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# DECADES OF WINNING MONEY FOR POLICYHOLDERS

**▸ When Eugene Anderson launched Anderson Kill in July 1969, he found a career and life mission that remains central to the firm's identity today. On its 50th anniversary, Managing Shareholder Bob Horkovich reflects on what's changed over time and what's stayed the same.**

**CCBJ: Since Anderson Kill's launch in the late 1960s, what has changed in the way insurance companies handle claims?**

**Bob Horkovich:** Fifty years ago, the insurance industry still reflected at least in part the dictum of Hendon Chubb: paying claims is not just a contractual duty, it's a moral obligation. Even 30 years ago, there still was a culture in certain insurance companies that would enable claims responses like, "You know what, that's covered – let me write you a check."

I don't see that any more. Those insurance professionals of old have been knocked out of the insurance market by money managers. As the wall between commercial and investment banking eroded, culminating in Glass-Steagall repeal, banks and money managers came in and took the place of insurance professionals. A business centered on insuring losses was lost. Maximizing profits and money management became all-important. The question was no longer, "Did you insure the loss?" It became, "How long can we hold onto the policyholder's money?"

**How have policyholders responded to that shift?**

Policyholders are very frustrated with the insurance industry. They have turned increasingly to captives. You'll get a group representing, say, 30 companies banding together to set up a captive or a group of captives to try to avoid coverage struggles and high premiums. Companies realize that via captives they can get access to the reinsurance market and therefore lower rates, as well as responsive or at least neutral claims handling. Other policyholders are retaining more risk by seeking higher deductibles and self-insured retentions, recognizing they will have a coverage fight if their claim exceeds the invisible seven-digit exclusion imposed by the insurance industry.

When I first went to the Risk and Insurance Management Society's (RIMS) annual conference 30 years ago, I don't remember many captive booths – now, there are dozens. That is a result of changes in claims management and high rates.

**What about legal practice? How has that changed?**

When Gene Anderson was developing the practice 40 years ago, there was maybe one other firm specializing in insurance coverage litigation. Now some 200 firms do it – practically everyone who can read a policy has a policyholder practice. But almost all of them also represent insurance companies, because the insurance industry is such a huge part of the legal market.

That matters even if the representation does not concern coverage litigation. If you do AIG's tax work, you're not going to be eager to push the envelope to establish new areas of liability against AIG. We are. We represent policyholders only in insurance coverage disputes, with no ties to insurance companies and no conflicts.

**Let's talk about the areas of coverage dispute. What's trending now?**

With regard to long tail environmental and asbestos claims, the major questions of coverage or no coverage are largely settled law by now. What remains are huge fights over allocation of insurance companies' defense and indemnity obligations.

The core battle is over pro rata versus all sums liability and how much of the loss the insurance industry can shift back to policyholders. The question on that front is whether each insurance company at risk in a long-tail loss is responsible for the whole loss up to coverage limits, with the onus on the insurance companies to allocate the losses among themselves, or whether each is only responsible for a proportionate, or pro rata share with policyholders. That plays out on several fronts: Can insurance companies parse their defense obligation, and say that in a given suit or set of suits, they're liable to defend some claims but not others? If insurance was unavailable in some years while long-term damage was occurring, or if an insurance company became insolvent, can those shares be imposed on the policyholder?

In the last 10 years, these battles have gone pretty well for policyholders. We're pleased to have been a part of that, particularly in the two largest jurisdictions, California and New York. Representing the State of California in its mammoth coverage battle over cleanup of the Stringfellow Acid Pits, we won a state Supreme Court decision upholding all sums allocation and policyholders' right to stack insurance policies. In New York, we submitted an amicus in the Viking Pumps decision that upheld all sums allocation. Rhonda Orin, our Managing Partner in D.C., recently won a New York appellate court decision upholding all sums allocation on behalf of an asbestos trust. Bill Passannante recently settled thousands of asbestos claims on behalf of a manufacturer – also an allocation battle.

**Robert M. Horkovich** is Anderson Kill's managing shareholder and chair of its insurance recovery group. He is a trial lawyer who has obtained more than $5 billion in settlements and judgments for policyholders from insurance companies. Reach him at rhorkovich@andersonkill.com.

**What else has changed over the years?**

More broadly, since the 1980s, the insurance industry has retreated from the basic premise of the business developed after World War II, embodied in the comprehensive general liability (CGL) policies, which was to sell an insurance policy that covered all risks instead of putting the onus on policyholders to find coverage for each risk they identified and faced. When liabilities arose that the insurance industry didn't want to insure after selling these policies – mainly the environmental and asbestos exposures of the 1970s and 1980s – the insurance industry put in exclusions, then developed new policy lines like pollution legal liability or environmental impairment. Now that pattern is repeating itself with cyber insurance, which is being excluded from CGL and sold in a burgeoning separate insurance market, with little standardization as yet.

Other specialty lines are likely to emerge. There is even the beginning of a new market for asbestos liabilities. Next up will be coverage for cryptocurrencies – and marijuana too. Enormous markets for recreational marijuana are developing in states like Colorado and California, and the insurance industry will doubtless be ready, willing and able to jump in with separate insurance policies if and when the federal government changes its position.

The general rule is, as a risk becomes significant, the insurance industry will exclude it from existing policy types and develop a separate market to get separate, additional premiums. But holding on to policyholders' money until policyholders force the insurance industry to pay is here to stay – and policyholders will have to be steadfast in getting insurance payments for the losses they paid precious premium dollars to insure. ■