Planning Ahead

(Federal/State Court Holidays in ***italics***)

March 2006

1st - Ash Wednesday (Christian)
7th - Peace Corp Day
12th - Employee Day
14th - Purim (Jewish)
14th - Pi Day
17th - St. Patrick's Day
30th - Doctor's Day
31st - Cesar Chavez Day

April 2006

1st - April Fool's Day
2nd - Daylight Saving Time starts
9th - Palm Sunday (Christian)
11th - Prophet's Birthday (Islamic)
13th - Maundy Thursday (Christian)
13th - Thomas Jefferson's Birthday
13th - First Day of Passover (Jewish)
14th - Good Friday (Christian)
15th - Income Tax Day
15th - Rubber Eraser Day
15th - Holy Saturday (Christian)
16th - Easter Sunday (Christian)
17th - Easter Monday (Christian)
20th - Last Day of Passover (Jewish)
22nd - Earth Day
23rd - Orthodox Easter (Orthodox)
25th - Yom HaShoah (Jewish)

May 2006

1st - Law Day
1st - May Day
3rd - Yom HaAtzmaut (Jewish)
5th - Cinco de Mayo
8th - V-E Day
9th - Teacher's Day
10th - Receptionist's Day
14th - Mother's Day
16th - Lag B'Omer (Jewish)
16th - Bike to Work Day
20th - Armed Forces Day
25th - Ascension Day (Christian)
29th - Memorial Day

June 2006

2nd - Shavuot (Jewish)
4th - Pentecost (Christian)
6th - D Day
11th - Trinity Sunday (Christian)
14th - Flag Day
17th - Bunker Hill Day
15th - Corpus Christi (Christian)
18th - Father's Day
28th - WWI Day

Insurance Law

By: James M. Roth, The Roth Law Firm

THE COURT'S HAVE BEEN FAIRLY EVEN IN FINDING FOR BOTH CARRIERS AND INSUREDS

CARRIER WHICH PROPERLY RESERVES RIGHT MAY SEEK EXPENSE REIMBURSEMENT FROM INSURED IN DEFENDING SUIT WHEN NO COVERAGE AVAILABLE. In Scottsdale Insurance Company v. MV Transportation (2005) 36 Cal.4th 643, the issue before the California Supreme Court was whether an insurer that had properly reserved its rights could obtain reimbursement of its expenses of defending its insured against a third-party lawsuit where it was determined, as a matter of law, that the policy never afforded any potential for coverage and there was no duty to defend. The Court held "yes." In reaching its decision, the Court discussed at length its prior holding in Buss v. Superior Court (1997)16 Cal. 4th 35. Importantly, the carrier must make sure it properly issues its reservation for reimbursement. This decision simply confirms what is becoming well-settled California law.

NON-STANDARD UMBRELLA POLICY LANGUAGE WHICH INDEMNIFIED INSURED "OBLIGATED TO PAY BY REASON OF … PROPERTY DAMAGE … EITHER THROUGH ADJUDICATION OR COMPROMISE … AND FOR LITIGATION, SETTLEMENT, ADJUSTMENT AND INVESTIGATION OF CLAIMS AND SUITS …." APPLIED TO ENVIRONMENTAL CLEAN UP COSTS ORDERED BY AN ADMINISTRATIVE AGENCY. In Powerine Oil Co. Inc. v. Superior Court (2005) 37 Cal.4th 377, which is really what we insiders call "*Powerine Too*" because this is the second component of this very lengthy case to reach the highest court of this great state, the California Supreme Court evaluated the scope of coverage provided under insuring agreements in non-standard umbrella policies issued by Central National. The Court held that Central National's agreement to cover "all sums … the Insured shall be obligated to pay by reason of the liability … imposed … by law for damages … and expenses" was broad enough to extend to environmental cleanup costs ordered by administrative agencies. The Court reasoned that Central National's insurance policies were broader than the standard primary CGL insuring language at issue in Certain Underwriters at Lloyd's of London v. Superior Court (2001) 24 Cal.4th 945, which, yes, is what we refer to as "*Powerine Won*," because they incorporated the word "expenses" and therefore provided coverage beyond court-ordered money "damages." In *Powerine Won*, the Supreme Court held that an agreement to indemnify for "all sums that the insured becomes legally obligated to pay as damages" is limited to "money ordered by a court," and does not extend to environmental cleanup costs ordered by an administrative agency. *Powerine Too* also relied on the fact the Central National policies incorporated the phrase "ultimate net loss" defined as the total sum the insured becomes "obligated to pay by reason of … property damage … either through adjudication or compromise … and for litigation, settlement, adjustment and investigation of claims and suits …." The Supreme Court reasoned that while "adjudication" implies a proceeding in court, "compromise" does not necessarily implicate a suit commenced by the filing of a complaint. Moreover, the Supreme Court determined that by including the term "claim" in addition to "suit," the definition of ultimate net loss in the Central National policies extended coverage to expenditures beyond those incurred as a result of litigating an action brought in court. If that were not enough, *Powerine Too* also relied on the fact that the Central National policies provided umbrella coverage that could

