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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

BI-COASTAL PAYROLL SERVICES, INC., et al., Plaintiffs and Appellants, v. CALIFORNIA INSURANCE GUARANTEE ASSOCIATION, Defendant and Respondent.	B205969 (Los Angeles County Super. Ct. No. BC336237)

APPEAL from a judgment of the Superior Court of Los Angeles County, Maureen Duffy-Lewis, Judge. Reversed and remanded with instructions.

Roxborough, Pomerance & Nye, Nicholas P. Roxborough, Michael H. Raichelson, and Drew E. Pomerance, for Plaintiffs and Appellants.

Locke Lord Bissell & Liddell, C. Guerry Collins, William S. Davis, and Conrad V. Sison, for Defendant and Respondent.

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* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of the **FACTUAL BACKGROUND** and **DISCUSSION**, part B.

INTRODUCTION

We issued an order to show cause regarding dismissal of the appeal as untimely, and the parties responded with letter briefs on the timeliness of the notice of appeal. We hold that plaintiffs' duty to file their notice of appeal arose from the service of their notice of entry of judgment, not the service of the trial court's earlier minute order, which order did not strictly comply with the requirements of California Rules of Court, rule 8.104(a)(1), and that their appeal is therefore timely. In the unpublished portion of this opinion, we hold that the trial court properly sustained the demurrer to the second, third and fourth causes of action because those claims are barred by *Isaacson v. California Ins. Guarantee Assn.* (1988) 44 Cal.3d 775 (*Isaacson*), but that plaintiffs should be granted leave to amend to plead a cause of action for reimbursement as recognized in *Isaacson*.

PROCEDURAL BACKGROUND

On July 7, 2005, plaintiffs and appellants (plaintiffs)[1] filed a complaint against defendant and respondent California Insurance Guarantee Association (CIGA) for declaratory relief. A month later, plaintiffs filed a first amended complaint, again seeking only declaratory relief. In response, CIGA filed a motion to strike and a demurrer. The trial court granted the motion to strike, but overruled the demurrer. After CIGA answered, plaintiffs sought and obtained leave of court to amend their complaint. In addition to declaratory relief, the second amended complaint asserted causes of action for an accounting, negligence, and breach of fiduciary duty. CIGA responded with a motion

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[1] The named plaintiffs are: Bi-Coastal Payroll Services, Inc.; Curiosity Payroll Services, Inc.; Epicurean Services, Inc.; Emerald Payroll Services, Inc.; Film Payment Services, Inc.; FPS Payroll Services, Inc.; FSI Processing, Inc.; Maize-El Services, Inc.; Movie Payroll, Inc.; Power Payroll, Inc.; Producer Payroll, Inc.; Production Processing, Inc.; Quantos Payroll Service, Inc.; Radar Payroll Services, Inc.; Staff Payroll Services, Inc.; Transcontinental Payroll, Inc., d.b.a. West Coast Extras, Inc.; West Coast Extras, Inc.; X Rhode, Inc.; Media Services.

to strike and a demurrer to the accounting, negligence, and breach of fiduciary duty causes of action. The trial court sustained the demurrer without leave to amend, leaving only the declaratory relief cause of action.

As discussed in detail below, plaintiff voluntarily dismissed the declaratory relief cause of action and the parties stipulated to entry of judgment in favor of CIGA. In a minute order served on the parties, the trial court accepted the stipulation and entered judgment. Plaintiffs thereafter gave formal notice of entry of judgment and filed a notice of appeal.

FACTUAL BACKGROUND[2]

Plaintiffs are related corporations formed for the purpose of providing personnel or payroll services to the entertainment industry. Pursuant to plaintiffs' service agreements with the certain production companies, plaintiffs were required to obtain and did in fact obtain workers' compensation coverage for the employees they provided to those companies.

Plaintiffs determined to meet their workers' compensation insurance requirements through a "high-deductible" program. In a high-deductible program, the insured is ultimately responsible for all claims up to a certain amount, which in this case was $350,000. Plaintiffs procured high-deductible policies through Legion Insurance Company (Legion). Plaintiffs also obtained a separate high-deductible reimbursement policy through Mutual Indemnity (U.S.) Ltd. (Mutual) to cover plaintiffs' obligations under the deductible. Plaintiffs posted several million dollars in collateral with Mutual based on the amounts paid as losses on claims, presumably as collateral to secure the plaintiffs' ability to satisfy the $350,000 deductible.

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2 Because we are reviewing a ruling sustaining a demurrer, we treat the well pleaded allegations of the operative second amended complaint as admitted. (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.)

Under the high-deductible policy, Legion was required to administer and pay the claims up to the deductible amount and then to seek reimbursement for amounts paid under the deductible from Mutual, with whom one of the plaintiffs, Media Services, had placed on deposit the necessary funds and securities.

