Amicus Project Update: February 2010

Last month UP helped score wins for business policyholders in New York and in Florida. In Griffith Oil Co. v. National Union Fire Ins. Co., the Appellate Division of the Supreme Court of the State of New York overturned a trial court and found indemnity coverage for certain clean-up costs associated with petroleum-related spills. This is a significant victory for New York policyholders. UP thanks the Anderson Kill and Olick team of John Nevius, Carrie Maylor and Meghan Finnerty for preparing the brief pro bono.

In Penzer v. Transportation Ins. Co., the Florida Supreme Court ruled that Commercial General Liability (CGL) insurance policies generally cover liability for unsolicited "blast faxes" that violate federal law. UP thanks our Amicus team Gene Anderson and Bill Passannante of AKO, and E. Hugh Lumpkin and Michael Huber of the firm Ver Ploeg & Lumpkin.

In recent months UP weighed in for policyholders in environmental claim disputes, as well as "big picture" issues relating to important deterrent function that punitive damages provide.

MICHIGAN

Demolition Contractors, Inc. d/b/a Pitsch Wrecking Co. v. Westchester Surplus Lines Insurance Company (2009) Sixth Circuit Court of Appeals, Case No.: 09-1582
Issue: Do "voluntary payment" and "no action" terms bar payment by the insurance company. Courts in Michigan and throughout the United States have held that, with regard to coverage, it makes no difference whether a policyholder voluntarily cleans up the contamination for which it is responsible before the government demand or until after the governmental intervention. Expenditures for environmental clean-up and remediation do not constitute voluntary payments for a company facing liability. Further, in the absence of prejudice, a voluntary payment clause will not bar a policyholder from recovering from their insurance company. UP argued in our brief that the "no action" clause functions to bar third-party claims. It does not prevent policyholders from suing their insurance companies. This brief was written *pro bono* for United Policyholders by **William G. Passannante, Esq.** of Anderson, Kill & Olick, P.C.Policyholders.

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NEVADA

Clinton, Merrick, G. Jr., vs. The Paul Revere Life Insurance Company, *et al.*, (2009)
Issue: Punitive damage awards that only slap an insurer on the wrist will fail to deter reprehensible behavior. In situations where insurers ignore the law and abandon the principles of good faith and fair dealing in a persistent manner, meaningful punitive damage awards are justified to temper the behavior of a member of this quasi-public industry. A punitive damage award must be sufficient in size to deter an insurer from committing similar reprehensible acts to the plaintiff **and** to society through a course of dealing that damages others in the same way. Wealth of the defendant remains an appropriate consideration when reviewing a punitive damages award. UP's brief was written *pro bono* for United Policyholders by **Kirk A. Pasich**, **Stephen N. Goldberg** and **Idan Ivri of Dickstein Shapiro, LLP.**

OHIO

Pennsylvania General Insurance Co. vs. Park-Ohio Industries, Inc. (2009)
Supreme Court of Ohio, Case No. 2009-0104
UP joined with the Ohio Manufacturers Association (OMA), a statewide association that employs the majority of the 610,000 men and women that work in manufacturing in the state of Ohio. Together UP and OMA presented the policyholder's perspective that when a claim triggers multiple policies, the policyholder can choose to recover under any of its policies providing coverage for all sums that it was legally obligated to pay, up to the policy limits. UP's brief was drafted *pro bono* by a team that included the Cleveland firm of **Brouse McDowell.**

OREGON

Strawn, Mark v. Farmers Insurance Company of Oregon, Mid-Century Insurance Company and Truck Insurance Exchange, (2009)
No. S057520 Supreme Court, Oregon
Issue: In order to assure that a punitive damages award fulfills the purpose of deterrence and retribution, due process considerations for assessing the constitutional validity of a punitive damages award must include consideration of the defendant's wealth. UP's brief was written *pro bono* for United Policyholders by California attorney **Sharon J. Arkin**.

TEXAS

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LM Ericsson Telefon, AB AND Ericsson INC., v. Certain Underwriters At Lloyd's, London Subscribing To Policy No. 509/QF037603, (2009)
In the Supreme Court of the State of Texas, Case Nos. 09-0012 & 09-0013
Issue: This case addresses what it means when an insurance contract incorporates and makes the insured's policy application a part of the policy of insurance.

In 2003, Ericsson Inc. submitted an application for errors and omissions liability insurance, which named its parent company, LM Ericsson Telefon, AB ("LM Ericsson"), as an entity requesting coverage under the policy to be issued. The insurer, American International Specialty Lines Insurance Company ("AISLIC"), did not deny the application, but rather issued a policy incorporating the application and making it a part of its policy. Later, after LM Ericsson became involved in litigation, AISLIC denied coverage on the basis that LM Ericsson was not insured by the policy.

In the coverage lawsuit that followed between Ericsson, AISLIC and Underwriters (Ericsson's follow-form excess insurers), LM Ericsson argued that the term identifying who is insured under the AISLIC policy, "you," was defined in the application to include "LM Ericsson." Therefore, because the application was part of the contract, LM Ericsson argued that the AISLIC policy should be interpreted to provide coverage for LM Ericsson. LM Ericsson also argued that AISLIC accepted its application by issuing a policy expressly incorporating the application and making it a part of the contract. Alternatively, to the extent that the terms of the AISLIC policy, including the incorporated application are ambiguous, LM Ericsson argued that the AISLIC policy should be construed in favor of coverage.

The trial court hearing the coverage lawsuit granted summary judgment finding that LM Ericsson was insured under the primary and follow-form excess policies issued by AISLIC and Underwriters. The Court of Appeals reversed finding that LM Ericsson was not insured under either policy. The UP amicus brief supporting LM Ericsson's position was prepared *pro bono* by **Lorena Trujillo, John N. Ellison, Toki Rehder, Whitney D. Clymer of Reed Smith, LLP**.

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