

POLICY INTERPRETATION

[4:1] **Interpretation as Question of Law:** The interpretation of an insurance policy is usually a question of law. [*Hartford Cas. Ins. Co. v. Swift Distribution, Inc.* (2014) 59 C4th 277, 288, 172 CR3d 653, 660]

Therefore, it is the court’s responsibility to determine coverage issues. It is error to leave policy interpretation to the jury, unless the interpretation involves the credibility of extrinsic evidence. [Ev.C. §310(a); *Garcia v. Truck Ins. Exch.* (1984) 36 C3d 426, 439, 204 CR 435, 441; *California Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 CA3d 1, 35, 221 CR 171, 187; see *GGIS Ins. Services, Inc. v. Sup.Ct. (Capitol Indemnity Corp.)* (2008) 168 CA4th 1493, 1507, 86 CR3d 515, 527—“The interpretation of a contract, including the resolution of any ambiguity, is solely a judicial function, unless the interpretation turns on the credibility of extrinsic evidence”]

[4:2] **Compare—factual issues affecting coverage:** Insurance coverage sometimes depends on disputed facts other than those relating to the policy’s meaning (e.g., the cause of loss, date of loss or date notice of loss was given to the insurer). These disputed factual issues are triable to a jury. The court will then determine coverage based on the facts found by the jury. [*Mellinger v. Ticor Title Ins. Co. of Calif.* (2001) 93 CA4th 691, 695, 113 CR2d 357, 360 (citing text); see also *Haynes v. Farmers Ins. Exchange* (2004) 32 C4th 1198, 1204, 13 CR3d 68, 72—where facts are *undisputed*, policy interpretation is question of law; and ¶15:894]

[4:3] **Appellate court’s independent interpretation:** Because policy interpretation is a judicial function, the reviewing court is not bound by the trial court’s interpretation, *unless* that interpretation turned upon a determination of disputed factual issues (¶4:2). Otherwise, the reviewing court makes an independent determination of the policy’s meaning. [*Spangle v. Farmers Ins. Exch.* (2008) 166 CA4th 560, 566, 82 CR3d 763, 768; *Prudential Ins. Co. of America, Inc. v. Sup.Ct. (Dunniway)* (2002) 98 CA4th 585, 595, 119 CR2d 823, 830 (citing text)]

[4:3.1] **Insurance Commissioner’s approval of policy form not controlling:** Certain policy forms require approval by the California Department of Insurance (CDI) (e.g., disability insurance; see ¶6:606). The CDI may also review other policy forms prior to their issuance. However, other than disability forms (see ¶4:436), the CDI’s approval or review does *not* establish the form’s compliance with the Insurance Code or govern interpretation of the form’s meaning. [See *Frenzer v. Mutual Benefit Health & Accident Ass’n* (1938) 27 CA2d 406, 414, 81 P2d 197, 202; *Rand v. American Nat’l Ins. Co.* (ND CA 2010) 717 F.Supp.2d 948, 955 (applying Calif. law)—Insurance Commissioner’s review “neither establishes [insurer’s] compliance with the Insurance Code, nor precludes this Court from determining whether [it] violated the disclosure requirements”]

[4:4 — 4:5]

[4:4] **Choice of law considerations:** A policy covering an insured’s risks in different states may be interpreted differently under each state’s laws. This choice of law issue is discussed at ¶15:592 ff.

A. “GENERAL RULES” OF POLICY INTERPRETATION

[4:5] The following rules establish the basic framework for interpretation of insurance policies. [*AIU Ins. Co. v. Sup.Ct. (FMC Corp.)* (1990) 51 C3d 807, 821-822, 274 CR 820, 831; *Romano v. Mercury Ins. Co.* (2005) 128 CA4th 1333, 1340, 27 CR3d 784, 789 (citing text)]

Rule #1—“Plain Meaning” Rule: First, an insurance policy is given its “plain meaning”: i.e., the terms must be read in their “ordinary and popular sense” in the context of the policy as a whole and the circumstances of the case. If the contractual language is clear and explicit, it governs. See ¶4:6 ff.

