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## A.B.A. Manual for Complex Insurance Coverage Litigation: A Prescription for Insurance Nullification

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## ESSAY

# A.B.A. MANUAL FOR COMPLEX INSURANCE COVERAGE LITIGATION: A PRESCRIPTION FOR INSURANCE NULLIFICATION

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### INTRODUCTION

In a February 1991 report, the United States General Accounting Office found that thirteen of the top twenty property and casualty insurance companies reported that they had approximately 2,000 pending lawsuits over environmental pollution claims.<sup>1</sup> Charles Stapleton, of USF&G Corporation recently boasted that “[a]s a property and casualty company we’re in the litigation business. . . . [There are] 16,000 lawsuits at any given time.”<sup>2</sup> The interests of the insurance industry are vested in litigation, not in insurance coverage. Policyholders, however, buy insurance because they are adverse to lawsuits.

When an insurance company capriciously denies a claim, most policyholders simply give up.<sup>3</sup> Few policyholders have the financial resources to file a lawsuit seeking to force the insurance com-

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1. U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-91-59 HAZARDOUS WASTE: POLLUTION CLAIMS EXPERIENCE OF PROPERTY/CASUALTY INSURERS (1991).

2. Nicholas Varchaver, *Hire Education*, CORP. COUNS. MAG., Summer 1994 at 58, 63. Mr. Stapleton also said that the USF&G claims litigation group spends \$2 million annually, and that USF&G attorneys “pay for themselves in a week.” *Id.*

3. Gina Kolata, *Patients’ Lawyers Lead Insurers To Pay For Unproven Treatments*, N.Y. TIMES, Mar. 28, 1994, at A1; Gavin Souter, *Don’t Admit Defeat on Denial*, BUS. INS., May 2, 1994, at 45.

pany to honor its contractual obligations. This attitude is common among policyholders despite the sentiment in the insurance industry that in "pollution cases," almost all bases for denial of coverage has been "destroyed."<sup>4</sup> Insurance regulators are unable or unwilling to help policyholders; they tell policyholders to "hire a lawyer."<sup>5</sup> Even when a policyholder pursues the insurance company in court, the compromises inherent in the civil justice system usually work to the disadvantage of the policyholder. More than ninety-seven per cent of all civil cases are settled.<sup>6</sup> In the insurance coverage context, this means that the policyholder settles and agrees to take less than the amount to which it is entitled. This may mean that simply by litigating insurance coverage or by litigating a claim, the system guarantees that the insurance company will pay less than the full value it promised when it sold the policy. In most instances, the policyholder is not as familiar with litigation claims evaluation as is the insurance company. The insurer is a "professional defender of lawsuits . . . . Unlike the insured, an [insurance company] is not a novice as to matters involving litigation."<sup>7</sup> Moreover, when a policyholder is forced to litigate a claim the insurance company gains — and the policyholder loses — the time value of money.<sup>8</sup>

When a policyholder challenges an insurance company in court or in a regulatory proceeding,<sup>9</sup> the odds usually favor the insurance

4. Patrick Magarick, *Pollution Claims*, INS. ADJUSTER, Dec. 1971, at 29, 30. Mr. Magarick was formerly the Vice President and General Claims Manager of the American International Group, a large insurance company.

5. See *Riordan v. Nationwide Mut. Fire Ins. Co.*, 977 F.2d 47, 50 (2d Cir. 1992); Ann Hood, *I'm Insured — I Think*, N.Y. TIMES, April 13, 1994, at A21.

6. Eugene R. Anderson et al., *Insurance Nullification By Litigation*, RISK MGMT. MAG., Apr. 1994, at 46, 48; Bert Tesoriero et al., *The Draconian Late Notice Forfeiture Rule: "Off With The Policyholders' Heads,"* INS. LIT. REG., Apr. 1993, at 120 n.38.

7. Memorandum in Support of Motion for Partial Summary Judgment at 7-8, *National Union Ins. Co. v. Liberty Mut. Ins. Co.*, 1989 WL 45570 (E.D. La. Jan. 24, 1989)(No. 86-2000).

8. Tesoriero, *supra* note 6, at 120.

9. When an insurance company capriciously denies a claim, it can do so without fear of regulatory reprisal. Insurance regulators rarely take effective steps to protect the rights of individual policyholders. Anderson, *supra* note 6, at 46; see John Harkavy, *Protecting Buyer's Needs: State Regulators Must Give Policy Form Changes Greater Scrutiny*, BUS. INS., July 20, 1992, at 19 (stating that

company. A policyholder can expect a major casualty loss once in every 30 years.<sup>10</sup> Thus, policyholders, individually and generally, both large and small, have minimal experience with insurance coverage disputes.<sup>11</sup> Moreover, policyholders buy insurance because they are adverse to litigation. On the other side, litigation is the bread and butter of insurance companies.<sup>12</sup>

The current climate of increasing litigation has led to a recent effort to solve, or at least explain the insurance coverage litigation quandary. One such effort is the American Bar Association's *Manual for Complex Insurance Coverage Litigation* ("Manual").<sup>13</sup> The *Manual* was created by the Section of Litigation's Task Force of the Committee on Insurance Coverage Litigation as a definitive reference tool for insurers and policyholders holder involved in litigation. The case management strategies described in the *Manual* are the products of this twenty member task force, which consists of an equal number of attorneys for commercial policyholders and their insurers, as well as one federal judge and one former state judge.<sup>14</sup> The *Manual* serves as an authoritative set of guidelines to be utilized by the insurers and the insureds alike for saving time and money.

Part I of this Essay briefly discusses the *Manual* in the context of the traditional and most popular form of insurance policy, the Comprehensive General Liability policy, a pro-policyholder form created

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insurance regulators rarely act on behalf of commercial policyholders).

