CONNECTICUT INSURANCE LAW JOURNAL

VOLUME 4 1997-98 NUMBER 2

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ARTICLES

NOTES AND COMMENTARIES

CONCURRENT MEDIATION OF LIABILITY AND INSURANCE COVERAGE DISPUTES

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This Article has benefited from the comments of individuals who represent all the perspectives involved in the types of disputes the Article discusses: plaintiff's counsel; insurance defense counsel; coverage counsel for policyholders; and in-house counsel for insurers, including insurers of standard individual lines (such as homeowners and auto) and non-standard complex commercial coverages. We are grateful for the input of those who preferred not to be acknowledged by name, as well as the following: Eugene Anderson (Anderson, Kill & Olick); William T. Barker (Sonnenschein, Nath & Rosenthal); Alissa Christopher (Cowles & Thompson); Russell McMains (Law Offices of Russell McMains); Allene Evans (Perry & Haas); R. Eben Price (In-House Counsel, North Texas Region, State Farm Fire & Casualty Company); Randy Roach (Cook & Roach); and attorneys who participated in a colloquium discussion at Zelle & Larson. Of course, the views and any mistakes contained in this Article are our own.

INTRODUCTION

The tort liability and insurance regime has yet to produce a satisfactory solution to a recurring and frustrating problem: the presence of an undecided insurance coverage question when the underlying liability case is still pending. The "underlying liability case" refers to the suit in which the insured is a defendant and for which the insured expects the liability insurer to provide a defense, indemnity for liability, or both. Consider a common variation of the problem: the insured is sued on various theories for polluting the groundwater supply; the insurer provides a defense but files a declaratory judgment action seeking a ruling that the pollution was neither sudden nor accidental and thus is not covered under the policy.[3] There are two possible *adjudicatory* responses to the insurer's request. One is to allow the declaratory judgment action to proceed, which may result in resolving the coverage issue before the conclusion of the underlying tort suit.[4] The alternative is to stay or dismiss the declaratory judgment action until the tort suit is resolved.[5] This means that the coverage question will linger throughout the pendency of the underlying lawsuit.

Both alternatives have problems. Allowing the coverage case to proceed, as we will explain, may pose a danger of undermining the insured's defense in the underlying lawsuit. Yet leaving the coverage question unresolved throughout the underlying lawsuit presents a number of serious concerns. These concerns, described in more detail shortly, include structural collusion[6] between the plaintiff and insured defendant, and inefficient levels of indemnity coverage.

This Article explores the use of what we call "concurrent mediation" – mediation of both liability and coverage – as an alternative to these

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3. The insurer might also deny a defense and file a declaratory judgment action seeking a ruling that it owes no duty to defend or indemnify. Or the insured might file the declaratory judgment action. In any of these versions, the coverage issue can linger during some or all of the time when the underlying lawsuit is proceeding.

4. *See infra* text accompanying notes 15-17.

5. *See infra* text accompanying notes 15-17.

6. Professor Coffee used the term "structural collusion" in his discussion of incentives in class action contexts. As he explains, collusion is structural rather than "conspiratorial" when, as a result of the incentives generated by attorneys' fees, the parties reach a settlement lower than the settlement that would be expected from full adversarial bargaining. *See* John Coffee, *Rescuing the Private Attorney General: Why the Model of Lawyer as Bounty Hunter is Not Working*, 42 MD. L. REV. 215, 248 (1983).

adjudicatory responses. By working through a series of paradigmatic coverage–liability disputes, we examine whether, when, and how concurrent mediation can be effectively employed. Our aim is not to discuss the benefits that mediation can afford over litigation generally, but to illuminate the incentives, strategies, and doctrinal issues that might affect the feasibility and desirability of concurrent mediation.

Part II outlines the problems posed by the current adjudicatory options for addressing coverage issues while the underlying suit is pending. Part III then considers the use of concurrent mediation with four case scenarios that differ in ways that may affect the incentives of the parties to a concurrent mediation.

Two primary points emerge. First, in many situations, concurrent mediation can be successful at resolving the liability and coverage disputes even when neither dispute is likely to be resolved if considered solely on its own. Second, the parties to a concurrent mediation generally do not need to be concerned that participation in the mediation will disadvantage them in later litigation if the mediation proves unsuccessful.

This Article focuses on simultaneous coverage-liability disputes arising under standard liability policies, such as individual homeowners' and auto liability coverages, commercial general liability ("CGL") policies, and other standard business coverages. In a later Article, we will discuss mediation of liability and coverage disputes arising from other liability insurance arrangements, such as excess policies written over large deductibles or self-insured retentions, "defense within limits" policies that apply the policy limits to both the costs of defense and the costs of indemnity, and reinsurance.

I. SIMULTANEOUS COVERAGE-LIABILITY DISPUTES AND THE CURRENT ADJUDICATORY OPTIONS

Standard[7] liability policies commonly impose two basic duties on insurers: the duty to defend suits that assert covered claims against the insured,[8] and the duty to pay, up to the policy limits, for a judgment or

7. By "standard," we do not mean an unvarying policy form. Instead, the term refers to a form that is widely in use across jurisdictions and that usually results from collaborative drafting efforts by insurers, such as the drafting processes of the Insurance Services Office, a trade organization for insurers. For discussion of the process of standardization, see KENNETH S. ABRAHAM, INSURANCE LAW AND REGULATION 33-38 (2d ed. 1995).

8. *See* ALLIANCE OF AM. INSURERS, POLICY KIT FOR INSURANCE PROFESSIONALS 198, 201 (1993-94) (reprinting a standard commercial general liability policy formulated by the Insurance Services Office and providing that "[w]e will have the right and duty to defend any

settlement against the insured for covered damages.[9] The duty to defend, to be meaningful, must come into play at the commencement of the suit against the insured. By contrast, the insurer's duty to indemnify – or duty to pay – comes into play only if and when there is a judgment or settlement against the insured for covered damages. The most commonly accepted test for determining if the insurer owes a duty to defend is the "eight corners" or "complaint allegation" test: the insurer must provide a defense when the lawsuit makes allegations that, if assumed to be true, would establish a liability that is covered under the policy.[10] In addition, most jurisdictions also impose a duty to defend if the insurer becomes aware of information that brings the claim potentially within coverage.[11]

Another important feature of the policy's defense-related provisions is that the insurer has not only a duty to defend, but a right to defend and to

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'suit' seeking those damages"); *id.* at 29 (reprinting a standard homeowners' policy providing that "we will [p]rovide a defense at our expense by counsel of our choice"). For good introductions to the duty to defend and how it relates to the duty to indemnify, see KENNETH S. ABRAHAM, DISTRIBUTING RISK 195-203 (1986); ROBERT H. JERRY, II, UNDERSTANDING INSURANCE LAW § 111 (2d ed. 1996); 1 ALLAN D. WINDT, INSURANCE CLAIMS AND DISPUTES § 4.01 (3d ed. 1995).

9. *See* ALLIANCE OF AM. INSURERS, *supra* note 8, at 201 (reprinting a standard commercial general liability policy providing that "[w]e will pay those sums that the insured becomes legally obligated to pay as damages because of 'personal injury' or 'advertising injury' to which this coverage part applies"). The policies also make clear that settlements constitute covered liabilities only if the insurer agrees to the settlement. *See id.* at 206 (providing that the insurer may be sued to recover the amount of an agreed judgment, but defining "agreed judgment" as "a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative"). The policy provisions relating to the coverage of settlements, however, tell only part of the tale. A complex and still evolving body of law now addresses the circumstances under which an insured can settle without the insurer's consent and still not forfeit coverage. For further discussion of this topic, see *infra* notes 39-41.

10. *See, e.g.*, George Muhlstock & Co. v. American Home Assurance Co., 502 N.Y.S.2d 174, 178-79 (N.Y. App. Div. 1986); JERRY, *supra* note 8, § 111 [C][1], at 734; WINDT, *supra* note 8, § 4.01, at 149.

11. *See, e.g.*, Ogden Corp. v. Travelers Indem. Co., 681 F. Supp. 169, 172-73 (S.D.N.Y. 1988) (stating that the duty to defend is not restricted to the complaint's allegations, but also may be triggered by facts known to the insurer). Depending on the jurisdiction, this exception to the complaint allegation rule might turn on facts actually known to the insurer, or on facts that the insurer knew or should have known. For general discussion of this topic, see JERRY, *supra* note 8, § 111 [C][2], at 734-35; WINDT, *supra* note 8, § 4.03, at 169-72.

control the defense.[12] This allocation of responsibility generally makes sense for both insurers and insureds. For most claims, the insurer has the greater financial incentive to defend the claim in a way that minimizes liability. In addition, the insurer is a repeat litigation player with greater experience in managing litigation. Allocating control of the defense to insurers, then, should minimize total claim costs and result in lower premiums for insureds.[13]

Because the duty to defend has a different scope than the duty to pay, insurers often provide a defense to the insured even when the insurer disputes the existence of coverage in the policy. To illustrate, suppose the plaintiff's petition states that the insured defendant "negligently caused a sudden discharge" of a polluting substance. The insurer has a duty to defend. The allegations, if assumed to be true, would establish a liability covered under the policy. But the insurer does not necessarily owe a duty to pay. The insurer will have this duty only if (1) a judgment is entered against the insured (after a trial or insurer-approved settlement), and (2) the insured prevails on the coverage issue.[14] Thus, the insurer is obligated to defend this suit even

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12. *See* ALLIANCE OF AM. INSURERS, *supra* note 8, at 198 (reprinting CGL policy which states that the insurer has the "right and duty" to defend, and "may at our discretion investigate any 'occurrence' and settle any 'claim' that may result"), *id.* at 29 (reprinting homeowners' policy which provides that the insurer "may investigate and settle any claim or suit that we decide is appropriate"). For discussion of the right to defend, see William T. Barker, *"The Right and Duty to Defend:" Conflicts of Interest and Insurer Control of the Defense*, *in* A.B.A., TORT AND INS. PRAC. SEC., LITIGATING THE COVERAGE CLAIM 195 (1992); Charles Silver & Kent Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 DUKE L.J. 255, 264-65 (1995). For an argument that the standard policy language does not unambiguously give insurers the right to control the defense, see Robert H. Jerry, II, *Consent, Contract, and the Responsibilities of Insurance Defense*, 4 CONN. INS. L.J. 153 (1998).

13. *See* Barker, *supra* note 12, at 204-05; Silver & Syverud, *supra* note 12, at 265.

14. Sometimes, the factual issue on which coverage will turn is also relevant to the tort suit. When this occurs, the way in which the underlying defense is conducted can affect the outcome of the coverage issue. For instance, if the insurer plans to assert a policy exclusion for intentional harm, and if the insurer is allowed to control the defense, the insurer might shape the defense so that any finding of liability is more likely to be based on intentionally harmful conduct rather than on merely negligent conduct. Many jurisdictions require the insurer to give up control over the defense, and to pay for independent counsel, when the manner in which the defense is conducted in the underlying claim can affect the outcome of the coverage dispute. *See, e.g.*, CAL. CIV. CODE § 2860 (West Supp. 1998). For discussion of this rule and the other approaches to the problem, see JERRY, *supra* note 8, § 114[c]; WINDT, *supra* note 8, § 4.22. When the insurer is required to relinquish control of the underlying defense for this reason, the findings in the tort suit should not be given collateral estoppel effect in the coverage suit. *See id.* § 6.22, at 433.

though the insurer contests coverage.

These familiar and well-intentioned principles, however, lead to a recurring problem: the coverage issue often remains unresolved throughout much or all of the time that the underlying liability suit is pending. It is important to understand why this occurs, why it is undesirable, and why the *adjudicative* solutions to this are limited.

When the insurer accepts a defense in a disputed coverage case, the adjudicatory response to the coverage issue might take one of two forms.[15] First, at either the insurer's or insured's behest, the coverage issue could be litigated in a separate declaratory judgment action while the underlying suit is pending. If the insurer prevails, then the insurer will owe no duty to defend or to pay, and may safely withdraw from the defense. A majority of jurisdictions allow this option in at least some cases – specifically, when the facts at issue in the coverage suit do not overlap with those in dispute in the tort suit.[16] Second, litigation of the coverage question could be postponed until the completion of the underlying suit. So, if the insurer filed a declaratory judgment action on the coverage question, the action would be dismissed or stayed until the completion of the underlying suit. Currently, most courts adopt the second approach when facts relevant to the coverage issue overlap with the facts at issue in the underlying suit.[17]

In many cases, then, the declaratory judgment action will not be allowed to proceed until completion of the underlying case. Even when the declaratory judgment is allowed to move forward, resolution of the coverage dispute often will not occur quickly. Thus, the coverage issue will linger unresolved – and the insurer will have a duty to defend – during much or all of the tort suit.

The existence of an unresolved coverage issue during the pendency of the underlying suit has several undesirable effects. First, this may result in inefficient levels of indemnity insurance; that is, higher levels of insurance payments for harms that, ultimately, are not covered by insurance. This point requires some explanation. One should begin by recognizing that plaintiffs'

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15. For more detail on these options and which adjudicatory approaches are most desirable, see Ellen S. Pryor, *The Tort Liability Regime and the Duty to Defend*, 58 MD. L. REV. (forthcoming 1998).

16. *See* Britamco Underwriters, Inc. v. Central Jersey Invs., Inc., 632 So. 2d 138, 140-41 (Fla. Dist. Ct. App. 1994); 2 ALLAN D. WINDT, INSURANCE CLAIMS AND DISPUTES § 8.03 (3rd ed. 1995).

17. *See, e.g.*, North East Ins. Co. v. Northern Brokerage Co., 780 F. Supp. 318, 320 (D. Md. 1991); Morris v. Leopold, 771 P.2d 1206, 1210 (Wyo. 1989).

lawyers have reason to plead cases strategically in a way that triggers the duty to defend whenever the insured has insufficient noninsurance funds to satisfy a likely judgment or settlement.[18] The reasons for strategic pleading may include (1) the settlement value created by the prospect of further defense costs; (2) the settlement value created by the extracontractual duty to settle that insurers owe even in cases of questionable ultimate coverage; and (3) the potential for an insurer misstep in handling the defense, which could lead to an extracontractual claim that ultimately will increase payment to the tort plaintiff.[19]

All these factors increase the chance that insurance funds will be paid to indemnify noncovered harms. This is undesirable when we consider that one key aim of the tort-insurance regime is optimal spreading--that is, efficient allocation of the risks and costs of unprevented accidents.[20] Many of the exclusions and limitations in standard policies can plausibly be viewed as reflecting optimal levels of indemnity coverage because they comport with the level of indemnity insurance that insureds would wish to purchase ex ante.[21] And, even if particular exclusions arguably are not optimal in efficiency terms, it does not make sense to "cure" this inefficiency by converting the duty to defend into a somewhat unpredictable yet often potent source of indemnification.[22]

Second, leaving the coverage issue unresolved increases the potential for collateral litigation arising from the initial lawsuit. As long as the coverage issue is unresolved and the insurer is providing a defense in the case, there may be disagreements and missteps that ripen into additional lawsuits, including claims that the insurer failed to settle, that insurance defense counsel breached a duty owed to insurer or insured, or that the insurer

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18. For a more detailed analysis of pleading and other strategies designed to access insurance, see Ellen S. Pryor, *The Stories We Tell: Intentional Harm and the Quest for Insurance Funding*, 75 TEX. L. REV. 1721, 1729-35 (1997).

19. *See id.*

20. *See* GUIDO CALBRESI, THE COSTS OF ACCIDENTS 26-31 (1970) (giving the classic exposition of loss spreading – what he calls reducing "secondary costs" – as one of the key aims of an accident law scheme); ABRAHAM, *supra* note 8, at 10-13 (explaining how insurance furthers the aim of efficiency in spreading). For discussion of how various doctrines relating to insurer claim-handling affect efficiency in both loss prevention and loss spreading, see ABRAHAM, *supra* note 8, 173-206; Ellen S. Pryor, *Comparative Fault and Insurance Bad Faith*, 72 TEX. L. REV. 1505, 1511-13 (1994).

21. *See* Pryor, *supra* note 18, at 1741-45.

22. *See id.* at 1744.

defended the case wrongfully. Resolving the coverage issue would eliminate or greatly reduce the chances for disagreements of this sort.

Given the problems created by an overhanging coverage dispute, can we construct better *adjudicatory* approaches to simultaneous coverage liability disputes? An obvious possibility is widening the declaratory judgment route by allowing insurers to pursue simultaneous coverage-related declaratory judgment actions even when the coverage issue overlaps factually or legally with the issues in the tort suit.[23] As argued in another article, the standard language relating to the duty to defend should not be interpreted as ruling out this option.[24] In addition, the option is not objectionable, as some courts have suggested, just because the insurer becomes an opposing litigant on a coverage question.[25] Any insurance relationship potentially will generate a dispute that pits the insurer against the insured on the issue of coverage. And, given the nature of these disputes, jurisdictions properly have fashioned potent extracontractual remedies for opportunistic breaches by insurers.[26]

There is a special problem, however, with allowing this type of coverage dispute to go forward.[27] In some cases, the coverage dispute will involve facts or theories that overlap with the substantive issues at stake in the underlying case. In these overlapping cases, the insurer's actions in the coverage suit may weaken the insured's position in the underlying suit. The classic though not exclusive example is a case involving the arguable application of an intentional harm exclusion. In the declaratory judgment proceeding, the

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23. Another possibility is to do away with the complaint allegation rule, and instead measure the duty to defend by the actual facts relating to coverage. Professor Susan Randall recently has argued for this approach. *See* Susan Randall, *Redefining the Insurer's Duty to Defend*, 3 CONN. INS. L.J. 221 (1997). Our own view is that the duty to defend should be modified to an "actual" facts approach, but only in certain cases. Even under these modifications, however, the coverage issue would sometimes remain unresolved during much of the tort suit.

24. *See* Pryor, *supra* note 15. *See also* Randall, *supra* note 23, at 245-50 (arguing that standard policy language does not support the strict complaint allegation rule).

25. *See* Hecla Mining Co. v. New Hampshire Ins. Co., 811 P.2d 1083, 1090 n.11 (Colo. 1991) (en banc) (stating that requiring average insureds "to bear the onerous financial burden of proving that they are entitled to a defense from liability claims asserted against them would deny the insured the protection afforded by a liability policy"); Morris v. Farmers Ins. Exch., 771 P.2d 1206, 1211 (Wyo. 1989) (noting six reasons for disallowing the declaratory judgment action, including that it would unduly burden the insured).

26. *See generally* articles contained in the *Symposium on the Law of Bad Faith in Contract and Insurance*, 72 TEX. L. REV. 1203 (1994).

27. More detail on this point appears in Pryor, *supra* note 15.

insurer will try to prove that the insured caused the injury intentionally. This may harm the insured's position in the tort suit, even if the insured is being represented by independent counsel in the tort suit. The insurer might uncover facts or develop proof that the plaintiff's counsel would not. Or the insured's best defense, in the declaratory judgment action, might be that he acted only negligently. Yet asserting this negligence defense could undermine the insured's ability to argue, in the tort suit, that he was not negligent at all.[28] The potential for harmful spillover is exacerbated when the insured does not have sufficient funds to defend himself adequately in the declaratory judgment proceeding.

In sum, allowing the declaratory judgment action to proceed in overlapping fact contexts has severe drawbacks. Yet the alternative adjudicatory approach--dismissing or staying the declaratory judgment action--leaves the coverage issue unresolved through the pendency of the underlying suit. This creates all the problems noted earlier.

II. MEDIATION IN SIMULTANEOUS COVERAGE-LIABILITY CONTEXTS

A. Introduction: The Cases, the Mediation Process, and the Participants

Given the problems with the existing adjudicatory options, it makes sense to examine whether and how mediation can be an effective approach in simultaneous coverage–liability contexts. Two main points will emerge from the discussion. First, mediation in these contexts will usually not be successful unless it can take account of both the liability and the coverage aspects of the case. Second, in general, none of the parties needs to fear that concurrent mediation of both aspects of the dispute will disadvantage that party's position as to either part of the dispute or as to later collateral litigation.

The claim that concurrent mediation is feasible and useful implicates a larger scholarly and cultural debate over the desirability of settlement and settlement–promoting processes. A sizable literature now raises a number of questions on this topic, including whether settlement or alternative dispute resolution procedures reduce the public realm of justice too substantially, disfavor subordinated groups, or result in compromises that are objectionable

28. *See* Hartford Ins. Group v. District Court, 625 P.2d 1013, 1016 (Colo. 1981); State Farm Fire & Cas. Co. v. Finney, 770 P.2d 460, 466 (Kan. 1989).

on moral principles.[29]

We share the view that the mediation process and mediation-promoted settlements can be desirable for both the litigants and the civil justice system. More importantly, there are special reasons to conclude that "a trial is a failure"[30] in the context of many simultaneous coverage-liability disputes. As we will see, the simultaneous existence of both a liability and a coverage dispute often makes it difficult to settle either of the disputes, standing alone. As a result, a liability–only or coverage–only settlement that otherwise might be fair, desirable, and efficient will be difficult to achieve only because the other dispute remains unresolved. This point gains force when one recalls that *adjudication* of coverage is often not available until after adjudication or resolution of the liability case. Concurrent mediation, then, can offer a way around this structural barrier.

To explore concurrent mediation, we will examine several case scenarios which differ in ways that may affect either the usefulness of mediation or the methods for effective mediation. We will examine the following scenarios: (A) One insurer, insured with assets adequate to satisfy all or a substantial part of the potential tort settlement or judgment; (B) One insurer, insured without assets adequate to satisfy all or any substantial part of the potential tort settlement or judgment; (C) Two or more insurers (either because excess insurance is involved or because two or more policies arguably apply), insured with assets adequate to satisfy all or a substantial part of the potential tort judgment; (D) Two or more insurers (either because excess insurance is involved or because two or more policies arguably apply), insured without assets adequate to satisfy all or a substantial part of the potential tort judgment. The discussion of all these scenarios will not focus on the benefits that mediation can afford over litigation generally,[31] but instead will concentrate on the specific reasons why concurrent mediation can be feasible

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29. *See, e.g.*, Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995). For a detailed consideration of the criteria by which settlement might or might not be judged preferable to trial, see Marc Galanter & Mia Cahill, *"Most Cases Settle:" Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339 (1994).

30. *See* Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 320 (1991).

31. These include timely and efficient resolution; informality and flexibility of the process; the protection of rules of confidentiality and privilege; control of the process and control of the outcome by the participants, rather than a court; and the saving of attorney's fees and other costs of litigation.

and desirable in this context.

In all the scenarios discussed, we are assuming that the arguable insurance coverage at stake is primary coverage, written without a sizeable deductible or self-insured retention, and containing the duty to defend as well as the duty to indemnify. These are the characteristics of most individual lines policies, such as the liability sections of homeowners' and auto policies. In addition this also describes commercial general liability insurance policies and many other standard commercial lines, such as boiler and machinery, business auto, and so forth.

Much commercial insurance differs from these standard lines. Commercial insureds often carry a large deductible or self-retention, thus retaining an initial and not-insignificant slice of the risk.[32] Many such arrangements do not include a duty to defend, although the policies often contain provisions allowing the insurer to associate in the defense of a claim that threatens to penetrate the insurer's layer.[33] Other commercial arrangements include excess or reinsurance, and may generate disputes between primary and excess insurers or reinsurers. The incentives and dynamics relevant to mediation in these contexts differ enough to warrant more elaborate treatment in a separate article.

Some introductory points are necessary about the process and the participants. Although the ground rules of the mediation process vary among jurisdictions due to statutory mandate, judicial edict, or local custom and practice, these ground rules tend to set up a process with the following attributes:

- Mediation is a non-binding process; although parties to a mediation can, by agreement up front, agree to be bound by the mediator's recommendation, mediation ordinarily implies

32. For discussion of insurance arrangements that differ from standard policies in the allocation of risk, see William T. Barker, *Combining Insurance and Self Insurance: Issues for Handling Claims*, 61 DEF. COUNS. J. 352, 352-55 (1994); Kent D. Syverud, *The Duty to Settle*, 76 VA. L. REV. 1113, 1201-07 (1990).

33. For instance, directors' and officers' liability policies usually do not contain separate defense insurance uncapped by policy limits. Rather, the total policy limits apply to both indemnity costs and defense costs, and the insured provides its own defense. *See* ALLIANCE OF AM. INSURERS, *supra* note 8, at 420-23 (reprinting directors' and officers' liability policy in which "loss" is defined to include indemnity payouts and defense costs, and under which the insurer has no duty to defend the insured).

that the participants are under no obligation to fashion an agreement, and the mediator cannot compel, direct, or order an outcome.

• To say that "mediation is a non–binding process" does *not* mean that a compromise and settlement agreement reached after mediation is not binding; a mediated settlement agreement is a binding and enforceable contract; thus, mediation can and frequently does achieve final, non-appealable resolution.

• Mediation is a confidential process, with virtually all communication assigned a privileged, non-discoverable status; many states now have an ADR statute that specifically exempts from discovery in any proceeding any communication that transpires during the mediation process; mediators usually cannot be compelled by subpoena or otherwise to disclose offers, demands, positions taken, their opinions, or any other matter pertaining to a mediation; the cloak of privilege and confidentiality protects all participants and enhances the dynamic of the mediation process.

• Mediation is an informal process; mediation sessions typically involve an opening, joint session, in which the mediator goes over the ground rules, and in which every interested party is given an opportunity, in whatever fashion they desire, to share their perspective on the dispute; joint sessions are often perfunctory and polite, but just as often they are an opportunity for information gathering, venting, and advocacy.

• Joint sessions typically dissolve into private caucuses, in which the mediator is able to further explore the interests and positions of each party, separately and confidentially; unless explicitly authorized otherwise, any communication received by the mediator in a private caucus may not be disclosed to any other party; after a series of private caucuses, the mediator is often in a position to encourage proposals and

> solutions and to facilitate resolution. When appropriate, the mediator can reconvene the parties, create separate caucuses for client-representatives only or counsel-only, or otherwise create whatever mechanism facilitates communication, and ultimately resolution.

With these ground rules in mind, the "concurrent mediation of liability and coverage disputes" (or "concurrent mediation") contemplates mediation with the full participation of (1) the claimant and the claimant's attorney; (2) the insured defendant and defense counsel for the insured; (3) a representative of the insurer authorized to represent the insurer with respect to settlement of the liability claim; and (4) a representative of the insurer with respect to the coverage issue, and insurer's coverage counsel. A bit more detail is necessary about these participants.

Consider the defense counsel for the insured. Most lawsuits against insured defendants do not involve coverage disputes or insufficient policy limits; rather, the insurance policy provides full coverage for any likely settlement or judgment.[34] In such situations, the insurer ordinarily retains defense counsel who represents both the insured and the insurer as joint clients.[35] In addition, in these full coverage situations, the insurer is permitted, as the standard policy contemplates, to control the defense and settlement of the underlying claim.[36] If the insured interferes substantially with this control, or fails to cooperate in some significant manner, the insured's actions might be deemed a breach of the policy's cooperation clause and thus might forfeit the insured's coverage under the policy.[37]

This ordinary arrangement can change when the lawsuit against the insured asserts a claim that is arguably uncovered, or when the lawsuit poses the risk of a judgment in excess of the policy limits. First, if the insurer raises a coverage doubt and if the manner in which the underlying defense is conducted can affect the outcome of the coverage issue, many jurisdictions

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34. *See* Silver & Syverud, *supra* note 12, at 264-65.

35. *See id.* at 272-80. Some courts and commentators disagree that insurers may and do have co-client status with the insured in full coverage situations. For a general introduction to the debate, see JERRY, *supra* note 8, § 114 [b]. A recent symposium issue of this journal includes a number of articles devoted to this topic. *See* 4 CONN. INS. L.J. 1 (Symposium: Liability Insurance Conflicts and Professional Responsibility, 1998.)

36. *See* Silver & Syverud, *supra* note 12, at 284-85.

37. *See* JERRY, *supra* note 8, § 110.

require a significant departure from the standard arrangement: the insurer must relinquish control of the underlying defense, and the insurer must provide the insured with independent counsel who represents only the insured.[38]

Second, even when a coverage issue does not require the insurer to relinquish control over the defense, the insured might retain separate coverage counsel to represent the insured's interests with respect to coverage. Third, the potential for a judgment in excess of policy limits might prompt the insured to retain separate counsel to represent only his or her interests in defense or settlement. In these second and third situations, the insurer still might be allowed to exercise control over defense and settlement of the claim,[39] but the insured will have separate counsel who represents the insured's interests in connection with the claim.

In sum, in a simultaneous mediation, defense counsel for the insured might include any of the following: independent counsel who represents only the insured with respect to the liability claim; defense counsel who represents the insured and the insurer jointly with respect to defense of the claim; defense counsel who represents the insured and insurer jointly with respect to defense along with separate counsel who represents only the insured's

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38. *See, e.g.*, CAL. CIV. CODE § 2860 (West Supp. 1998); Illinois Mut. League Risk Mgmt. Ass'n v. Seibert, 585 N.E.2d 1130, 1137 (Ill. App. Ct. 1992). *See generally* JERRY, *supra* note 8, § 114[c]; WINDT, *supra* note 8, § 4.22. Some jurisdictions require the insurer to fund independent counsel in a wider set of circumstances. *See* WINDT, *supra* note 8, § 4.20, at 219-20 (discussing and criticizing the cases that seem to suggest that a reservation of rights always creates a conflict of interest that requires independent representation of the insured); Barker, *supra* note 12, at 284-86 (discussing and criticizing the minority of cases that have required the insurer to relinquish control over the defense whenever there is any question of coverage).

39. We are not answering here the difficult questions of whether and when a risk of excess exposure requires the insurer to relinquish control over settlement and whether that risk disables an insurance defense counsel from representing both insured and insurer as joint clients. Currently, scholarly and judicial opinions on these points remain divided and in flux. For discussion of the divisions among insurance scholars and courts, compare Jerry, *supra* note 8, at § 114 [d][1] (summarizing the issue and expressing doubts that the joint client model is adequate in this situation), with Barker, *supra* note 12, at 311-23 (arguing that joint representation is possible even in light of excess exposure if the scope of representation excludes settlement). The notion that the scope of representation of the insured might exclude settlement first appeared in Robert E. Keeton, *Liability Insurance and Responsibility for Settlement*, 67 HARV. L. REV. 1136, 1168-73 (1954).

interests as to defense or settlement of the claim.[40]

Now consider the insurer's representatives and lawyers. One necessary participant will be claims personnel authorized to make decisions about settlement of the underlying liability claim. Yet, because coverage is contested, a necessary participant is an insurer representative who has knowledge about the coverage issue. Internally, insurers may separate the claims file–the file relating to the underlying liability suit–from the coverage file. Especially when the insurer retains control of the underlying suit, separation may help protect the insurer from the contention that coverage-only information came to the insurer improperly–for instance, that defense counsel developed damaging coverage–only information without proper disclosure to and consent from the insured.

This is not to say that no one representative of the insurer is or should be authorized to make a decision about both coverage and liability. Such a decision, of course, is the objective of the simultaneous mediation. Rather, the point is that the company, as an internal matter, may have handled the coverage issue separately from the liability issue. Thus, the company should be encouraged to send whichever personnel are necessary to air the coverage issues as well as the liability issues.

A final point that should be noted about these various actors is whether and in what sense their participation is mandatory. In some jurisdictions, participation by all these individuals in mediation will be voluntary because the court might not have the power to require the parties to engage in any form of alternative dispute resolution process. By contrast, in state or federal courts that employ court-annexed alternative dispute resolution,[41] courts often order parties to participate in mediation. In a number of such jurisdictions, however, the extent to which the court may issue an enforceable order to mediate, and the extent of required participation,[42] remain unsettled issues.[43]

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40. The insured might be prompted to retain separate counsel for either the risk of an uncovered claim or the risk of a covered claim that may exceed the limits of the policy. In practice, both risks might be present in a given case, and the insured's separate counsel might represent the insured both as to the uncovered risks and the excess exposures.

41. *See, e.g.*, 28 U.S.C.A. § 471 (West 1998) (requiring district courts to implement a civil justice and delay reduction plan, and authorizing consideration within that plan of the use of alternative dispute resolution, including mediation); TEX. CIV. PRAC. & REM. CODE ANN. § 154.02 (a) (West 1998) (authorizing courts to refer cases to an ADR process).

42. The notion of full participation raises a number of issues. Most court-ordered mediations take place with some version of the following court directive:

The notion of a concurrent mediation adds another twist to this still-evolving area of law. Even when the court has the power to order mediation

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> Party Representatives must have authority to settle and all persons necessary to the decision to settle shall be present.

Advocates and commentators disagree over the meaning of "authority to settle," or what the expression should mean. If a policy provides for $1 million in liability coverage, but the personal injury claimant has medical expenses of only $10,000, and no lost time for work, has the insurer satisfied the court order if its claim representative attending the mediation has "authority" to settle for $25,000? For $50,000? For any amount less than the entire $1 million policy limit? At the end of the eight-hour mediation, after all the attendees have participated in information gathering and re-evaluation, as well as shared in the tedium, frustration and boredom of a very long and exhausting negotiation process, the mediator suggests that the claim can be settled for $60,000. All participants, including the adjuster, agree that this is a reasonable suggestion. However, the claims representative must call his supervisor for the additional authority necessary to resolve the claim. The supervisor, whose focus and energies have been directed throughout the eight-hour mediation on other matters, declines to approve the additional authority. The mediator, reluctantly, declares an impasse. Most participants to the mediation, if made aware of the true circumstances, would presume that had the supervisor been a full participant in the mediation, the matter would have been compromised and settled.

Has the insurer in this hypothetical violated the court order? Probably not. The insurer will argue that it had a representative with "authority" present at the mediation, and that had the claimant exercised more appropriate judgment, the matter could and should have settled for the $50,000 offered at the mediation.

Regrettably, the occasional practice of insurers of "underparticipating" present at the mediation presents a real dilemma for mediators and for the courts. However, the remedy of legislating or court ordering "good faith" in the process is not an obvious solution. The controlling law in many jurisdiction is that there is no "good faith" obligation in the mediation process. *See* Kimberlee K. Kovach, *Good Faith in Mediation --Requested Recommended, or Required? A New Ethic*, 38 SO. TEX. L. REV. 575 (1997) (discussion of current status of good faith in mediation). Many ADR practitioners and courts, while frustrated at the occasional misuse of the process, have concluded that a good faith prescription would be worse than the illness, and have declined to inquire into the quality of the ordered participation. Other than ordering participation and payment of a share of the mediation fee, most courts are reluctant to go further. *See* Decker v. Lindsey, 824 S.W.2d 247 (Tex. App. 1992, no writ); *see also* David S. Winston, *Participation Standards in Mandatory Mediation Statutes: "You Can Lead A Horse to Water . . .,"* 11 OHIO ST. J. ON DISP. RESOL. 187 (1996); Note, *Leading Horses to Water: May Courts Which Have the Power to Order Attendance at Mediation Also Require Good-Faith Negotiation?*, 2 J. DISP. RESOL. 377 (1992).

43. Much depends, of course, on the terms of the particular statute or court rule governing the use of ADR. For discussion of this still-evolving area of law, see Edward F. Sherman, *A Process Model and Agenda for Civil Justice Reform in the States*, 46 STAN. L. REV. 1553, 1573-74, 1576-78 (1994) (discussing, respectively, the issue of mandatory ADR and the scope of the required participation).

between the parties to the liability dispute, does this extend to requiring mediation of the coverage issue? This seems unlikely. It is true that courts often require the participation of insurer's representative, and that the insurer's decisionmaking as to the liability suit does and may take account of the coverage issue. But these points form too thin a basis for concluding that the court presiding over the liability dispute has the power to order the insurer and insured to mediate their coverage dispute. We should note, however, that we are aware of instances in which courts have ordered the parties to engage in concurrent mediation, apparently without objection by any of the parties.

B. One Insurer: Insured With Assets

We will first consider a scenario in which the claim involves one insurer and an insured with non-insured assets sufficient to satisfy any likely judgment against the insured. An example is a suit filed against the insured by a former employee of the insured. The suit alleges breach of contract for the plaintiff's termination by a supervisor, sexual harassment as a result of the supervisor's unwelcome suggestive sexual comments, defamation resulting from comments and written reports made by the supervisor about the plaintiff, and negligent hiring and training by the employer. The employer is a large corporation with sufficient assets to satisfy any likely judgment in this case; a judgment against only the supervisor would be uncollectible. The employer's only primary insurance coverage is a commercial general liability policy. Under the policy, liability arising from negligent hiring-training or defamation might be covered; liability arising from sexual harassment or breach of contract is not covered.[44] The insurer provides a defense under a reservation of rights, and might or might not file a declaratory judgment action. If the insurer does file a parallel action, the declaratory judgment court might dismiss or stay the action, depending on whether the issues in the two actions overlap. Whether or not the insurer files a declaratory judgment

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44. This is simply a summary of some very complicated and still-evolving questions of coverage under CGL policies for employment-related practices. *See generally* A.B.A., TORT AND INS. PRAC. SEC., INSURANCE COVERAGE OF EMPLOYMENT DISPUTES (Peter Bennett ed. 1996) (collecting papers discussing employment-related coverage issues under CGL and other policies). Employers are increasingly purchasing policies aimed specifically at this area of risk, usually termed "employment practices liability" or "EPL" policies. A number of insurers now market such a product, even though no standard form has been promulgated by the Insurance Services Office. *See id.* at B-1 (Joseph Montelione, *Coverage Under Commercial General Liability and Directors' and Officers' Liability Policies*).

action, and whether or not the court dismisses or stays the action, the unresolved coverage issue will continue to linger over the underlying lawsuit for some period of time. This poses all the problems discussed in Part II.

1. Possibility of Successful Liability-Only or Coverage-Only Settlement

In this example, as in the others to follow, we will first consider whether the parties are likely to settle either the liability–only dispute, or the coverage-only dispute, without concurrent mediation or concurrent settlement efforts. Consider first the liability claim alone. When the insured has assets, the parties do have an incentive and a feasible way to arrive at a liability-only resolution even when the coverage dispute remains unresolved. Before outlining this path, we should first note briefly one avenue that will not be attractive to the parties when they approach the possible settlement of liability alone.

Consider a settlement along the following lines: the claimant and the insured settle the underlying suit for a particular sum; the claimant covenants not to execute on that sum; in exchange for the non-execution agreement, the insured assigns to the insured any rights the insured has against the insurer, including contractual and extracontractual rights.[45] Yet this will be an unappealing route from the claimant's perspective. Most obviously, since the insured has assets sufficient to satisfy the likely judgment, the claimant has little incentive to agree to a payment that is contingent on coverage or on the insurer's having breached a contractual or extracontractual duty. In addition, unless the insurer has breached a policy provision or the duty of good faith and fair dealing, the insured's settlement without insurer approval will forfeit policy coverage.[46] Thus, the claimant would be unwise to enter any such agreement without, at a minimum, having confidence that the insurer has

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45. For a detailed theoretical and doctrinal analysis of such arrangements, see Chris Wood, Note, *Assignments of Rights and Covenants Not to Execute in Insurance Litigation*, 75 TEX. L. REV. 1373 (1997).

46. *See* ALLIANCE OF AM. INSURERS, *supra* note 8, at 193 (reprinting CGL policy that defines an agreed settlement as "a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative"). The policy conditions relating to insurer approval of settlement do not bind the insured if the insurer has already breached the insurance policy. *See* WINDT, *supra* note 8, § 5.16, at 330-31. But, in our scenario, the insurer has not done anything to breach the policy or any extracontractual obligation. Rather, the insurer is providing a defense subject to a reservation of rights.

indeed breached a duty. Yet, in our example, the insurer has not breached its obligations; it has provided a defense and has raised a legitimate coverage doubt. In addition, even if the insured's settlement without the insurer's approval does not forfeit policy coverage, an agreement of the sort just described will not be enforced in some jurisdictions,[47] and will be subject to challenge in other jurisdictions on the basis of fraud, collusion, or unreasonableness.[48]

A different route is available, however, for settling the liability claim only. The underlying claim could be settled for a particular sum, with the approval of the insurer. The insurer might agree to pay the sum and then pursue reimbursement of that amount from the insured; conversely, the insured might agree to pay the sum and then to seek reimbursement from the insurer. For instance, suppose the policy limits are $1 million, the settlement value of the liability case (given liability and damages) is $750,000.00, and the claimant offers to settle the case for $750,000.00. The chances of the insurer prevailing on coverage are 70%. Both the insured and the insurer would have reason to pay the demand even if the coverage issue remains unresolved. From the insurer's perspective, refusing to pay the demand carries some risk even though the insurer's coverage argument is a strong one. This is because, if the case goes on to trial and results in a verdict in excess of policy limits, and if the insurer proves to be mistaken about the coverage issue, the insurer may well be liable for the full excess judgment under duty-to-settle doctrine.[49] Thus, the insurer might prefer paying the demand and

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47. *See* State Farm Fire & Cas. Co. v. Gandy, 925 S.W.2d 696 (Tex. 1996) (invalidating the use of a pre-trial assignment when the insurer has provided a defense and has made a good faith effort to adjudicate its coverage doubt). For analysis and critique of the Texas approach, see Wood, *supra* note 45, at 1393-1402.