On April 25, 2003, the Insurance Commissioner of Pennsylvania liquidated Legion. Thereafter, all of plaintiffs' California claims with Legion were transferred to CIGA[3] for adjustment and payment as required under California Insurance Code section 1063, et seq. Accordingly, CIGA became statutorily responsible for defending, handling, reserving, paying, and settling the workers' compensation claims filed under the Legion policy.

The total incurred losses (amounts paid and reserved) by CIGA on plaintiffs' claims are part of the contractual formula used by Mutual to calculate the amount of collateral necessary to cover obligations pursuant to the Mutual deductible reimbursement policy. Additionally, the manner in which CIGA administers plaintiffs' claims directly determines how much of the deductible plaintiffs ultimately will be responsible to pay through reimbursement on each workers' compensation claim. Further, by defending, handling, managing, reserving, paying, and settling the claims, CIGA's acts and omission affect the amount of premiums that plaintiffs have paid and will pay in the future.

In or about June 2004, plaintiffs obtained balance sheets, income statements, and underwriting summaries providing incurred amounts on claims administered by CIGA. Plaintiffs believed the reserves set by CIGA were disproportionately high in relation to the age of the individual claims, representing an aggressive reserving policy on the part of CIGA. Plaintiffs also learned that CIGA set substantial reserves to cover incurred but

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3 CIGA is a governmental entity created to provide an insured with coverage for claims in the event his or her insurer becomes insolvent. (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 397.)

not yet reported losses (IBNR), even though most of the claims being administered by CIGA were several years old.

During the same period, CIGA commenced sending demand letters to the various payroll companies seeking direct reimbursement for benefits paid under the Legion policies. The demand letters sought reimbursement for amounts under the deductible that Legion is contractually obligated to pay pursuant to the policies. Concerned with their significant exposure on these claims, and the fact that millions of dollars in collateral had been placed with Mutual to secure their obligations, plaintiffs made numerous requests to CIGA to audit CIGA's handling and reserving of the claims files. Plaintiffs' requests were prompted by: 1) a need to obtain an accurate assessment of the amount of its reserves and IBNR's in order to secure the release of the posted collateral through Mutual; and 2) to assure that CIGA was not overpaying on its claims, such that plaintiffs would be billed for costs and expenses that should not be passed on to plaintiffs by CIGA.

Despite CIGA's demand for reimbursement for benefits paid under the Legion policies, CIGA refused to provide meaningful access to the claims files. Although CIGA implicitly acknowledged that the plaintiffs ultimately were liable for the deductible amounts by directing its demand letters to plaintiffs, CIGA in bad faith refused to allow meaningful access to the claims files in an attempt to conceal its claims mishandling, over reserving, and late reporting of claims to the detriment of plaintiffs.

On December 15, 2004, plaintiffs requested the production of ten litigated files in CIGA's possession. In response, CIGA only agreed to provide plaintiffs access to a certain portion of the claims files and only after plaintiffs or plaintiffs' third party expert executed a confidentiality and indemnification agreement. Plaintiffs, however, were not required to identify an expert prior to reviewing the claims files; had no obligation to indemnify and defend CIGA; and CIGA had no statutory or other authority to withhold documents to which plaintiffs are statutorily entitled.

On January 25, 2005, plaintiffs' counsel sent a draft protective order to address CIGA's privacy concerns by agreeing to keep the contents of the claims files confidential

and to not disclose its contents to any entity, including plaintiffs, without the express consent of CIGA. In the proposed protective order, plaintiffs also agreed to require all consultants hired by plaintiffs to execute a confidentiality agreement prior to reviewing the claims files to further protect the employees' privacy.

On February 9, 2005, CIGA responded to plaintiffs' proposed protective order by not only refusing to allow access to the claims files unless plaintiffs first executed CIGA's agreement, but also requiring that a release be executed by the workers' compensation claimant prior to the production. In response, plaintiffs sent a letter on February 11, 2005, further agreeing to modify the proposed protective order by providing 20 days notice to the injured worker to object to the production by sending notice to the claimant's last known address or to his or her attorneys' last known address.

On June 16, 2005, CIGA summarily rejected plaintiffs' compromise proposal.

DISCUSSION

A. Order to Show Cause re Dismissal

1. Background

To facilitate an appeal from the trial court's ruling on the demurrer, plaintiffs agreed to dismiss voluntarily the remaining declaratory relief cause of action and the parties stipulated to the entry of a judgment in favor of CIGA. The parties' stipulation was filed on December 12, 2007. That same day, the clerk mailed copies of a minute order to the parties. Below the case caption, the minute order provided: "**NATURE OF PROCEEDINGS:** COURT ORDER RE: STIPULATED JUDGMENT [¶] [The c]ourt is in receipt of [the] stipulated judgment submitted by the parties on 12/12/07. [¶] The court accepts the stipulated judgment. [¶] Judgment is entered in favor of defendant CIGA against plaintiffs according to the terms as set forth therein and [the court] adopts those terms as the [c]ourt's judgment by reference. [¶] [The t]rial date of 1/07/08 is advanced to this date and vacated. [¶] Counsel for plaintiffs to give notice."

