. Rptr. 350 (1970). Injuries serious and large recovery warranted, but too large compared with judgments upheld in other cases. *See Maede v. Oakland High Sch. Dist.*, 212 Cal. 419, 425, 298 P. 987 (1931); *Mondine v. Sarlin*, 11 Cal. 2d 593, 599, 81 P.2d 903 (1938); *Loeb v. Kimmerle*, 215 Cal. 143, 163, 9 P.2d 199 (1932). Appellate Court cannot tamper with excessive punitive damage award unless jury acted with passion or prejudice as a matter of law. *Pistorious v. Prudential*, 123 Cal. App. 3d 541, 554, 176 Cal. Rptr. 660, 668 (1981).

**Arbitration Awards.** Arbitration awards can have collateral estoppel effect if judgment following arbitration actually, necessarily and finally resolved issue and contains all elements intrinsic to collateral estoppel. *State Farm v. Sup., Ct.*, 211 Cal. App. 3d 5, 13-14, 259 Cal. Rptr. 50 (1989).

**Comparative Negligence.** Seminal case is *Li v. Yellow Cab*, 13 Cal. 3d 804, 119 Cal. Rptr. 858 (1975), which adopts "pure" comparative negligence by assigning responsibility and liability for damage in direct proportion to the fault of the persons whose negligence has brought such damage about, and damages awarded shall be diminished in proportion to the amount of fault attributable to that person.

**Indemnification.** No contract of insurance is valid unless insured has an insurable interest. Ins. C. §280. Without insurable interest, policy is void as against public policy. *Jiminez v. Protective Life*, 8 Cal. App. 4th 528, 536, 10 Cal. Rptr. 2d 326, 330 (1992).

**Psychic Injuries - Mental Pain and Suffering.** Damages for emotional distress or mental anguish usually not recoverable for breach of contract. *Sawyer v. Bank of America*, 83 Cal. App. 3d 135, 139, 145 Cal. Rptr. 623, 625 (1978). Said damages, however, may be available for intentional infliction of emotional distress. *Frazier v. Metropolitan Life*, 169 Cal. App. 3d 90, 101, 214 Cal. Rptr. 883, 889 (1985); *Fletcher v. Western Nat'l Life*, 10 Cal. App. 3d 376, 401-402, 89 Cal. Rptr. 79, 93-94

(1970); *Sprague v. Equifax*, 166 Cal. App. 3d 1012, 213 Cal. Rptr. Cal. Rptr. 69 (1985); or statutory violations, *Schlauch v. Hartford*, 146 Cal. App. 3d 926, 936, 194 Cal. Rptr. 658, 664 (1983).

**Punitive Damages.** C.C. §3294 provides for punitive damages when defendant is guilty of oppression, fraud or malice, express or implied, to “recover damages for sake of example and by way of punishing defendant.” Must be proved by clear and convincing evidence. *Mock v. Michigan*, 4 Cal. App. 4th 306,328, 5 Cal. Rptr. 2d 594 (1992). Punitive or exemplary damages may not be awarded in suit on contract. *Middlebrook, etc. v. Southern Sav. & Loan Assn.*, 18 Cal. App. 3d 1023, 1038, 96 Cal. Rptr. 338 (1971); *Roam v. Koop*, 41 Cal. App. 3d 1035, 1040, 116 Cal. Rptr. 539 (1974). However, when insurer unreasonably and in bad faith withholds payment of claim of its insured, it is subject to liability in tort. It would then also be liable for punitive damages if it acted maliciously or oppressively. *Egan v. Mutual of Omaha*, 24 Cal. 3d 809, 818-819, 169 Cal. Rptr. 691 (1979); *Flyer’s v. Ticor*, 185 Cal. App. 3d 1149, 230 Cal. Rptr. 276 (1986). Where plaintiff fails to provide sufficient evidence of defendant’s financial condition he or she may be deemed to forfeit recovery of punitive damages and is not entitled to retrial after reversal on appeal. *Kelly v. Haag*, 145 Cal. App. 4th 910, 52 Cal. Rptr. 3d 126 (2006).

In *Sharp v. Automobile Club of So. Cal.*, 225 Cal. App. 2d 648, 37 Cal. Rptr. 585 (1964), punitive damages awarded under fraud when defendant’s agent represented it would pay up to \$5,000 medical expense irrespective of other medical insurance, and when it was not defendant’s policy to pay such. Misrepresentation as to coverage which defendant never intended to furnish justified punitive and exemplary damages. *Wetherbee v. United Ins. Co. of America*, 265 Cal. App. 2d 921, 71 Cal. Rptr. 764 (1968). Upon new trial, \$200,000 was awarded and affirmed in *Wetherbee v. United Ins. Co. of America*, 18 Cal. App. 3d 266, 95 Cal. Rptr. 678 (1971). See also *Walker v. Signal*, 84 Cal. App. 3d 982, 149 Cal. Rptr. 119 (1978). In *Finney v. Lockhart*, 35 Cal. 2d 161, 217 P.2d 19 (1950), compensatory damages awarded were but \$1, while punitive damages were \$2,000. Wealth of defendant is to be considered in determining amount of award for punitive damages, but award should not exceed level necessary to properly punish and deter. *Adams v. Murakami*, 54 Cal. 3d 105, 110, 284 Cal. Rptr. 318 (1991); *Neal v. Farmers Ins. Exch.*, 21 Cal. 3d 910, 928, 148 Cal. Rptr. 389 (1978). Absent evidence of uncompensated harm, constitutionality of punitive damages award shall be evaluated against compensatory damages award; \$1.7 million punitive damages award is excessive and reduced to \$50,000 in light of \$15,000 in compensatory damages. *Simon v. San Paolo U.S. Holding Com-*

*pany*, 35 Cal. 4th 1159, 29 Cal. Rptr. 3d 379 (2005). In light of *Simon v. San Paolo Holding Company, supra*, 35 Cal. 4th 1159, a trial court has authority to enter a JNOV setting the maximum constitutionally allowable punitive damages awards. *Gober v. Ralphs Grocery Co.*, 137 Cal. App. 4th 204, 40 Cal. Rptr. 3d 92 (2006). A jury cannot punish defendant for the effects/results of tortious conduct toward non-parties, however it may consider harm to non-parties when deciding how reprehensible the conduct toward plaintiff was and therefore what amount should be awarded in punitive damages as compared to compensatory damages. *Phillip Morris U.S.A. v. Williams*, 127 S. Ct. 1057 (2007). Defendant is entitled to jury instruction in a punitive damages case providing that the jury may not punish the defendant for harm allegedly caused to nonparties. *Bullock v. Philip Morris USA, Inc.* 159 Cal. App. 4th 655, 71 Cal. Rptr. 3d 775 (2008).

Pre-judgment interest allowed in actions for personal injury, where defendant fails to accept settlement offer and plaintiff obtains a more favorable judgment. C.C. §3291; *Gutierrez v. State Ranch Services*, 150 Cal. App. 3d 83, 84, 198 Cal. Rptr. 16 (1983). But “bad faith” action is not action for personal injury. *Gourley v. State Farm*, 53 Cal. 3d 121, 123-124, 3 Cal. Rptr. 2d 666 (1991). If insurance company unreasonably fails to pay claim by its insured for insurance benefits, then insured is entitled to recover attorney’s fees reasonably incurred to recover those benefits. *Brandt v. Superior Court*, 37 Cal. 3d 813, 210 Cal. Rptr. 211 (1985).

**Collateral Source Rule.** Where a person suffers personal injury or property damage by reason of wrongful act of another, an action against wrongdoer for the damages suffered is not precluded nor is amount of damages reduced by the receipt by him if payment for his loss from a source wholly independent of the wrongdoer. *Anheuser-Busch v. Starley*, 28 Cal. 2d 347, 349, 170 P.2d 448 (1946); *Helfand v. Southern Calif. Rapid Transit*, 2 Cal. 3d 1, 6, 84 Cal. Rptr. 173 (1970).

**Statutory Caps on Awards.** For measure of tort damages, see C.C. §3333. For measure of contract damages, see C.C. §3300. Under C.C. §3333.2 for non-economic losses in medical malpractice actions (pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damage) statutory cap is \$250,000.

## DEATH

See Law Digest Tables.

Presumption of death from unexplained absence. *Benjamin v. District*, 171 Cal. 260, 152 P. 731 (1915); *Minnis v. Equitable*, 204 Cal. 180, 184, 267 P. 538



(1928). Constitutionality of missing persons statute. *Sevier v. Bank of America*, 101 Cal. App. 2d 184, 189-190, 225 P.2d 3 (1950).

Presumption of disputable presumption that person not heard from in seven years is dead. C.C.P. §1963(26) was repealed in 1965, operative January 1, 1967 and repealed by Evid. C. §667 which now states: "A person not heard from in five years is presumed dead." *Darrell v. Mutual Benefit*, 44 Cal. App. 523, 527-528, 186 P. 620 (1919) still stands in that it is not necessary that insurer prove insured is alive, but only overcome the force of the disputable presumption. Presumption need not be proved false, but merely balanced or equalized. *Valentine v. Provident*, 12 Cal. App. 2d 616, 620, 55 P.2d 1243 (1936). The rule is different when the presumption resides with a defending party. In such case, the moving party has an affirmative duty to overcome the presumption by preponderance of evidence. *Hooper v. Bronson*, 123 Cal. App. 2d 243, 249, 266 P.2d 590 (1954). Diligent inquiry must have been made to establish this presumption. *Kaufmann v. New York*, 44 Cal. App. 313, 315, 186 P. 360 (1919). Note should be taken that this requirement appears to depend on circumstances. *Estate of Bassi*, 234 Cal. App. 2d 529, 549, 44 Cal. Rptr. 541 (1965). Circumstances surrounding one's disappearance, together with additional facts, may be such that the one endeavoring to establish death may not be required to prove diligent effort to ascertain his whereabouts. *Estate of Christin*, 128 Cal. App. 625, 629, 17 P.2d 1068 (1933). See *Ashbury v. Sanders*, 8 Cal. 62; and *Pollack v. Hann*, 3 Cal. 3d 264, 475 P.2d 213 (1970), which held that to shorten seven year period (now 5 year), there must be evidence of some specific peril. Also, see *Western Grain v. Pillsbury*, 173 Cal. 135, 138-139, 159 P. 423 (1916), holding that absence coupled with other circumstances may be sufficient to prove death prior to expiration of statutory period. Distinguished by *Lesser v. New York Life*, 53 Cal. App. 236, 239-240, 200 P. 22 (1921), which held that it is unnecessary that decedent came in contact with some specific peril to shorten period if evidence of married life, financial condition and other circumstances tend to show improbability of absence due to any cause other than death. See *Conservatorship of Geiger*, 3 Cal. App. 4th 127, 4 Cal. Rptr. 2d 252 (1992); *People v. Niccoli*, 102 Cal. App. 2d 814, 819-820, 228 P.2d 827 (1951). Disappearance with considerable sum of money after mysterious phone call and subsequently car found with stolen license plates sustained finding of death on or about date of disappearance. *McLaughlin v. Northern Life*, 28 Cal. App. 2d 425, 427-428, 82 P.2d 725 (1938).

## DISABILITY

Classifications. Total disability exists though insured may be able to perform few occasional or trivial acts if he is not able to do any substantial portion of his work. *Erreca v. Western States Life Ins. Co.*, 19 Cal. 2d 388, 396, 121 P.2d 689 (1942); *Moore v. American*, 150 Cal. App. 3d 610, 626-627, 197 Cal. Rptr. 878 (1984). Insured is not totally disabled if he is physically and mentally capable of performing substantial portion of the essential work connected with his employment. *Bareno v. Employers Life Ins. Co.*, 7 Cal. 3d 875, 886-887, 103 Cal. Rptr. 865 (1972); *Erreca v. Western States Life Ins. Co.*, 19 Cal. 2d 388, 396, 121 P.2d 689 (1942). Disability held immediate and continuous if processes of nature are at work during period in question. *Frenzer v. Mutual Benefit*, 27 Cal. App. 2d 406, 413, 81 P.2d 197 (1938). Further held that clause "total disability... which ... has existed continuously for not less than three months shall be presumed to be permanent" created conclusive presumption of permanent disability during period total continuously existed. Element of pain held immaterial. *Dietlin, infra*. See also *Ives v. Prudential*, 12 Cal. App. 2d 306, 55 P.2d 273 (1936). What amounts to disability is a question of fact. *Shavarsh Chuchian v. Metropolitan Life*, 103 Cal. App. 2d 760, 765, 230 P.2d 381 (1951). Total disability defined to exclude ability to work with reasonable continuity in customary occupation or other occupation appropriate to training, education, etc. *Culley v. New York*, 27 Cal. 2d 187, 191, 163 P.2d 698 (1945); *Moore v. American*, 150 Cal. App. 3d 610, 618, 197 Cal. Rptr. 878 (1984); *Zunino v. Carleson*, 33 Cal. App. 3d 36, 108 Cal. Rptr. 769 (1973). No coverage for employee under "accident benefit policy" for carpal tunnel syndrome caused by years of typing, as such an injury is not an accident, *i.e.*, a specific series of events manifesting itself at an identifiable time which caused identifiable harm at the time it occurred. *Gin v. Pennsylvania Life Ins. Co.*, 134 Cal. App. 4th 939, 36 Cal. Rptr. 3d 571 (2005).

