EMPLOYMENT LAW

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Employers Beware of The Private Attorneys General Act of 2004

Effective January 1, 2004, the California workforce became deputized as private attorneys general for purposes of enforcing the provisions of the Labor Code. Prior to the enactment of the Labor Code Private Attorneys General Act of 2004 (L.C. §§2698 et seq.), an employee with a Labor Code claim (i.e. failure to pay overtime, vacation pay, commissions, missed meal/lunch breaks, misclassification of employee as exempt, etc.) had to seek redress administratively before the California Division of Labor Standards Enforcement ("DLSE"). Now, under the Private Attorneys General Act, also known as the "Sue Your Boss" law, employees can sue their employers directly in the Superior Court on behalf of themselves and all other current and former employees for almost any violation of the Labor Code. If successful, the employee recovers his or her wages, attorney's fees and 25 percent of the penalties that previously went exclusively to the State. Penalties are imposed under the Act in the amount of $100.00 per employee, per pay period, for each initial Labor Code violation and $200.00 for each subsequent violation. Thus, an employer with only a few employees can pay significant penalties where several Labor Code violations continue over the course of a year or more.

The legislative policy behind the Act was to achieve maximum compliance with State labor laws in the face of declining funding and staffing levels for the DLSE, the State agency charged with enforcing the Labor Code. The response from the business community was swift with an unsuccessful attempt to repeal the Act in its entirety in April of 2004 and successful amendments to the Act in August of 2004. The amendments include requiring an employee to send a claim letter to the State and employer as a prerequisite to filing a civil action. The State then has 30 days in which to decide whether to take over investigation of the claim, which could result in a citation being issued to the employer. If the State takes the claim, then the employee cannot commence a civil action. However, it is a rare case where the State will take over a claim from the employee as the DLSE lacks the resources to handle these claims. Moreover, there is no real incentive now for the State to prosecute these claims because, under the Act, it can sit back and let private attorneys do the work and yet still recover 75 percent of the penalties. Other amendments include the prohibition of civil actions merely for the failure to post signs or give notices required by the Labor Code. The amendments also give the court the power to award a lesser amount than the maximum civil penalty if the court determines that the maximum penalty would be unjust, arbitrary, or oppressive to the employer.

Although employers were successful in getting amendments to the Act in August 2004, these amendments were a hollow victory and will likely not reduce the number of claims, but instead will merely delay civil actions on these claims for the 30-day waiting period. In fact, the Act opened the flood gates for Labor Code claims as it gives employees an incentive to sue by offering them a 25 percent cut of the penalties and the ability to file a direct civil action. Likewise, the Act gives plaintiffs' attorneys an incentive to file Labor Code actions by awarding attorney's fees to a prevailing employee and expressly authorizing an employee to bring an action on behalf of himself or herself and all other current or former employees. As such, the incentive for bringing representative or class actions is built into the Act.

Employers Beware. Now is the time to audit your firm's compliance with wage/hour laws and make sure that your payroll practices and employee classifications (i.e. exempt versus non-exempt) are correct. What may seem like a trivial Labor Code violation can turn into a major liability for an employer when multiplied by the number of current and former employees, plus attorney's fees and penalties.

INSURANCE LAW

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In this issue we review the last cases to have been published during 2004 and the first to be published during 2005. Overall, the decisions were favorable to the insurance industries. See, there is a Santa Clause.