Directly below the foregoing text, the minute order stated: "CLERK'S CERTIFICATION OF MAILING/NOTICE OF ENTRY OF ORDER. [¶] I, the below named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that this date I served Notice of Entry of the above minute order of 12/12/07 upon each party or counsel named below by depositing in the United States mail at the courthouse in Los Angeles, California, one copy of the original entered herein . . . ."

On December 26, 2007, plaintiffs served by mail a "Notice of Entry of Order of Stipulated Judgment in Favor of Defendant . . ." that was filed in the trial court on December 27, 2007. That document notified the parties of the trial court's acceptance and entry of their stipulated judgment according to its terms on December 12, 2007. It also attached a copy of the December 12, 2007, minute order.

On February 20, 2008, plaintiffs filed their notice of appeal. On June 30, 2008, this court issued an "Order to Show Cause Re: Dismissal." That order provided as follows: "On December 12, 2007, the clerk served notice of entry of judgment. The notice of appeal was not filed until February 20, 2008, . . . more than 60 days after December 12, 2007—the date of service of the notice of entry of judgment. Because the present appeal may be untimely, we have a duty to issue an order to show cause concerning possible dismissal of appeal. [Citation.] It appears the notice of appeal was filed more than 60 days after service of the notice of entry of judgment and service of a file stamped copy of the stipulated judgment in violation of rule 8.104(a) of the California Rules of Court. [Citations.] Hence, it may be that the appeal must be dismissed. [Citations.] . . ."

Plaintiffs filed their response to the order to show cause and CIGA thereafter filed a letter brief in support of dismissal. We granted plaintiffs' request to file a supplemental letter brief on the dismissal issue. On July 21, 2008, this court ordered that "[t]he issue of whether to dismiss the appeal will be decided in conjunction with the decision on the merits of the appeal."

2. Rule 8.104(a)

California Rules of Court, rule 8.104(a)[4] controls the determination of the timeliness of the appeal and provides as follows: "(a) Unless a statute or rule 8.108 provides otherwise, a notice of appeal must be filed on or before the earliest of: [¶] (1) 60 days after the superior court clerk mails the party filing the notice of appeal a document entitled 'Notice of Entry' of judgment or a file-stamped copy of the judgment, showing the date either was mailed; [¶] (2) 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled 'Notice of Entry' of judgment or a file-stamped copy of the judgment, accompanied by proof of service; or [¶] (3) 180 days after entry of judgment."

3. Contentions

Plaintiffs contend that, under the Supreme Court's recent decision in *Alan v. American Honda Motor Co., Inc.* (2007) 40 Cal.4th 894 (*Alan*), when a clerk gives notice of entry of a judgment or appealable order, that notice must strictly comply with the requirements of rule 8.104(a)(1). According to plaintiffs, the December 12, 2007, minute order fails to comply strictly with those requirements. Therefore, plaintiffs argue that the time to appeal the judgment ran from their December 26, 2007, notice of entry of judgment, which notice plaintiffs contend strictly complies with rule 8.104(a)(2).

CIGA contends that the decision in *Alan, supra,* 40 Cal.4th 894 is inapposite and that the facts in this case more closely resemble those in *Sunset Millennium Associates, LLC v. Le Songe, LLC* (2006) 138 Cal.App.4th 256 (*Sunset Millennium*). CIGA argues that in this case, unlike *Alan*, the December 12, 2007, minute order is the judgment itself and, therefore, the "Notice of Entry of Order" language on the first page of that order complies with rule 8.104(a)(1). As a result, CIGA maintains that the time to file the notice of appeal ran from December 12, 2007, and urges us to dismiss the appeal as untimely.

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4 All references to rules are to the California Rules of Court.

4. *Alan*

The Supreme Court recently interpreted rule 8.104(a) in *Alan, supra,* 40 Cal.4th 894. In that case, the trial court denied the plaintiff's motion for class certification, and the clerk notified the parties of that procedural development by mailing them copies of two documents in a single envelope. (*Id.* at p. 898.) The first document was entitled "Statement of Decision Re: [the plaintiff's] Motion for Class Certification," which set out the trial court's reasons for denying the motion. (*Ibid.*) The statement of decision, which was file stamped, provided that the plaintiff's class certification motion was denied. (*Ibid.*) The second document in the envelope was a minute order entitled "Ruling on Submitted Matter/Motion for Class Certification." (*Ibid.*) It stated that the trial court "now issues its Statement of Decision . . . this date." (*Ibid.*) It also stated that the minute order and statement of decision were mailed by the clerk to the parties on that date. (*Ibid.*) The minute order provided that it had been entered on that date by the clerk, but it was not file stamped. (*Ibid.*)

Nineteen days after the clerk mailed the statement of decision and minute order described above, the defendant in *Alan, supra,* 40 Cal.4th 894, served the plaintiff in that case with a document entitled "Notice of Entry of Order and Statement of Decision Denying Class Action." (*Id.* at p. 899.) The plaintiff filed his notice of appeal 63 days after the clerk mailed the statement of decision and minute order, but only 44 days after the defendant served its notice of entry of order and statement of decision. (*Ibid.*) The defendant moved to dismiss the appeal as untimely under rule 8.104(a)(1). The Court of Appeal granted the motion and dismissed the appeal. (*Ibid.*)