"Any occupation " or "any work" are "construed to mean ordinary employment of particular person insured, or such other employment, if any approximating same livelihood, as insured might fairly be expected to follow, in view of his station, circumstances, and physical and mental capabilities..." *Wright v. Prudential*, 27 Cal. App. 2d 195, 209, 80 P.2d 752 (1938); *Erreca v. Western States Life Ins. Co.*, 19 Cal. 2d 388, 121 P.2d 689 (1942); *Austero v. National Cas. Co.*, 84 Cal. App. 3d. 1, 20, 148 Cal. Rptr. 653 (1978); *Moore v. American*, 150 Cal. App. 3d 610, 618, 197 Cal. Rptr. 878 (1984). Inability to perform one or more important daily duties was held to be but partial disability under both types of policies. *Dietlin v. Missouri State*, 126 Cal. App. 15, 14 P.2d



331, 15 P.2d 188 (1932); *Dietlin v. General American*, 4 Cal. 2d 336, 49 P.2d 590 (1935).

Disability recurring while policy in force, proof given thereafter, held covered. *Fritz v. Metropolitan*, 50 Cal. App. 2d 570, 123 P.2d 622 (1942).

Presumption of Permanency. See *Erreca v. Western States Life Ins. Co.*, 19 Cal. 2d 388, 403-404, 121 P.2d 689 (1942).

Proof of Condition. Physician's testimony that insured "unable to engage in any occupation or perform any work for compensation of financial value" objectionable as it is conclusion or opinion and goes to ultimate issue and includes conclusion beyond field of medical science. *Gardenswartz v. Equitable*, 23 Cal. App. 2d Supp. 745, 753, 68 P.2d 322 (1937). However, questions apparently along same line based upon physician's observation and treatment of others suffering from same difficulties permissible. *Bochner v. Equitable*, 4 Cal. App. 2d 670, 672, 41 P.2d 365 (1935).

Insurance against loss of time but not in excess of money value of time did not require proof of value of time if occupation remained same. *Bean v. Travelers Ins. Co.*, 94 Cal. 581, 583-584, 29 P. 1113 (1892). Policy providing benefits for immediate and continuous disability and benefits from date of accident to date of loss held to provide two modes of indemnity. *Claxton v. American Casualty*, 30 Cal. App. 457, 158 P. 544 (1916). Under provision for indemnity from accident to loss no recovery allowed where loss and accident are contemporaneous. *DeLeon v. Pacific Mutual*, 186 Cal. 488, 491, 199 P. 789 (1921).

Provisions that disease or cause of disease must originate after policy date held to bar recovery in *Cohen v. Metropolitan*, 32 Cal. App. 2d 337, 346-347, 89 P.2d 732 (1939). See also, *McPherson v. Mutual Benefit*, 37 Cal. App. 2d 56; 98 P.2d 777 (1940); *Fohl v. Metropolitan Life*, 54 Cal. App. 2d 368, 129 P.2d 24 (1942). Overpayments recovered in *Cohen case, supra*, and *John Hancock v. Markowitz*, 62 Cal. App. 2d 388, 144 P.2d 899 (1944). Contrary holding if "provided such disability occurred after insurance" although causes may have existed from birth. *Hill v. New York*, 38 Cal. App. 2d 627, 631, 101 P.2d 752 (1940).

If policy requires that disability arise out of injury or sickness incurred after commencement of coverage, then test is when disease first manifested itself, not when medical cause first originated. *Bower v. Roy-Al Corp.*, 33 Cal. App. 3d 1027, 1040-1041, 109 Cal. Rptr. 612 (1973); distinguished in *Callahan v. Mutual Life*, 7 Cal. App. 4th 1089 (1999); *Mogil v. California Physicians*, 218 Cal. App. 3d 1030, 267 Cal. Rptr. 487 (1990).

Extended walks and visits to physician's office barred recovery. *Carabelli v. Mountain States Life*, 8 Cal. App. 2d 115, 46 P.2d 1004, 1005-1006 (1935); *Norager v. Mountain States*, 10 Cal. App. 2d 188, 51 P.2d 443 (1935). Visits to physician's office in wheel chair and to barber shop if assisted approved. *Nelson v. Washington Fidelity*, 135 Cal. App. 731, 27 P.2d 779 (1933).

## FINANCIAL RESPONSIBILITY LAW

See Law Digest Tables; "AUTOMOBILES, Compulsory Coverage."

Financial responsibility required. V.C. §16000 *et seq.*

## FIRE INSURANCE

Arson. Voluntary and intentional burning of insured property by insured gives insurer valid defense against collection of fire insurance benefits. *Singleton v. Hartford*, 105 Cal. App. 320, 287 P. 529 (1930). Insurer does not have to establish that insured personally set fire to prevail on arson defense. *Don Burton v. Aetna*, 575 F.2d 702, 705 (9th Cir. 1978).

Appraisal and Arbitration. Ins. C. §2071. Standard Provision. No cause of action until appraisal made within terms of policy. *Adams v. Southern British*, 70 Cal. 198, 11 P. 627 (1886); *Rives-Strong v. Bank Amer.*, 50 Cal. App. 2d 810, 123 P.2d 942 (1942). Demand for arbitration must be made within required time or right to arbitration is waived. *Jordan v. Friedman*, 72 Cal. App. 2d 726, 727, 165 P.2d 728 (1946); *Winchester v. Northern British*, 160 Cal. 1, 5-6, 116 P. 63 (1911). Denial of liability is waiver of arbitration provision. *Jacobs v. Farmers Mut.*, 5 Cal. App. 2d 1, 6, 41 P.2d 960 (1935); *Farnum v. Phoenix*, 83 Cal. 246, 262-263, 23 P. 869 (1890); *Genuser v. Ocean*, 57 Cal. App. 2d 979, 983, 135 P.2d 670 (1943). Failure to give notice to insured so he could present evidence of value of household goods invalidated appraisal and arbitration. *Stockwell v. Equitable*, 134 Cal. App. 534, 542, 25 P.2d 873 (1933). Arbitration is not condition precedent to suit. *Palma v. Watson*, 148 Cal. App. 2d 879, 307 P.2d 689, (1957). Fire damage under open policy measured by new replacement value rather than old (deteriorated) value. *Continental Ins. v. Dunne*, 226 F.2d 471, 473 (9th Cir. Cal. 1955); Ins. C. §2051.

Assignment. Fire insurance policy not assignable without consent of insurer. *Greco v. Oregon Mut. Fire Ins. Co.*, 191 Cal. App. 2d 674, 682, 12 Cal. Rptr. 802 (1961); *Quemetco v. Pacific*, 24 Cal. App. 4th 494, 498, 29 Cal. Rptr. 2d 627 (1994). Policy void, if assigned before loss, unless otherwise agreed in writing. Ins. C.



§520. Equitable assignment, policy assigned without transferring property is valid without insurer's consent unless specifically prohibits policy terms. *Bergson v. Builders*, 38 Cal. 541 (1869); *University of Judaism v. Transamerica*, 61 Cal. App. 3d 937, 132 Cal. Rptr. 907 (1976). Provision voiding policy in case of assignment without consent of insurer does not include transfer as collateral security. *Bibend v. Liverpool*, 30 Cal. 78 (1866). Provision for payment to mortgagee is provisional assignment, and does not substitute mortgagee as party insured. *Holbrook v. Baloise*, 117 Cal. 561, 566, 49 P. 555 (1897); *Sharp v. Scottish Union*, 136 Cal. 542, 69 P. 253 (1902). Clause providing for forfeiture of policy assigned can be orally waived. *Limsky v. Scottish*, 68 Cal. App. 688, 689, 229 P. 1017 (1924).

**Chattel Mortgages.** Chattel mortgage must be regarded with reference to its actual effect and not merely in respect to its form. *Raulet v. Northwestern*, 157 Cal. 213, 107 P. 292 (1910). Tax return listing title in third person not prejudicial. *Malter v. National Fire*, 54 Cal. App. 198, 200, 201 P. 605 (1921). If insurer had knowledge of condition of title it is estopped from defense that plaintiff not sole and unconditional owner. *Foristiere v. Aetna*, 209 Cal. 92, 95, 285 P. 849 (1930). Notice to company's agent of subsequent chattel mortgage held ineffective in view of limitation on agent's authority in policy and requirement of written consent. *Hargett v. Gulf*, 12 Cal. App. 2d 449, 55 P.2d 1258 (1936); *Vyn v. Northwest*, 47 Cal. 2d 89, 301 P.2d 869 (1956).

**Contract Policy - Binder.** Covering note is contract of present insurance and "binder" contract or "keep covered" contract need not express any consideration, there being implied agreement to pay usual premium. *Law v. Northern Assur.*, 165 Cal. 394, 132 P. 590 (1913); *Globe v. Liberty*, 16 Cal. App. 2d 76, 79, 60 P.2d 200 (1936).

**Cancellation.** Standard form for stock companies provides for cancellation by either party. If cancelled by company, unearned premium is returned; if cancelled by assured, premium is short rated. Ins. C. §2071. Under above provision return of unearned portion of premium paid is not condition precedent to cancellation of policy by insurer. *Mangrum v. Law Union*, 172 Cal. 497, 501, 157 P. 239 (1916); *Jennings v. Prudential*, 48 Cal. App. 3d 8, 18-19, 121 Cal. Rptr. 125 (1975). If any material representations are false, tender by insurer of premium and notice of cancellation rescinds contract. *Rankin v. Amazon*, 89 Cal. 203, 208, 26 P. 872 (1891). Insurer may rescind fire insurance policy on the grounds of insured's unintentional but material misrepresentation in an insurance application, even though the standard form fire insurance policy appears to limit rescission to willful misrepresentation. *Mitchell v. United Nat. Ins. Co.*, 127 Cal. App. 4th 457, 25 Cal. Rptr. 3d 627 (2005).

Agent employed to place insurance cannot cancel for insured. *Cronenwett v. Iowa Underwriters*, 44 Cal. App. 571, 575-576, 186 P. 824 (1919); *K.C. Working v. Eureka*, 82 Cal. App. 2d 120, 129, 185 P.2d 832 (1947). Nor is policy cancelled by returning to broker not authorized to act for insured, part of unearned premium in cash, with new policy. *Quong Tue Sing v. Anglo-Nevada*, 86 Cal. 566, 25 P. 58 (1890); *Hooker v. American*, 12 Cal. App. 2d 116, 54 P.2d 1128 (1936). Cases distinguish situation wherein broker has implied authority to cancel. *Ferrar v. Western*, 30 Cal. App. 489, 159 P. 609 (1916). Broker has power to cancel when insured's instructions to procure a reduction in insurance could not be done without canceling policy. *Stevenson v. Sun*, 17 Cal. App. 280, 119 P. 529 (1911).

**Substitution of policies constitutes cancellation.** *Strauss v. Dubuque*, 132 Cal. App. 283, 292-293, 22 P.2d 582 (1933); *Spott v. Industrial Indem.*, 30 Cal. App. 3d 797, 806, 106 Cal. Rptr. 710 (1973).

**Cancellation is effective under five-day notice clause,** although five days do not elapse between receipt of notice and date fixed for cancellation, where no loss occurs until after such date. *American Glove Co. v. Pennsylvania Fire*, 15 Cal. App. 77, 113 P. 688 (1910). Standard Form County Fire Policy provides for withdrawal and cancellation on five days' notice, pro-rating claim liabilities and return of unearned premium. Ins. C. §6010.

**Mortgage Clause.** Where policy provides that loss be payable to mortgagee as his interest appears, there are two contracts and mortgagor may lose his right of recovery without affecting mortgagee's rights. *Witherow v. United American*, 101 Cal. App. 334, 340, 281 P. 668 (1929). Void mortgage not insurable interest. *Chapman v. England*, 231 F.2d 606, 610-611 (9th Cir. Cal. 1956).

**Under joint policy of mortgagor and mortgagee,** notice to one of parties only does not effect cancellation as to other under standard mortgage clause. *Lauman v. Springfield*, 184 Cal. 650, 652-653, 195 P. 50 (1921); *Tarleton v. De Veuve*, 113 F.2d 290, 298 (9th Cir. Cal. 1940) (notice to mortgagee is prerequisite to cancellation under standard policy containing mortgage clause).

