

# THE RHA REVIEW

ROUTE TO:

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A publication of Robert Hughes Associates, Inc., an international insurance consulting, actuarial, litigation support and risk management company.

## HOLES IN THE PARACHUTE

### Common Insurance Company Defenses

By Robert N. Hughes, CPCU, ARM

A couple of years ago, upon instructions from my spouse, I set my cruise control on 55 mph and, while listening to Garrison Keillor tell a hilarious story, left it on 55 mph while passing through a 35-mph zone. The resulting speeding ticket caused me to seek out the Comedy Driving School, where I took a defensive driving course in order to void the ticket. It was a hilarious and relatively painless way to learn about defensive driving and I actually enjoyed it (save for losing a Saturday). In short, I learned that defensive driving is about trying not to do stupid things yourself while, at the same time, expecting everyone else to do stupid things and planning how to avoid the consequences of their stupidity.

I talked to you in the last issue about your insurance "parachute" and whether or not you could count on it when you needed it. You may recall I said the first step was to buy insurance from companies which have a reputation for paying their claims and which would most likely be financially able to do so. I want, in this issue, to begin to tell you about some of the excuses (holes in the parachute, if you will) insurance company attorneys are offering for their clients' denial of coverage to their policyholders and how you might avoid being the subject of such excuses if you are unfortunate enough to have a large liability claim. In other words, I'm going to teach you the principles of "defensive driving" as they apply to your insurance program.

These "excuses" I just mentioned are what is known in legal jargon as "affirmative defenses." At last count, more than 60

were being used with a high degree of regularity. Most policyholders are unaware of these defenses unless they have had the misfortune of being sued by or having to sue their insurance companies. I want, therefore, to talk to you about a few of them over the next several issues. Some will amuse you. Many will horrify you. Most, if not all, will likely anger you. Hopefully, however, with prior knowledge and a little planning, you can avoid much of the aggravation of having these defenses used by your insurance companies as an excuse for not paying a claim.



Just as in defensive driving, some of what I will tell you will involve your own behavior modification. Other advice will deal with actions you might expect from some insurance companies and the "defensive driving" techniques you should use to eliminate or minimize the "damage" they might cause. By the way, the defenses will appear in random order as they come to me, so don't ascribe any significance to the order in which they appear.

### NOTICE

Most liability policies require you to give the company notice "as soon as practicable." What you are supposed to notify them about varies. Primary CGL policy language usually requires you to give notice of an "occurrence" (which is defined in the policy). Excess or umbrella policies usually require you to give notice when it "appears likely" that a claim will become sufficiently large to reach that particular layer of coverage. Many policies require you to give "immediate" notice of any claim or suit.

The law in some states provides that insurance companies cannot deny coverage on the basis of "late notice" unless their interests have actually been prejudiced by the "lateness" of the notice. It is my opinion that this has always been an essential element of the bargain struck between policyholders and their insurance companies. Unfortunately, these affirmative defenses are put forward, not by underwriters, but by attorneys who, for the most part, have little experience in the buying, selling or application of insurance.

"Well," you may say, "I don't think someone who sits around forever before notifying his or her insurance carrier should be able to get coverage." Perhaps

(HOLES, continued inside)

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- *RHA is on the Move*

**(HOLES, continued from cover)**

not, but think about this. The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) was

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passed in 1980, making thousands of companies and individuals retroactively liable for acts and conditions which had not theretofore been illegal. Some insurance companies have now denied liability for claims arising out of "Superfund" sites on the basis that they should have been notified of the "condition" contemporaneously, decades ago. Now I ask you, how are you going to notify your insurance company of an "occurrence" when you don't know it has happened and even if you did, you were not legally liable for the consequences? Here's another thought...what if you notify your agent of what you believe is an "occurrence" and he or she tells you it isn't covered? Then, sometime later you find out it is covered

and you notify your insurance company, which does absolutely nothing. Or what if you notify your agent/broker, who fails to notify the insurance company? Should the insurance company be able to say after you sue, "We don't owe because notice was too late."?

