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Trust Me, Insurance Companies are Fiduciaries

Eugene R. Anderson

The insurance business is a fiduciary business. You get access to other people's money under conditions where in many cases the other people have very little knowledge or control of where the money's going.

Warren Buffett, 1992 Annual Report of Berkshire Hathaway, filed with the United States Securities and Exchange Commission.

Insurance companies are fiduciaries. They fit the dictionary definitions and the scholarly interpretations of "fiduciary," and they have characterized themselves as fiduciaries. In addition, many courts have concluded that insurance companies are fiduciaries.

With the mantle of the fiduciary comes responsibilities and duties. A breach of a fiduciary obligation is a promise betrayed. Insurance companies therefore owe policyholders a high duty of care.

Insurance Companies Fit The Definition Of A Fiduciary

Insurance companies fit both the historical and modern definitions of fiduciary. The root of the word "fiduciary" is *fides*, meaning faith, confidence, reliance, trust, and belief. A recent dictionary definition states that a fiduciary is "one ... .that holds a fiduciary relation or acts in a fiduciary capacity to another" a "fiduciary relation" is one which exists when "good conscience requires one to act at all times for the sole benefit and interests of another with loyalty to those interests." Webster's Third New International Dictionary of the English Language Unabridged 845 (1986).

In law, "fiduciary" is derived from Roman law, meaning "a person holding the character of a trustee, or a character analogous to that of a trustee, in respect to the trust and confidence involved in it and the scrupulous good faith and candor which it requires." The term fiduciary is used to "refer to a person having duties involving good faith, trust, special confidence, and candor towards another." Black's Law Dictionary 625 (6th ed. 1990).

"The insurer has no right to sacrifice the interests of the policyholder."

Insurance professionals and insurance companies meet these definitions. Insurance company employees who obtain the designation of "Chartered Property Casualty Underwriter" (CPCU) are required to adhere to a Code of Professional Ethics which provides that CPCUs should place the public interest above their own interest. The nature of the insurance contract, where the policyholder turns over his or her financial interests to the insurance company, dictates that the insurer has no right to sacrifice the interests of the policyholder. The relationship between the insured and the insurer under the contract closely approximates that of principal and agent, or beneficiary and trustee, and indeed, some courts have held that the insurer occupies a fiduciary position. Willis Park Rokes, Aggressive Good Faith and Successful Claims Handling 26 (Insurance Institute of America 1987).

Insurance Companies Hold Themselves Out To The Public As Fiduciaries

The insurance industry has acknowledged that it is in a unique position because of the public nature of insurance. In 1981, the Chairman of the American Insurance Association noted that the insurance industry is "imbued with the public

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Washington Judge Places Double Recovery Burden On The Insurance Company. *The Boeing Co. v. Affiliated FM Insurance Co.* On March 20, a Washington judge denied a motion for partial summary judgment, stating that insurance companies bear the burden of proving double recovery where a policyholder has received settlements from other insurance companies. The insurance companies, Executive Risk Indemnity and American Re-Insurance Co., sought summary judgment, contending that Boeing is not entitled to further recovery under their policies. The court discussed two cases it stated were binding upon it, the Washington Court of Appeals' decision in *Puget Sound Energy Inc. ("PSE") v. Alba General Insurance Co.* and the Washington Superior Court decision in *Weyerhaeuser Co. v. Commercial Union Insurance Co.* The court held that the insurance company has to prove double recovery where a policyholder has received general releases from other insurance companies "rather than placing an initial burden on Boeing to 'demonstrate how it intends to or has allocated the funds it has received from the settling insurers.'" It further stated that "A close reading of both decisions suggests to the court that PSE is more fact-specific, and less categorical in its placement of the allocation burden. Indeed, Judge Agid's opinion appears specifically to leave to the trial court, in what she described as a case with

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interest" and that "[w]e convince others of the leading role insurance plays in society. We encourage them to expect superior performance from us."

The fiduciary aspect of the insurance company's role in society is also dictated by the large amount of money controlled by insurance companies. The United States Supreme Court has recognized that insurance companies were essentially trustees over a fund of assurance and credit:

> The contracts of insurance may be said to be interdependent. They cannot be regarded singly, or isolatedly, and the effect of their relation is to create a fund of assurance and credit, the companies becoming the depositories of the money of the insured, possessing great power thereby, and charged with great responsibility.

German Alliance Ins. Co. v. Lewis. Insurance companies, as providers of a public service with vast power over the public and control over vast financial assets, are fiduciaries.

Insurance company advertisements frequently portray insurance companies as fiduciaries. Allstate Insurance Company's "good hands" advertisements clearly communicate that Allstate wants the policyholder to place trust and confidence in Allstate. Travelers Insurance Company's "taking care of one another" and State Farm's "good neighbor" advertisements encourage public trust. "As such advertisements reflect, the relationship between insurer and insured and does not merely concern indemnity for money loss." *Andrew Jackson Life Ins. Co. v. Williams*, (Miss. 1990).

A leading insurance law treatise notes that insurance company advertising can impose a fiduciary relationship:

> Particularly is this approach ["dog eat cat"] outmoded when television advertising repeatedly refers to "the good hands" of the insurer or how it is "like a good neighbor," implying an ability to place trust and reliance upon the broad shoulders of the kindly company. Some [court] decisions impose a fiduciary relationship; others disagree.

