

# Why Can't We Get Along?

The Coverage Wars Are Hurting Both Carriers and Policyholders

BY MARC S. MAYERSON

**F**or nearly two decades, insurance companies and commercial corporations have litigated against each other in fierce, protracted lawsuits. Each side has spent millions of dollars, and sometimes tens of millions of dollars, for lawyers, experts, computerized document-management systems, and the like. These coverage cases—often involving environmental liabilities or mass product liability (breast implants and other medical devices, asbestos, plumbing systems, etc.)—are notable not only for the enormous amounts of money at stake but also for the bad blood created between the insurers and their customers, the policyholders.

These coverage cases are marked by the insurers taking the seemingly surprising posture of prosecutors of their own insureds. In an effort to avoid paying the claim, the insurers typically don the hat of the underlying plaintiffs and try to prove that their insured acted with flagrant disregard to safety, health, or the environment. Thus, rather than lending their aid to defeat the allegations and claims of the plaintiffs, the insurers in effect join with the plaintiffs by seeking to establish that coverage should not be provided because the plaintiffs' allegations against the insured are true.

In such circumstances, the insured faces a two-front war: defending against the plaintiffs' allegations in the underlying liability cases (with no financial help from its insurers), and defending the same allegations when leveled by its own insurance carriers in the insurance-coverage case. Thus, when a company faces what is like-



an excellent vehicle to help rid the courts of claims of liability based on junk science. Several of the recent liability cases have rejected the plaintiff's claim of causation between the implant and the plaintiff's alleged injuries. Had the insurers lent their resources and expertise to the defense, the insurers could have helped stave off the bankruptcy of Dow Corning, could have reduced a multibillion dollar problem to a multimillion dollar one, and could have helped prune pseudo-science from the courts.

Insurers should be developing sophisticated systems to manage mass tort, toxic tort, environmental, and product liability litigation. Insurers have the opportunity to develop this expertise and transfer that expertise for the benefit of each of the insureds that become ensnared in such litigation.

ly its worst liability problem in its history—the precise moment when it needs its liability insurance protection most—its insurers turn upon it and compound the company's problem by refusing to pay under their policies and by opening a second front, further stretching the insured's resources.

These insurance-coverage cases are notable also because they take place against the backdrop of legal uncertainty on many if not most of the key issues, and of tremendous discontinuity in the results or rules from state to state. On identical issues, involving identical policy language, some states find coverage and others do not. Whether one interpretation or the other prevails in a given state thus can be dispositive.

This instability in outcome-determinative legal rules creates incentives for the parties to these disputes to file suit first to attempt to secure a favorable forum and the application of favorable law on an outcome-determinative issue. This has spawned an atmosphere of uncertainty and mistrust, where insureds are reticent even to provide notice to insurers of claims, as they are supposed to do under the policies, for fear that an insurer will respond to such a notification by filing a lawsuit against it.

## LEGAL BOON

This state of affairs has been a boon to lawyers, creating an entire cottage industry for disputes regarding insurance coverage. Private law firms involved in this area generally are allied with one side or the other, and thus firms have developed expertise representing insurers or representing policyholders. But private law firm lawyers are not the only ones who now find themselves involved in coverage disputes: Within insurance companies, scores of lawyers have been hired—gener-

ally displacing the claims people bred by the insurance industry—to manage these claims/cases on behalf of the insurance companies.

Quite obviously what has been lost in the fray is the essence of the insurance relationship and the historical partnership between American industry and their insurers. The adversarial stance of the insurers has blinded them to opportunities not only to help their insureds, but more generally to reduce the insurers' own possibility of payouts.

Take breast implants, for example. The major breast implant manufacturers uniformly were denied coverage by their insurers, and, concurrent with the torrent of suits against the manufacturers, the manufacturers were engaged in coverage litigation with their insurers. Because the insurers uniformly lost the coverage cases, their efforts to prosecute their own insureds have only created an additional record for the underlying plaintiffs to pick through in their effort to establish tort liability against the manufacturer/policyholder. The insurers thus may have actually compounded their own loss exposure by their adversarial stance.

What should have happened? The insurers should have joined with their insureds to fight the liability claims. The breast-implant cases would have provided

This would reduce costs and increase the likelihood of a successful defense or at least the successful management of a liability problem. Businesses are not equipped, when first confronted with these problems, to create ideal, efficient systems to handle and manage such

cases. As things now stand, each company must invent the wheel rather than being able to tap their insurers' greater experience in such matters.

None of this is to gainsay that there may be legitimate coverage issues. Legitimate coverage issues can, however, be resolved amicably and in a businesslike way between insurers and their policyholders.

But it would be better to reach business accommodations at the outset—with the insurers agreeing to pay at least some money and insurers supporting their insured. Were one to cut out the transaction costs of mega-coverage disputes, that money could be

applied to bridge the gap between the insurers and the insured as well.

Most important of all, the present state of affairs should not be allowed to continue. The fabric of the insurance relationship has been rent, but not irrevocably if insurers and policyholders try to mend it.

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can be resolved  
amicably and in  
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way.

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