apply to claims not covered under the primary standard CGL policies at issue in *Powerine Won*. The Court noted that the insured would have expected Central National to provide broader coverage than that afforded under the primary policies, such as coverage for environmental cleanup costs order by administrative agencies. And so it goes.

NON-STANDARD "INDEMNITY ONLY" UMBRELLA POLICY LANGUAGE WHICH INDEMNIFIED INSURED FOR MONEY DAMAGES ORDERED BY A COURT DID NOT APPLY TO ENVIRONMENTAL CLEAN UP COSTS ORDERED BY AN ADMINISTRATIVE AGENCY. In County of San Diego v. Ace Property & Casualty Co. (2005) 37 Cal.4th 406, a case way close to home, the California Supreme Court evaluated the scope of coverage provided under a non-standard "indemnity only" excess policy issued by ACE. The Court determined that ACE's agreement to indemnify "all sums which the insured is obligated to pay by reason of liability imposed by law" for "damages" did not cover the County's settlement of non-litigated claims including an administrative order to remediate groundwater. In so doing, the Court aligned the ACE policy language with the language at issue in *Powerine Won* (discussed above) and distinguished it from the language at issue in *Powerine Too* (also discussed above). The Court relied on the fact that the insuring clauses in the nonstandard ACE policy and the standard policy at issue in *Powerine Won* limited coverage to "damages," i.e., money ordered by a court, not "damages and expenses." The Court rejected the County's argument that the ACE policy's reference to "claims" as well as "suits" in its definition of "ultimate net loss" meant that ACE had a duty to settle non-litigated claims. Unlike the policy at issue in *Powerine Too*, the ACE policy did not define its indemnity obligation in terms of "ultimate net loss." Rather, the phrase was used in ACE's "limits of liability" provision which operated only to define ACE's limits obligations. Importantly, the Court noted that nothing in the ACE policy indicated coverage was to extend beyond money damages ordered by a Court. Finally, the Court relied on the fact that the ACE policy included a "no action" clause which allows a suit against an insurer if there has been a judgment or, with the insurer's consent, a settlement as well as a "no voluntary payments" provision. The Court determined that the inclusion of these conditions "belie the notion that the term damages in the ACE policy extends the indemnity duty to any settlement [of non-litigated claims] entered into by the County." And so it goes, the other way.