48. For a discussion and analysis of the approaches, see *id.* at 1389-1402.

49. In some jurisdictions, the insurer will be deemed to have breached the duty to settle if the insurer has a coverage doubt, rejects a within-limits settlement demand that is reasonable given the merits of the underlying suit, and then loses on the coverage question. *See* Johansen v. California State Auto. Ass'n Inter-Ins. Bureau, 538 P.2d 744, 748-49 (Cal. 1975). In other jurisdictions, the insurer will not be liable in such cases unless the insurer's coverage position was unreasonable, not just mistaken. *See* Mowrey v. Badger State Mut. Cas. Co., 385 N.W.2d 171, 178-85 (Wis. 1986). For further discussion, see Stephen S. Ashley, *Coverage Doubts and the Insurer's Duty to Settle*, 4 BAD FAITH LITIG. REP. 27 (1988). Under either version of the doctrine, however, the insurer faces a real risk of excess liability when it rejects a reasonable within-limits demand in a case in which the insurer has a coverage doubt. The size of that risk depends on the strength of the coverage doubt and on whether the jurisdiction imposes liability only when the coverage doubt was unreasonable.

pursuing reimbursement from the insured rather than facing the risk of exposure to the full amount of the excess verdict.[50]

The insured also would have reason to agree to pay the claimant's demand and to seek reimbursement from the insurer. If the demand is rejected and the case goes on to trial, the case might result in a judgment in excess of policy limits. As noted, the insurer eventually might have to pay that excess judgment under duty-to-settle doctrine if the insurer loses on the coverage issue. But, ex ante, the insured cannot be certain of this outcome, and faces a real risk of having to shoulder the excess verdict amount as well.[51] Thus, the insured has incentive to fund the reasonable settlement demand and then to pursue the insurer in a coverage action.

What is the likelihood of successful "coverage only" mediation? Generally, not good. In theory, a coverage-only settlement could take one of two forms: (1) a formula–such as an agreement that the insurer would fund a certain percentage of a settlement or verdict in the underlying case; or (2) a specific dollar amount. The formula approach would likely be unattractive to all when the amount of the underlying liability remains unknown. A coverage-only settlement for a specific dollar amount would generally be undesirable from the policyholder's perspective when the amount of the underlying liability (whether by verdict or settlement) remains quite uncertain.

In certain scenarios, a coverage-only settlement for a dollar amount might occur. One such situation is when the coverage amount represented by the carrier is quite small in relation to the value of the underlying claim. Or, the insured might strongly desire to take control of the defense and might be willing to relinquish the coverage claim to gain that control. More commonly, however, the parties will be disinclined to reach a coverage–only settlement in the face of an uncertain range of liability. And always the possibility of a totally successful defense is a tantalizing hope, creating a "maybe we don't need to be having this negotiation" environment.

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50. How the insurer chooses between these options depends on the strength of the coverage claim, the contours of duty-to-settle law in this particular jurisdiction, and the transaction costs associated with seeking reimbursement from the insured. *See supra* note 49.

51. The insured will have to pay the excess verdict amount if (1) the insurer wins on the coverage issue, or (2) the jurisdiction imposes duty-to-settle liability only if the insurer's coverage doubt, though mistaken, was reasonable, and in this case the insurer's coverage doubt was reasonable.

2. Possibility of Successful Concurrent Mediation

Let us now examine the concurrent mediation of liability and coverage. We will first explain why concurrent mediation in this context can achieve a successful resolution of both liability and coverage. We then discuss, in the next subsection, whether concurrent mediation poses risks for any of the participants.

The claimant in this scenario is not concerned about an uninsured liability; consequently, the claimant's overall evaluation of the claim and its settlement potential should remain unaffected by the coverage dispute between the insurer and insured. But the coverage dispute might have one influence on the settlement dynamic: the claimant might make a more realistic and reasonable demand than he might otherwise, so that an equally meaningful negotiation can occur between the insurer and insured over how to satisfy the demand.

For example, suppose that, absent any coverage dispute, counsel for the former employee values at $150,000.00 the claim against the former employer and supervisor (given the likely damages discounted by the probability of prevailing on liability). Ordinarily, the claimant's opening demand might be in the range of $600,000.00 to $800,000.00. With coverage at issue, the settlement value of the claim is still $150,000.00, but claimant's counsel must consider whether making an excessive demand will discourage any meaningful negotiation by causing the insurer and insured to presume that the matter cannot be resolved. An opening demand of $300,000.00 to $450,000.00, communicated with the instruction that the claimant is making a demand near his "bottom line" in recognition of the fact that the insurer and insured have to conduct their own negotiation, is likely to energize the resolution process.

We are not claiming that, in a concurrent mediation setting, claimants always will or must alter the negotiation strategy that they pursue in liability cases uncomplicated by insurance considerations. Some claimants' counsel will not deviate from their usual negotiating strategy in the face of a coverage issue, especially when the defendant has sufficient non-insurance assets. Our point is only that the dynamic just described is plausible from claimant's perspective and does occur in some concurrent mediations.

Now turn to the insured's perspective. Concurrent mediation allows the insured, in this instance a resourceful corporation, to explore the interests of the claimant and to engage in information gathering and evaluation. At the same time, the insured, through its own counsel, can encourage its insurer to

address the risks that the insurer faces if the underlying case is not settled: the risk that any liability finding will indeed be an insured one, and the risk that trial might result in a judgment in excess of the policy limits, an excess for which the insurer will be liable if the insurer loses on the coverage issue or was unreasonably mistaken on the coverage question.[52]

From the insurer's perspective, concurrent mediation in this scenario may not be as beneficial as in scenarios to follow; as we will see, the insurer will have greater leverage in the negotiation with the claimant when the insured is essentially judgment proof. Still, even in the current scenario, concurrent mediation offers abundant benefits to the insurer. First, because the participation of the claimant will help the other parties know the range in which the case might be settled, the insurer and insured will be more likely to arrive at some settlement of their respective portions of the liability. For instance, suppose that the settlement value of the case, considering liability and damages alone, is $400,000, that the claimant has indicated willingness to settle in this range, and that the chances of a finding in favor of coverage are 70%. Even if the insurer and insured might agree on this appraisal of the coverage issue, they might not settle the coverage dispute without first having some certainty about the settlement sum itself. When the insured and insurer know that the insured will settle for a particular sum, they can translate their appraisals of the coverage issue into an agreement that the insurer will fund $280,000 and the insured will fund $120,000. The parties should find this preferable to the other alternatives--for instance, the insurer's payment of the full sum followed by a suit for reimbursement, or vice versa. The settlement avoids the litigation costs associated with these alternatives.

Second, concurrent mediation might be a desirable option from the insurer's perspective when the underlying claim involves a grievous personal injury that may result in a verdict significantly in excess of policy limits. In theory, the insurer's exposure is capped by the policy limits. But, as all participants realize, various missteps by the insurer can expose the insurer to the full excess judgment, mental anguish, and punitive damages.[53] The legal doctrines that govern these possible missteps--including duty to defend, duty to settle, vicarious responsibility of the insurer for defense counsel's errors--are often unclear or unstable in given jurisdictions. In addition, some uncertainty always exists about how factfinders will apply the standards. For

52. *See supra* note 49.

53. For more detail on these points, see Pryor *supra* note 18, at 1729-35.

a carrier faced with such a case, it might make more sense to "shut this case down" than to stand on its coverage defense and allow the underlying claim to proceed. Concurrent mediation offers the most efficient means of resolving all strands of the dispute.

One might counter that insurers should not be forced to pay any portion of uncovered claims, or that uncertainty about the various insurance doctrines and the consequences of insurer breach should not result in higher indemnity payouts. These complaints, however, are not appropriately directed at concurrent mediation, but at the complex fabric of tort and insurance law. Concurrent mediation is simply a tool for efficiently resolving this type of case; it is not the source of the incentives to reach a resolution.

Concurrent mediation also offers other benefits from the insurer's perspective. As noted, the claimant has an incentive to lower his opening demand; the insurer may engage in direct communication with and evaluation of the claimant and claimant's counsel; and the insurer may be able to evaluate directly the level of communication and possible cooperation between the claimant and insured.

Another feature of concurrent mediation has important implications for all the parties. A concurrent mediation may lead to a greater exchange of information than might occur in mediation or settlement discussions in a liability–only or coverage–only context. The coverage issue might depend in part on information–about the underlying facts or litigation strategy–that the claimant is in the best position to know. Or the insured might have extensive information relevant to liability and coverage, but might restrict the flow of this information to the insurer, especially when the insured is being represented by independent counsel.[54] In these circumstances, concurrent mediation increases the chances of filling the informational gaps relevant to liability and coverage. The claimant might offer information, assist the mediator with development of appropriate responses to questions and concerns that otherwise hinder evaluation of the liability claim by the insurer and insured, and serve generally as a resource, all in a format in which all

54. This point is only a brief account of an issue that is both practically and doctrinally complex: the extent to which the insured, whether or not represented by independent counsel, is allowed to withhold or "shade" liability-relevant information in dealings with the insurer. A full treatment of this would require a separate article. For now, our point is an empirical one: some "shading" or withholding of information does take place, especially when the insured is represented by independent counsel or defense counsel who perceives his or her obligations as flowing only to the insured.

communication is "off the record" and privileged.

3. Possible Concerns Raised By Concurrent Mediation

Does participation in concurrent mediation pose risks for any of the parties? Arguably, the claimant might prefer a liability–only mediation. The insured has sufficient non–insured assets to fund a reasonable settlement, and the addition of the coverage dispute to the ambit of the mediation will add to the time and possibly to the cost borne by the claimant. Other than these points, however, the claimant should not have concerns about concurrent mediation.

From the insured's perspective, one important issue is whether concurrent mediation might in some way undermine the strength of the insured's defense in the liability action, or the strength of the insured's coverage argument. After all, as explained in Part II, the potential for harm to the insured is one reason why courts generally disallow a simultaneous declaratory judgment action when the coverage issues overlap with the liability issues.

Likewise, from the insurer's perspective, the question is whether the insurer's participation in a concurrent mediation might weaken the chance of a defense verdict in the underlying lawsuit, strengthen the insured's chance of prevailing on coverage, or strengthen the insured's claim against the insurer in any later collateral litigation against the insurer–for instance, a claim of bad faith or negligent defense.

The strength of these concerns depends in part on the degree to which a mandate or privilege of confidentiality applies to mediation. This is a complex topic on which the law continues to evolve.[55] In many jurisdictions, statutes provide for the confidentiality of mediations to a greater or lesser extent.[56] Currently, however, the exact scope of the confidentiality privilege

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55. *See generally* JOHN S. MURRAY, ET AL., PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 379-419 (2d ed. 1996) (collecting and discussing statutory and judicial developments relating to confidentiality in mediation).

56. For instance, the Colorado statute specifies certain limited circumstances in which communications made during mediation will be discoverable or subject to disclosure by compulsion. These circumstances include: consent by all the parties and by the mediator; a statute requires disclosure; the communication reflects an intent to commit a felony, inflict bodily injury, or threaten a child's safety. COLO. REV. STAT. ANN. §13-22-307(2) (West 1998). The next subsection, however, states that "[n]othing in this section shall prevent the discovery or admissibility of any evidence that is otherwise discoverable, merely because the evidence

varies considerably among jurisdictions, and the statutes still present many unanswered questions.[57]

Although a complete analysis of how these confidentiality provisions would apply is beyond the scope of this Article, we can venture several conclusions about the concurrent mediation context. First, in states with broad and clearly defined boundaries relating to confidentiality in mediation, the parties could generally be confident that participating in an unsuccessful concurrent mediation would not disadvantage any of the parties with respect to the merits of the underlying case, the coverage case, or any later litigation between the carrier and insured. Second, even in states that afford only narrow or vague confidentiality protection to mediations, it seems unlikely that a concurrent mediation would *substantively* affect the parties' cases in the underlying liability suit or in the coverage dispute. The concurrent mediation might, of course, have strategic rather than substantive effects. For instance, the insurer that fully intends to adhere to a no–coverage position might be concerned that a concurrent mediation–and thus the claimant's presence – will intensify the pressure on the insurer to contribute something.

Third, any effect of a weak confidentiality protection would most likely be found in later litigation between the carrier and insured, whether for negligent defense, failure to settle, or some other bad faith theory. For example, some jurisdictions require proof of a within-limits settlement demand as one element of a claim for breach of the duty to settle.[58] Suppose that the only evidence of such an offer is a statement made during the mediation, and that the court allows the admission of this evidence. As

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was presented in the course of a mediation service proceeding or dispute resolution proceeding." *Id.* at §13-22-307(4). The Texas statute provides that any communication made during mediation, and the record of the mediation, shall not be subject to disclosure and shall not be admissible as evidence against the participant unless it is "admissible or discoverable independent" of the alternative dispute resolution proceeding. TEX. CIV. PRAC. & REM. CODE ANN. §154.073 (West 1998).

57. *See* MURRAY, ET AL., *supra* note 55, at 409-12 (reprinting comments made by Professor Carol Izumi, which were originally published as part of *Symposium on Standards of Professional Conduct in Alternative Dispute Resolution*, 1995 J. DISP. RESOL. 95) (summarizing the varied state approaches to confidentiality, and noting a number of unanswered questions).

58. *See, e.g.*, American Physicians Ins. Exch. v. Garcia, 876 S.W.2d 842, 849 (Tex. 1994). The alternative rule is that the carrier has an affirmative obligation to initiate or explore the opportunity for settlement in at least some circumstances. For discussion of both approaches, see WINDT, *supra* note 8, at § 5.02.

another example, suppose that the jurisdiction views the duty of good faith and fair dealing as extending to the conduct of the insurer in litigation with its insured.[59] Conceivably, comments or incidents occurring during a concurrent mediation might be admissible in later bad faith litigation between carrier and insured.

Notice, however, that any concerns raised by the examples do not stem from the *concurrent* nature of the mediation. These same situations could arise from a liability-only or coverage-only mediation. The plaintiff in later bad faith litigation might seek to introduce an offer to settle that was made during a liability-only mediation, or evidence of the carrier's allegedly bad faith conduct that occurred in a liability–only or coverage-only mediation.

We do not mean to dismiss the concerns that these and other situations might present. Indeed, our view is that a broad and firm privilege of confidentiality should apply in all mediation contexts. Our point is only that the parties need not fear that *concurrent* mediation adds anything significant to the risks posed by weak confidentiality protection for mediation.

A final source of risk also needs to be considered: the triangular relationship among insurer, insurance defense counsel, and the insured defendant. The questions generated by the relationship are old ones, but they remain the subject of judicial and scholarly examination and, sometimes, disagreement.[60] Some of the hardest issues involve the professional

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59. Only a few jurisdictions have adopted this view to date. The seminal case relating to this doctrine is White v. Western Title Ins. Co., 710 P.2d 309 (Cal. 1985). This was a first-party bad faith case, in which the plaintiff sought to introduce, as evidence of bad faith, certain conduct of the insurer that occurred after the plaintiff had filed suit against the insurer for recovery of the policy benefits. The court rejected the insurer's argument that "all evidence relating to events after plaintiffs filed suit should have been excluded on the ground that, once suit had been filed, the insurer stands in an adversary position to the insured and no longer owes a duty of good faith and fair dealing." *Id.* at 316. The court rejected such a "sharp distinction" between the pre-suit and post-suit conduct of the insured. But the court did note that a trial court should exercise its discretion and exclude "evidence of settlement offers or other conduct of the insurer" if the prejudicial effect of this evidence would outweigh its probative value. *Id.* For analysis and critique of *White*, see Randy Papetti, Note, *The Insurer's Duty of Good Faith in the Context of Litigation*, 60 GEO. WASH. L. REV. 1931 (1992).

60. *See* Stephen Pepper, *Applying the Fundamentals of Lawyers' Ethics to Insurance Defense Practice*, 4 CONN. INS. L.J. 27 (1997-1998) (noting that questions arising from the triangular relationship are "old... but still important"). A vast literature addresses the insurance issues and the ethical issues arising from the triangular relationship. For the most recent and comprehensive theoretical analysis of the three-way relationship, see Silver & Syverud, *supra* note 12. For general introduction to the current doctrinal landscape relating to the three-way

responsibilities of insurance defense counsel in contested coverage contexts.[61] There is general agreement that insurance defense counsel may not work to advance the interest of one client if this would conflict with the interest of the other, unless the conflict is waivable and the clients in fact consent after disclosure.[62] In general, this means that insurance defense counsel should avoid "lawyering" the coverage case for either client.[63] But many specific questions about the professional responsibilities of insurance defense counsel in contested coverage contexts remain unsettled.[64]

A natural concern, then is whether concurrent mediation might make more difficult the insurance defense counsel's effort to comply with ethical requirements. Coverage will be presented, discussed, and negotiated during a concurrent mediation. The insurance defense counsel's involvement or perceived involvement in the coverage issue might later be used as the basis of a malpractice claim, a claim against the carrier, or a claim that the carrier

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relationship, see JERRY, *supra* note 8, § 114; 3 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE §§ 28.3-.26 (4th ed. 1996). A recent symposium issue in this journal contains a number of articles that address the cutting edge of this general topic. *See* 4 CONN. INS. L.J. 1 (Symposium: Liability Insurance Conflicts and Professional Responsibility, 1998) *supra* note 35.

61. As explained earlier, depending on the jurisdiction and the nature of the coverage issue, the insurer might be required to relinquish control of the defense and to fund independent counsel for the insured. *See supra* notes 38-39 and accompanying text. In such cases, defense counsel's ethical responsibilities are much clearer because he or she has only one client.

62. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(a) (1994) (stating that a lawyer shall not represent a client if the representation of the client will be "directly adverse to another client, unless: (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents after consultation"); MALLEN & SMITH, *supra* note 60, §28.16, at 558-60; Silver & Syverud, *supra* note 12, at 334-35 (discussing permissible method of handling actual conflicts).

Another view sometimes appears in the cases: when a conflict appears, the insurance defense counsel owes primary allegiance to the insured, and may advance the insured's interests over those of the insurers. A convincing case against this view is made in Silver & Syverud, *supra* note 12, at 335-41.

63. *See* MALLEN & SMITH, *supra* note 60, § 28.20, at 600-01 (discussing cases in which defense counsel acted improperly by advancing the insurer's coverage claim); Silver & Syverud, *supra* note 12, at 293 (noting their tentative view that "defense counsel has no duty to serve as coverage counsel for either client and should refrain from providing coverage advice to either client").

64. *See* JERRY, *supra* note 8, § 114[a], at 779 (discussing the many types of conflicts and noting that "[u]nfortunately, there are few clear answers, and this creates further conflicts").

is estopped from asserting any coverage defenses.[65]

The concurrent mediation, however, can be structured in a way that allays these concerns. Insurance defense counsel should be involved only with the liability negotiation, not with the presentation, discussion, or negotiation of coverage issues. This will not eliminate the risk and uncertainty that defense counsel may face when engaged in dual representation. But it should ensure that the concurrent mediation does not add to that uncertainty and risk.

C. One Insurer, Insured Without Assets

Now consider the scenario in which the insured lacks non-insured assets sufficient to satisfy all or a substantial part of the likely judgment. A fashion model sues her designer-employer for sexual harassment. The employer has no assets other than his needles and thread, and no business insurance coverage. As luck would have it, however, the designer–employer has an endorsement to his homeowner's insurance policy that provides coverage for alleged defamation and certain other intentional torts otherwise excluded by ordinary homeowner's policies.[66] The insurer provides a defense, but reserves its rights to deny coverage on the basis of exclusions relating to business purpose and to knowing violations of penal laws or ordinances.[67]

How are the dynamics of mediation changed from the previous scenario? The possibility of successfully mediating the liability–only case is diminished because the insured has little, if anything, to offer the claimant. Coverage–only agreement is also unlikely, for basically the same reasons outlined in the discussion of the first scenario.

The chances for comprehensive resolution of liability and coverage, promising in our first scenario, are now enhanced because all the participants now have added incentive to compromise and settle through concurrent mediation. From the claimant's perspective, going ahead with the liability claim poses the risks of a no-liability finding or a finding of liability on an

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65. *See* Parsons v. Continental Nat'l Am. Group, 550 P.2d 94 (Ariz. 1976) (holding that defense counsel had acted unethically by obtaining and eliciting information about the insured that supported the insurer's coverage argument, and that the insurer was estopped from asserting this coverage defense); MALLEN & SMITH, *supra* note 60, § 28.20, at 600-01 (discussing cases in which defense counsel was found to have acted unethically in assisting one client on coverage).

66. For an example of such an endorsement, see ALLIANCE OF AM. INSURERS, *supra* note 8, at 50 (reprinting personal injury endorsement to standard homeowners' policy).

67. For examples of a homeowners' endorsement qualified by such exclusions, see *id.*

uninsured theory of recovery. Thus, concurrent mediation may present the only opportunity for compensation short of undertaking the time, expense, distraction, and emotional wear-and-tear inherent in the lengthy process of prevailing in two lawsuits. Concurrent mediation allows the claimant to focus the insurer on the avenues the claimant has to a recovery based on insured theories of recovery.

From the insured's perspective, concurrent mediation is a "can't lose" proposition. Because the insured has very little he can offer independent of his insurer's resources, the insured most often participates in this mediation with the goal of accomplishing resolution, perhaps on a confidential basis.

From the insurer's perspective, the coverage question gives the claimant an incentive to accept a settlement sum that reflects not just the value of the underlying lawsuit (likely damages discounted by the probability of liability), but that value discounted by the likelihood that coverage will exist. In addition, this scenario presents the same advantages noted in discussion of the first scenario: the insurer may engage in direct communication with and evaluation of the claimant and claimant's counsel; the insurer may be able to evaluate directly the level of communication and possible cooperation between the claimant and insured; and a concurrent resolution will ensure that the carrier's exposure is not transformed into a serious excess verdict.

As with the first scenario, however, we also must consider whether participation in concurrent mediation might disadvantage any of the parties. Again, the insured need not be concerned that participation in concurrent mediation will reduce the strength of the insured's defense in the liability action, or the strength of the insured's coverage argument. And, for the same reasons noted earlier, insurers need not fear that the concurrent mediation will weaken their coverage case or increase their exposure in later suits alleging bad faith or negligent handling of the defense.

The claimant, however, arguably might see one disadvantage to the concurrent mediation. Suppose that the liability facts are strong, damages are severe, and the amount of insurance (even if coverage exists) is small relative to the true settlement value of the case – for instance, the policy limits are $100,000 and the settlement value of the case is $850,000. Depending on the particular jurisdiction's law, insurer misconduct in the form of failure to settle or mishandling of the defense might give the insured an extracontractual claim for damages against the insured, damages that might include the amount

of an excess verdict, mental anguish, or other consequential damages.[68] The claimant might see a way of translating this set of remedies into a more meaningful level of recovery for the claimant: either before or after trial of the underlying case, the claimant could take an assignment of the insured's rights against the insurer and give the insured a covenant not to execute on the judgment. Depending on the jurisdiction's laws and the nature of the insurer's misconduct, the insured might get far more than the policy amount. For instance, if the case proceeds to trial and results in an excess verdict of $1.2 million, and if the insurer eventually is found to have breached the duty to settle, the insured could obtain the full excess verdict.

One might argue that this set of possibilities could discourage claimants from agreeing to participate in concurrent mediation. The claimant might perceive that a resolution of the case that takes into account only the existing low policy limits will be less desirable than taking the chance that the insurer's misconduct can be translated into a large above–limits recovery. Yet this concern is unwarranted. If the insurer has not already violated some duty at the time of concurrent mediation, then the claimant can only hypothesize that an extracontractual claim eventually might arise.[69] If, by contrast, the insurer already has violated some duty to the insured–for instance, has mishandled the case in a way that increases the settlement value of the case beyond policy limits – then the value of the extracontractual claim can be considered in the concurrent mediation.

D. Multiple Insurers, Insured with Assets

This scenario is like the first, with the added complexity of an additional insurer or insurers with potential coverage. Cases fitting into this scenario, moreover, might fall into one of two categories.[70] First, the different insurers might represent layered amounts of coverage, not arguably concurrent

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68. For discussion of remedies for breach of the duty to settle, see JERRY, *supra* note 8, § 112[f]; WINDT, *supra* note 8, at 332-42. Whether and in what circumstances the insurer can be liable to the insured for mishandling the defense or for the defense counsel's mishandling of the defense is still an evolving area. *See* JERRY, *supra* note 8, § 111[g].

69. The claimant might fear that a concurrent mediation will interfere with an effort to construct a situation that will lead to arguable insurer misconduct– for instance, a demand letter giving the carrier only a few days or a week to respond. But, to the extent that concurrent mediation interferes with such efforts, this is a desirable consequence of concurrent mediation.

70. There are many, often repeated variations of these scenarios, including multi-defendants/multi-insurers– multiple defendants each with multiple policies.

coverage. For instance, insurer 1 might have coverage of liabilities up to $500,000.00, insurer 2 might have the first excess layer from $500,000.00 to $1 million, and insurer 3 might have the second excess layer from $1 million to $2 million.

Second, several insurers might represent coverages that arguably both apply to the same layer of monetary exposure. For instance, depending on the nature of the injury and the jurisdiction's rules relating to the "trigger" of coverage, multiple policy years might be triggered by a single injury claim.[71] Or a business might have CGL coverage with insurer 1 for up to $2 million, and also carry an errors and omissions policy with insurer 2 for $1 million. A claim against the insured might arguably trigger coverage under each of the policies.

In both of these categories, disputes among the insurers can exist, although the nature of the conflicts differs in each of the categories. In the first category, in which the insurers represent layered coverages, inter-insurer disputes should be less common. The insurers will not be disputing which insurer is responsible for a particular dollar level of coverage. Rather, any inter-insurer dispute will likely arise from either (1) disagreement over whether the underlying suit can and should be settled for an amount within one of the insurer's limits;[72] or (2) dispute over the quality or manner of the defense being provided by the underlying carrier–for instance, insurer 2 might believe that the value of the claimant's case has been enhanced and has penetrated the excess layer because insurer 1 has mishandled the defense of the claim.[73]

In the second category – insurers whose policies arguably cover the same

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71. For discussion of the many complexities posed by various trigger rules and the resulting inter-insurer allocation disputes, see WINDT, *supra* note 8, § 6.47; James M. Fischer, *Insurance Coverage for Mass Exposure Tort Claims: The Debate Over the Appropriate Trigger Rule*, 45 DRAKE L. REV. 625 (1997).

72. For more detail, see WINDT, *supra* note 8, § 7.08; Syverud, *supra* note 32, at 1201-1207.

73. Reported cases relating to such theories are not common. Many jurisdictions allow excess carriers, on a theory of equitable subrogation, to assert any claim against the primary carrier that the insured would have had. *See, e.g.*, American Centennial Ins. Co. v. Canal Ins. Co., 843 S.W.2d 480, 482-83 (Tex. 1992). *See generally* WINDT, *supra* note 8, at 549. Usually, the asserted cause of action relates to failure to settle. In theory, however, if a jurisdiction recognizes an equitable subrogation avenue and a theory of negligent or bad faith handling of the defense (aside from settlement), then the jurisdiction could allow the excess to pursue the primary carrier on a mishandling theory.

dollar of liability–intra-insurer disputes may be frequent and sharply contested. This is essentially a coverage dispute between the insurers, situated within a larger coverage dispute between the insured and its insurers.[74]

In multiple insurer situations of either category, the chances for successful liability-only mediation are essentially the same as those outlined in the discussion of the first scenario. The insured will be disinclined to arrive at a liability-only settlement with the claimant without insurer approval, because to do so will risk forfeiture of policy coverage. The claimant will be unwilling to agree to a settlement whose amount is to some extent contingent on the insured's prevailing on coverage. As in the first scenario, the most feasible form of liability-only settlement is the following: the insured, insurer, and claimant agree to a settlement amount; either the insurer or the insured is willing to fund the settlement; and a later coverage suit ensues.

Now consider the chances for successful coverage-only mediation. In either type of multiple insurer context, coverage-only resolution of all the claims is not likely. As noted earlier, however, a coverage-only settlement might occur when the amount of insurance coverage is quite low relative to the value of the tort claim. This dynamic also might appear in a multiple insurer context. For instance, suppose that a pollution claim against the insured has a likely settlement value of between $50 and $65 million. The claim arguably triggers ten years' worth of CGL coverage written by insurer 1, for a total possible exposure of $50 million. Insurer 2 wrote a $2 million policy for only one year of the risk. Even if the policyholder believes that its coverage argument as to Insurer 2 has a 75% to 90% chance of success, the policyholder might agree to release all claims against Insurer 2 for $1 million. These funds will help pay litigation costs in the fight against Insurer 1, and the difference between the policyholder's estimated value of the coverage claim against Insurer 2 ($1.5 to $1.8 million) and the settled amount of the claim is not significant in light of the exposure presented by the underlying suit.

Let us turn to the prospects for successful concurrent mediation. In the first scenario–one insurer and insured with assets–the prospects for resolution were enhanced because concurrent mediation provided the mediator with an opportunity to persuade the claimant to reduce his opening demand, in light

74. For discussion of inter-insurer disputes over allocations of coverage, see ABRAHAM, *supra* note 8, at 133-72 (1986); WINDT, *supra* note 8, § 7.04.

of the yet unresolved coverage issues. The same opportunity for the mediator exists here. Assuming a more "realistic" opening demand from the claimant of $350,000 to $450,000, a negotiated agreement is theoretically more affordable to multiple insurers who will share and divide the total amount of the settlement, perhaps with a contribution from the insured. On the other hand, conducting the litigation is less expensive for either insurer, presuming that ongoing defense costs and attorneys fees are also being shared.

In actual practice the negotiation that takes place at mediation between the insurers as to the relative amounts each should pay, or the relative amounts each should at least contribute to a settlement proposal, are often at least as difficult as the negotiation between the claimant and the insured. The goal of the mediator is to persuade the claimant and claimant's counsel that, given the tension between the multiple insurers and between the insured and the insurers, the claimant must reduce her settlement proposal to an amount that focuses the negotiation on "who will pay?", and not "how much will be paid?"

Should an impasse occur between the insurers as to allocation among policies, claimant's counsel is on hand to provide the mediator and other participants with a resource. For instance, claimant's counsel is in the best position to give guidance about which theories of liability are most likely to be presented to the jury.

In addition, even if the insurers cannot agree to an allocation formula, concurrent mediation may still result in a successful outcome. An example can illustrate. Suppose that, in advance of the mediation, the claimant's only formal settlement demand is two million dollars. Yet claimant's counsel has indicated, during a break at a recent deposition, that if "seven figures" could be put on the table, perhaps something could be "worked out." Jury verdict research by defense counsel indicates that successful harassment claims seldom result in jury awards in excess of $500,000 to $600,000, but more often fall in the range of $300,000 to $400,000. Defense counsel's estimate of the probability of a claimant's recovery in the case is "fifty/fifty." Defense counsel concludes that resolution in the range of $200,000 to $250,000 would be appropriate, and the insurers are so advised. The parties proceed to mediation.

At the mediation, the mediator caucuses with the insured and the insurers, and asks for their analysis and evaluation of the value of the underlying liability claims, independent of any coverage issues. The mediator is also able to caucus separately with the insurers' coverage representatives. The risks of going forward, the expense of defending two lawsuits, the exposure

to extra-contractual remedies for bad faith, etc. are explored. Eventually, a commitment is extracted from the insurers that, if the mediator is successful in obtaining a firm commitment by the claimant to compromise and settle her claims for any amount under $200,000, the insurers will fund the settlement, and will agree to resolve in a one day, confidential insurance arbitration hearing the allocation of the sum among the insurers.

The mediator, in private caucuses with the claimant, is able to confront the claimant with jury verdict reports and various concerns about and weaknesses in the claimant's case. Ultimately, the mediator can challenge the claimant to accept the notion that a judgment based on an uninsured theory of liability is a legitimate risk, as is the risk of a finding of no liability. As the mediation progresses, the insured is able to volunteer an apology for any "misunderstandings and any miscommunication" with the claimant during her employment. The claimant is encouraged to make a more realistic demand for $500,000, and the negotiation dance begins.

In this third scenario, does concurrent mediation pose risks or disadvantages to any of the parties? For the same reasons set out in the discussion of the first scenario, the claimant might prefer a liability-only resolution. As to the other parties, concurrent mediation presents little risk, for the same reasons discussed in part III (B)(3).

E. Multiple Insurers, Insured without Assets

Cases involving multiple insurers and an insured without assets pose perhaps the most likely context for successful concurrent resolution. Basically, all the same points raised in the discussion of the second scenario–single insurer, insured without assets–apply here. The chances of liability–only or coverage-only resolution are dim; concurrent resolution can be feasible and desirable for all the parties; and the risks of the process are as outlined earlier. In addition, the fact that two or more insurers are potentially at risk for coverage does not, in and of itself, give the claimant's case a greater settlement value, but it does provide an opportunity for two or more insurers to share the cost of resolution. Of course, the insurers might reach an impasse over the allocation issue. As discussed in the third scenario, however, the claimant's counsel can serve as a resource for information that may be relevant to the allocation issue--for instance, which theories of liability are likely to be emphasized at trial. In addition, as in the third scenario, an impasse over allocation need not defeat entirely the concurrent resolution effort. The parties might settle all issues but the allocation

formula, leaving this issue for resolution by arbitration.

F. Side Deals

The concurrent mediation process can be beneficial even if it does not conclude in a formal compromise and settlement agreement of all issues. The process might result in a less comprehensive but still valuable settlement of pending issues, and the preservation or establishment of useful working relationships.

For instance, consider a liability claim arising out of environmental contamination of a piece of industrial property; the primary insurer denies coverage and a defense, and does not participate in any mediation. The excess insurer also, coincidentally, is the primary general liability carrier for a co-defendant and the primary insurer for the errors and omissions coverage carried by yet another co-defendant. Among several of the theories of recovery pled by the claimant is a theory that exposes the insured and both co-defendants to joint and several liability.

Two days of mediation fail to conclude in resolution. However, when the eventual impasse becomes apparent, counsel for the excess insurer asks the mediator to inquire if the insured would be willing to relinquish control of its defense, in exchange for the excess insurer's reimbursement of the insured for its litigation costs and expenses to date, and the excess insurer's agreement to bear the further defense costs and expenses. The insured has an incentive to accept this seemingly gratuitous life preserver being thrown to it, with the full knowledge and understanding that the excess insurer will control the defense of the litigation. The excess insurer has an incentive to make the proposal because the inadequate defense being funded by the insured enhances the likelihood of joint and several liability on the part of the insurer's other insured.

This is a perfectly appropriate "side deal" facilitated by the process and the mediator. Because the litigation proceeds, the court's perspective might be that the mediation was unsuccessful. From the perspective of at least several participants, however, the process was valuable. Other side deals are often achievable: agreements among insurers to share in the cost of defense of an insured; resolution of all claims with respect to some, but not all, of the parties to the litigation; agreements to defer resolution of certain claims or to channel resolution to more private, expedient and efficient resolution mechanisms, such as arbitration; agreements among all participants to experiment with other non-binding resolution mechanisms, such as a

summary jury trial or mini-trial; or other agreements between the litigants pertaining to discovery, scheduling, or the resolution process.

CONCLUSION

The tort and liability insurance regime frequently generates concurrent disputes over both liability and coverage. For the reasons we have explained, allowing the coverage dispute to remain unresolved through much or all of the underlying liability suit leads to a number of troublesome results. Yet concurrent *adjudicatory* resolution of liability and coverage is often unacceptable or practically impossible. In this Article, we have explored whether and when concurrent mediation of liability and coverage can offer a way around these structural difficulties. In all the basic scenarios we have discussed, settlement of coverage alone is highly unlikely. Settlement of only the liability claim is also generally unlikely, except when the insured has assets sufficient to satisfy a likely judgment or a reasonable settlement.

In all the scenarios, by contrast, concurrent mediation of liability and coverage can be feasible and desirable from the perspective of all the parties. In addition, none of the parties needs to be concerned that participating in the concurrent mediation will pose a disadvantage--for instance, that it will weaken the party's position on liability or coverage if the mediation proves unsuccessful, or that it will help the insured with a later bad faith claim. Even if the concurrent mediation does not settle every strand of a multilayered dispute, it often can produce an efficient and desirable partial settlement or side agreement. For these reasons, concurrent mediation deserves careful consideration as a route to the efficient and fair resolution of simultaneous coverage and liability disputes.

DRIVING GOVERNMENTALITY: AUTOMOBILE ACCIDENTS, INSURANCE, AND THE CHALLENGE TO SOCIAL ORDER IN THE INTER-WAR YEARS, 1919 TO 1941

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INTRODUCTION

After nearly two decades as a luxury curiosity, the automobile began in the 1920s to transform the fabric of urban life in the United States. Slowed briefly only by the onset of the Great Depression at the end of that decade and again by the conversion to a war economy for World War II, the explosive growth of automobile and truck[2] ownership and use posed a challenge to the governability of American society. This challenge did not manifest itself in the threat of political revolution (that remained concentrated in the tensions of the labor market), but in a general crisis of the ability of traditional hierarchical regulation to operate in a wide variety of public and private institutions. The formal state, as such, was only one of many forms of authority undermined by the spread of driving. If the automobile threatened to allow criminals to laugh in the face of the law as they sped out of the jurisdiction, family heads and employers also found their strategies and mechanisms of control slipping on the fast-paced new surface of a motorized life.

Naturally, the automobile and virtually every aspect of its ownership and operation became a potent subject for developing new strategies of governance at all levels in these decades. People struggled not only over the proper methods to use to restore control, but over the very nature of the subjects to be governed. Conduct long beneath the threshold of ordinary governmental ordering became a subject of power (not just operating a vehicle but walking). As happens in such circumstances, debates about policy become questions of the basic rationality of government, or

2. While trucks served particular kinds of users and posed particular kinds of problems, this essay does not develop that distinction. For convenience I refer to automobiles for both.

"governmentality."[3] Thus the automobile produced at least two new governable subjects, the driver and the pedestrian, and whole series of problems of how best to govern them. On occasions these discourses about automobiles and government reached the highest levels of the national state, as when Commerce Secretary Herbert Hoover convened a national conference on uniform traffic laws in 1925.[4] But much of this went on beneath the level of national politics, in courtrooms, city halls, and even in the popular discourse of newspapers and magazines.

In some respects the automobile's provocation to reflection and debate over governmentality has never ceased. In its own way, for example, Ralph Nader's book UNSAFE AT ANY SPEED (1965),[5] helped provoke a major rethinking of governance strategies for the 1960s and 1970s. But in the 1920s and 1930s, the first wave of efforts to really govern the automobile opened and closed a chapter in American governance. After World War II, the basic principles of automotive governance, especially the dominance of the individual driver and pedestrian over different ways of conceiving of the at risk population became fixed. Most of our public policy debates on the automobile since have accepted this as a basic template. In this sense the

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3. This neologism coined by the late Michel Foucault is a condensation of governmental rationalities. *See* MICHEL FOUCAULT, THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY, 87 (Graham Burchell, et al. eds., University of Chicago Press 1991). According to Foucault, the problem of state power was not always "governmental." It is a specific moment in the 16th century when a discourse about the problem of rule developed which takes state power as a problem unique to its own domain. Earlier reflections on power were either theological or legal and focused on the status of the sovereign. What marked the emergence of governmentality was the attempt, begun in response to Machiavelli's writings, to "articulate a kind of rationality which was intrinsic to the art of government, without subordinating it to the problematic of the prince and his relationship to the principality of which he is lord and master." *Id.* at 89. This governmental revolution continues in the 20th century, and has become more important as the state and other power centers have expanded with the addition of large ensembles of governmental officials and experts. A number of scholars have used the concept of governmentality to explore the growth of regulation in the 20th century and its anchors in various kinds of social knowledge. *See generally* [the other essays in] THE FOUCAULT EFFECT; JACQUES DONZELOT, THE POLICING OF FAMILIES (Pantheon 1979), NIKOLAS ROSE, GOVERNING THE SOUL: THE SHAPING OF THE PRIVATE SELF (Routledge 1989).

4. Second National Conference on Street and Highway Safety. *See* UMVCTA, Commissioner's Prefatory Note, 11 U.L.A. 421, 423 (1974).

5. RALPH NADER, UNSAFE AT ANY SPEED: THE DESIGNED-IN DANGERS OF THE AMERICAN AUTOMOBILE (Grossman 1965).

automobile radically deepened the logic of individualism at a time when liberalism was generally being recast as a mode of governmentality.[6]

In the 1920s and 1930s, however, a more collectivist approach to addressing the automobile, influenced by the rise of worker's compensation in the previous decades, seemed possible. In the years immediately preceding World War I, workers' compensation systems rapidly replaced a dense web of employers' liability law regulating when injured workers would receive compensation from their employers.[7] This new compensation regime was based on the technology of insurance and the premise that an increase in both efficiency and fairness could be achieved by treating the risks of each industry as a collective cost to be dispersed through the "natural" mechanisms of the economy. To many observers it provided a blueprint for the government of maturing industrial society and its influence can be seen on such later developments as social security, unemployment insurance, and Medicare.[8]

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6. Liberalism as a governmental rationality is not exactly the same as liberalism as a political theory. Although the former no doubt feeds into the latter, the latter consists also of technical discourses that have as their object the problems of managing individual subjects. For a discussion of liberalism as governmentality, see Nikolas Rose & Peter Miller, *Advanced Liberalism*, *in* FOUCAULT AND POLITICAL REASON: LIBERALISM, NEO-LIBERALISM AND RATIONALITIES OF GOVERNMENT (Andrew Barry, Thomas Osborne, and Nikolas Rose eds., University of Chicago Press 1996) and NIKOLAS ROSE, INVENTING OURSELVES: PSYCHOLOGY, POWER, AND PERSONHOOD 150 *et passim* (Cambridge 1996). For a very different but consistent effort to think through the significance of this strong form of individualism, see LAWRENCE M. FRIEDMAN, THE REPUBLIC OF CHOICE: LAW, AUTHORITY, AND CULTURE (1990).