So here are your "defensive driving" hints regarding notice. First, read your policy and make sure you understand the notice requirement. If you are not sure, discuss it with your agent/broker and get a written response. Second, if by any stretch of your imagination you think there might have been an occurrence, give notice and make sure that notice is forwarded to your insurance company. Don't try to make coverage decisions on your own. Finally, amend all your current policies, all your future policies, and as many of your past policies as you can, to state that denial of a claim on the basis of late notice shall not be effective unless the insurance company can show that its interests were prejudiced by such late notice. Finally, get all your liability carriers to agree, in writing, that any notice to your agent/broker is notice to the company.

#### **NO POLICY - NO COVERAGE**

Many insurance companies are now taking the position that if you can't produce your

policy they have no way to tell what your coverage really was, so you have no coverage. (Do I hear the hiss of steam emerging from your ears?) This is particularly true of excess carriers whose policies "reference" the underlying coverage. Can you imagine that an excess carrier whose policy purports to follow "all the terms and conditions of the underlying policy" doesn't have a copy of that policy in its file? Oh, by the way, you might also be surprised to learn that very few agents or brokers actually keep complete copies of your policies in their files. They keep what are called "dailies," which are usually no more than the

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***"Be prepared to deal with some very unexpected tactics from your insurance companies when you have the 'big one.'"***

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declarations page plus some endorsements. The companies have refused in most litigation to recognize agents' or brokers' "dailies" as evidence of coverage.

This has become such a problem in environmental cases that a whole new

**(HOLES, cont'd on following page)**

## **FROM NEAR AND FAR**



Texas state representative Elton Bomer was sworn in as state insurance commissioner Thursday, February 2nd. Bomer was appointed by new Texas governor George W. Bush, Jr., to replace temporary commissioner Rebecca Lightsey. Lightsey finished out the term of J. Robert Hunter, who resigned in November.



On the first anniversary of the Northridge, California, earthquake that killed 57, the city of Kobe, Japan, was rocked by a quake measuring 7.2 on the Richter scale. More than five thousand lives were lost. The port city of Kobe was shut down for weeks following the quake because of difficulties in getting relief supplies into the region. Property and casualty claims are expected to exceed \$5 billion.



U.S. catastrophe losses for 1994 totaled more than \$14 billion. More than \$10 billion of that figure came in the first quarter and was bolstered primarily by the Northridge earthquake.



A nine-year-old girl was the only survivor of a mysterious plane crash in Colombia in January. The DC9 was on a scheduled flight from Bogota to Cartagena when it crashed without warning 60 miles short of its destination, killing 51 passengers and crew.

(HOLES, cont'd from preceding page)

profession has emerged. It is called "insurance archaeology," and its practitioners are specialists in looking for lost policies. Amazingly enough, in some cases, the last place they hope to find them is in the hands of the insurance companies themselves.

So, given this very frustrating fact, here are your "defensive driving" hints regarding the "lost policy" defense. First, don't ever throw away a liability policy. (I'll talk more expansively about insurance document retention in a future article, but right now I'm sticking to liability policies.) Keep them forever in a very secure, fireproof place. (And for all you smart-alecs who know the difference, yes, you need to keep your claims made policies as well.) Second, if you do not now have such a retention policy, begin immediately to reconstruct your coverage for as many past years as you possibly can. Pretend you are looking for an amount of cash equal to the policy limits because, if the future were known, you might actually be doing just that. Finally, make sure you have copies of all underlying policies to which your excess policies may follow form. You also need to make sure that your excess policies are clear and unambiguous as to which policy terms they will follow. Don't accept "to be advised" or lists of numerous underlying policies. Insist that a single policy be referenced by company name, date and number.

Well, here I am out of space and I have only talked about two of dozens of affirmative defenses being offered by insurance companies in coverage litigation. I suppose that means we'll just have to keep publishing. Just remember, in the meantime, to know the terms and conditions of your policies and try to behave in accordance with them. At the same time, be prepared to deal with some very unexpected tactics from your insurance companies when you have the "big one." See you again soon. **RHA**

**1994:**

## A YEAR TO FORGET?

Surely 1994 was not all bad for all people, but there were very few good things going on in the arena of property and casualty insurance. The world was rocked by a series of disasters — some natural and some not. From the early days of January right through to the last hours of December, the insurance industry was on the receiving end of some of the largest claims of all time. Below is a sampling of many of the headline events of the past year:

### 1st Quarter

An earthquake centered in Northridge, California, claimed 57 lives in January. Early estimates of damage claims were about \$2 billion but rose gradually to top out at about \$10 billion.

