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In the Supreme Court of Ohio

*SAFECO INSURANCE COMPANY OF AMERICA,*

Plaintiff-Appellant,

v.

*FEDERAL INSURANCE COMPANY, et al.,*

Defendants-Appellees.

RECEIVED  
MAR 03 2008  
CLERK OF COURT  
SUPREME COURT OF OHIO

CLAIMED CERTIFIED CONFLICT FROM  
THE FIRST APPELLATE DISTRICT, HAMILTON COUNTY, APP. № C-070074

**MOTION TO DISMISS CERTIFIED CONFLICT FOR WANT OF  
JURISDICTION BY APPELLEES FEDERAL INSURANCE COMPANY AND  
PACIFIC INDEMNITY COMPANY**

FILED UNDER SEAL PURSUANT TO PENDING MOTION TO SEAL

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**MOTION TO DISMISS CERTIFIED CONFLICT FOR WANT OF JURISDICTION**

Now come Appellees, Federal Insurance Company and Pacific Indemnity Company (“Chubb”), by and through counsel, and respectfully request that this Honorable Court dismiss the instant certified conflict case filed by Safeco Insurance Company of America’s (“Safeco”) for want of jurisdiction.

**A. THIS COURT LACKS JURISDICTION OVER THE CLAIMED CERTIFIED CONFLICT FILED BY SAFECO BECAUSE THE ORDER CERTIFYING THE CONFLICT WAS SIGNED BY ONLY ONE JUDGE OF THE COURT OF APPEALS AND IS, ACCORDINGLY, NOT A VALID CERTIFICATION UNDER ARTICLE IV, § 3(B)(4), OF THE OHIO CONSTITUTION.**

Article IV, § 3(B)(4) of the Ohio Constitution states: "Whenever the **judges** of a court of appeals find that a judgment upon which **they** have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the **judges** shall certify the record of the case to the supreme court for review and final determination." (Emphasis added.) The Ohio Constitution clearly requires that “judges,” not one judge, certify the conflict. In this case, only one Judge signed the certification. The second page of the order is reproduced here:

Accordingly, the Court finds that a conflict exists between this Court's December 28, 2007 judgment and Torres v. Gentry (Ohio App. 5 Dist.), 2007-Ohio-4781 on the following issue:

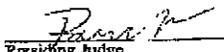
When an insurance policy defines an 'occurrence' as an 'accident' that results in bodily injury, does an 'occurrence' include injuries that result from an intentional act when the insured seeking coverage are claimed to have been negligent in relation to that intentional act?

The Court also finds that a conflict exists between this Court's December 28, 2007 judgment and United Ohio Ins. Co. v. Metzger (Feb. 8, 1999), Putnam App. No. 12-98-1, 1999 Ohio App. LEXIS 920 on the following issue:

When an insurance policy excludes an injury 'which is expected or intended by [an or any] insured \* \* \*'; injuries 'arising out of an illegal act committed by or at the direction of an insured'; or 'any injury caused by a violation of penal law or ordinance committed by or with the knowledge or consent of any insured,' do the exclusions become ambiguous when read in conjunction with a 'Severability of Insurance' condition, in light of the announced expectation by policyholders that their negligence will be covered?

IT IS SO ORDERED.

DATE: FEB 13 2008

  
Presiding Judge

The Clerk is instructed to serve this Order on all parties to App. No. C070074.

As can clearly be seen, the order certifying the conflict bears only one Judge's signature. No other Judges are identified as concurring.

The Order is, therefore, an invalid certification which does not vest this Court with jurisdiction.

**B. THE ORDER CERTIFYING A CONFLICT WAS NOT TIMELY FILED UNDER PRACTICE RULE VI, SECTION 1, OF THIS COURT WHICH ALSO DIVESTS THIS COURT OF JURISDICTION.**

S.Ct. R. IV, Section 1, specifically states: “Failure to file the court of appeals order certifying a conflict within 30 days after the date of such order shall divest the Supreme Court of jurisdiction to consider the order certifying a conflict.” (Emphasis added.) The time line of events relative to the order at issue here is as follows:

- December 28, 2007. The First Appellate District files its Opinion and Judgment Entry. Both the Opinion and the Judgment Entry specifically state: “conflict [sua sponte] certified.”
- January 7, 2008. Safeco files a motion to certify a different (single) conflict.
- January 24, 2008. The Court of Appeals denies Safeco's motion to certify stating that: “In its judgment entry and opinion [of December 28, 2007], the Court sua sponte certified a conflict to the Ohio Supreme Court.” (Emphasis added.)
- January 31, 2008. Safeco attempts to file the December 28, 2007 Opinion and Judgment Entry which certified two conflicts. The filing is rejected as untimely because it was due no later than January 28, 2008.
- February 1, 2008. Safeco files a motion for reconsideration of the January 24, 2008 order denying Safeco's motion to certify a conflict asking the Court of Appeals to re-certify a conflict on the *exact same two issues certified on December 28, 2007.*
- February 13, 2008. A *single* judge from the First Appellate District grants Safeco's motion for reconsideration and certifies the *same* two issues originally certified on December 28, 2007.
- February 21, 2008. Safeco files the February 13, 2008 Order granting its motion for reconsideration with this Court as the order certifying a conflict.

There are two problems with Safeco's filing. First, "Failure to file the court of appeals order certifying a conflict within 30 days after the date of such order shall divest the Supreme Court of jurisdiction to consider the order certifying a conflict." S.Ct. R. IV, Section 1 (Emphasis added.) Safeco's February 1, 2008 motion for reconsideration requested that the Court of Appeals issue a *second* order certifying the *same* issues originally certified on December 28, 2007. But because Safeco did not timely file the December 28, 2007 order certifying the conflict, this Court was divested of jurisdiction. Safeco cannot sidestep the 30 day time period imposed by this Court's Rules of Practice by having the same alleged conflicts certified over and over. The 30 day time limit is jurisdictional, not discretionary.

Second, the Rules of this Court state that "When a court of appeals issues an order certifying a conflict pursuant to Article IV, Section 3(B)(4) of the Ohio Constitution, any interested party to the proceeding may institute an appeal by filing a notice of certified conflict in the Supreme Court." S.Ct. R. IV, Section 1 (Emphasis added.) The rule makes no provision for an order reconsidering the denial of a motion to certify a conflict. The reason is that a motion for "reconsideration" of an order denying certification is, in reality, an untimely motion for certification. Otherwise, a party could file an endless series of motions for "reconsideration" suggesting endless, different, certified questions. Safeco's filing is improper for this reason as well.

### **C. CONCLUSION.**

The certified conflict at issue here: 1) is an invalid certification under the Ohio Constitution because it was signed by only one judge; 2) was not timely filed within thirty days of originally being certified; and 3) is an order granting reconsideration, not certifying a conflict. There is no conflict properly certified under the Ohio Constitution presented here. The original order certifying the conflict was not timely filed, thereby divesting this Court of jurisdiction. Accordingly, and for all

these reasons, this certified conflict case should be dismissed for want of jurisdiction.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

A copy of the foregoing Motion to Strike was mailed by regular U.S. mail, postage pre-paid,  
this 25th day of February, 2008, to:

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