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The Cherry Tree Principle Revisited

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Everyone remembers the story of George Washington and the cherry tree. Washington's father discovered one day that somebody had felled a cherry tree in his orchard. When his father asked who was responsible, Washington acknowledged it was he, saying, "Father, I cannot tell a lie." Washington's father responded by commending his honesty, and stressing that lying would have been worse than the original deed.

Imbedded in our national consciousness, the Cherry Tree Principle imparts two related lessons—the importance of telling the truth, and the need to come to terms with the consequences of one's choices and actions. The Cherry Tree Principle depicts the way people are expected to do business with each other, and how courts are to settle disputes between parties.

A Thundering Rebuke

On July 21, 1993, the New Jersey Supreme Court delivered a thundering rebuke to the insurance industry for its violation of this principle. In its landmark decision, *Morton Int'l, Inc. v. General Accident Ins. Co.* (New Jersey Supreme Ct., 1993), the court employed such words as the following to describe the industry's official filings with state regulators in 1970 regarding the pollution exclusion: "misleading," "indefensible," "perilously close to deception," "lacking in candor," and "not straightforward." The Supreme Court of New Jersey is not the first court to find dishonesty in the 1970 insurance industry filings. [Two earlier courts found the 1970 representations to state insurance regulators to be dishonest. *Claussen v. Aetna Casualty & Sur. Co.* (South District Ct. of Georgia, 1987), and *FMC Corp. v. Liberty Mutual Ins. Co.* (Cal. Super. Ct., Santa Clara Cty.,1988).]

In the Literature

In a recent article, Professor Amy Timmer of Cooley Law School asked whether the insurance industry was lying to state insurance regulators in 1970, or whether it is lying to policyholders and the courts today. [(See Timmer, "Are They Lying Now or Were They Lying Then?" *The Insurance Industry's Ambiguous Pollution Exclusion: Why the Insurer, and Not the Innocent Insured, Should Pay For Pollution Caused By Prior Landowners* (46 Baylor L. Rev. 355, 1994).]

Timmer was referring to two possibilities. The first was that the industry was lying in 1970 when it told state insurance regulators that the pollution exclusion merely clarified existing coverage under standard-form comprehensive general liability (CGL) policies. The second is that the insurance industry is lying to policyholders and the courts today when it contends that the exclusion bars coverage for gradual pollution. Regardless of which explanation is the correct one, the Cherry Tree Principle dictates that the insurance industry must live today with the consequences of its choice in 1970 to characterize the pollution exclusion as a "mere clarification" of existing coverage for gradual environmental damage.

A Consistent Representation

That was precisely the opinion of the Morton court. The fact that policyholders relied to their detriment upon the insurance companies' 1970 representations was the very reason for holding insurance companies to these representations. The precept that one must be held to one's word is part of what undergirds the legal doctrine known as *equitable estoppel* which the New Jersey Supreme Court rightly embraced in *Morton*.

Nearly every appellate court that has specifically considered the regulatory and drafting history of standard form insurance policy provisions has decided insurance coverage issues in

Partial Listing of Appellate Courts Ruling in Favor of Policyholders in CGL Disputes