12 John Alan Appleman & Jean Appleman, Insurance Law & Practice §7004 at 52 (1981) (citations omitted).

Insurance companies frequently tell courts that they are fiduciaries. For example, National Union Fire Insurance Company, one the larger insurance company arms of AIG, has stated "[L]egal

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"An insurer stands in a fiduciary relationship to its insured; when an insurer chooses his interest over the interests of his insured his actions are indeed 'intentional and deliberate'…"

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authorities have declared the relation of insured and insurer to be fiduciary…" Defendant National Union Fire Insurance Co. of Pittsburgh, PA's Reply Memorandum in Support of its Motion for Summary Judgment at 24 (dated Oct. 20, 1995), *In re: Cardinal Industries, Inc.*, No. C-2-94-254 (S.D. Ohio).

Judicial View Of Insurance Companies As Fiduciaries

Courts in New York as well as other jurisdictions have held that insurance companies are fiduciaries. The principal authority in New York for the fiduciary obligations of insurance companies is *Hartford Accident & Indemnity Co. v. Michigan Mutual Insurance Co.* In *Michigan Mutual* the Court noted that the fiduciary duty owed by Michigan Mutual as a primary to excess carrier Hartford was the same as Michigan Mutual's fiduciary duty owed to its own policyholder. The Court held:

> It is well established that, as between an insurer and its assured, a fiduciary relationship does exist, requiring utmost good faith by the carrier in its dealings with its insured. In defending a claim, an insurer is obligated to act with undivided loyalty; it may not place its own interests above those of its assured. Similarly, it has been recognized in this and other states, as well as in the federal courts, that the primary carrier owes to the excess insurer the same fiduciary obligation which the primary insurer owes to its insured, namely, a duty to proceed in good faith and in the exercise of honest discretion, the violation of which exposes the primary carrier to liability beyond its policy limits. (extensive citations omitted) *Id*. at 340-341.

Furthermore the Court of Appeals of New York held "Michigan Mutual as the primary liability insurer owed to Hartford as the excess carrier the same duty to act in good faith which Michigan owed to its own insureds." This ruling has set the stage for numerous other pro-policyholder decisions in New York, State and Federal courts.

Conclusion

Insurance companies are fiduciaries. Insurance companies say they are fiduciaries. Insurance companies act like fiduciaries. Courts have found insurance companies to be fiduciaries. The nature of the insurance relationship meets all of the traditional and modern definitions of "fiduciary."

Insurance companies ask for, and receive, the trust and confidence of the public. They are fiduciaries and should be held to the standards of a fiduciary. Trust me. ■

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'complex facts,' the problem of establishing the burden. *Weyerhaeuser*, on the other hand, expressed a broader view, and clearly endorsed a public policy that favors creating incentives for settlement."

Louisiana Appellate Court Finds Professional Liability Exclusion Ambiguous. *Arnette et al. v. NPC Services Inc. et al*. In September 1988 multiple plaintiffs filed a petition for damages claiming injury as a result of exposure to chemicals and fumes allegedly attributable to the remediation of the PetroProcessors hazardous-waste site in East Baton Rouge Parish, La. The plaintiffs, employees of Reynolds Metals Corp. and Schuylkill Metal Works businesses located near the site, named several defendants, including NUS Corp. and its insurance company, First State Insurance Company. First State moved for summary judgment, claiming that the two excess liability policies it sold to NUS excluded coverage under pollution hazard and professional liability exclusions. The trial court granted First State's motion for summary judgment and determined there was no coverage for NUS. The plaintiffs

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a WHO SAID WHAT?

Fireman's Fund Ins. Co., Civil Action—Cross Petition for Certification and Brief in Opposition to Defendant-Appellant Petition for Certification at 13, dated Mar. 4, 1975, *Fireman's Fund Ins. Co. v. Security Ins. Co. of Hartford*, No. 1,223 (N.J.).

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and NUS filed separate appeals. On appeal, all parties agreed that a change in controlling Louisiana law meant that First State was not entitled to summary judgment on the pollution hazard issue. With respect to the professional liability exclusion, the Appellate Court observed that the First State policies did not define the term "professional duty," held that the exclusion was ambiguous, and determined that the exclusion had to be construed in favor of NUS and against First State. The Appellate Court also determined that First State, as the movant for summary judgment, had the burden of proving that the alleged negligent acts of NUS fell within the scope of NUS' "professional duty" and that First State had failed to meet its burden. —*Claudia Ilie*

CALIFORNIA COURT ISSUES IMPORTANT INSURANCE COVERAGE RULING

California Court Rules in Favor of Policyholder Regarding Excess Insurance Companies' Obligations to Pay Asbestos Claims. The Superior Court of the State of California, County of Los Angeles held that excess liability insurance companies may be held immediately liable for a present liability of a policyholder to pay present and future asbestos claims. Attorneys Robert M. Horkovich and Robert Y. Chung tried the case on behalf of the bankrupt policyholder facing present and future asbestos liabilities in excess of the policies' attachment points along with Michel Horton of Zevnik Horton. In setting forth the scope of the obligations of excess insurance companies, the Court also held that actual money payment by primary insurance companies is not a condition precedent to an excess insurance company's incurring liability to pay on a policy and ruled that excess liability policies are triggered no later than the time the policyholder's liabilities exceed primary insurance limits. The Court's rulings extended to, among other things, the proposition that bankruptcy does not relieve an insurance company's obligations to its policyholder but rather excuses a policyholder from conditions it cannot meet resulting from the bankruptcy and merely transforms an indemnity policy into a liability policy. The duties of an excess insurance company further include participation in the settlement and investigation of the underlying claims giving rise to the policyholder's liabilities.

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