# INSURANCE LAW

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With summer just around the corner, the Courts are slowing down the decisions related to insurance. I believe that this is occurring because we want to be outside to enjoy the nice weather. Be that as it may, below is a picnic of newly created case law.

**Announcements to customers and employees of a decision to start a new company and a request for continued patronage were not "advertising" activities within the meaning of a general liability policy's "advertising injury" coverage.** In Rombe Corp. v. Allied Ins. Co. (2005) 128 Cal.App.4th 482, the California Court of Appeal for the Fourth Appellate District held that general business announcements to customers and employees of a decision to start a new company and a request for continued patronage were not "advertising" activities within the meaning of a general liability policy's "advertising injury" coverage. Rombee was a franchisee of TRC Staffing Services, a nationwide temporary employment agency. Rombe invited customers and employees of its franchise to a breakfast meeting at a hotel and announced that it would no longer be affiliated with TRC and solicited those in attendance to become customers and employees of the new agency. The breakfast meeting and plans were later reported in an internet newsletter. TRC sued Rombe alleging breach of contract, misappropriation of trade secrets, and unfair competition. AMCO insured Rombe under a Premier Businessowners Policy which provided coverage for "advertising injuries" including slander or libel; violation of the right to privacy; copyright, title or slogan infringement; misappropriation of advertising ideas or style of doing business. The policy defined "advertisement" as "a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters." AMCO denied Rombe's tender of the TRC suit. Rombe sued AMCO and cross-motions for summary judgment were filed. The trial court ruled in favor of AMCO and the appellate court affirmed. Rombe argued the breakfast it hosted, and the later internet report of the breakfast and Rombe's plans constituted the "'use of another's advertising idea in your 'advertisement'" within the meaning of the AMCO policy. Rombe contended that the breakfast was arguably a form of advertisement to "specific market segments." The court of appeal disagreed. It reasoned that the term "specific market segments" does not relieve an insured of the burden of demonstrating that it was engaged in relatively wide dissemination of its advertisements even if the distribution was focused on recipients with particular characteristics or interests. With respect to the breakfast, the court found that it did not involve the broad dissemination of information required by the AMCO policy. As for the internet report, the court found that while it might have been broadly disseminated, nothing in the record indicated it involved any covered "advertising injury" offense. Perhaps there would have been coverage if the ballroom doors were left open so that the solicited would have reached a larger audience. Think about that the next time you solicit a client.

**Insurer has the right to rescind an insurance policy based on an insurance applicant's unintentional misrepresentations.** In Mitchell v. United Natl. Ins. Co. (2005) 127 Cal.App.4th 457, the California Court of Appeal for the Second Appellate District affirmed the trial court's order granting the insurer's motion for summary judgment, holding that an insurer has the right to rescind an insurance policy based on an insurance applicant's unintentional misrepresentations based upon Insurance Code §§ 331 and 359. James Mitchell, individually and on behalf of the Mitchell Family Trust, submitted an insurance application for fire insurance on a commercial building to Debra Messina, an authorized underwriter for defendant United National Insurance Company. The application included several misrepresentations. A business associate of Mitchell, Carl Robinson, set fire to the building and Mitchell submitted a claim to UNIC, which denied the claim, citing Mitchell's numerous misrepresentations on the insurance application. Mitchell sued alleging that the misrepresentations were immaterial and solely the fault of his brokers. Darn. UNIC filed a motion for summary judgment based on California Insurance Code §§ 331 and 359. Section 331 states: "Concealment, whether intentional or unintentional, entitles the injured party to rescind insurance." Section 359 provides: "If a representation is false in a material point, whether affirmative or promissory, the injured party is entitled to rescind the contract from the time the representation becomes false." The trial court granted United's motion for summary judgment and the appellate court affirmed relying on Messina's declaration stating that had she known the truth, she would have underwritten the policy differently, or rejected the application altogether. Mitchell argued that Insurance Code §§ 2070 and 2071 controlled over §§ 331 and 359. Section 2070 requires all fire insurance policies to be on the standard form set forth in section 2071 which states that rescission of a policy based on the insured's misrepresentation requires that the statement "have been knowingly and willfully made with the intent (express or implied) of deceiving the insurer." The court of appeal rejected Mitchell's argument, finding that nothing in §§ 2070 and 2071 prevents the application of §§ 331 and 359 to fire insurance policies, noting that such policies usually insure more than just fire. This, of course, brings to mind the axiom: Don't play with matches or you will get burnt.

**Court Issues Confusing Discovery Ruling Which Makes Sense after You Think about it for a While.** In Catholic Mutual Relief Society v. Superior Court (2005) 128 Cal.App.4th 879, the California Court of Appeal for the Second Appellate District issued a peremptory writ of mandate directing the

trial court to vacate an order denying a non-party insurer's motion to quash deposition subpoenas aimed at obtaining documents concerning the insurer's financial condition, including its reserve and reinsurance information. The plaintiffs sought this information in order to determine whether the insurer could meet its coverage obligations to the insured-defendant which, plaintiffs argued, would facilitate settlement discussions. The appellate court determined that the information was not relevant, admissible, or likely to lead to the discovery of admissible evidence under California Code of Civil Procedure Section 2017(a) and was not related to the "existence and contents" of the defendant's insurance which is discoverable under Section 2017(b). This is from LA. What do you expect?

**A Weather Conditions Clause Specifically Excluded Damage Caused by a Rain-induced Landslide Which Was Within the Risks Excluded by the Weather Conditions Clause.** In Julian v. Hartford Underwriters Ins. Co. (2005) 35 Cal.4th 747, the California Supreme Court enforced a "weather conditions clause" relied on by Hartford to deny a first party claim over the insureds' objection that the clause violated the efficient proximate cause doctrine. In this case, a rain-induced landslide caused damage to plaintiffs' home. Hartford denied coverage for all but a minor part of the damage citing the policy's exclusions for earth movement and weather conditions that "contribute in any way with" another excluded cause to produce a loss (the "weather conditions clause"). It was undisputed that Hartford covered losses caused by weather conditions that did not join with another excluded cause. Hartford filed a motion for summary judgment on the ground that its denial was appropriate because the efficient proximate cause of plaintiffs' loss, the rain-induced landslide, was excluded under the weather conditions clause. The trial court granted the motion and the appellate court affirmed. The appellate court's decision conflicted with another appellate decision which found that the weather conditions cause violated Insurance Code Section 530, which codified the efficient proximate cause doctrine. The California Supreme Court granted review to resolve the dispute over the validity of the weather conditions clause. The efficient proximate cause doctrine holds that when a loss is caused by a combination of covered and specifically excluded risks, the loss is covered if the covered risk was the efficient proximate cause of the loss, but the loss is not covered if the covered risk was only a remote cause of the loss, or the excluded risk was the efficient proximate cause. An insurer cannot contract around the efficient proximate cause doctrine with an exclusion. Plaintiffs argued that Hartford attempted to avoid the efficient proximate cause doctrine because rain, a covered risk, was the efficient proximate cause of their loss. The Court disagreed. It found that the weather conditions clause specifically excluded damage caused by a rain-induced landslide which was within the risks excluded by the weather conditions clause (weather in combination with another excluded risk).

**The Supremes:** On May 11, 2005, the California Supreme Court granted review and removed from publication Essex Ins. Co. v. Five Star Dye House, Inc. (2004) 125 Cal.App.4th 1569, a decision in which the Second District Court of Appeal held that an insured may assign its right to recover as damages attorney fees incurred in obtaining the benefits of an insurance policy that were denied as a result of the insurers bad faith. I discussed this case in the April 2005 edition of *The Adjuster*.