**Reformation.** General rule is reformation is available where due to fraud, inequitable conduct, or mutual mistake, policy does not express actual and real agreement of parties. *American Surety v. Heise*, 136 Cal. App. 2d 689, 695-696, P.2d 103 (1955). Proof of discrepancy must be clear, convincing and satisfactory. *Taff v. Atlas*, 58 Cal. App. 2d 696, 700, 137 P.2d 483 (1943). Mistake of one party which other party knew at the time (unilateral mistake) may be basis for reformation. *Eagle v. Industrial Acc.*, 92 Cal. App. 2d 222, 224, 206 P.2d 459

(1933). Insured's failure to read policy does not prevent reformation. *National Auto v. Industrial Acc.*, 34 Cal. 2d 20, 26, 206 P.2d 841 (1949).

**Severable Contracts.** Whether fire insurance policy is severable is question of intent at time of entering into contract, determined by language employed. *Goorberg v. Western Assur.*, 150 Cal. 510, 515, 89 P. 130 (1907). Severability arises where policy, in consideration of gross premium, insures distinct items for different amounts; where risk on one item affects risk on another item, policy is entire, but where risk on one item is separate and distinct from others so that one does not affect the other, policy is severable. *Goorberg, supra*, at P. 513.

**Standard Policy Provisions.** Standard fire policy adopted by State Legislature March 1909. (Stats. 1909, P. 404). Now provided for by Ins. C. §§2071 to 2083, inclusive. "All fire policies must conform with exception of additions and alterations permitted by these actions. Failure to do so is misdemeanor."

**Coverage.** Provision "while occupied only for barber shop purposes" was held condition precedent to recovery. Other use was shown to have been prejudicial. *Rizzuto v. National*, 92 Cal. App. 2d 143, 145, 206 P.2d 431 (1949).

If negligence of others is prime or moving cause of loss, then "All Risk" policy provides coverage if not specifically excluded. *Garvey v. State Farm*, 48 Cal. 3d 395, 408, 257 Cal. Rptr. 292 (1989).

**Damages. Excepted Risks:** 1) Explosion. Under provision that insurer not liable for loss by explosion, unless fire ensues, and in that event for damage by fire only, if explosion precedes fire insured may recover only for damage resulting from fire, but if explosion occurs after commencement of fire as resulting incident thereof, whole loss may be recovered. *Rossini v. St. Paul*, 182 Cal. 415, 420, 188 P. 564 (1920); 2) Fixtures. "Fixtures" defined in C. C. §660. Fixture Statute: C.C. §1013; Where person affixes his property to the land of another, without agreement permitting him to remove it, the thing affixed belongs to the owner of land, unless landowner requires him to remove it or he elects to remove it under C.C. §1013.5 (person who mistakenly believes he has right to affix improvements may remove fixture if pays landowner damages resulting from affixing/removal); 3) Friendly Fires. Municipality not liable, absent statute, for buildings destroyed in order to stop the progress of a fire. *Dunbar v. Alcade*, 1 Cal. 355, (1850). No personal liability on part of officer who performs act of destruction, if in good faith and apparent necessity. *Surrocco v. Geary*, 3 Cal. 69, (1853). Destruction of building is not taking of property for public use warranting just com-

pensation because private rights yield to interests of society. *Surrocco, supra*; 4) Smoke and soot. Where fire is proximate cause of loss, damage from water or smoke is recoverable. *Windnester v. Northern British*, 160 Cal. 1,116 P. 63 (1911).

**Ownership.** Doctrine that there is no breach of provision against change of title so long as insured retains title has no application to change of interest, since "interest" embraces both legal and equitable rights. *Brickell v. Atlas Assur.*, 10 Cal. App. 17, 101 P. 16 (1909). Such provision refers to some change of interest which would make loss fall upon some other person, so that insured would lose his disposition to maintain and protect property; does not affect mere right, such as option to purchase. *Mackintosh v. Agricultural*, 150 Cal. 440, 89 P. 102 (1907). Deed in escrow, see *Vierneisel v. Rhode Island*, 77 Cal. App. 2d 229, 175 P.2d 63 (1946); *People v. Elliott*, 77 Cal. App. 3d 673, 144 Cal. Rptr. 137 (1978).

Where policy provides for payment in foreign currency (Chinese) in California money must be paid as so provided, rather than under California law. *Sternberg v. West Coast Life Ins. Co.*, 196 Cal. App. 2d 519, 16 Cal. Rptr. 546 (1961).

**Proof of Loss.** Standard form of fire policy provides that within sixty days insured shall render proof of loss to company. Ins. C. §2071. Best evidence available sufficient for preliminary proof of loss. Ins. C. §552. If policy requires testimony of third person, only reasonable diligence necessary in effort to procure it. Ins. C. §555. Where policy so provides, failure to render preliminary proof of loss is bar to recovery. *White v. Home Mutual*, 128 Cal. 131, 60 P. 666 (1900); *Bank of Orville v. Minnesota F. Ins.*, 132 Cal. App. 510, 23 P.2d 83 (1933).

Mortgagee to whom loss payable not required to file proof of loss unless policy so stipulates; owner's failure does not bar mortgagee's right. *Seccombe v. Glens Falls*, 45 Cal. App. 611, 188 P. 305 (1920). Mortgagee not required to file separate proof, proof by insured sufficient. *Bank of Orville v. Minnesota*, 132 Cal. App. 510, 516, 23 P.2d 83 (1933).

**Repair/Replacement Value.** Measure of indemnity in fire insurance is expense to the insured of replacing the thing lost or injured in its condition at the time of the injury, to be computed at time of commencement of the fire. Ins. C. §2051.

Insurer exonerated if notice unnecessarily delayed. Ins. C. §550. Where two insurers are bound severally on one policy, notice of loss addressed to one company, but served on agent of both, held sufficient. *Bernero v. South British*, 65 Cal. 386, 4 P. 382 (1884).

Co-Insurance. Means relative division of risk between insurer and insured. *A. Mutual v. Cawog*, 30 Cal. App. 3d 378, 385, 106 Cal. Rptr. 307 (1973).

Concurrent Insurance. Separate insurance procured by mortgagee on his distinct interest is not other insurance. *Mosee v. Fireman's*, 87 Cal. App. 473, 475-476, 262 P. 436 (1927); *Ohio Cas. v. Harbor*, 259 Cal. App. 2d 207, 66 Cal. Rptr. 340 (1968). Procurement of other insurance contra to policy provision voids policy. *Holbrook v. Baloise Fire*, 117 Cal. 561, 567, 49 P. 555 (1897). Unless such provision is waived or insurer estopped. *Bank of Anderson v. Home*, 14 Cal. App. 208, 111 P. 507 (1910); *Shultz v. Hartford*, 187 Cal. App. 3d 513, 231 Cal. Rptr. 715 (1986).

Contribution Between Companies. Standard form policy provides for apportionment of loss. Ins. C. §2071.

If damages for continuing loss first manifested prior to commencement of second policy, then prior policy covers entire loss. *Home v. Landmark*, 205 Cal. App. 3d 1388, 1392, 253 Cal. Rptr. 277 (1988); *Chu v. Canadian*, 224 Cal. App. 3d 86, 274 Cal. Rptr. 20 (1990).

Where several companies' policies require pro rata payment of loss, contracts are independent; no contribution in case of excess payment by one unless new agreement to determine amount of this loss. *Fireman's Fund v. Palatine*, 150 Cal. 252, 88 P. 907 (1907); *Colby v. Liberty*, 220 Cal. App. 2d 38, 33 Cal. Rptr. 538 (1963). Where loss paid by all insurers under loan receipts approved by insurers, defendant insurer estopped to assert "loan receipts" were fictitious; excess insurance did not attach until specific insurance exhausted. *Gillies v. Michigan Millers*, 98 Cal. App. 2d 743, 221 P.2d 272 (1950).

## FRAUD

See "AGENTS AND BROKERS"; "REPRESENTATIONS AND WARRANTIES."

## GUEST CASES

See "AUTOMOBILES, Guests."

## HOSPITAL

Lien for Services. C.C. §§3045.1-3045.6.

Immunity. No liability against hospital for action recommended by its medical staff. C.C. §43.97.

Records. Admissible in evidence under Uniform Business Records as evidence. Evid. C. §1560 *et seq.*, *Loper v. Morrison*, 23 Cal. 2d 600, 145 P.2d 1 (1944); *Springer v. Reimers*, 4 Cal. App. 3d 325, 84 Cal. Rptr. 486 (1970).

## HUSBAND AND WIFE

Community Property Rights. For effect of community property law on gift of insurance policy, see *Travelers v. Fancher*, 219 Cal. 351, 26 P.2d 482 (1933), *overruled in part*, *Sieroty v. Silver*, 58 Cal. 2d 799, 26 Cal. Rptr. 635 (1962); *Bazzell v. Endries*, 41 Cal. App. 2d 463, 107 P.2d 49 (1940); *Estate of Mendenhall*, 182 Cal. App. 2d 441, 6 Cal. Rptr. 45 (1960). Putative community property rights recognized. *Santos v. Santos*, 32 Cal. App. 2d 62, 89 P.2d 164 (1939). Waiver by wife of community property rights. *Mazman v. Brown*, 12 Cal. App. 2d 272, 55 P.2d 539 (1936); *Estate of Roach*, 176 Cal. App. 2d 547, 1 Cal. Rptr. 454 (1959); *Martinez v. Hudson*, 14 Cal. App. 2d 42, 57 P.2d 970 (1936). Husband may waive community property right by consenting to wife using community funds for purchase of insurance. *Pacific v. Cleverdon*, 16 Cal. 2d 788, 108 P.2d 405 (1940). Superseded by statute in *In re Estate of MacDonal*, 51 Cal. 3d 262, 272 Cal. Rptr. 153 (1990).

Separate property agreement determining rights as to after-acquired property is not effective when parties resumed marital relations prior to obtaining final decree. *Mundt v. Connecticut*, 35 Cal. App. 2d 416, 95 P.2d 966 (1939); *Tompkins v. Tompkins*, 202 Cal. App. 2d 55, 20 Cal. Rptr. 530 (1962). Property settlement agreement releasing interest in policy held to revoke prior designation of former wife as beneficiary as between insured's estate and former wife. *Sullivan v. Union*, 16 Cal. 2d 229, 105 P.2d 922 (1940); *but see Gallaher v. State*, 237 Cal. App. 2d 510, 47 Cal. Rptr. 139 (1965).

Same Sex Marriage. Privacy and due process provisions of California state constitution guarantee basic civil right of marriage to all individuals and couples without regard to their sexual orientation. *In re Marriage Cases*, 43 Cal. 4th 757, 76 Cal. Rptr. 3d 683 (2008).

Divorce. California community property law complicates distribution of benefits. Gift of proceeds of insurance policy premiums which have been paid out of community funds is valid until avoided by wife. *Blethen v. Pacific Mutual*, 198 Cal. 91, 243 P. 431 (1926). Where policy had been issued prior to divorce, and insured married again, but named beneficiary was first wife, still designated as wife of insured, first wife can recover. *Jenkins v. Jenkins*, 112 Cal. App. 402, 297 P. 56 (1931). See generally *Shaw v. Board of Admin.*, 109 Cal. App. 2d 770, 241 P.2d 635 (1952), *disapproved by Watenpaugh v. State Teachers' Retirement*, 51 Cal. 2d 675, 336 P.2d 165 (1959), (distinguishing life insurance contracts from death benefits under retirement systems for public employees.)

Divorce by default decree after service by publication does not determine property rights in insurance



policies. *De La Montanya v. De La Montanya*, 112 Cal. 101, 44 P. 345 (1896). See generally *Pinon v. Pollard*, 69 Cal. App. 2d 129, 158 P.2d 254 (1945), distinguished by *Allen v. Sup. Ct.*, 41 Cal. 2d 306, 259 P.2d 905 (1953).

Interspousal Immunity. Right to sue each other in tort. One spouse may sue other in tort. *Self v. Self*, 58 Cal. 2d 683, 376 P.2d 65 (1962); *Klein v. Klein*, 58 Cal. 2d 692; 376 P.2d 70 (1962).

Married person not liable for torts of spouse. C.C. §5122 (a). Repealed 1992. See Fam. C. §1000.

Loss of Consortium. Each spouse has action for loss of consortium caused by injury to other spouse by third party. *Rodriguez v. Bethlehem*, 12 Cal. 3d 382, 115 Cal. Rptr. 765 (1974). Includes loss of support, services, love, companionship, affection, society, sexual relations, solace. *Krouse v. Graham*, 19 Cal. 3d 59, 137 Cal. Rptr. 863 (1977). Emotional injuries are no less severe or debilitating than physical injuries. *Molien v. Kaiser*, 27 Cal. 3d 916, 167 Cal. Rptr. 831 (1980) (repeatedly criticized.)

