



The Weekly Update of Texas Insurance News

## TEXAS INSURANCE LAW NEWSBRIEF



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A Service of Martin, Disiere, Jefferson & Wisdom L.L.P.

Principal Office 808 Travis, Suite 1800 Houston, Texas 77002 713.632.1700 FAX 713.222.0101

111 Congress Avenue, Suite 1070 Austin, Texas 78701 512.610.4400 FAX 512.610.4401

900 Jackson Street, Suite 710 Dallas, Texas 75202 214.420.5500 FAX 214.420.5501

May 17, 2010

### **INSURER MUST ESTABLISH POLICY DEFENSES BY A “PREPONDERANCE OF THE EVIDENCE” UNDER STANFORD EXECUTIVES D&O POLICY**

In its continuing efforts to address coverage questions surrounding the D&O insurance policies issued to executives of the several Stanford entities, a federal court in the Southern District of Texas issued an order last Monday addressing the burden of proof placed on the parties to determine whether the insurers have to continue advancing defense costs. *Pendergest-Holt v. Certain Underwriters at Lloyd's of London*, Slip Copy, 2010 WL 1903595 (S.D.Tex. 2010). After a remand from the Fifth Circuit instructing the insurer to continue funding defense costs “unless and until a court determine[s] that the alleged act or alleged acts [of Money Laundering] did in fact occur,” the federal court announced that the determination would be made at a preliminary injunction hearing, and requested briefing from the parties regarding the burdens and procedure to follow. In its opinion, the court announced that the insurer will bear the burden of proof to show that money laundering did in fact occur. But, the court rejected the executives’ argument that because the insurer is relying on a policy exclusion a higher, “clear and convincing evidence” standard should apply and, determined that the insurer must meet its burden only by a lower, “preponderance of the evidence” standard.

### **NONSUIT DID NOT PREVENT TRIAL COURT FROM DISMISSING CASE WITH PREJUDICE**

On Friday, the Texas Supreme Court issued an opinion that could change the way litigants follow several common procedures in Texas – nonsuits, DWOP’s, and re-filing of lawsuits. In *Travelers Ins. Co. v. Joachim*, --- S.W.3d ----, 2010 WL 1933022 (Tex. 2010), Joachim nonsuited his claims for underinsured motorists benefits on the eve of trial. A nonsuit is a matter of right in Texas and can be taken without court action, it is effective immediately upon filing. Several months after the nonsuit, the trial court entered an order dismissing the case with prejudice for want of prosecution (DWOP). A DWOP is a common procedural device used by trial courts to ensure that their dockets keep moving, usually in response to a notice of DWOP the parties will appear and update the court on the status of the case. When Joachim re-filed his lawsuit against Travelers, Travelers moved for judgment on the basis of res judicata on the DWOP order.

The question presented was whether a trial court could DWOP a case that the plaintiff had already nonsuited. The court ruled that the trial court’s order was voidable, not void. A voidable order is one that must be attacked directly in the same court or appeal from the same court that entered it. A void order is subject to attack at any time in a different court or later suit. Joachim had not attacked the DWOP order. By holding that the DWOP was voidable and that Joachim had not attacked it in the trial court, the court upheld Travelers’ res judicata defense against the new suit Joachim filed. While not strictly an insurance

case, this ruling by the Texas Supreme Court could change how litigations and trial courts handle these issues at all phases of litigation, including settlements.

## **STATE CLAIMS, INCLUDING DTPA, PREEMPTED BY FEDERAL AUTHORITY OVER INTRASTATE TRANSPORTATION**

Last Tuesday, a federal court in the Southern District of Texas determined that Federal law controlling intrastate transportation preempted state law claims in *Huntington Operating Corp. v. Sybonney Exp., Inc.*, Slip Copy, 2010 WL 1930087 (S.D.Tex. 2010). Huntington contracted with Custom Direct Logistics to haul a load of perfume from Miami to Houston. Custom in turn hired Sybonney. The load was stolen, and Custom had no insurance to cover the loss because of a clerical error. Huntington sued Custom and Sybonney for the lost load, including not having insurance. Custom moved for summary judgment on the basis that the state law claims preempted by 49 U.S.C. § 14501(c)(1), titled “Federal authority over intrastate transportation.” The district court agreed with Custom and granted summary judgment on the state law claims.

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