Not Reported in Cal.Rptr.3d, 2006 WL 216696 (Cal.App. 2 Dist.)
Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
(Cite as: 2006 WL 216696 (Cal.App. 2 Dist.))

Court of Appeal, Second District, Division 3, California.
PARAGON HOMES, INC., et al., Plaintiffs and Appellants,
v.
INSURANCE COMPANY OF The STATE OF PENNSYLVANIA, et al., Defendants and Respondents.

No. B171147.
(Los Angeles County Super. Ct. No. BC194221).
Jan. 30, 2006.

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles W. McCoy, Judge. Affirmed.
Stanzler Funderburk & Castellon and Jordan S. Stanzler; Dunn **Koes**, Pamela E. Dunn and Daniel J. **Koes** for Plaintiffs and Appellants.

Sedgwick, Detert, Moran, & Arnold, Christina J. Imre, Mark A. Graf and Orly Degani for Defendants and Respondents.

CROSKEY, Acting P.J.

***1** In this case, plaintiffs, Paragon Homes, Inc. (Paragon), Irwin E. Garfield and Brian Catalde,[FN1] appeal from a summary judgment granted to plaintiffs' excess insurer, the defendant and respondent, Insurance Company of the State of Pennsylvania (ICSOP). Plaintiffs claimed that ICSOP owed them a defense to an action filed against them arising out of the detritus of a failed residential real estate development enterprise. The complaint in that action contained 20 causes of action, involving a number of business torts and related contract claims; one of those counts, however, was for malicious prosecution. It was on the existence of that one claim that plaintiffs based their demand for a defense. When ICSOP rejected the tender, plaintiffs went ahead and defended the action at their own expense and it resulted in a substantial judgment against them, but no award of damages was made under the malicious prosecution claim. [FN2] After the case was resolved, plaintiffs filed this action against ICSOP seeking to recover their defense costs.

FN1. Other plaintiffs and appellants, Paramar Partners, Victorville Associates, Simi Valley Associates, Seco Canyon Associates, MVE/Seco 3 & 4 Associates, and Perris Associates are all California general partnerships between or including corporations also owned by Garfield and Catalde (hereafter collectively referred to as the plaintiffs).

FN2. Although, as we note below, the jury found that the malicious prosecution claim *was* meritorious; it simply had caused no damage.

The trial court granted ICSOP's motion for summary judgment. As our review of the policy and the circumstances of the case compels the conclusion that there was no coverage under the policy, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Paragon is a residential real estate developer. It is owned by Garfield and Catalde. Beginning in the 1970s, Paragon and Garfield and Catalde, through their partnerships, engaged in a number of real estate development projects with banking subsidiaries of Ford Motor Company, including First Nationwide Bank (FN Bank(FN Financial(FN Projects) (collectively, the FN entities). [FN3] The projects were governed by a series of complex Development

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Management Agreements (DMAs) under which the plaintiffs would subdivide, develop, construct and market lots and homes with the FN entities providing the required funding and financing.[FN4]

> FN3. There are two other entities that are included, unless otherwise indicated, in the descriptive term, "FN entities." They are FN Development Company (Alpha) [FN Alpha] and FN Development Company (Bravo) [FN Bravo] which, along with FN Projects, are wholly owned subsidiaries of FN Financial. (See *Continental Casualty Co. v. Superior Court* (2001) 92 Cal.App.4th 430, 433, fn. 2 [*Continental*].)
>
> FN4. For example, DMAs were entered into for the following projects: (1) "HB Ranch" (Paramar Partners and FN Projects), (2) "Clavell" (Victorville Associates and FN Financial), (3) "Simi Valley" (Simi Associates and FN Projects), (4) "Seco 2" (Seco Associates and FN Bank), (5) "Mountain View East" (MVE/SECO Associates and FN Projects), (6) "Brentwood" (Victorville Associates and FN Projects), and (7) "Triple Crown" (Perris Associates and FN Projects).

During the 1980s, these development projects were very successful, but in the early 1990s the real estate market suffered a severe recession and they became unprofitable. As a result, the FN entities, asserting a contractual option to do so, terminated the several DMAs. On February 25, 1994, plaintiffs attacked these terminations by filing a federal lawsuit in which they named as defendants Ford Motor Company, FN entities.

The federal complaint alleged antitrust and RICO violations; unfair competition and unlawful business practices; breaches of contract, fiduciary duty, and the implied covenant of good faith; commercial disparagement, fraud, and negligent misrepresentation or concealment. Plaintiffs' consistent theme was that the FN entities had conspired to drive plaintiffs out of the local housing market by "wrongfully attempting to exercise their rights to terminate the joint ventures based upon fraudulent and misleading projections of lack of profitability, all as part of their continuing efforts to acquire these joint venture properties solely for their own benefit."

***2** Within two months of filing this complaint, however, plaintiffs dismissed it and filed a cross-complaint in a then-pending state court action which had previously been filed by several of the FN entities [FN5] against a different developer (with whom plaintiffs joined in filing the cross-complaint).[FN6] The cross-complaint included causes of action for breaches of fiduciary duty, breach of contract and breach of the implied covenant of good faith and fair dealing and also alleged several business tort claims. It included the allegation that the FN entities had "wrongfully terminate[d] the joint ventures in order to appropriate the joint venture properties for themselves."

> FN5. The FN entities that had filed the state action were FN Financial, FN Alpha, FN Bravo and FN Projects.
>
> FN6. The other developer with whom plaintiffs joined in filing the cross-complaint to the state action filed by the FN entities was American Beauty Homes and/or American Beauty Investment Company (collectively, American Beauty).