10. Tesoriero, *supra* note 6, at 120 n.38; Anderson, *supra* note 6, at 46.

11. National Casualty summarized the reality 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." Reply Brief of Petitioner National Casualty Company at 9, *National Casualty Co. v. Great Southwest Fire Ins. Co.*, 833 P.2d 741 (Colo. Sup. Ct. 1992)(No. 91 SC 562).

12. As one insurance industry spokesman has stated, "[t]he liability system is fuel for the insurance engine." Franklin W. Nutter, *Search For Stability*, *BUS. INS.*, July 17, 1985, at 21.

13. The *Manual* was produced by a sub-committee of the Task Force on Insurance Coverage Litigation, of the American Bar Association Section of Litigation. TASK FORCE OF THE COMMITTEE ON INSURANCE COVERAGE LITIGATION, A.B.A. SECTION OF LITIGATION, *MANUAL FOR COMPLEX INSURANCE LITIGATION* (1993) [hereinafter *MANUAL*].

14. *MANUAL*, *supra* note 13, at i.

in the 1940s. Part II details key provisions of the *Manual* that address the case management of “complex” insurance coverage cases, such as environmental pollution litigation. This part also critically analyzes the *Manual* provisions treating important litigation issues such as discovery, secrecy, fiduciary duty of the insurer to the insured, and transaction costs. This Essay concludes that the *Manual* decidedly encourages and endorses the insurance companies to engage in litigation, and favors the further nullification of policyholder insurance coverage.

### I. COMPREHENSIVE GENERAL LIABILITY POLICY

When first introduced in 1940, the Comprehensive General Liability policy, or “CGL” policy, was hailed as a breakthrough for policyholders.<sup>15</sup> Instead of having to buy several policies naming various types of perils, a comprehensive general liability policy sufficed. For example, when The Travelers Insurance Company (“The Travelers”) first sold a standard form CGL policy in the 1940s, The Travelers executive John H. Eglolf wrote an article in which he stated:

How much better it is to say — “We cover *everything* except this and this and this —” instead of “We cover *only* this and this and this. . . .” Since a risk cannot choose the kind of accident that will give rise to the need for liability insurance, it is wise to be protected against all losses under one policy . . . one premium and worry regarding liability insurance.<sup>16</sup>

Courts have specifically noted the broad scope of coverage intended by CGL policies.<sup>17</sup> For example, in *James Graham Brown Found., Inc. v. St. Paul Fire & Marine Ins. Co.*,<sup>18</sup> the Kentucky Supreme Court stated that:

15. See Jordan S. Stanzler & Charles A. Yueb, *Coverage for Environmental Cleanup Costs: History of the Word “Damages,”* 14 COLUM. BUS. L. REV. 449, 459 (1990).

16. John H. Eglolf, *Comprehensive Liability Insurance: The Outside*, BEST’S FIRE & CAS. NEWS, May 1941, at 19 (emphasis in original).

17. See Marla Jo Aspinwall, Note, *The Applicability of General Liability Insurance to Hazardous Waste Disposal*, 57 S. CAL. L. REV. 745, 757 (1984). “The very title ‘Comprehensive General Liability Insurance’ suggests the expectation of maximum coverage.” *Id.*

18. 814 S.W.2d 273 (Ky. 1991).

The primary purpose of a comprehensive general liability policy is to provide broad comprehensive insurance. Obviously the very name of the policy suggests the expectation of maximum coverage. Consequently the comprehensive policy has been one of the most preferred by businesses and governmental entities over the years because that policy has provided the broadest coverage available. All risks not expressly excluded are covered, including those not contemplated by either party.<sup>19</sup>

An anti-policyholder bias is reflected throughout the *Manual*. One example is the *Manual's* treatment of the CGL, one of the insurance industry's most popular commercial forms.<sup>20</sup> Section 1.07 of the *Manual* suggests that, despite its name, the CGL policy does *not* provide comprehensive coverage.<sup>21</sup> The *Manual* suggests that coverage hinges on a long list of variables including: "location, date, conditions, . . . precise cause and circumstances, . . . affiliation of individuals and instrumentalities, . . . manufacturing processes, scientific principles and other technical information."<sup>22</sup> The insurance industry promised policyholders "comprehensive" coverage;<sup>23</sup> the American Bar Association should not attempt to take it away.

## II. CASE MANAGEMENT OF COMPLEX INSURANCE COVERAGE CASES

While no one factor differentiates complex cases from other presumably simpler ones, many insurance cases, particularly those with "multiple insurers or policyholders as parties," "multiple claims or losses or one large claim or loss at issue," or "a large number of insurance policies or other contracts with differing terms at issue,"<sup>24</sup> require specialized case management techniques. Dis-

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19. *Id.* at 278.

20. *MANUAL*, *supra* note 13, at 1-14.

21. *Id.*

22. *Id.*

23. In fact, prior to 1940, the insurance industry sold insurance policies that only provided coverage for named perils. The industry then switched to "all-risk" insurance policies that provided coverage for everything except a few items that were expressly excluded. DONALD S. MALECKI ET AL., 1 *COMMERCIAL LIABILITY RISK MANAGEMENT AND INSURANCE* 238 (2d ed. 1986).

24. *MANUAL*, *supra* note 13, at xix.

covery in complex insurance coverage cases presents unique case management and efficiency problems because the cases often entail: "(1) a large volume of discovery requested and provided by the parties; (2) a large number of parties seeking and responding to discovery; (3) discovery directed to numerous non-parties having divergent relationships with the parties and interest in the coverage litigation; and (4) frequent discovery disputes on a broad range of issues."<sup>25</sup> In addition to successfully resolving discovery challenges, a deft case management program must also consider issues of confidentiality, fiduciary duty, and transaction costs. The *Manual* addresses these four key issues in litigation case management in a manner that unsatisfactorily places commercial policyholders at an unfair disadvantage.

