

The Nullification War, Part II:

Scrap Metal Recycler Successfully Battles Policyholder-Bashing Insurance Companies



**Robert M.
Horkovich**
Jay B. Spievack

In the April 1992 *Advisor*, AKO Attorney Eugene R. Anderson discussed some of the more effective weapons available to policyholders at war with policyholder-bashing insurance companies. Recently, using those same

weapons, a scrap metal recycler successfully battled its insurance companies over environmental claims at the Tacoma Tar Pits site in Washington state. For policyholders everywhere, the battle represents a significant victory in the insurance "nullification war."

Scare Tactics and "Muck" Imagery

In *Joseph Simon & Sons, Inc. v. Aetna Fire Underwriters Ins. Co. n/k/a/ Cigna Fire Underwriters Ins. Co.*, the insurance companies attempted to stigmatize the policyholder by trying to focus the court's attention on the alleged pollution, rather than on the insurance coverage issues. The insurance companies told the trial court: "[t]he relevant issues...in this case relate to the information unique to the generation, storage or disposal of hazardous waste by Simon." The insurance companies made demagogic tirades against the policyholder. Liability insurance policies, they argued, do not provide coverage "for depositing lead in water, lead in ponds, gasoline on earth, hydraulic fluid in soil, PCB's in the dirt, in gigantic quantities over the past two decades."

The insurance companies hired a private investigator to find former Simon employees who, since their dismissal, were hostile to the company. The goal was to gather evidence that Simon was an "intentional polluter" that disregarded the environment and the general public.

Had the insurance companies succeeded in duping the court into believing that it was hearing a "pollution" case, rather than an insurance coverage case, the policyholder might have suffered the fate of policyholders in several other insurance nullification cases. Simon, however, prepared its case by aggressively examining two of the several services owed by its liability insurance companies: (1) loss control, and (2) claims handling. Simon presented to the court evidence that its insurance companies failed to competently deliver these services as well as other services that the insurance companies sold to Simon and other policyholders.

"Loss Control Experts" or "Sleeping Cops"?

When the primary insurance companies sold liability insurance to Simon, the insurance companies promoted their loss control services as "tailored" to prevent losses associated with the scrap metal industry. "Loss control" was advertised widely throughout the scrap metal industry. What did Simon get for its premium dollars? The insurance companies' records showed that the so-called "loss control experts" may have been nothing more than "sleeping cops" (see "The Nullification War," *Advisor*, April 1992).

As they frequently do for policyholders, the insurance company loss control experts visited the Simon facility nearly every quarter; walked the entire facility; observed Simon's industrial operations and activities which were always in plain view; and sent "loss control reports" to Simon specifying the liability risks that Simon needed to correct. Significantly, not one of these "loss control reports" mentioned—let alone warned of—any of Simon's future potential environmental liability

which could result from Simon's normal industrial operations and activities. Thus, Simon may not have gotten what it paid for—its "loss control experts" may have been asleep at the wheel. But assuming the insurance companies were not negligent, Simon could argue that even the experts were unaware of Simon's potential environmental liability exposure. As with so many other policyholders, the risks of environmental liability associated with Simon's normal industrial practices may not have been known to anyone in the 1960s, 1970s, and early 1980s.

Policyholders Deserve "Reasonable" Claims Handling

With respect to claims handling, another insurance company service owed by insurance companies to policyholders, Simon focused on the state Consumer Protection Act which protects policyholders against unfair or deceptive practices by insurance companies. Many states have consumer protection laws that are virtually identical. These laws prevent insurance companies from misrepresenting pertinent facts or insurance policy provisions; failing to reasonably acknowledge or act upon communication of a claim; failing to reasonably investigate a claim or refusing to pay a claim, without a reasonable investigation; and failing to provide a reasonable explanation for denial of a claim.

How well did Simon's insurance companies perform according to the state consumer protection laws? Simon discovered the following:

- The disclaimers of coverage sent by the insurance companies to Simon misrepresented the meaning of policy terms as the meaning of those terms had been already interpreted by the courts.
- The disclaimers failed to reasonably explain the legal basis for denying insurance coverage.
- Some insurance companies failed to affirm or deny coverage or respond to policyholder correspondence within a reasonable period of time.
- An investigation of Simon's claim suggested that the insurance companies' real objection to coverage was based on money, not reason.

The insurance companies vehemently objected to evidence being allowed at trial that questioned

their conduct. After extensive briefing and argument, the trial judge held that such evidence—including expert testimony on the reasonableness of insurance company conduct—would be permitted. The judge held:

When regulations include the word "reasonable" or where they include "possible," it injects a factual uncertainty into what should be purely a matter of law.... I think that kind of situation, provided the expert has the background and foundations for having opinions, it's appropriate to have opinions so that the jury knows what ["reasonable" or "possible"] means.

The insurance companies were not happy with the ruling. Shortly thereafter, the parties reached an agreement in principle settling the action.

The lessons for the policyholder at war with its insurance companies are as follows: (1) the policyholder must hang tough when facing tirades and accusations regarding business practices that were normal at the time; and (2) the policyholder must turn the spotlight on the insurance companies and make them explain exactly how they fulfilled—or why they failed to fulfill—their promises and obligations to their policyholders. ■

ROBERT M. HORKOVICH IS AN ATTORNEY IN AKO'S NEW YORK OFFICE. MR. HORKOVICH, ALONG WITH AKO ATTORNEY EUGENE R. ANDERSON REPRESENTED SIMON IN ITS RECENT LEGAL BATTLES. MR. HORKOVICH CAN BE REACHED AT (212) 278-1322 OR AT rhorkovich@andersonkill.com