7. *See* Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50 (1967); *see also* Jonathan Simon, *For the Government of its Servants: Law and Disciplinary Power in the Work Place, 1870-1906*, 13 STUD. L. POL. & SOC'Y 105 (1993); John F. Witt, *The Transformation of Work and the Law of Workplace Accidents, 1842-1910*, 107 YALE L.J. 1467 (1998).

8. Workmens' compensation was exemplified the governmental strategies that James Gilbert labels "collectivist." *See* JAMES GILBERT, DESIGNING THE INDUSTRIAL STATE: THE INTELLECTUAL PURSUIT OF COLLECTIVISM IN AMERICA, 1880-1940 8 (Quadrangle Books 1972). As Gilbert himself emphasizes, collectivist intellectuals include a broad political spectrum from socialists through progressive conservatives. What joined them was:

> A general theory of society in which economic institutions were the key element. Possibilities for social interaction and political reform derived from the mass nature of these economic institutions. Although many collectivists wished to preserve such older values as individualism, they

While many aspects of driving raised basic questions of how to govern, the automobile accident emerged as a perhaps the single most volatile site for the whole range of concerns about the disruptive influence of motorization of social life.[9] During the 1920s, for the first time, the automobile accident began to replace industrial and railroad accidents as the largest source of civil lawsuits and the most visible symbol of the potential for horror and carnage in modern life. The numbers are dramatic. In 1930 more than 30,000 Americans died in automobile accidents.[10] More than a half century later the number is remarkably similar at around 41,800 in 1995.[11] As a function of population this is actually a slight decline. More relevantly, as a function of motor vehicles in operation or miles driven, today's rate is dramatically lower. We are used to recognizing motor vehicles as killers, but in the 1920s and 1930s the scale of this carnage was far more shocking against a recent past in which the whole category of such deaths did not exist. Americans in this period were used to associating carnage with World War I battlefields and industrial accidents. The automobile accident both superseded and incorporated the symbolic significance of the other two.

Unlike manufacturing or even railroads, the automobile, and its attendant carnage, were broadly distributed across the social landscape. Industrial accidents were largely limited to the closed sites of production, hidden behind the walls of factories or the fences of rail yards. Railroading accidents took place in rail yards and in the corridors of track cutting across towns and

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> were nonetheless forced by their understanding of the scale of social problems to consider as a solution pitting social organization against injustice, or translating such older economic ideas as laissez-faire competition into theories of competing groups. Pluralism, a variant of collectivist thought, is an example of one direction which these assumptions often took. But other concrete theories also expressed the same central assumptions about social organization; only the details varied.

Id.

9. A suggestive case for this has been made in an unpublished dissertation. *See generally*, Anedith Jo Bond Nash, Death on the Highway: The Automobile Wreck in American Culture, 1920-1940 (1983) (unpublished dissertation, University of Minnesota) (on file with author).

10. *See* REPORT BY THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS, 17 (1932) [hereinafter Columbia Report, Columbia Committee, Columbia Plan].

11. *See* U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, 1997 94 (1997).

countryside. But, automobile accidents happened in the most public of places. Carnage and its relics could be witnessed routinely in this period, due in part to the growth of newspaper. Later, radio and television journalism wed to broadcast the ready-to-hand tragedy of an automobile wreck.[12]

Just as industrial accidents formed a natural locus for worker's grievances with the governance of work inside the factory,[13] the automobile accident formed an independent source of popular grievance against the government of urban life from the 1920s on. Indeed one reason that the horror of the Great Depression did not seem to relax popular interest in the automobile accident is that the automobile accident actually operated as an effective metaphor for the spectacle of the super-heated 1920s economy twisted into a terrible wreckage of steel, rubber, and human beings.[14]

The response to the automobile accident drew on a number of existing approaches to governance. One approach was the legal regulation of the motor vehicle. The automobile ownership explosion caught many states without basic requirements for registration of vehicles or the licensing of drivers. The 1920s also saw a scramble to set speed limits, establish rules of traffic interaction among and between motor vehicles, horse vehicles, and pedestrians, and create policing systems to enforce these rules. These efforts called forth a broad and often heated popular discussion about how to regulate driving. As Americans invested huge portions of their wealth (mostly borrowed) in automobiles they acquired an interest in governance unknown to most of them before.

Another approach was to build on the existing structure of civil liability. Faced with the extraordinary toll of the automobile on people with no real opportunity to self-insure, courts faced intense litigation pressure to expand liability. But the fast paced automobile market was placing many automobiles in the hands of people with virtually no assets (including the often unscathed automobile itself which would be owned by the bank).

As in so many areas of tort law even in the early 20th century, automobile

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12. No holiday weekend would be appropriate without some pile up and none was likely to pass without at least one being within somebody's camera range. By the middle of the 1920s, streetcars and railroads also brought spectacles of blood and pain into public spaces, but it occurred with much less frequency than violence associated with the automobile.

13. For convenience I will use the contemporary non-gendered term even though "workmen's" compensation was the term used during the period discussed.

14. *See* Nash, *supra* note 9, at 4.

liability turned out to be largely about a third source of regulatory power, that of insurance. Only one state in the nation, Massachusetts, required liability insurance as a condition for operating a motor vehicle in 1932. But the growing private assets of many Americans during this period provided their own incentives to insure. Indeed, a large private insurance market was already thriving in this period. Next to workers' compensation, automobile liability was the leading line of casualty insurance in 1931.[15] Over 250 million dollars worth of liability insurance, and another 100 million worth of property insurance on automobiles, was written in 1929.[16] But private insurers were reluctant to pursue the theme of insurance as a source of governance. Many rightly feared that any bold attempt to rewrite the rules of automobile accident compensation would include the need for regulation if not state take-over of the insurance industry.[17]

Yet such a bold attempt had already been undertaken in a nearby field – workers' compensation – which had an inexorable influence on the automotive governance debate. In the 1920s, legal scholars proposed a variety of ways to extend the logic of what was then considered the worker's compensation principal. The automobile accident represented a promising early frontier of expansion. Like work accidents, automobile accidents became a major source of practical concern about risk in the modern world. In both circumstances, the overwhelming power of mechanical instruments eclipsed the ability of individual care taking to make correlative differences in the degree of harm. Those who were even a little bit careless ended up just as injured or dead as those grossly so. Then there was the carnage itself. Like the factory machine, the automobile was capable of mutilating the human body in a way which soon captured the attention of a fascinated and horrified public. Finally, like the factory, the automobile was becoming a vector not only of investment but of economic growth, and thus offered an economic dynamic to which the distribution of costs could be attached.

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15. *See* Columbia Report, *supra* note 10, at 21.

16. *See* Columbia Report, *supra* note 10, at 50.

17. In 1938 an insurance industry leader criticized the industry for its paralyzing fear of state take over. "A short-sighted policy of blind opposition to compulsory insurance, in lieu of a whole-hearted effort to contribute toward a solution of one or our most serious social problems, has brought private insurance face to face with a grave danger." *Quoted in* Albert A. Ehrenzweig, *"Full Aid" Insurance for the Traffic Victim - A Voluntary Compensation Plan*, 43 CAL. L. REV. 1, 12 (1955) (quoting Sawyer, *Frontier of Liability Insurance*, 39 BEST'S INSURANCE NEWS (Fire & Cas. Ed.) 439 (1938)).

This Article examines this automobile driven struggle to reinvent governance in the 1920s and 1930s through an examination of the 1932 Report of the Committee to Study Compensation for Automobile Accidents, popularly known as the "Columbia Report" and its context. The Columbia Report was the first systematic effort to propose a response to the automobile accident through the use of insurance, building on the model of worker's compensation. Formed under the auspices of Columbia University's Council for Research in the Social Sciences in late 1928, the Committee was composed of prominent judges and lawyers involved in liability reform. Much of the intellectual force behind the Committee came from collaboration between a group of realist and reform oriented law professors and social scientists at both Columbia and Yale.[18] The Columbia Report combined a critique of compensation under a common law tort regime with one of the largest empirical studies of legal practices up to that point. The Committee's staff undertook an examination of almost 9,000 accident cases from several different states and types of communities. The database remained the most comprehensive statistical picture of automobile accident compensation available until the mid-1960s.

The Committee's legislative proposal (hereinafter referred to as the "Columbia Plan") mandated automobile owners to carry third-party insurance coverage for the benefit of anyone injured by the automobile.[19] Most controversially of all, it proposed to eliminate all fault considerations save for deliberate efforts at suicide or self-injury. Borrowing from worker's compensation plans, the Columbia Plan proposed to cover up to two-thirds of economic loss plus medical costs.[20] Only economic losses – medical and lost earnings – were recoverable, if only in part.

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18. On the context of the Columbia Committee in terms of the realist movement see JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE 105-09 (University of North Carolina Press 1995). For its place in tort law scholarship see George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 479 (1985).

19. The only exception was the driver who if not the owner might be an employee or a family member. The Columbia Plan assumed that where another automobile was involved, the driver of the first automobile would be covered by the liability of the owner of the second. Where no additional automobile was involved, *e.g.*, if the automobile strikes a stationary object, the driver would look to self insurance or workers' compensation (for employee drivers). *See* Columbia Report, *supra* note 10, at 246, n.3.

20. *See* Columbia Report, *supra* note 10, at 146.

Supporters of the Columbia Plan viewed this as a natural extension of the worker's compensation principal.[21] Like industrial accidents, automobile accidents were the product of machine dynamics not readily addressed by legal concepts such as fault. Likewise their consequences, deaths and horrible injuries, outstripped by a great degree the level of human folly that triggered those consequences. In short, both presented compelling cases for reducing the focus on individual blame in favor of the rational management of collective risks. Opponents of the Columbia Plan rejected the analogy. If worker's compensation made sense (which not all critics were ready to concede) it was because the range of injuries and the parties involved in work accidents were structured by the nexus of power relationships. In contrast, automobile accidents cast a much broader net over a much more diverse set of human interactions. Those injured often had no prior relationship with their injurers and no determinate structure of enterprise or contract provided an overarching frame.

In some respects, the debate turned out to be irrelevant. With the country soon in the grips of the Great Depression there were more pressing social problems and compelling sites for grand struggles over the shape of social policy. The main features of the Columbia Plan were widely debated, but the only jurisdiction ever to adopt a major portion of it was the Canadian province of Saskatchewan in 1947.[22] Nonetheless, the Columbia Plan remains important, as a window into the rationalities of governance available in the early 20th century. The logic of worker's compensation as a general schema for governance seemed compelling to many observers in that period.[23] Although it appears today to have little influence outside the workplace setting, a richer analysis of the cultural and legal context in which the Columbia Report was deployed can ultimately help clarify the anchors of our own governmentalities.

Part I provides a more detailed analysis of the way driving and automobile accidents in particular, challenged the governability of American

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21. *See id.* at 134.

22. *See* J. Green, *The Automobile Accident Insurance Act of Saskatchewan*, 31 J. COMP. LEG. & INT. L. 39 (1949). The plan was also discussed by legislative committees in New York, Wisconsin, Virginia and Connecticut. *See* Note, *Automobile Accident Compensation Insurance Reconsidered*, 1953 ILL. L. FORUM 263, 269 n.37 (1953).

23. *See* Jeremiah Smith, *Sequel to Workmen's Compensation Acts*, 27 HARV. L. REV. 235 (1913).

institutions. Part II looks at the three major models of governance that informed debate, legal regulation, civil liability, and insurance. Part III focuses on the Columbia Report and the debate it engendered.

I. THE AUTOMOBILE AS A CHALLENGE TO GOVERNANCE IN THE 1920S AND 1930S

The significance of the Columbia Plan is clearer when it is seen in its social context. Research began in 1929 and the final report was issued in 1932. Viewed with hindsight we can see this as a much more significant period in the social history of the automobile than its participants probably did. In 1919 the automobile was still largely seen as a luxury item. By 1929, however, it was visibly transforming American life.[24] The scale of carnage of the automobile accident in the 1920s, by whatever measure, would never be matched. The Great Depression which was reaching its deepest levels by the time the Columbia Plan was published in 1932, would cripple the expansion of automobile ownership. World War II would hold it back for another five years. Thus, the Columbia Report arrived at the beginning of what would be a generation long plateau in the growth of driving in the United States.

When prosperity and civilian production revived in the late 1940s, the automobile burst forth as unchallengeable, remaking the landscape and economic structure of the United States. While automobile accidents and the problem of compensation remained, they had less urgency. Further efforts were made to reform liability, but the issue was no longer a singular pivot for the larger problem of governing the automobile or even automobile accidents. Increasingly it would share that with issues like highway construction, air pollution, passenger safety and fuel efficiency.

A. The Growth of Automobile Ownership and Use

Table 1 provides some measures of the remarkable growth of the automobile and the practices of motoring in the United States. Seen from the present, the history of motoring has two phases. The first phase lasts from the initial marketing of automobiles at the turn of the century until the Great Depression. The second begins at the end of World War II and continues at

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24. *See* MORTON KELLER, REGULATING A NEW ECONOMY: PUBLIC POLICY AND ECONOMIC CHANGE IN AMERICA, 1900-1933 73 (Harvard University Press 1990).

least through the early 1970s. Automobile manufacturers produced around 4,000 cars in 1900, while by 1910 they were producing nearly 200,000 units a year.[25] The 1920s were the peak of the first phase. By the end of the 1920s more than half of American families owned a automobile.[26] This rapid growth completely outpaced the growth of legal and highway infrastructures.

Table 1: New Automobile Sales and Total Registrations (in thousands)

YEAR	SALES (thousands)	REGISTRATIONS (thousands)
1910	181.0	458.3
1915	895.9	2,332.4
1920	1,905.5	8,131.5
1925	3,735.1	17,481.0
1930	2,787.4	23,034.7
1935	3,273.8	22,567.8
1940	3,717.3	27,465.8
1945	69.5	25,796.9
1950	6,665.8	40,339.0
1955	7,920.1	52,144.7
1960	6,674.7	61,682.3
1965	9,305.5	75,257.5
1970	6,546.8	89,279.8

Source: U.S. Department of Commerce, Historical Statistics of the United States, Colonial Times to 1970, Part 2 at 13 (Washington, D.C. U.S. Bureau of Census).

25. *See* CHRISTOPHER FINCH, HIGHWAYS TO HEAVEN: THE AUTO BIOGRAPHY OF AMERICA 64 (1992).

26. *See* JAMES FLINK, THE AUTOMOBILE AGE 132 (1988).

Table 1 also shows that the market stalled after the start of the Depression and did not grow vigorously again until after World War II. This is not surprising given the ferocity of the economic crisis, particularly in its early years. More remarkable, in a way, is that new automobile sales fell by only a third, and recovered all their lost ground by 1940, while registrations declined only slightly. Apparently many of the millions who had entered the automobile age in the 1920s now found it impossible to go back.[27] The slack economy made any improvement in the affordability of the automobile highly unlikely and thus the expansion of the motoring public difficult.

After the war, growth in both income and public investment in infrastructure fueled a rapid rise in the size of the automobile market which continued through the early 1970s. Having hovered just under 30 million from the mid-1930s until the mid-1950s, registrations then climbed steadily to 90 million by the 1970.

B. Motoring and the Institutions Governing Everyday Life

During the 1920s the tremendous growth in the automobile market made it a dominant force shaping the economy.[28] Indeed, the automobile industry's methods of production placed a new stamp on a whole phase of industrial development.[29] The industry also encouraged the development of new distribution networks, the dealerships, and new financing techniques, like the installment loan, that reshaped the world of consumption.[30]

The urban landscape was also being transformed. By the early 1920s, the fastest growing portion of the metropolitan population was a large suburban population that had become totally dependent on the automobile for transportation.[31] By the mid-20s the diner, the motel, and the billboard were already ubiquitous. The first limited access highway designed with the automobile in mind, the Bronx Parkway, was fully open.[32] In Los Angeles

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27. *See* James Interrante, *The Road to Autopia: The Automobile and the Spatial Transformation of American Culture*, 19-20 MICH. Q. 502, 514 (1980-81).

28. *See* ANTHONY CAMPAGNA, AN ECONOMIC HISTORY OF THE UNITED STATES 31 (1987).

29. *See* Flink, *supra* note 26, at 40.

30. *See* Flink, *supra* note 26, at 190.

31. *See* Interrante, *supra* note 27, at 506.

32. *See* Finch, *supra* note 25, at 77. The Willow-Run freeway near Detroit, thoroughly contemporary in sensibilities, and lacking the stylized decorativeness of the Bronx Parkway, was done in 1938. *See id.* at 156. Finch points out that these projects were initiated before

and other cities the new real estate development of linear shopping centers along a broad automobile road was already becoming a significant site for retailing.

These transformations have earned the automobile considerable attention on the part of historians of the U.S. economy and society. Less attention has been paid by those interested in law and governance. As a corollary to its tremendous growth and the institutional accommodations made to produce and consume it, the automobile placed tremendous pressures on strategies of governance that had only themselves been rather recently established against hard fought resistance in the factory and public square. The mobility and consequent freedom engendered by the automobile introduced into the very midst of social life a new form of social space wholly unmapped by the prevailing forms of disciplinary management and largely ungraspable by the strategies of control developed to administer persons in fixed locations. This can be seen in the disciplinary strategies of governance within families, the workplace, the class system, and the criminal law.

1. The Family

The significance of the automobile as a moveable but private space perfect for unregulated intimacies was appreciated from the beginning. One of the most striking contemporary observations of the cultural effects of motorization was the sociological classic by Robert and Helen Lynd, *Middletown* first published in 1929, and based on a survey of social life in Muncie Indiana in the mid-1920s.[33] The authors found that automobile was transforming family life by creating new opportunities for family members to slip out of constraints of the household. At the same time, the automobile began to shape a whole new space for the family as a unit, separated from the informal regulation of neighborhood institutions and merchants. The first stage of this was the automobile itself as a site for "Sunday" drives in the country and visits to distant commercial establishments.

> When auto riding tends to replace the traditional call in the family parlor as a way of approach between the unmarried, "the home is endangered," and all-day Sunday motor trips

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Mussolini's *autostrada* and Hitler's *autobahn*. *See id.* at 77.

33. *See* ROBERT S. LYND & HELEN M. LYND, MIDDLETOWN (Harcourt Brace, 1929).

> are a "threat against the church"; it is in the activities concerned with the home and religion that the automobile occasions the greatest emotional conflicts.[34]

If the automobile undermined the regime of domestic surveillance, it also threatened that great of middle class construction, the internalized will to discipline. The Lynds' worried that the automobile was undermining the mechanisms of thrift and self-restraint in Muncie's growing middle and working classes.

> The automobile has apparently unsettled the habit of careful saving for some families. "Part of the money we spend on the car would go to the bank I suppose," said more than one working class wife. A business man explained his recent invitation of social oblivion by selling his car by saying: "My car, counting depreciation and everything, was costing might [sic] nearly $100.00 a month, and my wife and I sat down together the other night and just figured that we're getting along, and if we're to have anything later on, we've just got to begin to save." The "moral" aspect of the competition between the automobile and the certain accepted expenditures appears in the remark of another business man, "An automobile is a luxury, and no one has a right to one if he can't afford it. I haven't the slightest sympathy for any one who is out of work if he owns a car."[35]

The second stage of the automobile's reconfiguration of domestic governance, which began remarkably quickly, was the isolation of the family in new single family suburban housing. As early as 1922 a noticeable class of residence had grown up around the large cities which was totally dependent on the automobile for access to work and shopping.[36] It would take the rapid suburbanization of the post-World War II years to manifest the consequences for political and cultural life of this mass privatization of family life. The difficulties of sustaining household social control is evident

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34. *Id.* at 254.

35. *Id.* at 255.

36. *See* Interrante, *supra* note 31, at 506.

in the now nearly half century long crisis of "youth culture" in the United States.

2. The Business Firm

The 19th century witnessed revolutionary changes in workplace control. By the beginning of the 20th century management in the most advanced corporations was in a position to govern work comprehensively and to do so with organizational rather than physical power.[37] These technologies of control were largely rooted in fixed locations. The spread of the automobile and its collateral economic effects displaced workers from these grids of control and sent them careening around the erratic road system of the metropolis.

As soon as workers left the warehouse or factory, they left a grid of spatially fixed systems of management that functioned through surveillance. Once in the automobile or truck making a delivery the employee was free not only to day dream but to interact with others, take care of personal needs, and appropriate company time and goods for personal use. Indeed, a whole legal problem grew up in the 1920s concerning the vicarious liability of employers for automobile and truck accidents by their employees while on the job but off the immediate business of the employer. Courts distinguished between mere "detours," e.g., a truck driver stopping for lunch in a restaurant a block or two from their route, and "frolics," when an employee seemed to have more substantially abandoned the employer's business, e.g., when truck driver goes many miles off course to deliver some pilfered coal to his sisters.[38] Even for those whose employment kept them largely inside a fixed workplace, the automobile in the parking lot remains into our own time a dangerously autonomous zone in which substance abuse may take place and stolen or contraband material secreted.

3. The Class System

The system of social class has always provided its own background social control. The markers of class, money, dress, language, provide real and

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37. *See generally* ALFRED CHANDLER, THE VISIBLE HAND: THE MANAGERIAL REVOLUTION (Harvard University Press 1975); and RICHARD EDWARDS, CONTESTED TERRAIN: THE TRANSFORMATION OF THE WORK PLACE IN THE 20TH CENTURY (Basic 1979).

38. *See* Young B. Smith, *Frolic and Detour*, 23 COLUM. L. REV. 444 (1923).

imagined opportunities for surveillance and exclusion. The popularization of the automobile introduced new ways of demonstrating class status, but also the opportunity to slip across boundaries. In his famous novel, *The Great Gatsby* (1925), F. Scott Fitzgerald captured this blurring of American class lines around the automobile.[39] Nick, Fitzgerald's protagonist, first glimpses the Great Gatsby's class status through the "Rolls Royce"[40] that ferrys his guests around. Nick takes Gatsby and his companions are society's elites, a circle widened to include those "selling something: bonds or insurance or automobiles."[41] But the meaning of class markers becomes progressively destabilized throughout the novel. "Who is he?" Nick asks his friend Jordan Baker after his first surprise encounter with Gatsby.[42]

> "He's just a man named Gatsby."
>
> "Where is he from, I mean? And what does he do?"
>
> "Now *you*'re started on the subject," she answered with a wan smile. "Well, - he told me once he was an Oxford man."
>
> A dim background started to take shape behind him but at her next remark it faded away.
>
> "However, I don't believe it."
>
> "Why not?"
>
> "I don't know," she insisted. "I just don't think he went there."
>
> Something in her tone reminded me of other girls "I think he killed a man," and had the effect of stimulating my curiosity. I would have accepted without question the information that Gatsby sprang from the swamps of Louisiana or from the lower East Side of New York. That was comprehensible. But young men didn't – at least in my provincial inexperience I believed they didn't – drift cooly

39. F. SCOTT FITZGERALD, THE GREAT GATSBY 70 (1925). The Great Gatsby may be among the first novels in which much of the crucial action takes place in and around automobiles.

40. *See id.* at 43.

41. *Id.* at 46.

42. *Id.* at 53.

out of nowhere and buy a palace on Long Island Sound.[43]

The automobile, with its ability to either carry one across class boundaries becomes a general symbol of this, especially when, late in the book, it becomes an instrument of carnage. Nick, a young stock broker on a limited income, buys a used Dodge[44] which increases his ability to negotiate the sometimes conflicting economic and social demands as he seeks to move up the class hierarchy from his small town middle class roots. We also visit the garage of the cuckolded mechanic and gas station owner George B. Wilson in which is set "the dust-covered wreck of a Ford which crouched in a dim corner"[45] symbolizing the accessibility of the automobile even to those near the bottom of the class hierarchy and in which no prestige inheres.

The same year as Fitzgerald's novel was published, Herbert Ladd Towle, writing in the *Atlantic Monthly* inveighed against the crisis created by inexpensive automobiles whose massive destructive power was untempered by the maturity or wealth of their owners.

> A dozen years ago, when motorists were few, ownership implied both skill and earning power, usually with the responsibility that those qualities bring. It was not hard, then, to avoid one's neighbors on the road. To-day cars are priced anywhere to 50 per cent below 1913 figures. The skill they require is negligible. Used cars are a drug on the market. Any young fellow may purchase an old high-powered car for a few weeks' earnings, and 'burn up the road'. And the traffic congestion in and near all our large cities is almost beyond belief. Instead of money and a taste for mechanics, the greatest need of the owner today is for the social feeling that accords courtesy and fair play to one's neighbors on the road. It is the lack of this quality, among a minority of the newer class of motorists, that accounts for most of the avoidable accidents.[46]

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43. *Id.* at 53-54.

44. *See id.* at 8.

45. *Id.* at 36.

46. Herbert Ladd Towle, *Motor Menace*, 137 THE ATLANTIC MONTHLY 98, 98-99, July-Dec. 1925.

This threat against social order was far from mainly mechanical. It was who could drive that posed as much of a problem as the sheer number of automobiles on the road (although the two problems ran together).

> [T]he solid business or professional man is seldom a trouble-maker. As his time is valuable, he is likely to drive fast when the way is open; but his sense of responsibility keeps him from knowingly taking chances. As he has property, he can be sued; and even with liability insurance he hates the thought of appearing in court. As for jail or suspension, he tries to avoid giving even a pretext for such penalties. The new-rich owner, made arrogant by success, and the spoiled sons and daughters of rich parents, are another matter. They have property, but without responsibility... Instead of money and a taste for mechanics, the greatest need of the owner to-day is for the social feeling that accords courtesy and fair play to one's neighbors on the road. It is the lack of this quality, among a minority of the newer class of motorists, that accounts for most of the avoidable accidents.[47]

> It is the happy-go-lucky chap with no property except his car – itself perhaps not yet paid for – who is our main problem. His car means a lot to him and his wife and children, – fresh air and sunshine and green fields, – most of the things that make life worth living. Nobody has ever taught him to feel very much obligation toward strangers. What wonder that he goes out for a good time, and lets the other fellow shift for himself![48]

The automobile then, became a central locus of anxiety about the whole rapidly shifting surface of the class structure going on in the 1920s caused by real economic mobility and the opportunities the automobile offered to make it or fake it.

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47. *Id.* at 98-99.
48. *Id.* at 101.

4. Criminal Law

Perhaps the most obvious threat to institutional order for observers in the 1920s was the association of the automobile with crime. The automobile generated new crimes simply by creating a new class of valuable assets with unprecedented access for thieves, i.e., cars themselves. The automobile also greatly enhanced the opportunity for criminals of all sorts to evade capture. The "get away car" did not take long to be discovered. Until police themselves became motorized, an automobile virtually assured escape. The automobile also made it possible for criminals to occupy new spaces on the margins of cities where police jurisdiction was questionable or non-existent. The roadhouse became a perfect site for criminals to gather and plan crimes or regroup afterwards. By the 1930s the combination of robberies with automobile touring had fashioned a new kind of national criminal like John Dillinger and Bonnie and Clyde. Worst yet, the automobile as a vector of violent, albeit accidental, death, invited a kind of dispersal of criminality that was itself destabilizing of criminal stigma. Writer Edward Weeks wondered if every family in the 1920s was not a potential refuge for criminals.

> My brother and I have each been arrested once. My father has been arrested twice – for speeding. Now this, I submit, is not an extraordinary record for an American family whose four older members have been driving steadily over a period of eight years. We were responsible for no injuries; we received the state's reprimand, paid our fines, and there the matter dropped. But I am not sure that the matter would have dropped so quickly if we had received the same number of convictions, say, for bootlegging or petty larceny.[49]

C. The Carnage

> *Formerly, when horse drawn vehicles, slow in movement and few in number, were the principal means of transportation, there was comparatively little danger in the use of the streets. But the increasing use and speed of automobiles*

49. Edward Weeks, *A Criminal in Every Family*, 140 ATLANTIC MONTHLY 445, 448 (1927).

have made our streets more dangerous than our factories and are causing a greater loss of life and a greater number of casualties or losses than in the World War.[50]
Judge Robert Marx (1925)

Of all of the ways in which the automobile destabilized the governance of the American people, none was more profound than the automobile accident. The rapid growth of motoring coupled with unimproved roads and a population with no historical experience driving such machines, combined to generate a hellish carnage that is difficult to appreciate in our era of air bags, engineered highways, and automobile conscious people. The Columbia Committee reported that the automobile fatality rate in 1931 had increased 500 percent since 1913.[51] The annual death toll reached 33,000 in 1930. The Twenties would see nearly a quarter of a million Americans, the majority pedestrians, killed in automobile accidents. It was as if the explosive force and potential for violence of the great industrial manufactories had exploded out touching thousands whose class position or status gave them little real protection.

Table 2 provides some measure of the relative significance of automobile accidents at the time of the Columbia report. Factory accidents had, to be sure, often provided graphic violence, but they were contained in the walls of the factory. The railroads, particularly at grade crossings, also took lives. But none of these could compare with the visibility and the numbers of humans injured by automobiles that brought the mutilations and corpses right into the center of American public life.

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50. Robert S. Marx, *Compulsory Compensation Insurance*, 25 COLUM. L. REV. 164, 167 (1925).

51. *See* Columbia Report, *supra* note 10, at 17.

Table 2: Causes of Accidental Death 1929 (percentage of total)	
Motor Vehicles	29
Falls	18
Drowning	8
Railroad	7
Burns	6
All Others	32

Source: Bureau of the Census, Division of Vital Statistics, Number of Deaths and Death Rates per 100,000 Estimated Population, 1929.[52]

The experience of carnage is more difficult to gauge then the scale and growth of automobile related deaths in the 20s and 30s. Relative to population, automobile accidents rose steadily from under 5 per 100,000 in 1910 to 27.2 per 100,000 in 1931, the year before the Columbia Plan was published.[53] The Depression suppressed driving and therefore accidents, but the number of accidents per 100,000 nevertheless rose by the mid 1930s to 30.8. Fatalities fell during World War II with the removal of large numbers of young males from civilian life. While the growth of accidents resumed after the war, it never again achieved the same levels witnessed during the 1930s.

But it may be accidents by population understates their relevance as a social problem. To the population of drivers, these events were far from rare. Consider that the actual number of automobiles in use the 1920s and 1930s was only a small fraction of the number in recent decades and yet the fatality figures are fairly close. An author in *The Atlantic Monthly* estimated that in three years during the mid 1920s one in every thousand automobiles in the country had been involved in a fatal accident and nearly one in twenty had

52. Columbia Report, *supra* note 10, at 24.

53. *See* GARY W. SHANNON & GERALD F. PYLE, DISEASE AND MEDICAL CARE IN THE UNITED STATES: A MEDICAL ATLAS OF THE TWENTIETH CENTURY 23 (1993).

been involved in an injury causing accident.[54] Thus among the automobile owning population, the experience of causing grave violence to other people, who were often an exposed pedestrian rather than the fellow motorist, was far from rare. As a function of the number of automobiles on the road, fatalities fluctuated wildly in the 1920s, first dropping as the rapid surge of sales widened the base, but then going up in the mid-1920s as many of these new drivers began to accumulate victims.[55] It was at this moment, significantly, that the Columbia Committee was first planned.

From a different perspective altogether, that of America's practical commitment to the automobile, the lethality of the automobile had already peaked and begun a downward trend in this period. As a function of miles driven, the automotive fatality rate was already in an impressive descent that has lasted until the present. When the post World War II automobile boom began, the death rate had fallen to only a third of its 1920s peak. At present, it is only a tenth of what it was in 1923.[56] Americans, both drivers and those exposed to them, have adjusted to motor vehicles. Some of this improvement probably came from greater skills in managing both cars and pedestrians around cars. Another part of the story is the gradual improvement of road conditions during this period.

The most difficult conclusion one can draw from statistical rates is the social experience of the automobile accident as part of one's lived world. The mutilation of human bodies by machines creates effects more disturbing then the numbers alone. The linking of technology and all its promise of productivity and order with the grotesque destruction of human life has produced a lasting and powerful counter-symbol to the progressive self-image of modernity. As contemporary novels and movies repeatedly demonstrate, the carnage of the automobile accident remains a subject of both horror and fascination.[57] But for urban populations in the 1920s and 1930s, these experiences were not yet iconographic. Instead, they were fresh and raw.

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54. *See* Weeks, *supra* note 49.

55. A possible cause of this upsurge was the increasing speed of automobiles in the 1920s. While cars going fifteen or twenty miles an hour were already lethal for pedestrians they struck, the new range of fifty, sixty, or even eighty miles per hour exposed the occupants to the threat of death.

56. *See* Shannon & Pyle, *supra* note 53.

57. *See, e.g.*, J.G. BALLARD, CRASH (Henry Holt 1973), produced as a major motion picture in 1997.

The possibility of coming around the corner to see a fellow human being in some state of shock or worst after being struck by an automobile was very real. This was by no means simply the fault of automobile drivers. Pedestrians were reluctant to give up their old prerogatives of walking when and where convenient, and were often reckless in making their way across thoroughfares crowded with all manner of vehicle both motorized and hitched to animals.[58]

The automobile was surely not the only source of carnage in the imagination of Americans during the second and third decade of the 20th century. Two other competitors were the industrial accident and war, especially the great slaughter of World War I. Clearly the spectacle of bodies mangled by automobiles was far more widely available to the ordinary citizen then that of war or industrial accidents. There was no television to bring home the full measure of gore from World War I. Work accidents happened behind the doors of the factory or the boundaries of the rail yard. No doubt word spread in working class neighborhoods, but direct observation was likely limited to fellow workers. The automobile reproduced the industrial accident but on the front porch of American urban life.

The images of automotive carnage and its random tragedies also merged with the horrors of the World War I battlefield in which unprecedented numbers of young men had been cut down by ruthlessly efficient new armaments.[59] Indeed, the war was from the start the first to be bound up with the figure of the automobile. Archduke Ferdinand was assassinated in his open touring automobile while his motorcade wound through Vienna.[60] For Europeans the automobile turned the war into a commuter affair with reserves being driven to the front in Taxi-cabs to cut off the nearly fatal German

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58. *See generally* A TRIP DOWN MARKET STREET (1905), an early life in action film shot from a cable car going down Market street in San Francisco in 1905. For more on the film as evidence about street conduct, see Thomas Russell, Blood on the Tracks: Turn of the Century Streetcar Injuries, Claims, and Litigation in Alameda County, California (unpublished manuscript on file with the author), at n.150 and accompanying text.

59. *See generally* PAUL FUSSELL, THE GREAT WAR AND MODERN MEMORY (Oxford University Press 1975).

60. This political gesture would be repeated a number of times during the remainder of the century, including the 1933 assassination attempt on Franklin Roosevelt (which resulted in the death of Chicago Mayor Anton Cermack), and the 1963 assassination of John F. Kennedy while his motorcade slowly moved through downtown Dallas.

advance of 1914.[61]

The war linked the automobile and violence inextricably. Throughout the 20s and 30s the automobile death toll was inevitably compared with that of the World War I.

> War was never like this. You can add together the American death toll of every war in which this nation has engaged, including the Civil War, and the automobile in ten years is still the greatest man-made killer we have ever known.[62]

An early reflection of the intertwining of war and automobile accident themes comes in F. Scott Fitzgerald's 1925 novel *The Great Gatsby* (1925). Gatsby is himself someone whose mysterious identity traces back to his war service. He tells Nick, his unassuming young neighbor:

> [T]hen came the war, old sport. It was a great relief and I tried very hard to die but I seemed to bear an enchanted life. I accepted a commission as first lieutenant when it began. In the Argonne Forest I took two machine gun-detachments so far forward that there was a half-mile on either side of us where the infantry couldn't advance. We stayed there two days and two nights, a hundred and thirty men with sixteen Lewis guns, and when the infantry came up at last they found the insignia of three German divisions among the piles of dead. I was promoted to be a major and every Allied government gave me a decoration – even Montenegro, little Montenegro down on the Adriatic Sea.[63]

The emotional climax of the novel places Gatsby in a much different kind of killing machine. Gatsby, as close as he will ever come to having his long lost love Daisy, is riding as a passenger with her at the wheel, in a car belonging to Tom, Daisy's husband. They are returning to Long Island from the dramatic confrontation at the Plaza hotel with Daisy's husband Tom. As the automobile passes a service station a woman suddenly rushes into the road

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61. *See* Finch, *supra* note 24, at 100.

62. Russell Holt Peters, *Death on the Highway*, 93 FORUM 179, 180 (1935).

63. *See* Fitzgerald, *supra* note 39, at 70.

and is struck by the automobile. The victim, Myrtle, unknown to either Daisy or Gatsby, is Tom's mistress. Daisy and Gatsby had been drinking heavily at the Plaza and were engaged in the most serious possible discussion involving both of their lives. Myrtle saw the automobile and assumed that Tom was driving by. Having just had a big fight with her own husband, Myrtle ran toward the automobile and into a fatal embrace with the machine itself.

> The "death car," as the newspapers called it, didn't stop; it came out of the gathering darkness, wavered tragically for a moment and then disappeared around the next bend. Michaelis wasn't even sure of its color – he told the first policeman that it was light green. The other car, the one going toward New York, came to a rest a hundred yards beyond, and its driver hurried back to where Myrtle Wilson, her life violently extinguished, knelt in the road and mingled her thick, dark blood with the dust.
>
> Michaelis and this man reached her first but when they had torn open her shirtwaist still damp with perspiration they saw that her left breast was swinging loose like a flap and there was no need to listen for the heart beneath. The mouth was wide open and ripped at the corners as though she had choked a little in giving up the tremendous vitality she had stored for so long.[64]

The second victim of the accident, of course, turns out to be Gatsby himself, who is murdered by Myrtle's husband George Wilson, who has been wrongly told that Gatsby was at the wheel.

These images of horror and carnage caused by automobile accidents were even more prominent in newspapers and mass-market magazines. The latter published numerous articles in the late 20s and through the 30s with titles like: "A Criminal in Every Family,"[65] "Death on the Highway,"[66] "The Motor Menace"[67] and "The Nut that Holds the Wheel."[68] Perhaps the culmination

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64. *Id.* at 144-45.
65. Weeks, *supra* note 49.
66. Peters, *supra* note 62.
67. Towle, *supra* note 46.
68. Curtis Billings, *The Nut That Holds The Wheel*, 150 ATLANTIC MONTHLY 439 (1930).

of this genre was J.C. Furnas' article, "And Sudden Death" first printed in *The Reader's Digest* in 1935 and reprinted numerous times.[69] Furnas' article was a deliberate effort to bring the horrible facts of an accident into the consciousness of the driver. His prose was undoubtedly shared with generations of drivers' education students. At the outset he imagined putting the dead to work teaching the living:

> If ghosts could be put to a useful purpose, every bad stretch of road in the United States would greet the oncoming motorist with groans and screams and the educational spectacle of ten or a dozen corpses, all sizes, sexes and ages, lying horribly still on the bloody grass.[70]

In light of that spectral haunting, Furnas' article attempted to create memorable images of horror. Much of the article, like the genre generally, expressed a fascination with the inevitable physics of accidents.

> Collision, turnover or sideswipe, each type of accident produces either a shattering dead stop or a crashing change of direction – and, since the occupant – meaning you – continues in the old direction at the original speed, every surface and angle of the car's interior immediately becomes a battering, tearing projectile, aimed squarely at you – inescapable. There is no bracing yourself against these imperative laws of momentum.[71]

The article combined its description of carnage with reminders that these events are repeated thousands of times in each year. Thus the automobile, ostensibly a means of establishing individuality, offered a similar end to many.

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69. J.C. Furnas, *And Sudden Death*, READER'S DIG., Aug. 1935, at 21. Magazine articles on automobile accidents became increasingly popular and increasingly sensationalist in the late 1920s and 1930s. Furnas' six page article generated a huge response and helped establish a style of reporting on accidents that came to quickly dominate ordinary newspaper reporting as well. *See* Nash, *supra* note 9, at 37.

70. Furnas, *supra* note 69, at 22.

71. *Id.* at 22-23.

> To be remembered individually by doctors and policemen, you have to do something as grotesque as the lady who burst the windshield with her head, splashing splinters all over the other occupants of the car, and then, as the car rolled over, rolled with it down the edge of the windshield frame and cut her throat from ear to ear.[72]

The Reader's Digest proclaimed itself "bombarded" by responses to Furnas' article. The magazine published many of them including the almost poetic little reminiscences of a small town embalmer located near an interstate highway.

> Just three happy boys on their way across the country to Detroit. Constant driving, day and night, with a change at the wheel every four hours, but endurance lost and we pick them up on the side of the road where they have crashed a telephone pole and overturned. Not an easy thing to telephone the poor father out on the Coast and inform him that the body of his boy lies in our mortuary. A wig that matches his hair, plastic art and dermasurgery restore the body to almost lifelike appearance, but we cannot bring back that youthful smile or happy laugh which he carried when he left home. These are only memories to his loved ones.[73]

D. A New Locus for Governance

The automobile literally drove holes through the webs of control imposed by institutions on the behavior and beliefs of individuals. The carnage the automobile created of twisted bodies and metal defied the picture of orderliness emerging from a technological society. But at the very same time, these destabilizing events were provocations to rethink strategies of governance at every level, including some never before made explicit targets of governance. Likewise accidents constituted a new set of subjects and objects through which that governance could operate. The growing sense that the automobile accident represented a dark side to modernity's embrace of

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72. *Id.* at 25.

73. A. J. Bracken, *The Aftermath of Sudden Death*, 27 READER'S DIG., 1935, at 53.

technology carried with it a demand for a new rationality of governance.