#### A. *Discovery*

The "discovery" protocol in Chapter 3 is decidedly one-sided. The *Manual* implies that by delaying the policyholder's full discovery of all insurance companies, efficiency may be promoted.<sup>26</sup> The *Manual* fails to mention that the price for this alleged efficiency may be that the policyholder is deprived of his legal right to demonstrate the intent of the contract when drafted, the understanding of insurance regulators when these contracts were approved for sale, contradictory statements insurance companies have made in courts nationwide, and the understanding of reinsurance companies. Giving up the right to seek important insurance company documents is unquestionably injurious to policyholders. Additionally, the withholding of these critical documents by insurance companies, though advocated by the *Manual* as an "efficiency" measure,<sup>27</sup> may even be sanctionable.<sup>28</sup>

A policyholder should be able to discover documents revealing

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25. *Id.* at 3-5.

26. *Id.* at 2-34.

27. *Id.*

28. *See, e.g.,* Adolph Coors Co. v. American Ins. Co., No. 92-N-61, 1993 U.S. Dist. LEXIS 3732, at \*4 (D. Colo. Mar. 4, 1993) (sanctioning Liberty Mutual Insurance Company for withholding a key document, stating that "Liberty Mutual's approach to the discovery process as a whole involves delay, obfuscation, and disingenuity.") *Id.*

inconsistent positions that an insurance company may have previously taken. There should be discovery of the instances in which an insurance company has previously covered claims (a) in court;<sup>29</sup> (b) in regulatory proceedings;<sup>30</sup> (c) before legislatures; (d) in reinsurance disputes;<sup>31</sup> (e) in its own manuals;<sup>32</sup> and, (f) in its own promotional literature.<sup>33</sup>

The *Manual* repeatedly refers to “the high cost of inefficiency”<sup>34</sup>

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29. Insurance companies file “tens of thousands” of briefs against policyholders. Brief and Appendix of Amicus Curiae Insurance Environmental Litigation Association in Support of Continental Insurance Company, Aetna Casualty & Surety Company and Fireman’s Fund Insurance Company of Newark, N.J. at 25 n.21; *County of Columbia v. Continental Ins. Co.*, 83 N.Y.2d 618 (N.Y. App. Div. 1994).

30. See *Morton Int’l, Inc. v. General Accident Ins. Co.*, 629 A.2d 831 (N.J. 1993), *cert. denied*, 114 S. Ct. 2764 (1994).

31. See *North River Ins. v. Philadelphia Reinsurance Corp.*, 831 F. Supp. 1132 (D.N.J. 1993).

32. The importance of an insurance company claims manual was underscored in the *Montrose* case, in which the California Court of Appeals stated:

The Travelers Indemnity Company’s amicus brief in support of Admiral urges adoption of the “manifestation of loss” rule, at least in property damage cases. We give to this brief all the weight it deserves when it is juxtaposed with Travelers’ own claim department’s liability coverage manual’s explanation that, under the standard 1966 CGL occurrence policies used by it and Admiral, the “injury must occur during the policy period because coverage is triggered by the injury, not the accident or the wrongful act. . . . When the injury is gradual, resulting from continuous or repeated exposures, and occurs over a period of time, coverage may be afforded under more than one policy — the policies in effect during the period of injury.”

*Montrose Chem. Corp. v. Admiral Ins. Co.*, 5 Cal. Rptr. 2d 358, 362 n.7 (Cal. Ct. App.), *vacated*, 897 P.2d 1 (1995) (en banc).

33. For example, CNA Insurance Company stated in an advertisement:

Imagine being surprised in 15 years with a liability lawsuit. You just never know if a service performed today, a product sold tomorrow, or a material used next week may come back to haunt you in the form of a lawsuit. Even if it takes 5, 10 or 30 years to result in a claim, your business would be liable for the loss. That’s why it’s critical to choose an insurance company *now* with the financial strength to pay claims not just today, but in 20 or 30 years.

NEWSWEEK, Mar. 11, 1991, at 2 (emphasis in original).

34. *Manual*, *supra* note 13, at 2-3.



but ignores the higher cost of depriving a policyholder of legitimate discovery that has proven itself to be enormously persuasive to courts nationwide. For example, regulatory history and drafting history documents are of vital importance to policyholders. Virtually every appellate court that has considered and written about regulatory history, drafting history and insurance company interpretive documents has reached a pro-policyholder decision.<sup>35</sup> Moreover, where the regulatory and drafting history supports insurance companies, they use it and they win.<sup>36</sup>

Another area of discovery policyholders should insist on is reinsurance information and files.<sup>37</sup> This information reveals what the