In reversing the Court of Appeal's ruling dismissing the appeal, the Supreme Court in *Alan, supra,* 40 Cal.4th 894 began its analysis by noting that "[t]he ordinary principles of statutory construction govern our interpretation of the California Rules of Court. (*Crespin v. Shewry* (2004) 125 Cal.App.4th 259, 265 [22 Cal.Rptr.3d 696]; *Life v. County of Los Angeles* (1990) 218 Cal.App.3d 1287, 1296 [267 Cal.Rptr. 557].) Our objective is to determine the drafter's intent. If the rule's language is clear and unambiguous, it governs. (*Crespin v. Shewry*, *supra*, at p. 265.)" (*Id.* at p. 902.)

The court in *Alan, supra,* 40 Cal.4th 894 then observed that "courts interpreting rule 8.104(a)(1) and its predecessors [have held] that documents mailed by the clerk do not trigger the 60-day period for filing a notice of appeal unless the documents strictly comply with the rule. 'Because the time limits for filing a notice of appeal are jurisdictional, we must apply [former] rule 2(a)(1) . . . strictly and literally according to its terms; the rules "must stand by themselves without embroidery."' (*In re Marriage of Taschen* [(2005)] 134 Cal.App.4th 681, 686, quoting *20th Century Ins. Co. v. Superior Court* (1994) 28 Cal.App.4th 666, 672 [33 Cal.Rptr.2d 674]; see also *Sunset Millennium Associates, LLC v. Le Songe, LLC* (2006) 138 Cal.App.4th 256, 260 [41 Cal.Rptr.3d 273] ['Within reason, [former] rule 2 is read literally'].) Thus, courts have consistently held that the required 'document entitled "Notice of Entry"' (rule 8.104(a)(1)) must bear precisely that title, and that the 'file-stamped copy of the judgment' (*ibid.*) must truly be file stamped. (E.g., *Sunset Millennium Associates, LLC v. Le Songe, LLC*, *supra,* at p. 260; *In re Marriage of Taschen*, *supra*, p. 686; *Cuenllas v. VRL International, Ltd.* (2001) 92 Cal.App.4th 1050, 1051, 1054 [112 Cal.Rptr.2d 383]; *20th Century Ins. Co. v. Superior Court*, *supra,* at pp. 671–672; *Hughey v. City of Hayward* (1994) 24 Cal.App.4th 206, 210 [30 Cal.Rptr.2d 678].) For the same reason, the older rule that technical defects in a notice of entry of judgment are excusable unless they are so egregious as to preclude actual notice of entry (*In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 114 [95 Cal.Rptr. 2d 113]) has not been applied to rule 8.104(a)(1) or its identically worded, immediate predecessor, former rule 2(a)(1) (as adopted, eff. Jan. 1, 2002). (See *Sunset Millennium Associates, LLC v. Le Songe, LLC, supra,* at p. 260, distinguishing *In re Marriage of Eben-King & King*, *supra*, at p. 114; cf. *20th Century Ins. Co. v. Superior Court*, *supra*, at p. 672 ['It might seem that the difference between a "notice of ruling" and a "notice of entry" is hypertechnical. In another context it might be.'].)" (*Alan, supra*, 40 Cal.4th at pp. 902-903.)

According to the court in *Alan, supra,* 40 Cal.4th 894, rule 8.104(a) does not require litigants to glean from multiple documents the information necessary to determine when the 60-day period for the filing of a notice of appeal commenced or to guess

whether the time within which to file a notice of appeal has commenced. "'Neither parties nor appellate courts should be required to speculate about jurisdictional time limits.' (*Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 Cal.4th 51, 64 [61 Cal.Rptr.2d 166, 931 P.2d 344].)" (*Alan, supra*, 40 Cal.4th at p. 905.)

Accordingly, the court in *Alan, supra,* 40 Cal.4th 894 concluded that "the documents mailed by the clerk in this case did not comply with rule 8.104(a)(1). No document entitled 'Notice of Entry' exists. Nor is the appealable minute order, which arguably shows the date on which it was mailed, file stamped. Accordingly, the clerk's mailing of these documents did not commence the 60-day period for the filing of a notice of appeal. Instead, the relevant 60-day period began when [the defendant] filed its own, proper notice of entry on January 17, 2003. [The plaintiff] timely filed his notice of appeal on March 6, 2003, 44 days later. Thus, the Court of Appeal erred in dismissing [the plaintiff's] appeal as untimely." (*Id.* at p. 905.)