On August 1, 1994, the FN entities responded by filing a first amended complaint in the action naming plaintiffs as additional defendants and alleging 13 of the 20 causes of action against them. [FN7] Of those 13 causes of action, 12 explicitly sought to resolve the parties' economic disputes over the termination of the DMAs. In particular, four causes of action sought a declaration that the FN entities' termination of the DMAs was valid, and requested dissolution and/or accounting; one sought to enforce Garfield and Catalde's personal

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guarantees securing plaintiffs' performance of the DMAs' obligations; another sought a declaration that plaintiffs were solely liable for various construction defect claims made by purchasers of homes built through the joint ventures; four were for breach of contract and breach of fiduciary duty; and two were for money had and received and imposition of a constructive trust.

> FN7. The other seven causes of action were directed against American Beauty. FN Bravo had no specific contractual business dealings with plaintiffs but rather had been created to deal with American Beauty. Except for the malicious prosecution count, FN Bravo was not a party to any of the causes of action asserted against plaintiffs. Although plaintiffs rely heavily on this circumstance in their arguments to sustain coverage, we do not, as we explain below, find such arguments to be persuasive.

The 20th and final cause of action was for malicious prosecution of the dismissed federal action. It alleged that plaintiffs had brought the federal action against the FN entities without probable cause and without reasonable and honest grounds.

Plaintiffs were insured under three commercial general liability (CGL) policies covering the period October 1993 to October 1994:(1) a primary policy issued by Classic Syndicate, Inc. (Classic), providing a $100,000 policy limit, with a $10,000 self-insured retention; (2) a Homestead Insurance Company (Homestead) following-form excess policy, [FN8] providing $900,000 in coverage, excess of the $100,000 Classic policy; and (3) an ICSOP umbrella policy providing $10 million in coverage, excess of the combined $1 million provided by the Classic and Homestead policies.

> FN8. "Following form policies 'are typically written on the same terms and conditions as the coverage provided by the underlying primary coverage. They are generally short, consisting of one or two pages, with an endorsement or provision that incorporates by reference the underlying policy coverages, except for the premium, the liability limits, and the obligation to investigate, defend, or pay costs of defense.' [Citations.]" (*Coca Cola Bottling Co. v. Columbia Casualty Ins. Co.* (1992) 11 Cal.App.4th 1176, 1183.)

Both the Classic and Homestead policies provided for a defense *within* policy limits. That is, the indemnity limits would be reduced by costs of defense (including legal fees) incurred by the insurer; as the costs of *defending* a third party claim rose, the amount available to provide *indemnity* coverage decreased.[FN9] In addition, both policies contained the following cross-liability exclusion: "It is agreed that this policy does not cover suits made by any insured covered hereunder against any other insured covered by this policy." The Classic and Homestead policies did not just list the several plaintiffs as named insureds, but also included First Nationwide Savings and Loan Association,[FN10] FN Projects and FN Alpha.

> FN9. Such provisions are commonly referred to as "self-consuming" or "burning limits" clauses. Where the policy limits are subject to such a provision, the insurer's duty to defend terminates when it has paid out the full limits in defense even if no settlement or judgment has been reached. (*Aerojet-General Corp. v. Transport Indemnity Co.* (1997) 17 Cal.4th 38, 76, fn. 29.)

> FN10. Although the record before us is not entirely clear, it appears that the policy references to First Nationwide Savings and Loan Association is actually meant to refer to the FN entity, First Nationwide Bank.

***3** ICSOP issued its umbrella policy to Paragon [FN11] effective October 2, 1993. It contained an insuring agreement which required ICSOP: "To pay on behalf of the insured that portion of the ultimate

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net loss in excess of the retained limit as hereinafter defined, which the insured shall become *legally obligated* to pay as *damages to third parties* for liability imposed upon the insured by law, or liability assumed by the insured under contract because of ... personal injury ... as defined herein, caused by an occurrence as defined and/or restricted in this policy." (Italics added.)

> FN11. The following entities were listed as named insureds on ICSOP's policy: (1) Paragon Homes, Inc.; (2) Irwin Garfield and Kathleen Garfield; (3) Brian Catalde and Michelle Catalde; (4) BG Enterprises, Inc.; (5) Garfield Development, Inc.; (6) Brian Catalde Developments; (7) Paragon Development Company; (8) Seco Canyon Associates; (9) Canyon Country Associates; (10) Montebello Associates; (11) Jefferson Boulevard Associates; (12) Simi Associates; (13) Rancho Cucamonga Associates; (14) Perris Associates; (15) Victorville Associates; (16) Seco Canyon # 3 Associates and Seco Canyon # 4 Associates; (17) *First Nationwide Savings & Loan Association;* (18) *FN Projects, Inc.;* (19) *First Nationwide Savings and Mountainview East, a joint venture;* (20) Shadow Hills Associates; (21) Paramar Partners; (22) The Villas Models Partnership, LP-California LTD. Partnership; (23) Malibu Plaza, a California General Partnership; (24) Coachella Associates, a California General Partnership; (25) Any joint venture, partnership or corporation in which Paragon Homes, Inc. and/or Irwin Garfield, as an individual and/or Garfield Development, Inc., Big Enterprises, Inc., or any subsidiary thereof retains majority interest or assumes direct management and/or control, in [FN] Projects, Inc. as their interest may appear.

Like the Classic and Homestead policies, ICSOP's contract defined "personal injury" to include "malicious prosecution" which occurs during the policy period. The policy also included the following pertinent definitions: *Occurrence:* "[A]n event, including continuous or repeated exposure to conditions, which result[s] in Personal Injury ... during the policy period, neither expected nor intended from the standpoint of the insured." *Third Party:* "a party other than the 'persons insured' as defined in the policy." *Persons Insured:* (1) any "Named Insured," and (2) "[i]f the Named Insured is designated in the Declarations as a partnership or joint venture, the partnership or joint venture so designated and *any partner or member thereof* ...." (Italics added.) The definition of "persons insured" further provided: "This policy does not apply to Personal Injury ... *arising out of the conduct* of any partnership or *joint venture of which the Insured is a partner or member and which is not designated in this policy as a Named Insured.*" (Italics added.)