General Contractor's Insurer Not Liable for Equitable Contribution to Subcontractor's Insurer When Underlying Indemnity Provision in Subcontract Negated Indemnity For Type of Conduct at Issue in Underlying Case. In Hartford Cas. Ins. Co. v. Mt. Hawley Ins. Co. (2004) 123 Cal.App.4th 278, the California Court of Appeal for the Second Appellate District reversed a trial court ruling in favor of a subcontractor's insurer and concluded that a general contractor's insurer was not liable to the subcontractor's insurer where there existed an indemnity provision in the subcontract between the general contractor and subcontractor which negated liability by the general contractor to the subcontractor. PCS was a general contractor insured under a CGL policy issued by Mt. Hawley. PCS entered into a subcontract with Valley Metal. The subcontract required Valley Metal to obtain a CGL policy for itself and to include coverage for PCS as an additional insured. Valley Metal fulfilled that obligation by purchasing a CGL policy from Hartford. During construction, an employee of Valley Metal (Cortez) was injured. Cortez eventually sued PCS. PCS contacted Mt. Hawley which, in turn, tendered PCS' defense to Hartford. Hartford accepted the defense and informed PCS that it would indemnify PCS per the indemnity provision in the subcontract, except for PCS' sole negligence or willful misconduct. Hartford settled Cortez's complaint and filed a reimbursement action against Mt. Hawley. The court of appeal reversed the trial court which had awarded Hartford one-half of the underlying defense and

indemnity expenses. The court rejected Hartford's argument that the indemnity provision in the subcontract agreement between PCS and Valley Metal was irrelevant to the insurers' coverage obligations. It interpreted the indemnity provision to mean that Valley Metal agreed to indemnify and hold PCS harmless absent PCS's sole negligence or willful misconduct. The court relied on evidence that PCS was not solely negligent to conclude that Hartford (as the insurer for Valley Metal) could not recover from Mt. Hawley (as the insurer for PCS).

Insured Was "Upon" Vehicle Pursuant to Auto Liability Insurance When Insured Was Injured Rendering Aid to Passenger in Another Vehicle. In Atlantic Mutual Ins. Co. v. Ruiz (2004) 123 Cal.App.4th 1197, the California Court of Appeal for the Sixth Appellate District affirmed the decision of the Santa Clara County Superior Court holding that a person in proximity to a vehicle need not have occupied it in order to be deemed "upon" the vehicle for purposes of qualifying as insured under an automobile liability policy. After a motor vehicle accident, Ruiz (who was in the course and scope of his employment) went to check on the status of an injured passenger in another vehicle owned by Group Manufacturing. When approaching the Group Manufacturing vehicle, Ruiz was struck by an underinsured motorist. American States issued a commercial auto policy to Ruiz's employer. Atlantic Mutual insured Group Manufacturing under a business auto policy. Both policies provided $1 million in underinsured motorist coverage and included the following endorsement:

> We will pay all sums the 'insured' is legally entitled to recover as compensatory damages from the owner or driver of an 'uninsured motor vehicle.' The damages must result from 'bodily injury' sustained by the 'insured' caused by an 'accident.' The owner's or driver's liability for these damages must result from the ownership, maintenance or use of the 'uninsured motor vehicle.'

The policies defined "insured" to include "anyone else 'occupying' a covered 'auto'." "Occupying" was defined to mean "in, upon, getting in, on, out or off." The trial court determined that Ruiz was an insured under the Atlantic Mutual policy but not the American States policy. Ruiz and Atlantic Mutual appeal. The appellate court affirmed. The court of appeal determined that Ruiz was "upon" the Group Manufacturing van when he was struck by the underinsured motorist. It reasoned that Ruiz was positioned immediately adjacent to the van for reasons related to the vehicle's use on the highway. As such, the court found that Ruiz was an insured within the meaning of Atlantic Mutual's underinsured motorist coverage. The court found that Ruiz was not an insured under the American States policy issued to his employer relying, in part, on the fact that he was approximately 200 feet away from the employer's vehicle when he was struck.

Insureds Not Entitled to Prejudgment Interest on Malicious Prosecution Damage Awards Against Insurers. In Hillenbrand, Inc. v. Ins. Co. of North America (2004) 20 Cal.Rptr.3d 380, the California Court of Appeal for the Third Appellate District affirmed a decision from the Sacramento County Superior Court, holding that insureds are not entitled to prejudgment interest on malicious prosecution damage awards against insurers. The court concluded that because malicious prosecution claims against insurers are analogous to bad faith actions, any related damage award does not constitute "damages for personal injury" for which prejudgment interest might be recoverable under California Civil Code section 3291.