In this case, the minute order is not *entitled* "Notice of Entry" of judgment or order. It is entitled "COURT ORDER RE: STIPULATED JUDGMENT." Thus, as in *Alan, supra,* 40 Cal.4th 894, the document relied upon by CIGA as commencing the time to appeal does not bear the title "'Notice of Entry' of Judgment [or order]" required under rule 8.104(a)(1). And, even assuming the minute order is the judgment itself, as CIGA contends, it is not *file stamped* as required under rule 8.104(a)(1). Thus, neither of the two alternative means of giving notice that are required under rule 8.104(a)(1) when a clerk gives notice of entry of judgment has been satisfied in this case.

That the minute order contains "NOTICE OF ENTRY OF ORDER" language on the first page does not satisfy the mandates of rule 8.104(a)(1). Moreover, that language creates an ambiguity because the minute order has a different title, "COURT ORDER RE: STIPULATED JUDGMENT" and it expressly provides, "[C]ounsel for plaintiffs to give notice." As a result, and contrary to the teaching of *Alan, supra,* 40 Cal.4th 894, it placed plaintiffs' counsel in the position of guessing whether the order triggered the 60-day time period within which to file the notice of appeal. Because rule 8.104(a)(1) was

intended to obviate the need for such guesswork when calculating jurisdictional time limits, we conclude that the December 12, 2007, minute order did not commence the 60-day time period for filing the notice of appeal in this case. That time period began instead when plaintiffs served their notice of entry of order on December 26, 2007, which notice strictly complied with rule 8.104(a)(2).

5. Sunset Millennium

Unlike CIGA, we do not read our decision in *Sunset Millenium, supra,* 138 Cal.App.4th 256 as supporting a dismissal in this case. To the contrary, *Sunset Millenium* supports our conclusion that the December 12, 2007, minute order does not strictly comply with the requirements of rule 8.104(a)(1).

In *Sunset Millenium, supra,* 138 Cal.App.4th 256, the clerk mailed a 14-page minute order to the parties granting the defendant's special motion to strike under Code of Civil Procedure section 425.16 and explaining the reasons for the trial court's ruling. (*Sunset Millenium, supra,* 138 Cal.App.4th at p. 257.) Page 13 of that minute order contained language similar to the language in the order at issue in this case: "CLERK'S CERTIFICATE OF MAILING/[¶] NOTICE OF ENTRY OF ORDER" which was followed by the clerk's confirmation that the 14-page minute order had been mailed to the parties the same day it was entered in the minutes. (*Id.* at p. 258.) Unlike this case, however, the space below "**NATURE OF PROCEEDINGS**" was blank on all 14 pages of the minute order, i.e., the order had no title. (*Id.* at p. 257.) Over a month after the clerk served the 14-page minute order on the parties, the trial court signed a proposed judgment submitted by the defendant and the clerk mailed a signed copy of the judgment to the parties along with a separate minute order which provided below the caption: **"NATURE OF PROCEEDINGS: [¶] NOTICE OF ENTRY OF JUDGMENT."** (*Id.* at p. 258.) The plaintiff served the notice of appeal more than 60 days after the service of the 14-page minute order, but less than 60 days after the service of the copy of the judgment and notice of entry of judgment. (*Ibid.*)

On appeal, the defendant filed a motion to dismiss, arguing that page 13 of the 14-page minute order contained the notice of entry of judgment language required by former rule 2(a).[5] (*Sunset Millennium, supra,* 138 Cal.App.4th at p. 257.) We denied the motion, reasoning as follows: "The 14-page minute order with the notice of entry language on page 13 does not comply with the literal requirement that the document providing notice of entry be so *entitled*." (*Id.* at p. 259.) Moreover, we rejected the defendant's assertion that mere technical noncompliance with former rule 2's requirements could be ignored for purposes of determining whether the duty to file a notice of appeal had been triggered. "In the case of *In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 114 [95 Cal.Rptr.2d 113], the Court of Appeal held: 'It is established law that a technical defect in the notice of entry of judgment cannot be invoked to avoid the [former] rule 2(a) 60-day period for filing a notice of appeal, unless the defect was arguably so egregious as effectively to preclude any *actual notice* of entry of judgment. (*Delmonico v. Laidlaw Waste Systems, Inc.* (1992) 5 Cal.App.4th 81, 85–86 [6 Cal.Rptr. 2d 599]; *National Advertising Co. v. City of Rohnert Park* (1984) 160 Cal.App.3d 614, 618–619 [206 Cal.Rptr. 696]; *Pacific City Bank v. Los Caballeros Racquet & Sports Club, Ltd.* (1983) 148 Cal.App.3d 223, 228 [195 Cal.Rptr. 776].)' Each of the cases cited in *Marriage of Eben-King* involves a technical defect in the notice such as a misstatement of the date the judgment was entered or the failure to attach a proof of service to the notice (something [former] rule 2 does not even require). Neither *Marriage of Eben-King* nor the cases it cites involve the failure to entitle the crucial document using the mandated notice of entry language. More to the point, the failure to entitle the document using the crucial notice of entry language is not a matter of mere form; [former] rule 2(a)(1) explicitly without any ambiguity requires the document be 'entitled' notice of entry." (*Sunset Millennium, supra*, 138 Cal.App.4th at p. 260.)