AN INSURER IS ENTITLED TO PURSUE A SUBROGATION CLAIM AGAINST ITS OWN INSURED IF THE POLICY DOES NOT COVER THE INSURED FOR THE PARTICULAR LOSS OR LIABILITY. In McKinley v. XL Specialty Insurance Company (2005) 131 Cal.App.4th 1572, the California Court of Appeal for the Third Appellate District affirmed a judgment of the Nevada County Superior Court denying a claim for bad faith against a subrogating insurer. The court concluded that because Plaintiff was not insured under the policy for the damage in question, the defendant insurer did not act in bad faith by bringing an unsuccessful subrogation action against her. Plaintiff McKinley rented a plane from Todd Aero for the purpose of receiving advanced flight instruction. The plane was damaged during landing, and Todd Aero's insurer, XL Specialty Insurance Company, paid the repair costs. XL then brought a subrogation action against McKinley. The action was referred to judicial arbitration and eventually dismissed when the arbitrator concluded McKinley was not at fault for the damage. McKinley then sued XL for bad faith, alleging XL should not to have sued her in subrogation because she qualified as an insured under Todd Aero's policy. The Court of Appeals held that an insurer is entitled to pursue a subrogation claim against its own insured if the policy does not cover the insured for the particular loss or liability. The court found that while the XL Policy added renter pilots (such as McKinley) as insureds under the policy's "third party" liability coverage, such pilots were not insureds under the policy's at-issue first party coverage.

NO DUTY OF GOOD FAITH AND FAIR DEALING TO A THIRD PARTY CLAIMANT, EVEN IF THE INSURER COINCIDENTALLY INSURES THE THIRD PARTY CLAIMANT. In Coleman v. Republic Indem. Ins. Co. of California (2005) 132 Cal.App.4th 403, the Court of Appeal for the Second Appellate District, held that an insurer owes no duty of good faith and fair dealing to a third party claimant, even if the insurer coincidentally insures the third party claimant. Plaintiffs, who were insured by Republic Insurance Company, were involved in a traffic accident with Defendant Gonzalez, who was insured by Infinity Insurance Company. Infinity is Republic's parent company. While Infinity allegedly advised Plaintiffs that the statute of limitations would expire one year after the traffic accident, Infinity's adjuster allegedly told Plaintiffs that if they turned in all medical documentation before the limitations period expired, then their claim would be processed and settled regardless of the statute of limitations. Plaintiffs submitted all the information on their personal injury claim, but did not file suit within one year. After the statute of limitations expired, Infinity rejected the claim because the statute had run. Plaintiffs then filed suit against Gonzalez, Infinity and Republic alleging negligence against Gonzalez and intentional and negligent infliction of emotional distress, fraud, and breach of the implied covenant of good faith and fair dealing against both Infinity and Republic. Plaintiffs alleged that Republic was Infinity's "alter ego" and, therefore, that Infinity and Republic should be treated as one insurer. The Court of Appeal held that Plaintiffs could not state a cause of action for breach of the implied covenant of good faith and fair dealing because Infinity and Republic (as Infinity's alter ego) did not owe Plaintiffs a duty of good faith and fair dealing. The court reasoned that the Plaintiffs are in an adversarial relationship with the insurers despite being coincidentally insured by Republic. Explained the Court, "Imposing a duty of good faith and fair dealing running from the Insurer to the [Plain-

tiffs] would 'create a serious conflict of interest for the [I]nsurer' by obligating it to safeguard both the [Plaintiffs'] and Gonzalez's interests." Plaintiffs, as third party claimants, have no contractual relationship with the insurer and cannot sue the insurer for breach of the implied covenant of good faith and fair dealing.

A GENERAL LIABILITY POLICY WHICH DID NOT INCLUDE AN ORGANIZATION IN IT'S DEFINITION OF A "NATURAL PERSON" DID NOT PROVIDE COVERAGE FOR AN ORGANIZATION. In Mirpad v. California Insurance Guarantee Association (2005) 132 Cal.App.4th 1058, the Second District Court of Appeal reversed a Los Angeles Superior Court's entry of judgment in favor of plaintiffs finding that the interpretation of "natural person," as referenced in the personal injury coverage of a CGL policy, included organizations when considered in context in the policy as a whole. Mirpad purchased a commercial building in Phoenix, Arizona. One of the tenants was POS Systems, Inc. ("POS"). Mirpad hired Allred to manage the building. Allred eventually notified POS that it was in default under the terms of the lease and locked POS out of the premises. POS sued Mirpad and Allred for wrongful eviction. Mirpad and Allred were insured under a CGL policy issued by United Pacific Insurance Company. The policy provided coverage for "those sums to which this insurance applies, that the insured becomes legally obligated to pay as damages because of personal injury." "Personal injury" was defined as "injury other than bodily injury, arising out of one or more of the following offenses . . . (3) wrongful eviction from, wrongful entry into, or invasions of the right of private occupancy of: (a) a room; (b) a dwelling; or (c) premises; that a person occupies by or on behalf of its owner, landlord or lessor[.]" The term person was not defined in the policy.