Rule #2—“Objectively Reasonable Expectations of Insured” Rule: If the term in dispute is ambiguous, i.e., susceptible to more than one reasonable interpretation, courts will interpret the term in accordance with the insured’s “objectively reasonable expectations.” See ¶4:305 ff.

Rule #3—“Contra-Insurer” Rule: If the previous rule fails to resolve the ambiguity or uncertainty, it is resolved against the insurer. See ¶4:405 ff.

Sequence of application? These general rules should be followed in the order listed above. [See *Yahoo Inc. v. National Union Fire Ins. Co.* (2022) 14 C5th 58, 67, 301 CR3d 1, 7–8—“[o]nly if these rules do not resolve a claimed ambiguity do we resort to the rule that ambiguities are to be resolved against the insurer” (internal quotes omitted); see also *Elliott v. GEICO Indemnity Co.* (2014) 231 CA4th 789, 802-803, 180 CR3d 331, 341—insured’s objectively reasonable expectations “come[] into play *only* where there is an ambiguity in the policy” (emphasis in original; internal quotes omitted)]

Decisions prior to *Yahoo, Inc.* looked to the insured’s “reasonable expectations” to *confirm* the policy’s “plain meaning,” thus *avoiding* any finding of ambiguity. [See *Powerine Oil Co., Inc. v. Sup.Ct. (Central Nat’l Ins. Co. of Omaha) (Powerine II)* (2005) 37 C4th 377, 404, 33 CR3d 562, 582—“We find no ambiguity here . . . The literal language of the policies controls, as does the objectively reasonable expectations of Powerine, the insured”; and ¶4:12]

Still other opinions proceeded directly to “reasonable expectations” with little apparent evaluation of “plain meaning.” [See *State of Calif. v. Allstate Ins. Co.* (2009) 45 C4th 1008, 1025-1026, 90 CR3d 1, 16—applying rule that liability policy might cover otherwise excluded act if “undertaken to prevent a covered source of injury from coming into action . . . Th[is] rule fits . . . with the principle that insurance policies are to be read in accord with the parties’ reasonable expectations” (original emphasis omitted)]

CAUTION re pre-1990 case law: These “general rules” originated from a series of California Supreme Court decisions in the early 1990s and the formulation of the rules have evolved over time. In its latest opinion on the interpretation of insurance policy language, the court noted that, “[w]e have, in the past, formulated this inquiry slightly differently,” and, “[t]o the extent these prior formulations are inconsistent with our description of the inquiry here, *our formulation in this opinion controls.*” [*Yahoo Inc. v. National Union Fire Ins. Co.* (2022) 14 C5th 58, 67, 301 CR3d 1, 7-8, fn. 7 (emphasis added)]

Rule #4—“Conspicuous, Plain and Clear Limitations on Coverage” Rule: In order to be enforceable, policy provisions that take away or limit coverage the insured reasonably expects must be “conspicuous, plain and clear.” Not only must the *language* used in the exclusion be conspicuous, plain and clear, the *placement* and *appearance* of the exclusion or limitation must be such that it attracts the reader’s attention. See ¶4:450 ff.

B. “PLAIN MEANING” VS. AMBIGUITY

1. [4:6] **General Rule #1 (“Plain Meaning” Rule):** Insurance policies are contracts and therefore subject to the rules of construction governing contracts. [*Bank of the West v. Sup.Ct. (Industrial Indemnity Co.)* (1992) 2 C4th 1254, 1258, 10 CR2d 538, 544-545]