### INFANTS

See also "AUTOMOBILES, Age"; "LIABILITY INSURANCE"; "NEGLIGENCE, Age."

Age. "Minors" are all persons under age of 18. C.C. §25.1. Repealed by Stat. 1993, See Fam. C §25.

Actions. Unemancipated minor child may maintain an action for negligence against parent. *Gibson v. Gibson*, 3 Cal. 3d 914, 92 Cal. Rptr. 288 (1971). Unemancipated minor child may not sue parent's employer for negligence of parent as an employee even if parent acting in course and scope. *Myers v. Tranquility*, 26 Cal. App. 2d 385, 79 P.2d 419 (1938).

### INLAND MARINE

Law of marine insurance recognizes two distinct classes of insurance, one against total loss only, and one against total or partial loss. *California Canneries v. Canton*, 25 Cal. App. 303, 143 P. 549 (1914). Total or partial loss. See Ins. C. §1960 *et seq.* Total loss may be actual or constructive. Ins. C. §1961. Actual total loss destroys, renders valueless or deprives owner of thing insured. Ins. C. §1962. May be presumed from absence of a ship. Ins. C. §1964. A constructive total loss gives the insured a right to abandon. Ins. C. §1963. For measure of damages and distinction between types of loss, see Ins. C. §§1969-1992.

### LIABILITY INSURANCE

See also, "CANCELLATION," "CONSTRUCTION OF POLICY" and "UNFAIR PRACTICES."

Cancellation. Cancellation refers to termination before the end of policy period. Ins. C. §660 (g) (auto policies). Policies can be cancelled pursuant to their terms or by mutual consent. *Spott Elect. v. Industrial Indem.*, 30 Cal. App. 3d 797, 106 Cal. Rptr. 710 (1973). Cancellation of homeowner's insurance, Ins. C. §675; commercial insurance, Ins. C. §§675.5, 676.2 (b).

Assault and Battery. Not "accident" or "occurrence" under liability policy but duty to defend may nonetheless be triggered. *Gray v. Zurich*, 65 Cal. 2d 263, 54 Cal. Rptr. 104 (1966); *Fire Ins. Exch. v. Altieri*, 235 Cal. App. 3d 1352, 1 Cal. Rptr. 2d 360 (1991); *Evans v. Pacific Indem.*, 49 Cal. App. 3d 537, 122 Cal. Rptr. 680 (1975).

Compromise of Claims. Insurer, after denying coverage, waives right to control litigation or make settlement. *Comunale Traders & General Ins. Co.*, 50 Cal. 2d 654, 328 P.2d 198 (1958); *Stalberg v. Western Title Ins. Co.*, 230 Cal. App. 3d 1223, 282 Cal. Rptr. 43 (1991).

Liability of Insurer to Settle. Liability of insurer for failure to consider compromise within limits. *Comunale v. Traders & Gen. Ins. Co.*, 50 Cal. 2d 654, 328 P.2d 198 (1958). Medical malpractice insurance carrier liable for judgment in excess of its policy limits where insured requested that case be settled, but insurance company refused to settle as it did not have consent of committee of local medical society to which group insurance policy had been issued. *Garner v. American Nat'l Liab. Ins. Co.*, 31 Cal. App. 3d 843, 107 Cal. Rptr. 604 (1973). See also *Walbrook v. Liberty Mut.*, 5 Cal. App. 4th 1445, 7 Cal. Rptr. 2d 513 (1992).

Duty to Act in Good Faith. Duty of good faith and fair dealing is two way street. *Commercial Union Assur. Co., v. Safeway Stores, Inc.*, 26 Cal. 3d 912, 164 Cal. Rptr. 709 (1980); *Diamond Heights v. National American Ins. Co.*, 227 Cal. App. 3d 563, 277 Cal. Rptr. 906 (1991). Acts of insured cutting off insurance company from its right of subrogation is breach of that duty. *Liberty Mut. Ins. Co. v. Altfillisch Constr. Co.*, 70 Cal. App. 3d 789, 139 Cal. Rptr. 91 (1977). If insured and primary carrier act in concert to defeat rights of excess carrier, then insured breaches his duty of good faith and fair dealing owing to excess carrier. *Kaiser Foundation v. Northstar Reins. Corp.*, 90 Cal. App. 3d 786, 153 Cal. Rptr. 678 (1979). Excess carrier may maintain action against primary carrier for refusal to settle within limits of primary carrier. *Northwestern Mut. v. Farmers Ins. Group*, 76 Cal. App. 3d 1031, 143 Cal. Rptr. 415 (1978). But absent terms to contrary, if insured must pay portion



of claim before excess carrier would be liable, then insured owes no duty to accept settlement offer which would avoid exposing excess carrier to liability. *Commercial Union v. Safeway*, 26 Cal. 3d 912, 164 Cal. Rptr. 709 (1980); distinguished by *Fireman's Fund v. Maryland Cas.*, 65 Cal. App. 4th 1279, 77 Cal. Rptr. 2d 296 (1998).

**Contribution between Joint Tort-feasors.** Joint tort-feasors are jointly/severally liable for economic damages, but liability for non-economic damages apportioned according to comparative fault principles. C.C. §1431, 1431.2. Release of joint tort-feasor may now be given without releasing other joint tort-feasors, and judgment for contribution may be obtained by one party against other tort-feasor judgment debtors. C.C.P. §877 and 878. Contribution statutes do not preclude application of common law right of comparative indemnity. *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 578 P.2d 899 (1978) (superseded by statute.) But "good faith" settlement bars claim for equitable and implied contractual indemnity. *Far West v. D & S*, 46 Cal. 3d 796, 251 Cal. Rptr. 202 (1988); *Bay Development v. Superior Court*, 50 Cal. 3d 1012, 269 Cal. Rptr. 720 (1990).

**Cooperation of Insured in Defense of Action.** General rule is that insurer is not bound by judgment against its insured unless it had notice of pendency of action, but if the insurer denies coverage, the insured is relieved of duty to inform insurer of service of summons and of the trial date. *Samson v. Transamerica*, 30 Cal. 3d 220, 178 Cal. Rptr. 343 (1981).

**Coverage - Construction of Terms.** Interpretation of policy is question of law. *Merced v. Mendez*, 213 Cal. App. 3d 41, 45, 261 Cal. Rptr. 273 (1989). Parol evidence admissible as an aid in interpretation. *Garcia v. Truck Ins. Exch.*, 36 Cal. 3d 426, 204 Cal. Rptr. 435 (1984).

**Omnibus Provisions.** Use of automobile by third person is not covered by omnibus clause in insurance policy where owner has expressly forbidden it. *Norris v. Pacific*, 39 Cal. 2d 420, 247 P.2d 1 (1952). But see *Wildman v. Government*, 48 Cal. 2d 31, 307 P.2d 359 (1957). Where policy provides insurance against liability or operation of motor vehicle within restricted territory insurance is not extended to operation of vehicle outside restricted area where motor vehicle was "regularly and frequently" so used. *Kindred v. Pacific*, 10 Cal. 2d 463, 75 P.2d 69 (1938). Extended coverage clause held to apply even though vehicle belonged to member of insured's household excluded by clause, where insured stored son's vehicle and occasionally used vehicle while son in armed service. *Island v. Firemen's Fund*, 30 Cal. 2d 541, 184 P.2d 153 (1947).

**Standard Provisions.** Automobile under "control of" insured includes vehicles undergoing repairs by insured in its shop. *J. G. Spiers v. Underwriters*, 84 Cal. App. 2d 603, 191 P.2d 124 (1948). Insurance covering injury caused solely by collision or upset of any automobile while riding therein or being struck by same interpreted to include all hazards normally incident to riding in or driving car. *Garcia v. Trans*, 156 Cal. App. 3d 900, 203 Cal. Rptr. 325 (1984); *Miller v. United*, 113 Cal. App. 2d 493, 248 P.2d 113 (1952); *Pacific v. Mercer*, 56 Cal. App. 2d 597, 132 P.2d 846 (1943).

**Direct Action Against Insurer.** Injured party may proceed against insurer only after obtaining judgment against insured. Ins. C. §11580; see also *Wright v. Fireman's Fund Ins.*, 11 Cal. App. 4th 998, 14 Cal. Rptr. 2d 588 (1992).

**Duty to Defend.** Duty to defend is broader than duty to indemnify. *Horace Mann v. Barbara B.*, 4 Cal. 4th 1076, 17 Cal. Rptr. 2d 210 (1993). Duty arises when insured tenders lawsuit and continues until lawsuit is concluded. *Montrose v. Sup. Ct.*, 25 Cal. App. 4th 902, 31 Cal. Rptr. 2d 38 (1991). Where policy provides defense to suit, whether groundless or not, duty of insurer depends upon complaint against insured. If complaint shows potential liability or if insurer knows of potential liability then insurer must defend insured. *Gray v. Zurich*, 65 Cal. 2d 263, 54 Cal. Rptr. 104 (1966); distinguished by *Quan v. Truck Ins.*, 67 Cal. App. 4th 583, 79 Cal. Rptr. 2d 134 (1999); *Devin v. U.S. Auto*, 6 Cal. App. 4th 1149, 8 Cal. Rptr. 2d 268 (1992). Where insurer denies first party claim as not covered under the policy, insured cannot maintain a cause of action against insurer for negligent investigation of the claim. *Benavides v. State Farm General Ins. Co.*, 136 Cal. App. 4th 1241, 39 Cal. Rptr. 3d 650 (2006). But if insurer provides insured with counsel under reservation of rights, then insurer must also pay for services of attorney retained by insured. *San Diego Federal v. Cumis*, 162 Cal. App. 3d 358, 208 Cal. Rptr. 494 (1984) (superseded by statute); C.C. §2860. Where liability insurance policy does not cover the injury alleged in complaint brought against an insured, the insurer is not liable for bad faith even if the policy is later reformed to provide coverage. *R&B Auto Center, Inc. v. Farmers, Group Inc.*, 140 Cal. App. 4th 327, 44 Cal. Rptr. 3d 426 (2006).

**Liability Between Insurers - Primary.** Primary insurer has primary duty to defend and indemnify insured. *Olympic v. Employers Surplus Lines*, 126 Cal. App. 3d 593, 178 Cal. Rptr. 908 (1981).

**Excess.** Excess insurance provides coverage after policy limits of other identified insurance have been exhausted. *Olympic, supra*.

Exclusions. Exclusions must be conspicuous, plain and clear. *State Farm v. Jacober*, 10 Cal. 3d 193, 110 Cal. Rptr. 1 (1973). Exclusionary clauses are interpreted narrowly and any doubt is construed in favor of coverage. *Cong. Rodef Shalom v. Amer. Motorists*, 91 Cal. App. 3d 690, 697, 154 Cal. Rptr. 348 (1979). CGL's policy "employment-related practices" exclusion did not exclude coverage for insured's liability to an employee of the insured's independent subcontractor. *North American Building Maintenance, Inc. v. Fireman's Fund Ins. Co.*, 137 Cal. App. 4th 627, 40 Cal. Rptr. 3d 468 (2006).

Intentional Acts. See Ins. C. §533; *J.C. Penney v. M.K.*, 52 Cal. 3d 1009, 278 Cal. Rptr. 64 (1991); *Horace Mann v. Barbara B.*, 4 Cal. 4th 1076, 17 Cal. Rptr. 2d 210 (1993). Insuring language may preclude "intentional" acts by "neither expected nor intended" language. Test is whether insured knew or believed its conduct was substantially certain or highly likely to result in injury. *Montrose v. Superior Ct.*, 25 Cal. App. 4th 902, 31 Cal. Rptr. 2d 38 (1994); *Shell Oil v. Winterthur*, 12 Cal. App. 4th 715, 15 Cal. Rptr. 815 (1993).