Mirpad and Allred tendered to Union Pacific. The tender was referred to the California Insurance Guarantee Association because United Pacific was insolvent. CIGA denied the tender because the policy's personal injury coverage for wrongful eviction applied only where the tenant was a "person," as compared to an organization, and POS was a corporation, not a person. The insureds filed an action for declaratory relief. The trial court rejected CIGA's argument finding for plaintiffs. It relied on Insurance Code § 19 which defined the term "person" to include organizations. The Court of Appeal reversed, citing the rules of construction that words in a policy must be interpreted in their ordinary and popular sense and in the context of the policy as a whole. The court examined the use of the word "person" throughout the policy which demonstrated that it is consistently referred only to natural persons. Moreover, because the policy used the words "persons" and "organizations" distinctly, they had to be must be accorded their separate and distinct meanings. Even within the definition of "personal injury" itself, the word "person" without the word "organization" is used in connection with the offenses of wrongful eviction and invasion of right of privacy; but the term "person or organization" is used with respect to the defamation offenses.

YET ANOTHER SUIT FLOWING FROM THE NORTHRIDGE EARTHQUAKE. In Doheny Park Terrace Homeowners Assoc. v. Truck Ins. Exch. (2005) 132 Cal.App.4th 1076, the Second District Court of Appeal reversed a demurrer granted by the Los Angeles County Superior Court and held that, while both the original and the revived limitations periods had expired, plaintiff alleged sufficient facts against its insurer to raise the application of the doctrine of equitable estoppel. Doheny Park Terrace Homeowners Association suffered damage to its condominium complex during the 1994 Northridge earthquake. Doheny submitted a claim to Truck Insurance Exchange. Truck investigated the property, determined the damage amount was less than the deductible, and denied the claim. Doheny took no further action until February 2003, eight years later, at which point it obtained an expert report concluding the damage was more extensive and the amount exceeded the deductible. Doheny sued Truck and Truck successfully demurred on the grounds the complaint was untimely and did not establish a basis for equitable estoppel. The appellate court reversed finding that, although the claim was technically time barred, plaintiff plead sufficient facts to raise the bar of equitable estoppel. The court first disposed of plaintiff's "delayed discovery" argument. Although the ordinary statute of limitations on breach of contract is four years, when an insured has a property damage claim under an insurance policy, there is a contractual limitation period imposed by the policy. Under the Truck policy this was two years. Under Insurance Code section 2071, the time runs from the inception of the loss, meaning not necessarily when the damage took place but that time when the damage reasonably should be known to the insured. Once any damage becomes reasonably apparent, the time begins to run and the insured must be diligent to determine the full extent of the damage. Doheny had sufficient knowledge of potential damage at the time of the earthquake and should have filed within the two year period. There was also no basis for equitable tolling of the limitations period. Although the limitations period is tolled during the time the claim is being considered by the insurer, the tolling period ends upon the insurer's unconditional denial of the claim in writing. The court found Truck's letter advising that the damage was less than the deductible constituted such an unequivocal denial, even though the letter did not actually use the words "deny" or "denial." However, the court found Doheny pled sufficient facts to raise the doctrine of equitable estoppel. The court noted that an insurer may be estopped from asserting a policy provision limiting the time to sue if the insured reasonably relied on the insurer's representations as to the amount of damage. This is a factual issue and will depend on questions including the insured's knowledge and expertise, the adjuster's knowledge and qualifications, and the insured's diligence in ascertaining extent of damages. Doheny alleged that it was untrained in assessing damage and reasonably relied upon Truck's expertise and representations that the damage did not exceed the

deductible. It further alleged that it had no reason to believe the damage was more extensive until years after the damage occurred. The court remanded the matter to determine whether plaintiff could prove these facts and justify the eight year delay in filing suit.

