

THE RHA REVIEW

ROUTE TO:

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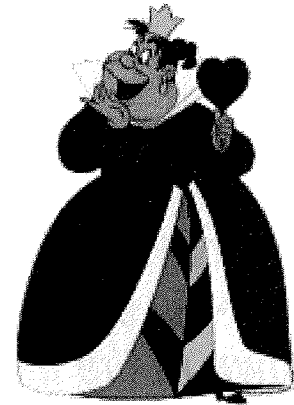
"JAM TODAY, TOMORROW OR YESTERDAY?"

by Robert N. Hughes

I am strongly tempted to write something pertaining to or in analysis of the attack on America, perhaps because its gravity overshadows and obliterates the significance of almost every other topic. I have rejected that temptation, however, because others who are more informed than I are doing a much better job with that theme. Instead, I want to continue the discussion of allocation issues that was begun in our last edition.

By way of review, you will recall that I chronicled the series of legal decisions regarding the allocation of insurance proceeds in long-term liability cases (such as environmental contamination, asbestos, etc.). I pointed out that those decisions led to certain courts determining that policyholders who are deemed to have been "underinsured" or "uninsured" during the periods of exposure will be required to share in the loss in the proportion that such "underinsurance" bears to the total

*"Twopence a week, and jam every other day."
"Well, I don't want any to-day, at any rate."
"You couldn't have it if you DID want it," the Queen said. "The rule is jam to-morrow and jam yesterday — but never jam to-day."
"It MUST come sometimes to 'jam to-day'," Alice objected.
"No, it can't," said the Queen. "It's jam every OTHER day: to-day isn't any OTHER day, you know."*



loss. They might also be required to share if their insurers are insolvent.

Policyholders have at least been able to take heart that the evidence is incontrovertible that every CGL policy issued after 1970 (with the exception of railroads and utilities) contained a limited exclusion pertaining to pollution and contamination and that every policy after 1985 contained an almost absolute pollution exclusion. Therefore, they argue, it should be a given that the policyholder did not "fail to purchase" enough coverage after those dates. No coverage was available.

Although this allocation theory, as I have described it so far, has no foundation in policy language or in the custom and practice of the insurance industry, it could at least be said, if one is in a gratuitous mood, that it contains just a shred of logical foundation. As bad as it is, however, it has gotten worse. Now, a new allocation principle has been interjected by the court in the *Olin Corporation v. Insurance Company of North America, et al.*, case that has no foundation in policy language, no foundation in insurance practice, and no foundation in logic. And, worst of all, it is based on incorrect and untrue assumptions. (This

case related to the chemical plant site located at Williamston, North Carolina.)

The furor focuses on a relatively obscure type of coverage known as Environmental Impairment Liability (EIL), or, as AIG calls it, Pollution Legal Liability. This is a type of policy that purports to provide indemnity to the policyholder for liability arising out of pollution. In some cases, coverage was provided for clean-up and remediation costs but only on a very limited basis. Most important, the coverage is provided only on a "claims made and reported" basis, meaning that the policy coverage is triggered by a claim having been made against the policyholder and reported to the insurance company during the policy period (as opposed to Comprehensive General Liability policies that respond when there is bodily injury or property damage during the policy period, regardless of when the claim is/was made).

The Olin court has seized upon the essentially retroactive nature of claims-made policies and said, in essence, "Aha! Even though Olin could not have bought a policy covering pollution occurrences in 1980, you could

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have bought an EIL policy so that, when claims were made in 1985, the policy in effect in 1985 would cover the loss. Since you didn't buy such EIL coverage, then you must contribute to the loss as a self-insured."

The errors of this decision are so numerous that I fear I will not have enough space to enumerate them, much less discuss them. Here's the old college try, however. By way of background, it is important to know that EIL was

"First, the court ignores the fact that many EIL policies have a feature called a 'retroactive date,' meaning that, although the coverage applies to claims made during the policy period, only claims arising out of circumstances occurring after the retroactive date are covered."

invented, arguably, in the mid-1970s but became generally available only in 1980 (a fact acknowledged by the Olin court). Here are some of the facts ignored by the Olin court.

First, the court ignores the fact that many EIL policies have a feature called a "retroactive date," meaning that, although the coverage applies to claims made during the policy period, only claims arising out of circumstances occurring after the retroactive date are covered. In many cases the retroactive date is the inception date of the policy. So if you bought a policy for CY 1985

with a retroactive date of 1/1/85, only claims made during 1985 for damages arising out of pollution events beginning after 1/1/85 are covered. The only facility ever writing coverage universally without a retroactive date was the London/European facility known as ERAS. This facility ceased to exist in 1983.

Pesticides had been manufactured at the Williamston site since at least 1950. So in order to have coverage, Olin would have to have had an EIL policy in force in 1985, when the state of North Carolina responded to a complaint of "strong odors" from a dance hall on the site. That policy would have to have had no retroactive date or a retroactive date earlier than 1950, a circumstance that was highly unlikely in 1985.

Second, the Olin court ignores the limited nature of coverage provided under any or all of the forms available. Most of the policies available excluded on-site clean-up and remediation. All of them excluded damage to owned and controlled property. Virtually all exclude remediation of pre-existing conditions. All of these excluded circumstances existed at Williamston.

Third, the court ignores the fact that all the facilities writing EIL coverage required risk-assessment inspections as a predicate to coverage, with the cost of such inspections borne by the insureds. In other words, the issuance of policies was subject to strict underwriting standards, a fact attested to in Olin by the insurer's own witnesses.

The Olin court took the position that Olin could have purchased EIL coverage in 1980 and continued to have purchased such coverage through 1985, therefore concluding that Olin could have had retroactive coverage for the Williamston site via EIL for the years

between 1970 and 1985, when no coverage was available under the CGL form. The "claim" that the court feels Olin could have purchased coverage for was, put simply, removing all the contaminated soil and cleaning up the groundwater ... damage that had accumulated between 1950 and 1985.