Intentional/Criminal Acts. Homicide. See *Studley v. Benecia*, 230 Cal. App. 3d 454, 281 Cal. Rptr. 631 (1991) (second degree murder); *State Farm v. Dominguez*, 131 Cal. App. 3d 1, 182 Cal. Rptr. 109 (1982) (first degree murder). Sexual molestation. See *J.C. Penney v. M.K.*, 52 Cal. 3d 1009, 278 Cal. Rptr. 64 (1991); *Allstate v. Kim W.*, 160 Cal. App. 3d 326, 333, 206 Cal. Rptr. 609 (1984). Sexual harassment. See *Coit Drapery v. Sequoia Ins. Co.*, 14 Cal. App. 4th 1595, 18 Cal. Rptr. 2d 692 (1993); *State Farm v. Ezrin*, 764 F. Supp. 153 (N.D. Cal. 1991). Exposing sex partner to transmissible disease. See *Aetna v. Sheft*, 989 F.2d 1105 (9th Cir. 1993); *State Farm v. Eddy*, 218 Cal. App. 3d 958, 968-972, 267 Cal. Rptr. 379 (1990). Racial and religious discrimination. See *American Motorists v. Allied-Sysco*, 19 Cal. App. 4th 1342, 24 Cal. Rptr. 2d 106 (1993), *disapproved in part*, *Buss v. Superior Ct.*, 16 Cal. 4th 35, 65 Cal. Rptr. 2d 366, (1997). Use or dispensing illegal drugs. See *State Farm v. Baer*, 745 F. Supp. 595 (N.D. Cal. 1990). Wrongful discharge. *Loyola Marymount v. Hartford*, 219 Cal. App. 3d 1217, 1224-1225, 271 Cal. Rptr. 528 (1990); *Dyer v. Northbrook*, 210 Cal. App. 3d 1540, 1547, 259 Cal. Rptr. 298 (1989).

Specific intent crimes exclude coverage. *Allstate v. Overton*, 160 Cal. App. 3d 843, 850-851, 206 Cal. Rptr. 823 (1984). General intent crimes (battery) may require duty to defend. *Allstate v. Overton*, *supra*; *Clemmer v. Hartford*, 22 Cal. 3d 865, 887, 151 Cal. Rptr. 285 (1978).

Miscellaneous Exclusions. "Furnished for regular use" exclusion, to "use of other automobiles" clause, and

effect of V.C. §415 as to term of insuring clause. *Northwest v. Legg*, 91 Cal. App. 2d 19, 204 P.2d 106 (1949). Other valid insurance exclusion clause where other policy contained pro-rata clause held under facts to require pro-rata as between insurers. *Air Transport v. Employers*, 91 Cal. App. 2d 129, 204 P.2d 647 (1949); *Donahue v. Transport*, 7 Cal. App. 3d 291, 86 Cal. Rptr. 632 (1970). If insurance policy provides exclusion for willful acts of insured, insurance company has burden of proving that act was willful. *Clemmer v. Hartford Ins. Co.*, 22 Cal. 3d 865, 587 P.2d 1098 (1978); *Masonite v. Great Amer.*, 224 Cal. App. 3d 912, 274 Cal. Rptr. 206 (1990). Trial court did not abuse its discretion in refusing to allow evidence of conviction of insured for murder as evidence of willful acts. *Clemmer*, *supra*. Provisions of general liability policy construed to require insurer to pay costs of environmental "cleanup." *A.I.U. Ins. v. Sup. Ct.*, 51 Cal. 3d 807, 274 Cal. Rptr. 820 (1990). Provisions "insured's business operations" and from "work let or sublet" construed. *Chrysler v. Royal*, 76 Cal. App. 2d 785, 174 P.2d 318 (1946); *Osborn v. Security Ins. Co.*, 155 Cal. App.2d 201, 205, 318 P.2d 94 (1957); *State Farm Mut. Auto. Ins. Co. v. Price*, 242 Cal. App.2d 619, 51 Cal. Rptr. 554 (1966).

Infants. Any negligence of minor driving motor vehicle is imputed to person who signed application for minor's license. V.C. §17707. Insurance carrier liable for damages recovered against insured, by reason of negligence of minor son driving covered vehicle. *Lackey v. Olds & Stoller*, 80 Cal. App. 687, 252 P. 672 (1927); *Marple v. American Auto. Ins.*, 82 Cal. App. 137, 255 P. 260 (1927). Unemancipated minor child may sue parents for negligence. *Gibson v. Gibson*, 3 Cal. 3d 914, 92 Cal. Rptr. 288 (1971).

Insolvency of insured. Policy insuring against loss or damage from accident must contain provision that insolvency or bankruptcy of insured shall not release insurer. Ins. C. §11580 (b) (1).

Jury. It is improper either directly or indirectly to get before jury any fact which conveys information that defendant is insured. Evid. C. §1155; *Perez v. Crocker*, 86 Cal. App. 288, 260 P. 838 (1927). Not prejudicial misconduct to ask jurors on examination if they are stockholders or otherwise connected with specific insurance company, but evidence that defendant is insured is not admissible. *Id.*; *Reneau v. Hirsch*, 88 Cal. App. 1, 262 P. 1100 (1927). See also *Perry v. Paladini*, 89 Cal. App. 275, 264 P. 580 (1928); *Pate v. Pickwick*, 125 Cal. App. 670, 14 P.2d 174 (1932).

Punitive Damages. Action for breach of obligation not arising from contract, when defendant is guilty of oppression, fraud or malice, express or implied, plaintiff, in addition to actual damages, "may recover damages for

sake of example and by way of punishing defendant.” C.C. §3294. Under count for tort deceit where defendant’s agent represented it would pay up to \$5,000 medical expense even though such was obtained elsewhere, when it was not defendant’s policy to pay such, amounted to fraud entitling plaintiff to punitive damages. *Sharp v. Automobile Club of So. Cal.*, 225 Cal. App. 2d 648, 37 Cal. Rptr. 585 (1964). Misrepresentation as to coverage which defendant never intended to furnish justified punitive and exemplary damages. *Wetherbee v. United Ins. Co. of America*, 265 Cal. App. 2d 921, 71 Cal. Rptr. 764 (1968). Punitive damages should bear a reasonable relation to actual damages, but there is no fixed ratio. *Finney v. Lockhart*, 35 Cal. 2d 161, 217 P.2d 19 (1950); *Gagnon v. Continental*, 211 Cal. App. 3d 1598, 260 Cal. Rptr. 305 (1989). Punitive or exemplary damages may not be awarded in suit founded in contract. *Roam v. Koop*, 41 Cal. App. 3d 1035, 116 Cal. Rptr. 539 (1974).

#### LIMITATION OF TIME FOR COMMENCEMENT OF ACTION

See Law Digest Tables.

The standard clause in insurance policies setting forth a one year limitation within which an action must be brought against the insurer is valid. *C&H Foods v. Hartford*, 163 Cal. App. 3d 1055, 211 Cal. Rptr. 765 (1984). Measured from “inception of the loss in first-party cases.” Ins. C. §2071. However, in gradual, continuous or progressive first-party losses such as slipping, subsidence and settlement the statute of limitations does not commence to run until such time as reasonable insured should have discovered damage (delayed discovery rule). *Prudential LMI v. Sup. Ct.*, 51 Cal. 3d 674, 274 Cal. Rptr. 387 (1990).

An insurer can be equitably estopped from asserting the one year limitation within which suit may be brought if it fails to notify the insured of that provision. *Elliano v. Assurance Co. of America*, 3 Cal. App. 3d 446, 83 Cal. Rptr. 509 (1970). Contractual limitations period is tolled while claim is being considered by insurer (from notice until formal denial). *Prudential-LMI, supra*. Waiver exists when insurer intentionally relinquishes right to rely on limitations provision. *Prudential-LMI, supra*. Waiver may be express or implied. *Intel Corp. v. Hartford*, 952 F.2d 1551, 1559 (9th Cir. 1991). Insurer does not waive time limit by failing to warn insureds before they filed suit that their right to sue had expired. *Becker v. State Farm*, 664 F. Supp. 460, 461-462 (N.D. Cal. 1987).

#### MALPRACTICE

Physician undertaking to treat patient not held liable when abandoned patient to summon another doctor as long as treatment was not “unskillful” prior to abandonment. *Lathrope v. Flood*, 135 Cal. 458, 67 P. 683 (1902). Principles of law of negligence apply in such cases and in cases based on wrongful treatment; physician not liable because treatment not successful. *McCurdy v. Hatfield*, 30 Cal. 2d 492, 183 P.2d 269 (1947). Responsible only if did not act with knowledge or foresight of physicians generally; general practitioner may not be held to have skill of specialist; specialist must exercise knowledge and skill of those making special study of particular organ, injury or disease. *Hopkins v. Heller*, 59 Cal. App. 447, 210 P. 975 (1922); *Valentine v. Kaiser*, 194 Cal. App. 2d 282, 15 Cal. Rptr. 26 (1961). See *Moore v. Belt*, 34 Cal. 2d 525, 212 P.2d 509 (1949); *Gluckstein v. Lipsett*, 93 Cal. App. 2d 391, 209 P. 2d. 98 (1949); *Allen v. Leonard*, 270 Cal. App. 2d 209, 75 Cal. Rptr. 840 (1969). Physician not liable for injuries resulting from unfortunate choice between recognized methods of treatment. *Linn v. Piersol*, 37 Cal. App. 171, 173 P. 673 (1918). No legal distinction between physician and dentist. *Roberts v. Parker*, 121 Cal. App. 264, 8 P.2d 908 (1932); *Barham v. Widing*, 210 Cal. 206, 291 P. 173 (1930). Same rule to chiropractors. *Howe v. McCoy*, 113 Cal. App. 468, 298 P. 530 (1931). Same rule applied to postoperative care by hospital. *Valentin v. LaSociete*, 76 Cal. App. 2d 1, 172 P.2d 359 (1946); *Rice v. California Lutheran*, 27 Cal. 2d 296, 163 P.2d 860 (1945). Existence of signed consent form by patient not conclusive proof of informed consent for surgical procedure. *Quintanilla v. Dunkelman*, 133 Cal. App. 4th 95, 34 Cal. Rptr. 3d 557 (2005). A physician who assists in medical procedure performed by another doctor may have a duty to secure patient’s informed consent for procedure. *Wilson v. Merritt*, 142 Cal. App. 4th 1125, 48 Cal. Rptr. 3d 630 (2006).

General rule that malpractice proved only by experts in same profession. Absence of expert testimony for matters of common knowledge, such as infection from use of unsterile instruments, sufficient to support verdict. *Ingamells v. Goodfellow*, 109 Cal. App. 62, 292 P. 162 (1930); *Barham v. Widing*, 210 Cal. 206, 291 P. 173 (1930); *Maestro v. Kennedy*, 57 Cal. App. 2d 499, 134 P.2d 865 (1943). And see *Willard v. Hagemeister*, 121 Cal. App. 3d 406, 175 Cal. Rptr. 365 (1981). Res ipsa loquitur applies only where laymen can say, as matter of common knowledge, consequences of treatment were not such as ordinarily would follow if due care used. *Engelking v. Carlson*, 13 Cal. 2d 216, 88 P.2d 695 (1939). Res ipsa loquitur, non-delegable duty, and captain of ship jury instruction should have been given in sponge-in-the-patient malpractice case against surgeon.



*Fields v. Yusuf*, 144 Cal. App. 4th 1381, 51 Cal. Rptr. 3d 277 (2006). Ins. C. §1280.7 provides for cooperative interindemnity corporations consisting solely of physicians and surgeons insuring them against malpractice claims.

Collateral Source Rule is not applied in medical malpractice actions. C.C. §3333.1. Non-economic losses in medical malpractice actions are limited to \$250,000.00. C.C. §3333.2. Periodic payment of damages acceptable. C.C.P. §667.7 Aforementioned provisions were held valid. *Fein v. Permanente*, 38 Cal. 3d 137, 211 Cal. Rptr. 368 (1985).

## NEGLIGENCE

See Law Digest Tables.

See "AUTOMOBILES."

Age. Negligence and contributory negligence with respect to infants discussed. *Katoaka v. May*, 60 Cal. App. 2d 177, 140 P.2d 467 (1943). *And see Pittman v. Pedro*, 42 Cal. App. 3d 859, 117 Cal. Rptr. 220 (1974).

Attractive Nuisance. To children, doctrine discussed *Walker v. Pacific Electric*, 66 Cal. App. 2d 290, 152 P.2d 226 (1944). Pond is not attractive nuisance per se. *Demmer v. City of Eureka*, 78 Cal. App. 2d 708, 178 P.2d 472 (1947), *but see King v. Lennen*, 53 Cal. 2d 340, 1 Cal. Rptr. 665 (1959).

Comparative/Contributory Negligence. Doctrine of contributory negligence no longer applied as it must give way to system of comparative negligence which assesses liability in direct proportion to fault. *Li v. Yellow Cab*, 13 Cal. 3d. 804, 119 Cal. Rptr. 858 (1975).

Assumption of Risk. Assumption of risk abolished as a complete defense. *Li v. Yellow Cab, supra*. The primary assumption of risk doctrine turns on the nature of the activity and the relationship of the parties to the activity in question. *McGarry v. Sax*, 158 Cal. App. 4th 983, 70 Cal. Rptr. 3d 519 (2008).

Negligent Infliction of Emotional Distress. Cause of action may be brought for negligent infliction of emotional distress without physical injury provided that emotional distress is serious. *Molien v. Kaiser*, 27 Cal. 3d 916, 167 Cal. Rptr. 831 (1980). Spouse may also have action for loss of consortium for negligent infliction of emotional distress. *Molien, supra*.