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5 Former rule 2(a) was the immediate predecessor to rule 8.104(a) and was "identically worded." (*Alan, supra,* 40 Cal.4th at p. 903.)

CIGA points out that the "NOTICE OF ENTRY" language in this case appears on the first page of the December 12, 2007, minute order, not on page 13 as in *Sunset Millennium, supra*, 138 Cal.App.4th 256. CIGA then refers to the following statement in *Sunset Millennium*, "[I]f the notice of entry language appeared on page 1 of a separate document, as distinguished from page 13 of 14, the result would potentially be different." (*Id.* at p. 260.) Based on that statement, CIGA argues that we distinguished *Sunset Millennium* from the cases such as this one where the notice of entry language appears on the first page of the document in question. As discussed above, however, the notice of entry language in this case only serves to render the minute order ambiguous on the issue of when the time within which to file the notice of appeal commenced. That language does not appear as the title of the December 12 minute order and it is preceded by language directing plaintiffs to give notice. Thus, regardless of whether the "NOTICE OF ENTRY" language appears on the first page of the minute order, a party reviewing it in context would be left to speculate whether that language was sufficient to commence the 60-day time period for the filing of a notice of appeal. Under *Alan, supra*, 40 Cal.4th 894, that is the type of uncertainty that the requirements of rule 8.104(a)(1) were designed to prevent. Accordingly, because the December 12 minute order did not strictly comply with rule 8.104(a)(1), it did not commence the duty to the file a notice of appeal. Plaintiffs' notice of appeal, which was filed within 60 days of the service of plaintiffs' December 26, 2007, notice of entry of order, was therefore timely filed. Accordingly, we have jurisdiction to determine the merits of the appeal.

B. Ruling on Demurrer

1. Standard of Review

"On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. We give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126 [119 Cal.Rptr.2d 709, 45 P.3d 1171].) Further, we treat the demurrer as admitting all material facts properly pleaded,

but do not assume the truth of contentions, deductions or conclusions of law. (*Ibid.*; *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966–967 [9 Cal.Rptr.2d 92, 831 P.2d 317] (*Aubry*).) When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. (*Zelig, supra*, 27 Cal.4th at p. 1126.) And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse. (*Ibid.*)" (*City of Dinuba v. County of Tulare, supra,* 41 Cal.4th at p. 865.)

2. Isaacson

The trial court relied primarily on the Supreme Court's decision in *Isaacson, supra,* 44 Cal.3d 775 in sustaining the demurrer to the second amended complaint without leave to amend. Plaintiff contends that *Isaacson* is not controlling because it does not confer "wholesale immunity" on CIGA and because this is a unique case with completely different facts from those at issue in *Isaacson*.

In *Isaacson, supra,* 44 Cal.3d 775, a patient sued two doctors for malpractice. (*Id.* at p. 780.) The doctors had a liability insurance policy limit of $1 million, but the company that issued the policy, and accepted the defense of the malpractice action, was adjudged insolvent. (*Ibid.*) CIGA assumed the doctors' defense pursuant to section 1063.2. (*Ibid.*) The malpractice case settled for $500,000 with CIGA paying $400,000 and the doctors paying $100,000. (*Ibid.*) Because CIGA refused to contribute more than $400,000, the doctors paid the additional $100,000 to avoid a potential verdict in excess of the $500,000 settlement offer made by the patient in the malpractice action. (*Ibid.*) The doctors then sued CIGA to recover the $100,000 based on several tort theories. "Plaintiffs' second amended complaint purported to state three causes of action against CIGA. First, they sought to recover $ 100,000 on the theory that the entire settlement amount of $ 500,000 constituted a 'covered claim' which CIGA was required to pay under the Guarantee Act. In the remaining causes of action they sought both compensatory and punitive damages for 'bad faith' (apparently based on breach of the

implied covenant of good faith and fair dealing) and intentional infliction of emotional distress." (*Id.* at p. 783.)

CIGA demurred to the causes of action for bad faith and intentional infliction of emotional distress, and the trial court sustained the demurrer without leave to amend. (*Isaacson, supra,* 44 Cal.3d at p. 783.) The trial court subsequently granted nonsuit in favor of CIGA on the claim for reimbursement of the $100,000. (*Ibid.*) The Court of Appeal, however, reversed the judgment, holding that plaintiff could state the causes of action. (*Ibid.*)

The court in *Isaacson, supra,* 44 Cal.3d 775 reversed the Court of Appeal's decision, explaining that "CIGA was created by legislation in 1969 (§ 1063 et seq.) to establish a fund from which insureds could obtain financial and legal assistance in the event their insurers become insolvent, i.e. 'to provide insurance against "loss arising from the failure of an insolvent insurer to discharge its obligations under its insurance policies." (Ins. Code, § 119.5.)' (*Biggs* v. *California Ins. Guarantee Assn*. (1981) 126 Cal.App.3d 641, 644 [179 Cal.Rptr. 16]; see § 1063, subd. (a).) All insurers transacting insurance business in California are involuntary members of CIGA, unless specifically exempted by statute. (§§ 1063, subd. (a), 1063.1, subd. (a).)" (*Isaacson, supra*, 44 Cal.4th at p. 784.)[6]