“Under statutory rules of contract interpretation, the *mutual intention of the parties* at the time the contract is formed governs interpretation . . . Such intent is to be inferred, if possible, *solely from the written provisions* of the contract.” [*AIU Ins. Co. v. Sup.Ct. (FMC Corp.)* (1990) 51 C3d 807, 821-822, 274 CR 820, 831 (emphasis added); see also *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 C4th 1, 18, 44 CR2d 370, 378—“The rules governing policy interpretation require us to look *first* to the language of the contract in order to ascertain its plain meaning or the meaning a layperson would ordinarily attach to it” (emphasis added); *American Cyanamid Co. v. American Home Assur. Co.* (1994) 30 C4th 969, 978, 35 CR2d 920, 925 (cautioning that court’s “initial focus” must be on the policy language rather than general coverage rules that are “not necessarily responsive to the policy language”); and *discussion at* ¶4:40 ff.]

 - a. [4:7] **Negotiated or standard form provisions:** The doctrine applies to standard form policy provisions as well as those resulting from actual agreement between the insurer and insured (“manuscript policies,” see ¶3:38). [*Powerine Oil Co., Inc. v. Sup.Ct. (Central Nat’l Ins. Co. of Omaha) (Powerine II)* (2005) 37 C4th 377, 391, 33 CR3d 562, 572]
 - b. [4:8] **Including endorsements:** Because an endorsement to an insurance policy forms a part of the insurance contract (see ¶3:188), the policy and the endorsement must be construed

[4:9 — 4:12]

together. (If they conflict, the endorsement usually controls; see ¶4:275 ff.) [*Narver v. California State Life Ins. Co.* (1930) 211 C 176, 181, 294 P 393, 395; *Frontier Oil Corp. v. RLI Ins. Co.* (2007) 153 CA4th 1436, 1463, 63 CR3d 816, 838]

[4:9] *Reserved.*

2. [4:10] **Statutory Basis:** The “plain meaning rule” derives from the following statutes:

Civ.C. §1636: “A contract must be so interpreted as to give effect to the *mutual intention* of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful” (emphasis added).

Civ.C. §1638: “The language of a contract is to govern its interpretation, if the language is *clear and explicit* and does not involve an absurdity” (emphasis added).

Civ.C. §1641: “The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.”

Civ.C. §1644: “The words of a contract are to be understood in their *ordinary and popular sense*, rather than according to their strict legal meaning; unless used by the parties in a technical sense or unless a special meaning is given to them by usage, in which case the latter must be followed” (emphasis added).

Civ.C. §1646: “A contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made.”

3. [4:11] **Effect:** “Clear and explicit” policy language governs. [*Powerine Oil Co., Inc. v. Sup.Ct. (Central Nat’l Ins. Co. of Omaha) (Powerine II)* (2005) 37 C4th 377, 390, 33 CR3d 562, 571; *Bank of the West v. Sup.Ct. (Industrial Indemnity Co.)* (1992) 2 C4th 1254, 1264, 10 CR2d 538, 545; *Baldwin v. AAA Northern Calif., Nevada & Utah Ins. Exch.* (2016) 1 CA5th 545, 550, 204 CR3d 433, 437]

- a. [4:12] **Clear language bars contrary expectation:** Policy provisions that are *ambiguous* may be interpreted according to the insured’s “objectively reasonable expectations” (see ¶4:310 ff.). But where the policy is clear and unequivocal, the only thing the insured may “reasonably expect” is the coverage afforded by the plain language of the mutually agreed-upon terms. [*Sarchett v. Blue Shield of Calif.* (1987) 43 C3d 1, 15, 233 CR 76, 85; *TIG Ins. Co. of Michigan v. Homestore, Inc.* (2006) 137 CA4th 749, 755, 40 CR3d 528, 532 (citing text); *Carolina Cas. Ins. Co. v. L.M. Ross Law Group, LLP* (2010) 184 CA4th 196, 206, 108 CR3d 701, 708 (citing text); *Pep Boys Manny Moe & Jack of Calif. v. Old Re-*

public Ins. Co. (2023) 98 CA5th 329, 343, 316 CR3d 600, 612—insured’s reasonable expectations of coverage “play no role” in policy interpretation where language unambiguous]

