This article was originally published in Enforce *(Volume 13, Issue 1)*

Enforce
The Insurance Policy Enforcement Journal

National Union v. Cambridge Revisited: Six Years on, the Insurance Industry's Silver Bullet Has Yet to Strike Third-Party Administrators Again

By David E. Wood and Eric R. Reed

Four years ago *Enforce* explored the troubling trend of insurance companies shifting the costs of covered losses to "strangers" to the insurance contract. One example was a self-insured employer's third-party administrator (TPA) that was accused by an excess insurer of mishandling a claim and thereby increasing exposure. (See "Third Party Administrators: The New Target for Insurer Claims?" *Enforce*, Volume 9, Issue 1, May 1, 2011). The bellwether of this trend was *National Union Fire Insurance Company of Pittsburgh, PA v. Cambridge Integrated Services Group, Inc*. (2009) 171 Cal.App.4th 35, in which a California court permitted an AIG affiliate to sue its policyholder's workers' compensation TPA for malpractice because its claim handling services were "intended to benefit" the insurance company. Was this the beginning of a trend allowing insurance companies that are paid premiums to cover enumerated risks, to shift that risk to TPAs?

As it turns out, *National Union* has not opened the floodgates of opportunistic litigation by insurers against TPAs working for their policyholders. The case is cited primarily in court opinions addressing whether a duty of care is to be imposed on a defendant not in privity with a plaintiff, based on a balancing of factors identified in *Biakanja v. Irving* (1958) 49 Cal.2d 647, California's seminal case involving the tort duties owed to third parties. This suggests that *National Union* is not a shortcut for insurance companies wishing to raid the coffers of TPAs or their errors and omissions insurers, but rather a confirmation that TPAs are subject to the same third-party liability standards as any other professional sued by a third party. See *Escalante v.*

David E. Wood is editor of *Enforce* magazine and a co-managing shareholder in the Ventura, California, office of Anderson Kill. With 30 years of experience in the insurance industry, Mr. Wood devotes his practice to the representation of corporate and public entity clients in insurance recovery matters involving primary liability and errors and omissions coverage, professional liability insurance, crime coverage, environmental coverage, primary-excess disputes, and rights of additional insureds.
(805) 288-1300 | dwood@andersonkill.com

Eric R. Reed is an attorney in the Ventura, California, office of Anderson Kill. Mr. Reed's practice concentrates on corporate and commercial litigation and insurance recovery, exclusively on behalf of policyholders.
(805) 288-1300 | ereed@andersonkill.com

Minnesota Life Ins. Co., 2010 U.S. Dist. LEXIS 127463 (S.D. Cal. Dec. 2, 2010) (TPA collected premium payments for a client's life insurer; the insurance company was allowed to plead that this fact created a duty of care when a policy lapsed due to the TPA's failure to transmit a premium); *Verso Paper LLC v. HireRight, Inc.,* 2012 U.S. Dist. LEXIS 85499 (C. D. Cal. June 19, 2012) (TPA performed background checks on prospective employees; the insurance company could plead a duty of care when the TPA failed to discover a criminal conviction in an employee's background).

These cases demonstrate that providers of professional services, including TPAs, are vulnerable to malpractice actions from *any* third-party plaintiff where the service professional and the client intend these services to be rendered for the benefit of the third party. Where this intent is gleaned not from the parties' contract but from the way the professional renders services, a duty of care may be found where the parties obviously intended the professional to work for the third party first and foremost, and then for the client only secondarily.

How can any professional avoid this result? The professional should be very clear with its client that its services are intended to benefit only the client, and not any third party. If the client won't agree to this, the professional should head for the hills. In the TPA example, the key is to determine the expectations of the policyholder client. The TPA should ask the client directly whether it wishes to hire the TPA to render services for the benefit of an excess insurer. If it does, the TPA can decide whether to assume such a duty, based on the value proposition of the contract and its appetite for risk.

To reiterate the point *Enforce* made four years ago: a TPA and its client can best avoid "*National Union* triangulation" by maintaining a candid dialogue about the client's expectations and a strong relationship in which any performance concerns can be discussed and resolved privately. At all times, a TPA should be alert to the danger that an excess insurer seeking to boost profits may attempt to shift a risk, which it was paid to cover, to its policyholder's self-insured claim-handling professional. ▲

About Anderson Kill

Anderson Kill practices law in the areas of Insurance Recovery, Commercial Litigation, Environmental Law, Estates, Trusts and Tax Services, Corporate and Securities, Antitrust, Banking and Lending, Bankruptcy and Restructuring, Real Estate and Construction, Foreign Investment Recovery, Public Law, Government Affairs, Employment and Labor Law, Captive Insurance, Intellectual Property, Corporate Tax, Hospitality, and Health Reform. Recognized nationwide by Chambers USA for Client Service and Commercial Awareness, and best-known for its work in insurance recovery, the firm represents policyholders only in insurance coverage disputes — with no ties to insurance companies and has no conflicts of interest. Clients include Fortune 1000 companies, small and medium-sized businesses, governmental entities, and nonprofits as well as personal estates. Based in New York City, the firm also has offices in Ventura, CA, Philadelphia, PA, Stamford, CT, Washington, DC, Newark, NJ, and Burlington, VT.