We do not often focus on the 1930s as a period of governmental invention at this level. First, because the Great Depression led to a revolution of governmental strategy at the highest levels of national government. Second, and partially as a result of the first, post-New Deal students of government have been less interested in governance at the state and local level, and through private actors.[74] These historic developments, however, did not stop contemporary observers from seeing the automobile accident as a critical issue of governance. Indeed, the capacity of the automobile to shift suddenly from facilitator of individual choice and economic opportunity to a nightmarish death machine made it a palpable symbol for the crisis of the Depression itself.[75]

Ironically, while we remember the New Deal for establishing important collectivist features to American government, such as Social Security, national economic regulation, and government borrowing as a counter-cyclical measure, the automotive revolution in governance that began to take shape in the same decade placed the individual at its center. The automobile had made it possible for the ordinary individual to assume direct control of powerful and lethal machinery of the sort previously limited to businesses and governments. Its financing gave the same individual a direct stake and role in the economy. How could this greatly expanded self be managed safely?

Fitzgerald, offered one picture of this problem. In *The Great Gatsby*, driving, with its potential for utter destruction, is a master metaphor for love and ultimately life itself. In an evocative passage the narrator Nick is complaining about the careless driving of his companion Jordan Baker. At one point she passes so close to "some workmen that our fender flicked a button on one man's coat."

> "You're a rotten driver," I protested. "Either you ought to be more careful or you oughtn't to drive at all."
>
> "I am careful."
>
> "No, you're not."
>
> "Well, other people are," she said lightly.
>
> "What's that got to do with it?"
>
> "They'll keep out of my way," she insisted. "It takes two

74. *See* KELLER, *supra* note 24.

75. *See* NASH, *supra* note 9, at 37.

> to make an accident."
>
> "Suppose you met somebody just as careless as yourself."
>
> "I hope I never will," she answered. "I hate careless people. That's why I like you."
>
> Her grey sun-strained eyes stared straight ahead, but she had deliberately shifted our relations, and for a moment I thought I loved her. But I am slow thinking and full of interior rules that act as brakes on my desires, and I knew that first I had to get myself definitely out of that tangle back home.[76]

But not everybody in the novel seemed to have maintained the strong internal rules and brakes of Nick's solid Midwestern upbringing. How to rebuild such rules is a question that Fitzgerald understandably did not try to answer.

II. STRATEGIES FOR RESPONDING TO THE UNGOVERNABILITY OF THE AUTOMOBILE

The fact that millions of ordinary Americans now controlled machines capable of incredible destruction meant that the behavior of individuals scattered over a vast range of landscapes and activities became a potential subject of regulation. The increasing carnage caused by the automobile produced mounting pressure during the 1920s to achieve better regulation over driving, and government at all levels responded with a variety of rules and measures. But in a deeper sense the destabilization worked by the automobile called into question the very nature of governance at all levels. Russell Holt Peters, writing in *Forum* magazine, saw the weakness of controls over reckless driving as rooted in a corrupted judiciary:

> Your traffic laws may be of the best, your streets may be adequately lighted and marked, your officers may be alert. But they aren't worth a tinker's dam if your judges don't toe the mark. Show me a court where the fixer can work, where "a friend who knows the judge" can influence decisions, and

76. FITZGERALD, *supra* note 39, at 63-64.

> I can show you a city of abnormal traffic accidents and deaths.[77]

The Nation, in a 1922 editorial titled "The Automobile Death Toll," began by asking "how shall we control the modern Juggernaut?"[78] The editorial cited a recent study by the New York legislature decrying the absence of effective regulations over who could operate motor vehicles.

> Outside of the city of New York there is "practically no limitation as to who may drive a motor vehicle" and the committee found "the child, the aged person, the lame, the blind, and the deaf dealing out death to those who use the roads."[79]

The same editorial, however, recognized that even great improvements in controls over who could drive and stiff punishments for violators would leave an unacceptable amount of hazard involved in driving.

> There will always be some fatalities, all the more so because we develop unsuspected and often undiscoverable defects such as the sudden collapse of the steering-gear or the breaking of an axle which outwardly shows no flaw. Again the undermining of a road, not visible on the surface, has sent many a motorist to his grave.[80]

The editors warned against over-reliance on the criminal law. Far too many deaths were blamed by coroners on the recklessness of pedestrians or on minor dereliction of care. New strategies had to be developed. *The Nation* looked to "the State and public opinion" to evolve new ways of controlling "so deadly a contrivance."[81]

The most basic efforts at regulating traffic did not begin until the Teens. Michigan introduced the first painted dividing line on a road in 1911, and

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77. Peters, *supra* note 62, at 179.
78. *Editorial: The Automobile's Death Toll*, 114 THE NATION, Mar. 1922, at 279.
79. *Id.* at 279.
80. *Id.* at 280.
81. *Id.*

Cleveland installed the nation's first electric traffic signal in 1914.[82] Although New York introduced the first traffic code in 1903, large gaps remained into the 1930s especially in the absence of interstate standardization. By 1927, 42 states had some statutory regulations over motor vehicles, typically supervised by pre-existing state structures intended to regulate railroads or public utilities.[83] At the time of the Columbia Report only 21 states and the District of Columbia required drivers' licenses (and four of them required no test of physical or mental ability).[84]

Seth Humphrey contrasted the absence of any real regulation of who can drive an automobile with the web of rules governing who could drive a trolley car.

> The trolley car is as easily and as quickly controlled as any good automobile; it is run usually at lower speeds, and its clearly defined rails make it a safer driving proposition. Yet because nobody wants to drive a trolley car except for pay, careful selection of its operators is assumed as a public necessity. None but mature men of proved judgment and caution are permitted at the controls. How scared we should be at seeing chatty high-school girls, or Antonio the fruit peddler, running a trolley car up the street as a holiday diversion! And nobody thinks of taking in the motorman as one of a gay party aboard; we are not allowed to speak to the motorman, much less pet him while he is running the car.
>
> Mass Psychology born of the universal will to drive has made impossible a proper conception of the motor car as a locomotive running intimately among frail human beings.[85]

A sign of the interest that automobile carnage was creating in the art of government was a remarkable series of articles in *Scientific American* given over to the topic of uniformity of laws. Throughout the 20s and 30s that

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82. *See* FINCH, *supra* note 25, at 112.

83. *See* KELLER, *supra* note 24, at 66.

84. *See* Columbia Report, *supra* note 10, at 19.

85. Seth Humphreys, *Our Delightful Man-Killer*, 148 ATLANTIC MONTHLY 724, 729 (1931).

magazine devoted extensive coverage to every aspect of automotive and road engineering, driver education, and general safety, but they gave early priority to the law.

> In the present article, we shall have very little to say of the physical problems of making the road safe and making them swift, beyond this merely pointing out of the existence of the problem and its place in the general scheme of automotive philosophy. For, important as it is to have the physical characteristics of the roads correct, very many of the existing roads are wrong in numerous fundamentals. Very many existing laws are wrong too; but the changing of a law is, on the whole, a somewhat simpler, and certainly a less expensive process than the changing of a much used highway. So in this initial attack upon the problem, we shall devote ourselves to the discussion of automobile laws.[86]

The staff suggested that the nature of the automobile problem called for fundamentally rethinking the relationship between law and citizen.

> Fundamental in our jurisprudence is the principle that the ignorance of the law is no excuse for its violation. The principle is a wise one, and in general it must prevail. But when the circumstances are such that your ignorance of the law may damage you, it is time for the law to ask whether some degree of responsibility for general knowledge of the statutes does not devolve upon the community as a whole. In the case of the traffic laws the answer to this is an emphatic "Yes."[87]

The staff wrote each state asking for their traffic laws and received printed pamphlets from 38 states. The very fact of a printed pamphlet suggested that states recognized the need for a form of popular legal

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86. Scientific American Staff, TRAFFIC AND THE LAW: THE UNNECESSARY DIVERGENCE BETWEEN THE MOTOR LAWS AND CUSTOMS OF THE SEVERAL STATES, 130 SCI. AM. 18 (Jan. 1924).

87. *Id.*

education with regard to traffic laws. But the existence of a pamphlet was only a start. Most lacked a logical organization or an index. Many simply listed traffic laws in the order in which they were enacted.

> Is it rational to ask the man who wants to know whether he may pass a standing street car to read through the equivalent of five to eight solid pages of the Scientific American in search of the information?[88]

Even more troubling was the lack of uniformity among the states. On the issue of licensing, for example, of 38 states reporting, fully 26 had no regulation at all at the time of the Scientific American survey. Of the rest, only six required a skills test for licensing with regular renewals. Most of the others used licensing merely as an opportunity to tax the driver. With regard to age, fully ten states had no regulation at all on the age at which a person could drive and five others permitted a child of any age to drive if an adult was in the car. Of the rest, 3 prohibited drivers younger than fourteen, four prohibited drivers younger than fifteen, nine prohibited drivers younger than sixteen, and two required drivers to be at least seventeen or eighteen.[89]

When it came to the speed at which automobiles could lawfully operate, there was similar diversity. Some states set an absolute limit. Others set a limit, and driving above it constituted prima facie evidence of recklessness. In the latter category the most frequent limit was thirty miles per hour but some states set it as low as twenty and others as high as forty, while still others simply required drivers to operate at "reasonable and proper" speeds. This situation was further complicated by the authorization in twenty-one of the states for municipalities to set their own speeds.[90]

Thus, even if traffic laws were easily accessible, the ordinary driver would have to become a veritable attorney to keep track of which rules where in effect in the jurisdiction in which she found herself.

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88. Scientific American Staff, *One Law Versus Forty-Eight: The Practicality and the Necessity of Uniform Motor-Vehicle Legislation in all the States*, 130 SCI. AM. 96 (Feb. 1924).

89. *See* Scientific American Staff, *Traffic and the Law: The Unnecessary Divergence Between the Motor Laws and Customs of the Several States*, 130 SCI. AM. 18, 18-19 (Jan. 1924).

90. *See* Scientific American Staff, *One Law Versus Forty-Eight: The Practicality and the Necessity of Uniform Motor-Vehicle Legislation in All the States*, 130 SCI. AM. 96 (Feb. 1924).

> The root of the difficulty, then lies not in the ignorance of the motorist, not in the difficult of informing him, but entirely in the fact that, within the territory covered by the average motorist, there exists a plurality of motor codes. If, confining our attention to this angle, we ask why such plurality should exist, there is but one answer – there is no reason why it should.[91]

In the last of the four articles, the *Scientific American* staff looked at the problem of gathering data on automobile accidents. Any real improvement in accident prevention would require accumulating data on the great variety of circumstances that led to accidents. The *Scientific American* staff pointed out that data collection is first a function of law.

> Hence it is obvious that we can get at the facts only under the authority of the law, through agencies established by the law, and with the distinct backing of the law.[92]

The leading state in addressing the problem of data collection was Connecticut, whose Commissioner of Motor Vehicles was an early proponent of aggressive accident prevention measures.[93] The Connecticut system required any driver involved in an accident to fill out a form on which a large number of circumstances had been coded. The listing of the relevant items provides a kind of portrait of automobile carnage as it played out in the 1920s and the way in which it was objectifying the world around it in a new light.

During the 1920s three important centers of regulatory activity emerged around the problem of the automobile in general and the automobile accident in particular. First, laws governing the operation of vehicles, especially speeding laws, aimed at influencing the judgment of the driver through the disciplines of law enforcement, punishment, and public education. Second, civil liability, the general rules of care taking in public life, promised to discipline the same subject. Here, the law was outstripped by the epistemological and economic complexity of the automobile accident.

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91. *Id.* at 141.

92. Scientific American Staff, *When, Where, Why? How Connecticut Gathers the Data of Her Automobile Accidents and the Use She Makes Thereof*, 130 SCI. AM. 312 (Apr. 1924).

93. *See id.*

Obtaining agreement on what constituted careless behavior, proving what had happened, and finding a source of capital for compensation stood as profound problems for making civil liability an effective way to govern driving. Third, insurance offered the possibility of providing compensation for victims while maintaining a subtle force for care taking that lacked the vulnerabilities and liabilities of coercive policing. While only one state made liability insurance a requirement for automobile owners, and although the provision of insurance remained a wholly private enterprise, insurance was intertwined with legal measures of governance. The owner's liability policy was typically the only available source of assets to pay any judgment, and thus the real cause of interest in litigation. These legal measures competed to some degree with a scientific discourse on accidents as a consequence of dynamics in a system of traffic which included not only cars, drivers, and pedestrians, but roads, weather conditions, and a universe of hard objects.

A. Speed Laws

New York, the very first state to introduce a law on speed in 1901, only forbade speeds greater than were "reasonable and proper."[94] Soon, however, the approach shifted to specific speed limits. The first generation of such statutes laid down an absolute limit generally applicable in the jurisdiction. This took no account of road conditions and traffic densities and was a source of considerable popular dissatisfaction.[95] Later statutes began to set speeds but only as prima facie evidence of reasonableness.[96]

By the 1920s a veritable politics of speed laws was in full swing. Pressure from drivers led many states to increase speed limits or eliminate them altogether in favor of reasonableness standards.[97] To some extent this controversy involved the practice of fining violators and the growing apparatus of police organized specifically to apprehend speeders. But its most significant context was in litigation over accidents, in which a rule on speeding might act to tip the scales to plaintiff or defendant. Popular anger over speeding restrictions led to efforts to rethink the measure of responsibility in driving. Writing in *Scientific American* in 1925, a

94. Note, *Development of Standards in Speed Legislation*, 38 HARV. L. REV. 838 (1934).
95. *See id.* at 840.
96. *See id.*
97. *See id.*

mechanical engineer proposed that speed laws be replaced altogether with rules establishing the number of feet in which an automobile had to be able to come to a complete stop. Operating the vehicle so as to bring it to a stop within such a distance would replace speed as the hallmark of reasonableness.[98]

> Now a law which employs speed as the sole criterion of careless driving and which makes no differentiation between good and bad brakes, between smooth and non-skid tires, and between dry or wet or icy pavements, evidently fails in its purposes of promoting maximum safety of driving. If the cure were impossible or were worse than the disease, we would have no criticism to make, but the remedy is so simple and can take into consideration so easily and automatically the various conditions which we have mentioned as affecting the safety of car operation, that we marvel that seventeen million cars are still governed in their activities by such antiquated laws.[99]

Peter O'Shea, writing in the *North American Review* pointed to the inevitable contradictions between speed laws and the tendency of manufacturers to build and sell cars based on their power and speed.

> Slow laws for a speedy people! Who is responsible for the paradox? How can we induce these authors of trouble to become mathematicians and write an equation between speed laws and present day people? What changes could we ask? Which are right: laws or people? We know the people must be right, for among them are many saintly characters who, in consistently obeying other laws, could not be wrong.[100]

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98. *See* H.W. Slauson, *A New Plan for Traffic Laws: It is Stops, Not Speeds, That Matter*, 131 SCI. AM. 296, 297 (1925). Several states experimented with this approach by abolishing speed limits and defining reckless driving by speed in relationship to stopping distance. *See* Bond, *supra* note 9, at 43.

99. Slauson, *supra* note 98, at 297.

100. Peter O'Shea, *Speeding Up Speed Laws*, 230 NORTH AM. REV. 561, 562 (1930).

In a tradition which continues today, automobile advertising emphasized speed capacities that inevitably exceeded legal limitations. The automobile was already linked to crime in the minds of many because of its association with criminals, but as O'Shea suggested, the marketing of automobiles invited a kind of criminality among even the most law abiding.

Not only were speed laws in tensions with the capacities of automobiles, they also varied so much from state to state that drivers crossing state lines might be challenged to comply with the law, especially in an era of limited signage along roads. O'Shea attributed the emphasis on command style speed limit laws to the political influence of lawyers who "as a class live in the past."[101] Better to spend time and treasure improving the skills of the population, who would drive fast in any event and on widening and straitening the roads to facilitate safer driving at high speeds.[102]

Others disagreed. A writer in the *Atlantic Monthly* noted that speed had a clear correlation with accidents, even if it did not in a literal sense cause them.

> While it may not be wholly accurate to say that speed causes accidents, no one can deny that high speed makes an accident a great deal more deadly.[103]

While "old fashioned" speed laws might not be the answer, the author argued, that drivers had to be taught that speed was a significant risk factor along with others.

> It will be apparent then that the positive work of correcting the present shocking conditions, which are a result of the American public's misuse of the automobile, will have to deal with five fundamentals. (1) It must be impressed upon motorists that speed is dangerous. (2) They must be made to realize what their blunders are costing in life and happiness. (3) It must be brought home to them by the proper enforcement of laws that they cannot 'get away with' criminal carelessness. (4) They must learn to maintain their

101. *Id.*
102. *See id.* at 566.
103. Billings, *supra* note 68, at 440.

> cars in a safe condition. (5) They must be taught how to drive.[104]

The Nation opined that the call for relaxing speeding laws was troubling.

> If we kill 30,000 persons a year with automobiles in the United States – as last year we did – which is at the rate of about one person to every thousand cars, we are nevertheless determined to drive faster and ever faster. The old days of driving at twenty to thirty miles an hour are vanishing, even in cities. In New York to drive at the legal rate of fifteen miles an hour would invite a rebuke for obstructing traffic. Forty is the speed now, or fifty. At the same time that our cars are equipped with more powerful engines and stronger brakes, our roads are smoother, better graded, freer of dangerous curves. They invite the swift, long rush of the motor. And the motor is eager to respond.[105]

Many of the writers of the popular discourse on speeding laws were troubled by the failure to treat traffic violations as real crimes. In a 1927 article in the *Atlantic Monthly*, titled, "A Criminal in Every Family", Edward Weeks called for recognition of the moral significance of law breaking in the automobile context and for carrying discipline to lower thresholds of misbehavior.

> My brother and I have each been arrested once. My father has been arrested twice – for speeding. Now this, I submit, is not an extraordinary record for an American family whose four older members have been driving steadily over a period of eight years. We were responsible for no injuries; we received the state's reprimand, paid our fines, and there the matter dropped. But I am not sure that the matter would have dropped so quickly if we had received the same number of convictions, say, for bootlegging or petty larceny.[106]

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104. *Id.* at 444.

105. *Editorial: More Speed!*, 131 THE NATION 287 (1930).

106. Weeks, *supra* note 49, at 448.

Weeks called for a combined effort of police and public opinion to transform the whimsical attitude of the public toward motor carnage.

> To open the public's eyes we must have men who are once martinets[107] and skilled propagandists. As state officials in charge of motor vehicles they must undertake to 'popularize' the idea of safety and to drub it into those who won't listen.[108]

Other writers decried the aggressive use of proactive policing techniques against the fast but careful driver, like speed traps operating to enforce archaic 15 mile per hour limits on good suburban highways capable of being normally traversed at 25 miles per hour. The author related his own arrest on a similarly safe road, which cost him thirty six dollars. "For pure extortion the court scene was a page from Dickens."[109] What was needed, the author argued, was to take the matter out of the hands of self interested local politicians and police and instead to develop a national speed limit defining distinct speeds for business districts, suburbs, and thinly settled areas.

These journalistic discourses suggest that the problem of speed and of fatal accidents was generating a considerable consciousness about the problem of government. On one level, this was a problem of where to locate a government of automobiles and driving. Curtis Billings noted that every level of formal government must be involved, but he would also include the schools, insurance companies, journalists and ultimately individuals themselves.

> We are at once the perpetrators and the victims of traffic accidents and we should be the principal gainers by reducing their number. It is time for us to learn that the automobile is no longer a novel toy, that it is a tremendous social force, mainly for good, but certainly for terrific evil if not sanely used.[110]

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107. A martinet is a strict disciplinarian, after General Jean Martinet the French promoter of drilling.

108. Weeks, *supra* note 49, at 449.

109. *Id.* at 450.

110. Billings, *supra* note 68, at 445.

The automobile was driving two very different and equally troubling tendencies in society with commensurate difficulties for governance. Personal conduct had never been so routinely intertwined with death and carnage. As a consequence, micro-level details of daily life were coming in for unprecedented attention and formal control. At the same time, however, the automobile had turned consumer choice, and through it manufacturers' profit, into an unprecedented force regulating much else in daily life. One writer suggested the underlying tensions by imagining the formal merging of corporate and municipal powers over the automobile.

> Let us suppose for a moment that manufacturers and lawmakers were identical. What a dilemma Henry Ford would be in if he were elected Mayor of Dearborn, and the city council passed over Mayor Ford's head an ordinance limiting motor car speed to thirty miles an hour! Would he resign as Mayor, or would he conscientiously telephone his factory: "Cease production on sixty-mile motors. Retool the plant for a legal thirty-mile motor."[111]

In one sense, of course, developing new criminal laws for the automobile age was a simple application of traditional police powers of the state. But precisely because the automobile was transforming the very nature of the subject to be governed, these rules became flash points of controversy for the whole effort to govern the unprecedented and dynamic society that seemed to be emerging from the 1920s.

B. Civil Liability

While states had to scramble to produce new law regulating the automobile, a regime of legality already existed to govern automotive conduct, i.e., the tort system. A person injured by an automobile accident in the 1920s could bring a civil suit for damages. Such plaintiffs faced the standard burdens of tort doctrine. First, they had to establish that their injury (or death in a case where decedents' survivors sued) was caused by the defendant's operation of the automobile.[112] Second, they had to establish that

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111. O'Shea, *supra* note 100, at 561.

112. *See* Columbia Report, *supra* note 10, at 25-26.

this operation was negligent, i.e., lacking in the care that a reasonable person would have provided.[113] Where traffic regulations existed and the driver violated them, this inevitably formed an important issue in establishing negligence. In some states a violation of a traffic law was per se negligence.[114] In this sense civil liability reinforced criminal traffic regulations.

But many observers noted that civil liability could police driving only if defendants had substantial reasons to fear accountability. Negligence, even if established could be defeated if the injured party was also negligent, unless that is, the defendant could be shown to have had the "last clear chance" to avoid injury.[115] A few states in the 1920s statutorily exempted from such civil suits, people who were injured while gratuitous guests in the automobile that caused the injury.[116] Vicarious liability could also be sought against the owner if that party was different than the operator of the automobile.[117] By 1931 courts in about half the states recognized some version of the so-called "family automobile" doctrine by which the owner was held liable for damage negligently done by a family member using the automobile with the owner's consent.[118]

As a practical matter, unless the defendant had significant assets, settlement was likely to be extremely low if any was offered at all.[119] Where assets made the case worthwhile, and where a negotiated settlement could not be reached, delays of up to three years to trial were already common in the larger cities.[120] The delay often meant that the social dislocation effects of injury would hit the family and the community regardless of any eventual tort recovery.[121] The burdens posed by the civil justice model as it existed in the

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113. *See id.* at 26.

114. *See* Richard M. Nixon, *Changing Rules of Liability in Automobile Accident Litigation*, 3 LAW & CONTEMP. PROBS. 476, 478 (1936).

115. *Id.* (citing Kansas City S. R.R. Co. v. Ellzey, 275 U.S. 236 (1927)).

116. But only if the defendant was not "grossly negligent." Columbia Report, *supra* note 10, at 27 (citing relevant statues and court cases).

117. *See id.*

118. *See id.* at 28; *see also* Edward E. Hope, *The Doctrine of the Family Automobile*, A.B.A.J. 359 (1922); Norman D. Lattin, *The Family Automobile*, 26 MICH. L. REV. 846 (1928); Ashley Cockril, *The Family Automobile*, 2 VA. L. REV. 189 (1914).

119. *See* Columbia Report, *supra* note 10, at 28.

120. *See id.* at 29.

121. *See id.* at 35.

1920s could be expected to prevent many losses from being shifted or perhaps even adjudicated, but they were particularly difficult in the context of automobile accidents.

> The very injury for which compensation is sought has often hindered or prevented the gathering of evidence. Some days or even weeks will ordinarily elapse before the plaintiff or his attorney begins to prepare his case. Meanwhile the defendant, unless he is also injured, has often been able to gather the names of witnesses at the scene of the accident and to notify his insurance company or employ his attorney immediately. The considerations apply peculiarly to motor vehicle accidents. The suddenness with which such accidents occur and the fact that the participants are usually unknown to each other and to all the bystanders, make the plaintiff's task harder than in the case of many other accidents.[122]

Other critics suggested that courts were too ready to facilitate compensation for the victim at the cost of eroding the requirements of fault. A student note by Richard M. Nixon,[123] in a symposium on automobile accident compensation in *Law & Contemporary Problems*, argued that the drive for compensation had left the field doctrinally confused. Despite rejecting the view that autos should be treated as dangerous instrumentalities (and thus be subjected to strict liability), courts were accomplishing much the same thing by letting cases get to the jury despite the requirement that the plaintiff demonstrate the negligence of the driver, and in many states an absence of negligence by the plaintiff.[124] The effort, made famous by Justice Holmes, to create presumptive rules for typical fact patterns, like the "stop, look, listen" rule for when an automobile came to a railroad crossing, had

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122. *Id.* at 33.

123. *See* Nixon, *supra* note 114, at 481. While this is not the occasion for a fuller treatment of the automobile accident as a problem of national government, it is extremely interesting that both President Herbert Hoover, *see supra* note 4 (regarding Hoover's uniform traffic law), and President Richard Nixon, took a keen interest in the automobile accident problem prior to their presidencies (several decades prior, for the young Nixon).

124. *See* Nixon, *supra* note 114, at 481.

been abandoned by the mid-1930s.[125]

Courts were also moving to expand the possibility of finding assets sufficient to satisfy judgments by holding automobile owners liable for the negligence of a driver if the driver had a reputation for incompetence, if the driver could be construed as working for the owner, or if the driver was a member of the owner's family.[126] Nixon saw this as arising out of the normalization of driving:

> In the days when an automobile driver was looked upon with somewhat that same degree of awe and respect which the airplane pilot inspires in the ordinary ground dweller of today, the owner did not often entrust his car to others. He either drove it himself or, since he was usually a man of wealth, employed an experienced chauffeur. There were few cases, therefore, in which the owner's liability for injuries caused by the negligent operation of his automobile could not be predicated either on his own fault or on that of his regularly employed servants.[127]

With driving becoming ordinary, the lines between employment relationships and others was being blurred both by the casualness with which owners lent their cars, and the striving of courts to expand the judgment pool. A good example was the "family purpose" doctrine which held that family members were, in effect, serving the business of the family when they took the automobile to the grocery store or even on a pleasure outing.

C. Insurance as Government

Insurance was a potentially significant source of government over the automobile. Although expensive, liability insurance was already becoming widespread. If statutory mandate or fear of civil damages was effective at requiring coverage, accessibility would be substantially expanded, especially for those with incomes and predictably some assets. This would also achieve

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125. Justice Holmes held that the driver had a duty to "stop, look, and listen" before attempting to cross. *See* Baltimore & Ohio R. R. v. Goodman, 275 U.S. 66 (1927). Justice Cardozo declined to apply the rule in Pakora v. Wabash Ry., 202 U.S. 98 (1934).

126. *See* Nixon, *supra* note 114, 483-86.

127. *Id.* at 484.

compensation for at least those victims with a colorable negligence claim against the driver. By charging based on experience, insurance companies could create an incentive for improving driving behavior.

The Columbia Committee found, however, that the potential for insurance to influence behavior was largely untapped. Nationally twenty-seven percent of motor vehicles registered in 1929 were covered by a liability insurance policy.[128] While the numbers of motorists who purchased liability insurance varied enormously, in only twelve states were more than a quarter of all motorists insured.[129] Only Massachusetts made liability coverage a condition for registration,[130] and insurance companies strongly disliked the Massachusetts' plan which set premiums and created an administrative board with the power to compel companies to accept risks at the set premium.[131]

More common were financial responsibility laws that required a motorist, once involved in an accident,[132] to get insurance or post a bond prior to renewing registration after the accident. In 1932, financial responsibility laws were in force in eighteen states and four Canadian provinces, but the Committee's analysis suggested that the enactment of such laws had only produced marginal increases in insurance coverage.[133] The late 1920s also saw states creating motor vehicle or insurance commissioners in charge of enforcing financial responsibility. Where the law limited its mandate to careless drivers, the insurance commissioner was made responsible for evaluating whether or not insurance coverage would be required for individual drivers. In Connecticut, the law required the commissioner to sort those subject to insurance requirements into four risk groups for which insurance companies offered separate premiums.[134] In Massachusetts, insurance companies set up a joint bureau for rating drivers under the oversight of the insurance or motor vehicle commissioner.[135] Another

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128. *See* Nixon, *supra* note 114, 483-86.

129. The Columbia Report acknowledged that the percentage was higher in the cities where it was most needed. *See id.* at 46.

130. *See id.* at 113. All states, however, required insurance for public carriers.

131. *See id.* at 114.

132. Statutes varied as to whether financial responsibility applied only where the driver was at fault or simply on being involved in an accident. *See id.* at 98.

133. The Committee acknowledged that most of these laws had only been in force for one or two years at the time of the analysis. *See id.* at 99.

134. *See id.* at 98.

135. *See id.* at 123.

function of the motor vehicle or insurance commissioner was to monitor satisfaction of judgments and to withhold driving privileges from parties failing to pay their judgments.[136] To enforce these mandates, commissioners were typically invested with significant power to revoke licenses of drivers with records of carelessness, as well as financially irresponsible or judgment shirking drivers. In practice, however, the Committee's study suggested that enforcement was largely non-existent. Those who chose to ignore an order to surrender their license had little to fear from continuing to operate their automobile.

Proposals to make insurance mandatory emerged following World War I. The first law review articles calling for mandatory automobile insurance along the lines of worker's compensation appeared before the expansion of the automobile to the middle and working classes. They reflected the image of the motoring public as a small and determinate class. Earnest Carman, for instance, denounced motoring as the excess of a distinct minority.

> Due care on the public highways today is much more burdensome to all classes than it was before the appearance of motor vehicles, or would now be in their absence. The motoring class has placed this added burden of care upon the public without bestowing any corresponding benefits. Would the expense of accident compensation insurance, placed upon the motoring class for the benefit of the public, be any more than a fair offset?[137]

Weld Rollins had an even more sinister view of the motoring class.

> The automobilists who do the most harm, I learn at the Highway Commission, are not the tyros or those under the influence of liquor, but the skillful, confident drivers who take chances. The most numerous class of victims is children.[138]

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136. *See id.* at 102.

137. Weld A. Rollins, *A Proposal to Extend the Compensation Principle to Accidents in the Streets*, 4 MASS. L. Q. 392. (1919).

138. *Id.*

Rollins proposed a compensation system limited to pedestrian victims and paid for by motorists. In Rollins' view these were two apparently implacable classes.

> In an impact between an automobile and a pedestrian, the automobile can injure the pedestrian; the pedestrian cannot injure the automobile. The chances are all one way. Moreover, it is the automobilist who gets the pleasure of profit from the machine; the pedestrian gets none.[139]

An indemnity company would set a price based on the driver's record that would price out the most reckless drivers. Rollins criticized regular liability insurance as practically an incitement to carelessness:

> The business of the accident insurance companies in insuring automobilists is in some respects very objectionable. In the first place, what they offer to sell to automobilists are policies of insurance which are in effect licenses to do harm with impunity. These cost the automobilist only a trivial sum, $25–$90, and in consideration of that amount the automobilist is privileged to be reckless.[140]

Shippen Lewis was ready to support a gradual extension of protection to victims. His proposal reflects his vision of a social body segmented by motoring classes.

Any plan would necessarily provide compensation to pedestrians. In fact, I believe that it would be reasonable to begin with pedestrians only and to extend coverage to others after a few years of experience as to cost and method of operation. Next come bicyclists, horsemen and occupants of horse drawn vehicles, all of whom appear to be really in the same class as pedestrians. Occupants of motor vehicles present the most difficult problem.[141]

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139. *Id.* at 394.

140. *Id.* at 393.

141. *See* Shippen Lewis, *The Merits of the Automobile Accident Compensation Plan*, 3 LAW & CONTEMP. PROBS. 583, 592 (1936).

At the end of the 1920s, then, efforts were underway to develop both criminal and civil law strategies for regulating the risks of driving. Both of these were undercut in important ways by the ways in which automobiles were changing the nature of the governed subject. Insurance beckoned as a resource that could not only provide its own forms of control, but could make the insured subject more amenable to regulation through the criminal and civil laws.

III. THE COLUMBIA PLAN

Perhaps the most significant effort during this period to think through the implications of insurance as a way of governing automotive life was the *Report of the Committee to Study Compensation for Automobile Accidents* and the debate over its proposals (the Columbia Plan). While it never became law, the Columbia Plan nevertheless was influential, for three reasons. First, the Committee was one of the most powerful groups of lawyers brought together under the leadership of academic legal realists. Second, the empirical component provided the best statistical data on automobile accident liability available until the mid-1960s. In both these senses it was anticipatory of the kind of public policy role that legal academics have played since the end of World War II. Third, the Report had influenced legal scholars through the 1960s when many of our current orthodoxy's on accident law were set.[142]

The Committee itself was formed on November 15, 1928, by what it describes as "voluntary association." Its membership was composed largely of leading judges and lawyers long active on the issue of liability reform.[143] The Director of the study was Shippen A. Lewis, a member of the

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142. *See* Priest, *supra* note 18, at 479.

143. The Committee included: Arthur Ballantine: then Assistant Secretary of the United States Treasury, Victor Dowling: the ex-presiding Justice of the Appellate Division of the Supreme Court of New York, First Department, William Draper: the Director of the American Law Institute, Robert S. Marx: a former Cincinnati Judge who had published an article calling for a no-fault system in the mid-1920s, Ogden L. Mills: Undersecretary of the Treasury of the United States, William A. Schnader: Attorney General of Pennsylvania, Bernard L. Sheintag: Justice of the Supreme Court of New York and formerly the Commissioner of Labor of New York, Horace Stern: President Judge of the Court of Common Pleas No. 2 of Philadelphia, Howard W. Taft: a member of the New York City Bar, and Miles M. Dawson: a lawyer, actuary, and leading author on insurance issues. *See* Columbia Report, *supra* note 10, at 15, n.2.

Philadelphia bar and leading advocate of liability reform. The analysis of liability rules and the drafting of the model legislation was overseen by a number of law professors at Yale and Columbia, including Dean Charles Clark, Prof. Walter F. Dodd of Yale, Prof. Noel T. Dowling, and Professor Francis Deak of Columbia (Clark and Dodd were also members of the Committee). Two professional sociologists, Dorothy Swaine Thomas of Yale and Frank A. Ross of Columbia oversaw the collection and analysis of statistical data.

The study consisted of a number of distinct parts, and was carried out by cooperating scholars working in a dozen different towns and cities. One part of the study was a descriptive legal survey of current automobile compensation law, the product of recent legislation, and the approaches of European legal systems.[144] A second element was a study of records of courts and insurance companies for data on damage awards and payments. The most innovative segment of the research was the collection of nearly 9,000 case studies from ten different field sites.[145] Research teams in six urban and four rural counties aimed to collect a representative pool of injury cases.[146] Victims were identified mainly by examining court records. In a few cities, an effort was made to look beyond the formal legal system by advertising for persons injured. In each case the field researchers conducted personal interviews with the injured party or family member in their home as to aspects of their health, family, income, medical and legal treatment.[147]

The Columbia Committee spent three years collecting by far the largest database available on cases of personal injury resulting from an automobile accident. Although state of the art for social science methodology in the Twenties, the Committee's statistics would be problematic by contemporary standards. The Committee's database was not a representative sample of American automobile accidents.[148] As with other pioneering efforts to use social scientific methods to study problems that had been addressed legal

144. *See id.* at 5.

145. *See id.* at 9.

146. *See id.*

147. *See id.* at 11.

148. *See id.* at 9. The nearly 9,000 accident cases investigated were collected from six medium to large cities (Boston, New Haven, New York, Philadelphia, San Francisco, Worcester) and four suburban, small town, or rural areas (Muncie, Indiana; Terre Haute, Indiana; Rural Connecticut; San Mateo County, California). These were combined in many tables to provide a total sum of cases with no effort at weighting.

institutions and arguments, much of the Committee's task involved defining a new object of study in the social effects of accidents. This shift in orientation was significant enough that the report addressed it explicitly.

> The studies have been made by interviewing the persons injured and their families and the investigators have made no effort to procure data bearing on fault. . . The ensuing discussion therefore makes no attempt to separate cases in which the defendants were negligent from those in which they were not negligent. It is concerned not with anyone's legal responsibility for the accident, with what happens to the injured person as a consequence of the accident. We are dealing here not at all with responsibility or with liability, but only with results.[149]

A. The Columbia Report's Critique of Current Governance Strategies

The Committee contrasted the situation of victims of automobile accidents with victims of industrial accidents and found the automobile accident victims disadvantaged. While the automobile accident compensation system worked for some of those with minor injuries, those with longer term disabilities, and those surviving the death of a wage earner found themselves with inadequate compensation if any. Even where victims faced insured defendants, settlements or judgments averaged out to significantly less than the workers' compensation payments for comparable injuries. In Massachusetts, for example, survivors of a wage earner covered by workers compensation received nearly twice as much as survivors of a wage earner killed in an automobile accident, despite the mandatory insurance law in that state.[150]

The Report's main finding was that injuries caused by *insured* automobiles were far more likely to be compensated than those caused by uninsured automobiles.[151] This proved true for each category of injury. Those temporarily disabled were three times more likely to be compensated

149. *Id.* at 54-55.
150. *See id.* at 116.
151. *See id.* at 76-91.

if injured by an insured automobile.[152] Those permanently disabled were four times more likely, and in fatal cases plaintiffs were five times more likely to get some compensation.[153] The data also showed, that even where insurance was available, the adequacy of compensation varied systematically by type of injury. Those with the most minor injuries received overcompensation. For the most seriously injured, awards covered only a fraction of real loss over a lifetime.[154] Fatal cases received full compensation for medical and funeral expenses in most cases, but because lost earnings were often not available, the awards were far less than comparable awards under workmen's compensation rules.[155] Those with small losses were considerably overpaid, while those with larger losses were considerably underpaid.[156]

In addition to collecting statistical data, the Committee's investigators undertook fuller descriptions of particular cases. Each chapter of the report included brief descriptions of actual accidents, and their consequences for the individuals and families effected. Most depicted a family on the margins of economic security being pushed under by the blind hand of fate in the form of an uninsured motorist running them down.

> A truck driver, 30 years old, earning $24 a week, collided with another machine. He died after one week, leaving a wife aged 23, and two children, aged 4 and 6. The family were already in debt to the extent of $800. The driver of the other car was not insured and was financially irresponsible so that he paid nothing. The deceased was driving his own truck and was therefore not covered by workmen's compensation. The wife went to work at $18 per week, living with her mother to whom she paid $15 a week for board for herself and the children.[157]

The Report's depiction of the fate of many accident victims, and their statistical portrait of systematically inadequate compensation for automobile

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152. *See id.* at 78.
153. *See id.* at 81.
154. *See id.* at 92.
155. *See id.* at 89.
156. *See id.* at 92.
157. *Id.* at 60.

accident victims, had an implicit comparative referent, the fate of industrial workers injured in accidents on the job. In both cases machines of awesome power injured victims with little apparent ability to avoid injury. In both cases the injured parties often passed losses onto families confronted with great expenses and a sudden loss of income, and ultimately to whole communities faced with providing relief and confronting the consequences of neighbors torn from the lives that they had built. But as was well known to most contemporary observers of automobile accident compensation, many workers were protected by the recent spread of worker's compensation laws across the nation.[158] To the authors of the Columbia Report worker's compensation provided a model for how to reconstruct the governmentality of automobile accident.[159]

B. The Columbia Plan

The lessons of the Report were crystallized in a plan for reforming automobile accident compensation. The Plan consisted of four elements suitable for adaptation and adoption by state legislation. First, a state would make liability insurance a requirement for the lawful registration of the vehicle. Second, it abolished the common-law right of action for negligence for automobile accident victims against the owner and or driver of the automobile. In its place the Plan established a near absolute right to compensation to any person injured by an automobile regardless of the negligence of the driver or the contributory negligence of the injured party. Third, the Plan replaced jury set compensation, available at common law, and imposed instead a fixed schedule of benefits according to type and degree of injury. Fourth, it replaced adjudication in a court of general jurisdiction with a limited administrative inquiry focused predominantly or establishing that the injuries complained of did indeed arise from "the operation of an automobile."

1. Mandatory Insurance

The Columbia Plan required that security against potential personal

158. *See supra* notes 6-7 and accompanying text.

159. *See* Columbia Report, *supra* note 10, at 134-35.

injuries[160] be provided in advance through the procurement of an insurance policy for the benefit of parties injured by the operation of the automobile, what we would today call third party insurance coverage. The Committee took no stand on whether this insurance should be provided by the state or by private enterprise. They did acknowledge that, as in Massachusetts where insurance was mandatory, the state was likely to at least set maximum rates and thereby circumscribe, if not drive out, private insurers.

2. The Abolition of Fault

The complete abolition of fault was perceived by the plan's supporters as its most vulnerable point. Academic conservatives ardently defended negligence as the logical modern form of liability, one premised on the image of liberty and equality among individuals. Any form of liability without fault invoked the image of paternalism rooted in monarchical power.[161] To turn a motor vehicle owner into an insurer for all those injured by his vehicle regardless of the efforts taken to provide security, smelled of expropriation and redistribution. Despite the fact that a very conservative Supreme Court had upheld the worker's compensation plans against a similar challenge,[162] proponents of expanding absolute liability to other forms of injury such as automobile accidents worried extensively about whether abolishing negligence might still run afoul of substantive due process.[163]

On the merits, the proponents argued the transformations associated with the automobile had rendered a compensation system based on the fault standard unworkable. The power and speed of motorized machinery, whether in the factory or on the street, simply outstripped the capacity of even careful persons to guard against mishap, and magnified the consequences of lapses of care beyond moral recognition.

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160. As is the case with many current no-fault plans as well, property damage was left out. The justification for this was that it would make the plan too expensive and that property damages were less socially threatening than personal injuries.

161. Much of the conservative response to the worker's compensation model of reform generally was to invoke this traditional democratic critique of paternalistic government. *See, e.g.*, Smith, *supra* note 23, at 239.