Even so, some opinions have looked to the parties’ reasonable expectations to reinforce the court’s conclusion regarding the meaning of language it found to be *unambiguous*. [*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 C4th 1, 27-28, 44 CR2d 370, 384; *Powerine Oil Co., Inc. v. Sup.Ct. (Central Nat’l Ins. Co. of Omaha) (Powerine II)* (2005) 37 C4th 377, 404, 33 CR3d 562, 582]

(1) [4:13] **Insured’s and insurer’s subjective intent immaterial:** *Unambiguous* policy language cannot be challenged because the insured or insurer misunderstood its meaning: “Under the objective test of contract formation, a ‘meeting of the minds’ is unnecessary. A party is bound, even if he misunderstood the terms of a contract and actually had a different, undisclosed intention.” [*Atlas Assur. Co., Ltd. v. McCombs Corp.* (1983) 146 CA3d 135, 144, 194 CR 66, 70; see also *General Reinsurance Corp. v. St. Jude Hosp.* (2003) 107 CA4th 1097, 1108, 132 CR2d 540, 548—uncontroverted testimony that insured’s claims manager “reasonably believed” certain risks were covered did not create ambiguity allowing policy to be construed in insured’s favor; *Hervey v. Mercury Cas. Co.* (2010) 185 CA4th 954, 965, 110 CR3d 890, 898 (citing text); *American Star Ins. Co. v. Insurance Co. of the West* (1991) 232 CA3d 1320, 1329-1330, 284 CR3d 45, 50-51 (rejecting interpretations based on uncommunicated understandings of insured and insurance industry)]

b. [4:14] **No coverage by waiver or estoppel:** In most cases, the doctrines of implied waiver or estoppel cannot be used to create coverage or extend coverage to risks expressly excluded by the policy. [See *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 C4th 1, 32, 44 CR2d 370, 387 (third party case); *Dollinger DeAnza Assocs. v. Chicago Title Ins. Co.* (2011) 199 CA4th 1132, 1154, 131 CR3d 596, 611-612 (first party case); *Komorsky v. Farmers Ins. Exch.* (2019) 33 CA5th 960, 972-973, 245 CR3d 623, 633-634 (first party case)]

(1) [4:14.1] **Compare—insurer bound by waiver or estoppel in certain circumstances:** There may be circumstances, however, in which the doctrines of waiver or estoppel may be invoked *against* an insurer:

- [4:14.2] *Insurer misled insured:* An insurer may be estopped from denying coverage when the insured was misled by and detrimentally relied on the *insurer’s representation that it was providing coverage*. [See *State Farm Fire & Cas. Co. v. Jioras* (1994) 24 CA4th

[4:14.3 — 4:15.5]

1619, 1627-1628, 29 CR2d 840, 845 (but rejecting estoppel claim); and ¶7:443 ff.]