HOLOCAUST ERA INSURANCE CLAIMS ARE SUBJECT TO FEDERAL PREEMPTION. In Steinberg v. International Commission on Holocaust Era Insurance Claims (2005) 133 Cal.App.4th 689, the Second District Court of Appeal held that Code of Civil Procedure § 354.5, enacted to permit California residents to bring claims arising out of Holocaust era insurance policies, is preempted by the foreign policy of the United States. Plaintiffs were holocaust survivors and heirs who filed a class action lawsuit against the International Commission on Holocaust Era Insurance Claims following the denial of claims for insurance benefits from Assicuazioni Generali. The ICHEIC filed a motion to quash on the ground that California courts could not exercise personal jurisdiction and a demurrer on the ground that the parties' disputes were preempted by federal foreign policy. The ICHEIC argued that federal foreign policy favors settlement of Holocaust insurance claims under the ICHEIC's processes and that Section 354.5, which permitted litigation, conflicted with this federal policy. The trial court granted the motion to quash and sustained the demurrer without leave to amend. Plaintiffs appealed. The Court of Appeal affirmed, holding that a state may not enforce a statute, in this case Section 354.5, which interferes with a specific interest of the federal government. The specific interest need not be expressly set forth in an official agreement such as a treaty or executive agreement but, rather, may be reflected in official agreements and statements by the executive branch. The appellate court determined that if the plaintiffs' lawsuit were allowed to proceed, it would undermine the federal policy that the ICHEIC provides the exclusive forum for resolution of Holocaust era insurance claims.

INTERPRETATION OF TERM "WILLFULLY" IN FEDERAL FAIR CREDIT REPORTING ACT. In Reynolds v. Hartford Financial Services Group, Inc. ___ F.3d ___, 2006 WL 171920, 06 Cal. Daily Op. Serv. 689, 2006 Daily Journal D.A.R. 973, 9th Cir. (Or.), Jan 25, 2006. the United States Court of Appeal for the Ninth Circuit amended an earlier opinion issued on October 3, 2005 regarding the meaning of the term "willfully" as used in connection with the Fair Credit Reporting Act ("FCRA") 15 U.S.C. § 1681n. Section 1681n of the FCRA provides that "[a]ny person who willfully fails to comply with any requirement imposed under this title with respect to any consumer is liable to that consumer" for actual or statutory damages, punitive damages, and reasonable attorney's fees. Having previously held that a company which knowingly and intentionally performs an act that violates FCRA will be liable for "willfully" violating consumers' rights, the Ninth Circuit's amended opinion further concluded that an insurer's reliance on implausible interpretations of the law from its counsel can constitute "reckless disregard," which also amounts to a willful violation of the FCRA. In a footnote, the Ninth Circuit recognized that while consulting with attorneys may be evidence of lack of willfulness, it is not dispositive. It reasoned that attorneys who provide an implausible legal opinion that purports to relieve the insurers of their "clear statutory responsibilities" will not automatically avoid a charge of reckless disregard.

James M. Roth, of the Roth Law Firm APLC, has spent the past two decades practicing law in California. He has devoted his practice to corporate and business related issues, representing start-up to multinational entities. He can be reached at jroth@TheRothLawFirm.com.

Cha...Cha...Cha...Changes...

Did your firm name change? Did your firm relocate? Did you change your own name? Did you open a new firm? Did your email address change?

We want to keep up with you and your firm, as well as keep SDDL's records current. If you have any change to let us know about PLEASE either mail us the form below or email our Executive Director at srugg@waltonbiz.com

To: San Diego Defense Lawyers
P.O. Box 927062
San Diego, CA 92192

Name: _____

Firm: _____

Address: _____

City, State, Zip: _____

Phone: _____

Fax: _____

E-mail: _____

Other info: _____

_____

_____