Definition of Negligence. Definition and discussion of negligence. *Hoyem v. Man. Beach*, 22 Cal. 3d 508, 150 Cal. Rptr. 1 (1978). Negligence of minors. *Bolar v. Maxwell*, 205 Cal. 396, 271 P. 97 (1928). Negligence of students and schools. *See Calandri v. Ione*, 219 Cal. App. 2d 542, 33 Cal. Rptr. 333 (1963). Violation of stat-

ute not negligence per se unless proximate cause of injury. *Greene v. M & S Lumber Co.*, 108 Cal. App. 2d 6, 238 P.2d 87 (1951).

Governmental Immunity. Governmental tort liability is controlled entirely by statute. *Fox v. County of Fresno*, 170 Cal. App. 3d 1238, 216 Cal. Rptr. 879 (1985). Tort claims Act (Gov. C. §5, 810, *et seq.*) abolished all common law governmental tort liability in California. *Ibarra v. California Coastal*, 182 Cal. App. 3d 687, 227 Cal. Rptr. 371 (1986). Act provides that except as otherwise provided by statute, public entity is not liable for any injury even if culpable. Gov. C. §815 (a). Immunity waived if requirements of act are satisfied. *Brown v. Poway*, 4 Cal. 4th 820, 15 Cal. Rptr. 2d 679 (1993).

Imputed Negligence. Negligence of operator not imputed to passenger unless they are joint-venturers. *Campagna v. Market*, 24 Cal. 2d 304, 149 P.2d 281 (1944); *Workman v. San Diego*, 267 Cal. App. 2d 36, 72 Cal. Rptr. 509 (1968). Emergency or sudden peril doctrine discussed. *Leo v. Dunham*, 41 Cal. 2d 712, 264 P.2d 1 (1953); *Damele v. Mack*, 219 Cal. App. 3d 29, 267 Cal. Rptr. 197 (1990). Children's conduct is unpredictable; their thoughtlessness should be anticipated and their presence in itself warning. *Freeland v. Jewel*, 118 Cal. App. 2d 764; 258 P.2d 1032 (1953). Cattle owner who negligently permits cattle to stray on highway is liable for injuries resulting even where highway is unfenced. *Summers v. Parker*, 119 Cal. App. 2d 214, 259 P.2d 59 (1953); *Wollstrum v. Mailloux*, 141 Cal. App. 3d Supp. 1, 190 Cal. Rptr. 729 (1983).

Joint and Several Liability. Doctrine holds each tort-feasor whose negligence is proximate cause of indivisible injury remains individually liable for all compensable damages attributable to that injury, diminished only by plaintiff's comparative fault. *American Motorcycle v. Sup. Ct.*, 20 Cal. 3d 578, 143 Cal. Rptr. 692 (1978). (Joint and several liability limited to economic damages by Proposition 51.)

Last Clear Chance Doctrine. Abolished and subsumed under general process of assessing liability in proportion to fault. *Li v. Yellow Cab*, 13 Cal. 3d 804, 119 Cal. Rptr. 858 (1975).

Liquor Liability. Bus. & Prof. C. §25602 provides that every person who sells, furnishes, gives, or causes to be sold, furnished or given away, any alcoholic beverage to any habitual or common drunkard or to any obviously intoxicated person is guilty of misdemeanor. *See Bernard v. Harrah's Club*, 16 Cal. 3d 313, 317, 546 P.2d 719 (1976).

Negligence Per Se. Presumption of failure to exercise due care if defendant violated a statute, ordinance or



regulation which resulted in injury. Evid. C. §669 (a) (1); *Peterson v. Long Beach*, 24 Cal. 3d 238, 155 Cal. Rptr. 360 (1979).

Proximate Cause. No longer the rule in California. Proper rule re causation is “legal cause” which asks whether defendant’s conduct was “substantial factor” in bringing about injury. *Mitchell v. Gonzales*, 54 Cal. 3d 1041, 1043, 1 Cal. Rptr. 2d 913 (1991).

Res Ipsa Loquitur. Presumption that the nature of accident infers it could not have happened but for negligence of defendant. *Seedborg v. Lakewood Gardens*, 105 Cal. App. 2d 449, 233 P.2d 943 (1951).

Sudden Emergency. Person confronted with peril held to lesser standard of care under circumstances. *Leo v. Dunham*, 41 Cal. 2d 712, 264 P.2d 1 (1953); *Damele v. Mack Trucks*, 219 Cal. App. 3d 29, 267 Cal. Rptr. 197 (1990).

### NO-FAULT INSURANCE

To date no-fault legislation has not been enacted.

### PENALTY AND ATTORNEYS FEES

No statutory penalties for failure to pay insurance benefits. However, if insurer breaches its covenant of good faith and fair dealing, then insured is entitled to recover attorneys fees incurred in the recovery of benefits. *Brandt v. Sup. Ct.*, 37 Cal. 3d 813, 210 Cal. Rptr. 211 (1985). If insured proceeds in tort for breach of covenant of good faith and fair dealing, then insured may also seek to recover exemplary damages. *Egan v. Mutual of Omaha*, 24 Cal. 3d 809, 157 Cal. Rptr. 482 (1979).

### PRIVILEGED COMMUNICATIONS

See §900 Evid. C. *et seq.* lists following: husband and wife, attorney and client, clergyman and penitent, physician and patient, public officers, and newspaper writers. Litigation privilege covers communications of potential parties with plaintiff’s counsel made with “some relation” to an anticipated lawsuit before filing complaint. *Rubin v. Green*, 4 Cal. 4th 1187, 17 Cal. Rptr. 2d 828 (1993). As between physician and patient, bringing action to recover for personal injuries is waiver of privilege. Litigation privilege does not apply to non-communicative conduct. *Kimmel v. Goland*, 51 Cal. 3d 202, 271 Cal. Rptr. 191 (1990). The corporate attorney-client privilege includes confidential communications between agents of the corporate client concerning legal advice and legal strategy even though attorneys are not directly involved in those communications. *Zurich American Insurance Co. v. Superior Court*, 155 Cal. App. 4th 1485, 66 Cal. Rptr. 3d 833 (2007).

### PRODUCTS LIABILITY

Strict Liability. Manufacturer strictly liable where article defective. *Greenman v. Yuba Power Products*, 59 Cal. 2d 57, 62, 27 Cal. Rptr. 697 (1963). Retailers may also be strictly liable. *Vandermark v. Ford Motor*, 61 Cal. 2d 256, 37 Cal. Rptr. 896 (1964). See *Witkin Summary*, Cal. Law, 9th Ed. §1279 *et seq.* For corporate successor liability of manufacturers, see *Ray v. Alad Corp.*, 19 Cal. 3d 22, 136 Cal. Rptr. 574 (1977).

Economic Loss. Claimant entitled to damage to property caused by defective product, but not entitled to economic loss. *Seely v. White Motor Co.*, 63 Cal. 2d 9, 45 Cal. Rptr. 17 (1965).

Contributory Negligence. Contributory negligence of plaintiff and/or assumption of risk by plaintiff, to extent that latter is form of contributory negligence, will not defeat claim of plaintiff, but doctrine of comparative negligence will be applied to reduce plaintiff’s recovery. *Daly v. General Motors*, 20 Cal. 3d 725, 144 Cal. Rptr. 380 (1978). Jury may compare conduct of defective product manufacturer with the conduct of plaintiff or codefendant. *Far West Financial Corp. v. D & S Co.*, 46 Cal. 3d 796; 251 Cal. Rptr. 202 (1988). Comparative fault principles should be applied to apportion responsibility between defendant liable pursuant to strict product liability doctrine and second defendant liable on negligence theory. *Safeway Stores v. Nest-Kart*, 21 Cal. 3d 322, 146 Cal. Rptr. 550 (1978); *GEM v. Hallcraft*, 213 Cal. App. 3d 419, 261 Cal. Rptr. 626 (1989). Jury can consider plaintiff’s voluntary action to participate in a risky endeavor. *Knight v. Jewett*, 3 Cal. 4th 296, 313, 11 Cal. Rptr. 2d 2 (1992). Primary assumption of risk doctrine does not protect the manufacturer of defective product that increases risk in the sport. *Ford v. Polaris Industries*, 139 Cal. App. 4th 755, 43 Cal. Rptr. 3d 215 (2006).

If plaintiff is unable to identify manufacturer of substance produced by several manufacturers according to identical formula, and if plaintiff joins manufacturers of substantial share of that product, then burden of proof is shifted to each defendant to show that it did not manufacture product. *Sindell v. Abbott Lab.*, 26 Cal. 3d 588, 163 Cal. Rptr. 132 (1980).

Sophisticated User. The “sophisticated user defense” applicable to negligence and strict products liability actions exempts a manufacturer from its typical obligation to provide users with warnings about a product’s potential hazards, when the users are sophisticated users who are already aware or should be aware of the dangers, such as members of a trade or a profession in which the dangers of the manufacturer’s product are



generally known. *Johnson v. American Standard Inc.*, 43 Cal. 4th 56, 74 Cal. Rptr. 3d 108 (2008).

Coverage. Products liability coverage insures against loss resulting from defective goods or products made, sold or distributed by insured. Coverage to third party injured by insured's product for loss of use, but not for purely economic loss resulting from workmanship. *Maryland Cas. v. Reeder*, 221 Cal. App. 3d 961, 969, 270 Cal. Rptr. 719 (1990). For property damaged, diminution in value is measure of loss. *Geddes v. St. Paul*, 51 Cal. 2d 558, 334 P.2d 881 (1959).

## RELEASE

See Law Digest Tables.

Contract Law—General. Release is of no legal effect unless it is based upon new consideration, or in writing, with or without new consideration. C.C. §1541. Contract of release is at most mere voidable contract and "plaintiff could not avoid same on ground of fraudulent representations without ... restoring money paid as consideration." *Garcia v. California Truck Co.*, 183 Cal. 767, 192 P. 708 (1920). General release does not extend to unknown or unsuspected claims. C.C. §1542. *construed in Backus v. Sessions*, 17 Cal. 2d 380, 110 P.2d 51 (1941). Contract of release is at most mere voidable contract and plaintiff "could not avoid same on ground of fraudulent representations without...restoring money paid as consideration." *Garcia v. California Truck Co.*, 183 Cal. 767, 192 P. 708 (1920); *Cilibrasi v. Reiter*, 103 Cal. App. 2d 397, 229 P.2d 394 (1951). Where amount of disability claim is disputed and not liquidated, release is binding. *Matthews v. Pacific*, 47 Cal. App. 2d 424, 118 P.2d 10 (1941).

A release is binding only to the extent of the intention of releasor if misunderstanding of the terms of release are not due to releasor's negligence. *Case v. Proctor*, 59 Cal. 2d 97, 28 Cal. Rptr. 307 (1963).

Covenant Not to Sue. Document held to be covenant not to sue and did not therefore operate as release to all joint tort-feasors. *Kincheloe v. Retail Credit*, 4 Cal. 2d 21, 46 P.2d 971 (1935).

Fraud. Surrender and release of policy set aside upon ground of misrepresentation of policy terms. *Glickman v. New York Life*, 16 Cal. 2d 626, 107 P.2d 252 (1940). Releases have been set aside in California in following cases: *Smith v. Occidental*, 99 Cal. 462, 34 P. 84 (1893) (plaintiffs unable to read release); *Meyer v. Haas*, 126 Cal. 560, 58 P. 1042 (1899) (fraud and mistake); *Edmunds v. S. P. Co.*, 18 Cal. App. 532, 123 P. 811 (1912) (fraud and undue influence); *Carr v. Sacramento Clay Prod.*, 35 Cal. App. 439, 170 P. 446 (1917) (fraud, mistake, undue influence and mental capacity);

*Charleville v. Metropolitan*, 136 Cal. App. 349, 29 P.2d 241 (1934); *Wilson v. S.F. Ry.*, 48 Cal. App. 343, 191 P. 975 (1920) (fraud and undue influence, with dictum to effect that neurasthenia if present would give rise to even closer scrutiny); *Backus v. Sessions*, 17 Cal. 2d 380, 110 P.2d 51 (1941) (incompetency at time of signing release and also discusses effect of subsequent endorsement of settlement check containing release); see *DuBois v. Sparrow*, 92 Cal. App. 3d 290, 154 Cal. Rptr. 717 (1979).

Court refused to invalidate release in following cases: *Haviland v. Southern Cal. Edison*, 172 Cal. 601, 158 P. 328 (1916); *Garcia v. Cal Truck Co.*, 183 Cal. 767, 192 P. 708 (1920); *Rogers v. Atchison, etc. Ry. Co.*, 38 Cal. App. 343, 176 P. 176 (1918); *Edwards v. Comstock*, 205 Cal. App. 3d 1164, 252 Cal. Rptr. 807 (1988).