So let's do what the court did not do. Let's compare all the available forms with the facts and see how much coverage Olin could have purchased and from whom. Though there were a number of companies providing EIL coverage in 1980, that fact is entirely irrelevant. The claim was made in 1985, and that is the only year in which coverage could have been triggered. Matthew Lenz reported in the *Risk*

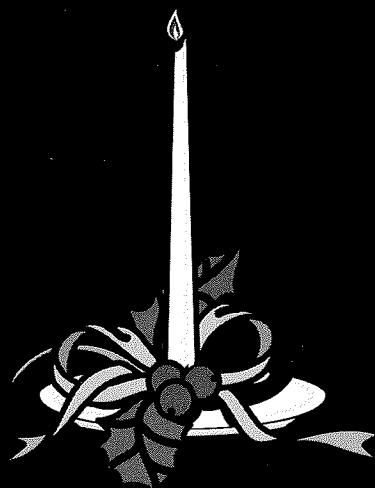
"Secondly, the Olin court ignores the limited nature of coverage provided under any or all of the forms available."

Management Manual, published by The Merritt Company, that as of October 1, 1984, there were eight sources of coverage:

- AIG (National Union Insurance Co. of Pittsburgh, Pa.)
- Hartford Insurance Group
- Home Insurance Company
- Shand Morahan (Evanston Insurance Co.)
- Stewart Smith (Great American Surplus Lines Ins. Co.)
- Swett and Crawford (St. Paul Surplus Lines)
- Travelers Indemnity Company
- PLIA (Pollution Liability Insurance Association)

Of these, The Hartford, Home,

(Jam Today, cont'd. on opposite page)



*We wish you a safe
and peaceful
holiday season*

ROBERT HUGHES ASSOCIATES, INC.

(Jam Today, cont'd. from opposite pg.)

PLIA, Shand and Travelers all had a retroactive date requirement that would have precluded coverage. This leaves AIG, Stewart Smith and Swett & Crawford. AIG and Swett & Crawford excluded on-site clean-up and remediation. The only remaining possibility, Stewart Smith, excluded payments expended to improve pre-existing conditions. Therefore, none of the policies available in 1984 would have provided coverage for the Williamston costs.

By mid-1985 the only facilities for EIL left standing were AIG, St. Paul and PLIA. Ken Goldstein, the underwriter for St. Paul Surplus Lines, has testified that St. Paul was interested in only small, "mom and pop" type risks. That notwithstanding, however, its policy did not cover clean-up or remediation of owned property. The PLIA program was a reinsurance pool serving a number of member insurance companies. It, too, was designed for the smaller risk and also had the requirement that the policy-issuing company must issue both the CGL and the EIL. Again, PLIA used the ISO-filed form which excluded on-site

remediation. We have already seen that the AIG form would not have provided coverage.

So what is the answer to the question, "Could Olin have purchased EIL insurance that would have provided

"Thirdly, the court ignores the fact that all the facilities writing EIL coverage required risk assessment inspections as a predicate to coverage with the cost of such inspections borne by the insureds."

coverage for the 1985 claim which arose as a result of contamination beginning in 1950?" The answer is a resounding NO! What is absolutely amazing is that the trial court actually came to that conclusion during the trial. On November 4, 1997, the following exchange occurred. An ex-underwriter for PLIA and Stewart Smith, Douglas Hamilton, had just testified that neither entity would have covered the

Williamston site for past pollution. Judge Griesa's response was, "Why are we spending all this time? ... They wouldn't have gotten the insurance for Williamston. ... It seems to me that is the end of the hearing as far as Williamston."

Inexplicably the court changed its mind, however, and ruled that Olin could have obtained EIL coverage when it became available in 1980, and in 1985, when the claim was made. The Second Circuit of the United States Court of Appeals agreed. They both missed the point and missed it badly. The question is not whether Olin could have obtained any EIL policy but whether it could have obtained a policy that would have actually covered the costs expended at the Williamston site for which the claim was first made in 1985. The answer is still NO! The exclusions and restrictions in the only policy available in 1985 would have denied coverage.

I have in my files an anonymous summary of the Second Circuit's opinion with the following commentary:

"Question: Is the current state of the courts in America such that regardless of cost, qualification, or underwriting by the insurance company whereby a site or risk is specifically excluded or a decision is made to flat-out refuse to cover (a) site or risk, an insured is still obligated to share in the portion of the risk as if it were bare, underinsured, or self-insured?"

As far as the Southern District of New York and the Second Circuit is concerned, the answer is yes. Hopefully, other courts will approach the matter with a better understanding of the facts and greater discernment of the truth and be able to say no when appropriate. **REHA**

Robert N. Hughes is founder and president of Robert Hughes Associates, Inc.

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New Associate: Robert Rochelle


Robert Hughes Associates is pleased to announce that Robert Rochelle has joined us as an associate. Robert will provide consulting and expert testimony on human resources matters that include but are not limited to hiring practices, discrimination, personnel training, service management, organizational communications, interviewing techniques, negligent hiring and wrongful termination.



Robert Rochelle

Robert, president of The People Skills Company, has contracted with, among others, major law firms and insurers with regard to organizational development. Executive Vice President John Oakley said, "We are excited to have Robert join us, and we are looking forward to being able to provide our clients with another quality resource." 

A Reminder: Mike Fitzgerald

RHA would like to remind you that wet marine underwriting specialist Mike Fitzgerald is a part of our team of associate consultants and experts. Mike has more than 25 years of experience as a wet marine underwriter, marine manager and broker. 

THE RHA REVIEW

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