The court in *Isaacson, supra,* 44 Cal.3d 775 then delineated CIGA's statutory duties. "[S]ection 1063.2, subdivision (a), . . . directs CIGA to 'pay and discharge *covered claims* and in connection therewith pay for or furnish loss adjustment services and defenses of claimants when required by policy provisions.' (Italics added.) Section 1063.1, subdivision (c)(1), in pertinent part defines 'covered claims' as 'the obligations of an insolvent insurer, including the obligation for unearned premiums, (i) imposed by law and within the coverage of an insurance policy of the insolvent insurer; (ii) which were unpaid by the insolvent insurer; [and] (iii) which are present*ed as a claim to the*

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6 References to statutory sections are to the Insurance Code unless stated otherwise.

liquidator in this state or to the association . . . .'" (*Isaacson, supra,* 44 Cal.4th at p. 784, italics added.)

After stating CIGA's statutory obligations to pay covered claims, the court in *Isaacson, supra,* 44 Cal.3d 775 described the limitations on CIGA's liability. "Section 1063.2, subdivision (f), (footnote omitted) specifically provides, '"Covered claims" shall not include any judgments against or obligations or liabilities of the insolvent insurer or the commissioner, as liquidator, or otherwise *resulting from alleged or proven torts* . . . .' (Italics added.) Finally, section 1063.12, subdivision (a), explicitly limits CIGA's liability, providing, 'The association . . . shall *under no circumstances be liable for any sum in excess of the amount of covered claims* of the insolvent insurer . . . and the costs of administration and the costs of loss adjustment, investigation and defenses relating to claims thereunder. (Italics added.) As explained below, we find the overall statutory scheme indicates a legislative intent that CIGA not be subject to tort liability for its conduct relating to the handling of claims, under any of the three theories plaintiffs espouse." (*Isaacson, supra*, 44 Cal.4th at pp. 784-785.)

In light of CIGA's statutory obligation to pay only covered claims and the express statutory limitations on other liabilities, the court in *Isaacson, supra,* 44 Cal.3d 775 concluded that "[t]he Guarantee Act[7] shields CIGA from liability for damages for common law and statutory bad faith and intentional infliction of emotional distress, by virtue of its limitation of CIGA's obligations to the payment and discharge of 'covered claims.' We do not mean to imply that the statute precludes an insured from recovering reimbursement from CIGA, within the statutory limits, (footnote omitted) in the event CIGA breaches its duties under the Guarantee Act to defend or pay a 'covered claim.' If CIGA fails to comply with the foregoing statutory duties, thus inducing the insured to pay money to satisfy an adverse judgment (footnote omitted) or to settle (or augment settlement of) the claim against him, the insured, on proving that CIGA breached its duty

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[7] The court in *Isaacson, supra,* 44 Cal.3d 775, 780 referred to sections 1063 to 1063.14 as the Guarantee Act.

toward him, is entitled to recover the money expended, up to the statutory maximum." (*Isaacson, supra*, 44 Cal.4th at pp. 789-790.)

3. Negligence and Breach of Fiduciary Duty

Here, as in *Issacson, supra,* 44 Cal.3d 775, plaintiffs attempted to assert common law tort claims—negligence and breach of fiduciary duty—against CIGA. Those claims seek more than reimbursement for failure to pay covered claims; they seek consequential damages in the form of increased premiums, loss of posted collateral, and interest on such lost funds. Moreover, the prayers for the negligence and breach of fiduciary duty claims expressly seek "general and special damages in a sum to be proven at trial . . . ." By seeking such damages, the common law tort claims sought relief beyond reimbursement for covered claims. In doing so, they contravened the rule set out in *Issacson, supra,* 44 Cal.3d at page 775, that CIGA is immune from such tort liability arising from its conduct in the claims adjustment process. Accordingly, the trial court did not err in sustaining CIGA's demurrer to plaintiffs' common law negligence and breach of fiduciary duty claims.

In addition to distinguishing *Issacson, supra,* 44 Cal.3d 775, as it relates to their common law tort claims, plaintiffs also raise certain policy-based arguments in an effort to circumvent *Issacson*'s preclusive effect on their tort claims. First, they contend that, as a matter of policy, CIGA should not have "absolute immunity," and *Issacson* should not be read to confer such immunity. But CIGA concedes that the immunity from liability under *Issacson* is limited, and that it can be sued for reimbursement of the amount of covered claims, as *Issacson* makes clear. Thus, plaintiffs' policy arguments against absolute immunity are misguided and based on the faulty premise that CIGA is claiming absolute immunity under *Isaacson* when it is not.