This latter provision is a specific limitation on coverage for joint ventures and it was later reiterated in a specific policy exclusion entitled "Contractor's Limitation" endorsement, which provided: "[T]he insurance afforded by this policy *shall not apply to any liability arising out of ... joint venture(s) unless designated in the declarations as named insured(s).*" (Italics added.)

The ICSOP policy also contained a "Cross Suits Exclusion," providing: "It is agreed that the coverage afforded by this policy shall not apply to any liability claim for damages arising out of personal injury or property damage, initiated, alleged, or caused to be brought about by a named insured covered by this policy against any other named insured covered by this policy."

Finally, the policy contained a *separate* defense insuring agreement, specifying that ICSOP would defend against *claims within the scope of its coverage* as an excess insurer if the underlying insurance was "exhausted by payment of covered claims," or as an umbrella insurer if the underlying insurance did not cover the claims: "Should applicable underlying insurance(s) become *exhausted by*

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payment of covered claims, this insurance will continue in force as underlying insurance and shall defend any suit *arising out of a covered occurrence.* As respects occurrences *not covered under the underlying insurance(s), but covered by this policy,* the company shall likewise defend any suit, even if the suit is groundless, false or fraudulent...." (Italics added.)

*4 The defense insuring agreement specifically stated: "Except for exhaustion of underlying limits by payment of covered claims, and occurrences not covered by the underlying policies, but covered by this policy, the company shall not be called upon to investigate or defend any suit brought against the insured...." [FN12]

FN12. It is apparently undisputed that plaintiffs did not provide ICSOP with copies of the underlying Classic and Homestead policies until February 1994, at the earliest, months after the ICSOP policy issued, and did not inform ICSOP that their underlying policies had "burning limits." Thus, ICSOP claims that when it issued its policy in 1993, it was unaware that neither of the two underlying policies provided for defense of covered claims (see excerpt from endorsement to the Classic/ Homestead policies describing the limitation on the defense obligations of those insurers-fn. 14, *post*) or that any defense costs eroded the underlying policy limits. It was for this reason that ICSOP claims it issued a standard umbrella excess policy designed to be written over underlying insurance that provided for a defense "outside limits." An ICSOP representative testified that ICSOP does write umbrella policies over underlying insurance that have "inside limits" or "burning limits" provisions. Such a policy, however, exposes ICSOP to far greater liability and is, therefore, substantially more expensive than the coverage plaintiffs purchased. In light of our conclusion regarding coverage, however, we need not reach or further discuss the issues raised by this contention.

On or about February 6, 1995, over six months after it was filed, plaintiffs tendered the action (i.e., the first amended complaint) filed by the FN entities to Classic, Homestead and ICSOP. Plaintiffs based their claim of coverage on the cause of action in the FN entities' first amended complaint for malicious prosecution.[FN13] On February 21, 1995, the claims manager for Classic and Homestead denied coverage and refused to provide a defense. It did so on two grounds: (1) a cross-liability exclusion which provided that there would be no coverage for any suit "made by any Insured covered hereunder against any other Insured covered by this policy;" there were three of the FN entities listed as named insureds and, therefore, this exclusion precluded coverage; and (2) the self-insured endorsement added to the Classic and Homestead policies, provided that neither insurer had any duty to provide a defense until after the plaintiffs had exhausted the self-insured amount ($10,000).[FN14]

FN13. As previously described, the malicious prosecution claim was asserted in a first amended complaint (20th cause of action) filed on behalf of FN Alpha, FN Bravo, FN Projects and FN Financial; all but FN Bravo were named insureds under the Classic and Homestead policies.

FN14. The self-insured endorsement, added to the Classic policy (and therefore to the Homestead policy under the following form provisions), provided the following with respect to the indemnity obligation of Classic (and therefore, Homestead): "Self-Insured Retention: The words 'Self-Insured Retention' shall mean the amount of loss which the Insured shall pay first arising from claims otherwise covered under the policy. Such Self-Insured Retention shall be primary or underlying to such insurance as is afforded by this policy. The

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> Insured shall pay 100% of such Self-Insured Retention before this policy applies."
>
> With respect to the insurers' defense obligation, the endorsement stated:
>
> "It is agreed that all policy provisions regarding the right and duty of the Company to defend any suit against the insured seeking damages on account of occurrence covered hereunder are deleted and replaced by the following: (1) The Company shall have no obligation to participate in or to assume charge of the investigation, defense, or settlement of any claims made, or suits brought or proceedings instituted against the insured even after the retention of the Insured has been paid; but, the Company shall have the right and be given the opportunity to associate with the Insured and the Insured's defense counsel in defense and control of any claim, suit, or proceeding relative to any occurrence which, in the opinion of the Company, may involve liability on the part of the Company under the terms of this policy. In the event of the actual or probable exhaustion or reduction of the Self-Insured Retention, the Company, at its sole discretion, may elect to assume control and defense of any or all claims, suits and proceedings which, in the Company's opinion may involve this policy. [¶] (2) Unless the Company elects otherwise, the Insured shall be solely responsible for the investigation, defense, settlement, and final disposition of any claim made or suit brought or proceedings instituted against the Insured to which this policy would apply. The Insured shall use due diligence and prudence to settle all such claims and suits which, in the exercise of sound judgment should be settled; provided, however, that the Insured shall not make or agree to any settlement for any sum, which would involve the limits of this insurance without the prior written approval of the Company."