Insured Cannot Compel Arbitration in Uninsured Motorist Context When Insurer Pays Policy Limited to Insured. In State Farm Mutual Automobile Ins. Co. v. Superior Court (2004) 123 Cal.App.4th 1424, the Second District Court of Appeal vacated the trial court's order compelling State Farm to arbitration on an uninsured motorist claim. State Farm's insured was injured in a rear-end collision. She tendered an uninsured motorist claim to State Farm, seeking the policy limits less a credit for the uninsured driver's contribution. State Farm initially rejected the tender, and the insured demanded arbitration. State Farm subsequently paid the policy limits, but the insured nevertheless sought an order compelling arbitration. She contended her damages exceeded the policy limits, and sought to use the arbitration proceedings to evaluate a possible bad faith suit. The court of appeal concluded the maximum award available in an uninsured motorist arbitration is the policy limits. However, the arbitrator could not consider whether State Farm paid in an untimely manner or engaged in other claims handling misconduct. Since State Farm had paid the policy limits, there was thus no controversy left to be arbitrated.

Insurance Broker Who Knowingly Makes False Statements on an Insurance Application May Be Held Liable to an Insurer That Reasonably Relies on the Statements. In Century Surety Company v. Crosby Insurance, Inc. (2004) 124 Cal.App.4th 116, the Fourth District Court of Appeal in San Bernardino reversed in part and affirmed in part a judgment of dismissal after a demurrer was entered in favor of an insurance broker on a complaint brought by an insurer for fraud, negligence and negligent misrepresentation. The court of appeal held an insurance broker who knowingly makes false statements on an insurance application may be held liable to an insurer that reasonably relies on the statements. The court of appeal rejected the broker's contentions that only the insured could be held liable for the misrepresentations and that the insurer's remedy was limited to rescission of the policy. The court also concluded that, although no California court had considered whether an insurance broker owes a duty of care to an insurer, public policy supports imposing such a duty.

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No Duty to Defend in Advertising Injury Claim Where the Underlying Suit Included No Allegations of a Causal Connection Between Some Form of Advertising and Plaintiff's Alleged Injuries. In We Do Graphics, Inc. v. Mercury Cas. Co. (2004) 124 Cal.App.4th 131, the Fourth District Court of Appeal in Orange County affirmed a summary judgment in favor of an insurer. The Court concluded the insurer had no duty to defend where the underlying suit included no allegations of a causal connection between some form of advertising and plaintiff's alleged injuries. The underlying plaintiff alleged its former employee stole trade secrets, joined We Do Graphics, Inc., and attempted to solicit plaintiff's customers. Plaintiff then sued We Do Graphics. We Do Graphics tendered the suit to Mercury Casualty Co., and Mercury denied coverage. We Do Graphics sued Mercury, alleging the underlying suit triggered advertising injury coverage. The trial court and the court of appeal disagreed, concluding there were no allegations in the underlying suit relating to the insured's advertising activities. The court of appeal concluded the alleged trade secrets were customer information, not advertising ideas. Moreover, the only reference to advertising was in a declaration filed by the insured in opposition to Mercury's motion for summary judgment. The Court concluded this speculation, about extraneous facts regarding potential liability or ways in which the plaintiff might amend its complaint, could not trigger a duty to defend.

Attorney Barred as Expert When Personally Involved in Providing Legal Advice and Services to Insurer in Matters Substantially Related to the Instant Litigation. In Brand v. 20th Century Insurance Company (2004) 124 Cal.App.4th 594, the Second District Court of Appeal reversed the trial court's denial of an insurer's motion to exclude expert testimony of its former attorney. Plaintiff designated the attorney to provide expert testimony on claims handling issues. 20th Century Insurance Company moved for a protective order barring the attorney from testifying against it as an expert. The trial court denied the application, but the court of appeal reversed. 20th Century had not engaged the attorney for over twelve years. Nevertheless, the court of appeal concluded the attorney should be barred from testifying as an expert because he was personally involved in providing legal advice and services to 20th Century in matters substantially related to the instant litigation.