- American Home Prods. Corp. v. Liberty Mut. Ins. Co., 565 F. Supp. 1485 (S.D.N.Y. 1983), aff'd as modified, 748 F.2d 760 (2d Cir. 1984).
- American Star Ins. Co. v. Grice, 854 P.2d 622 (Wash. 1993), opinion supplemented, 865 P.2d 507 (Wash. 1994).
- Anderson v. Minnesota Ins. Guaranty Ass'n, 520 N.W.2d 155 (Minn. Ct. App. 1994).
- Broadwell Realty Servs. Inc. v. Fidelity & Casualty Co., 528 A.2d 76 (N.J. Super. Ct. App. Div. 1987), overruled in part by Morton Int'l, Inc. v. General Accident Ins. Co., 629 A.2d 831 (N.J. 1993).
- CBI Indus., Inc. v. National Union Fire Ins. Co., 860 S.W.2d 662 (Tex. Ct. App. 1993), reh'g overruled (Sept. 9, 1993), appeal pending.
- Claussen v. Aetna Casualty & Sur. Co., 380 S.E.2d 686 (Ga. 1989).
- Davis v. United Servs. Auto Ass'n, 273 Cal. Rptr. 224 (Ct. App. 1990), review denied (Cal. Dec. 12, 1990).
- Eljer Mfg., Inc. v. Liberty Mut. Ins. Co., 972 F.2d 805 (7th Cir. 1992), cert. denied, 113 S. Ct. 1646 (1993).
- Fireguard Sprinkler Sys., Inc. v. Scottsdale Ins. Co., 864 F.2d 648 (9th Cir. 1988).
- Gerrish Corp. v. Universal Underwriters Ins. Co., 947 F.2d 1023 (2d Cir. 1991), cert. denied, 112 S. Ct. 2939 (1992).
- Great Southwest Fire Ins. Co. v. Watt Indus., Inc., 280 Cal. Rptr. 249 (Ct. App.), reh'g denied, modified, No. D009371, 1991 Cal. App. LEXIS 476 (May 14, 1991), review denied, withdrawn, No. S021356, 1991 Cal. LEXIS 3443 (July 22, 1991).
- Joy Technologies, Inc. v. Liberty Mut. Ins. Co., 421 S.E.2d 493 (W. Va. 1992).
- Just v. Land Reclamation, Ltd., 456 N.W.2d 570 (Wis.), modified, reconsideration denied, 157 Wis. 2d 507 (1990).
- Montrose Chem. Corp. v. Admiral Ins. Co., 5 Cal. Reptr. 2d 358 (Ct. App.), review granted, 862 P.2d 661 (Cal. 1992).
- Morton Int'l, Inc. v. General Accident Ins. Co., 629 A.2d 831 (N.J. 1993), cert. denied, 114 S. Ct. 2764 (1994), reh'g denied, 1994 U.S. LEXIS 5256 (U.S. 1994)
- New Castle County v. Hartford Accident & Indem. Co., 933 F.2d 1162 (3rd Cir. 1991), on remand, 778 F. Supp. 812 (D. Del. 1991), rev'd on other grounds, 970 F.2d 1267 (3d Cir. 1992), cert. denied, 113 S. Ct. 1846 (1993).
- Prudential-LMI Commercial Ins. Co. v. Reliance Ins. Co., 1994 Cal. App. LEXIS 165 (4th Dist. 1994).
- Queen City Farms, Inc. v. Central Nat'l Ins. Co., 827 P.2d 1024 (Wash. Ct. App. 1992), review granted, 847 P.2d 481 (Wash. 1993), aff'd in part and remanded in part, sub nom.; 1994 Wash. LEXIS 564 (Wash. Sept. 9, 1994), corrected sub nom. (Wash. Sept. 29, 1994).
- South Cent. Bell Tel. Co. v. Ka-Jon Food Stores, 1994 La. LEXIS 1315 (La. May 24, 1994).
- United Pac. Ins. Co. v. Van's Westlake Union, Inc., 664 P.2d 1262 (Wash. Ct. App.), review denied, 100 Wash. 2d 1018 (1983).
- United States Fidelity & Guar. Co. v. Specialty Coatings Co., 535 N.E.2d 1071 (Ill. App. Ct.), appeal denied, 545 N.E.2d 133 (Ill. 1989

favor of positions usually taken by policyholders. (See box.) It is no wonder that more than two score of governmental agencies, including the United States Department of Justice, have supported policyholders in environmental insurance coverage disputes.

The Right to Be Wrong?

If a pharmaceutical company makes a false representation to the Federal Food and Drug Administration in Washington, D.C. in a "new drug application" which results in an injury to a consumer, should a court not hold that company responsible? If an automobile driver misrepresents facts on a driver's license application, would the victim of a resulting accident not be entitled to relief in court? Closer to home, the insurance industry has well-honed litigation skills for "post-loss rescission of insurance coverage," also known as "post-loss underwriting." A policyholder alleged to have lied in connection with the purchase of insurance is given short shrift by the industry. So draconian is the insurance industry about alleged liars that many states have enacted statutes to protect the insurance consumers via incontestability provisions.

No industry other than the insurance industry would dare argue for a "right to be wrong". [See Houser, "Good Faith As A Matter of Law: The Insurance Company's Right to Be Wrong," (27 Tort & Ins. Law Journal 665, Spring 1992).] While insurance companies assert a right to be wrong, policyholders have no such rights. Similarly, lawyers representing policyholders have no right to be wrong. An insurance industry lawyer recently lambasted a law firm for "aggressively [pursuing] claims against [an insurance company] and [creating] theories hostile to . . . the insurance industry in general." [See Houser Letter to All DRI Law Institute Committee Members (June 13, 1994).] Policyholder lawyers have been characterized as "hypercreative" by the Insurance Environmental Litigation Association, "shameless," "stilted" and "self-serving" by Continental Casualty Company, and shrill, distorted, and dishonest by others in the insurance industry.

A Legacy Worth Preserving

The Cherry Tree Principle goes back at least two thousand years. The New Testament cites with approval an individual's vow that "if I have

cheated anybody out of anything, I will pay back four times the amount." (Luke 19:8 .)

Lying is unjustifiable, and individuals and institutions must live with the consequences of their past decisions and actions. These two precepts define the Cherry Tree Principle. The insurance industry has violated both of these, and so several courts—*Morton, Joy, Claussen,* and *FMC*—have rightly applied to it terms of scathing indictment. Everyone has an interest in the insurance industry and in seeing to it that such terms never again apply to industry-wide conduct. ■

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