



June 11, 2007

## **SUPREME COURT OF THE UNITED STATES DEFINES INSURERS' "ADVERSE ACTION" CREDIT REPORTING DUTIES**

Last week, the Supreme Court of the United States defined insurers' reporting duties under the Fair Credit Reporting Act in *Safeco Insurance Co. of America v. Burr*, 127 S.Ct. 2201 (U.S. June 4, 2007). Addressing the duties of two insurers underwriting new insurance policies the Court held that "the 'increase' required for 'adverse action,' 15 U.S.C. § 1681 a(k)(1)(B)(i), speaks to a disadvantageous rate even with no prior dealing; the term reaches new rates for new applicants." But when the prospective insured's credit rating would have no impact (or a neutral impact) on the rate charged for the initial policy, or on subsequent renewals due to other factors being considered, the insurer was not obligated to issue an "adverse action" notice letter to the insured. And despite an FTC staff member's interpretation of an insurer's duties to the contrary, Safeco's reading of the statute "was not objectively unreasonable" and thus its culpability fell far short of the "willful" or "reckless" standard necessary to establish statutory liability beyond actual damages.

## **DIFFERING DEFINITIONS OF "YOUR WORK" AND MEANING OF "COVERAGES AFFORDED" RESULT IN UMBRELLA INSURER'S HORIZONTAL COVERAGE**

Last Tuesday, the Fifth Circuit Court of Appeals determined that an umbrella liability insurer whose policy did *not* include "warranties and representations" in its definition of "your work" was obligated to drop down and provide coverage for those claims on the same level as the primary insurer whose policy definition and related exclusion precluded coverage for "your work" defined so as to include "warranties and representations." In *Scottsdale Insurance v. Knox Park Construction, Inc.*, (5<sup>th</sup> Cir. (Tex.) June 5, 2007), the court noted the above differences in the policy language and held that "when 'retained limit' was defined as 'coverage(s) afforded' by the 'underlying insurance'," the umbrella insurer's policy provided coverage even without liability exceeding the stated amount of the underlying policy.

## **"ACTION OVER EXCLUSION" PRECLUDES CGL COVERAGE FOR ADDITIONAL INSURED WHEN THE NAMED INSURED'S EMPLOYEE SUFFERS INJURIES**

Addressing an "Action Over Exclusion" (which replaced the standard CGL "employee injury" exclusion) as a matter of first impression under Texas law, last Tuesday a federal District Court concluded that no coverage was afforded to an additional insured under the policy despite the separation of insureds provision. In *Starwood Hotels and Resorts Worldwide, Inc. v. Century Surety Co.*, 2007 WL 1644041 (S.D.Tex. June 5, 2007), the wording of the employee injury exclusion precluding coverage for bodily injury to an employee of "*the insured*" was replaced with "*the named insured*" arising out of and in the course of employment by "*the named insured*." When an employee of the named insured was injured on the job and sued the additional insured under the policy, the court held that coverage was precluded.

## **LIABILITY INSURER ENTITLED TO MEDICARE / MEDICAID RECORDS IN STOWERS ACTION DEFENSE**

Granting mandamus relief to the insurer, last Wednesday, in *In re Home State County Mutual Insurance Company*, 2007 WL 1616823 (Tex.App.- Tyler June 6, 2007), the Tyler Court of Appeals concluded that an insurer was entitled Medicare / Medicaid records to determine if payments had been made prior to the expiration of a *Stowers* demand which would thereby invalidate the *Stowers* demand as failing to offer a full release. Writ of mandamus was conditionally granted effectively overturning the trial court's decision denying the insurer's motion to compel discovery.

## **NONSUITED THIRD PARTY BENEFICIARY RECOVERS ATTORNEY FEES IN DECLARATORY JUDGMENT ACTION**

Recently, the Fort Worth Court of Appeals awarded attorney fees and mediation costs to a third party beneficiary under an auto liability policy after the insurer nonsuited them in order to take a final judgment on the coverage issues against its insured. In *State and County Mutual Fire Ins. Co. ex. rel. Southern United General Agency of Texas v. Walker*, 2007 WL 1575008 (Tex.App.- Fort Worth May 31, 2007), the insurer filed a declaratory judgment action against its insured and joined the executrix of the third party decedent's estate as a person having or potentially claiming an interest in the insurance policy. The insureds filed an answer in the lawsuit but failed to respond to the insurer's motion for summary judgment. The insurer subsequently nonsuited the executrix and was granted summary judgment against the insureds. The executrix of the potential third party beneficiary then sought and was awarded attorney fees and mediation costs from its efforts in defending the declaratory judgment action. After reviewing reasonableness and necessity of the fees and related standing issues, the Fort Worth court upheld the trial court's award. **Note:** carriers and counsel frequently debate whether to add adverse parties in an underlying case to a dec action against the insured. There are strategic reasons to do so and to refrain from doing so. So, every case should be separately evaluated on this issue. But, if the adverse party is joined, this case illustrates one significant risk if they are dismissed once the insurer gets the relief it wants against the insured.

## **Firm Named Top 5 in Nation for Insurance & Reinsurance Disputes Involving Natural Disasters**

On June 8th, Martin, Disiere, Jefferson & Wisdom was named one of the Top 5 law firms in the nation in the field of Insurance & Reinsurance for Natural Disasters. Due to the firm's extensive work in numerous coverage and bad faith cases arising out of recent hurricanes, the mold crisis, and regional weather catastrophes, the firm was named a Top 5 firm in the country in *The Legal 500*, a corporate counsel survey of what the publication calls "the best of the best -- the pre-eminent firms in the world's strongest and most competitive legal markets." Partners Chris Martin, Marty Sadler and David Disiere were also individually recognized for their contributions in this area of the law.

If you wish to discuss legal principles mentioned herein, reply to this e-mail or contact any of our lawyers at Martin, Disiere, Jefferson & Wisdom L.L.P.  
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