This coverage dispute with Classic and Homestead was ultimately resolved. Classic tendered its policy limits ($100,000, less the $10,000 self-insured retention) in another, unrelated lawsuit.[FN15] Plaintiffs filed an action against Homestead, alleging causes of action for declaratory relief, breach of contract and breach of the implied covenant. This action was ultimately settled (after judgment was entered in the underlying action brought by the FN entities-see below). Pursuant to that settlement, entered into on or about October 27, 2000, Homestead agreed to pay to plaintiffs the sum of $650,000 in full settlement of all of Homestead's obligations under its policy. The parties hereto later stipulated, on or about February 14, 2001, that with such payments, Homestead's policy limits had been exhausted.[FN16] An order, based on the stipulation, summarily adjudicating this issue was filed by the trial court in this matter on February 16, 2001.

> FN15. It is unclear from the record, however, whether all (or even any part) of this sum was actually ever paid out by Classic.
>
> FN16. Homestead paid, on or about April 2, 2001, the remaining $250,000 of its policy limits to settle, on behalf of plaintiffs, another unrelated lawsuit.

The underlying action went to trial in November 1997. The jury returned a special verdict in March 1998 on all the remaining causes of action. It found that plaintiffs had breached the DMAs, the implied covenants of good faith and fair dealing and their related fiduciary duties. The jury also found that plaintiffs had maliciously prosecuted the federal court action, but that the FN entities had suffered no damages as a result thereof. Based on this verdict, the trial court awarded the FN entities

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$74.7 million for business losses on the various projects covered under the DMAs. This was subject to a $10.5 million set-off for plaintiffs' recovery on their cross-complaint. Both parties appealed the judgment, but neither appeal challenged the resolution of the malicious prosecution claim which had been in plaintiffs' favor.[FN17]

> FN17. Apart from the malicious prosecution cause of action (which serves as the *only* basis for the claims of coverage litigated herein), the underlying action and the resulting judgment essentially adjusted and resolved the dispute between the parties regarding the proper allocation of the business losses sustained by several of the residential real estate projects that were the subject of the several DMAs. On appeal, that judgment was substantially affirmed on February 21, 2001 by Division One of this District subject to a remand for (1) clarification and (2) the adjudication of one unresolved cause of action (*FN Development Company, Alpha, et al. v. Paramar Partners, et al.*-No. B123192 [hereinafter, *FN Development;* the underlying action is hereinafter referred to as the *FN Development* action]). We have, on our own motion, taken judicial notice of this decision. At oral argument, counsel for the parties were advised of our intent to take such judicial notice and no objection was made to our doing so.

***5** In April 1994, over nine months prior to the tender to ICSOP, plaintiffs began to incur expenses for defense of the *FN Development* action. By February 1996, plaintiffs claim that they had incurred over $2 million in defense costs and by March 2003, they claim to have spent over $13 million.

As already indicated, plaintiffs tendered the *FN Development* action to ICSOP in February 1995. In July 1995, ICSOP denied coverage and refused to provide a defense. It did so, according to its denial letter, because malicious prosecution did not fall within the policy's definition of an "occurrence." It was an "intentional act" and thus was not unexpected from the "standpoint of the insured." ICSOP's denial letter did not specifically cite any other grounds for its rejection of plaintiffs' tender, but did expressly reserve "all of its rights under the terms and conditions of the policy...." [FN18]

> FN18. The claims adjuster who wrote the denial letter later testified that he had "secondary" reasons for denying coverage that he had not set out in his letter, including that the underlying litigation was "between two insureds."

On July 14, 1998, shortly after entry of judgment in the *FN Development* action, plaintiffs filed this action against ICSOP for breach of contract, breach of the implied covenant of good faith and fair dealing and declaratory relief. In their complaint, they alleged that ICSOP had failed to honor the promise of its policy to defend plaintiffs in the *FN Development* action. [FN19]

> FN19. This action against ICSOP by plaintiffs is the same one in which they also had named Homestead as a defendant and which, as already described, was resolved as to that insurer by settlement in February 2001. Also named in that suit were Continental Casualty Company, Scottsdale Insurance Company and United Coastal Insurance Company. Plaintiffs ultimately settled with Scottsdale and United Coastal for a combined total of $4 million. On September 20, 2001, we held that there was no coverage under the Continental policy and directed the issuance of a writ of mandate to the superior court requiring that court to enter judgment in favor of Continental. (*Continental, supra,* 92 Cal.App.4th at pp. 439, 447.)

After a number of law and motion and discovery proceedings, plaintiffs and ICSOP filed cross-motions for summary judgment (or adjudication) on

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the issue of whether ICSOP owed any duty to defend the malicious prosecution claim alleged in the *FN Development* action. ICSOP raised three principal points: (1) before ICSOP could be liable to provide coverage there had to be exhaustion of the Homestead policy by the payment of *damages;* the payments made by Homestead on its policy were for defense, not indemnity or damages; (2) ICSOP's policy promised coverage only for claims which result in a "legal obligation" on the part of the insured to pay *damages* to " *third parties;* " the FN entities were not third parties but, as plaintiffs' business partners and joint venturers, were "persons insured" under ICSOP's policy and thus could not be "third parties;" the "cross-suits exclusion" reinforces this conclusion; and (3) it is clear from the record that plaintiffs and FN entities were engaged in numerous joint ventures for the purpose of constructing residential real estate developments; as a result, the joint venture exclusion in the ICSOP policy precluded coverage.