35. See *Eljer Mfg., Inc. v. Liberty Mut. Ins. Co.*, 972 F.2d 805 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1646 (1993); *Gerrish Corp. v. Universal Underwriters Ins. Co.*, 947 F.2d 1023 (2d Cir. 1991), *cert. denied*, 504 U.S. 973 (1992); *New Castle County v. Hartford Accident & Indem. Co.*, 933 F.2d 1162 (3d 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*, 507 U.S. 1030 (1993); *Fireguard Sprinkler Sys., Inc. v. Scottsdale Ins. Co.*, 864 F.2d 648 (9th Cir. 1988); *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); *Montrose Chem. Corp. v. Admiral Ins. Co.*, 897 P.2d 1 (Cal. 1995); *Claussen v. Aetna Cas. & Sur. Co.*, 380 S.E.2d 686 (Ga. 1989); *United States Fidelity & Guar. Co. v. Specialty Coatings Co.*, 535 N.E.2d 1071 (Ill. Ct. App. 1989); *Morton Int'l, Inc. v. General Accident Ins. Co. of Am.*, 629 A.2d 831 (N.J. 1993); *Broadwell Realty Servs. Inc. v. Fidelity & Cas. Co.*, 528 A.2d 76, 84 (N.J. Super. Ct. App. Div. 1987), *overruled in part by Morton Int'l, Inc. v. General Accident Ins. Co. of Am.*, 629 A.2d 831 (N.J. 1993); *American Star Ins. Co. v. Grice*, 854 P.2d 622 (Wash. 1993); *Joy Technologies, Inc. v. Liberty Mut. Ins. Co.*, 421 S.E.2d 493 (W. Va. 1992).

Appellate courts that do not discuss the regulatory history, the drafting history, or other interpretive insurance industry documents sometimes reach anti-policyholder results. See *Hybud Equip. Corp. v. Sphere Drake Ins. Co.*, 597 N.E.2d 1096 (Ohio 1992), *cert. denied*, 507 U.S. 987 (1993). *But see Smith v. Hughes Aircraft Co.*, 10 F.3d 1448 (9th Cir. 1993) (discussing drafting and regulatory history); *ACL Tech., Inc. v. Northbrook Prop. & Cas. Ins. Co.*, 17 Cal. App. 4th 1773 (Cal. Ct. App. 1993); *Lumbermens Mut. Cas. Co. v. Belleville Indus. Inc.*, 555 N.E.2d 568 (Mass. 1990); *Upjohn Co. v. New Hampshire Ins. Co.*, 476 N.W.2d 392 (Mich. 1991).

36. See *Oritani Sav. & Loan v. Fidelity & Deposit Co.*, 989 F.2d 635 (3d Cir. 1993); see also *Schering Corp. v. Home Ins. Co.*, 712 F.2d 4 (2d Cir. 1983); *Liberty Mut. Ins. Co. v. Foremost-McKesson, Inc.*, 751 F.2d 475 (1st Cir. 1985); *American Star Ins. Co. v. Ins. Co. of the West*, 232 Cal. App. 3d 1320 (1991).

37. See 44 AM. JUR. 2D *Insurance* § 1831 (1964).

insurance companies told their reinsurance companies about the meaning of policy terms and the policyholder's claim. In addition, this information can help policyholders determine the terms of lost insurance policies. Insurance companies regularly ask for and receive this type of information when it suits their purpose.<sup>38</sup> This information should be made available to the average policyholder as well as to sophisticated litigants such as insurance companies.

Insurance companies should be required to disclose all possible bases for insurance coverage. One insurance company, The Travelers, has written that it was "ethically obligated to disclose potential coverage to [the policyholder]."<sup>39</sup> This duty is glaringly omitted in the *Manual*. For example, insurance companies repeatedly argue that insurance coverage should be denied when notice is untimely given.<sup>40</sup> Policyholders are entitled, however, to discover statements such as the following made by one insurer: "[a]n insurance policy is not to be construed as a game of cat and mouse, in which the insurer (or reinsurer) can avoid liability if he succeeds in catching his insured in a technical breach."<sup>41</sup>

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Reinsurance may be defined as a contract whereby one party, the reinsurer, agrees to indemnify another, the reinsured, . . . against . . . liability which the latter may sustain or incur under a separate and original contract of insurance. . . . "Reinsurance" is also used to denote a contract between two insurers by which one assumes the risk of the other and becomes substituted to its contract, so that on the assent of the original policyholder the liability of the first insurer ceases and that of the second is substituted.

*Id.*

38. See *North River Ins. v. Philadelphia Reinsurance Corp.*, 831 F. Supp. 1132 (D.N.J. 1993).

39. Memorandum of Plaintiff The Travelers Insurance Company in Opposition to The Moving Defendants' Motion to Compel Responses to Interrogatories at 49-50, *Travelers Ins. Co. v. Buffalo Reinsurance Co.*, 735 F. Supp. 492 (S.D.N.Y. 1990)(No. 86 Civ. 3369).

40. See, e.g., *Unigard Security Ins. Co. v. N. River Ins. Co.*, 762 F. Supp. 566, 591 (S.D.N.Y. 1991) (recognizing a change in industry custom towards insistence on close compliance with contractual notice requirements).

41. Brief of Plaintiff-Appellee at 41, *Hartford Accident & Indem. Co. v. Calvert Ins. Co.*, slip op. (3d Cir. 1987)(No. 86-5898). The notice provision should only be enforced where the insurance company has been prejudiced by a policyholder's long delay in reporting a claim. See *Tesoriero*, *supra* note 6, at 113; see also Eugene R. Anderson et al., *Notice To An Insurance Company After*

Policyholders are also entitled to discover information about the instances in which insurance companies or their affiliates have sought and are seeking insurance coverage themselves for the same types of claims that they are denying to their policyholders.<sup>42</sup> Insurance companies also buy insurance. Why should insurance companies and their affiliates get coverage for certain claims while excluding the same coverage for the average businessman?

The *Manual* goes on to discuss how insurance policies are underwritten.<sup>43</sup> Underwriting guidelines are crucial in reflecting the level of risk that the insurer attaches to a policyholder. The information that an insurer obtains in an insurance application is compared with the underwriting guidelines to determine whether the "risk reflected in the application is acceptable to the insurer at the specified premium."<sup>44</sup> If it is, then the insurer issues the policy and appropriate endorsements.<sup>45</sup> The *Manual* suggests that insurance companies limit discovery of the underwriting and claims documents.<sup>46</sup> It is unfair for insurance companies to hold its policyholders to such a high standard of disclosure, when they fail to disclose information in return. This is an inequitable relationship with a lack of mutuality which should be changed.