- [4:14.3] *Bar to rescission by insurer*: The doctrines of waiver and estoppel may prevent the insurer from rescinding the policy. [*Supervalu, Inc. v. Wexford Underwriting Managers, Inc.* (2009) 175 CA4th 64, 77, 96 CR3d 316, 326; see ¶5:288 ff.]
 - [4:14.4] *Ground for reformation*: Waiver and estoppel may also *permit the insured* to obtain reformation of a policy to include coverage promised by the insurer. [*R & B Auto Ctr., Inc. v. Farmers Group, Inc.* (2006) 140 CA4th 327, 351, 44 CR3d 426, 447; see ¶5:111 ff.]
 - [4:14.5] *Liability insurer's defense without reservation*: Where a liability insurer, with knowledge of a ground of noncoverage, assumes the insured's defense without disclaiming liability or reserving its rights to do so, it may be precluded from later disclaiming coverage. An unconditional defense constitutes a waiver of the policy terms and an estoppel to assert such grounds. [See *Stonewall Ins. Co. v. City of Palos Verdes Estates* (1996) 46 CA4th 1810, 1838-1839, 54 CR2d 176, 190-191 (disapproved on other grounds by *Truck Ins. Exchange v. Kaiser Cement* (2024) — C5th —, — CR3d — (2024 WL 3016941))— waiver where insurer's belated reservation of rights on eve of trial prevented insured from retaining separate counsel; see also *Dollinger DeAnza Assocs. v. Chicago Title Ins. Co.* (2011) 199 CA4th 1132, 1154, 131 CR3d 596, 611-612 (same, but noting rule does not apply to title insurers)]
- c. [4:15] **No rewriting policy for public policy reasons**: Courts may not rewrite clear and explicit policy provisions based on considerations of public policy. [*Certain Underwriters at Lloyd's of London v. Sup.Ct. (Powerine Oil Co., Inc.) (Powerine I)* (2001) 24 C4th 945, 968, 103 CR2d 672, 687 (discussed at ¶4:15.5); *Rosen v. State Farm Gen. Ins. Co.* (2003) 30 C4th 1070, 1073, 135 CR2d 361, 362 (same) (discussed at ¶4:15.7); *24th & Hoffman Investors, LLC v. Northfield Ins. Co.* (2022) 82 CA5th 825, 833, 298 CR3d 816, 822]

[4:15.1-15.4] *Reserved.*

(1) **Application**

- [4:15.5] A liability policy providing for indemnification of "damages" ordered by a court cannot be rewritten to include pollution clean-up costs ordered by a state agency, despite a strong public policy favoring pollution clean-up. [*Certain Underwriters at Lloyd's of*

London v. Sup.Ct. (Powerine Oil Co., Inc.) (Powerine I) (2001) 24 C4th 945, 968, 103 CR2d 672, 687; see ¶7:148.1]

- [4:15.6] Similarly, a liability policy providing for defense of “suits” cannot be rewritten to include CERCLA proceedings, despite public policy favoring pollution clean-up. [*Foster-Gardner, Inc. v. National Union Fire Ins. Co.* (1998) 18 C4th 857, 888, 77 CR2d 107, 128; compare *Ameron Int’l Corp. v. Insurance Co. of State of Pa.* (2010) 50 C4th 1370, 1386, 118 CR3d 95, 107—undefined term “suit” includes adjudicative (quasi-judicial) administrative proceedings (*discussed at* ¶7:607.6a); *see further discussion at* ¶7:607 ff.]
 - [4:15.7] A property insurance policy covering “collapse” of a building and defining “collapse” as “actually fallen down or fallen into pieces” cannot be rewritten to cover property in a state of imminent collapse, even though public policy favors repair before a collapse endangers other persons and property. [*Rosen v. State Farm Gen. Ins. Co.* (2003) 30 C4th 1070, 1077, 135 CR2d 361, 365; *see* ¶6:287.10]
 - [4:15.8] A CGL policy excluding claims arising out of the insured’s work incorporated into a *condominium project* would be enforced as written, despite insured’s claim that it believed it was working on noncondominium single family residences. The plain language of the policy made any belief in the existence of coverage unreasonable as a matter of law. [*California Traditions, Inc. v. Claremont Liab. Ins. Co.* (2011) 197 CA4th 410, 420-422, 127 CR3d 451, 458-460—rejecting analysis in *Scottsdale Ins. Co. v. Essex Ins. Co.* (2002) 98 CA4th 86, 93, 119 CR2d 62, 68, that court may invalidate plain exclusion “if the court is unconvinced the clause has some significant actuarial basis”]
- (2) [4:16] **Exceptional cases:** Nonetheless, public policy has sometimes been invoked to invalidate, modify or supplement otherwise clear policy provisions:
- [4:16.1] Policy conditions that purport to excuse the insurer from liability when the insured fails to give timely notice and proof of loss or to cooperate with the insurer have been held unenforceable as *a matter of public policy* when the insured’s breach has not substantially prejudiced the insurer. [See *Northwestern Title Security Co. v. Flack* (1970) 6 CA3d 134, 140, 85 CR 693, 696; *Campbell v. Allstate Ins. Co.* (1963) 60 C2d 303, 306, 32 CR 827, 828-829; *and* ¶6:32 ff.]