Plaintiffs also argue that *Issacson, supra,* 44 Cal.3d 775, should be ignored in this instance because circumstances have changed since *Issacson* was decided. According to plaintiffs, due to the insolvency of many workers' compensation carriers in recent years, CIGA is now one of the largest of such carriers in California. Assuming that is accurate,

it raises a matter for the Legislature to address, not this court. By enacting sections 1063 through 1063.14, the Legislature established the immunity from tort claims recognized in *Isaacson* and only the Legislature can further limit that immunity.

Plaintiffs' argument that for policy reasons, CIGA should be treated as the State Compensation Insurance Fund (SCIF) also misses the point. In addition to being based on plaintiffs' misguided argument that CIGA is seeking absolute immunity, plaintiffs' contentions concerning SCIF raise matters for the Legislature to determine, not this court. The immunity from tort liability recognized in *Issacson*, *supra*, 44 Cal.3d 775 has been the law of this state for over 20 years. If policy reasons now exist to alter that immunity, any such alteration must be undertaken by the Legislature.

4. Accounting

CIGA argues that plaintiffs' accounting cause of action is merely a request for an equitable remedy based on plaintiffs' declaratory relief and tort claims. Because plaintiffs dismissed their declaratory relief claim, and their tort claims are barred by *Issacson, supra,* 44 Cal.4th 775, CIGA contends that the accounting claim must also fail. According to CIGA, the remedy of an accounting is limited to two situation (neither of which is present here): (1) when there is a fiduciary relationship, such as a trust, between the plaintiff and the defendant, citing *Glue-Fold, Inc. v. Slautterback Corp.* (2000) 82 Cal.App.4th 1018, 1023, footnote 3; or (2) when the accounts are so complicated, an ordinary legal action for a fixed sum is impracticable, citing, inter alia, *Civic Western Corp.* v. *Zila Industries, Inc.* (1977) 66 Cal.App.3d 1, 14.

Here, the accounting cause of action did not expressly allege the existence of a fiduciary duty, and, as discussed, the fiduciary duty cause of action was barred under *Issacson, supra*, 44 Cal.3d 775. Thus, the request for an accounting could not be based on the existence of a fiduciary duty between plaintiffs and CIGA. Similarly, the accounting cause of action did not allege that the accounts at issue were so complicated that an ordinary legal action would have been impracticable. Instead, plaintiffs alleged that "the amount of money to be reimbursed is relatively unknown and/or unexplained

. . .” and that “CIGA has had difficulty determining with any level of certainty how much was specifically reimbursed . . . .” Allegations suggesting that the accounts at issue are uncertain are not the equivalent of alleging that the accounts are so complicated they are not amenable to an ordinary legal action for a fixed sum. Based on the allegations of the second amended complaint, the trial court did not err in sustaining CIGA’s demurrer to the accounting cause of action.

5. Leave to Amend

Plaintiffs have requested leave to amend their complaint to state a cause of action for reimbursement as recognized in *Isaacson, supra,* 44 Cal.3d 775—i.e., a claim seeking “reimbursement from CIGA, within the statutory limits, (footnote omitted) in the event CIGA breaches its duties under the Guarantee Act to defend or pay a ‘covered claim.’ If CIGA fails to comply with the foregoing statutory duties, thus inducing the insured to pay money to satisfy an adverse judgment (footnote omitted) or to settle (or augment settlement of) the claim against him, the insured, on proving that CIGA breached its duty toward him, is entitled to recover the money expended, up to the statutory maximum.” (*Id.* at pp. 789-790.)

“When a demurrer is sustained without leave to amend, this court decides whether a reasonable possibility exists that amendment may cure the defect; if it can we reverse, but if not we affirm. The plaintiff bears the burden of proving there is a reasonable possibility of amendment. [Citation.] The plaintiff may make this showing for the first time on appeal. [Citations.]” (*Rakestraw v. California Physicians’ Service* (2000) 81 Cal.App.4th 39, 43.) Plaintiffs here have shown that a reasonable *possibility* exists that they can allege facts sufficient to state a claim for reimbursement under *Isaacson*.[8] Accordingly, their request for leave to state such a claim should be granted.

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8 At oral argument, plaintiffs’ counsel asserted that his clients could allege facts entitling them to reimbursement from CIGA for either failure to pay covered claims *or* overpayment of covered claims. Whether the reimbursement cause of action contemplated in *Isaacson, supra*, 44 Cal.3d 775 extends to claims for overpayment of

DISPOSITION

The judgment in favor of CIGA and the order sustaining the demurrer without leave to amend are reversed, and the matter is remanded to the trial court with instructions to enter a new order sustaining CIGA's demurrer to the second, third, and fourth causes of action without leave to amend, but granting plaintiffs leave to amend to state a claim for reimbursement under *Isaacson, supra,* 44 Cal.3d 775. No costs are awarded.

CERTIFIED FOR PARTIAL PUBLICATION

MOSK, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.

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covered claims is an issue that is not properly before us on appeal because it was not pleaded below. Therefore, we do not reach that issue on this appeal.