Chapter 3 of the *Manual* seems to suggest that discovery in prior cases should be used as a *substitute* to full discovery in current insurance coverage disputes.<sup>47</sup> This idea clearly favors insurance companies who are in the business of litigating against policyholders and who have at least four professional trade associations to assist them in blocking coverage.<sup>48</sup> If the insurance company can

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Hecla Mining, 20 COLO. LAW. 2053, 2054 (1991).

42. See, e.g., *Employers Ins. of Wausau v. Xerox Corp.*, No. B-87-625, slip op. (D. Conn. May 12, 1989).

43. *MANUAL*, *supra* note 13, at 1-11 to 1-13.

44. *Id.* at 1-12.

45. *Id.*

46. *Id.* at 3-10 to 3-12.

47. *Id.* at 3-7 to 3-10 (emphasis added).

48. Insurance industry trade associations that regularly file anti-policyholder briefs include: Insurance Environmental Litigation Association, American Insurance Association, National Association of Independent Insurers, and Alliance of American Insurers. See *Absolute Pollution Exclusion Not Applicable to Maryland Lead Claims*, 4 MEALEY'S LIT. REP., Nov. 1995, at 1 (discussing the Insurance

simply produce documents generated in a prior litigation it can save thousands of dollars and can hide the fact that there are thousands more documents in its files.<sup>49</sup> Similarly, if the insurance company can simply produce previous depositions taken of its personnel it not only saves money but reduces the risk its agents will make additional damaging or contradictory statements.<sup>50</sup>

The policyholder, who will probably encounter one major insurance coverage problem in its lifetime, gains nothing by agreeing to accept prior discovery completely in lieu of current discovery. Obviously, the use of prior testimony to supplement current testimony can save the policyholder time and money. The policyholder should insist on *both* past discovery and current discovery in order to determine if the insurance company defendants made consistent arguments and representations. Within the past nine years a great deal of pro-policyholder and anti-insurance company information has become public. Courts that have reviewed this material have issued harsh rulings against the insurance industry.<sup>51</sup> It should work to the policyholder's advantage that prior discovery documents may provide multiple sets of depositions and testimony of insurance company personnel. The discovery materials in prior cases should not be utilized to limit the policyholder's advantage, and should be furnished to the policyholders by insurance companies.

The *Manual* recognizes that insurance companies regularly inspect their policyholder's business operations and make recommen-

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Environmental Litigation Association); Alfred R. Light, *Deja Vu All Over Again? A Memoir of Superfund Past*, 10 NAT. RESOURCES & ENV'T 29 (1995) (explaining the American Insurance Association); *Insurance Organizations Agree on Principles for Superfund Reform*, 7 MEALEY'S LIT. REP., Jan. 1995, at 16 (discussing the National Association of Independent Insurers); Thomas Mallin et al., *The Suit Limitation Defense to a Party Insurance Pollution Claim: Will Insureds' Late Discovery Arguments Succeed?*, 17 N. KY. L. REV. 317 (1990) (discussing the Alliance of American Insurers).

49. See MANUAL, *supra* note 13, at 3-7.

50. *Id.* at 3-9.

51. *E.g.*, Morton Int'l Inc. v. General Accident Ins. Co. of Am., 629 A.2d 831 (N.J. 1993), *cert. denied*, 114 S. Ct. 2764 (1994); Adolph Coors Co. v. American Ins. Co., No. 92-N-61, 1993 U.S. Dist. LEXIS 3732 (D. Colo. Mar. 4, 1993).

dations.<sup>52</sup> In fact, insurance companies have *long* touted their role as “surrogate regulators.”<sup>53</sup> This information for “loss prevention” or “loss control” should be furnished by the insurance companies to the policyholder.<sup>54</sup> For example, in the 1960s, Liberty Mutual Insurance Company advised its policyholders to dispose of used cleaning solvents on open ground away from habitation.<sup>55</sup>

### B. Secrecy

Secrecy of insurance company files has no place in insurance coverage litigation.<sup>56</sup> Such secrecy does nothing more than make it more difficult for policyholders to litigate with insurance companies.<sup>57</sup> Secrecy deprives future policyholders of the benefit of the discovery and litigation successes achieved by other policyholders. Yet the theme of secrecy recurs throughout the *Manual*. For example, the *Manual*, states that “[d]ue to the potential for prejudice in subsequent cases, the parties should agree that position papers will remain *confidential* and will be used only in the case for which they were prepared.”<sup>58</sup> Additionally, the *Manual* asserts that “[c]ourt[s] should grant Protective Orders sought by third-parties brought into insurance coverage litigation.”<sup>59</sup> Finally, the *Manual* advocates that courts should liberally grant confidentiality orders<sup>60</sup>

52. MANUAL, *supra* note 13, at 1-13.

53. A group of insurance companies and anti-policyholder advocacy organizations filed an amicus brief stating that, “[o]ne function of insurance is ‘surrogate regulation.’ When an insurer chooses to insure a given activity, it evaluates and monitors the insured’s performance.” Brief of Amici Curiae Ins. Envtl. Litig. Assoc. at 36, *Technicon Elec. Corp. v. Atlantic Mutual Ins. Co.*, slip op. (N.Y. Sup. Ct. 1989) (No. 08811/85).