Infants/Capacity. Compromise must be approved by order of court on petition of guardian or guardian ad litem. C.C.P. §372; Prob. §§2504, 3500, 3600-3612. At discretion of court, no necessity of appointment of general guardian if sum involved \$20,000 or less. C.C.P. §§372, Prob. §§1510, 1431, 3611. Under 18 years of age, contract may be disaffirmed or if 18 years or older, may be disaffirmed on return of consideration received. C.C. §1556. Payment of judgment to attorney for guardian ad litem who executed satisfaction did not satisfy judgment as payment to general guardian required under code (now Prob. §1510). *Parra v. Cleaver*, 12 Cal. App. 2d 386, 55 P.2d 599 (1936).

## REPRESENTATIONS AND WARRANTIES

Statutory Provisions. Warranty is either expressed or implied. Ins. C. §440; see also *Slinkard v. Manchester*, 122 Cal. 595, 55 P. 417 (1898). No particular form of words necessary. Ins. C. §442. Every express warranty must be in policy. Ins. C. §443; see also *Rankin v. Amazon*, 89 Cal. 203, 26 P. 872 (1891); *Employer's Liab. v. Industrial Acc Comm.*, 177 Cal. 771, 171 P. 935 (1918); *Isaac Upham v. U.S. Fidelity*, 59 Cal. App. 606; 211 P. 809 (1922); *Standard Acc. v. Pratt*, 130 Cal. App. 2d 151, 278 P.2d 489 (1955), distinguished on other grounds in *Barrera v. State Farm*, 71 Cal. 2d 659, 79 Cal. Rptr. 106 (1969). Warranty may relate to past, present or future. Ins. C. §444. A statement relating to the risk is an express warranty. Ins. C. §441; see *McCormick v. Springfield*, 66 Cal. 361, 5 P. 617 (1885); *Gise v. Fidelity*, 188 Cal. 429, 206 P. 624 (1922). Statement as to intention or future. Ins. C. §445. Performance excused. Ins. C. §446. Acts which avoid warranty. Ins. C. §447; see *Joshua Hendy M. Works v. American Ins. Co.*, 86 Cal. 248, 24 P. 1018 (1890); *Farmer's v. First*, 38 Cal. App. 2d 335, 101 P.2d 141 (1940); *Everett v. Standard*, 45 Cal. App. 332, 187 P. 996 (1919). Policy may pro-



vide for avoidance. Ins. C. §448; *McKenzie v. Scottish*, 112 Cal. 548, 44 P. 922 (1896); *Holz v. American*, 14 Cal. 3d 45, 120 Cal. Rptr. 415 (1975). Breach without fraud. Ins. C. §449; see *Kahn v. Royal Indem. Co.*, 39 Cal. App. 180, 178 P. 331 (1918). Statements in application declared as warranties will not be treated as mere representations. *Craig v. USF&G*, 11 Cal. App. 2d 644, 54 P.2d 486 (1936). Insurer may not rely upon insured's misrepresentations or concealment where its investigation disclosed facts. *Di Pasqua v. California Life*, 106 Cal. App. 2d 281, 235 P.2d 64 (1951); *Old Line v. Sup. Ct.*, 229 Cal. App. 3d 1600, 281 Cal. Rptr 15 (1991).

Misrepresentations/Materiality. Concealment does not invalidate unless material. *Thompson v. Occidental*, 9 Cal. 3d 904, 513 P.2d 353 (1973); see also *Kurtz, Richards, Wilson & Co. v. Insurance Communicators*, 12 Cal. App. 4th 1249, 16 Cal. Rptr. 2d 259 (1993). Representation of good health when known to be bad invalidates. *Robinson v. Occidental*, 131 Cal. App. 2d 581, 281 P.2d 39 (1955); *Cohen v. Pennsylvania Mutual*, 48 Cal. 2d 720, 312 P.2d 241 (1957). Failure to disclose minor ailments does not void policy. *In re West Coast*, 92 F. Supp. 636 (S.D. Cal. 1950); *Brubaker v. Beneficial*, 130 Cal. App. 2d 340, 278 P.2d 966 (1955). Insurer entitled to rescind automobile policy for false representation as to vision, etc. *Standard v. Pratt*, 130 Cal. App. 2d 151, 278 P.2d 489 (1955); *Wilson v. Western National*, 235 Cal. App. 3d 981, 1 Cal. Rptr. 2d 157 (1991). Insurer entitled to know all insured knows as to specific questions in his application, and failure to disclose invalidates coverage. *Cohen v. Pennsylvania Mutual Life*, 48 Cal. 2d 720, 312 P.2d 241 (1957); *Thompson v. Occidental*, 9 Cal. 3d 904, 109 Cal. Rptr. 473 (1973). Provision in life policy that it shall not be effective unless at time of issuance insured is in sound health, is valid condition precedent and policy issued without medical examination not effective if subject not in good health. Insured's lack of knowledge of ill health immaterial. *American Nat'l Life Ins. Co. v. Herrera*, 211 Cal. App. 2d 793, 27 Cal. Rptr. 641 (1963). However, coverage applies where insured examined by company doctor. *Brubaker v. Beneficial Standard Life*, 130 Cal. App. 2d 340, 278 P.2d 966 (1955). Where insured is without knowledge or belief as to his bad health, recovery possible (after private physician diagnosis not relayed to insured). *Metropolitan Life v. Devore*, 66 Cal. 2d 129, 424 P.2d 321 (1967).

Rescission. If applicant has no present knowledge of the facts sought or fails to appreciate the significance of information related to him/her it may not constitute grounds for rescission. *Wilson v. Western National*, 235 Cal. App. 3d 981, 1 Cal. Rptr. 2d 157 (1991).

Reformation. A policy may be reformed where by reason of fraud, inequitable conduct or mutual mistake, policy as written does not express actual and real agreement of parties. *American Surety v. Heise*, 136 Cal. App. 2d 689, 289 P.2d 103 (1955).

## SERVICE OF PROCESS

See Law Digest Tables.

Corporations. Service may be made upon the president, vice president, secretary, treasurer, general manager or person authorized to receive service of process. C.C.P. §416.10 (b).

Upon Insurance Commissioner. If despite reasonable diligence, service cannot be effected, service may be made on Secretary of State. C.C.P. §416.10 (d). Foreign Corporations. Service may be made upon Insurance Commissioner. Ins. C. §1610.

Upon Non-Resident Motorists. See "AUTOMOBILES." Service of process on non-admitted insurer having no office or agents in State, by registered mail under Ins. C. §§1610-1620 at its home office outside California is constitutionally valid under certain circumstances. *McGee v. International Life Ins. Co.*, 355 U.S. 220, 2 L. Ed. 2d 223 (1957).

Service of Process. V.C. §§17454, 17455. See *Varra v. Superior Ct.*, 181 Cal. App. 2d 12, 4 Cal. Rptr. 920 (1960); *Quaranta v. Merlini*, 192 Cal. App. 3d 22, 237 Cal. Rptr. 179 (1987); disapproved by *Watts v. Crawford*, 10 Cal. 4th 743, 896 P.2d 807 (1995).

Defendant's failure to specify making "special appearance" strictly for the purpose of objecting to jurisdiction gives consent as general appearance to submit to the court's jurisdiction. *Severdia v. Alaimo*, 41 Cal. App. 3d 881, 116 Cal. Rptr. 405 (1974). See *Geary St., L.P. v. Superior Ct.*, 219 Cal. App. 3d 1186, 268 Cal. Rptr. 678 (1990).

Past domicile in the state without more is not sufficient "minimum contact" in the state to allow jurisdiction. *In re the Marriage of Hattis*, 196 Cal. App. 3d 1162, 242 Cal. Rptr. 410 (1987).

Personal service. Delivering copies of summons and complaint to defendant personally is "personal service." C.C.P. §415.10. Service is valid notwithstanding defendant's refusal to accept. *Trujillo v. Trujillo*, 71 Cal. App. 2d 257, 162 P.2d 640 (1945). For substitute service, see C.C.P. §415.20; *Hourie v. Sabek*, 220 Cal. App. 3d 1009, 269 Cal. Rptr. 687 (1990).



## SUBROGATION

In general. Where reimbursement is sought from tort-feasor causing loss, the action is one for subrogation. An insurer on paying loss is subrogated in amount equal to that paid insured against tort-feasor responsible. *Rossmoor v. Pylon*, 13 Cal. 3d 622, 633, 119 Cal. Rptr. 449 (1975). Insurer's right to subrogation arises as matter of law, not dependent on contract. *Offer v. Sup. Ct.*, 194 Cal. 114, 228 P. 11 (1924). Statutory provisions found in C.C. §2787 and 2848. But insurer not entitled to subrogate against its own insured for payments covered by different policy. *National Union v. Engineering Science*, 884 F.2d 1208 (9th Cir. 1989).

Parties to Action. Automobile Owner. V.C. §17153 establishing owner's liability gives owner right of subrogation against driver and/or bailee. *Overgard v. Beaverson*, 89 Cal. App. 2d 449, 201 P.2d 67 (1948).

Liability Insurance. Compare subrogation to indemnity claims.

Collision Insurance. Insured's release to third party barred action by insurer against third party who had no knowledge of interests of insurer. *Mitchell v. Holmes*, 9 Cal. App. 2d 461, 50 P.2d 473 (1935); *Conservatorship of Edwards*, 198 Cal. App. 3d 1176, 244 Cal. Rptr. 330 (1988). Release of a tort-feasor with knowledge of indemnification from insurer does not necessarily bar insurer's right of subrogation. *Id.* Insured's release and prior suit for personal injuries barred action by insurer. *Kidd v. Hillman*, 14 Cal. App. 2d 507, 58 P.2d 662 (1936); *Commercial Union v. San Jose*, 127 Cal. App. 3d 730, 179 Cal. Rptr. 814 (1982). In action brought in name of insured it is no defense that plaintiff has been fully reimbursed by insurance carrier. *Lebet v. Cappobiancho*, 38 Cal. App. 2d Supp. 771, 102 P.2d 1109 (1940). *Accord, Anheuser-Busch v. Starley*, 28 Cal. 2d 347, 170 P.2d 448 (1946). See *Waite v. Godfrey*, 106 Cal. App. 3d 760, 163 Cal. Rptr. 881 (1980).

Fidelity Bonds. Neither insured nor insurer, after payment of loss under fidelity bond, can recover from innocent third party who has innocently negotiated forged instrument. *American Alliance v. Capital Nat'l Bank*, 75 Cal. App. 2d 787, 171 P.2d 449 (1946); *Continental v. Morgan*, 83 Cal. App. 3d 593, 148 Cal. Rptr. 57 (1978). So-called bank receipt construed as payment of loss. *American Alliance v. National Bank, supra*.

Fire Insurance. Standard fire policy contains express provision with reference to subrogation and requires insured to make assignment to insurer. Ins. C. §§2070 and 2071. Insurer on payment of loss is subrogated in corresponding amount to right of action of insured without formal assignment or express stipulation in policy. *Dibble v. San Joaquin*, 47 Cal. App. 112, 190

P. 198 (1920); *Commercial Union v. San Jose*, 127 Cal. App. 3d 730, 179 Cal. Rptr. 814 (1982). Insurer cannot recover treble damages against third party as provided in statute. *Phoenix v. Pacific Lumber*, 1 Cal. App. 156, 81 P. 976 (1905). In absence of agreement if one insurer pays in excess of amount due under "pro rata" clause such insurer cannot recover from other insurers. *Firemen's Fund v. Palatine*, 150 Cal. 252, 88 P. 907 (1907); *Colby v. Liberty Mut.*, 220 Cal. App. 2d 38, 33 Cal. Rptr. 538 (1963). Same rule applied as to liability insurance in *Fidelity & Cas. v. Firemen's Fund*, 38 Cal. App. 2d 1, 100 P.2d 364 (1940); but see *California Food v. Great Amer.*, 130 Cal. App. 3d 892, 182 Cal. Rptr. 67 (1982).

Parties to Action. Insurer may bring suit in name of insured with his consent, sue in its own name with insured as co-plaintiff or as defendant. *Bank of Orient v. Superior Ct.*, 67 Cal. App. 3d 588, 136 Cal. Rptr. 741 (1977). See *Patent Scaffolding v. William Simpson Constr. Co.*, 256 Cal. App. 2d 506, 64 Cal. Rptr. 187 (1967). In absence of objection by defendant, insured need not be made party to action. See *Offer v. Superior Ct.*, 194 Cal. 114, 228 P. 11 (1924); *Peerless v. Superior Ct.*, 6 Cal. App. 3d 358, 85 Cal. Rptr. 679. (1970).