162. *See* New York Central R.R. Co. v. White, 243 U.S. 188 (1917).

163. The Columbia Report contained an entire chapter on constitutionality, which dealt extensively with the due process argument. *See* Columbia Report, *supra* note 10, at 162-97.

> The present traffic situation furnishes an omnipresent danger of injury; every individual who operates a motor vehicle or steps upon the streets runs a risk of doing or receiving serious injury. Even superhuman vigilance would not free the traffic situation of all danger.[164]

Proponents acknowledged that difficult line drawing questions might arise regarding which injuries actually arose from the operation of an automobile, but they assumed that in most cases there would be rather little dispute. One available defense was if at the time of the accident, the automobile was being operated without the consent of the owner. Thus, where a car was stolen, the owner would not be responsible. Instead, the plan called for a fund to pay victims of such drivers as well as uninsured out of state motorists. The Plan also left potential victims unprotected against out-of-state vehicles. The injured party would still have the benefit of a right to compensation regardless of fault, but without the mandatory insurance to back it up.[165]

3. Standardization of Benefits

One of the most significant features of typical worker's compensation laws that the Plan adopted was a predetermined schedule of benefits. In a personal injury lawsuit that made it to trial, the jury had the authority to award damages sufficient to make the plaintiff "whole". A typical package would include medical costs, lost wages (if any), diminished or destroyed earning capacity, and finally, compensation for "pain and suffering" endured as a result of injuries. Dependents of victims of fatal accidents might receive the costs of the funeral, as well as some lump sum for loss of support. In many states, however, death terminated any right of action. Reformers had criticized this damage award process for reasons that are still given today. The Columbia study was cited to show that the awards overcompensated the losses of the lightly injured and under compensated the losses of the more seriously injured. In any event, specific awards were considered hard to predict which made both settlement and insurance more difficult.

The Columbia Plan proposed to establish a predetermined schedule of

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164. PATTERSON H. FRENCH, THE AUTOMOBILE COMPENSATION PLAN: A SOLUTION FOR SOME PROBLEMS OF COURT CONGESTION AND ACCIDENT LITIGATION IN NEW YORK STATE 45 (Columbia University Press 1933).

165. Columbia Report, *supra* note 10, at 138.

benefits that differed from traditional tort recovery in three ways. First, the benefits represented only a portion of recovery. No compensation was provided for the first week of lost wages, for instance, and disability compensation was set at 2/3 of actual estimated loss.[166] Second, benefit payments, were to be spread out from shortly after the accident itself rather than in a lump sum at the end of all legal proceedings.[167] Third, pain and suffering were excluded.[168] The benefit levels, however, were based on the New York workmen's compensation schedule, the most generous in the country at the time.[169]

The reformers' arguments for standardized benefits borrowed from the worker's compensation debates. Reduced recovery was necessary to discourage malingering. It was also the rough equivalent of the more generous tort benefits discounted by the chance of recovery. Continuous payments from the start were thought to be essential to prevent individuals and families from falling into immediate deprivation, or being forced into uneconomic arrangements to provide for immediate needs. Finally, the exclusion of pain and suffering was seen as a trade off for the elimination of the whole issue of the negligence of the injured party and the need to prove the injurers' negligence. The academic supporters of the Columbia Plan were most uncomfortable with the maximum caps on economic loss recoveries. The caps might appear to deprive wealthier individuals of equitable treatment.[170]

4. Administrative Justice

The Committee took an extremely cautious tone in discussing how the plan would be administered. It clearly preferred a "commission or board" because in the workmen's compensation field courts had "proved not at all satisfactory."[171] The Board's primary duty would be adjudication of claims and awards with a right of appeal from the body to courts. Other promoters of the compensation plan, like Patterson French, saw the Board in more

166. *See id.* at 140-41.
167. *See id.* at 152.
168. *See id.* at 143.
169. *See id.* at 142.
170. *See* FRENCH, *supra* note 164, at 167-68.
171. *Id.* at 153.

activist terms.[172] A mandatory insurance law would require state regulation even if left to the private market to fill. Some oversight of medical care provided for automobile injuries would be expected, as well, in order to control award costs.[173] Inevitably statistics on accidents would be generated simply by the regular reporting that of injured parties seeking compensation under the plan.

> The Board may become a body of experts in determining and alleviating loss in accordance with wise policy and the terms of the statute. This is the true function of an administrative body and it is this which is designed to make a direct attack on the social problems presented by the motor accident situation.[174]

If all these functions were to rest with a central state Commission or Board, it might well become a vital locus of government over the new but rapidly expanding field of motorized behavior.

C. The Case for the Columbia Plan

The most important academic defense of the Columbia Plan was the lead article in a Columbia Law Review symposium on the Plan, written by Columbia Dean Young B. Smith.[175] He praised the Report effusively for its empirical data and rigorous analysis.

> It sweeps aside legal theories about rights and duties, causes and damages, and endeavors to reveal what actually happens when an accident occurs. It neither approves nor

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172. *See* FRENCH, *supra* note 164. French's book was not officially connected to the Committee but it was published just afterwards by Columbia University Press and takes a strong adversarial posture in favor of the Columbia Plan.

173. French considers whether it would not be the most efficient of all to have the Board control its own state provided medical services which would permit it complete direction of treatment. He acknowledged, however, that "one disadvantage wold be the violent opposition which such a scheme might engender among members of the medical profession." *Id.* at 64.

174. *Id.* at 50.

175. Symposium, *Compensation for Automobile Accidents*, 32 COLUM. L. REV. 785 (1932).

> disapproves the ethical postulates which underlie existing rules of tort law, or the political theories which account for existing administrative devices. It is concerned only with their effects and with ways and means for achieving results more satisfactory.[176]

His account of its strengths provided a summary of the two major arguments that had accumulated behind the worker's compensation principal. First, that the nature of automobile accident risk was collective. The law of liability could best recognize that collective character by replacing fault principals with those of insurance. Second, the common law system could not address the social dislocations produced by automobile accidents and thus solve the crisis of governability.

1. Collective Risk

Smith saw the link to workmen's compensation, both in subject matter and in the work of reform, as clear. In both cases good research was revealing a collective distribution of risk that the law had treated as a simple aggregation of individual failures to engage in appropriate personal risk management.

> In many respects the report reminds of the report of the Wainwright Commission in 1910 which led to the adoption in New York of a workmen's compensation act. The striking similarities with respect to the natures of the problems, the inadequacies of existing laws, the social results thereby produced, and the solutions proposed, cause one to wonder whether this report, as did that of the Wainwright Commission, foreshadows an impending development in the law looking towards a more scientific distribution of inevitable risks which are incident to an important and necessary activity in modern society.[177]

For the Committee and for Smith, automobile casualties were the

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176. *Id.* at 786.
177. *Id.*

equivalent of industrial accident casualties. Just as it made sense to spread the impact of industrial accidents over a broad population through insurance, it made sense to do the same with automobile accidents.

> It is with the *consequences* of these accidents that the Committee is concerned – whether death or disability with its train of distress and suffering and want be caused by the operation of a machine in a factory or a motor vehicle on the road. This, in truth, was what the workmen's compensation statutes were concerned with, namely, the social situation resulting from the inadequacies of the then existing legal system.[178]

To Smith, and other proponents, it seemed obvious that the two forms of casualty were equivalent. Once you admitted that loss spreading through the collectivist strategy of social insurance was a desirable solution to one, you had to admit that it was a desirable solution in the other. Both involved machines whose great force and speed diminished the role of human agency. Both involved the dark side of what were otherwise highly beneficial advances in technology. Finally, both involved horrific and largely unavoidable damage to individuals and to the networks of dependents, creditors, and others that economically relied on the injured individual.

2. Governability

As Shippen Lewis, study director for the Columbia Committee, put it in an article written several years later, compensation was simply a more "realistic" approach to the problem.

> The problem is how to distribute the losses caused by automobile accidents in a way best suited to public welfare. Conceivably, the losses may be allowed to rest where they first fall, that is on the victim of the accident and often on his family, his landlord, his physician and his grocer; or they may be partly shifted to the shoulders of the motorist or of his insurance carrier under a scheme of liability for

178. *See id.* at 792, n.5., quoting the Columbia Report, *supra* note 10, at 136.

> negligence; or they may be shifted, under a compensation scheme, the motorists as a class or to all taxpayers.[179]

As to the elimination of fault, Lewis argued that fault was being abandoned in practice anyway, as judges blurred the boundaries around negligence and contributory negligence and thus let cases go to sympathetic juries (a tendency confirmed by Nixon's article in the same issue of *Law & Contemporary Problems*).[180] If that was the case, then the only real issue was whether people should be mandated to carry insurance. Lewis argued that the damages caused by the automobile were just too extensive to permit individual drivers to determine whether they should be financially responsible or not.

> I believe that no one should be allowed to drive a death-dealing machine on the highways unless he can answer for the damage he does. I believe that in this regard automobiles should be treated differently from shot-guns, bicycles, horses and other things which can cause injuries, because the huge number of automobile accidents puts automobiles in a class by themselves, and because the present regulation of them facilitates further regulation.[181]

The last sentence hints that since the automobile has already become the occasion for the most extensive regulation of private life ever undertaken by government, it made great sense to pursue this further and more significant goal of compensation.

The supporters of compensation also emphasized the efficiencies to be achieved on the legal side.[182] By the 1920s automobile accident claims had replaced industrial and rail road accidents as the major source of personal injury law suits (and in at least some jurisdictions the majority of all lawsuits added to the docket in a typical year).[183] In part, this was due to the fact that workmen's compensation took industrial accident cases out of court, but it

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179. Lewis, *supra* note 141, at 588.
180. *See id.* at 589.
181. *Id.* at 586.
182. *See id.* at 596.
183. *See* FRENCH, *supra* note 164, at 27.

also reflected the massive increase in automobile ownership and use in the 1920s. As we saw above, the incredibly explosive growth of the automobile industry in these years and the consequent sharp rise in casualties and lethal casualties, meant that the public must have been well aware of the problem with many people actually witnessing or hearing about incidents.

D. The Case Against the Columbia Plan

The analogy with workmen's compensation was the main point of contestation for the opponents of the Columbia Plan. For the most part, opponents of the plan conceded that worker's compensation was an appropriate solution to the problem of industrial accidents. But they rightly saw that the automobile, the uses made of it, and the accidents arising out of it, presented some important differences. The analogy was closest, to be sure, when the automobile in question was used in a business. But the private automobile used for family and pleasure opened up a potentially very different issue and pointed, if vaguely, toward a much different organization of the modern social body than the world of factory and train had suggested.

1. Heterogeneity

Critics pointed out, repeatedly, that the structural relationship between automobile owners, who were made absolutely liable under the Columbia Plan, and victims, was totally different than that between employers and employees. Writing the negative piece in the *Columbia Law Review* symposium, Austin J. Lilly argued that the automobile accident did not involve the meeting of opposed but interdependent interests as those that existed in the work accident situation.

> [motorists and motor vehicle accident victims] are not divided into two great, interdependent classes, able, respectively to treat each with other, having a mutual zone of interest bottomed on contractual and economic relationship. They are divided into many classes. The pedestrian today is the automobilist tomorrow. Automobilists are claiming each-against the other. Every distinct party to the classes

> may be at any time a party to any other class.[184]

One consequence of this role fluctuation is that losses were presumably difficult to standardize within a narrow range.

> Payments under workmen's compensation can be made proportionate to earnings and to loss, so that the compensation scale, the wage scale and the loss scale have a direct ratio, each to the other. This condition does not exist, and cannot exist, in compulsory automobile compensation as it affects a majority of the victims.[185]

Lilly noted that workmen only compose about half of automobile accident victims and even there the absence of an employer link to liability means less of a "salutary effect". Once this is recognized, according to Lilly, the analogy between workmen's compensation and automobile compensation breaks down:

> One of the soundest economic principles of workmen's compensation is found in its approximate equality of application to those affected by it. There is of course some variation, but on the whole, the graded, limited scale of payments serves roughly the purposes of equalization and is not essentially unfair. Such a scale, however, when applied to the whole body of our people, in disregard of every difference in condition, age, financial standing and responsibility, in disregard of the ordinary pertinent standards of right and wrong, develops the vices of both inadequacy and of excessiveness.[186]

Writing the negative article in the *Law & Contemporary Problems* symposium, P. Tecumseh Sherman noted that, unlike factories where a standard range of wages could be approximated in a schedule, automobile

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184. Symposium, *Compensation for Automobile Accidents*, 32 COLUM. L. REV. 785, 805 (1932).

185. *Id.*

186. *Id.* at 809.

accidents befall people of greatly varying fortunes.

> Where a successful business executive, artist or professional man is killed or permanently incapacitated, the compensation might amount to less than 10 or 20 per cent of the economic loss.[187]

The idea that the automobile nexus was inherently less stable than the work nexus was carried all the way through to the effects of machines on bodies. Ray A. Brown, in a review of compensation for automobile accidents in the *Wisconsin Law Review* criticized the Columbia Plan approach for ignoring the difficulty of categorizing automobile injuries.[188] In Brown's view, industrial accidents lent themselves to a categoric schedule of injuries, e.g., missing limbs, lost sight, etc. But Brown believed that "a large majority of automobile accident injuries are of a type not placeable within any definite compensation schedule."[189]

2. The Market for Risk

The diffuse nature of motoring behavior led to another distinction critics drew between the workmen's compensation case and the automobile compensation proposal. Lilly argued that automobile accidents did not arise, as did industrial accidents, from a "natural economic process".

> Employers who do the paying under workmen's compensation, in theory at least, have the money with which to pay, - money produced by the operations which caused the accident and the resulting loss to the victim; and thus the cost of payment an be readily absorbed by industry and its products or service, including the recipients of the payments. This *natural economic process* does not apply to the greater

187. P. Techumseh Sherman, *Grounds for Opposing the Automobile Accident Compensation Plan*, 3 LAW & CONTEMP. PROBS. 598, 606 (1936).

188. Ray A. Brown, *Automobile Accident Litigation in Wisconsin: A Factual Study*, 10 WIS. L. REV. 170, 189-90 (1935).

189. *Id.*

part of the field of motor vehicle operation.[190]

To some extent Lilly was talking about what we would now call loss spreading. Legal theorists like William O. Douglas and Young B. Smith had written influential articles in the 1920s arguing about how to link compensation most effectively with the economic units in the best position to pass on the costs to broad groups of consumers.[191] Lilly was surely correct that most automobile owners did not regularly earn a profit from the operation of their vehicle, especially not one which related to the victim. But he also seemed to be articulating a widely shared sense that the automobile was not really a part of the productive economy. It was still possible to see it largely as a high risk luxury like skiing rather than an engine of economic growth.

This point was actually raised some years earlier in the *American Law Review* which criticized a New York statute imposing liability on the owner of an automobile for accidents caused by the driver of that automobile:

> If the statute is interpreted broadly as its terms would warrant, however, it constitutes a very interesting and somewhat startling extension of the doctrine of liability without fault and will probably be attacked as going over the border of constitutionality. While the propriety of making a business liable for all probable consequences of its operation without consideration of fault, whether on the theory that the owners can spread the cost, to the users of the service or buyers of the goods, or that he who takes the profit must pay the losses traceable to the business, is easily arguable, it is different with private owners loaning cars without charge. The conditional vendor or the lessor may be considered as operating a business, so it is reasonable to ask them to include this added element in the cost of business, but not the

190. Symposium, *Compensation for Automobile Accidents*, 32 COLUM. L. REV. 803, 805 (1932).

191. *See* William O. Douglas, *Vicarious Liability and Administration of Risk I, II*, 38 YALE L.J. 585-606, 720-45 (1929); Smith, *supra* note 23.

private citizen who accommodates a friend.[192]

This economic assumption was linked by some to a moral distinction between industrial accidents and automobile accidents. Work was virtuous activity. It might generate accidents but only as a necessary consequence of its productive contribution to society. Such accidents ought to be compensated as a way of completing the virtuous cycle. The automobile was less clearly virtuous. While some uses of the automobile were positive and many neutral, other motorized behavior was hedonistic and reckless. As Austin Lilly put it:

> The automobile is the most fruitful and unholy source of such accidents. It is difficult to picture the equity of imposing upon law-abiding motorists a financial burden which is largely increased by the cost of compensation benefits and expenses in cases of this kind.[193]

P. Techumseh Sherman, the former Commissioner of Labor for New York, contrasted the trustworthiness of the work relationship with the capriciousness of the automobile relationship.

> Under the workmen's compensation laws the employer is liable "regardless of fault" only to his own employees and while they are acting within the scope of their employments, subject to his orders, whereas, under this plan a motorist would be liable to strangers whatever they might be doing.[194]

Other opponents took the opposite tack, arguing that the Columbia Plan singled out and taxed a particular class of citizens, automobile owners, for the benefit of the class of victims.[195] Columbia Plan champion Patterson French

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192. Note, *Automobiles and Vicarious Liability*, 59 AM. U. L. REV. 451, 455 (1925). Interestingly the author compared the new vicarious law to both workmen's compensation and the body of cases dealing with railroads and fires which so influenced the law and economics movement in the United States.

193. Symposium, *supra* note 190, at 809.

194. Sherman, *supra* note 187, at 600.

195. *See* French, *supra* note 164, at 158.

acknowledged that the plan amounted to a tax, and that pedestrians could just as well be seen as contributing to the risks of accidents and thus also be taxed.[196] He relied on pragmatic considerations to defend the selection of motorists. They were likely to be solvent and at any rate politically less difficult to deal with then the entire tax paying public.[197]

3. Power

In distinguishing workers' compensation in the work accident field, Austin Lilly touted the role of the employment relationship itself in providing a disciplinary nexus in which costs can be controlled, a nexus that was missing in many automobile accident situations.

> Fraud, collusion and malingering are the certain outcome of compulsory insurance and compensation as they already are in workmen's compensation.[198]

Work creates its own field of power which helps control costs:

> There is the influence of the job. This influence affects every victim of the work accident. It probably does not affect more than half the victims of motor vehicle accidents. It has a salutary effect upon the return to work. It has a salutary effect upon speed, accuracy and fairness of investigations. It has a salutary effect upon the promptitude and fairness of voluntary settlements. It has a salutary effect upon the development and establishment of proof. It has the salutary effect of reducing to a minimum the debatable issues which may lead to litigation, and thus of reducing litigation itself. It has the salutary effect of reducing to a minimum, fraud and collusion in the establishment of claims and in malingering. It has a salutary and constructive effect in the furtherance of accident prevention. For all these reasons and many others perhaps more obscure but similarly important to

196. *See id.* at 159.
197. *See id.*
198. Symposium, *supra* note 190, at 806-08.

> the proper functioning of the law, the relationship of employer and employee has a most wholesome effect upon the costs of operation and administration.[199]

Even French conceded that this was the greatest difference from worker's compensation:

> The nature of motor vehicle accidents as compared with industrial ones is such that in the former, evidence is likely to be more complicated, witnesses more heterogeneous and medical testimony less reliable. The inclusion of claimants in the higher income-brackets may furnish a class which is more willing to hire counsel, enlist any available technicalities in its aid and appeal from awards than is the workman who sorely needs the amount of the award and has a natural desire to avoid even the complications of compensation procedure.[200]

French noted only that these were "intangible" factors that should not be considered fatal to the overall plan, especially in light of the existing flaws.

CONCLUSION: THE RISK SOCIETY ON THE EVE OF THE GREAT DEPRESSION

The legislative failure of the Columbia Plan was over determined to say the least. The Great Depression diminished the problem of automobile accidents literally (as the growth of motoring stalled and economic activity of all kinds fell off) and in comparison to unemployment, hunger and homelessness. As Patterson French put it (avoiding any mention of the Depression as did other participants in the debate):

> The evils which the compensation plan is designed to cure are not obvious in a way that excites sympathy or interest or that suggests the compensation plan is designed to cure are not obvious in a way that excites sympathy or interest or that

199. *Id.* at 806.

200. FRENCH, *supra* note 164, at 120.

suggests the compensation scheme as a remedy.[201]

Perhaps most importantly, no ready political identity or institutional expression existed for the victim class, largely pedestrians from all social classes. In contrast the success of worker's compensation had been greatly facilitated by its support from a broad array of organized groups. The specter of motor accidents must have been a very real one, but it discharged through a highly dispersed population who had few mechanisms to identify issues and mobilize concern. Indeed, as the opponents of the plan pointed out, victims lacked the qualities of a class, including the political power that comes from common bonds and shared needs. The plan did, however, have powerful opponents including the insurance companies and the automobile manufacturers.[202]

The Depression and World War II also affected the political volatility of the accident issue. The governmental challenge posed by the rapid rise of motoring during the Teens and Twenties now had twenty years to ease itself. This it did in a number of respects. Most importantly the generations that experienced the next really dramatic expansion of motoring in the 1950s, had lived with the automobile all their lives. They had a far more natural skill in responding to automotive demands on both drivers and pedestrians than those who faced its explosion from practically nothing in the 1920s. They were altogether less likely to act recklessly in front or inside of it. Road building made progress during the 1930s even while the volume of traffic dipped. Thanks to the post World War II economic boom, those generations would also have a good deal more affluence. They had more to spend on being respectable and more to lose by not being responsible. One clear result was to broaden the market for insurance. Anyone with a house, a status which rapidly expanded in over the next four decades, had reason to have automobile insurance.

The Columbia Report and Plan deserve attention from students of the history of insurance and in the history of the governmentalities at play in modern societies. The Report and the plan recognized insurance as a having a special role in contemporary governance. Just as the automobile itself had taken its drivers outside of the grids of control that operated in work and

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201. Symposium, *supra* note 190, at 806.

202. Neither sector weighed into the debate directly but likely would have if the plan had come closer to legislative consideration.

family contexts, insurance placed the driver in new kind of grid. Not itself a target of power, but a kind of medium through which subjects would become more governable. The nature of that grid was not developed by the Columbia Plan, which left most questions of how to administer the Plan up to the future. Patterson French imagined that the mandatory insurance called for by the plan would become a site for developing evaluative norms and controls over all aspects of automobile accidents (including medical care itself).[203]

Insurance as a way to make subjects more responsible also applied to victims in the logic of the Columbia Plan. Just as worker's compensation advocates had emphasized the destabilizing effects of work accidents on workers and their families, the Columbia report was full of short case summaries profiling the effects of automobile accident deaths and injuries.[204] It is interesting in this regard that while the Columbia Plan seems strikingly collectivist in its assumptions that the world being shaped by the automobile was largely the same as that being shaped by industrial labor, its intended effects were to support the central role of the individual subject in the governance of automotive life.

Compared to contemporary plans, the Columbia Plan seems dated mainly with regard to its worker's compensation model. It is not surprising that the cultural assumptions and political sensibilities generated by industrial and railroad accidents would be changed in the automobile age. The architects of the Columbia Plan examined a social practice in the midst of astoundingly rapid change. Their implicit analogy between automobile accident victim (typically a pedestrian struck by someone else's automobile) and a worker would be rapidly transformed by the popularization of the automobile market. It is possible that the sort of activist insurance commissioners some supporters of the Plan envisioned might have raised the cost of automobile ownership high enough to slow its growth for a while. A flow of insurance data on accidents leading to fresh demands for regulation might have further slowed and even altered the character of motorization. But the critics of the plan also missed the historical significance of the automobile. In rejecting the analogy of automobile and factory they missed the emerging role of the automobile as source of wealth creation in consumption oriented economy. By the time the question of automobile accident compensation reform re-emerged in the

203. *See supra* notes 171-174 and accompanying text.

204. *See, e.g.*, Columbia Report, *supra* note 10, at 60-61.

1950s and 1960s the industrial virtues of uniformity and standardization clashed with the individually expressive ethos of a super charged consumer society. The political culture had shifted decisively in favor of individual choice and individual maximization. Significantly the automobile itself would become the chief symbol and one of the chief agents of that transformation.[205]

205. To be sure the automobile has always presented individuality at its most contradictory (mass production, conformity, utter and total dependence on the actions of others, etc.). Yet from quite early into its introduction into American life the automobile began to erode those features of American life that made the worker's compensation principal so influential in the first three decades of the 20th century.

PREVENTING INCONSISTENCIES IN LITIGATION WITH A SPOTLIGHT ON INSURANCE COVERAGE LITIGATION: THE DOCTRINES OF JUDICIAL ESTOPPEL, EQUITABLE ESTOPPEL, QUASI-ESTOPPEL, COLLATERAL ESTOPPEL, "MEND THE HOLD," "FRAUD ON THE COURT" AND JUDICIAL AND EVIDENTIARY ADMISSIONS

Eugene R. Anderson[1] *and Nadia V. Holober*[2]

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INTRODUCTION

A. The Call to Preclude Inconsistent Positions

[A] judicial proceeding is a quest for truth.[3]

Depending on . . . where the most valuable interpretation is, [counsel][4] will argue both sides of [a] question in

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3. Supplemental Memorandum of Points and Authorities of Home [Insurance Company] and Continental [Casualty Company] Re: Application of New York Law (filed Aug. 31, 1991) at 5, Champion Int'l Corp. v. Aetna Cas. & Sur. Co., No. 90-2-09616-5 (Wash. Super. Ct. 1991) [hereinafter Supplemental Memorandum].

4. In that case, insurance industry counsel.

> *different litigation based on the advantage to the client.*[5]

Both of these statements accurately describe the arenas in which the insurance industry conducts its battles - courts and administrative tribunals. In the quest for truth and the advocacy of a position, inconsistent statements are made and inconsistent positions are taken. But a judicial or administrative proceeding should not be viewed as an opportunity to advance whichever position seems most promising.[6] The practice of selling inconsistent positions to courts and administrative agencies damages the integrity of the nation's judicial system, leads to needless litigation and embarrassing inconsistencies in decisions and weakens the public's confidence in the judicial system.

Over the years, a number of legal doctrines and tools have been crafted in order to avert the threat that inconsistent positions pose upon the "essential integrity of the judicial process."[7] These doctrines, often explicitly identified by the courts, include the doctrines of estoppel (judicial, equitable, quasi-estoppel, collateral estoppel), "mend the hold," "fraud on the court" and various rules and doctrines governing admissions. Other times the courts do not even clearly identify why an inconsistent position should be precluded;

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5. Letter Decision of Judge C. Judson Hamlin Denying Motion for Dismissal on Basis of *Forum Non Conveniens* by Home Insurance Co. and Joined by Other Defendants (dated June 18, 1993) at 2, Ford Motor Co. v. Certain Underwriters at Lloyd's London, No. L-11463-92 (N.J. Super. Ct. 1993) [hereinafter Letter Decision].

6. A person who asserts a position in litigation regarding the meaning of a term contained in a contract that is inconsistent with a position that the person asserted either before or after litigation began violates the Restatement (Second) of Contracts § 205, which imposes upon each party to a contract a duty of good faith and fair dealing in the contract's enforcement. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. e (1981) makes clear that:

> [t]he obligation of good faith and fair dealing extends to the assertion, settlement and litigation of contract claims and defenses. *See, e.g.*, [Restatement (Second) of Contracts] §§ 73, 89. The obligation is violated by dishonest conduct such as conjuring up a pretended dispute, asserting an interpretation contrary to one's own understanding or falsification of facts.

U.C.C. § 1-203 (1977) provides that "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."

7. Allen v. Zurich Ins. Co., 667 F.2d 1162, 1166 (4th Cir. 1982) (applying judicial estoppel doctrine to preclude litigant's inconsistent position).

it seems rather to be a matter of it "just isn't right."[8]

Regardless of the rubric employed, this article will urge the use of any available doctrine or tool to preclude the taking of inconsistent positions in litigation. Because the insurance industry is the largest, most frequent private user of the civil justice system,[9] this article will rely heavily upon insurance industry briefs to illustrate litigants' views regarding the problem of inconsistent positions in litigation. As assistance in explaining the doctrines available to defeat inconsistent positions, this article will reference some of the "tens of thousands of briefs"[10] insurance companies have filed against

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8. The United States Supreme Court:

> It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.

Davis v. Wakelee, 156 U.S. 680, 689 (1895).

The United States Court of Appeals for the Third Circuit:

> It goes without saying that one cannot casually cast aside representations, oral or written, in the course of litigation simply because it is convenient to do so. . . .

EF Operating Corp. v. American Bldgs, 993 F.2d 1046, 1050 (3d Cir. 1993).

The California Court of Appeals:

> One may not alter one's appellate argument as a chameleon does his color, to suit whatever terrain one inhabits at the moment.

Aerojet-General Corp. v. Superior Court, 258 Cal. Rptr. 684, 686 (Cal. Ct. App. 1989) (denying petition for rehearing).

9. Courts and insurance companies have recognized insurance companies to be frequent users of the civil justice system. *See, e.g.*, Adolph Coors Co. v. American Ins. Co., No. 92-N-61, slip op. at 2 (D.Colo. Mar. 4, 1993) (describing insurance company as "major league team" in game of "hardball litigation"); Liberty Mutual Insurance Company's Memorandum in Support of Motion for Partial Summary Judgment (filed July 5, 1988) at 7, National Union Ins. Co. v. Liberty Mut. Ins. Co., No. 86-2000 (E.D. La. 1988) (describing insurance companies as "not novice[s] as to matters involving litigation" and as "professional defender[s] of law suits").

10. Brief and Appendix of *Amicus Curiae* Insurance Environmental Litigation Association in Support of Continental Insurance Company, Aetna Casualty & Surety Company and Firemen's Insurance Company of Newark, N.J. (filed Aug. 24, 1992) at 25 n.21, County of Columbia, N.Y. v. Continental Ins. Co., 595 N.Y.S.2d 988 (N.Y. Sup. Ct. 1993).

policyholders in our nation's courts in the course of spending "conservatively a billion dollars a year in so-called 'coverage litigation.'"[11]

Attorneys for Continental Casualty Company, Columbia Casualty Company, Transportation Insurance Company, and American Casualty Company of Reading, Pennsylvania, described the swell of insurance coverage litigation as a "war" between policyholder attorneys on behalf of policyholders and the insurance industry. Memorandum of Law of CNA in Support of Motion to Strike Amended Counterclaims, Cross-Claims and Third-Party Complaint of General Battery (dated Feb. 2, 1996) at 1, Continental Cas. Co. v. General Battery Corp., C.A. No. C-11-008-WCC (Del. Super. Ct.).

11. Brief of *Amicus Curiae* American Insurance Co. (dated Feb. 25, 1993) at 3, Affiliated FM Ins. Co. v. Constitution Reinsurance Corp., No. SJC-06165 (Mass. S. Jud. Ct.)

Insurance companies are able and willing to spend vast sums on litigation. The United States General Accounting Office reports that the assets of 2,274 property/casualty insurance companies that were tracked totaled $527 billion at the close of 1989. *See Potential Liability of Property/Casualty Insurers for Costs of Cleaning Up Hazardous Waste Sites*: Hearing Before the Subcomm. on Policy Research and Insurance of the House Comm. on Banking, Finance and Urban Affairs, 101st Cong., 2d Sess. 150 (1990) (statement of Peter F. Guerrero, Associate Director, Environmental Protection Issues). *See also* Reply Brief of Petitioner National Casualty Company (filed May 4, 1992) at 9, National Cas. Co. v. Great Southwest Fire Ins. Co., No. 91 SC 562 (Colo.) ("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."); Defendants' Memorandum of Law in Opposition to Motion to Remand and in Support of Cross-Motion for Judgment on the Pleadings as to the Nonarbitrable Claims, and to Stay the Action Pending Arbitration (filed Jan. 7, 1992) at 2, Travelers Ins. Co. v. Richard John Ratcliffe Keeling, No. 91 Civ. 7753 (S.D.N.Y.) (Travelers Insurance Company possesses assets of $57 billion); [Travelers Insurance Company's] Memorandum of Law in Support of Motion to Remand (filed Dec. 16, 1991) at 14, *id.*, (for preparation of application to dismiss one London action, Travelers incurred $966,000 in legal fees). For a discussion of the immense reserves maintained by insurance companies to pay claims arising from environmental and asbestos liability exposure, see John H. Snyder and W. Dolson Smith, *Environmental/Asbestos Liability Exposures: A P/C Industry Black Hole*, BEST WEEK, March 28, 1994, at P/C 1.

The American Insurance Association and the National Association of Independent Insurers has said that "the insurance industry by virtue of its role as the primary provider of first party and third party liability and defense coverage, is the principal participant in litigation in the United States." *See* Brief of *Amici Curiae* of American Insurance Association and National Association of Independent Insurers (dated Jan. 28, 1994) at 2, Marsel Mirror & Glass Prods., Inc. v. American Int'l Underwriters Ins. Co., No. 9508/92 (N.Y.).

Two competing American Bar Association committees have emerged as a result of the proliferation of insurance coverage litigation: the ABA Committee on Insurance Coverage Litigation of the Section of Litigation and the ABA Insurance Coverage Committee of the Torts and Insurance Practice Section. The growth of insurance coverage litigation involving comprehensive general liability insurance policies prompted Judge H. Lee Sarokin to write:

> With the growth of claims that have taken years to manifest themselves and the size of the class of potential claimants, many insurance companies

Preclusion of inconsistent positions "obviously contemplates something other than the permissible practice . . . of simultaneously advancing in the same action inconsistent claims or defenses which can then . . . be evaluated as such by the same tribunal"[12] and result in an internally-consistent decision. Federal Rule of Civil Procedure 8(e)(2) permits the pleading of alternative or hypothetical claims and defenses, regardless of consistency, subject to Federal Rule of Civil Procedure 11.[13] Consistent with modern rules of

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> faced with such claims have run for cover rather than coverage. The small print suddenly has been magnified, and insurance companies can be seen scurrying about the courts of this country in search of ways to avoid honoring their policies.

Sandoz, Inc. v. Employer's Liab. Assurance Corp., 554 F. Supp. 257, 258 (D.N.J. 1983).

12. Allen v. Zurich Ins. Co., 667 F.2d 1162, 1167 (4th Cir. 1982).

13. FED. R. CIV. P. 8(e)(2) states:

> A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. . . . A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

FED. R. CIV. P. 11 states in relevant part:

> By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--
>
> > (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
> > (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
> > (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
> > (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on

pleading,[14] preclusion of inconsistent positions allows for inconsistent pleading while protecting the judiciary from litigants who seek, by the assertion of newly-concocted and inconsistent positions, to "whipsaw"[15] a court or to "win twice on the basis of incompatible positions."[16]

Courts increasingly have expressed intolerance with the use of inconsistent positions as a "strategic or tactical tool"[17] to gain advantage. This "[j]udicial perturbation with inconsistent positions" has been expressed in many ways.[18] The California Court of Appeal, for example, admonished an insurance company that a litigant "may not alter [its] argument as the chameleon does his color, to suit whatever terrain [it] inhabits at the moment."[19] When insurance companies litigated positions contrary to the

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a lack of information or belief.

14. *See, e.g.*, Aston Chauffeured Limousine Co. v. Runnfeldt Inv. Corp., 910 F.2d 1540, 1548 (7th Cir. 1990) (judicial estoppel doctrine is consistent with Federal Rules of Civil Procedure); Otto Wolff Handelsgesellschaft v. Sheridan Transp. Co., 800 F. Supp. 1359, 1365 n.3 (E.D. Va. 1992) ("pursuant to Federal Rules of Civil Procedure 8 and 11, a party may assert, in good faith, as many inconsistent *legal* claims [as] it may have." (emphasis in original)); AFN, Inc. v. Schlott Inc., 798 F. Supp. 219, 227 n.12 (D.N.J. 1992) ("Th[e] analogy [between the assertion of inconsistent positions and] alternative pleading is not persuasive. While a party may quite properly plead that A or, in the alternative, B, is true, it is quite another thing for a party to assert that A, which directly contradicts B, is true at one time for one purpose and later assert that B is also true at another time for another purpose." (citations omitted)). *But see* Konstantinidis v. Chen, 626 F.2d 933, 938 (D.C. Cir. 1980) ("we agree . . . that utilization of [the doctrine of preclusion against inconsistent positions] 'would be out of harmony with [the modern rules of pleading]. . . .'") (quoting Parkinson v. California Co., 233 F.2d 432, 438 (10th Cir. 1956)).

15. Matter of Cassidy, 892 F.2d 637, 641-42 (7th Cir. 1990); 31 C.J.S. *Estoppel and Waiver* § 139 at 593 (1996).

16. 18 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4477 (Supp. 1992) [hereinafter WRIGHT & MILLER]. *See also* Certain Insurers' Reply Memorandum in Support of Motion to Preclude Forty-Eight from Taking Inconsistent Coverage Positions (dated Nov. 2, 1993) at 6, Forty-Eight Insulations, Inc. v. Aetna Cas. & Sur. Co., No. 87 C 10594 (N.D.Ill.) [hereinafter Insurers' Reply Memorandum] (urging court to preclude opponent's "bald-faced attempt to get a second bite at the apple").

17. Letter Decision, *supra* note 5, at 2.

18. *See* Wright & MILLER, *supra* note 16, § 4477.

19. Aerojet-General Corp. v. Superior Court, 258 Cal. Rptr. 684, 686 (Cal. Ct. App. 1989) (denying petition for rehearing).

Two insurance companies sought to persuade a Washington court of this principle. The insurance companies urged the court to apply judicial estoppel to preclude the policyholder from denying that New York law governed a specific dispute when, in the insurance companies'

insurance industry's "studied, unambiguous, official and affirmative representations"[20] made in 1970 to state insurance regulators, the high courts of both West Virginia and New Jersey rejected the insurance companies' new position on public policy grounds.[21] Cautioning litigants and counsel alike, the United States Court of Appeals for the Seventh Circuit opined that the practice of asserting inconsistent positions generally may warrant sanctions under Rule 11,[22] and in another case, affirmed sanction awards arising from inconsistent contentions in successive litigation.[23] Courts recognize that when

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view, the policyholder earlier had conceded that New York law applies. *See* Supplemental Memorandum, *supra* note 3, at 4.

20. Joy Technologies, Inc. v. Liberty Mut. Ins. Co., 421 S.E.2d 493, 497 (W. Va. 1992).

21. *See id.* at 499-500; Morton Int'l, Inc. v. General Accident Ins. Co. of Am., 629 A.2d 831, 854 (N.J. 1993). *See also* Just v. Land Reclamation, Ltd., 456 N.W.2d 570, 573 (Wis. 1990) (conclusion that polluters' exclusion does not preclude coverage for gradual pollution "comports with substantial evidence indicating that the insurance industry itself originally intended the [polluters' exclusion] to be construed as 'unexpected and unintended'").

In a case decided subsequent to *Joy Technologies, Inc.*, *supra* note 20, the West Virginia Supreme Court of Appeals castigated the insurance industry for its "wrongdoing" in "misrepresent[ing] to state insurance officials the meaning and effect of [insurance policy language]. *See* Nadler v. Liberty Mut. Fire Ins. Co., 424 S.E.2d 256, 265 (W. Va. 1992).

The standard form 1970 polluter's exclusion has been a glaring example of some litigants' proclivity to assert inconsistent positions. *Compare* Centennial Insurance Company's Memorandum of Law (undated) at 12, Centennial Ins. Co. v. Lumbermen's Mut. Cas. Co., 677 F. Supp. 342 (E.D. Pa. 1987) (polluter's exclusion is ambiguous and does not preclude coverage when the policyholder "did not know, expect or intend" that a discharge of materials "would result in any type of environmental harm.") *with* Brief for Defendants-Respondents Atlantic Mutual Insurance Company and Centennial Insurance Company (filed May 5, 1989) at 19, Technicon Elec. Corp. v. American Home Assurance Co., 542 N.E.2d 1048 (N.Y. 1989) (polluter's exclusion prevents coverage for environmental harm).

Insurance companies' inconsistent positions regarding the meaning of standard form insurance policy language have resulted in inconsistent judicial interpretations of the standard form language. *Compare* Allstate Ins. Co. v. Quinn Constr. Co., 713 F. Supp. 35 (D. Mass. 1989), *settled on appeal*, No. 85-2220-WD (D.Mass. Jan. 19, 1990) (exclusion does not bar coverage for gradual pollution) *with* Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp., 636 So. 2d 700 (Fla. 1993) (exclusion bars coverage for gradual pollution).

The "polluters' exclusion" is discussed in Part II, B, *infra*.

22. *See* Aston Chauffeured Limousine Co. v. Runnfeldt Inv. Corp., 910 F.2d 1540, 1548 (7th Cir. 1990). One commentator has noted that the policy underlying preclusionary doctrine of judicial estoppel, "to protect the sanctity of the oath and to protect the judicial system itself, . . . is strikingly similar to the one behind Rule 11." D.W. Henkin, Note, *Judicial Estoppel – Beating Shields into Swords and Back Again*, 139 U. PA. L. REV. 1711, 1752 (1991). For a discussion of the policy of protecting the sanctity of the oath, see Part I, C., 1, *see infra*.

23. Kale v. Obuchowski, 985 F.2d 360 (7th Cir. 1993) (litigant was judicially estopped

the "parties feel free to select contradictory positions before different tribunals to suit their ends, the integrity and efficacy of the courts will suffer."[24]

Courts preclude use of litigation positions that are inconsistent with prior positions to "prevent parties from making a mockery of justice by inconsistent pleadings."[25] The Supreme Court of Pennsylvania has explained that "[w]hen a man alleges a fact in a court of justice, for his advantage, he shall not be allowed to contradict it afterwards. It is against good morals to permit such double dealings in the administration of justice."[26] Principles of "equity and fairness,"[27] conscionability[28] and "norms of candor and responsibility"[29] underlie "universal judicial reluctance to permit litigants to "play fast and loose" with courts of justice according to the vicissitudes of self-interest."[30] Courts decry the "sporting theory of justice"[31] and have emphasized that "truth is not a weather vane. It does not veer when the winds of self-interest change. It remains constant."[32]

Litigants, who sometimes have detrimentally relied on the earlier position, have taken umbrage with the assertion of inconsistent positions by

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from asserting ownership interest in bankruptcy proceeding when he had denied interest in divorce proceeding; Rule 11 sanctions properly imposed against counsel and litigant for frivolous appeal challenging application of judicial estoppel doctrine).