Carrier's Receipt of an Initial Premium Check and Subsequent Approval of the Policy Application Rendered the Life Insurance Policy Effective from the Date of the Application. In Hodgson v. Banner Life Ins. Co., (2004) 124 Cal.App.4th 1358, the California Court of Appeal, Third Appellate District, reversed the judgment of the trial court and granted summary judgment in favor of an insured, holding that a carrier's receipt of an initial premium check and subsequent approval of the policy application rendered the life insurance policy effective from the date of the application. Hodgson completed an application for a $500,000 life insurance policy with defendant Banner Life Insurance Company ("Banner") and paid an initial premium. Hodgson's application included a "conditional receipt," which provided interim coverage while the application for permanent coverage was being considered. When Hodgson applied, Banner limited interim insurance to applicants who applied for face amounts of life insurance of $250,000 or less. However, the broker used an old application form indicating that the conditional receipt was effective for limits up to $500,000. Within days, Banner returned the check for the initial premium to Hodgson and declared the conditional receipt ineffective. The company eventually approved coverage for Hodgson only to find that he had died five days earlier. Oops! Banner considered the policy terminated prior to Hodgson's death and was sued by his survivors. The court found that Hodgson and his survivors could not have a reasonable expectation that interim coverage was in place because Banner had returned the premium payment and advised that any coverage under the conditional receipt was terminated. However, with respect to the permanent insurance policy ultimately approved by Banner, the court held that coverage was effective from the date of the application pursuant to Insurance Code section 10115. That section provides that when an applicant makes a premium payment concurrently with the submittal of a life insurance application and either receives a form receipt for the premium or the carrier receives the payment at its home office, and the carrier later approves the application, if the applicant dies on or after the date of the application, the "insurer shall pay such amount as would have been due under the terms of the policy . . . as if such policy had been issued and delivered on the date the application was signed by the applicant." The court found the requirements of section 10115 met because Hodgson submitted an application with a premium check, the same was received at Banner's home office, and Banner ultimately approved the application. While many of you are not in the life insurance industry, the case is noteworthy, and more importantly, fills space for the column.

Carriers' Settlement Without Consent or Participation of Insureds Enforceable with Plaintiff When No ROR Issued. In Fiege v. Cooke (2004) 125 Cal.App.4th 1350, the California Court of Appeal, Second Appellate District, concluded that notwithstanding the express requirement by CCP section 664.6 that to be enforceable a settlement must be either stipulated in writing by the parties or placed upon the record before the court, a settlement between a personal injury plaintiff and defendants' carriers, which had the right under the policies to settle without the defendants' consent, was enforceable even though defendants did not stipulate in writing to the settlement or place the settlement upon the court's record, since the settlement by the carriers did not prejudice the rights of the defendants as no reservations of rights

were issued by the carriers. A long sentence; but you get the idea. Fiege sued several defendants, including individuals Norman Cooke and Robert Ellis, over a traffic accident. Michael Wooldridge, the driver of the car in which Fiege was a passenger, also sued Cooke and Ellis. After a complaint in intervention by one of the insurance companies, a consolidation, and a cross-complaint by Cooke and Ellis, the matter went to a mandatory settlement conference. By this time, Fiege was on one side; Cooke, Ellis and Wooldridge were on the other, in that Fiege was seeking compensation from all three. The defendants were all insured under policies that gave the carriers the right to settle without the defendants' consent and to bind the defendants to the settlement. One carrier agreed to settle for $135,000 (including payment on two liens) on behalf of Cooke and Ellis. The other agreed to pay $25,000 on behalf of Wooldridge. The trial court secured Fiege's oral consent to the settlement. The defendants were not present at the settlement conference nor did they stipulate in writing to the settlement. Fiege later sought to escape from the settlement. In response, the defendants successfully moved under CCP section 664.6 to enforce the settlement. That section provides, in part, that "[i]f parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement." The trial court entered a judgment consistent with the settlement terms, reasoning that not only are the insureds rights not prejudiced but the consent of the carriers was superfluous because the policies provided the carriers the rights to settle without the consent of the insureds. Moving from facts and law to reality, the court explained that:

> it is common practice for insurance counsel and an adjuster to handle the negotiation of insurance-funded settlements without the superfluous involvement of a fully protected insured. If Levy [the case law relied upon by Fiege] were nevertheless interpreted to require the superfluous signature of an insured to an insurance-funded settlement in order for section 664.6 to apply, it is predictable that the insured would henceforth be ordered to attend all [mandatory settlement conferences]. Present practice often allows an insured to avoid such expense and inconvenience by permitting counsel and the adjuster to appear. Indeed, many people regard the ability to let the insurance carrier handle insured incidents without inconvenience to the insured as one of the benefits gained by purchasing insurance.
>
> The Levy court was not faced with an insured situation in which a literal party-signature requirement would more likely impair the insureds interests than protect them. Since Levy did not involve an insurance-funded settlement, we do not read Levy as precluding enforcement pursuant to section 664.6 of an insurance-funded settlement reached by an authorized insurance defense counsel or adjuster when the carrier has the contractual right to settle.

The question surviving this decision is what would have happened if any of the carriers had issued ROR's and sought reimbursement from the insured rather than waive the ROR? Can you say "bad faith" litigation?

Cal-OSHA Standards Can Be Used as Evidence. In an important withdraw from historically disallowing administrative findings into court, the California Supreme Court has recently decided in Elsner v. Uveges, (2004) 34 Cal.4th 915, that for injuries occurring after January 1, 2000, courts may consider Cal/OSHA safety standards as evidence of acceptable safety practices in lawsuits brought by workers against companies other than their own employer. The ruling reverses a law that had been in place since 1971 (Labor Code section 6304.5), which specified use of industry custom as the safe workplace guideline in third-party lawsuits. The reversal upholds a key provision of Assembly Bill 1127, a controversial 2000 law aimed at increasing penalties against employers for serious safety violations. In the case, Rowdy Elsner, an employee of Hoffman Roofing, injured his ankle when a scaffold collapsed beneath him at a construction site. Carl Uveges, the general contractor, was directly responsible for supervising work and for enforcing safety compliance. When Elsner sued Uveges for negligence, Uveges asked the court to exclude any references to alleged violation of Cal-OSHA safety standards. The trial judge disagreed, and ruled Cal-OSHA provisions admissible, a change permitted by the 2000 amendment. The judge also refused to admit evidence that the scaffold was built according to accepted industry standards. As a result, the jury found the company 100 percent at fault and awarded Elsner substantial damages. The California Supreme Court agreed with the trial judge's conclusion, but reversed the decision in this case because the injury occurred prior to the effective date of the amended law. The court said that until January 1, 2000, an industry could rely on a custom or practice as a reasonable standard of care, even though it did not meet Cal-OSHA safety orders. Applying the new rules would make the company potentially responsible for conduct that might have satisfied the prior legal standard, but not specific Cal-OSHA standards.