Plaintiffs argued in support of their motion that (1) ICSOP's policy specifically promised coverage for malicious prosecution claims; (2) ICSOP had a duty to defend the *FN Development* action when (a) the primary insurers denied coverage, (b) plaintiffs had incurred at least $1 million in defense costs (thus necessarily exhausting the "burning limits" policies of the two primary insurers), and (c) the primary policies were formally judicially determined to have become "exhausted" in February 2001; (3) some of the FN entities that had brought the *FN Development* action were not "persons insured" and thus they qualified as "third parties" for whose claims coverage was promised under the ICSOP policy; here, plaintiffs specifically argue that since FN Bravo had no contractual business dealings with the plaintiffs (see fn. 7, *ante*) it could not have been a party to, or member of, any partnerships or joint ventures involving plaintiffs; nor was FN Bravo a named insured under ICSOP's policy (see fn. 11, *ante*); (4) the joint venture exclusion *was* not enforceable; and (5) ICSOP failed to conduct a proper investigation of the plaintiffs' claim and based its denial letter on an erroneous legal proposition upon which it no longer relies; [FN20] as a result, it may not now assert other defenses to coverage.

> FN20. In 1998, we held in *Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, that an insurer promising coverage for malicious prosecution may still owe a duty to defend even if the duty to indemnify is precluded by Insurance Code section 533. (*Id.* at p. 508.)

***6** The trial court was persuaded by ICSOP's arguments and granted its motion; plaintiffs' motion was denied. Plaintiffs then prosecuted this timely appeal. Both plaintiffs and ICSOP urge upon us essentially the same arguments that they raised below in the trial court.

DISCUSSION

1. *Standard of Review and Relevant General Principles of Coverage*

Summary judgment is granted when no triable issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Villa v. McFerren* (1995) 35 Cal.App.4th 733, 741.) After examining documents supporting a summary judgment motion in the trial court, this court independently determines their effect as a matter of law. (*Hulett v. Farmers Ins. Exchange* (1992) 10 Cal.App.4th 1051, 1057-1058.) The moving party bears the burden of establishing, by declarations and evidence, a complete defense to plaintiff's action or the absence of an essential element of plaintiff's case. (*Westlye v. Look Sports, Inc.* (1993) 17 Cal.App.4th 1715, 1726-1727; Code Civ. Proc., § 437c, subd. (p)(2).) The moving party must demonstrate that under no hypothesis is there a material factual issue requiring a trial. (*Flowmaster, Inc. v. Superior Court* (1993) 16 Cal.App.4th 1019, 1026.)

When the moving party makes that showing, the burden of production shifts to the opposing party to present evidence, showing that a triable is-

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sue of material fact exists. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.App.4th 826, 850; Code Civ. Proc., § 437c, subd. (p)(2).) An issue of fact becomes one of law and loses its "triable" character if the undisputed facts leave no room for a reasonable difference of opinion. (*Preach v. Monter Rainbow* (1993) 12 Cal.App.4th 1441, 1450.)

Where the facts are undisputed, the court can resolve the question of law in accordance with general summary judgment principles. (*Adams v. Paul* (1995) 11 Cal.4th 583, 592 (lead opn. of Arabian, J.).) "Absent a *factual* dispute as to the meaning of policy language, which we do not have here, the interpretation, construction and application of an insurance contract is strictly an issue of law. [Citation.]" (*Century Transit Systems, Inc. v. American Empire Surplus Lines Ins. Co.* (1996) 42 Cal.App.4th 121, 125.) This includes the question of whether the insurer owes a duty to defend. (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18-19 [*Waller*].)

An insurer's duty to defend applies only "to those actions of the nature and kind covered by the policy." (*Gray v. Zurich Insurance Co.* (1966) 65 Cal.2d 263, 274.) The nature and kind of risk covered defines and limits the duty to defend. (*Hurley Construction Co. v. State Farm Fire & Casualty Co.* (1992) 10 Cal.App.4th 533, 538.) "Where the policy language clearly provides no basis for coverage, ... there is no duty to defend ... [Citation.]" (*We Do Graphics, Inc. v. Mercury Casualty Co.* (2004) 124 Cal.App.4th 131, 136.)

***7** While the insurer bears the burden to establish that a policy exclusion bars coverage, it is the insured's *preliminary* burden to show the claim falls within the scope of the insuring agreement. (*Waller, supra,* 11 Cal.4th at p. 16.) Thus, " '[b]efore even considering exclusions, a court must examine the coverage provisions to determine whether a claim falls within [the policy terms].' [Citation.]" (*American Internat. Bank v. Fidelity & Deposit Co.* (1996) 49 Cal.App.4th 1558, 1575.) " '[C]ourts will not indulge in a forced construction of the policy's insuring clause to bring a claim within the policy's coverage.' [Citation.]" (*Waller, supra,* 11 Cal.4th at p. 16.) " 'An insurance company has the right to limit the coverage of a policy issued by it and when it has done so, the plain language of the limitation must be respected. [Citations.]' " (*Fresno Economy Import Used Cars, Inc. v. United States Fid. & Guar. Co.* (1977) 76 Cal.App.3d 272, 280.)

2. *The Record Establishes That No Basis For Coverage Existed Under ICSOP'S Policy*

The insuring clause of ICSOP's policy promised coverage only for " *damages to third parties* " for which plaintiffs became "legally obligated" because of "personal injury." [FN21] "Third party" was a person other than the "persons insured" as defined in the policy. The terms "persons insured" included not only any "named insured," but also "any partner or member" of any partnership or joint venture designated as a named insured. Most significantly, the term "persons insured" also expressly excluded coverage for a "personal injury .... *arising out of the conduct of any partnership or joint venture of which the insured is a partner or member* and which is not designated in this policy as a Named Insured." (Italics added.) [FN22]

> FN21. As already noted, the term "personal injury" expressly included malicious prosecution which occurred during the policy period.
>
> FN22. As already noted, this exclusionary provision was effectively repeated in a "contractor's limitation" endorsement.

