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■ 9TH CIRCUIT ■

# Insurance rates, credit focus of ruling

## Rate hikes based on credit must be explained.

By Peter Geier
STAFF REPORTER

THE FAIR CREDIT Reporting Act does not allow insurance companies to charge new policy applicants a higher rate based on their credit reports without telling them why, according to the 9th U.S. Circuit Court of Appeals, the first federal circuit to rule on this issue.

The 9th Circuit's main holding, reversing an Oregon district court, could clear the way for class action litigation over insurance companies' alleged failure to notify consumers when they take "adverse actions" such as raising premiums based on a consumer's credit report. *Reynolds v. Hartford Financial Services Group Inc.*, No. 03-35695, and *Edo v. GEICO Casualty Corp.*, No. 04-35279 (9th Cir.).

Richard J. Rubin, a solo national consumer law practitioner based in Santa Fe, N.M., said that the decision reflects the Federal Trade Commission's guidance on an issue that the lower court got wrong. He said that he expects "plaintiffs' lawyers and class action lawyers are gearing up to file these kinds of lawsuit."

### Wake-up call?

The court also cautioned insurance companies in the cases before it that they must not rely on "creative lawyering" to generate "implausible" legal opinions that purport to relieve them of "their clear statutory responsibilities."

The 9th Circuit's warning "might be a wake-up call to corporate America that an advice of counsel letter is not bulletproof," Rubin said.

Douglas G. Houser of Bullivant Houser Bailey's Portland, Ore., office, who represents Hartford Financial, did not return a call for comment. Hartford spokesman Joe Loparco said that the company declined to discuss substantive issues.

Robert D. Allen, an attorney in the Dallas office of Baker & McKenzie who represents GEICO, referred requests for comment to the company. GEICO spokeswoman Christine Tasher said that the company's legal department maintains "that our practices are proper and we have appealed this decision."

STEVE D. LARSON: *The plaintiffs' counsel called the ruling an "important victory for consumers."*

Steve D. Larson of Stoll Stoll Berne Lokting & Shlachter in Portland, a lawyer for the plaintiffs in these and other pending Fair Credit Reporting Act (FCRA) cases, called the decision an "important victory for consumers."

The court's opinion clarifies the FCRA, Larson said, adding that the court's advice of counsel holding bears only on the facts in cases at issue and is not "a blanket ruling as to all cases."

Larson also noted that a footnote in the opinion "explains that the 9th Circuit was not saying that advice of counsel is not a defense," just that "under the facts in the cases pending before it, consulting with attorneys to get implausible legal opinions that purport to relieve insurance companies of their clear statutory responsibilities would not insulate the insurance companies from liability."

Kathleen N. Jensen, senior legal counsel and director for the Property Casualty Insurers Association of America, a national industry trade association based in Chicago, said that the court in effect "imposed a new set of notice requirements that are in conflict with the FCRA statute" that will result in higher costs passed on to consumers. She took umbrage at the court's caution to counsel, calling it "offensive to attorneys" by inferring "they're not using independent legal expertise when giving their opinion of the law.

"For the companies, there was no indication ever before that this is what they should have been doing and [how they] should have approached it. It's not like an attorney gave them bad advice, and now it's like the attorneys didn't do their job," Jensen said. NLJ

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