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Buying and Lying:
A Threat to the Integrity of Our Judicial System

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A large number of pro-policyholder judicial decisions are wiped off the law books by the insurance industry. This astonishing manipulation of our judicial system—probably our most precious heritage—has only recently come to light.

A classic "sale" of pro-policyholder case law occurred in 1981 when Hartford Accident and Indemnity paid $200,000 to expunge from the case books a decision of Judge Morris Lasker of the Southern District of New York. (*Bankers Trust Co. v. Hartford Accident & Indem. Co.*)

Getting Down To Cases

In *Bankers Trust*, Judge Lasker held that Bankers Trust was entitled to coverage from Hartford Accident and Indemnity Company for certain cleanup costs incurred by Bankers Trust in removing oil from its property. Nearly four months later, Judge Lasker signed an order vacating his earlier decision in favor of Bankers Trust. Judge Lasker indicated that he took this action so as to allow Hartford to submit additional materials to the court, after which Judge Lasker would "determine Bankers' motion for summary judgment de novo." Apparently, Hartford would pay Bankers Trust $2.3 million—about $200,000 more than the amount Bankers Trust had sought in its complaint—with the provision that Judge Lasker would vacate his earlier opinion.

Sold For $200,000

In *Circle "C" Ranch Co. v. St. Paul Fire & Marine Ins. Co.* (Tex. Ct. App. May 5, 1993), St. Paul Insurance Company paid Circle "C" $300,000 with the understanding that both parties would jointly file a motion requesting that the decision be withdrawn from the case books.

The indemnity amount due from St. Paul in *Circle "C"* was approximately $5,000 which together with attorney's fee of $81,000 gave Circle "C" a total claim of $86,000. Thus, the Texas court's decision also sold for approximately $200,000, about the same amount paid for Judge Lasker's decision in *Bankers Trust.*

Other cases are settled simply to avoid the risk of adverse precedent, sometimes even after insurance companies have prevailed:

> [W]hen [the policyholder's] counsel became aware of two superior court cases that had addressed the same issue before the court they moved for reconsideration of the damages ruling on the basis of these decisions. Judge Bryan then wrote counsel for additional briefing on whether these superior court decisions were binding or if they required certification to the State Supreme Court. Soon thereafter, the insurers settled with Ross Electric. Thus the Ross opinion was decided without the benefit of the reasoning of the only Washington court to have addressed the issue. (*Boeing v. Aetna*, Washington Supreme Court, 1990)

Central Dauphin

Similarly, in 1994, the Pennsylvania Supreme Court lost an opportunity to rule on the so-called "pollution exclusion" in *Central Dauphin School Dist. v. Penn. Manufacturers' Assoc. Insurance Co.* In *Central Dauphin*, the insurance company

agreed to pay the policyholder approximately $100,000 more than the cleanup costs the policyholder was seeking in the coverage action, even though the insurance company's motion for summary judgment regarding the "pollution exclusion" was granted, and the grant was affirmed. Not surprisingly, the insurance company attempted to hide the settlement agreement from the public.

The settlement was entered into on July 19, 1994—a little over two months after the Pennsylvania Supreme Court agreed to address, among other things, the following issues:

1. Should insurance companies be permitted to violate insurance regulatory laws by enforcing a policy exclusion in a manner different than was represented to gain approval for the exclusion's use?
2. Is the phrase "sudden and accidental," as contained in the insurance policy's pollution exclusion, ambiguous and required to be construed in favor of the policyholder?

Also in 1994, an insurance company settled a lead paint insurance coverage case after prevailing at the trial court level, but before the appellate court had the chance to review. The New York trial court held that underlying claims regarding injuries resulting from the ingestion of lead pigment in paint in an apartment were excluded from coverage by a so-called "absolute" pollution exclusion. (*Oates v. State*) This anti-policyholder decision remains on the books post-settlement, and pre-appellate review.

Misrepresenting Judicial Decisions

After a huge chunk of the pro-policyholder precedent is expurgated from the law books, insurance companies then ask the courts to rely upon what remains in the case reporters.

The insurance industry often supports its coverage positions in legal briefs and memoranda by representing to courts what the "vast majority of cases hold." Often, these representations are untrue. For example, in a brief filed by American Casualty Company of Reading, PA (ACCO) in 1993, ACCO was less than candid with the court in stating that a "majority" of courts have interpreted the "sudden and accidental" pollution exclusion as having a temporal meaning:

> By this Supplemental Opposition, ACCO does not concede that the Broadwell decision correctly interprets the "sudden and accidental" phrase. Instead, ACCO opposes application of the Broadwell interpretation, relying instead on the majority view in [sic] throughout the country that "sudden and accidental" has a temporal element, and means "immediate and unexpected."

Statements like these must be viewed skeptically. When a decision is vacated prior to publication of a written opinion, there is often nothing left to inform the public of what was decided.

Repeat Litigants Expunge Adverse Precedent

The argument that on rare occasions policyholders seek to have decisions vacated is unpersuasive.

Insurance companies are different types of litigants than policyholders. Most insurance policyholders are one-time insurance coverage litigants; a favorable settlement is far more significant than a resounding pro-policyholder opinion. Insurance companies on the other hand, are repeat litigants that face the same exact issues over and over again in courts throughout the country. Through *vacatur*, insurance companies can eradicate or reduce the number or pro-policyholder decisions and then argue that the weight of authority is in their favor.

Insurance companies file tens of thousands of briefs against policyholders. Regular insurance industry trade associations frequently file anti-policyholder briefs, and the insurance industry even has a trade association devoted solely to anti-policyholder litigation.

Litigation costs for policyholders are enormous and are increased because lawyers representing policyholders must "reinvent wheels" while insurance companies with vast experience litigating against policyholders can simply reuse some of their tens of thousands of briefs. National Casualty, in a brief submitted to a Colorado court, summarized the reality of the stacked deck as follows: "It is preferable to litigate multi-insurer coverage disputes between insurers than it is between insurers and insureds, who often lack the resources to wage these disputes."

It is insurance companies, and not policyholders who have the greatest incentive to "white out" adverse decisions. Isolated instances of policyholders seeking *vacatur* cannot be equated to the

organized effort by the insurance industry to attain pro-insurance company uniformity of case law by purging unfavorable decisions.

United States Supreme Court Disfavors Vacatur

The United States Supreme Court recently held that "mootness by reason of settlement does not justify *vacatur* of a judgment under review" even though "[s]ome litigants, at least, may think it worthwhile to roll the dice rather than settle in the district court, or in the court of appeals, if, but only if, an unfavorable outcome can be washed away by a settlement-related *vacatur*." (*U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership*, 1994)

The Supreme Court's recent decision was based upon an appreciation that "judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a *vacatur*...To allow a party...to employ the secondary remedy of *vacatur* as a refined form of collateral attack on the judgment would—quite apart from any considerations of fairness to the parties—disturb the orderly operation of the federal judicial system."

Conclusion

Courts should not allow insurance companies to purchase adverse judicial precedents and to make bald faced misrepresentations about the weight of judicial authority regarding insurance coverage law. Policyholders need to be aware of this manipulation of the judicial scorecard. ■

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