54. MANUAL, *supra* note 13, at 1-13.

55. See generally *Check List for Vapor Degreasing Operations* (Liberty Mutual Ins. Co. Boston, N.Y.), Nov. 18, 1969 (on file with the *Fordham Environmental Law Journal*).

56. See generally Thomas E. Workman, *Plaintiff’s Right To The Claim File, Other Claim Files And Related Information: The Ticket To The Gold Mine*, 24 TORT & INS. L.J. 137 (1988).

57. See *id.*

58. MANUAL, *supra* note 13, at 2-6 (emphasis added).

59. *Id.* at 3-38.

60. *Id.* at 3-43 to 3-49.

and require that settlement agreements should be kept confidential.<sup>61</sup>

Policyholders should fight all attempts to create secrecy in litigation. Policyholders should insist that the party seeking a protective order meet a very high burden of proof.<sup>62</sup> At the same time, policyholders should insist that insurance shields not be turned into swords by insurance companies seeking to use confidential policyholder information to paint their policyholders as wrongdoers not entitled to protection.<sup>63</sup>

There is another corresponding problem threatening our judicial system that the *Manual* ignores. Insurance companies not only insist on secrecy, but when they lose an insurance coverage case they attempt to “erase” the adverse precedent by making a settlement with the policyholder that is contingent on the vacatur of the court ruling.<sup>64</sup> Fifty percent of the pro-policyholder judicial decisions are removed of legal precedential value by the insurance industry.<sup>65</sup> This astonishing manipulation and prostitution of our judicial system — probably our most precious heritage — has only recently come to light.<sup>66</sup>

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61. *Id.* at 5-17.

62. *Id.* at 3-49 (citing TEX. R. CIV. P. ANN. R. 166(b)(5), 76(a)).

63. For example, in amicus briefs submitted to various courts, the Insurance Environmental Litigation Association (“IELA”), a trade association of major property and casualty insurance companies formed to present the position of its members in environmentally-related insurance law issues, regularly labels those who submit amicus briefs with a position in opposition to the IELA as “polluter amici.” See, e.g., Brief and Addenda of Amicus Curiae Ins. Envntl. Litig., Meagan Lynn Oates v. The State of New York, 206 A.D.2d 979 (N.Y. App. Div. Dec. 21, 1993)(No. 80404). In one case, the IELA has even tagged as “polluter amici” the Wisconsin Academy of Trial Lawyers, the Wisconsin State Public Intervenor, and a local group called, Environmental Decade. See Brief of Amici Curiae Wis. Ins. Alliance and Ins. Envntl. Litig. Assoc., James R. Fortier v. Flambeau Plastics Co., 164 Wis. 2d 639 (Wisc. Ct. of App. 1989) (No. 89-0196, 89-0956).

64. See Philip Carrizosa, *Making the Law Disappear: Appellate Lawyers Are Learning to Exploit the Supreme Court’s Willingness to Depublish Opinions*, CAL. LAW., Sept. 1989, at 65.

65. *Id.*

66. See Sandra Torrey, *When Decisions are Written in Disappearing Ink*, WASH. POST, July 25, 1994, at F7; Roger Parloff, *Rigging the Common Law*, AM. LAW., Mar. 1992, at 74; Stacy Goron, *Vanishing Precedents*, BUS. INS., June

Recently, in *United States Bancorp Mortgage Co. v. Bonner Mall Partnership*,<sup>67</sup> the Supreme Court held that vacatur is an “extraordinary” remedy and that “[j]udicial 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.”<sup>68</sup> Furthermore, the Court of Appeals for the Second Circuit recently refused to vacate a banking law decision as part of a settlement, holding that a “[vacatur] would allow a party with a deep pocket to eliminate an unreviewable precedent it dislikes simply by agreeing to a sufficiently lucrative settlement to obtain its adversary’s cooperation in a motion to vacate.”<sup>69</sup> Judge Easterbrook, writing for the Seventh Circuit, also refused to vacate published opinions upon the parties’ settlement stating that “[w]hen a clash between genuine adversaries produces a precedent . . . the judicial system ought not to allow the social value of that precedent, created at cost to the public and other litigants, to be a bargaining chip in the process of settlement. The precedent, a public act of a public official, is not the parties’ property.”<sup>70</sup>

Finally, Supreme Court Justice Stevens in a dissenting opinion also found that judicial precedents are “presumptively correct” and allowing parties to erase them hurts society as a whole.<sup>71</sup> Justice Stevens criticized the viewing of precedents as merely the “property of private litigants,” and advocated that they be allowed to stand “unless a court concludes that the public interest would be served by a vacatur.”<sup>72</sup>

There are other problems not addressed by the *Manual*. For instance, insurance companies often use lawyers and law firms as

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15, 1992, at 1; Jill E. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 *CORNELL L. REV.* 589 (1991).

67. 115 S. Ct. 386 (1994).

68. *Id.* at 392.

69. *Manufacturers Hanover Trust Co. v. Yanakas*, 11 F.3d 381, 384 (2d Cir. 1993).

70. *In re Memorial Hospital, Inc.*, 862 F.2d 1299, 1302 (7th Cir. 1988).

71. *Izumi Seimitsu Kogyo Kabushiki Kaisha v. United States Philips Corp.*, 114 S. Ct. 425, 431 (1993) (Stevens, J., dissenting).