Thus, the ICSOP policy provided no coverage for claims asserted against plaintiffs by parties that were either themselves "named insureds" under the ICSOP policy or were, by virtue of their membership in designated partnerships or joint ventures, entitled to claim the status of insureds. In addition, there could be no coverage for a claim that arose out of the conduct of an uninsured partnership or joint venture if an insured person was a member

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thereof.

The malicious prosecution claim was asserted by FN Projects, FN Alpha, FN Bravo and FN Financial. FN Projects was a named insured under the ICSOP policy and thus, by express definition, would not be a "third party." Another designated FN entity was "First Nationwide Savings and Mountainview East, *a Joint Venture.* " (Italics added.) According to plaintiffs' own allegations in the underlying litigation, this designation referred to the joint venture project known as "Mountainview East," between the Paragon partnership MVE/Seco 3 & 4 Associates and FN Projects, which later assigned an interest in the venture to *FN Alpha.* Thus, FN Alpha was a "partner or member" of a named joint venture, which made FN Alpha a "person insured," not a "third party."

***8** In both their federal and state court proceedings, plaintiffs themselves alleged that while they "nominally set up separate joint ventures" with the FN entities, "as a matter of actual practice" there was " *a single, overarching, ongoing " joint venture enterprise between the parties* which was "partly oral." (Italics added.) [FN23] Plaintiffs also alleged that *all* the FN entities-including specifically, *FN Projects, FN Alpha, FN Bravo, and FN Financial*-"acted as partners and joint venturers" with them; sought to and did exercise "control over the joint venture(s)"; and shared profits and losses from the joint venture projects. These allegations constitute judicial admissions binding upon the plaintiffs and cannot be expediently avoided in order to advance the proposition that the malicious prosecution claim by FN Bravo was covered and not excluded under the ICSOP policy. (See e.g ., *Valerio v. Andrew Youngquist Construction* (2002) 103 Cal.App.4th 1264, 1271.) Thus, by plaintiffs' own admission, all the FN entities-including FN Bravo and FN Financial, in addition to FN Projects and FN Alpha-were "partner [s] or member[s]" of a single joint venture enterprise.

> FN23. "There are three basic elements of a joint venture: the members must have joint control over the venture (even though they may delegate it), they must share the profits of the undertaking, and the members must each have an ownership interest in the enterprise. [Citation.]" (*Orosco v. Sun-Diamond Corp.* (1997) 51 Cal.App.4th 1659, 1666.) A joint venture may be formed by parol agreement or may be assumed as a reasonable deduction from the acts and declarations of the parties. (*Ibid;* see also *Scottsdale Ins. Co. v. Essex Ins. Co.* (2002) 98 Cal.App.4th 86, 91-93.)

Plaintiffs argue that such a reading of selected portions of the record misstates the status of the various FN entities. There were a number of specific joint ventures or partnerships and it is unfair to conclude that each of the FN entities was a member or partner in each one of them. Yet, these pleadings admissions by plaintiffs, however general they may be, and whatever the specific context in which they were made, are not only binding on them, but also clearly speak to a larger truth. No impartial review of this record, indeed, the entire business history of these parties, can fail to result in the conclusion that they were in fact engaged in an "overarching" joint venture to develop, finance, build and sell new residential real estate.

This conclusion is further enforced by the undisputed history of the manner in which the FN entities operated during their business relationship with the plaintiffs. In its unpublished opinion of February 28, 2001 in the *FN Development* action, [FN24] Division One of this District set forth the background and circumstances that resulted in the 1992 creation of FN Alpha and FN Bravo. Prior to October 1992, these entities did not exist. *They were created out of the assets of FN Projects in order to avoid the regulatory restriction of a new federal law.* The following factual recitations are taken from the Division One opinion.

> FN24. As noted in footnote 17, *ante,* we have taken judicial notice of that opinion.

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As our colleagues in Division One noted, " 'In 1989, Congress had enacted the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA, 12 U.S.C. § 1811 et seq.). The purpose of FIRREA was "to remedy the problems Congress perceived in the savings and loan industry." (*Robbins v. Foothill Nissan* (1994) 22 Cal.App.4th 1769, 1783-1784.) Toward this end, FIRREA was designed to, among other things, strengthen savings and loan institutions' capital and minimize activities which posed unacceptable risks to federal deposit insurance funds. (*Id.* at p. 1785, fn. 9.)

***9** " 'Both [FN Bank[FN Projects[FN Bank]'s goal was the liquidation of its real estate development portfolio "as rapidly as can be accomplished with the least economic damage" to the bank. This could be either by sale of property owned, which was preferable from the bank's perspective, or by development of the property if that were the most "economically viable decision."

" 'In 1990, Garfield met with a [FN Bank] executive. The executive told Garfield that while FIRREA prevented the bank from entering into new DMAs, the bank would complete its existing projects.

" 'In October 1992, [FN Projects[FN Alpha and FN Bravo[FN Bank[FN Alpha and FN Bravo[FN Financial[FN Alpha and FN Bravo[FN Alpha and FN Bravo[FN Alpha and FN Bravo[FN Financial] obtained funds from its parent, Ford Motor Company; it did not have the assets to operate the corporations on its own.

" 'Prior to the transfer, [FN Bank[FN Projects[FN Financial] ..., the Bank's holding company. This move will provide us with greater flexibility in managing our real estate development activities." ' "

As the opinion in *FN Development* clearly establishes, the FN entities were anything but passive financiers. They were repeatedly and consistently involved in development decisions, including whether to proceed with or cancel specific projects and under what conditions. For example, FN Bank created a task force in 1992 to review development plans for selected DMA projects, including one called the HB Ranch.

