Amicus Project Update: March 2009

Since our last issue, UP went to bat in court for individual and business policyholders in New York, California and Florida and Mississippi. In New York we continued our work promoting full legal protection for policyholders who fall victim to unfair insurance practices, and in California we advocated for arbitrator neutrality standards and for enforcement of a regulation requiring insurers to give clear notice to consumers about pending legal deadlines. In Florida we weighed in on an important legal issue that impacts all policyholders in the Sunshine State. A big win for policyholders was just handed down in Mississippi, in a Katrina-related case (Corban vs. USAA.) It was decided that if an insurer sells a homeowners policy labeled "all risk", it cannot apply ambiguous or contradictory exclusions to deny a claim. We will explain this case in detail in our upcoming print newsletter.

Standing up for individual and business policyholders in courts of law is an important part of the work United Policyholders does through our Advocacy & Action program. Filing "friend of the court" (amicus) briefs and working on improving and defending laws and regulations is part of how we help solve insurance problems. We savor the victories and learn from the losses. We're proud of our pro bono team of brief writers and we're grateful for the donations that support our Amicus Project/Advocacy program work.

CALIFORNIA

Hyundai Motor America v. National Union Fire Insurance Company (2009)

US Ct. of Appeals For the Ninth Circuit, No. 08-56527, Central Dist. CA case no 8:08 cv 00020,

Issue: ***Duty to Defend, Advertising Injury.*** The district court erroneously held that "advertising injury" insured under the CGL Policies at issue did not include "an injury caused by patent infringement even if that injury occurs during the course of an advertising activity." The district court also failed to properly apply the California Rules governing the interpretation of insurance policies, including the requirement to

interpret ambiguous insurance policy language in a manner that protects the objectively reasonable expectations of the insured. The court below failed to apply California law correctly when it failed to engage in the same rigorous analysis as employed by the courts in Lebas Fashion, Mez and Homedics. As made clear by the holding in Lebas Fashion, the phrase "misappropriation of advertising ideas or style of doing business" and its constituent terms are ambiguous. Accordingly, under controlling California law, the court below was obliged to interpret the operative policy language in accordance with the insured's objectively reasonable expectations of coverage. **Lee M. Epstein** prepared this brief pro bono for United Policyholders.

Randal D. Haworth, M.D. v. Superior Court of California for the County of Los Angeles, Real Party in Interest, Susan Amy Ossakow, (2009)

CA. Supreme Court case #S165906

Issue: ***Standards for Arbitrators.*** The law requiring neutral arbitrators, as well as sitting judges, should be required to disclose the facts and circumstances of a previous censure. The disclosure requirements for neutral arbitrators is critically important because it affects the ability of insurance consumers to obtain a fair and reasoned recovery of the policy benefits for which they have paid years of premiums. These decisions by arbitration panels go to the core of the insurer/insured relationship. The reputation of the judiciary—the perception of the public as to the honesty and integrity of the judicial process—is of utmost importance. It is not enough to simply mouth the standard. It is critical to enforce it. **Sharon J. Arkin** prepared this brief pro bono for United Policyholders.

FLORIDA

QBE Insurance Corporation v. Chalfonte Condominium Apartment Association, Inc. (2009)

Supreme Court of Florida, Case No: SC09-441, On Certified Questions from the United States Circuit Court for the Eleventh Circuit, Case Nos. 08-10009-HH, 08-11337-H.

Issue: This case concerns whether or not Florida law recognizes a claim for breach of the implied warranty of good faith and fair dealing. Making an insurer accountable for causing additional damages that naturally flow from the breach of its mandated obligation of utmost good faith is good public policy and logically required. UP requests that the Court find that a claim for breach of the implied warranty of

good faith and fair dealing in the first party insurance context exists in Florida common law. **William F. Merlin, Jr.** and **Mary Kestenbaum Fortson** prepared this brief pro bono for United Policyholders.

MISSISSIPPI

Corban v. United Services Automobile Association aka USAA Insurance Agency, (2008)

Supreme court of Mississippi, Case No. 2008-M-645

Issue: If an insurer sells a homeowners policy labeled "all risk", it cannot apply ambiguous or contradictory exclusions to deny a claim. Addresses numerous issues: 1. In an "all risk" policy, once the insured proves that "a direct physical loss" was sustained, the insurer has the burden of proof to establish what portion of the "direct physical loss" was caused by a specifically excluded event or cause. 2. With a Katrina loss, which contains components of both wind and flood, the insurer should still have the burden of proving, through non-speculative evidence that personal property damage was caused by a specific exclusion. 3. If the court finds the anti-concurrent clause is not ambiguous, it should rule that wind and water damage are separate and only the "flood" damage is subject to the exclusion. 4. If the policy contains Additional Coverage for "collapse" the policy's exclusion for "water damage" should be inapplicable. **Mary Kestenbaum Fortson** wrote this brief pro bono for United Policyholders.

NEW YORK

Griffith Oil Company, Inc. V. National Union Fire Insurance Company of Pittsburgh, (2009)

New York Supreme Court, Appellate Division—Fourth Department, Appellate Division Docket Nos. CA 08-00930 and CA 08-026565.

Issue: ***Products Completed Operations***. UP urges the Court to reverse the lower court's ruling that a Products Completed Operations Hazard provision includes a restrictive condition that the policyholder physically possesses its product prior to the occurrence. The plain language of the insurance policy, and the fundamental purpose behind the provision, and the reasonable expectations of the policyholder do not support such a requirement. **John G. Nevius** wrote this brief pro bono for United Policyholders.

Panasia Estates, Inc. v. Hudson Insurance Company and UTC Risk Management Services, Inc.

(2009)

Supreme Court of the State of New York, Appellate Division—First Department, New York County Clerk's Index No. 602472/05.

Issue: ***Bad Faith Damages in NYS.*** The Decision and Order of the Supreme Court, New York County, should be reversed to the limited extent that it implicitly requires Plaintiff to prove bad faith in order to recover consequential damages. John G. Nevius wrote this brief pro bono for United Policyholders.

Superior Dispatch v. Insurance Corporation of New York (2009) Case No. B204878, Court of Appeal, Second Appellate District, Division Three, Los Angeles County Superior Court, Case No. NC 037014.

Issue: ***Insurer compliance with SOL notice regulations.*** The insurer's position in this appeal is that, despite its violation of Sections 2695.4 and 2695.7 of the Cal. Code of Regulations, it should not be estopped to assert the contractual limitations period. The plain meaning of the regulations commands an insurer to give the claimant (first or third party) notice of time limits that apply to the claim. The violations of the regulations occur when the insurer denies the claim but chooses not to inform the claimant about the applicable time limits. An insured's act of consulting a lawyer months later does not reverse the violation or relieve the insurer of the consequence of the violation. Equity, fairness and plain dealing will not be fostered if the regulations are interpreted to render violations retroactively meaningless if the insured fortuitously consults an attorney after denial of the claim. **Steven B. Stevens** wrote this brief pro bono for United Policyholders.