INSURANCE CASELAW ROUNDUP (1/29/09)

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The following is a summary of recent insurance-related opinions issued in California. (By James Castle, Esq., guest contributor and associate at Barger & Wolen LLP.)

Court Holds that a Third Party Who is Not in Privity of Contract with the Liability Insurer Lacks Standing to Resolve Coverage Questions About an Insured's Rights Under a Policy: Otay Land Company, et al. v. Royal Indemnity Company, __ Cal. App. 4th __, 4th App. Dist., Div. 1, 11/25/2008): Plaintiff filed an action seeking declaratory relief regarding Royal's anticipated insurance coverage of one of Royal's former insureds (who was a non-party to the action) with respect to contamination problems on a piece of property that was purchased by Plaintiff from the insured. Plaintiff contended that it had a legitimate interest in making coverage arguments that may affect its possibilities of recovering damages from the insured. The appellate court found that California law generally prohibits third parties from suing an insurer when they are not in contractual privity and found that Plaintiff and Royal were not in such privity. At best, the court believed that Plaintiff was a "potential judgment creditor" or "potential beneficiary" under the policy, but its interest was not sufficient to rise to the level of a "protectible interest." Rather, the court found that Plaintiff's interests were contingent upon its prevailing against the insured in a separate action against the insured. As such, the court held that until "liability under the policy is settled, the Court cannot be certain that a controversy will arise between" Plaintiff and Royal and affirmed the trial court's decision to sustain Royal's demurrer to Plaintiff's Complaint without leave to amend. (The opinion is here.)

Court Analyzes Apportionment of Payment of Attorneys' Fees Where the Underlying Case Settled: Employers Mutual Casualty Company v. Philadelphia Indemnity Insurance Company, __ Cal. App. 4th __, 2nd App. Dist., Div. 2, (11/19/08): Multiple companies insured a mobile home park owner who was sued by 188 residents of the park for "failure to maintain" the property. The three insurers covered the owner for different years that constituted the time at issue in the underlying suit. Two of the three insurers tendered a defense of the underlying claim, which ultimately settled for $3 million ($1.2 million in damages, $1.8 million attributed to Plaintiff's fees). The third insurer was subsequently sued by the two other insurers for contribution. The non-defending insurer appealed from the determination that it had to contribute to the $1.8 million in fees. First, the insurer argued that it was not required to contribute to the fees because its policy said that it would pay "all costs taxed against the insured in the suit" and an allocation under a settlement is not being "taxed." The court disagreed and found that the word "taxed" (which was undefined in the policy) included amounts allocated as costs in a settlement. Second, the insurer argued that it cannot

be required to pay for attorneys' fees because there was no determination who was the "prevailing party" because the case settled. The court found that such an argument was misplaced because it would exalt form over substance to find that the mobile home park owner prevailed when he was paying $1.2 million in damages. Third, the insurer argued that if it is required to contribute to the fees, it should be prorated because not all of the plaintiffs in the underlying action were living at the mobile home park when the insurer's policy was in effect. The court found that there was no way to apportion plaintiff's attorneys' fees by plaintiff and that those costs were "fixed", as such a reduction was not warranted. Ultimately, the Court found that the court in the contribution action did not err in its when it required non-defending insurer to contribute to the attorneys' fees. (The opinion is here.)

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