72. *Id.*

claims handlers. This practice has resulted in the protection of normal claims handling documents under the attorney-client privilege.<sup>73</sup> Claims files are an important source of information for policyholders that is becoming increasingly unavailable.<sup>74</sup>

### C. *Bad Faith*

The *Manual* tacitly endorses two tactics commonly used by insurance companies that amount to bad-faith and a breach of the insurance company's fiduciary duty to its policyholder. First, the *Manual* suggests that policyholders should produce "all pleadings, notices and relevant discovery from underlying claims for which coverage is sought."<sup>75</sup> The goal of such discovery is to enable the insurance companies to paint the policyholder as an evil wrongdoer undeserving of insurance.<sup>76</sup> Insurance companies attempt to use the allegations and documents brought to bear against the policyholder in the underlying litigation *against* the policyholder in the insurance coverage litigation at hand.<sup>77</sup>

This tactic amounts to a breach of the insurance company's fiduciary obligations to policyholders and should be an act of actionable bad faith.<sup>78</sup> Courts nationwide have held that an insurance company cannot place its interests in denying coverage above the interests of its policyholder.<sup>79</sup>

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73. *But see* National Farmers Union Prop. and Casualty Co. v. District Ct. for the City and County of Denver, 718 P.2d 1044, 1048 (Colo. 1986) (en banc) (holding that an insurance company "may not avail itself of the protection afforded by the work product doctrine simply because it hired attorneys to perform the factual investigation into whether the claim should be paid.").

74. *But see* Workman, *supra* note 56, at 13.

75. *MANUAL*, *supra* note 13, at 2-8.

76. *See supra* note 63.

77. Insurance companies regularly file briefs calling policyholders "polluters" who are undeserving of insurance coverage. *See, e.g.*, Reply to Plaintiff's Memorandum of Law In Opposition to Defendants Truck's and Fireman's Fund's Motion for Summary Judgment Re: "Known Risk, Known Loss," Adolph Coors Co. v. American Ins. Co., slip op. (D. Colo. Nov. 9, 1994)(No. 92-N-61).

78. *See* Adolph Coors Co. v. American Ins. Co., slip op. (D. Colo. Nov. 9, 1994)(No. 92-N-61) (awarding attorneys fees for prosecuting insurance coverage where Liberty Mutual breached its duty to defend Coors).

79. *See* LaRoca v. State Farm Mut. Auto. Ins. Co., 329 F. Supp. 163, 171



The *Manual* admits its silent approval of this bad-faith contention. For instance, it states that discovery about the hazardous waste handling practices of a policyholder — sought as relevant to the coverage issue of whether personal injury or property damage was “neither expected nor intended” from the standpoint of the policyholder — could provide assistance to the underlying claimant, or future claimants, in litigating matters against the policyholder.<sup>80</sup> There could hardly be a threat more chilling to a policyholder’s rights.

Continental Casualty Company has represented in judicial proceedings that “[i]f the insurer is motivated by selfish purpose or by a desire to protect its own interests at the expense of its insured’s interest, bad faith exists.”<sup>81</sup> Equal consideration of the policyholder’s interests with those of the insurance company seems to be the most benign formulation of the duty of good faith.

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(W.D. Pa. 1971), *aff’d*, 474 F.2d 1338 (3d Cir. 1973); *Burnaby v. Standard Fire Ins. Co.*, 20 Cal. Rptr. 2d 44, (Cal. Ct. App. 1993)(holding that “an insurance company ‘may not put its own interest above that of the insured’s interest.’”), *cert. denied*, 114 S. Ct. 884 (1994); *Lieberman v. Employers Ins.*, 419 A.2d 417, 423 (N.J. 1980) (“[T]he insured’s interests must necessarily come first.”); *Rova Farms Resort, Inc. v. Investors Ins. Co. of Am.*, 323 A.2d 495, 505 (N.J. 1974) (“[T]he relationship of the [insurance] company to its insured regarding settlement is one of inherent fiduciary obligation.”); *Hartford Accident & Indem. Co. v. Michigan Mut. Ins. Co.*, 462 N.Y.S.2d 175, 178 (App. Div. 1983)(“[A]n insurer is obligated to act with undivided loyalty; it may not place its own interests above those of its assured.”), *aff’d*, 463 N.E.2d 608 (N.Y. 1984); *Tank v. State Farm Fire and Casualty Co.*, 715 P.2d 1133, 1137 (Wash. 1986) (en banc) (holding it is bad faith for an insurance company to engage in “any action which would demonstrate a greater concern for the insurer’s monetary interest than for the insured’s financial risk.”); WILLIAM M. SHERNOFF ET AL., INSURANCE BAD FAITH LITIGATION §1.05 (1984) (“[T]he relationship between the insurer and insured has a fiduciary character . . . . [B]y the inherent nature of the services to be provided, insureds place great trust and confidence in their insurance coverage and their insurers. In a practical sense, the insurer occupies a position comparable to that of a trustee for the benefit of its insured. This is the very essence of a fiduciary obligation.”).

80. MANUAL, *supra* note 13, at 3-44.

81. Plaintiff’s Memorandum of Law for Trial at 13, *Continental Casualty Co. v. Great American Ins. Co.*, 739 F. Supp. 929 (N.D. Ill. 1990)(No. 86-C-3938), *quoting* *Commercial Union Ins. Co. v. Liberty Mutual Ins. Co.*, 393 N.W.2d 161, 164 (Mich. 1986).