24. F.D.I.C. v. CNA Cas. of Puerto Rico, 786 F. Supp. 1082, 1086 (D.P.R. 1991) (quoting Patriot Cinemas, Inc. v. General Cinema Corp., 834 F.2d 208, 214 (1st Cir. 1987)).

25. American Nat'l Bank of Jacksonville v. F.D.I.C., 710 F.2d 1528, 1536 (11th Cir. 1983).

26. Tops Apparel Mfg. Co. v. Rothman, 244 A.2d 436, 438 n.8 (Pa. 1968) (quoting Wills v. Kane, 2 Grant 60, 63 (Pa. 1853)).

27. Morton Int'l, Inc. v. General Accident Ins. Co. of Am., 629 A.2d 831, 874 (N.J. 1993).

28. *See* Brief of Appellant Transit Casualty Co. (filed July 20, 1982) at 24, Transit Cas. Co. v. Topeka Transp., Case No. 82-54377-A (Kan. Ct. App.) (quoting Bank of Denton v. Jesch, 163 P. 150, 152 (1917)).

29. Patriot Cinemas, Inc. v. General Cinema Corp., 834 F.2d 208, 214 (1st Cir. 1987), *quoted in*, F.D.I.C. v. CNA Cas. of Puerto Rico, 786 F. Supp., 1082, 1086 (D.P.R. 1991).

30. Guinness PLC v. Ward, 955 F.2d 875, 899 (4th Cir. 1992) (quoting 1B JAMES W. MOORE, ET AL., FEDERAL PRACTICE § 0.405[8] at 765-68 (2d ed. 1971) (citations omitted)).

31. Heimer v. Travelers Ins. Co., 400 So. 2d 771, 772 (Fla. Dist. Ct. App. 1981), (explaining, "In earlier times, the rule we apply in this case was said to reflect the feeling that a party may not "mend his hold," . . . or "blow hot and cold at the same time" or "have his cake and eat it too." . . . Today, we might say that the courts will not allow the practice of the "Catch-22" or "gotcha!" school of litigation to succeed.") (quoting Salcedo v. Asociacion Cubana, Inc., 368 So. 2d 1337, 1339 (Fla. Dist. Ct. App. 1979)).

32. Department of Transp. v. Coe, 445 N.E.2d 506, 506 (Ill. App. Ct. 1983).

other litigants. Constantly enmeshed in litigation, insurance companies often have implored courts to bar inconsistent positions asserted by opponents.[33] In *American Home Assurance Co. v. Republic Insurance Co.*,[34] for example, American Home Assurance Company asserted a position against insurance coverage in direct contradiction to its position favoring insurance coverage that it had maintained in previous litigation. When opponent insurance companies pointed out the inconsistency, American Home declined to reconcile its position to reflect its previous understanding of the meaning of its insurance policy. Instead, it instructed its opponents to "take the issue... to the court."[35] In urging the court to reject the inconsistent position, the opponent insurance companies remarked, "It strains the bounds of credibility to say the least, that American Home is now heard to take a contrary view"[36] to defeat insurance coverage.

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33. Many of the inconsistent positions used for illustration in this article were asserted by insurance companies. One attorney who represents insurance companies warned counsel for other insurance companies, "One of the areas which creates the greatest danger for insurers engaged in any significant degree of insurance coverage litigation, particularly in the toxic tort or environmental impairment areas, is to take different positions on fundamental issues in different cases." Mitchell Lathrop, Excess Insurance and Insurance Coverage Litigation, Paper Presented at American Bar Association Annual Midyear Meeting, Section of Litigation, Insurance Coverage Litigation Committee, March 25-27, 1993, at 22 (unpublished manuscript, on file with the author).

Mr. Lathrop cited, among other cases, Upjohn Co. v. New Hampshire Ins. Co., 444 N.W.2d 813 (Mich. Ct. App. 1989), and Stonewall Ins. Company v. City of Palos Verdes Estates, 54 Cal. Rptr. 2d 176 (Cal. Ct. App. 1996). Lathrop, *supra*, at 25-29. At the urging of Stonewall Insurance Company's national insurance coverage counsel (who professed to previously have been unaware of Stonewall's litigation position in support of broad insurance coverage) Stonewall moved unsuccessfully to withdraw the brief it had filed with the California Supreme Court less than one month earlier, citing as its reason the binding effect of one's prior litigation position. *See* Milo Geyelin, *Disavowed Filing Stands*, WALL ST. J., Apr. 8, 1993, at B1; Motion for Leave to Withdraw Respondent's Brief on the Merits and to File Its [Proposed] Amended Respondent's Brief on the Merits (filed Feb. 11, 1993) at 5, Stonewall Insurance Co. v. City of Palos Verdes Estates, No. S027319 (Cal.). Ironically, Stonewall's brief that it sought to withdraw chastised Admiral Insurance Company and Fireman's Fund Insurance Company for taking a position inconsistent with their prior, pro-insurance coverage, litigation position.

34. 788 F. Supp. 214 (S.D.N.Y. 1992), *aff'd*, 984 F.2d 76 (2d Cir. 1993), *cert. denied*, 508 U.S. 973 (1993).

35. Memorandum of Law of the Republic Insurance Company and the United National Insurance Company in Support of Their Motion for Summary Judgment (dated June 17, 1991) at 2, American Home Assurance Company v. Republic Ins. Co., 788 F. Supp. 214 (S.D.N.Y. 1992).

36. *Id.* at 2 n.1.

Stonewall Insurance Company has criticized opposing litigants, Admiral Insurance Company and Fireman's Fund Insurance Company, for asserting inconsistent positions.[37] CNA Casualty of California has criticized another insurance company for changing its prior litigation position, recognizing its duty to defend a lawsuit against the policyholder.[38] First State Insurance Company, part of the Hartford Insurance Group, castigated other insurance companies for their failure to "maintain consistent, principled positions"[39] in the courts. However, the Hartford Insurance Group itself has drawn criticism for changing its litigation position.[40] And Home Insurance Company asked a New York federal district court to bar opponent insurance companies' inconsistent positions regarding insurance coverage:

> Having taken that position in an earlier proceeding before

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37. *See* Respondent Stonewall Insurance Company's Brief on the Merits (filed Jan. 14, 1993) at 25-26, Stonewall Ins. Co. v. City of Palos Verdes Estates, 54 Cal. Rptr. 2d 176 (Cal. Ct. App. 1996).

38. *See* Reply Brief of Respondent CNA Casualty of California in Reply to Appellant Pacific Indemnity Company (filed Oct. 5, 1984) at 7, 26, CNA Cas. of Cal. v. Seaboard Ins. Co., No. 761572 (Cal. Super. Ct.), 222 Cal.Rptr. 276 (Cal. Ct. App. 1986), *reh'g denied*, No. 1 Civ. AO 21608 (Feb. 13, 1986), *rev. denied*, April 17, 1986 (adding new position "not persuasive").

39. First State Insurance Company's Application for Leave to Appeal and Petition for Realignment of Parties (filed Aug. 18, 1989) at 6, Upjohn Co. v. New Hampshire Ins. Co., 444 N.W.2d 813 (Mich. Ct. App. 1989), *rev'd*, 476 N.W.2d 392 (Mich. 1991).

40. *See* Opinions, *Revisionist History*, BUS. INS., Sept. 25, 1989, at 8 (noting that just three months after it argued one position successfully in *Upjohn Co.*, *supra* note 39 (arguing that its insurance policy provides insurance coverage for gradual pollution despite the addition of the "polluters' exclusion" in 1970), the Hartford Insurance Group changed its position in preparation for litigation against a California policyholder. The publication admonished Hartford and other insurance companies that would attempt to rely on the 1970 language to defeat insurance coverage for gradual pollution: "Insurers should not be allowed to reinterpret the scope of the coverage they sell to policyholders years--even decades--after the policyholder pays the premium. . . . You can't have it both ways.").

Still intent on "hav[ing] it both ways," several London Market insurance companies that had joined in Hartford Insurance Group's brief argued to an Illinois court that the doctrine of judicial estoppel should not operate to bind them to arguments made in the joint brief. The London Market insurance companies argued that they should be permitted to switch positions because various insurance companies that authored the earlier brief "later repudiated their argument . . . and thus no 'benefit' was derived from that argument. . ." Defendants Cheshire and [London Market Insurance] Companies Reply Memorandum in Further Support of Their Motion for Partial Summary Judgment (filed Nov. 9, 1995) at 4 n.1, Maremont Corp. v. American Motorists Ins. Co., 681 N.E.2d 548 (Ill. 1997).

> this Court, [the opposing insurance companies] are estopped from asserting otherwise under the doctrine of preclusions against inconsistent judicial positions: "Such use of inconsistent positions would most flagrantly exemplify that playing 'fast and loose with the courts' which has been emphasized as an evil that courts should not tolerate."[41]

Lloyd's of London, in a case involving an agreement signed by investors, argued that the position taken in the case by the United States Securities and Exchange Commission (SEC), contradicted the position the SEC had taken in other cases. That contradiction, said Lloyd's "is a basis for discounting the SEC's position here."[42] Litigants recognize that other litigants' use of inconsistent positions offends judicial integrity and places at a disadvantage litigants who maintain principled and consistent positions.

In *Travelers Insurance Co. v. Richard John Ratcliffe Keeling and Certain Underwriters at Lloyd's of London*,[43] plaintiff and defendant insurance companies each asked the court to prohibit the other from taking an inconsistent position. Travelers pointed out that the defendant insurance companies had changed their position in litigation and declared, "Such duplicitous procedural gamesmanship, played at the expense of Travelers and this Court, should not be countenanced."[44] To this, the defendant insurance companies replied, "What's sauce for the goose is sauce for the gander! . . . [W]hy isn't Travelers estopped for the same reason . . . ?"[45] The answer: All litigants equally should be estopped from asserting inconsistent positions.

Despite the outcry among courts and litigants, some litigants continue to tell courts whatever they believe will suit their present interests. National

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41. Defendant [Home Insurance Co.]'s Memorandum in Support of Motion for Summary Judgment (filed Oct. 24, 1988) at 4 n.2, CNA Reinsurance of London, Ltd. v. Home Ins. Co., No. 85 Civ. 5681 (S.D.N.Y. Jan. 10, 1990) (quoting Scarano v. Central R.R. Co., 203 F.2d 510, 513 (3d Cir. 1953)).

42. Appellees' Answering Brief (dated July 5, 1996) at 50, Richards v. Lloyd's of London, 135 F.3d 1289 (1998).

43. No. 91 Civ. 7753, 1993 WL 18909 (S.D.N.Y. 1993).

44. Plaintiff [Travelers Insurance Company]'s Memorandum of Law in Support of its Motion to Remand (filed Dec. 16, 1991) at 4, Travelers Ins. Co. v. Richard John Ratcliffe Keeling and Certain Underwriters at Lloyd's of London, *supra* note 43.

45. Defendants' Reply Memorandum of Law (filed Feb. 7, 1992) at 26, Travelers Ins. Co. v. Richard John Ratcliffe Keeling and Certain Underwriters at Lloyd's of London, *supra* note 43.

Union Fire Insurance Company told a New York court to disregard its prior position asserted in three states and the District of Columbia because "what different counsel has argued for National Union in different cases in other jurisdictions has absolutely no relevance. . . ."[46] The Insurance Environmental Litigation Association,[47] on behalf of eighteen of its member insurance companies, told a New York court that "[c]onsidering that insurance companies have filed tens of thousands of briefs across the country in a number of courts," the assertion of inconsistent positions by members of the insurance industry is "not . . . surprising."[48] "This," said the insurance industry trade association, "is mere gamesmanship."[49] Counsel for the Insurance Environmental Litigation Association has portrayed its member insurance company's affirmative representations of broad insurance coverage to the California Supreme Court as merely "[s]ome local guy, for whatever reason, espous[ing] [a] position."[50] A senior Aetna Life & Casualty Company claims executive, after meeting with claims executives of other major insurance companies, advocated the use of inconsistent positions:

> [W]e should push ahead, on a case by case basis, for whichever theory suits us best in a particular case. Thus, I have no problem with our simultaneously contending (in different courts, of course) for both . . . theories.[51]

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46. Sur-reply Memorandum of Law in Further Support of Defendant National Union Insurance Company's Motion for Summary Judgment and in Further Opposition to Plaintiffs' Cross-Motion for Summary Judgment (dated Oct. 27, 1992) at 32, Town of Harrison v. National Union Fire Ins. Co. of Pittsburgh, Pa., 680 N.E.2d 620 (N.Y. 1997).

47. The Insurance Environmental Litigation Association is the anti-policyholder litigation arm of the principal American property and casualty insurance companies. It is comprised of twenty of the largest property and casualty insurance companies in the United States, and was organized "to assure nationwide coherence of position among insurers and provide amicus curiae support in key coverage cases." Leslie H. Cheek, *Site Owners or Liability Insurers: Who Should Pay for Cleaning Up Hazardous Waste?*, 8 VA. J. NAT. RESOURCES L. 75, 87 (1988).

48. Brief and Appendix of *Amicus Curiae* Insurance Environmental Litigation Association in Support of Continental Insurance Company, Aetna Casualty & Surety Company and Firemen's Insurance Company of Newark, N.J. (filed Aug. 24, 1992) at 25 n.21, County of Columbia, N.Y. v. Continental Ins. Co., 595 N.Y.S.2d 988 (N.Y. Sup. Ct. 1993).

49. *Id.*

50. *See Ambiguous? Yes . . . er, no.*, AM. LAW., May, 1993, at 25.

51. Interoffice communication from S.B. Guiney, Jr. to E.F. Brady, Aetna Life & Casualty Co. (Apr. 18, 1978) (on file with author).

These statements show that some litigants will continue to "blow hot and cold as the occasion demands"[52] without regard for the damage that inconsistent positions cause to our justice system.

Courts' indignation with litigants' self-serving shifts in position at the expense of the integrity of the judicial system has been long-standing. Forty years ago, one federal district court admonished that "court[s] will not tolerate weathervane arguments which shift with the winds of necessity."[53] A century ago, the United States Supreme Court articulated the principle that a litigant may not assume one legal position and then, "simply because his interests have changed, assume a contrary position."[54] As United States Supreme Court Justice Hugo Black explained in 1944,

> [T]ampering with the administration of justice in the matter indisputable shown here involves far more than an injury to a single litigant. It is a wrong against institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.[55]

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52. Allen v. Zurich Ins. Co., 667 F.2d 1162, 1167 n.3 (4th Cir. 1982). The "blow hot and cold" phraseology is traceable to Lord Kenyon. *See* Smith v. Boston Elevated Railway, 184 F. 387, 389 (1st Cir. 1911) (citing HERBERT BROOM, A SELECTION OF LEGAL MAXIMS 130 (London 1845)).

53. Georgia-Pacific Plywood Co. v. U.S. Plywood Corp., 148 F. Supp. 846 (S.D.N.Y. 1956), *rev'd on other grounds*, 258 F.2d 124 (2d Cir. 1958), *cert. denied*, 358 U.S. 884 (1958).

54. Davis v. Wakelee, 156 U.S. 680, 689 (1895). *See also* Defendant Insurer's Memorandum in Support of Motion to Preclude [Policyholder] from Taking Inconsistent Coverage Positions (undated) at 9, Forty-Eight Insulations, Inc. v. Aetna Cas. & Sur. Co., Nos. 87C 10594, 87A 1004 (relying on quoted passage); Defendants' [Certain Underwriters at Lloyd's of London] and Subpoena Respondent's Memorandum in Opposition to Plaintiff's Motion to Reconsider Ruling of May 7, 1992 Concerning Lord, Bissell & Brook Documents (filed Aug. 28, 1992) at 11-12, International Ins. Co. v. Certain Underwriters at Lloyd's, 1992 WL 330018 (N.D.Ill. 1992) (same); 31 C.J.S. *Estoppel* § 117 (1955)(same).

55. Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246 (1944).

Loath to be "mute and helpless victims"[56] of litigants' "chameleonic"[57] arguments advanced at the expense of judicial integrity and other litigants' rights, courts have led the call to end the practice of litigating inconsistent positions in the courts and in administrative proceedings.

B. The Doctrines and Rules That Protect Against the Assertion of Inconsistent Positions

Courts have developed doctrines and rules that protect the integrity of the judicial process and the interests of other litigants when a party attempts to litigate inconsistently. This article will examine the doctrines and rules as applied by courts and as urged and explained by litigants.

Part I will discuss the first of the doctrines and rules invoked by courts to preclude litigants from asserting inconsistent positions. This doctrine, judicial estoppel, is known as "the doctrine of preclusion against inconsistent positions"[58] and was developed by the courts specifically to prevent manipulation of the justice system.[59] As one litigant explained to the California Supreme Court, the doctrine "generally prevents a party from taking a position inconsistent with one previously asserted by the party in a prior proceeding."[60] The discussion of judicial estoppel examines the doctrine as framed by courts in several jurisdictions and urges rejection of the formulation initially devised by the United States Court of Appeals for the Second Circuit, which unnecessarily incorporated elements of the separate

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56. *Id.*

57. Levinson v. United States, 969 F.2d 260 (7th Cir. 1990).

58. *See* WRIGHT & MILLER, *supra* note 16.

59. *See, e.g.*, Banda, Inc. v. Seaboard Sur. Co., Case No. 92 C 1234, 1994 U.S. Dist. LEXIS at *2306 (N.D.Ill. Mar. 2, 1994) (quoting Astor Chauffeured Limousine Co. v. Runnfeldt Inv. Corp., 910 F.2d 1540, 1547 (7th Cir. 1990)) (insurance company was precluded by doctrine of judicial estoppel from asserting action was barred by contractual limitations period in Illinois federal district court, the designated forum in the forum selection clause of the applicable insurance policy, when it had asserted in a successful motion to dismiss an action in Pennsylvania state court that "the designated forum is available and capable of providing substantial justice"). *See generally* EUGENE R. ANDERSON ET AL., INSURANCE COVERAGE LITIGATION §12.3 (1997).

60. Stonewall Insurance Company's Motion for Leave to Withdraw Respondent's Brief on the Merits and to File Its (Proposed) Amended Respondent's Brief on the Merits (filed Feb. 11, 1993) at 5, Stonewall Ins. Co. v. City of Palos Verdes Estates, *supra* note 37 (citations omitted).

doctrine of equitable estoppel.[61]

Part II will discuss the doctrine of equitable estoppel. Also labeled "estoppel in pais" and "estoppel by misrepresentation,"[62] the doctrine of equitable estoppel bars a party from asserting an inconsistent position when another person has relied upon the prior position.[63] In *Morton International, Inc. v. General Accident Insurance Co. of America*,[64] the New Jersey Supreme Court joined the many courts that apply equitable estoppel to preclude litigants from asserting positions in litigation which are contrary to representations made in prior administrative proceedings. The court found the necessary elements of privity of the parties and reliance because agents of the insurance industry – insurance rating bureaus[65] – had made representations of broad insurance coverage in 1970 upon which the New Jersey Commissioner of Insurance relied to approve the polluter's exclusion.[66]

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61. *See* Young v. U.S. Department of Justice, 882 F.2d 633, 639 (2d Cir. 1989), *cert. denied*, 493 U.S. 1072 (1990) (judicial estoppel requires reliance by party to its detriment). The United States Court of Appeals for the Second Circuit seems to have retreated from requiring reliance for the application of judicial estoppel. *See* Bates v. Long Island R.R. Co., 997 F.2d 1028 (2d Cir. 1993).

62. 31 C.J.S. *Estoppel* § 59.

63. Edward v. Aetna Life Ins. Co., 690 F.2d 595, 599 (6th Cir. 1982). *See* EUGENE R. ANDERSON ET AL., INSURANCE COVERAGE LITIGATION §12.4 (1997).

The doctrine sometimes is confused with the doctrine of waiver. The doctrines of estoppel and waiver are distinguished in Part II, discussing the application of the equitable estoppel doctrine in insurance coverage litigation.

64. 629 A.2d 831 (N.J. 1993), *cert. denied*, 512 U.S. 1245, *reh'g denied*, 512 U.S. 1277 (1994).

65. The Mutual Insurance Rating Bureau and the Insurance Rating Board, which made the representations on behalf of the insurance industry, are now combined into the Insurance Services Office, Inc. ("ISO"). ISO is the insurance industry trade association that drafts standard form insurance policy language for nearly all of the principal property and casualty insurance companies in the United States. For a description of ISO's activities, *see In re* Insurance Antitrust Litigation, 938 F.2d 919 (9th Cir. 1991), *aff'd in part, rev'd in part sub nom. and remanded*, Hartford Fire Ins. Co. v. State of Cal., 509 U.S. 764 (1993). *See also In re* Hoechst Celanese Corp., 184 A.D.2d 223 (N.Y. 1992).

66. *See Morton Int'l, Inc.*, 629 A.2d 831, 873-76 (N.J.1993) The court discussed cases in which the court found that the policyholder's justifiable and reasonable reliance upon the insurance company's representations gave rise to a claim for estoppel and, applying the estoppel doctrine, explained:

> In misrepresenting the effect of the pollution-exclusion clause to the Department of Insurance, the IRB misled the state's insurance regulatory authority in its review of the clause, and avoided disapproval of the proposed endorsement as well as a

Part III will turn to the "broadly remedial doctrine"[67] of quasi-estoppel, also known as "estoppel by acceptance of benefits,"[68] and in the tax law context, "the duty of consistency."[69] The doctrine usually requires that the person to be estopped has gained some advantage as a result of the prior position or that the another person has suffered some disadvantage.[70] Quasi-estoppel may apply to bind a litigant to conduct or a statement asserted in or out of the courtroom, and may apply when the elements of the other estoppel doctrines are absent.[71]

Part IV will discuss the offensive and defensive uses of the doctrine of collateral estoppel. This "refined version of the broader doctrine of res judicata"[72] precludes relitigation of an issue of fact or law which a court or administrative agency has determined by a final judgment and which a party to the current action previously has litigated or had the opportunity to litigate.[73] The doctrine of collateral estoppel evolved for the purpose of preserving the dignity of the judicial system.[74] The United States Supreme Court has noted that the doctrine serves "the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless

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reduction in rates. As a matter of equity and fairness, the insurance industry should be bound by the representations of the IRB, its designated agent, in presenting the pollution-exclusion clause to state regulators.

Id. at 874. *Contra* Anderson v. Minnesota Ins. Guar. Ass'n, 534 N.W.2d 706 (Minn. 1995).

67. Keesee v. Fetzek, 723 P.2d 904, 905 (Idaho Ct. App. 1986).

68. Brooks v. Hackney, 404 S.E.2d 854, 857 n. 3 (N.C. 1991); 31 C.J.S. *Estoppel* §§ 107, 109 (1964 & Cum. Supp. 1991).

69. Herrington v. Commissioner, 854 F.2d 755, 756 (5th Cir. 1988).

70. *See* Missouri Pacific R.R. Co. v. Harbison-Fischer Mfg. Co., 26 F.3d 531, 537 (5th Cir. 1994) (applying Texas law), *reh'g denied*, (citing Enochs v. Brown, 872 S.W.2d 312, 317 (Tex.App. 1994)).

71. El Paso Nat'l Bank v. Southwest Numismatic Inv. Group, Ltd., 548 S.W.2d 942, 947 (Tex.App. Ct. 1977) (citing 31 C.J.S. *Estoppel* § 107 (1964)).

72. 50 C.J.S. *Judgments* § 593 at 13 (1992 Supp.) (*citing* Lynch v. Commissioner of Internal Revenue, 216 F.2d 574 (7th Cir. 1954)). Res judicata means "matter adjudged." BLACK'S LAW DICTIONARY 1305 (6th ed. 1990). Under the doctrine of res judicata, a judgment bars a subsequent trial when the parties, subject matter and causes of action are identical or substantially identical. *See* Berisha v. Hardy, 474 A.2d 90, 91 (Vt. 1984).

73. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1980).

74. *See* Colin Hugh Buckley, *Issue Preclusion and Issues of Law: A Doctrinal Framework Based on Rules of Recognition, Jurisdiction and Legal History*, 24 HOUS. L. REV. 875, 879-80 (1987).

litigation."[75] Much has been written about the doctrine of collateral estoppel; the discussion in this article will focus on the doctrine's use as a tool to combat inconsistent litigation positions.

Part V will address the "mend the hold" doctrine as applied by courts in various jurisdictions. Courts apply the doctrine to prevent a litigant from asserting one position and then, when the position proves unsuccessful, asserting a contrary position with the hope of greater success.[76] The "mend the hold" doctrine bars a litigant from changing its position to rely on a claim or defense it otherwise would have been entitled to assert,[77] similar in this regard to the estoppel doctrines and the judicial admissions doctrine.[78]

Part VI will discuss the doctrine of "fraud on the court." "Fraud on the court" may be found when a litigant or the litigant's attorney engages in "misconduct [that] tampers with the judicial machinery and subverts the integrity of the court itself."[79] The doctrine applies when the misconduct misleads a court or is intended to mislead a court, such as when an officer of the court made false declarations concerning his financial interest in a bankruptcy proceeding.[80] Encompassing a wide range of misconduct before the courts, the doctrine applies when a litigant litigates in a manner inconsistent with the truth in derogation of the duty of honesty toward the courts.

Part VII will address the preclusive effects of a litigant's prior judicial admissions in litigation. The doctrine of judicial admissions precludes a

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75. Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 326 (1979), *quoted in* Insurers' Memorandum of Law in Support of the Application of New York Law (filed Oct. 31, 1990), Hatco v. W.R. Grace Corp., Civil Action No. 89-1031 (N.J.)).

76. *See* Harbor Ins. Co. v. Continental Bank Corp., 922 F.2d 357, 364-65 (7th Cir. 1992) (doctrine prevents insurance companies, which had argued that the policyholder should be denied insurance coverage for one reason, from adopting an inconsistent argument to deny insurance coverage when the court "threw cold water on [the first] argument").

77. *See* Employers Ins. of Wausau v. Bodi-Wachs Aviation Ins. Agency, Inc., 846 F. Supp. 677, 685 (N.D. Ill. 1994) (doctrine prohibits insurance company from amending pleading to add grounds for refusal to pay an insurance claim, when the grounds were not included in the declination of insurance coverage letter initially sent to the policyholder).

78. *See* The judicial admissions doctrine is discussed at Part VII of this article, *infra*.

79. Prince v. Delaware Cty. Bar Ass'n., No. 92-1942, 1993 U.S. Dist. LEXIS 5827 at *4-5 (E.D. Pa. May 3, 1993) (citing Eppes v. Snowden, 656 F. Supp. 1267, 1277 (E.D. Ky. 1986); United Bus. Communications, Inc. v. Racal-Milgo, Inc., 591 F. Supp. 1172, 1186 (D. Kan. 1984)).

80. *In re* Intermagnetics Am., Inc. 926 F.2d 912, 916 (9th Cir. 1991). *See also United Business Communications, Inc.*, 591 F. Supp. at 1187.

litigant from contradicting a statement asserted in a pleading, stipulation, argument, admission pursuant to a request to admit, affidavit or testimony. A judicial admission, if unrecanted, is binding throughout the litigation.

Part VIII will address the effect of a litigant's prior statement, spoken either in and out of court, as an admission which is admissible against the litigant in a legal proceeding. A party admission may consist of words or conduct and is rebuttable evidence against the litigant which made the admission.

This article will conclude that, with the many doctrines and rules which preclude the litigation of inconsistent positions, a court need not tolerate the threat that inconsistent positions pose upon the integrity of the judiciary. The court need not sit idle as a litigant seeks to "insist at different times, on the truth of each of two conflicting [positions] . . . according to the promptings of its private interest."[81]

I. THE JUDICIAL ESTOPPEL DOCTRINE

A. The Doctrine of Judicial Estoppel Generally as a Bar to Inconsistent Positions

The doctrine of judicial estoppel sometimes is called "the doctrine of preclusion against inconsistent positions" or "estoppel by oath."[82] The "wise and salutary doctrine," the United States Supreme Court has recognized, "binds a party to his judicial declarations and forbids him from subsequently contradicting his statements thus made."[83] It "is premised upon the desire to

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81. Smith v. Boston Elevated Railway, 184 F. 387, 389 (1st Cir. 1911) (citing H. BROOM, LEGAL MAXIMS 130 (London 1845)).

82. *See* WRIGHT & MILLER, *supra* note 16. *See also* Ross v. Ross, 648 P.2d 1119, 1131 (Idaho 1982) (Bistline, J., concurring in part and dissenting in part) ("estoppel of 'chameleonic guise'"); Douglas v. Gov't Employees Ins. Co., 654 N.Y.S.2d 39, 40 (N.Y. App. Div. 1997) (judicial estoppel or "doctrine of inconsistent positions" barred auto accident victims from arguing insurance company insured auto that hit them when in earlier arbitration they recovered substantial award on theory that vehicle was not covered by insurance); Brief in Opposition to the Cross-Appeal of Respondents-Cross-Appellants Town of Harrison and Village of Harrison and in Further Support of the Appeal of Appellant Cross-Respondent National Union Fire Insurance Company of Pittsburgh, PA (dated Sept. 20, 1996) at 24, Town of Harrison v. National Union Fire Ins. Co., No. 13167192 (N.Y.) (citing Moore v. County of Clinton, 219 A.D.2d 131, 134 (N.Y. App. Div. 1996) ("the doctrine against inconsistent positions . . . is the same doctrine as judicial estoppel").

83. Sturm v. Boker, 150 U.S. 312, 334 (1893). *See also* Huffman v. Pursue, 420 U.S. 592, 606 n.18 (1975) (noting the "normal rules of res judicata and judicial estoppel").

maintain the integrity of the judicial process and the orderly administration of justice."[84] When invoked, the doctrine precludes the litigant from asserting the inconsistent position and may result in the resolution of the second issue on summary judgment in accord with the prior assertion.[85]

The doctrine precludes a litigant from asserting a position that is inconsistent[86] with a position that the litigant or its privy[87] unequivocally[88]

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84. Brief of Defendant-Appellee Aetna Life Insurance Co. (filed April 12, 1991) at 13, Edwards v. Aetna Life Ins. Co., 690 F.2d 595 (6th Cir. 1982). *See* Fleck v. DKI Sylvan Pools, Inc., 981 F.2d 107, 121 (3d Cir. 1992), *reh'g denied, cert. denied*, Doughboy Recreational, Inc. v. Fleck, 507 U.S. 1004, *on remand*, 1993 WL 195434 (judicial estoppel applied to protect integrity of courts); Sure-Snap Corp. v. Bradford Nat'l Bank, 128 B.R. 885, 888 n.4 (D. Vt. 1991) ("doctrine of judicial estoppel is intended to protect the integrity of the courts by precluding a party from assuming a position in a legal proceeding inconsistent with one previously asserted"); *In re* Marriage of Dekker, 21 Cal. Rptr. 2d 642, 646 (Cal. Ct. App. 1993) (noting judicial estoppel doctrine is "aimed at preventing fraud on the courts," but declining to apply doctrine because asserting party had helped draft declaration to which she now sought to bind adversary); Vennerberg Farms, Inc. v. IGF Ins. Co., 405 N.W.2d 810, 814 (Iowa 1987) (doctrine designed to protect integrity of judicial process). *See also* David W. Steuber, *The Doctrines of Judicial and Collateral Estoppel: The 1970 Pollution Exclusion Clause Proceedings Before the West Virginia Insurance Commissioner*, 2 ENVTL. CLAIMS J. 317, 323 (1990) (the author regularly represents policyholders in insurance litigation).

85. *See* WRIGHT & MILLER, *supra* note 16. *See also* Teledyne Indus., Inc. v. National Labor Relations Bd., 911 F.2d 1214, 1218 (6th Cir. 1990) (judicial estoppel doctrine "precludes a contrary position without examining the truth of either statement"); Reynolds v. Commissioner, 861 F.2d 469 (9th Cir. 1988) (Internal Revenue Service estopped from bringing lawsuit asserting gain from sale of property was taxable to taxpayer when in earlier bankruptcy proceeding, it obtained settlement with second taxpayer based on allegation that gain was taxable to her); Scarano v. Cent. R.R., 203 F.2d 510 (3d Cir. 1953) (dismissal on summary judgment of former employee's complaint for breach of collective bargaining agreement based on the employer's refusal to reinstate was proper when employee recently recovered damages for permanent lost ability to earn wages). *See also* R.G. Boyers, Comment, *Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel*, 80 NW. U. L. REV. 1244, 1251-56 (1986) ("The original position 'is not merely evidence against the litigant, but . . . precludes him from denying its truth.'") (quoting Sartain v. Dixie Coal & Iron Co., 266 S.W. 313, 318 (Tenn. 1924)).

86. *See* In the Matter of Cassidy, 892 F.2d 637, 641 (7th Cir. 1990), *cert. denied*, 498 U.S. 812 (1991). *See also* Allison v. Ticor Title Ins. Co., 979 F.2d 1187, 1193 (7th Cir. 1992) (rejecting insurance company's claim that judicial estoppel precludes policyholders from denying that they authorized an agreement when policyholders previously had stipulated that they had not objected to the agreement, because statements not inconsistent); Virginia Sprinkler Co. v. Road Sprinklers Fitters Local 669, 868 F.2d 116, 120 (4th Cir. 1989) (no judicial estoppel because no actual inconsistency in union's prior and present positions); Garcia v. Andrus, 692 F.2d 89, 94 (9th Cir. 1982) (all United States Circuit Courts of Appeal agree judicial estoppel bars only positions that are inconsistent); F.D.I.C. v. CNA Cas. of Puerto

asserted in a prior testimony or affidavit,[89] pleading,[90] legal argument,[91] brief,[92] stipulation,[93] or settlement which has received judicial acceptance.[94]

Rico, 786 F. Supp. 1082, 1086 (D.P.R. 1991) (rejecting insurance company's claim that judicial estoppel precludes F.D.I.C. from claiming that policyholder's president committed fraud when F.D.I.C. in previous litigation had focused on wrongful acts of third person, because positions not contradictory); Kesterson v. American Cas. Co., C.A. No.83C-DK-93, 1988 Del.Super. LEXIS 269 at *7 (Del. Sup. Ct. Aug. 15, 1988) (rejecting insurance company's contention that judicial estoppel doctrine precluded policyholder's position because no inconsistency existed between policyholder's position in first and second cases, and noting that "[j]udicial estoppel addresses the incongruity of allowing a party to assert a position in one tribunal and the opposite in another tribunal") (citing Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 599 (6th Cir. 1982)).

87. *See* FDIC v. Mmahat, 907 F.2d 546, 553 (5th Cir. 1990). *See also* General Star's Reply Brief and Brief in Opposition to Meijer's Motion for Partial Summary Judgment (dated Nov. 13, 1992) at 9-12, Meijer, Inc. v. General Star Indem. Co., 826 F. Supp. 241 (W.D. Mich. 1993) *aff'd*, No. 94-1152, 1995 U.S. App. LEXIS 19951 (6th Cir. July 21, 1995) (brief discussed the doctrine's purpose and applications under Michigan law, but argued that affiliated company which asserted prior position is not the same party which asserted contrary position; issue was not decided on appeal).

88. *See* Roach v. Crouch, 524 N.W.2d 400, 403 (Iowa 1994); American Sav. & Loan v. Misick, 531 S.W.2d 581 (Tex. 1982).

89. *See, e.g.,* Allen v. Zurich Ins. Co., 667 F.2d 1162 (4th Cir. 1982); Hill v. Village Creek Drainage Dist., 219 S.W.2d 635 (Ark. 1949); Finley v. Kesling, 422 N.W.2d 1112, 1118 (Ill. 1982); 31 C.J.S. *Estoppel* § 117 at 626. *See also* [International Insurance Company's] Response to SCOR's Motion to Stay or Alternatively to Dismiss on Proceedings (filed Jan. 24, 1992) at 7, International Ins. Co. v. Certain Underwriters at Lloyd's, No. 88C 9838 (N.D. Ill.) ("Court should not tolerate such blatant reversals, particularly where they are stated in sworn affidavits . . ."); Defendants' Memorandum of Law in Opposition to Motion to Remand and in Support of Cross-Motion for Judgment on the Pleadings as to the Nonarbitrable Claims, and to Stay the Action Pending Arbitration (filed Jan. 7, 1992) at 21, Travelers Ins. Co. v. Richard John Ratcliffe Keeling, No. 91 Civ. 7753 (S.D.N.Y.) (condemning use of "about face" affidavits).

90. *See, e.g.,* Murray v. Silberstein, 882 F.2d 61, 66-67 (3d Cir. 1989) (plaintiff who obtained preliminary injunction preventing discharge from public office on grounds that Eleventh Amendment precluded damages was judicially estopped to amend complaint to seek damages once term expired two years later); Brief of Appellant [Transamerica Insurance Company] (filed March 26, 1973) at 18, Transamerica Ins. Co v. Johnson Service Co., No. 73-1108 (5th Cir.) (*quoting* Long v. Knox, 291 S.W.2d 292, 295 (Texas) for proposition that pleading may constitute basis for judicial estoppel); 31 C.J.S. *Estoppel* § 118 at 631.

91. *See, e.g.,* Patriot Cinemas, Inc. v. General Cinema Corp., 834 F.2d 208, 212 (1st Cir. 1987).

92. *See, e.g.,* Delgrosso v. Spang & Co., 903 F.2d 234, 241-42 (3d Cir. 1990); AFN, Inc. v. Schlott, Inc., 798 F. Supp. 219, 224 (D.N.J. 1992); Matek v. Murat, 638 F. Supp. 775, 782 (C.D. Cal. 1986).

93. *See, e.g.,* Smith v. Pinner, 891 F.2d 784, 787 (10th Cir. 1968) (applying Colorado

The litigant who seeks to invoke the doctrine need not have been a litigant to the prior proceeding.[95] To bind a litigant in a subsequent proceeding[96] or "with respect to the same matter in the same or a successive series of suits,"[97]

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judicial estoppel law to bar contradiction of stipulation made in workers' compensation proceeding). *But see* Teledyne Indus. v. National Labor Relations Bd., 911 F.2d 1214, 1217-1220 (6th Cir. 1990) (agreed order was insufficient basis for judicial estoppel because there was no judicial acceptance of prior position); State Farm Fire & Cas. Co. v. Taylor, 832 S.W.2d 645, 648-49 (Tex.App. Ct. 1992) (insurance company was not judicially estopped in insurance coverage action to argue that shooting was intentional when it had argued, during unsuccessful attempt to intervene in underlying wrongful death action, that it would be collaterally estopped by verdict because statement did not amount to stipulation).

94. *See, e.g.,* Warda v. Commissioner, 15 F.3d 533, 538-39 (6th Cir. 1994) (settlement received judicial acceptance when the prior court was obliged to ensure that the settlement was fair and equitable because of recognized "incongruity of allowing a litigant to defeat her own actions by attacking the validity of a settlement that she had willingly procured"). There is authority that a settlement reached between the parties to the first action is insufficient to support judicial estoppel absent judicial acceptance of the prior position. Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 599 (6th Cir. 1982); Konstantinidis v. Chen, 626 F.2d 933, 937 (D.C. Cir. 1980); Resolution Trust Corp. v. Farmer, 823 F. Supp. 302, 314 (E.D. Pa. 1993).

95. *See, e.g.*, Gray v. Fitzhugh, 576 P.2d 88, 91 (Wyo. 1978) (party's testimony during prior, unrelated action against different party precluded him from asserting contrary position in present case because one's "testimony in the previous action is the very highest order of evidence against [the speaker] and is entitled to judicial sanctity") (citing Allen v. Allen, 550 P.2d 1137 (Wyo. 1976)); Galena Park Home v. Krughoff, 538 N.E.2d 1366, 1367 (Ill. App. Ct. 1989) (son who successfully argued in suit against father's health insurer that he is liable for father's nursing home services bill was estopped to argue in subsequent suit against nursing home that he is not liable for full amount of bill). *But see* Daley v. City of Little Rock, 818 S.W.2d 259 (Ark. Ct. App. 1991) (judicial estoppel only applies between same parties and privies when questions involved are the same).

96. *See* Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 599 (6th Cir. 1982). *See also* Respondent Stonewall Insurance Company's Brief on the Merits (filed Jan. 14, 1993) at 5, Stonewall Insurance Co. v. City of Palos Verdes Estates, 904 P.2d 370 (Cal. 1995), *transferred with directions to vacate and reconsider in light of* Montrose Chem. Corp. v. Admiral Ins. Co., 897 P.2d 1 (Cal. 1995) ("Judicial estoppel generally prevents a party from taking a position inconsistent with one previously asserted by the same party in a prior proceeding.") (citing Reynolds v. Commissioner, 861 F.2d 469, 472 (6th Cir. 1988); Joy Technologies, Inc. v. Liberty Mut. Ins. Co., 421 S.E.2d 493 (W. Va. 1992); Tyra v. Board of Police and Fire Comm'rs, 225 P.2d 617, 620 (Cal.Ct. App. 1950); Aerojet-General Corp. v. San Mateo Cty. Super. Ct., 258 Cal.Rptr. 684, 686 (Cal. Ct. App. 1989)). *See also* Brief of Amicus Curiae American Insurance Association (filed Aug. 19, 1991) at 26-27, J.H. France Refractories Co. v. Allstate Ins. Co., 626 A.2d 502 (Pa. 1993) (arguing same).

