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"IFCA only applies prospectively," says the U.S. District Court for the Western District of Washington

By Matthew J. Sekits

The federal district court in Seattle has ruled, for the second time, that the Washington Insurance Fair Conduct Act (WIFCA) does not apply retroactively. WIFCA took effect December 6, 2007, and provides, among other things, for imposition of treble damages on an insurer determined to have unreasonably denied coverage. Policyholders have asserted that the Act applies to acts or omissions of insurers occurring before December 6.

On February 1, 2008, the United States District Court (W.D. Wash.) ruled, in *HSS Enterprises, LLC v. AMCO Insurance Co.*, Case No. C06-1485-JDP, that a policyholder plaintiff could not amend its complaint to add a claim under WIFCA because the Act did not apply retroactively. (This decision was reported in an earlier Bullivant eAlert.) On March 28, 2008, Judge Pechman of that court issued an unpublished opinion in *Aecon Buildings, Inc. v. Zurich North America*, Case No. C07-832MJP, denying plaintiff's motion to amend on the same ground. In her opinion, Judge Pechman noted that WIFCA is not merely remedial (which would permit retroactive application) but affects substantive rights by creating new rights for policyholders and imposes a new penalty—treble damages—not available before the effective date of the Act.

Although the issue of retroactive application of WIFCA remedies is unlikely to disappear until it is addressed in a reported decision, the trend to date has been to deny retroactive application.