Surety. In action on notary bond it is no defense that plaintiff had been reimbursed by its insurer. *Inglewood Park v. Ferguson*, 9 Cal. App. 2d 217, 49 P.2d 305 (1935); see *Olson v. Arnett*, 113 Cal. App. 3d 59, 169 Cal. Rptr. 629 (1980). Assignment of right of action adds nothing to subrogation right. If plaintiff had any right of subrogation plaintiff gained nothing by assignment. *Meyers v. Bank of America*, 11 Cal. 2d 92, 77 P.2d 1084 (1938); see also *Strike v. Trans-West*, 92 Cal. App. 3d 735, 155 Cal. Rptr. 132 (1979). Insurer may expressly or impliedly waive right to subrogation. *Liberty Mut. v. Auto Spring*, 59 Cal. App. 3d 860, 131 Cal. Rptr. 211 (1976); *Knight v. Alefosia*, 158 Cal. App. 3d 716, 205 Cal. Rptr. 42 (1984).

Equitable Subrogation. See *Schrenelis v. Farmers & Merchants Bank*, 6 Cal. App. 4th 767, 7 Cal. Rptr. 2d 903 (1992). To state cause of action for equitable subrogation. See *Patent Scaffolding v. Wm. Simpson*, 256 Cal. App. 2d 506, 64 Cal. Rptr. 187 (1967).

Workers Compensation. Insurers are statutorily entitled to recover amounts paid to injured employees under Workers Compensation policies. Lab. C. §3852.

## WAIVER AND ESTOPPEL

Considerable confusion exists between these two principles. Elements of waiver and estoppel are discussed in following cases: *Goorberg v. Western Assur.*, 150 Cal. 510, 89 P. 130 (1907); *Purefoy v. Pacific*, 5 Cal. 2d 81, 53 P.2d 155 (1935) (waiver held to be in na-



ture of promissory estoppel); *Mackintosh v. Agricultural*, 150 Cal. 440, 89 P. 102 (1907) (waiver, estoppel and new contract are inseparably intermingled); *Stockton v. Glens Falls*, 98 Cal. 557, 33 P. 633 (1893) (waiver treated as new agreement to pay); *McCormick v. Orient*, 86 Cal. 260, 24 P. 1003 (1890) (estoppel and waiver distinguished but states that terms are used interchangeably). Ins. C. §336 provides that right to information of material facts may be waived by 1) terms of policy and 2) failure to inquire of such facts when implied from facts given.

If facts given to insurer apparently are incomplete or give reason for suspicion as to need of further inquiry, failure of insurer to inquire constitutes waiver of inceptual breaches. *Golden Gate v. Great American*, 6 Cal. 2d 439, 58 P.2d 374 (1936). Failure to rescind on knowledge of false answers in application acquired after death of insured not waiver of defense, and knowledge of falsity of certain answers does not impute knowledge as to falsity of all answers. *Maggini v. West*, 136 Cal. App. 472, 29 P.2d 263 (1934); *Rutherford v. Prudential*, 234 Cal. App. 2d 719, 44 Cal. Rptr. 697 (1965). Insurer not estopped to set up defense of statute of limitations where it advised insured of his rights under policy. *Neff v. New York Life Ins. Co.*, 30 Cal. 2d 165, 180 P.2d 900 (1947); *Cf. Vu v. Prudential*, 172 F.3d 725 (1999); and see *Beach v. USF&G*, 205 Cal. App. 2d 409, 23 Cal. Rptr. 73 (1962). Accepting and keeping policy, as well as failure to read policy does not negate waiver by insurer. *Golden v. Great American*, 6 Cal. 2d 439, 58 P.2d 374 (1936). If liability policy issued without application and insured does not read policy, there can be no defense by insurer of breach of warranties. *Mercer v. Lewis*, 41 Cal. App. 2d 918, 108 P.2d 65 (1940); *Laing v. Occidental*, 244 Cal. App. 2d 811, 53 Cal. Rptr. 681 (1966). If inceptual or subsequent breach of condition is called to attention of insurer, and no affirmative action taken by insurer, breach is waived. *Farrar v. Policyholders*, 3 Cal. App. 2d 87, 39 P.2d 229 (1934). Insurer notified of misrepresentation in application but continued to collect premiums. *Arnold v. American*, 148 Cal. 660, 84 P. 182 (1906); *Phillips v. Reserve Life*, 128 Cal. App. 2d 540, 275 P.2d 554 (1954).

**Other Waiver Cases.** Practice of accepting overdue premiums is waiver of prompt payment. *Nelson v. National*, 131 Cal. App. 669, 21 P.2d 1022 (1933); *Lincke v. Mutual Benefit*, 76 Cal. App. 2d 222, 172 P.2d 912 (1946). Permitting agent in offices of branch office to give receipts for premiums is waiver of condition that premiums must be paid at home office or branch office. *Huber v. New York*, 18 Cal. App. 2d 269, 63 P.2d 318 (1936); *Gleed v. Lincoln*, 65 Cal. App. 2d 213, 150 P.2d 484 (1944). Denial of liability waiver of proof of loss. *Bank v. Home*, 14 Cal. App. 208, 111 P. 507 (1910);

*Luttrell v. Columbia*, 136 Cal. App. 513, 28 P.2d 1067 (1934). Also see *Kennedy v. American*, 97 Cal. App. 2d 315, 217 P.2d 457 (1950); and *Genuser v. Ocean*, 57 Cal. App. 2d 979, 135 P.2d 670 (1943). Refusal to furnish forms for proof of loss waived condition. *Hill v. Mutual*, 136 Cal. App. 508, 29 P.2d 285 (1934). Offer to settle disability claim waiver of due proof. *Martin v. Postal Union*, 31 Cal. App. 2d 329, 87 P.2d 897 (1939). Tender of premiums in arrears waived by denial of liability. *Culley v. New York*, 27 Cal. 2d 187, 163 P.2d 698 (1945); *Alta Cal. v. Fremont*, 25 Cal. App. 4th 455, 30 Cal. Rptr. 2d 841 (1994), *overruled in part*, *Waller v. Truck Ins. Exch.*, 11 Cal. App. 4th 1, 34, 900 P.2d 619 (1995).

Facts must be known by insurer. *California Western v. Feinstein*, 15 Cal. 2d 413, 101 P.2d 696 (1940); *Rizzuto v. National*, 92 Cal. App. 2d 143, 206 P.2d 431 (1949); *Anaheim v. Lincoln*, 233 Cal. App. 2d 400, 43 Cal. Rptr. 494 (1965). To be waiver, facts must be known by agent of insurer with actual or ostensible authority. Soliciting agent has no such authority. *Wilson v. Maryland*, 19 Cal. App. 2d 463, 65 P.2d 903 (1937); *Cole v. Calaway*, 140 Cal. App. 2d 340, 295 P.2d 84 (1956). Soliciting agent's statements as to clear and express terms of insurance contract does not alter or amend contract, nor estop insurer to rely on contract as written. *Linnastruth v. Mutual Benefit*, 22 Cal. 2d 216, 137 P.2d 833 (1943).

**Waiver of First Premium.** Provision that no liability exists until first premium paid "waived" by delivery of policy as presently effective contract under agreement for credit. *Farnum v. Phenix*, 83 Cal. 246, 23 P. 869 (1890); *Berliner v. Travelers*, 121 Cal. 451, 53 P. 922 (1898); *Alta Cal. v. Fremont*, 25 Cal. App. 4th 455, 30 Cal. Rptr. 2d 841 (1994), *overruled in part in Waller v. Truck Ins. Exch.*, 11 Cal. App. 4th 1, 900 P.2d 619 (1995).

**Proof of Loss.** If insured submits timely claim, the 1 year period within which action must be filed against insurer equitably tolled while insurer considers claim. *Prudential LMI v. Sup. Ct.*, 51 Cal. 3d 674, 274 Cal. Rptr. 387 (1990).

## WORKERS' COMPENSATION

See Law Digest Tables.

**Statutory Reference.** California Workers' Compensation Act (Lab. C. §3200, *et seq.*) provides comprehensive system of remedies for job-related injuries. Remedies in Act are "sole and exclusive remedy" for industrial injuries and are available only in proceedings before Workers' Compensation Appeals Board. Lab. C. §3602 (a), 5300. WCAB has exclusive jurisdiction over dis-



putes regarding employee's right to compensation or employer's liability. Lab. C. §5300. But exclusive remedy rule only applies in cases where personal injury/death is job-related. *Cole v. Fair Oaks*, 43 Cal. 3d 148, 233 Cal. Rptr. 308 (1987). Also, rule does not apply where employer's tortious conduct goes beyond proper role, i.e. not seen as regularly coming within the compensation bargain. *Shoemaker v. Meyers*, 52 Cal. 3d 1, 276 Cal. Rptr. 303 (1990). Employee's claims for job-related emotional distress or mental anguish are subject to exclusive remedy rule. *Shoemaker*, *supra* at P. 25.

New workers' compensation law, Senate Bill 899 (which apportions employers' liability for permanent disability on basis of causation and which makes substantive changes to Labor Code §§4663 and 4664) applies to cases pending when it was enacted regardless of date of injury. *Kleemann v. Workers Comp. Appeals Board*, 127 Cal. App. 4th 274, 25 Cal. Rptr. 3d 448 (2005).

Wrongful Termination. Cause of action for wrongful termination by "whistleblower" not barred by Workers' Compensation Act. Other claims for termination of employment that include claims of physical injury are subject to Act since termination is a normal part of employment relationship. *Shoemaker v. Myers*, 52 Cal. 3d 1, 276 Cal. Rptr. 303 (1990) (including emotional distress claim); *Johns-Manville v. Sup. Ct.*, 27 Cal. 3d 465, 165 Cal. Rptr. 858 (1980).

Benefits. Workers' Compensation law requires employer to provide medical treatment to an injured employee. Lab. C. §4600. When injury causes death, employer is liable, in addition to other benefits provided by workers' compensation law, for burial expenses and death benefits to dependents of employee. Lab. C. 4701; *Zenith v. WCAB*, 124 Cal. App. 3d 176, 176 Cal. Rptr. 920 (1981). Insured could not state causes of action for breach of contract and bad faith against worker's compensation carrier based on carrier's low settlement and allegedly poor investigation of subrogation claim against third party responsible for worker's injuries. *Tilbury*

*Constructors, Inc. v. State Comp. Ins. Fund*, 137 Cal. App. 4th 466, 40 Cal. Rptr. 3d 392 (2006).

Disability. Compensation for temporary total disability is 2/3 of average weekly earnings during disability period. Lab. C. §4653. For temporary partial disability, 2/3 of weekly loss in earnings during disability period. Lab. C. §4654. Compensation for permanent disability is computed by a statutory schedule. Lab. C. §§4658, 4659, 4661.

Occupational disease. Develop gradually and imperceptibly in workplace: inhalation of gases and fumes, *Fidelity & Cas. v. Industrial Acc.*, 177 Cal. 614, 171 P. 429 (1918); silicosis, *Associated Indem. v. Industrial Acc.*, 124 Cal. App. 378; 12 P.2d 1075 (1932); *Johnson v. Industrial Acc.*, 157 Cal. App. 2d 838, 321 P.2d 856 (1958); asbestos-related disease, Lab. C. §4402.

Preexisting injury. Aggravation at preexisting disease by industrial injury is compensable as injury arising out of and in course of employment, if accident is attributable to an industrial accident. *Industrial Indem. v. Industrial Acc.*, 95 Cal. App. 2d 443, 213 P.2d 11 (1949). For apportionment, see Lab. C §4663, *Calhoun v. WCAB*, 127 Cal. App. 3d 1, 179 Cal. Rptr. 198 (1981).

Liens. Workers' compensation liens are assignable, even to the employee. *Morris v. Standard Oil*, 200 Cal. 210, 252 P. 605 (1926). Where employer is negligent, judgment must be reduced by benefits paid employee to preclude double recovery to employee. *Witt v. Jackson*, 57 Cal. 2d 57, 17 Cal. Rptr. 369 (1961), superseded by statute as stated in *Rosales v. Thermex-Thermatron*, 67 Cal. App. 4th 187, 78 Cal. Rptr. 2d 861 (1998). Liens against worker's benefits allowed by WCAB: attorney's fees, Lab. C. §4903 (a); burial expenses, Lab. C. §4903 (d); medical and living expenses, unemployment benefits, Lab. C. §4903 (f), 4903 (b).

Attorney's Fees. WCAB determines what is recoverable (reasonable) amount. Lab. C. §4906. Attorney cannot contract for more fees than allowed by WCAB. *Bentley v. Industrial*, 75 Cal. App. 2d 547, 171 P.2d 532 (1946).