The Division One opinion discussed that matter in detail. " 'In December 1992, the task force "recommended that HB Ranch be placed in caretaker status with the prospect of future sale in an 'as is' condition." In part, the task force relied on an October 8, 1992 HB Ranch Plan of Development which indicated a potential loss of $34 million on the development project. Recommendations for the project included means for ensuring Paramar's share of the losses would be compensated or, in the alternative, terminating the DMA. On December 7, 1992, [FN Bank] sent a letter to Catalde advising him of the work of the task force. The letter included recommendations as to the HB Ranch project as well as a number of other projects regarding which they had DMAs. As to the HB Ranch project, the letter indicated the bank's decision was that "[a]ll development activity at HB Ranch ... will be limited to 'caretaker' activities...." ' [¶] [¶]

***10** "J.M. Development Company (J.M.) was formed to manage FN[Financial]'s real estate portfolio. [The former president of FN Alpha, was its president.] J.M. was a wholly-owned subsidiary of Granite Management Company, which was a wholly-owned subsidiary of Ford Motor Company, also FN[Financial]'s parent company.

"Specifically, the stated purpose in forming J.M. was so FN [Financial] could avoid selling its real estate portfolio at a time when land prices were depressed, to provide an alternative means of development where a developer had abandoned a real estate project or the DMA was terminated, to achieve economies of scale by reducing overhead costs, to implement better internal accounting controls and improved financial reporting and forecasting, to increase management capability, and to obtain a sig-

nificant benefit by building out projects itself rather than using third-party developers.

"FN [Financial] stated that it would achieve its goals by '[d]evelop[ing] a core group of key professionals with strong developer credentials'; '[p]erform [ing] comprehensive review of all projects'; '[d]evelop[ing] strategies for accelerating/delaying specific development plans and reposition[ing] projects to reflect changing market conditions while achieving [its] goals and objectives ...'; '[t]erminating DMA relationships where warranted'; '[e]stablish[ing] strong controls over DMA and all phases of project development ...'; and '[i]mplement[ing] computer systems which improve forecasting and provide checks and bal- ances.'

"[It was] understood that J.M. 'was being brought in to take over all of the joint venture partnerships. They were going to relieve everybody of the projects they had, whether the people were making money or not. They were going to close everything down.'

"J.M. hired Karin Krogius (Krogius) in March 1993 to be its executive vice president and director of development management administration.[FN25] FN [Financial]'s March 18, 1993 letter confirming Krogius's employment stated that her general objectives were to '[d]evelop or workout existing development projects to achieve the highest value to [FN Financial[FN Financial[FN's] requirements.' Krogius understood from this letter that she was 'to make decisions whether or not it made sense to go forward with development, if that was originally anticipated for a project,' or to redo or restructure the development projects. She was '[t]o analyze all the projects and to decide if it made sense to keep building ... or to stop development, or to ... just sell land in its present condition, or just decide what was the best thing to do under the circumstances.' "[FN26]

FN25. Although Krogius was hired by J.M. in March 1993, by December 1993 she was identifying herself as representing FN Development Company. Both FN Development Company and J.M. shared the same offices in Irvine.

FN26. This ends the factual recitations from Division One's opinion in the *FN Development* decision.

***11** As already emphasized, the FN entities were certainly not mere passive financiers, but were actively involved in all aspects of the management decisions made with respect to their real estate business venture with the plaintiffs. These undisputed factual circumstances, when considered in light of the exclusions in ICSOP's policy, inform our conclusion on coverage. The policy's purpose and intent is clear from the policy language. Not only is it established by the limited insuring clause, but also by the exclusionary language directed specifically at partnerships and joint venturers that have not been designated as "named insureds." Indeed, the confluence of these policy provisions creates a major conundrum to plaintiffs' coverage arguments. Put another way, we agree with ICSOP that plaintiffs cannot have it both ways. The joint venture relationships either fall within the category of "named insureds" and thus cannot be "third parties" or coverage for the FN entities' claim is excluded as having arisen out of the joint venture activities of the parties.

Plaintiffs do not argue that any of the joint ventures (other than the Mountainview East joint venture) were named insureds. Instead, they contend that, for several reasons, the joint venture exclusion is simply not applicable.

First, they argue that the malicious prosecution claim did not "arise from" the development activities of the parties, but rather from the dismissed federal lawsuit filed by the plaintiffs. We agree with ICSOP that this contention relies upon an overly restrictive interpretation of the phrase "arising out of." "California courts have consistently given a broad interpretation to the terms 'arising out of' or

'arising from' in various kinds of insurance provisions." (*Acceptance Ins. Co. v. Syufy Enterprises* (1999) 69 Cal.App.4th 321, 328.) "One court equated 'arising out of' with 'origination, growth, or flow from the event.' " (*Continental Cas. Co. v. City of Richmond* (1985) 763 F.2d 1076, 1080, quoting *Pacific Indem. Co. v. Truck Ins. Exch* (1969) 270 Cal.App.2d 700, 704.) Another held that " 'arising out of' " refers to " 'some kind of sequential relationship'." (*Continental Cas. Co. v. City of Richmond, supra,* at p. 1080, quoting *Hartford Accident & Indem. Co. v. Civil Service Employees Ins. Co.* (1973) 33 Cal.App.3d 26, 32-33.) "[T]his language does not import any particular standard of causation or theory of liability into an insurance policy. Rather, it broadly links a factual situation with the event creating liability, and connotes only a minimal causal connection or incidental relationship. [Citations.]" (*Acceptance Ins. Co. v. Syufy Enterprises, supra,* 69 Cal.App.4th at p. 328; see also *Vitton Construction Co ., Inc. v. Pacific Ins. Co.* (2003) 110 Cal.App.4th 762, 766-770.)

Clearly, plaintiffs' federal action, as well as their similar cross-complaint in the underlying action, represented an effort to obtain a judicial resolution of the business and economic disputes that had arisen out of the financial failure of the parties' joint development enterprise. To characterize it any other way is simply to ignore reality. The malicious prosecution action flowed from the breakdown of that enterprise and had more than a "minimal causation connection" to the conduct of the ventures. (*Acceptance Ins. Co. v. Syufy Enterprises, supra,* 69 Cal.App.4th at p. 328.)