[4:16.2 — 4:27]

- [4:16.2] Policy exclusions that seek to override statutory requirements may be invalidated as contrary to public policy. [See *Century-National Ins. Co. v. Garcia* (2011) 51 C4th 564, 573, 120 CR3d 541, 548—intentional acts exclusion in fire policy invalid to extent it conflicted with statutory requirements of minimum coverage for fire policies; *Julian v. Hartford Underwriters Ins. Co.* (2005) 35 C4th 747, 751, 27 CR3d 648, 650 (recognizing but not applying rule)]
 - [4:16.3] “Other insurance” clauses that purport to exonerate the insurer if another insurer covers the same risk (*see* ¶8:26 *ff.*) may be ignored in favor of apportioning the loss among the insurers on public policy grounds: “[E]quity overrides the terms of the insurance contract in these cases.” [*Edmondson Prop. Mgmt. v. Kwock* (2007) 156 CA4th 197, 203, 67 CR3d 243, 248; *see discussion at* ¶8:26 *ff.*]
- (3) [4:17] **Comment:** The California Supreme Court has suggested in a concurring opinion that, in an appropriate case, public policy might be used to rewrite or override plain policy language. However, that power must be exercised “with great caution” and only in cases “free from doubt” and where the insured can demonstrate a compelling public policy justification to ignore plainly-worded policy language. [See *Rosen v. State Farm Gen. Ins. Co.* (2003) 30 C4th 1070, 1082, 135 CR2d 361, 369 (J. Moreno concur.opn.)]
- [4:18-24] *Reserved.*
4. [4:25] **Limitations:** There are several other situations in which “plain and clear” policy provisions may not be given effect:
- a. [4:26] **Illegal provisions:** No matter how “plain and clear” they may be, policy provisions that purport to limit an insurer’s statutory obligations are unenforceable. [See *Julian v. Hartford Underwriters Ins. Co.* (2005) 35 C4th 747, 756, 27 CR3d 648, 654-655—property insurance exclusions that seek to bar coverage for losses proximately caused by a covered peril violate causation standards mandated by Ins.C. §530 (*see* ¶6:142 *ff.*)]
 - b. [4:27] **“Unusual or unfair” limitations on coverage not called to insured’s attention:** The general rule that “a party is bound by contract provisions and cannot complain of unfamiliarity” is not strictly applied to some coverage limitations in insurance policies. The insured’s duty to read the policy is insufficient to bind the insured to “*unusual or unfair language*” unless brought to the insured’s attention and explained. [*Haynes v. Farmers Ins. Exchange* (2004) 32 C4th 1198, 1210-1211, 13 CR3d 68, 77-78 (emphasis added)—unusual limitation on permissive use liability coverage in auto policy

defeated insured's reasonable expectations of coverage; see ¶4:535]

- (1) [4:28] **Rationale:** “It is a matter almost of common knowledge that a very small percentage of policyholders are actually cognizant of the provisions of their policies . . . The insured usually confides implicitly in the agent securing the insurance, and it is only just and equitable that the company should be required to call specifically to the attention of the policy-holder such provisions as the one before us . . . [A]n insurer's direction to the subscriber to read the entire policy is not a substitute for notice to the subscriber of a loss of benefit.” [*Haynes v. Farmers Ins. Exchange* (2004) 32 C4th 1198, 1210-1211, 13 CR3d 68, 77-78 (internal quotes omitted)]