97. Reply Brief of Appellant Federal Insurance Co. (filed Oct. 15, 1990) at 7, Federal Ins. Co. v. Susquehanna Broadcasting Co., 928 F.2d 1131 (3d Cir. 1991) (emphasis deleted) (quoting Scarano v. Central R.R. Co., 203 F.2d 510, 513 (3d Cir. 1953)); Brief of Amicus Curiae American Insurance Association (filed Aug. 19, 1991) at 27 n.43, J.H. France

Refractories Co. v. Allstate Ins. Co., 626 A.2d 502 (Pa. 1993) (judicial estoppel precludes a party "from adopting a legal position in conflict with one earlier taken in the same or related litigation") (quoting Allen v. Zurich Ins. Co., 667 F.2d 1162, 1166 (4th Cir. 1986)); [Maryland Casualty Company's] Memorandum in Opposition to Selby, Battersby & Company's Motion for Leave to Amend its Counterclaim to Assert Additional Acts of Bad Faith, In Opposition to Selby's Motion to Reopen Discovery for Thirty Days; and in Reply to Selby's Opposition to Maryland's Motions for Summary Judgment (dated Feb. 27, 1995) at 13-14, Maryland Cas. Co. v. Selby, Battersby & Co., No. 93-6441 (E.D. Pa.) (asserting that *Scarano*, 203 F.2d 510, stands for proposition that doctrine only applies in same or related proceedings).

The doctrine frequently has been applied within the same litigation. *See, e.g.*, Tenneco Chem., Inc. v. William T. Burnett & Co., 691 F.2d 658, 664-65 (4th Cir. 1982) (judicial estoppel precludes contradiction of prior statement made in same proceeding); Jett v. Zink, 474 F.2d 149, 154-55, *reh'g denied*, 474 F.2d 1347, 1348 (5th Cir. 1973), *cert. denied sub nom.*, Sterling Oil of Okla., Inc. v. Chamberlain, 414 U.S. 854 (1973) (party who argued that action was *quasi in rem* was precluded from arguing in later stage of litigation that action was *in personam*); Degen v. Bunce, No. 93-5674 1995 U.S. Dist. LEXIS 3576, at *22 (E.D. Pa. March 13, 1995) (judicial estoppel doctrine precludes party from adding request for treble damages after hearing at which counsel stated, "I am not authorized to pursue punitive damages nor RICO damages" at hearing); Colleton Regional Hosp. v. MRS Medical Review Sys., Inc., 866 F. Supp. 896, 900 (D.S.C. 1994) (judicial estoppel prevents party that earlier in litigation took position that it is not an ERISA fiduciary from switching positions to assert that it is an ERISA fiduciary); Otto Wolfe Handelsgesellschaft v. Sheridan Transportation Co., 800 F. Supp. 1359, 1365 (E.D. Va. 1992) ("judicial estoppel applies where a party attempts to assert different positions or factual claims in the same proceeding"); Radiation Sterilizers, Inc. v. United States, 867 F. Supp. 1465, 1473 (E.D. Wash. 1994) (noting that the "doctrine of judicial estoppel bars a party from taking inconsistent positions in the same litigation" but concluding that doctrine did not prevent party from adopting new position in present case) (quoting Morris v. California, 966 F.2d 448, 452 (9th Cir. 1991), *cert. denied,* 506 U.S. 831 (1992)); Held v. Mitsubishi Aircraft Int'l, Inc., 672 F. Supp. 369, 391 (D. Minn. 1987) (judicial estoppel precludes party from asserting inconsistent position in same or a related proceeding, but is not applicable where party produced significant documentation concerning matter it asserted was irrelevant) (citing *Allen*, 667 F.2d at 1166; USLIFE Corp. v. U.S. Life Ins. Co., 560 F. Supp. 1302, 1304 (N.D. Tex. 1983)); Ray v. Midfield Park, Inc., 266 So. 2d 291, 295-96 (Ala. 1972) (judicial estoppel applicable when prior representation occurred in same proceeding); Messler v. Simmons Gun Specialties, Inc., 687 P.2d 121, 128 (Okla. 1984) (appellant's silence at hearing on motion for summary judgment to determine responsibility for accident precluded appellant from arguing later in same proceeding that deceased was responsible for accident); ARC Electrical Construction Co., Inc. v. Commissioner of Internal Revenue, T.C. Memo 1994-176; 67 T.C.M. (CCH) 2727 (April 19, 1994) (party may not assume "contradictory position before the same or another court simply because it suits the party's present interest to do so"). *But see* Aston Chauffeured Limousine v. Runnfeldt Inv. Corp., 910 F.2d 1540, 1548 (7th Cir. 1990) (inconsistency is acceptable in same proceeding because, at the end of the proceeding, only one position will prevail); Crowder v. Tri-C Resources, Inc., 821 S.W.2d 393, 397 (Tex.App. Ct 1991) (party not estopped by statement made in deposition because that statement was made in present, not an earlier, action); Hampton Tree Farms, Inc. v. Jewett, 892 P.2d 683 (Or. 1995)

the prior position must have been legally relevant[98] when asserted. Once used primarily to estop a litigant from asserting a contradiction of fact,[99] the doctrine now precludes a litigant from asserting an inconsistent position regarding a matter of law[100] or with respect to procedure.[101]

Because the primary purpose of the doctrine of judicial estoppel is to protect courts and not litigants, the doctrine may be raised at any point in litigation either by a litigant or by the court on its own motion.[102] Although courts generally are reluctant to consider on appeal issues not raised at the trial court level, courts have considered estoppel and other issues on appeal

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(determination of whether judicial estoppel applies "involves three issues: benefit in the earlier proceeding, different judicial proceedings, and inconsistent positions").

98. Gleason v. United States, 458 F.2d 171 (3d Cir. 1972).

99. Boyers, *supra* note 85, at 1262. Some courts have stated that the doctrine of judicial estoppel is applicable when the facts in the previous proceeding are the same as the facts in the subsequent proceeding. For a discussion of when facts are the same in two proceedings, see Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414, 418-20 (3d Cir. 1988) (actions arose out of same facts; judicial estoppel applied); and Himel v. Continental Illinois Nat'l Bank & Trust, 596 F.2d 205, 209-20 (7th Cir. 1979) (actions did not arise out of same facts; judicial estoppel not applied).

100. *See* In the Matter of Cassidy, 892 F.2d 637, 641-42 (7th Cir. 1990) (citing Patriot Cinemas, Inc. v. General Cinema Corp., 834 F.2d 208, 214 (1st Cir. 1987)) ("It may be advisable not to prescribe too many rules of application of a doctrine designed to protect the integrity of the courts. . . . We also observe a trend away from strict limitation of the doctrine to positions on matters of fact.") The court explained that "the change of position on the legal question is every bit as harmful to the administration of justice as a change on an issue of fact." *Id. See also* Reply Brief of Appellant Federal Insurance Co. (filed Oct. 15, 1990) at 6-7, Federal Ins. Co. v. Susquehanna Broadcasting Co., 928 F.2d 1131 (3d Cir. 1991) (judicial estoppel precludes a party "from adopting a legal position in conflict with one earlier taken in the same or related litigation") (quoting Allen v. Zurich Ins. Co., 667 F.2d 1162, 1166 (4th Cir. 1986)). *But see* United States v. Siegel, 472 F. Supp. 440, 442 n.4 (N.D. Ill. 1979) (the doctrine of judicial estoppel "does not apply where the prior statement is merely an expression of opinion or legal conclusion"); DeMers v. Roncor, Inc., 814 P.2d 999 (Mont. 1991) (corporation president's testimony that covenants gave other party certain permanent rights did not preclude the corporation from cancelling those rights because the statement merely reflected the president's interpretation of permits, and judicial estoppel does not apply to changes in position of matters of law nor where the knowledge or means of knowledge of both parties is equal).

101. *See* 31 C.J.S. *Estoppel* § 118 at 630.

102. *See* DeMarco v. Ohio Decorative Prod., Inc., 19 F.3d 1432, n.5 (6th Cir. 1994). *Accord* In the Matter of Cassidy, 892 F.2d at 641 (citing Allen v. Zurich Ins. Co., 667 F.2d 1162, 1168 (4th Cir. 1982)) (doctrine may be raised by court *sua sponte* on appeal); Patriot Cinemas, Inc. v. General Cinema Corp., 834 F.2d 208, 211 (1st Cir. 1987) (applying judicial estoppel, which was first asserted on appeal).

when public interest requires or when manifest injustice would result from the failure to consider the new issue.[103]

The federal courts of appeals have not resolved whether state or federal law governs the application of judicial estoppel. The issue is important because when the doctrine is recognized under one law but not another, the law applied might determine whether the court applies the doctrine. For example, the United States Court of Appeals for the Tenth Circuit has rejected the doctrine of judicial estoppel, but has applied the doctrine under state law[104] and the United States Court of Appeals for the First Circuit has applied federal law when the viability of the judicial estoppel doctrine under Massachusetts state law was still in doubt.[105] A persuasive argument has been made that because the doctrine of judicial estoppel protects the integrity of the court, the law of the tribunal should apply.[106]

Judicial estoppel may preclude a litigant from asserting a position which is inconsistent with a position taken in a prior administrative proceeding.[107]

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103. *See* Altman v. Altman, 653 F.2d 755, 757 (3d Cir. 1981). *But cf.,* United States v. C.I.T. Constr., Inc., 944 F.2d 253, 257-59 (5th Cir. 1991) (absent flagrant threat to judicial process, judicial estoppel defense is waived if not pleaded); and Greene v. American Bankers Ins. Co., No. 66091, 1994 Ohio App. LEXIS 4617 at *14 (Ohio App. Ct. Oct. 13, 1994) (because civil procedure rules list estoppel as an affirmative defense which must be raised in a responsive pleading and because affirmative defenses are waived if not pleaded, litigant may not first raise estoppel on appeal).

104. *Compare* United States v. 49.01 Acres of Land, 802 F.2d 387, 390 (10th Cir. 1989) (United States Court of Appeals for the Tenth Circuit has never recognized the doctrine) *with* Smith v. Pinner, 891 F.2d 784, 787 (10th Cir. 1989) (applying doctrine under Colorado law); Ellis v. Arkansas La. Gas Co., 609 F.2d 436, 440 (10th Cir. 1979) (applying doctrine under Oklahoma law).

105. *See* Patriot Cinemas, Inc. v. General Cinema Corp., 834 F.2d at 215 (refusing to apply Massachusetts law) (decided before Fay v. Fannie Mae, 647 N.E.2d 422 (Mass. 1995) (recognizing judicial estoppel doctrine)).

106. *See In re* Kugler, 170 Bankr. 291, 302 (E.D. Va. 1994) (although case at bar involves state-court judgment, federal law controls the application of judicial estoppel to protect integrity of the federal judicial process); State v. Gonzalez, 641 A.2d 1060 (N.J. Super. Ct. App.Div. 1994) (because the purpose of the doctrine of judicial estoppel is to protect the integrity of the court, judicial estoppel law of tribunal applies).

107. *See, e.g.,* Smith v. Pinner, 891 F.2d 784, 787 (10th Cir. 1989) (applying Colorado judicial estoppel law to bar contradiction of stipulation made in workers' compensation proceeding); Smith v. Montgomery Ward & Co., 388 F.2d 291, 292 (6th Cir. 1968), *cert. denied,* 393 U.S. 871 (1968) (applying judicial estoppel to bar contradiction of statements made in workers' compensation proceeding); Long Island Lighting Co. v. Transamerica Delaval, Inc., 646 F. Supp. 1442, 1447 (S.D.N.Y. 1986), *aff'd sub. nom.,* Long Island Lighting Co. v. IMO Industries, 6 F.3d 876 (2d Cir. 1993) (assuming party may not contradict prior statements made

Courts and litigants recognize that "[t]he truth is no less important to an administrative body acting in a quasi-judicial capacity than it is to a court of law."[108]

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before state administrative agency, but finding present position not barred because prior statement was not asserted successfully and was not inconsistent); Czajkowski v. City of Chicago, 810 F. Supp. 1428 (N.D. Ill. 1992) (holding that application of doctrine can be based upon quasi-judicial administrative proceedings under federal law and citing many cases that apply the doctrine based on administrative proceedings); Unruh v. Industrial Comm'n, 301 P.2d 1029 (Ariz. 1956) (estoppel precluded former wife from contradicting statements made in worker's compensation proceeding); Mijatov v. Graves, 544 N.E.2d 809, 812 (Ill. App. Ct. 1989) (judicial estoppel doctrine precludes party who entered into lump sum settlement agreement under workers' compensation law to later bring civil suit against co-worker alleging co-worker is responsible for injury). *But see* Allen v. Zurich Ins. Co., 667 F.2d 1162, 1167 n.3, (4th Cir. 1982) (declining to decide whether plaintiff's prior statements made in prior administrative proceeding independently could support judicial estoppel); M.J. Plumer, Comment, *Judicial Estoppel: The Refurbishing of a Judicial Shield*, 55 GEO. WASH. L. REV. 409, 411 n.11 (1987) (limiting judicial estoppel to prior statements made "in court of law").

Several courts have held or assumed that an insurance company may be barred from contradicting a prior position asserted in a state insurance administrative hearing, such as proceedings held when an insurance company seeks approval of an insurance policy form. *See, e.g.*, USLIFE Corp. v. U.S. Life Ins. Co., 560 F. Supp. 1302 (N.D.Tex. 1983) (assuming judicial estoppel bars statement inconsistent with assertions before Texas' Insurance Commissioner, but declining to apply judicial estoppel based on other grounds); Claussen v. Aetna Cas. & Sur. Co., 380 S.E.2d 686, 689 (Ga. 1989) (binding insurance company to representations made in administrative proceedings); Morton Int'l Corp. v. General Accident Ins. Co. of Am., 629 A.2d 831, 873-74 (N.J. 1993), (applying estoppel to bind insurance companies to statements insurance industry made to Commissioner of Insurance); Joy Technologies, Inc. v. Liberty Mutual Ins. Co., 421 S.E.2d 493 (W. Va. 1992) (binding insurance company to statement made before Insurance Commissioner, but not specifically relying on estoppel doctrine).

Litigants likewise acknowledged that judicial estoppel may be based on statements made in administrative proceedings. *See, e.g.*, Memorandum of Continental Casualty Company in Response to the Motion for Summary Judgment of ACandS on Count II of Continental's Complaint (filed Jan. 17, 1989) at 8, Continental Cas. Co. v. ACandS, Inc., No. 86 C 6119 (N.D.Ill.) (citing Department of Transportation v. Grawe, 447 N.E.2d 467, 471 (Ill. App. Ct. 1983); Associated Hosp. Service of Philadelphia v. Pustilnik, 439 A.2d 1149, 1151-52 (Pa. 1981)).

108. Zapata Gulf Marine Corp. v. Puerto Rico Maritime Shipping Auth., 731 F. Supp. 747, 750 (E.D. La. 1990) (declining to apply judicial estoppel because prior administrative action was settled and not determined on its merits) (quoting Department of Transportation v. Coe, 445 N.E.2d 506, 508 (Ill. App. Ct. 1983)). *See also* Miramon v. Woods, 639 So. 2d 353, 358 (La. Ct. App. 1994) (rejecting New England Insurance Company's urging to adopt judicial estoppel doctrine in Louisiana and the insurance company's reliance on *Zapata Gulf Marine Corporation*); Memorandum of Law of CNA in Support of Motion to Dismiss Count 105 for Estoppel (dated Feb. 2, 1996) at 9, Continental Cas. Co. v. General Battery Corp., No. 93C-11-

The judicial estoppel doctrine was announced in Tennessee[109] and developed by other courts to protect the sanctity of the oath, and to protect judicial integrity and avoid "unseemliness."[110] Sometimes labeled the "absolute" approach, the doctrine as articulated in Tennessee precludes a litigant from asserting a position in litigation which is inconsistent with any sworn statement asserted in an earlier proceeding absent only mistake, inadvertence, or fraud. In Tennessee, it appears that the earlier position need not have been asserted under oath.[111] Courts in other jurisdictions, however, have required the litigant invoking the doctrine to prove elements in addition to a bare conflicting position – most commonly, that a prior tribunal accepted the earlier position.[112]

The United States Court of Appeals for the Ninth Circuit has opined that courts have developed two broad and sometimes competing views of judicial estoppel, depending upon whether the jurisdiction regards as the primary purpose of the doctrine the preservation of the sanctity of the oath or the prevention of inconsistent judicial determinations.[113] The first view focuses

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088-WCC (Del. Super. Ct.) (explaining that under Illinois law, requirements for application of judicial estoppel are relaxed in recognition of the quasi-judicial function of administrative proceedings).

109. *See* Hamilton v. Zimmerman, 37 Tenn. (5 Sneed) 39, 47-48 (1857).

110. *Id. See also* WRIGHT & MILLER, *supra* note 16, §4477.

111. *See, e.g.*, Allen v. Neal, 396 S.W.2d 344, 346 (Tenn. 1965). *But cf.* Federal Deposit Ins. Corp. v. Butcher, 660 F. Supp. 1274 (E.D. Tenn. 1987) (Tenn. law) (not applying judicial estoppel in part because complaint in which prior assertion made was not under oath).

112. *See, e.g.*, State Farm Auto. Ins. Co. v. Civil Serv.Employees Ins. Co., 509 P.2d 725, 730 (Ariz. 1973), *reh'g denied, rev. denied*, July 17, 1973 (rejecting State Farm's argument that judicial estoppel barred policyholder from asserting position inconsistent with position in prior litigation, because policyholder did not receive any "judicial relief" based on prior position); Kalikow 78/79 Co. v. State, 174 A.D.2d 7 (N.Y. 1992) (New York rejects "broad utilization" of judicial estoppel doctrine to preclude party from asserting position absent success in prior litigation); Defendants-Appellees' Response Brief (dated Dec. 31, 1996) at 28, Maremont Corp. v. Cheshire, No. 96-0146 (Ill. App. Ct.) (quoting Parisi v. Jenkins, 603 N.E.2d 566, 573-574 (Ill. App. Ct. 1992) (judicial estoppel applies only when "(1) the two positions must be taken by the same party; (2) the positions must be taken in judicial proceedings; (3) the positions must be given under oath; (4) the party must have successfully maintained the first position, and received some benefit thereby; and (5) the two positions must be 'totally inconsistent'"). *Cf.*, Anonymous v. Anonymous, 137 A.D.2d 739 (N.Y. 1988) (judicial estoppel doctrine precluded husband who failed in divorce action to object to financial provisions in separation agreement from later challenging financial provisions in separate proceeding).

113. *See In re* Corey, 892 F.2d 829, 835-36 (9th Cir. 1989), *cert. den'd*, 498 U.S. 815 (1990).

on the protection of the judicial system from all inconsistent assertions when the first position was stated under oath, while the second view focuses on the protection of the judicial system from the threat of inconsistent judicial results.

The judicial estoppel doctrine, although expressed by the courts in a myriad of terms, has been applied routinely by most courts[114] over a period of nearly one hundred and fifty years to preclude litigants from asserting positions that are inconsistent with positions maintained in the course of prior judicial and administrative proceedings. The judicial estoppel doctrine is not applied differently in insurance coverage disputes.[115] The doctrine is grounded in the "concern for fairness and for the integrity of the courts,"[116] and serves vital policy objectives.

B. Judicial Estoppel Advances Important Public Policy Objectives

Courts, commentators and litigants have advanced important public policy rationales for the application of the judicial estoppel doctrine. Underlying these rationales is the recognition that the primary function of judicial estoppel is to safeguard the judicial system. The doctrine thus is distinguished from the related doctrines of equitable estoppel and collateral estoppel which primarily protect litigants.

In the early case of *Scarano v. Central Railroad Co.*,[117] the United States Court of Appeals for the Third Circuit adopted judicial estoppel to protect judicial dignity in the face of "intentional self-contradiction" by litigants who

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114. *See* John K. DiMugno, *Excess Insurer Has No Duty to Defend and Therefore No Duty to Reserve Right to Deny Coverage,* 18 INS. LITIG. REP. 26, 28 (Jan. 1996) (discussing Interstate Fire & Cas. Co. v. Portland Archdiocese, 899 F. Supp. 498 (D. Or. 1995), *aff'd sub nom* Interstate Fire & Cas. Co. v. Underwriter'sat Lloyd's, London, 139 F.3d 1234 (9th Cir. 1998), in which the court applied judicial estoppel as urged by excess insurance company to estop policyholder and primary insurance company from arguing position inconsistent with prior position in same litigation, and noting that "[m]ost courts hold that the doctrine of judicial estoppel may preclude a litigant from asserting a position that is inconsistent with its prior litigation position.").

115. *See* Brief of Appellant (dated April 6, 1993) at 20, Commercial Union Ins. Co. v. Walbrook Ins. Co., No. 92-2415 (1st Cir.).

116. Resorts Int'l v. Great Bay Hotel & Casino, 830 F. Supp. 826, 830-31 (D.N.J. 1992) (declining to apply doctrine primarily because it was raised for first time on motion for reconsideration).

117. 203 F.2d 510 (3d Cir. 1953).

seek to manipulate the judicial process.[118] This rationale focuses on the relationship between the litigant and the court[119] and comports with "[t]he essential function of judicial estoppel, . . . to protect the judiciary, as an institution, from the perversion of judicial machinery."[120] However, the *Scarano* decision should not be read to signify that only intentional contradiction is barred under the doctrine. For the century prior to the *Scarano* court's articulation of the public policy rationale against "intentional self-contradiction" and since the *Scarano* decision, courts have applied the judicial estoppel doctrine without considering whether the litigant's contradiction is intentional or inadvertent.[121]

The public policy against intentional self-contradiction assails the practice of "reckless and false swearing"[122] prompted by a party's interest at the moment.[123] Courts that have applied judicial estoppel to prevent intentional self-contradiction have pointed out that a litigant may not assert an inconsistent position "as a means of obtaining unfair advantage in a forum provided for suitors seeking justice."[124] The judicial estoppel doctrine, one

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118. *See id.* at 513. The *Scarano* court held that an employee who previously asserted damages for permanent lost ability to earn wages was estopped to bring, based on the employer's refusal to reinstate him one month after settlement as rehabilitated, an action for damages for breach of collective bargaining agreement.

119. *See* USLIFE Corp. v. U.S. Life Insurance Company, 560 F. Supp. 1302, 1304 (N.D. Tex. 1983).

120. Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 599 (6th Cir. 1982). *See also* Reciprocal Merchandising Serv. v. All Advertising Assocs., 163 Bankr. 689, 696 (S.D.N.Y. 1994) (citing *Scarano* to require intentional misconduct as necessary element to a claim for judicial estoppel).

121. *See, e.g.*, Messler v. Simmons Gun Specialties, Inc., 687 P.2d 121, 128 (Okla. 1984) (appellant, which was silent at hearing on motion for summary judgment to determine responsibility for accident, was precluded by doctrine of judicial estoppel from arguing later in same proceeding that deceased was responsible for accident); Hamilton v. Zimmerman, 37 Tenn. (5 Sneed) 39 (1857) (plaintiff estopped from pursing claim that he was entitled to half of defendant's receipts from sale of store when, in earlier proceeding brought by third party against defendant, defendant had stated that plaintiff was a clerk and plaintiff had pleaded in answer to cross-bill that he believed defendant's allegations were substantially true).

122. Konstantinidis v. Chen, 626 F.2d 933, 937 (D.C. Cir. 1980) (quoting Melton v. Anderson, 222 S.W.2d 666, 669 (Tenn. Ct. App. 1948)).

123. *See* Smith v. Boston Elevated Ry., 184 F. 387, 389 (1st Cir. 1911) (quoting BROOM, A SELECTION OF LEGAL MAXIMS 130 (London 1845)).

124. Patriot Cinemas, Inc. v. General Cinema Corp., 834 F.2d 208, 212 (1st Cir. 1987) (quoting *Scarano*, at 513; Allen v. Zurich Ins. Co., 667 F.2d 1162, 1167 (4th Cir. 1982); LNC Investments v. First Fidelity Bank, 92 Civ. 7584 (MBM), 1994 U.S. Dist. LEXIS 6880 at *12 (S.D.N.Y. May 24, 1994) (same).

court has noted, "preserve[s] respect for judicial proceedings without the necessity to resort to perjury statutes [and permits a court] to bar as evidence statements by a party which would be contrary to sworn testimony. . . ."[125] When applied to prevent intentional self-contradiction, the judicial estoppel doctrine enforces the duty of each litigant to tell the truth under oath.

Litigants often urge courts to apply the doctrine to prevent other litigants from engaging in intentional self-contradiction.[126] In attempting to persuade a federal district court to apply the doctrine to bar what they perceived to be intentional self-contradiction, several insurance companies summarized the doctrine, using the words of the United States Court of Appeals for the Seventh Circuit: "The principle is that if you prevail in Suit #1 by representing that A is true, you are stuck with A in all later litigation growing out of the same events."[127]

In the insurance coverage litigation context, an insurance company occasionally attempts to justify intentional self-contradiction on the ground that a position was taken in the prior proceeding only because the insurance

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125. Seattle-First Nat'l Bank v. Marshall, 641 P.2d 1194, 1196-97 (Wash. Ct. App. 1992).

126. *See, e.g.*, New Castle County v. Hartford Accident & Indem. Co., 933 F.2d 1162, 1199 (3d Cir. 1991) (court notes Continental Casualty Company (CNA) argued that policyholder "should not be allowed to reverse field whenever its self-interest so dictates"); Supplemental Memorandum, *supra* note 3, at 4; Reply Brief of Appellant Federal Insurance Co. (filed Oct. 15, 1990) at 7, Federal Ins. Co. v. Susquehanna Broadcasting Co., Nos. 90-5523, 90-5524 (3d Cir.); Brief of Amicus Curiae American Insurance Association (filed Aug. 19, 1991) at 6, J.H. France Refractories Co. v. Allstate Ins. Co., 626 A.2d 502 (Pa. 1993) (filed in support of Allstate Insurance Company, PMA Insurance Company, St. Paul Insurance Company, U.S. Fire Insurance Company, Wausau Insurance Company and Rockwood Insurance Company, but contending that these insurance companies were not the same insurance companies that asserted the prior position); Brief of Defendant-Appellant Aetna Life Insurance Company (filed April 17, 1981) at 9, Edwards v. Aetna Life Ins. Co., 690 F.2d 595 (6th Cir. 1982) (doctrine prevents a litigant from "expediently abandoning his prior theory").

127. Defendant Insurers' Memorandum in Support of Motion to Preclude for Taking Inconsistent Coverage Positions at 9, Forty-Eight Insulations, Inc. v. Aetna Cas. & Sur. Co., No. 87C 10594, 1993 U.S. Dist. LEXIS (N.D. Ill. Nov. 16, 1993) (quoting Astor Chauffeured Limousine Co. v. Runnfeldt Inv. Corp., 910 F.2d 1540, 1547 (7th Cir. 1990)).

The court denied the motion, finding that (a) the facts were not the same as in the prior action; (b) the positions were not clearly inconsistent; and (c) the policyholder was not "playing fast and loose with the courts," but rather was "merely attempting to restructure its previously uninformed legal claim with an intervening change in the law . . ." *Forty-Eight Insulations, Inc., supra*, at *10-18.

company had been subrogated to the rights of the policyholder.[128] This issue arises when the insurance company argued the position of the policyholder against a third-party in the earlier action in an attempt to establish the liability of the third-party. Then, in the later action, the insurance company seeks to avoid liability in a suit involving the insurance company and the policyholder. To permit a litigant to contradict a prior position merely because it no longer enjoys subrogation rights, however, would be to permit the litigant to change positions as its interests change. Courts developed the judicial estoppel doctrine in part to combat such intentional self-contradiction according to shifting self-interests.[129]

A second public policy rationale underlying judicial estoppel is to prevent inconsistent judicial results, which weaken public confidence in the judiciary.[130] By precluding the Federal Deposit Insurance Corporation from arguing in an insurance coverage case a position inconsistent with a position it had successfully asserted in earlier litigation, the United States Court of Appeals for the Fifth Circuit explained that a litigant may not, by successive litigation, "undo what it has wrought."[131] The integrity of the judicial system

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128. *See, e.g.*, Brief of Amicus Curiae American Insurance Association at 24, J.H. France Refractories Co. v. Allstate Ins. Co., 626 A.2d 502 (Pa. 1993).

129. As an insurance company argued in a case that did not involve subrogation but did involve another insurance company taking a position in an insurance coverage case that was inconsistent from the position taken in the underlying action: "Parties to litigation are estopped from taking inconsistent positions in other actions arising out of the first. . . . The principle of judicial estoppel can only have greater force and effect when applied to insurance company counsel, who have appeared for an insured in the first action, and the insurer in the second." Appellee's Brief at 12, United States Fidelity & Guar. Co. v. Executive Ins. Co., 893 F.2d 517 (2d Cir. 1990) (No. 88-795) (citations omitted).

130. *See, e.g.*, Stevens Technical Servs., Inc. v. Wilmington Trust Co., 885 F.2d 584 (9th Cir. 1989); Konstantinidis v. Chen, 626 F.2d 933, 937 (D.C. Cir. 1980); Lyons Sav. & Loan Ass'n v. Dire's Lock & Key Co., 885 P.2d 345, 348 (Colo. Ct. App. 1994); Boyers, *supra* note 85, at 1252 ("any perpetuation of untruth damages public confidence in the integrity of the judicial system") (citing Hamilton v. Zimmerman, 37 Tenn. (5 Sneed) 39, 48 (1857)).

131. Federal Deposit Ins. Corp. v. Duffy, 47 F.3d 146, 152 n.6 (5th Cir. 1995) (doctrine of judicial estoppel precluded the Federal Deposit Insurance Corporation, which in prior legal malpractice proceeding presented evidence that attorneys breached their fiduciary duties as lawyers because of actions taken to generate fees, from arguing against insurance company that attorneys did not intentionally conceal breach when claiming professional liability insurance after the breach occurred) (quoting Federal Deposit Ins. Corp. v. Mmahat, 907 F.2d 546, 553 (5th Cir. 1990)). *Accord* Interstate Fire & Cas. Co. v. Archdiocese of Portland, Or., 899 F. Supp. 498, 502 (D. Or. 1995) (judicial estoppel doctrine applied at urging of excess insurance company to bar policyholder and primary insurance company from introducing expert

suffers when the public perceives that a litigant has asserted inconsistent positions to mislead either the first or the second tribunal.[132]

The judicial estoppel doctrine "promotes credibility and certainty within the judicial system"[133] and prevents the appearance that the judiciary is controlled by powerful and frequent users of the judicial system. Public confidence in the purity of judicial proceedings is threatened when litigants with resources to devote to frequent court battles persuade courts to reach contradictory conclusions according to the litigants' shifting financial interests.[134] At the urging of Aetna Life & Casualty Company, a Connecticut court recently embraced the judicial estoppel doctrine in the interest of preserving public confidence in the purity and efficiency of judicial proceedings.[135]

Further, judicial estoppel prevents unnecessary litigation which diminishes the efficiency of the judicial system.[136] The case of *Allen v.*

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testimony that 80% of claimant's damages occurred in single policy period when they had litigated for four years the position that claimant's damages were indivisible and the prior position had become "the law of the case"; change of position would be "prejudicial and unfair" to excess insurance company).

132. *See* Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 599 (6th Cir. 1982) ("the essential function of judicial estoppel is to prevent intentional inconsistency; the object of the rule is to protect the judiciary, as an institution, from the perversion of judicial machinery").

133. Supplemental Memorandum, *supra* note 3, at 5.

134. *See* Konstantinidis v. Chen, 626 F.2d 933, 937 (D.C. Cir. 1980) (quoting Melton v. Anderson, 222 S.W.2d 666, 669 (Tenn. Ct. App. 1948)); Insurers' Reply Memorandum, *supra* note 16, at 2 (a party "should not be allowed to change that position . . . just because its economic interests now point in a different direction").

135. *See* Krauss v. Aetna Life & Cas. Co., CV 90-236432, 1994 Conn. Super. LEXIS 2136, at *2-3 (Aug. 23, 1994). The court declared:

> We cannot allow litigants to expect we will play host to duplicitous assertions at any point in the proceedings. This court would not hesitate to seize the opportunity to prevent a party from deliberately misleading the court in one judicial proceeding, and thereafter reverse his position in a subsequent proceeding. It is inimical to the fundamentals of justice and an affront to the honesty upon which our judicial process is based.

136. *See* In the Matter of Cassidy, 892 F.2d 637, 642 (7th Cir. 1990); Patriot Cinemas, Inc. v. General Cinema Corp., 834 F.2d 208, 214 (1st Cir. 1987); Federal Deposit Ins. Corp. v. CNA Cas. of Puerto Rico, 786 F. Supp. 1082, 1086 (D.P.R. 1991). *See also* Matek v. Murat, 638 F. Supp. 775, 782 (C.D. Cal. 1986) (doctrine applied to avoid inequity and inefficiency); Seattle-First Nat'l Bank v. Marshall, 641 P.2d 1194, 1196-97 (Wash. Ct. App. 1982) (doctrine's purpose is "to avoid inconsistency, duplicity, and the waste of time"). One

Zurich Insurance Co.,[137] is illustrative. There, the United States Circuit Court of Appeals for the Fourth Circuit applied judicial estoppel to overturn a finding, which was contrary to the litigant's successful position in an earlier jury trial, that the litigant was not the employee of a Zurich Insurance Company policyholder.[138] The court of appeals ruling followed a jury verdict for the litigant, judgment notwithstanding the verdict for the insurance company, and appeal. Trial and judgment notwithstanding the verdict would have been avoided had the district court exercised its judicial estoppel power before the trial stage to preclude the litigant's inconsistent position.

Courts have applied judicial estoppel to promote the orderly administration of justice. The judicial estoppel doctrine is derived, at least in part, from "positive rules of procedure based on manifest justice and . . . considerations of the orderliness, regularity and expedition of litigation."[139] "An effective legal system," courts have recognized, "depends upon norms of candor and responsibility."[140] To allow a litigant affirmatively to contribute to a judicial decision that the litigant later contends to be error offends

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commentator has noted that judicial estoppel does not "focus . . . on judicial efficiency." M.J. Plumer, Note, *Judicial Estoppel: The Refurbishing of a Judicial Shield*, 55 GEO. WASH. L. REV. 409, 414 (1987). Yet, the doctrine's usefulness in this regard has been recognized by many courts.

137. 667 F.2d 1162 (4th Cir. 1982).

138. *See id.* at 1167-68.

139. Mackley v. Mackley, 198 P.2d 486, 490 (Wash. 1948); Pullen v. Textron, Inc., 01-A-01-9404-CV-00193, 1994 Tenn. App. LEXIS 591 at *12 (Tenn. Ct. App. Oct. 21, 1994); Hassberger v. General Builders' Supply Co., 182 N.W. 27 (Mich. 1921); Long v. Knox, 291 S.W.2d 292, 295 (Tex. 1956); 31 C.J.S. *Estoppel* § 138 (1996). *See also* Hoover v. State, 552 So. 2d 834, 838 (Miss. 1989) ("doctrine of judicial estoppel 'is based on expedition of litigation between the same parties by requiring orderliness and regularity in proceedings'") (quoting Thomas v. Bailey, 375 So. 2d 1049, 1053 (Miss. 1979)). This rationale was argued strongly by insurance companies in Champion Int'l Corp. v. Aetna Cas. and Sur. Co., No. 90-2-09616-5 (Wash). *See* Supplemental Memorandum, *supra* note 3, at 9. *See also* Plaintiff's Memorandum of Law in Support of its Motion to Remand at 4, Travelers Ins. Co. v. Richard John Ratcliffe Keeling, No. 91 Civ. 7753, 1993 U.S. Dist. LEXIS 1140 (S.D.N.Y. Feb. 2, 1993) (opponent insurance companies' inconsistent position asserted to avoid litigation in New York courts constitutes "duplicitous procedural gamesmanship").

140. Patriot Cinemas, Inc. v. General Cinema Corp., 834 F.2d 208, 214 (1st Cir. 1987) (*cited in* Federal Deposit Ins. Corp. v. CNA Cas. of Puerto Rico, 786 F. Supp., 1082, 1086 (D.P.R. 1991)). *See also* American Nat'l Bank of Jacksonville v. Federal Deposit Ins. Corp., 710 F.2d 1528, 1536 (11th Cir. 1983) ("The doctrine is designed to prevent parties from making a mockery of justice by inconsistent pleadings.").

principles of justice and orderly procedure.[141] Moreover, inconsistent positions obstruct the orderly administration of justice by undermining principles of finality of judgments and could facilitate double recovery.[142]

Almost all courts recognize the crucial role the judicial estoppel doctrine has had in advancing public policy objectives that relate to the essential integrity of the judicial process.[143] By binding litigants to their judicial representations, the judicial estoppel doctrine combats intentional self-contradiction, inconsistent judicial results and the perception that the judiciary is controlled by powerful and frequent users of the judicial system. It prevents unnecessary litigation and the ensuing inefficiency of the judicial system. It promotes the orderly administration of justice and fosters credibility and certainty within the judicial system. Courts invoke the judicial estoppel doctrine in order to uphold the integrity of the judiciary when litigants, through litigation of inconsistent positions based on shifting interests, would countenance the devolution of the judicial system into a forum of "mere gamesmanship."[144]

C. Formulations of Judicial Estoppel Doctrine

Courts that have analyzed the doctrine of judicial estoppel have noted that there is "no pat formula for applying judicial estoppel."[145] Nonetheless, courts often discuss the doctrine within the general structural frameworks of the "sanctity of the oath" approach, which requires only that the prior position was stated under oath, and the "prior success" or "judicial acceptance"

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141. State v. Lofton, 528 N.W.2d 90, Wis. Ct. App. (citing State v. Gove, 437 N.W.2d 218, 221 (1989)).

142. Astor Chauffeured Limousine Co. v. Runnfeldt Inv. Corp., 910 F.2d 1540, 1548 (7th Cir. 1990); Arizona v. Shamrock Foods Co., 729 F.2d 1208, 1215 (9th Cir. 1984) (quoting MOORE, *supra* note 30 ¶ 0.405[8]).

143. Allen v. Zurich Ins. Co., 667 F.2d 1162, 1166 (4th Cir. 1982).

144. Brief and Appendix of Amicus Curiae Insurance Environmental Litigation Association in Support of Continental Insurance Co., Aetna Cas. & Surety Co. and Firemen's Ins. Co. of Newark, N.J. at 25 n.21, County of Columbia, N.Y. v. Continental Ins. Co., 595 N.Y.S.2d 988 (N.Y. Sup. Ct. 1993). The term was used by the Insurance Environmental Litigation Association, on behalf of eighteen of its member insurance companies, to describe insurance companies' use of inconsistent litigation positions in the nation's courts.

145. Czajkowski v. City of Chicago, 810 F. Supp. 1428, 1436 (N.D. Ill. 1993) (citing Levinson v. U.S., 969 F.2d 260, 264-65 (7th Cir. 1992)). *See also* Kesterson v. American Cas. Co., No. 83-C-DE-93, 1988 Del. Super. LEXIS 269 at *7 (Del. Super. Ct. Aug. 15, 1988) (courts "do not agree as to all the elements of judicial estoppel").

approach, which bars an inconsistent position only when a court has accepted the prior position.[146]

It must be reiterated that courts have not restricted the judicial estoppel doctrine to the confines of the "sanctity of the oath" and "judicial acceptance" approaches. Courts have found that judicial estoppel may apply when the prior representation was not asserted under oath and the prior representation was not accepted by any court.[147] The United States Court of Appeals for the Fourth Circuit, furthermore, found that many cases in which the courts have applied the doctrine may be grouped into two classes, neither of which requires "judicial acceptance." That court observed that other courts have applied judicial estoppel in cases "where a party seeks to contradict his own sworn statements made in a prior litigation in which he was a party or a witness; and [in cases] where the prior inconsistent position was not taken under oath."[148] "Both types of preclusion," observed the United States Court of Appeals for the Fourth Circuit, "seem to fall generically[] within a universal judicial reluctance to permit litigants to "play fast and loose" with courts of justice according to the vicissitudes of self-interest."[149] Similar to the "sanctity of the oath" approach, this broadened application based on "fast and loose" behavior focuses on the relationship of litigants to the courts and promotes each of the public policy rationales that have been set forth for the

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146. *See, e.g., In re* Corey, 892 F.2d 829, 835-36 (9th Cir. 1989). *See also* Paschke v. Retool Indus., 519 N.W.2d 441, 444 (Mich. 1994) (applying "prior success" model, but stating holding is in context of administrative proceedings at issue only).

147. *See, e.g.*, Guinness PLC v. Ward, 955 F.2d 875 (4th Cir. 1992) (noting "prior success" present under facts of case, but not requiring it); AFN, Inc. v. Schlott, Inc., 798 F. Supp. 219 (D.N.J. 1992) (stating "contours of doctrine are, for the most part, relatively straightforward" and not including judicial acceptance or oath as elements); United States v. Starrett City Assoc., 605 F. Supp. 262, 264 (E.D.N.Y. 1985) (not specifying oath or prior judicial acceptance among "essential elements for the application of judicial estoppel"). *But cf.* Zenith Lab., Inc. v. Bristol-Meyers Squibb Co., No. 91-3423, 1991 U.S. Dist. LEXIS 18463 at *33 (D.N.J. Dec. 12, 1991) (adopting "prior success" requirement "because, as in other forms of estoppel, reliance is the basis for the bar").

The Illinois appellate courts have split on the issue of whether an oath is required. *Cf.* Ceres Terminals, Inc. v. Chicago City Bank & Trust Co., 635 N.E.2d 485, 497-98 (Ill. App. Ct. 1994) (requiring that prior statement was asserted under oath) *and* Department of Transp. v. Coe, 445 N.E.2d 506, 508 (Ill. App. Ct. 1983) ("oath is a technical requirement and one which we decline to follow. Instead, we require that the record clearly reflect that the party intended the trier to accept the truth of the party's position.")