***12** Second, plaintiffs argue that the exclusion should not apply because the failure to designate them as named insureds had no material effect on ICSOP's assumed risk. (*Scottsdale Ins. Co. v. Essex Ins. Co., supra,* 98 Cal.App.4th at pp. 92-93; see also *Maryland Casualty Co. v. Reeder* (1990) 221 Cal.App.3d 961, 979 [purpose of joint venture exclusion "to protect the insurer from hidden risks it did not consider in calculating an appropriate premium"].)

In *Scottsdale,* the insurer provided coverage for the insured's contracting business subject to a joint venture exclusion. (*Scottsdale Ins. Co. v. Essex Ins. Co., supra,* 98 Cal.App.4th at p. 89.) The insured built a home for resale with financing obtained from a passive financier who was not involved in construction or design. (*Id.* at p. 88.) When the buyers sued the insured for construction defects, the insured tendered the claim to its insurer, which, relying on the joint venture exclusion, refused coverage. (*Id.* at p. 89.) The court held the joint venture exclusion was an improper ground for denying coverage because the joint venture did not materially alter the risk: the carrier undertook to insure the insured's contracting business, the construction defect claims arose from the insured's conduct of that business, and the insured would be individually liable for damages arising from the claimed defects. (*Id.* at p. 93.)

Scottsdale turned on the fact that the insured was seeking to hold its carrier liable for not defending a *construction defect lawsuit* where the construction defects were solely the insured's responsibility. That is not our case. Plaintiffs' only claim against ICSOP is that it owed a duty to defend against a malicious prosecution claim that resulted from internal business disputes concerning one or more joint ventures that ICSOP did *not* insure. Unlike *Scottsdale,* this is precisely the type of *hidden risk* the joint venture exclusion was designed to avoid.

Plaintiffs' final argument on this point rests on the proposition that the joint venture exclusion was not *conspicuously* placed in the policy. They urge that to put an exclusion in the "persons insured" definition (a part of the insuring clause) and into an exclusionary endorsement fails to satisfy the test set out in *Haynes v. Farmers Ins. Exchange* (2004) 32 Cal.4th 1198, 1204. We disagree.

The inclusion of the exclusion as part of the "persons insured" language is logical and under-

standable and is commonly done. (See *Maryland v. Casualty Co. v. Imperial Contracting Co.* (1989) 212 Cal.App.3d 712, 715; *Bott v. J.F. Shea Co., Inc.* (5th Cir.2002) 299 F.3d 508, 511.) Moreover, it also appears in the "contractor's limitation" endorsement. These are both appropriate and prominent locations where a reasonable insured would expect to find such language.[FN27]

> FN27. This is a commonly used exclusion. Precisely the same joint venture exclusion "has been in wide use by comprehensive general liability insurers in the United States" since the 1960s. (*Austin P. Keller Const. v. Commercial Union* (Minn.1986) 379 N.W.2d 533, 536; see also *id.* at p. 534; *Fireman's Fund Ins. Co. v. E.W. Burman, Inc.* (R.I.1978) 391 A.2d 99, 102). This common exclusion does not render the coverage "illusory." It simply protects the insurer from liability for claims arising from joint ventures in which the insured engages without notice to the insurer, thereby depriving the insurer of the opportunity to evaluate the added risk and adjust its premium accordingly. (See *Scottsdale Ins. Co. v. Essex Ins. Co., supra,* 98 Cal.App.4th at p. 93; *Maryland Casualty Co. v. Reeder, supra,* 221 Cal.App.3d at p. 979.)

CONCLUSION

When we review the ICSOP policy in the context of this record and the story the record tells us about the business history of the parties and their long engagement in an (ultimately unsuccessful) real estate development enterprise, we have no trouble concluding that there was no coverage under the ICSOP policy for the malicious prosecution claim filed by the FN entities. The parties were clearly jointly engaged in a major and complex development venture in which the FN entities provided the financing for the acquisition, development, construction and sale of residential real estate properties, and actively participated in the management of the venture particularly after the venture began to sustain losses. That the parties, for obvious reasons, chose to manage this enterprise by the use of multiple DMAs in which various plaintiffs and various FN entities were made separate signatory parties, does not change the nature of the macro picture that emerges. None of the FN entities could qualify as "third parties" as that term was plainly intended to be construed; but even if they were and none of the joint ventures were insureds under the policy, then the joint venture exclusion would preclude coverage. No other reasonable reading or application of the ICSOP policy is possible. Either plaintiffs have failed to demonstrate coverage by showing that the FN entities are "third parties" or the joint venture exclusion applies. Either way there is no coverage under the policy and ICSOP had no duty to defend.[FN28] In light of that conclusion, we have no need to further address the other contentions and arguments advanced by the parties.

> FN28. In light of our conclusion that coverage is precluded by the terms of the policy, we necessarily reject plaintiffs' contention that ICSOP failed to conduct a proper investigation; nor can ICSOP's failure to have expressly asserted this objection to coverage in its initial denial letter be deemed a waiver thereof. (*Waller, supra,* 11 Cal.4th at pp. 30-35.) "[W]aiver requires the insurer to *intentionally* relinquish its right to deny coverage and a denial of coverage on one ground does not, absent clear and convincing evidence to suggest otherwise, impliedly waive grounds not stated in the denial. [Citation.]" (*Id.* at pp. 31-32, italics added.)

DISPOSITION

***13** The judgment is affirmed. Each party shall bear their own costs on appeal.

WE CONCUR: KITCHING and ALDRICH, JJ.

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