[4:28.1-28.4] *Reserved.*

- (2) [4:28.5] **Compare—language not “unusual or unfair”:** Medical Group's errors and omissions policy contained an arbitration clause that was not identified on the application. However, the provision was listed in the policy's table of contents and was conspicuous within the policy itself. Disclosure outside the policy was not required. An arbitration provision is not the type of unusual or unfair language that requires special notice. Even if it were, the clause was sufficiently conspicuous within the policy to be enforceable. [*Mission Viejo Emergency Med. Assocs. v. Beta Healthcare Group* (2011) 197 CA4th 1146, 1157, 128 CR3d 330, 339]

- c. [4:29] **Effect of “illusory” policy language:** California courts have interpreted ambiguous policy language to avoid constructions that would render coverage illusory. [See, e.g., *Safeco Ins. Co. of America v. Robert S.* (2001) 26 C4th 758, 765, 110 CR2d 844, 850 (declining to interpret the term “illegal act” in illegal acts exclusion as meaning violation of any law, whether civil or criminal, since this would render promise of coverage for insured's negligent acts illusory) (*discussed at* ¶4:29.2); *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 C4th 847, 874, 881-882, 93 CR2d 364, 382-383, 388—where insured's business was to process almonds for customers, liability coverage for damage to insured's “stock” would be meaningless if it did not apply to property owned by others that was damaged during processing]

However, even if policy language is ambiguous, the terms will not be deemed “illusory” unless the insured can demonstrate it had a *reasonably objective belief that there was coverage*. [*John's Grill, Inc. v. Hartford Fin'l Services Group, Inc.* (2024) 16 C5th 1003, 1018-1020, 323 CR3d 875, 889-890 (citing text; *discussed at* ¶4:220 ff.) (noting *Safeco's* illusory coverage discussion, *supra*, was “expressly predicated

[4:29.1 — 4:29.2]

on the insoluble ambiguity of the phrase ‘illegal act’ in light of the overall policy,” including promised coverage for “accident[s]”)]

Comment: Insureds often argue their policy affords illusory coverage as a way to challenge limitation provisions and obtain coverage for a loss. For example, the insured in *John’s Grill* sought coverage for business interruption losses occasioned by closure of its business during the COVID-19 pandemic. The insured contended that the endorsement’s cause of loss limitation—which said coverage for viruses was available only if the virus was caused by a specified cause of loss such as wind or water—should be disregarded, and that any virus-related loss should be covered irrespective of the cause. But the Supreme Court noted it “has never recognized an illusory coverage doctrine as such. The doctrine as articulated by John’s Grill does not appear in our precedents.” And “even assuming some version of the doctrine may exist under California law,” the insured must make a foundational showing that it had a reasonable expectation that the policy would cover the claimed loss or damage. [*John’s Grill, Inc. v. Hartford Fin’l Services Group, Inc.*, supra, 16 C5th at 1008, 323 CR3d at 879-880 (emphasis added)]

(1) **Application**

- [4:29.1] A policy providing “personal injury liability” coverage promised coverage for malicious prosecution claims, even though Insurers are barred by Ins.C. §533 from indemnifying insureds for liability arising from malicious prosecution (see ¶7:1093). The court avoided a finding of illusory coverage by construing the policy to require a *defense* against malicious prosecution claims. Any other conclusion would defeat the insured’s reasonable expectations, derived from the policy language. [*Downey Venture v. LMI Ins. Co.* (1998) 66 CA4th 478, 487, 509-510, 78 CR2d 142, 146, 161; see also *Butcher v. Truck Ins. Exch.* (2000) 77 CA4th 1442, 1467, 92 CR2d 521, 539]
- [4:29.2] A homeowners policy excluded liability arising from the insured’s “illegal acts.” “Illegal” could reasonably be read to mean either criminal acts or acts violating any law, whether criminal or civil (e.g., as excluding negligent acts). The latter interpretation would render the policy illusory and would defeat the parties’ reasonable expectations of coverage for harm caused by accidental injury. [*Safeco Ins. Co. of America v. Robert S.* (2001) 26 C4th 758, 765-766, 110 CR2d 844, 850-851]