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Thank You

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A "User" of a Truck May Not Be a "Borrower" to Qualify for Coverage under a Motor Vehicle Liability Insurance. In City of Los Angeles v. Allianz Ins. Co., (2004) 125 Cal.App.4th 287, the California Court of Appeal, Second Appellate District, considered whether a shipper, who directs the loading of a truck on its premises and is to that extent a "user" of the truck, is also a "borrower" of the truck, and therefore an "insured" under the provisions of a trucking company's insurance policy. The court concluded the shipper did not exercise the requisite dominion and control over the truck to qualify as a borrower under the terms of the policy. A truck driver employed by MSM Trucking was injured when he fell during the weighing of his truck after it had been loaded with treated sewage at a City of Los Angeles treatment facility. After the driver sued the City, the City sought a defense from MSM's motor vehicle liability carriers. The City sued the carriers after they refused to defend on the ground that the City did not qualify as an insured. The policies covered MSM's "employees, partners, a lessee or borrower or any of their employees, while moving property to or from a covered auto." The court found that the City was a "user" of the truck. The City argued that the same facts establishing the City was a user of the truck — its control over the loading process — also establish it was a borrower of the truck. The court disagreed, finding "[o]ne can load or unload — and therefore 'use' — a truck one does not own and has not borrowed or hired." According to the court, "the pertinent question, in determining whether the City borrowed MSM's truck, is whether the City had 'the requisite dominion and control over the truck[,] not whether it directed or controlled the loading process.'" The court found that the requisite dominion and control was not present under the facts as the City was not in possession or custody of the truck and did not have the use of the truck for its own purposes, to the exclusion of its owner.

The "Sole Negligence" of an Additional Insured Party under a Liability Policy Will Not, in the Absence of Contrary Policy Language, Preclude That Party from Enforcing the Insurer's Coverage Commitment. In American Cas. Co. of Reading, PA v. General Star Indem. Co. (2005) 125 Cal.App.4th 1510, the California Court of Appeal for the Second Appellate District considered the impact of Civil Code § 2782(a) on the scope of an insurers' obligations under additional insured endorsements. Section 2782 limits the scope of indemnity promises in construction contracts. It declares unenforceable, as contrary to public policy, any provision purporting to indemnify a promisee for any injury or loss "arising from the sole negligence or willful misconduct" of the promisee. After pointing out that Section 2782 expressly states that its "sole negligence" limitation "shall not affect the validity of any insurance contract," the appellate court held that "[a] provision in a liability policy providing coverage to an additional insured will not be deemed contrary to public policy or unenforceable merely because that additional insured party may have incurred claim liability due to its 'sole negligence.' Stated another way, absent contrary language in the policy or in the additional insured endorsement, an indemnitee under a construction contract may enforce the commitment made by such endorsement to provide coverage for a claim arising from the indemnitee's negligence even though: (1) Section 2782 would preclude enforcement of the contractual indemnity promise made by the indemnitor; or (2) under the facts of the case and the terms of the contract of indemnity, the indemnitor had no obligation to provide indemnity to the indemnitee." The court concluded that while Section 2782 may preclude enforcement of a promise of indemnity in a construction contract, it does not limit the enforcement of an "additional insured" endorsement provided to the indemnitee by the indemnitor's liability insurer. In addition, the court held that the provisions of the contract of indemnity did not preclude enforcement by the indemnitee of its claim of coverage under the additional insured endorsement.

Insured May Assign its Right to Brandt Fees Claim. In Essex Ins. Co. v. Five Star Dye House, Inc. (2004) 125 Cal.App.4th 1569, the California Court of Appeal for the Second Appellate District reversed the trial court's order denying attorney fees and held that an insured may assign its right, established in Brandt v. Superior Court (1995) 37 Cal.3d 813, to recover as damages attorney fees incurred in obtaining the benefits of an insurance policy that were denied as a result of the insurer's bad faith. The court disagreed with dictum in Xebec Development Partners, Ltd. V. National Union Fire Ins. Co. (1993) 12 Cal.App.4th 501, which suggested that although an insured may assign its claims against an insurer for bad faith, the insured cannot assign the right to recover Brandt fees. The court noted that the policy in California is to favor assignability of claims and that, as a general proposition, the only claims which are not assignable are those which are founded upon wrongs of a purely personal nature, such as slander, assault and battery, seduction, breach of marriage promise, malicious prosecution, and others of like nature. The court concluded that the right to recover policy benefits in full, which Brandt fees are designed to accomplish, is not the kind of personal right that is not assignable.

