



March 5, 2007

## **FIFTH CIRCUIT APPLIES “GOOD HEALTH” CONDITION PRECEDENT TO LIFE COVERAGE –JUDGMENT REVERSED AND RENDERED**

Last Friday, the Fifth Circuit determined that a “good health” condition stated in the insurance application was a condition precedent to coverage and reversed the lower court’s judgment in favor of the beneficiary. In *Assurity Life Ins. v. Grogan*, 2007 WL 624209 (5<sup>th</sup> Cir. (Tex.) March 2, 2007), Mr. Grogan submitted an application for life insurance which provided that the policy would not take effect unless the application was approved by the company, the policy delivered and the first full premium was paid “during the Proposed Insured’s lifetime and continued good health....” The application was accepted and the first premium was paid September 6, 2002. At that time, Mr. Grogan had been aware of a lump on his neck for at least a year. On October 7, 2002, he was told that the lump was cancerous and in February 2003 he died from chemotherapy complications.

Assurity denied coverage and filed a declaratory judgment action. Mrs. Grogan filed a counterclaim and the trial court held in her favor awarding the \$1,000,000 policy benefit, plus penalties and attorney fees. On appeal, the Fifth Circuit stated:

“In short, we do not see how Assurity could have made the policy language much clearer. The policy unambiguously states that in order for it to take effect, the insured/proposed insured must make the first premium payment while in good health.

This language has been repeatedly upheld as a condition precedent to coverage by Texas courts and, although Mr. Grogan was not diagnosed with Hodgkin’s disease until October 2002, his medical records revealed that he had cancer long before his formal diagnosis. Accordingly, the court reversed the judgment in Mrs. Grogan’s favor and rendered judgment in favor of Assurity.

## **COURT APPLIES “BRIDGE ENDORSEMENT” TO SEQUENTIAL AND OVERLAPPING “OCCURRENCE-BASED” & “DISCOVERY-BASED” POLICIES**

Last Tuesday, in *SGF Global, Inc. v. Hartford Casualty Insurance Co.*, 2007 WL 602411 (S.D. Tex., February 27, 2007), the a Federal District Court interpreted Hartford’s coverage obligations when it’s “discovery-based” employee theft/misappropriation policy was preceded by Travelers’ “occurrence-based” policy which did not specify a termination date but continued “until cancelled” and provided an additional one-year discovery period. Hartford’s “bridge endorsement” provided that when the policy “replaced similar prior insurance”... “and such other insurance provided a period of time to discover loss...” the Hartford policy would be excess over the prior policy’s coverage for earlier losses discovered during the extended reporting period.

The court found that the distinction between Hartford’s discovery-based policy and Travelers’ occurrence-based policy focused “on the applicable periods of coverage and when claims must be made rather than on the actual risks for which the insurance is written.” The policies, therefore, provided “similar insurance” and the “bridge

endorsement” applied. Accordingly, Hartford’s policy was determined to be excess during the period of overlap.

Regarding the period of overlap, Travelers asserted that its’ notice of cancellation sent June 21, 2002 canceled the policy effective June 8, 2002 at the expiration of one full year, minimized the period of overlap and actually created a gap in coverage between its’ policy and the Hartford policy which became effective June 26, 2002. The court observed that Texas law required strict compliance with cancellation provisions and that Travelers policy did not specify a termination date but continued “until cancelled.” Also, the policy required 30 days notice of cancellation. As a result, Travelers policy continued until the cancellation was effective on July 21, 2002 - 30 days after the notice of cancellation was sent - and the policy overlapped Hartford’s policy which became effective June 26, 2002. The one year discovery-period ended one year later, on July 21, 2003, and Hartford’s policy was excess for losses that occurred during Travelers’ policy period and were discovered within the discovery period.

## **LEGISLATIVE UPDATE – SIGNIFICANT INSURANCE RELATED BILLS**

Four significant insurance related bills were introduced this past week which could have a profound impact on Texas insurers if the bills become law. Among them:

- H.B. 2013 – Seeks to legislatively overturn a recent Texas Supreme Court decision (*Brainard v. Trinity Universal Ins. Co.* – See *Texas Insurance Law Newsbrief* January 8, 2007 ) by mandating that a “legal determination” of UM/UIM status is not a prerequisite for recovery under this coverage and prejudgment interest, penalties and attorney fees would apply to amounts owed.
- S.B. 897 – Seeks to require all residential property insurance policies to pay based on replacement cost for real and personal property damaged or destroyed as a result of a covered peril. Actual Cash Value and similarly based payments would not be allowed.
- S.B. 898 – Mandating coverage for storm surge in residential property policies sold in Texas.
- S.B. 519 – Mandating coverage for mandatory evacuation expenses in residential property policies.

For more information on any of these bills or other pending legislation, please contact any of our lawyers.

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