Another bad-faith tactic endorsed tacitly by the *Manual* is the *ex parte* interviewing of former employees of the insured, where the interviewer fails to adequately disclose his alliance with a party to the litigation.<sup>82</sup> In fact, numerous courts have sanctioned or reprimanded insurance company counsel for their unethical conduct in interviewing former employees.<sup>83</sup>

Policyholders should be aware that insurance companies engage in this conduct in an attempt to find an aggrieved former employee who will testify that the corporation acted intentionally, thus voiding the insurance coverage. Policyholders should vigorously fight the introduction of such "evidence." George Katz, one of the principal drafters of the 1966 standard form CGL insurance policy wrote that to deny a corporation coverage on the ground that it expected or intended injury which gave rise to the claim, the insurance company

would have to show that the level of management responsible for making policy with regard to the act or omission causing the occurrence *expected or intended that injury would result . . . .* We also intend to cover other kinds of injury resulting from intentional acts of employees *unless such acts are known to and condoned by or directed by those officials of the corporation responsible for the action* of the employee that gave rise to the injury or damage.<sup>84</sup>

Similarly, Harold Schaffner of the Hartford Insurance Group stated that the definition of occurrence "will not be used to deny coverage unless the expectation or intent is that of the insured (individual), co-partner involved (co-partnership) or *responsible*

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82. MANUAL, *supra* note 13, at 3-38 to 3-39.

83. See, e.g., *In re Industrial Gas Antitrust Litigation*, No. 80-C-3479, 1986 WL 1846 (N.D. Ill. Jan. 28, 1986)(failure of plaintiff's attorneys to impress on their investigators the necessity of immediately determining whether their *ex parte* contacts with defendant's present employees was improper); *National Union Fire Ins. Co. v. Stauffer Chem. Co.*, No. 87C-SE-11, 1990 WL 140430 (Del. Super. Ct. Sept. 10, 1990)(court imposed sanctions for improper investigator conduct); see also Lawrence Weiss & Adam A. Reeves, *The Ex-Parte Explosion: When Do Communications With Corporate Employees Result In Ethical Misconduct?*, 31 JUDGES' J. 26 (1992).

84. Letter from George Katz, Secretary, Underwriting Dept., Casualty & Surety Div., Aetna Casualty & Surety Co., to Robert F. Bauer, Assistant Secretary, Johnson & Higgins (Aug. 31, 1966) (emphasis added)(on file with the *Fordham Environmental Law Journal*).

official in a management position (corporation)."<sup>85</sup> While insurance companies may conduct *ex parte* interviews in attempts to gather evidence of corporate intent, courts have not deemed the testimony of non-senior employees useful. Policyholders should argue that the intention of a large corporation can only be determined from the acts of senior management.<sup>86</sup>

#### D. *Transaction Costs*

Everyone should strongly support measures that reduce the enormous cost of insurance coverage litigation. Until 10 years ago nearly all insurance coverage disputes were resolved by motions for summary judgment. What has changed since then? Not the policyholders and not the insurance policies. The real problem with insurance coverage cases is not, for instance, the absence of proper case management as suggested in the *Manual*.<sup>87</sup> The real problem is that the practicalities and economics of denying insurance coverage weigh very heavily in favor of insurance companies.<sup>88</sup> For instance, insurance companies offset costs incurred through delays in litigation through claim inflation, the increase in the value of claims during the delay which is offset by the interest the insurance company earns.<sup>89</sup> The policyholder, however, must cover litigation expenses "out of pocket" during an insurance coverage dispute and faces cash-flow problems, sometimes small, but more often severe.

Although prejudgment interest exists to defray expenses resulting

85. Letter from Harold Schaffner to Robert F. Bauer, Assistant Secretary, Johnson & Higgins (Aug. 25, 1966) (emphasis added)(on file with the *Fordham Environmental Law Journal*).

86. See *Ashland Oil Inc. v. Miller Oil Purchasing Co.*, 678 F.2d 1293, 1317 (5th Cir. 1982)(finding that knowledge by high-level officers of a waste product's propensity to contaminate crude oil stock is evidence that the corporation "expected" or "intended" to inject hazardous wastes into a crude oil pipeline); see also *Premium Fin. Co. v. Employers Reins. Corp.*, 979 F.2d 1091 (5th Cir. 1992); *Federal Deposit Ins. Corp. v. Mmahat*, 907 F.2d 546 (5th Cir. 1990); *Hoechst Celanese Corp. v. National Union Fire Ins. Co.*, 1994 WL 721633 (Del. Super. Ct. Apr. 22, 1994).

87. *MANUAL*, *supra* note 13, at 2-3.

88. *Id.* at xix.

89. George M. McCabe & Robert C. Witt, *Investment Income and Claim Costs Inflation in Insurance*, *CPCU J.*, June 1983, at 117.

from litigation delays, it is rarely awarded.<sup>90</sup> Thus, if a policyholder pays a covered claim in year one and does not recoup the loss from the insurance company until year four, the policyholder has lost, and the insurance company has gained, the time-value of money.<sup>91</sup>

#### CONCLUSION

The present litigation system promotes insurance nullification by litigation. The *Manual* is evidence that not only is insurance not working, but that the insurance industry is a strong force within the American Bar Association. The *Manual* perpetuates the coverage-defeating myth that insurance coverage disputes are so esoteric, complicated and expensive that only the insurance industry and a handful of big case litigation lawyers are capable of understanding the issues.

Even if the policyholder persists in pursuing an insurance company in court, he will most likely settle the dispute. On the other hand, just by litigating insurance coverage the insurance company is virtually guaranteed that it will pay less than full value.

Thus, the entire litigation system — its enormous costs and lengthy delays — works to the advantage of the insurance company. The system is structured so that the insurance company, by denying a claim, gains the time-value of money and the likelihood that the claim will be settled for less than its full value. Moreover, at the same time the policyholder is fighting an uphill battle against the insurance company's lawyers, he or she is forced to defend endless allegations of fraud by the claims adjuster. Whether in negotiation or in litigation, the *Manual* eases the burden of insurance companies.

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90. *Home Ins. Co. v. Certain Underwriters at Lloyd's London*, 729 F.2d 1132 (7th Cir. 1984).

91. Anderson, *supra* note 6, at 46.