In an Action in Which Excess Insurer Was Added as a Defendant by Insured after Primary Insurers Had Settled, Excess Insurer Could Not Raise Peremptorily Challenge to Trial Judge Because Primary Insurers Had Previously Exercised the One Challenge per Side Permitted by Statute. In Home Ins. Co. V. Superior Court (Montrose Chemical) (2005) 34 Cal.4th 1025, the California Supreme Court considered the question of whether, in a single action brought by the insured against both its primary and excess insurers, the interests of the two types of insurers must be deemed "substantially

adverse," relegating them to different "sides" in the litigation and entitling an after-named excess insurer to the exercise of a separate peremptory challenge to a trial judge pursuant to C.C.P. § 170.6. Only one such challenge is available "per side." The Court held that a party seeking a subsequent disqualification of the trial judge has the burden of demonstrating that its interests are substantially adverse to those of a co-party that previously exercised a peremptory challenge. The Court found that the excess insurer had not made such a showing and noted that the interests of primary and excess insurers are not necessarily adverse so as to place them on different "sides" of an action for purposes of a peremptory challenge under Section 170.6.

Loss Suffered by Insured Property Owner When Clogged Sewer Line Underneath Property Caused Water and Sewage to Flow into Basement of Property Was Excluded from Coverage under Policy Exclusion for "[W]ater That Backs up from a Sewer or Drain." In Penn-America Ins. Co. v. Mike's Tailoring (2005) 05 C.D.O.S. 354, the California Court of Appeal for the Third Appellate District reversed the trial court and held that an exclusion for damage caused by "[w]ater that backs up from a sewer or drain" applied to preclude coverage for damage caused by sewage carried by water because the common sense interpretation of the exclusion includes "sewage that inevitably accompanies the water in the sewer." A sewer line erupted in the insured's basement and the sewage, water, and accompanying fumes caused damage. Penn-American filed a declaratory relief action to determine application of its water back-up exclusion which the trial court found did not apply because it only encompassed damage caused by water, not damage caused by the pollutants carried by the water. The appellate court reversed. It rejected the trial court's distinction between water damage and sewage damage from a broken sewer pipe. According to the court of appeal, the plain meaning of "[w]ater back[ed] up from a sewer or drain" included water and contaminants; "No reasonable person would assume that water backing up from a sewer would be pure water."

Provision in Statute Extending Limitations Period for Insurance Claims for Damages Suffered in Northridge Earthquake of 1994, Excluding Application of Statute Where Case Was Settled by Insured When Represented by Counsel, Operated to Bar Property Owner's Second Northridge Earthquake-related Action Against Insurer, Even Though Statute Was Enacted after Owner's Settlement of First Suit, and Even Though First Case Was Limited to Issue of Insurance Deductibles. In Israel-Curley vs. California FAIR Plan (2005) 126 Cal.App.4th 123, the California Court of Appeal for the Second Appellate District affirmed a trial court's order granting summary judgment to an earthquake loss insurer on the ground that Code of Civil Procedure 340.9, which extended the limitations period for lawsuits against insurers arising out of the Northridge Earthquake, did not apply to a plaintiff's lawsuit due to her prior participation in a settlement of earthquake claims. The court held that Section 340.9 did not extend the limitation period for plaintiff's otherwise time-barred suit because, pursuant to Section 340.9(d)(2), plaintiff had entered into a prior settlement and general release of her earthquake claims while represented by counsel.

Case Depublication. On January 19, 2005, the California Supreme Court heroically denied review and withdrew from publication the decision in Permanent General Assurance Corp. v. Superior Court (Hernandez), (2004) 19 Cal.Rptr.3d 597. The Hernandez decision had ruled that, as part of an unpleaded discrimination theory, plaintiff could compel discovery of other vehicle theft claims after obtaining authorizations from all insureds whose claim files were to be produced. Having been depublished, the case is no longer available for use as legal authority. This determined inaction by the Supremes results in a very slightly more constricted application of the *Colonial Life* discovery rule of other similar claims.