Winter storms throughout the Midwest took more than 60 lives, and claims came close to \$1 billion.

Lloyd's members rejected an offer to settle disputes between them and their agents, estimated to be about \$1.3 billion, setting the stage for years of intense legal wrangling and bad publicity for the already battered institution.

Late in March, storms brought havoc to the Southern United States, causing flooding and tornado damage from Southern California to South Carolina. Estimated damages reached \$250 million, and lives were lost in nine states.

### 2nd Quarter

More storms hit the area known as "Tornado Alley," causing damage estimated at \$750 million.

Lloyd's of London released figures for the 1991 accounting year: Losses for the year were reported to be just over \$3 billion.

In June, Exxon was found to be "reckless" in allowing Joseph Hazelwood to command the *Exxon Valdez*. Damage and punitive claims were expected to reach around \$15 billion.

### 3rd Quarter

Tropical storm Alberto struck the Southeast in July, causing more than 60 deaths and an estimated \$5 billion in damages, of which only \$100 million was expected to be covered by insurance.

In the same month, 37 passengers aboard a USAir jet died and 20 others were injured when flight 1016 crashed during a thunderstorm near Charlotte, NC.

Tropical storm Beryl ripped through five Southeastern states in August, causing \$80 million in insured losses.

USAir Flight 427 became the second of the company's jetliners to crash in 1994 and its fifth in five years. The crash, which killed all 127 people aboard, happened close to Pittsburgh, PA.

The passenger ferry *Estonia* sinks in the Baltic Sea, with the loss of more than 900 lives and an estimated claim of more than \$100 million.

### 4th Quarter

Sixty-eight passengers and crew died when American Eagle Flight 4184 crashed in Indiana, making this the third major aviation casualty in 1994.

Flooding in Texas was once again in the news, causing an estimated \$175 million in insured losses.

In November, the Property Claim Services division of American Insurance Services Group estimated catastrophe losses for the first nine months of 1994 to be more than \$12 billion.

A collision between the ferry *Cebu City* and the container ship *Kota Suria* in Manila Bay, Philippines, resulted in the probable loss of almost 150 lives. Claims estimates were not available at press time.

American Eagle Flight 3379 crashed near the Raleigh-Durham airport, killing 15. **RHA**

NOTE: All figures and statistics included in this report are approximations.



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ROBERT HUGHES ASSOCIATES INC.

## RHA IS ON THE MOVE

As you may know, Robert Hughes Associates, Inc., has been in business for 15 years and has been calling the same far North Dallas office building home for 13 of those years. That's about to change.

"Because of the company's continued worldwide growth, the need has arisen for a larger, more conveniently located operations center," company president Robert Hughes said.


In light of this need, the firm, along with its affiliate company, Actuarial & Risk Sciences Group, Ltd., will be relocating to a new office. The move will be to a more modern complex that will give its employees and clients easier access to Dallas' airports, business centers and major roadways.

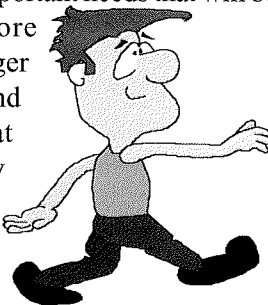
The new corporate headquarters of RHA will be located at 14180 Dallas Parkway, Suite 400, Dallas, TX 75240. Fortunately for all involved, the company's telephone and fax numbers will remain the

same. All changes to RHA's address will be effective beginning April 1, 1995.

The new space will be more suitably equipped for the 90s and will enable the firm to improve upon the client-based services it provides.

The move will meet many of RHA's office needs, including a more extensive library. "It is of paramount importance to our company that we maintain a well-stocked library that can be utilized both by our staff, for their client projects, as well as our clients for their own research," Hughes said.

Other important needs that will be met include more storage area, larger meeting areas, and extra offices that can be used by visiting clients and other professionals. 



## THE RHAREVIEW

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