

## The Nullification War: What To Do When Insurance Companies Play "Holier Than Thou"



Eugene R. Anderson

Insurance companies recently have declared "Holy War" against their policyholders. Unhappy with fulfilling their insurance policy obligations, insurance companies today are asking the courts to nullify their insurance policies; they argue that their policyholders are so bad as to be undeserving of insurance.

In *Shell Oil Co. v. Accident & Casualty Co. of Winterthur*, a large number of insurance companies recently told the California Court of Appeals that the case was "the story of a company which, in the face of irrefutable evidence that it was poisoning the environment with some of the most dangerous chemicals known to man, refused to stop."

The insurance industry's new-found morality is astonishing. This is an industry whose profits depend on collecting premiums for insuring against a host of man-made as well as natural calamities that result in death, disease, destruction, disability and disaster.

The insurance industry is the one industry that has profited regularly, consistently and legally from neglect and wrongdoing for over a century. As Franklin Nutter, former president of the American Association of Insurers, once wrote, "[t]he liability system is fuel for the insurance engine." Leslie Cheek, senior vice president of federal affairs at Crum & Forster, said, "[i]f there wasn't a liability system, there wouldn't be liability insurance."

The insurance industry has caught onto the idea that if it "just says no to claims there is more money to be made. Occasional fines by mostly sympathetic state insurance regulators and an even less occasional bad faith judgments are a small price to pay for the enormous rewards to be reaped from insurance nullification.

### *Policyholders Are Covered*

Policyholders today know that many of their liability insurance policies—particularly the older policies—provide valuable insurance coverage for pollution damages. Policyholders should also know that liability insurance policies specifically apply to intentional wrongdoing. Under many policies, intentional torts such as libel, slander, malicious prosecution, trespass and false arrest are explicitly covered.

The "holy war" that insurance companies are waging against policyholders is a distraction from the real issue in most of these cases: Can insurance companies be allowed to abrogate their contractual obligations to their policyholders, however loathsome the policyholder's activities might seem? Policyholders and their attorneys can get the upper hand in this war by applying the following rules:

- Prepare for and try an "insurance coverage case." Do not let insurance companies focus on the policyholder's alleged misdeeds. Remind the court that it is hearing an insurance coverage case and that insurance covers wrongdoers.
- Use pro-coverage admissions. Insurance companies have made many representations to state insurance commissioners, in statements before Congress, in court briefs, and in intra-company documents supporting coverage.
- Display insurance company advertisements. Many advertisements and promotional pieces directly contradict the positions typically taken by insurance companies in insurance coverage cases. For example, early sales liter-

ature promoted umbrella liability insurance policies that provided policyholders with “worry-free slumber.” (Today, unfortunately, obtaining coverage has become a nightmare for countless policyholders.)

- Prove that the insurance companies were “sleeping cops.” Even today, insurance companies tout their loss-control services. State that the insurance companies knew as much, if not more, than the policyholders and that they failed to put a stop to the alleged antisocial acts.

Finally, policyholders and their attorneys should alert the court that the insurance industry’s objection to coverage is financial, not “moral.” Policyholders should let the courts know what the real moral and legal issues are. They should make the courts carefully consider the insurance companies contractual obligations before allowing them to play “holier than thou.” ■

EUGENE R. ANDERSON IS A PARTNER IN THE NEW YORK OFFICE OF ANDERSON KILL & OLICK, P.C. HE REGULARLY REPRESENTS POLICYHOLDERS IN INSURANCE COVERAGE MATTERS. HE CAN BE REACHED AT (212) 278-1751 OR AT [eanderson@andersonkill.com](mailto:eanderson@andersonkill.com)