148. Guinness PLC v. Ward, 955 F.2d 875, 899 (4th Cir. 1992) (quoting MOORE, *supra* note 30) (citations omitted)).

149. *Id.*

doctrine.

1. The "Sanctity of the Oath" Approach

In *Konstantinidis v. Chen*,[150] the United States Court of Appeals for the District of Columbia explained the approach taken by courts that apply judicial estoppel to protect the sanctity of the oath:

> To the extent that prior sworn statements are involved, the [judicial estoppel] doctrine upholds the "public policy which exalts the sanctity of the oath. The object is to safeguard the administration of justice by placing restraint upon the tendency to reckless and false swearing and thereby preserve the public confidence in the purity and efficiency of judicial proceedings."[151]

A court that applies this approach refuses to permit a litigant to "insist at different times, on the truth of each of two conflicting [positions] . . . according to the promptings of its private interest."[152] The court focuses squarely on the integrity of the judicial process and the high standard of conduct demanded of litigants before the courts.[153]

To preserve the sanctity of the oath, the court looks solely to whether the position that the litigant seeks to assert in the present proceeding conflicts with a position stated under oath in a prior proceeding. If the positions are inconsistent, the litigant will not be permitted to "whipsaw"[154] the court by asserting the contrary position in the later proceeding. The outcome of the

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150. 626 F.2d 933 (D.C. Cir. 1980). The *Konstantinidis* court has not adopted the doctrine. *See also* Lassiter v. District of Columbia, 447 A.2d 456, 461 (D.C. 1982) ("[a]ppellant cannot establish an excessive force claim given his own discredited pleadings and prior testimony under oath [in prior juvenile proceeding] that he now cannot disavow").

151. *Konstantinidis*, 626 F.2d 933, 937 (D.C. Cir. 1980) (quoting Melton v. Anderson, 222 S.W.2d 666, 669 (Tenn. Ct. App. 1948)).

152. Smith v. Boston Elevated Ry., 184 F. 387, 389 (1st Cir. 1911) (quoting HERBERT BROOM, A SELECTION OF LEGAL MAXIMS 130 (London 1845)).

153. *See, e.g.*, Allen v. Zurich Ins. Co., 667 F.2d 1162, 1166 (4th Cir. 1982); *In re* Corey, 892 F.2d 828, 836 (9th Cir. 1989); Scarano v. Central R.R. Co., 203 F.2d 510, 512-13 (3d Cir. 1953); Boyers, *supra* note 85, at 1251-52. *See also* USLIFE Corp. v. U.S. Life Ins. Co., 560 F. Supp. 1302, 1304-05 (N.D. Tex. 1983) (focus on relationship between litigant and the judicial system is, at least in part, to protect sanctity of the oath).

154. In the Matter of Cassidy, 892 F.2d 637, 641-42 (7th Cir. 1990); *see also* 31 C.J.S. *Estoppel* § 138 (1996) (requiring judicial acceptance).

prior proceeding, privity of parties and reliance are irrelevant to the court's analysis.

Along with the courts of Tennessee, some courts have applied the doctrine of judicial estoppel broadly to bar any position inconsistent with a sworn position absent only mistake, inadvertence, or fraud.[155] In *Patriot Cinemas, Inc. v. General Cinema Corp.*,[156] for example, the United States Court of Appeals for the First Circuit applied judicial estoppel to preclude a claim inconsistent with a prior statement that "it [wa]s reasonable to believe . . . influenced" a prior court, without requiring a specific showing that the previous court indeed was influenced.[157] The court found the application of the doctrine warranted because the litigants had played "fast and loose" with the courts.[158]

The United States Court of Appeals for the Ninth Circuit has discussed, but declined to decide, whether to adopt the sanctity of the oath approach. On several occasions, the court permitted the litigant to assert a position inconsistent with a prior, unsuccessful position because "the offending party

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155. This is sometimes referred to as the "absolute" approach. Mistake has not been accepted by all courts as a valid basis for a change in position. *See, e.g., In re* J.F.K. Acquisitions Group, 166 Bankr. 207, 210 (E.D.N.Y. 1994) ("[i]f the [d]ebtor and the appraiser truly made "a mistake" rather than perpetrating a deception on this Court, then they will have to suffer the consequences, not the secured creditor."). *See also* Colleton Reg'l Hosp. v. MRS Medical Review Sys., Inc., 866 F. Supp. 896, 901 n.3 (S.C. 1994) (further research by counsel is not sufficient justification for change in legal position).

156. 834 F.2d 208 (1st Cir. 1987).

157. *See id.* at 213. Arguing to a state court that the court should not stay an action pending the outcome of a parallel federal action, the plaintiff stated that it "presently anticipates that it will not proceed with that first [federal action] and would then agree to a voluntary dismissal in favor of this present [state] action." The state court denied the stay without giving reasons for the denial, and the plaintiff subsequently did not agree to dismiss the federal action. The First Circuit Court of Appeals applied judicial estoppel to bar the plaintiff from proceeding in federal court. *Id.*

158. *See id.* at 212. *See also* Brooks v. Beatty, No. 93-1891, 1994 U.S. App. LEXIS 12425, *6-8 (1st Cir. May 27, 1994) (judicial estoppel requires finding of "fast and loose" behavior; conflicting evidence required evidentiary hearing on judicial estoppel issue); O'Hara v. Teamsters Local 856, No. C 92-1262 FMS, 1997 U.S. Dist. LEXIS 2074, *4 (N.D. Cal. Feb. 27, 1997) (judicial estoppel is "designed to protect the integrity of the judicial process by preventing the litigant from 'playing fast and loose with the courts.'"). *Cf.* Casas Office Mach., Inc. v. Mita Copystar Am., Inc., 42 F.3d 668, 676 (1st Cir. 1994) (judicial estoppel inapplicable where litigant did not succeed in gaining any advantage as a result of earlier statement "manifestly at odds" with its present position).

was not engaged in 'fast and loose' behavior."[159] In two of those cases, moreover, the facts suggested that the past position was asserted due to "mistake, inadvertence, or fraud," the exception Tennessee recognizes to the bar.[160] When the court has applied the doctrine, prior judicial acceptance was present but not specifically required.[161]

In *Allen v. Zurich Insurance Co.*,[162] the United States Court of Appeals for the Fourth Circuit declined to set forth elements in addition to a prior, inconsistent statement for the doctrine's application.[163] It noted, however, that application is "obviously more appropriate" when the offending litigant has achieved success previously by asserting a contrary position.[164] Other courts have applied the doctrine without regard to whether prior judicial acceptance should be required.[165]

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159. Corey v. H.K. Loui, 892 F.2d 829, 836 (9th Cir. 1989); Stevens Technical Serv. Inc. v. S.S. Brooklyn, 885 F.2d 584, 589 (9th Cir. 1989). *See also* Milgard Tempering, Inc. v. Selas Corp. of Am., 902 F.2d 703, 717 (9th Cir. 1990) (changed position on recoverability of attorneys' fees was not "fast and loose behavior").

160. In *Stevens Technical Serv. Inc.*, 885 F.2d at 589, a creditor misapplied a payment and "asserted what it believed in good faith to be its legitimate rights" in an unsuccessful first action for payment against the payor. In the second action against the client whose account initially was credited erroneously, the United States Court of Appeals for the Ninth Circuit refused to judicially estop the creditor from asserting the debt of the client.

Similarly, in *Corey v H.K. Loui*, 892 F.2d 829, 836 (9th Cir. 1989), Corey, after conveying land to a third person, was "duped" by the previous landowner into believing that she could not transfer title because she never possessed title. In the first proceeding brought by the third-party purchasers, Corey unsuccessfully asserted that the previous landowner possessed title. In the subsequent bankruptcy proceeding, the court of appeals affirmed the bankruptcy court's decision that she was not estopped to assert ownership.

161. *See* Russell v. Rolfs, 893 F.2d 1033, 1037-38 (9th Cir. 1990) (judicial estoppel applied; previous acceptance existed); Cash Flow Investors, Inc. v. Union Oil Co., Nos. 93 - 35157, 93 - 35206, 1994 U.S. App. LEXIS 22031 at *17-19 (9th Cir. Aug. 12, 1994); United States v. City & County of San Francisco, No. 92-15163, 1992 U.S. App. LEXIS 29986 at *3 (9th Cir. Oct. 30, 1992) (requirements of either test are met where intervenor, who previously joined in the City's motion to establish promotion policy because it wanted to assure that the nonminority candidates received promotions before expiration of the eligibility list and district court agreed with position, later challenged the promotion of minority candidates).

162. 667 F.2d 1162, 1166 (4th Cir. 1986).

163. The court again declined to set limitations on the doctrine's use in Guinness PLC v. Ward, 955 F.2d 875, 898-900 (4th Cir. 1992).

164. *See Allen*, 667 F.2d at 1167. *See also*, Murray v. Silberstein, 882 F.2d 61, 66 (3d Cir. 1989).

165. *See, e.g.*, Messler v. Simmons Gun Specialties, Inc., 687 P.2d 121, 128 (Okla. 1984) (appellant, which was silent at hearing on motion for summary judgment to determine

Litigants have advocated the "sanctity of the oath" approach. Transamerica Insurance Company, for example, has urged that "'a party is estopped merely by the fact of having alleged or admitted in his pleadings in a former proceeding under oath the contrary to the assertion sought to be made."[166] U.S. Life Insurance Company also advocated the "sanctity of the oath" approach in one case.[167] One commentator has advocated the "sanctity of the oath" approach as a means to induce litigants, in their self-interest, to observe "a high degree of honesty in their dealings with their adversaries and with courts"[168] because the earlier positions "might return to haunt them at a later time."[169]

By protecting the judicial system from all positions that are inconsistent with a prior position stated under oath, the "sanctity of the oath" approach serves most of the public policy rationales underlying judicial estoppel. The "sanctity of the oath" approach prevents "intentional self-contradiction" by litigants who seek to manipulate the judicial process, and averts the appearance that the judiciary is controlled by powerful and frequent users. It discourages inconsistent judicial determinations that diminish public confidence in the judiciary. Finally, the approach prevents unnecessary litigation that diminishes the efficiency of the judicial system. It should be noted, however, that the litigation of inconsistent positions may constitute "fast and loose" behavior, in offense of the integrity of the court, even when the prior position was not asserted under oath.

2. The "Judicial Acceptance" Approach

Courts that apply judicial estoppel only when another court has accepted the prior position focus on the detriment to the integrity of the judiciary that results from inconsistent judicial determinations. These courts apply the doctrine to prevent litigants from "abusing the judicial process through

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responsibility for accident, was precluded by doctrine of judicial estoppel from arguing later in same proceeding that deceased was responsible for accident).

166. Brief of Appellant [Transamerica Insurance Company] at 18, Trans. Ins. Co v. Johnson Serv. Co., No. 73-1108 (5th Cir. 1973) (quoting Long v. Knox, 291 S.W.2d 292, 295 (1956)).

167. *See* USLIFE Corp. v. U.S. Life Ins. Co., 560 F. Supp. 1302, 1304-05 (N.D. Tex. 1983).

168. Note, *Estoppel Against Inconsistent Positions in Judicial Proceedings*, 9 BROOK. L. REV. 245 at 262 (1940). *See also* 31 C.J.S. *Estoppel* § 139 (1993).

169. Boyers, *supra* note 85, at 1254 (1986).

cynical gamesmanship, achieving success on one position, then arguing the opposite to suit an exigency of the moment."[170]

The United States Court of Appeals for the Ninth Circuit, while not adopting the "prior judicial acceptance" approach, has explained its purpose:

> [A]bsent judicial acceptance of the prior inconsistent position, no risk of inconsistent results exists. Thus, the integrity of the judicial process is unaffected and the perception and/or danger that either the first or subsequent court was misled is not present.[171]

One litigant explained the rationale behind the rule similarly: "The doctrine rests upon the principle that a litigant should not be permitted . . . to lead a court to find one way and then contend in another judicial proceeding that the fact should be found otherwise."[172] The judicial estoppel doctrine, under any of its various formulations, is an effective tool to deflect the risk of inconsistent judicial determinations which arises when litigants intentionally or inadvertently assume inconsistent positions in litigation.

Some courts that require prior judicial acceptance understandably are

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170. Teledyne Indus. v. Nat. Labor Relations Bd., 911 F.2d 1214, 1217-18 (6th Cir. 1990).

171. Stevens Technical Serv., Inc. v. S.S. Brooklyn, 885 F.2d 584 (9th Cir. 1989). The court refers to the "prior success" approach as the majority view. *See id.* This characterization is persuasively refuted by the federal district court in AFN, Inc. v. Schlott, Inc., 798 F. Supp. 219, 224 n.7 (D.N.J. 1992).

One commentator has noted that in California, the question of whether "prior success" is needed is unsettled. *See* Jay R. Ziegler, *Perspective: Judicial Estoppel: The Doctrine of Preclusion of Inconsistent Positions*, INSIDE LITIG., Mar. 1997, at 15, 17.

172. Sur-reply Memorandum of Law in Further Support of Defendant National Union's Motion for Summary Judgment and in Further Opposition to Plaintiff's Cross-Motion for Summary at 34, Town of Harrison v. National Union Fire Ins. Co. of Pittsburgh, PA, No. 92-13167 (N.Y. Sup. Ct.) (quoting Kimco of New York, Inc. v. Devon, 163 A.D. 2d 573 (N.Y. App. Div. 1990)). *See also* Ford Motor Credit Co. v. Colonial Funding Corp. 626 N.Y.S.2d 527 (N.Y. App. Div. 1995) (same doctrine applied); Insurers' Reply Memorandum, *supra* note 16, at 1, 2 (pointing out that the opponent had failed to cite any cases in which a litigant had successfully asserted a prior position and the court did not apply judicial estoppel to preclude a contrary position). The brief was filed by Fireman's Fund Insurance Company, Hartford Accident & Indemnity Company, First State Insurance Company, Prudential Reinsurance Company, Highlands Insurance Company, American Re-Insurance Company, Affiliated FM Insurance Company, Bellefonte Insurance Company, U.A.P. and Employers Mutual Casualty Company.

reluctant to hold a litigant "forever bound to a losing argument."[173] The "prior acceptance" requirement, however, is not necessary to assure that a litigant is not forever bound to a losing position. An intervening judicial determination may constitute independent grounds to justify a change in positions,[174] just as a change in facts has been held to constitute sufficient basis for a shift in positions.[175]

The "prior judicial acceptance" rule does not require that the litigant "won" in the prior litigation – only that the prior inconsistent statement was adopted by the tribunal in some manner.[176] When the inconsistency is a sufficient affront to judicial dignity, courts have found the requirement met with little more than the prior court's consideration of the earlier position.[177]

In *In the Matter of Cassidy*,[178] for example, the United States Court of Appeals for the Seventh Circuit found "prior success" although the litigant *lost* in the prior proceeding. In the first action, the appellant taxpayer sought

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173. Levinson v. United States, 969 F.2d 260, 264 (7th Cir. 1992) (the doctrine of judicial estoppel "protects the courts from being manipulated by chameleonic litigants who seek to prevail twice on opposite theories.").

174. *See, e.g.,* Brandon v. Interfirst Corp., 858 F.2d 266, 268-69 (5th Cir. 1988) (change of position in response to intervening controlling United Supreme Court opinion is not culpable behavior to justify application of doctrine).

175. *See, e.g.*, Eagle Found., Inc. v. Dole, 813 F.2d 798, 810 (7th Cir. 1987) (determination that highway route would kill people is sufficient grounds to change litigation position regarding preferred highway route).

176. *See, e.g.*, U.S. Philips Corp. v. Sears Roebuck & Co., 55 F.3d 592, 597 (Fed. Cir. 1995); Lewandowski v. Nat'l R.R. Passenger Corp., 882 F.2d 815, 819 (3d Cir. 1989); Reynolds v. Comm'r of Internal Revenue, 861 F.2d 469, 473 (6th Cir. 1988); Allen v. Zurich Ins. Co., 667 F.2d 1162, 1166-67 (4th Cir. 1982); Scarano v. Central R.R. Co., 203 F.2d 510, 513 (3d Cir. 1953); USLIFE Corp. v. U.S. Life Ins. Co., 560 F. Supp. 1302, 1305 (N.D. Tex. 1983); Port Authority of St. Paul v. Harstad, 531 N.W.2d 496, 500 (Minn. Ct. App. 1995). *See also* Certain Reinsurers' Memorandum of Law in Opposition to Motions for Leave to Renew and Reargue at 11, Michigan National Bank-Oakland v. American Centennial Ins. Co., No. 23453/85 (N.Y.Sup. Ct.) (Judicial estoppel applicable when "party has, in a prior action, obtained judicial relief by taking an inconsistent position.").

177. *See* Guinness PLC v. Ward, 955 F.2d 875, 899 n.19 (4th Cir. 1992) (while not specifically requiring "prior success," noting that the foreign court heard appeal based on prior position and thus finding sufficient "success" although party lost); Delgrosso v. Spang & Co., 903 F.2d 234, 241-42 (3d Cir. 1990) (defendant employer was judicially estopped to argue that pension funds did not belong to plaintiff employees at two plants, because although employer was not successful in prior action in effort to revert funds to company, it had persuaded earlier court that funds did not belong wholly to employees at one plant in that action); In the Matter of Cassidy, 892 F.2d 637, 639-41 (7th Cir. 1990), *cert. denied*, 498 U.S. 812 (1990).

178. 892 F.2d 637, 639, 641 (7th Cir. 1990).

a determination in tax court that tax fraud penalties levied against him were dischargeable in bankruptcy. The tax court held that the penalties were not dischargeable in bankruptcy and the United States Court of Appeals for the Seventh Circuit affirmed. The taxpayer then turned to the bankruptcy court with a changed legal position: He now contended that the tax court lacked jurisdiction to determine the dischargability, and that the Seventh Circuit's opinion regarding the tax penalties thus was *dicta*. The Seventh Circuit found the "prior success rule" satisfied and applied judicial estoppel because in the first proceeding, the taxpayer had "prevail[ed] on the subsidiary question of what issues were to be decided by the court."[179] In another case, the United States Court of Appeals for the Seventh Circuit found the rule satisfied because the litigant "triumph[ed]" on his earlier position by inducing his former wife to enter a property settlement.[180] It should be noted that the United States Court of Appeals for the Seventh Circuit and courts in Illinois, the jurisdictions which most emphatically require "prior acceptance" for application of the judicial estoppel doctrine, have pioneered the growing use of the "mend the hold" doctrine," which prohibits a change of litigation positions in a single action even when no court has heard the prior position.[181]

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179. *See id.* at 641. Many insurance companies have urged courts to follow In the Matter of Cassidy to preclude the inconsistent positions of other litigants. *See, e.g.*, Insurers' Reply Memorandum, *supra* note 16, at 8,10 (urging court to apply judicial estoppel "'to protect the integrity of the courts' and 'to prevent the perversion of the judicial process . . . .'") (submitted on behalf of Fireman's Fund Insurance Company, Aetna Casualty and Surety Company, Argonaut Insurance Company, U.A.P., Continental Insurance Company, Harbor Insurance Company, Bellefonte Insurance Company, North River Insurance Company, London Market insurance companies, Highlands Insurance Company, American Re-Insurance Company, Affiliated FM Insurance Company, Employers Mutual Casualty Company, Taisho Marine and Fire Insurance Company and Federal Insurance Company). *See also* [International Insurance Company's] Response to SCOR's Motion to Stay or Alternatively to Dismiss on Proceedings (undated) at 7, International Ins. Co. v. Certain Underwriters at Lloyd's, No. 88C 9838 (N.D. Ill.) (judicial estoppel precludes opponent insurance companies' inconsistent position); Defendant's and Subpoena Respondent's Memorandum in Opposition to Plaintiff's Motion to Reconsider Ruling on May 7, 1992, Concerning Lord, Bissell & Brook (undated) at 11-12, International Ins. Co. v. Certain Underwriters at Lloyd's, No. 88C 9838 (N.D. Ill.) (judicial estoppel bars change of positions based on change of interests).

180. *See* Kale v. Obuchowski, 985 F.2d 360 (7th Cir. 1993) (under Illinois and federal law, litigant was judicially estopped from asserting ownership interest in bankruptcy proceeding when he had denied interest in state divorce proceeding and gained settlement based on prior position). *But see In re* Hunt, 124 B.R. 200 (N.D. Tex. 1991) (judicial estoppel does not apply to bind party to statements made in settlement in prior bankruptcy proceeding).

181. The "mend the hold doctrine" and the leading case of Harbor Ins. Co. v. Continental

In adopting the "prior success" approach, one federal court explained that "[t]he equities in support of judicial estoppel are substantially increased where the possibility of inconsistent results exists," and that inconsistent results are not a threat when the litigant was unsuccessful in the prior proceedings.[182] In that case, *USLIFE Corp. v. U.S. Life Insurance Co.*,[183] the opposing insurance companies each argued the opposite of the positions they had taken in earlier litigation and now disagreed whether judicial estoppel should be applied only when the prior position had been asserted with success.

The doctrine utilizing the prior judicial acceptance approach serves some of the important public policy rationales of judicial estoppel. It may avert the appearance that the judiciary is controlled by powerful and frequent users and it prevents inconsistent judicial determinations which diminish public confidence in the judiciary. It also reduces some unnecessary litigation and thus promotes the efficiency of the judicial system.

However, the approach prevents intentional self-contradiction only when the litigant persuaded a prior tribunal of the contrary position in some manner. When an offending litigant asserted the prior position without requisite

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Bank Corp., 922 F.2d 357 (7th Cir. 1990) and its progeny are discussed in Part V of this article, *infra*. *See generally* Robert H. Sitkoff, *Comment: "Mend the Hold" and Erie: Why an Obscure Contracts Doctrine Should Control in Federal Diversity Cases*, 65 U. CHI. L.REV. 1059 (1998).

182. *See* USLIFE Corp. v. U.S. Life Ins. Co., 560 F. Supp. 1302, 1306 (N.D. Tex. 1983). Twenty-two insurance companies and Lloyd's of London and London Market Companies acknowledged the "prior success" judicial estoppel model in state court proceedings in California. Designated Defendants' Opposition to FMC's Motion for Partial Summary Adjudication of Issues Respecting Certain Policies Issued by Defendants on Grounds of Judicial Estoppel and Collateral Estoppel at 5, FMC Corp. v. Liberty Mut. Ins. Co., No. 643058 (Cal. Super. Ct.) ("Under the doctrine of judicial estoppel, a party who has successfully and unequivocally asserted one position on a particular issue in a prior proceeding is estopped from asserting a wholly inconsistent position with respect to that identical issue in a subsequent proceeding.") The court declined to apply judicial estoppel in part because the proponents did not establish that the prior court had "accepted the truth" of the prior statements. *See* Memorandum Decision and Order Denying Motion of FMC for Partial Summary Adjudication of Issues on Grounds of Judicial Estoppel and Collateral Estoppel at 2, FMC Corp. v. Liberty Mut. Ins. Co., No. 643058 (Calif. Super. Ct.).

183. 560 F. Supp. 1302, 1304 (N.D. Tex. 1983). The court adopted the prior judicial acceptance model. *See also* Richard R. Orsinger, *Asserting Claims for Intentionally or Recklessly Causing Severe Emotional Distress in Connection with Divorce*, 25 ST. MARY'S L.J. 1254, 1299-1300 (1994) (discussing the judicial estoppel doctrine in the context of Texas family law).

success or when the offending litigant simultaneously asserts contrary positions to different courts, the approach does not preclude "fast and loose behavior" cited by many courts. The efficacy and the "integrity of the judicial process can be sorely compromised short of inconsistent results."[184] Recognizing the limitations of the prior judicial acceptance model in serving the public policy objectives of the doctrine, many courts have opted for a more flexible approach to the doctrine's application.

3. Incorporation of Elements of Equitable Estoppel into Judicial Estoppel Undermines Most Public Policy Objectives of Judicial Estoppel Doctrine

A doctrine intended to protect *courts*, judicial estoppel does not require elements of the related doctrines of equitable and collateral estoppel, which are intended primarily to protect *litigants*.[185] Almost all courts recognize the

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184. AFN, Inc. v. Schlott, Inc., 798 F. Supp. 219, 225 (D.N.J. 1992) (finding no requirement in law of Third Circuit which requires prior success and applying doctrine to preclude litigant from asserting validity and invalidity of agreement in different fora). *See also* Memorandum of Law of Defendant Royal Indemnity Company in Opposition to Plaintiffs' Order to Show Cause Dated December 9, 1994 at 2, Gold Fields Am. Corp. v. Aetna Cas. and Sur. Co., No. 19879/89 (N.Y. Sup. Ct., N.Y.) (arguing doctrine should apply to preclude litigant's change of position in same judicial proceeding where there has been no judicial acceptance of prior position, because allowance of changed position would "result in mockery of th[e] Court, and waste considerable judicial resources that the Court has invested"); *id.* at 12-13 (explaining public policy rationales for doctrine under New York case law).

185. *See* In the Matter of Cassidy, 892 F.2d 637, 641 n.2 (7th Cir. 1990). *See also* Hampton Tree Farms, Inc. v. Jewett, 892 P.2d 683 (Or. 1995):

> Because judicial estoppel is primarily concerned with the integrity of the judicial process and not with the relationship of the parties, it does not depend for its application on a showing that the party raising judicial estoppel as an affirmative defense detrimentally relied on the other party's prior inconsistent position.

Id. at 691. *See also* United States v. Owens, 54 F.3d 271, 275 (6th Cir. 1995) (judicial estoppel applies where neither collateral estoppel nor equitable estoppel would apply); Allen v. Zurich Ins. Co., 667 F.2d 1162, 1166 (4th Cir. 1982); David W. Steuber, *The Doctrines of Judicial and Collateral Estoppel: The 1970 Pollution Exclusion Clause Proceedings before the West Virginia Insurance Commissioner*, 2 ENVTL. CLAIMS J. 317, 323 (1990). This article sets forth an excellent analysis of the judicial estoppel and collateral estoppel effects in environmental liability insurance litigation of insurance industry positions asserted before the

distinct public policy objectives of the different estoppel doctrines and hold that privity of the parties,[186] reliance,[187] and prejudice,[188] generally recognized elements of equitable estoppel, are inapplicable to the doctrine of judicial estoppel.

The United States Court of Appeals for the Second Circuit, however, has "confused two doctrines"[189] by incorporating into its judicial estoppel formulation in the criminal law context elements of the related equitable

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West Virginia Insurance Commissioner in 1970. The author is a respected commentator and regularly represents policyholders in insurance litigation.

186. *See, e.g.,* Moore v. Neff, 629 S.W.2d 827 (Tex. App. 1982) (plaintiff's assertion that she was married to Howard Hughes and never divorced, barred by judicial estoppel because she had previously testified under oath in a California divorce action that she was married to someone else); Finley v. Kesling, 433 N.W.2d 1112, 1118 (1982) (party who asserted in prior divorce action that children owned 40% of stock is judicially estopped to bring action against another party in which he asserts beneficial ownership of the stock).

187. *See, e.g.,* Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 598 (6th Cir. 1982) (object of judicial estoppel is to protect integrity of judicial system); 31 C.J.S. *Estoppel* § 139 (1993) ("[J]udicial estoppel is to be distinguished from estoppel in pais or equitable estoppel, since judicial lacks some of the important pre-requisites of the traditional estoppel in pais or equitable estoppel [such as reliance privity or prejudice]."

See Ziegler, *supra* note 171, at 15, 16 (stating that in California reliance is not an element of the judicial estoppel doctrine) (citing Billmeyer v. Plaza Bank of Commerce, 50 Cal. Rptr. 2d 119 (1995)).

See also Supplemental Memorandum of Points and Authorities of Home [Insurance Company] and Continental [Casualty Company] Re: Application of New York Law at 5, Champion International Corp. v. Aetna Cas. and Sur. Co., No. 90-2-09616-5 (Wash.) ("Because judicial estoppel is intended to preserve the integrity of the judicial system, . . . whether one party relied on the previous inconsistent statements of the other has little if any relevance.")

188. *See, e.g.*, In the Matter of Cassidy, 892 F.2d 637, 641-42 (7th Cir. 1990) (because judicial estoppel protects integrity of court, prejudice to opposing party unnecessary); Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 598 (6th Cir. 1982).

See also Supplemental Memorandum of Points and Authorities of Home [Insurance Company] and Continental [Casualty Company] Re: Application of New York Law at 5, Champion International Corp. v. Aetna Cas. and Sur. Co., No. 90-2-09616-5 (Wash.) ("Several courts and commentators have suggested that neither the reliance nor the injury elements are essential." (quoting Markley v. Markley, 198 P.2d 486, 490 (Wash. 1948)).

189. 31 C.J.S. *Estoppel* § 117 at 626. *See also* Teledyne Indus., Inc. v. National Labor Relations Bd., 911 F.2d 1214, 1219, 1217-20 (6th Cir. 1990) (parties confuse doctrines of judicial estoppel, collateral estoppel and equitable estoppel; court explains difference); State v. Gonzalez, 641 A.2d 1060 (N.J. Super. Ct. App. Div. 1994) (formulation of judicial estoppel doctrine that requires prejudice to an adverse party reflects confusion between the doctrines of judicial estoppel and equitable estoppel).

estoppel doctrine. Although the court most recently has retreated from its initial ruling on the issue of the elements of judicial estoppel,[190] the circuit court held in *Young v. United States Department of Justice*[191] that an offended litigant must prove reliance on the prior position in order to invoke judicial estoppel.[192] The United States Court of Appeals for the Second Circuit said that the doctrine's "key ingredient . . . is reliance,"[193] misinterpreting an authority that specifies that any requisite reliance on the prior position is reliance on the part of the *court*, not on the part of another litigant.[194]

Four years after *Young* was decided, the United States Court of Appeals for the Second Circuit in *Bates v. Long Island Railroad Co.*,[195] "focus[ed] on the rationales behind judicial estoppel:"[196] First, the need "to preserve the sanctity of the oath by demanding absolute truth and consistency in all sworn positions . . . [to] prevent the perpetuation of untruths which damage public confidence in the integrity of the judicial system;"[197] and second, the need "to protect judicial integrity by avoiding the risk of inconsistent results in two proceedings."[198] Recognizing that the objectives of the judicial estoppel doctrine are distinct from the objectives of the equitable estoppel doctrines,[199] the court concluded that the elements of the doctrine consist of an

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190. *See* Bates v. Long Island R.R. Co., 997 F.2d 1028 (2d Cir. 1993).

191. 882 F.2d 633 (2d Cir. 1989), *cert. denied*, 493 U.S. 1072 (1990).

192. In *Young*, the Department of Justice relied on the Right to Financial Privacy Act, 12 U.S.C. §§ 3401-22 (1983 & Supp. 1988), to gain access, by *ex parte* order, to suspected felons' bank account without notifying them, and subsequently denied that the Act applied to the case. The United States Court of Appeals for the Second Circuit admonished that the Department of Justice "should have been more candid" with the court, but refused to apply the doctrine of judicial estoppel to bar the second position. The court reasoned that the government did not intend to mislead the court, and that the suspected felons did not rely on the prior *ex parte* position or suffer detriment because they did not know of the prior position. *Young*, 882 F.2d at 639-40. *Accord*, Jackson Jordan, Inc. v. Plaser Am. Corp., 747 F.2d 1567, 1578-80 (Fed. Cir. 1984). Three years after deciding *Young*, the United States Court of Appeals for the Second Circuit affirmed a bankruptcy court decision which stated that reliance is not a necessary element of the doctrine, but which did not apply the doctrine for other reasons. *See* National Westminster Bank, U.S.A. v. Ross, 130 B.R. 656 (S.D.N.Y. 1991), *aff'd sub nom.*, Yaeger v. National Westminster, 962 F.2d 1 (2d Cir. 1992).

193. *Young*, 882 F.2d at 639 (citing WRIGHT & MILLER, *supra* note 16).

194. *See* WRIGHT & MILLER, *supra* note 16 and cases cited therein.

195. 997 F.2d 1028 (2d Cir. 1993).

196. *Id.* at 1038.

197. *Id.*

198. *Id.*

199. *See id.*

inconsistent position and adoption by a court of that position in some manner, and omitted entirely any discussion of reliance.[200]

A formulation of the judicial estoppel doctrine as set forth in *Young* protects against some inconsistent judicial determinations and may promote the efficiency of the judicial system by preventing some unnecessary litigation. But the formulation prevents neither intentional self-contradiction nor "fast and loose" behavior on the part of litigants. Furthermore, such a formulation fails to protect the judiciary from the appearance of control by powerful and frequent litigants. The *Young* formulation should be rejected outright and the reliance element reserved for the doctrine of equitable estoppel.

Most courts that examine the judicial estoppel doctrine discuss the "sanctity of the oath" and the "judicial acceptance" approaches. Other courts have been reluctant to require either that the prior position was stated under oath or that the prior position was accepted by a court, thus allowing greater flexibility in applying the doctrine to protect judicial integrity.[201] A review of the various public policy objectives underlying the doctrine of judicial estoppel indicates that a flexible approach best affords the court latitude in employing the doctrine to protect the judicial system.

II. THE EQUITABLE ESTOPPEL DOCTRINE

A. Equitable Estoppel Generally as Bar to Inconsistent Positions

In addition to judicial estoppel, three other estoppel doctrines, equitable estoppel, quasi-estoppel and collateral estoppel, have been applied by courts to promote judicial integrity by preventing litigants from advancing positions

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200. *See Bates*, 997 F.2d at 1037-38. *See also* New York v. Almy Brothers, Inc., et al., No. 90-CV-818 (N.D.N.Y. Jan. 8, 1996) (citing *Bates* and declining to apply judicial estoppel to prevent state, which argued in prior bankruptcy proceeding that Comprehensive Environmental Response, Conservation and Liability Act of 1980, 42 U.S.C. § 9601, (CERCLA), is penal statute, from arguing in present case that CERCLA is remedial statute because litigant failed to demonstrate that bankruptcy court adopted the state's prior position) (discussed at *CERCLA, Contrary Argument Is Fodder for Judicial Estoppel Only If You Can Prove Court Bought Prior Position*, REAL ESTATE/ENVTL LIAB. NEWS, Mar. 8, 1996, at 7).

201. *See, e.g.*, Guinness PLC v. Ward, 955 F.2d 875, 900 (4th Cir. 1992); Stevens Technical Serv. Inc. v. Wilmington Trust Co., 885 F.2d 584, 589 (9th Cir. 1989); AFN, Inc. v. Schlott, Inc., 798 F. Supp. 219, 225 (D.N.J. 1992); Allen v. Neal, 396 S.W.2d 344, 346 (Tenn. 1965).

in litigation which are inconsistent with prior positions.[202] The doctrine of equitable estoppel or "estoppel in pais," addressed in this section and codified in some jurisdictions,[203] prohibits a litigant from assuming a position inconsistent with a prior position advanced by the litigant or one in privity[204] with that litigant to the detriment of another litigant, regardless of whether the prior position was asserted in litigation or in another context.[205] It is a doctrine of fundamental fairness,[206] which binds a litigant to its prior position

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202. *See also* discussion of "regulatory estoppel" and "file wrapper estoppel" or "prosecution history estoppel" discussed in this Part, *infra*.

203. *See, e.g.*, CAL. EVID. CODE § 623 (Deering 1996) which provides:

> § 623. Estoppel by own statement or conduct
>
> Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it.

GA. CODE ANN. § 24-4-24 (1997) reads, in pertinent part:

> (b) Estoppels include presumptions in favor of:
> . . .
> (7) Solemn admissions made in judicio;
> (8) Admissions upon which other parties have acted, either to their own injury or to the benefit of the persons making the admissions.

Estoppels also include all similar cases where it would be more unjust and productive of evil to hear the truth than to forbear investigation.

204. Morton Int'l, Inc. v. General Accident Ins. Co. of Am., 629 A.2d 831, 874 (N.J. 1993), (binding insurance companies as privities of declarant insurance industry representatives); *See* Brief of Appellee Alaska Insurance Guaranty Association (filed July 14, 1988) at 21, 22, Estes v. Alaska Ins. Guar. Ass'n, File No. S-2408 (Alaska Super. Ct.) (acknowledging that "[p]rinciples of equity might make it appropriate for [an insurance company and its privity] to be bound by its conduct in an appropriate case," but asserting privity is lacking because two parties "had no officers, agents, directors or employees in common.").

205. Trout v. Garrett, 780 F. Supp. 1396, 1425-26 (D.D.C. 1991) (government not permitted to assume litigation position inconsistent with past representations of counsel that it would promote women Navy employees retroactively to remedy discrimination). Some states have codified the doctrine. *See, e.g.*, CAL. EVID. CODE § 623 (Deering 1996).

206. Derry Township School District v. Suburban Roofing Co., Inc., 517 A.2d 225, 228 (Pa. Commw. Ct. 1986).

as evidenced by its prior statements or conduct.[207] Judicial estoppel precludes an inconsistent position when a court has relied upon a prior position; equitable estoppel, by contrast, precludes the inconsistent position when another litigant or one in privity with the litigant has relied upon the prior position.[208]

The doctrine of equitable estoppel when invoked absolutely precludes the assertion of the inconsistent position,[209] similar in this regard to the doctrines of judicial estoppel, quasi-estoppel, collateral estoppel, and "mend the hold," and the rule that binds a litigant to its judicial admissions.[210] Unlike some of these other doctrines, however, equitable estoppel may be used to bind a litigant to a prior out-of-court position, in addition to a prior judicial position, and the prior position need not have been accepted by any court.[211] The

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207. *In re* Roundabout Theatre Co., Inc., 131 B.R. 14, 16 (S.D.N.Y. 1991); Ernst v. Ford Motor Co., 813 S.W.2d 910, 918 (Mo. Ct. App. 1991); 31 C.J.S. *Estoppel* § 59.

The duty under the doctrine of equitable estoppel to litigate consistently with one's prior position asserted in litigation or at some other time is analogous to the duty of good faith and fair dealing imposed upon each party to a contract by the RESTATEMENT (SECOND) OF CONTRACTS § 205. Comment e of § 205 provides:

> [t]he obligation of good faith and fair dealing extends to the assertion, settlement and litigation of contract claims and defenses. (Citations omitted.) The obligation is violated by dishonest conduct such as conjuring up a pretended dispute, asserting an interpretation contrary to one's own understanding or falsification of facts.

208. Edward v. Aetna Life Ins. Co., 690 F.2d 595, 599 (6th Cir. 1982). *See also* 18 WRIGHT & MILLER, *supra* note 16, at 587-88, 591 and cases cited therein (highlighting distinction between reliance by court and reliance by adverse party).

209. *See, e.g.*, American Cas. Co. of Reading, Pa. v. Hambleton, 349 S.W.2d 664, 667 (Ark. 1961) (party equitably estopped is absolutely precluded, both at law and in equity, from asserting rights of property, contract or remedy which might otherwise have existed); Ladd Construction Co. v. Ins. Co. of N. Am., 391 N.E.2d 568, 573 (Ill. App. Ct. 1979) (same); American Bank & Trust Co. v. Universal Ins. Co., 205 So.2d 35, 40 (La. 1967) (party equitably estopped is absolutely precluded from asserting rights).

Some courts have held that the affirmative defense of equitable estoppel is waived if not pleaded. *Cf.*, Idaho Resources, Inc. v. Freeport-McMoran Gold Co., 874 P.2d 742 (Nev. 1994) (equitable estoppel is an affirmative defense and must be affirmatively pleaded or it is waived); Lewis v. Motorists Ins. Cos., 645 N.E.2d 784, 790 n.2 (Ohio Ct. App. 1994) (equitable estoppel was tried by implied consent although not specifically pleaded; doctrine precluded insurance company from retroactively cancelling insurance policy after death of policyholder).

210. The doctrines of quasi-estoppel, collateral estoppel "mend the hold," and judicial admissions are discussed respectively in Parts III, IV, V and VII of this article, *supra*.

211. *See, e.g.*, Teledyne Indus. v. National Labor Relations Bd., 911 F.2d 1214, 1217-20

equitable estoppel doctrine thus complements related doctrines that apply solely to judicial positions. One federal district court, for example, found a cause of action for equitable estoppel when a litigant sought to switch its position to adopt, rather than to contradict, its previous winning position in a state proceeding – circumstances under which the court found judicial estoppel inapplicable in the jurisdiction.[212]

A litigant seeking to invoke the equitable estoppel doctrine ordinarily must persuade the court[213] that estoppel should apply because the person to

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(6th Cir. 1990) (equitable estoppel does not require that a court accepted the party's prior position; it requires only that an adverse party detrimentally relied on the position and would be prejudiced if the party were allowed to change position); Joleewu, Ltd. v. City of Austin, 916 F.2d 250, 252-54, 254 n.3 (5th Cir. 1990), *cert. denied,* 500 U.S. 904 (1991) (equitable estoppel applies to preclude city from asserting position inconsistent with position not asserted under oath); American Cas. Co. of Reading, Pa. v. Hambleton, 349 S.W.2d 664, 667 (Ark. 1961) (insurance company that deleted endorsement at renewal without notifying insured was equitably estopped from denying coverage for loss that would have been covered under endorsement). *See also* Brief of Appellant Federal Insurance Co. (dated Oct. 15, 1990) at 8, Federal Ins. Co. v. Susquehanna Broadcasting Co., 727 F. Supp. 169 (M.D. Pa. 1989) (explaining that equitable estoppel may be based upon extrajudicial representations). *See generally* EUGENE R. ANDERSON ET AL., INSURANCE COVERAGE LITIGATION §12.4 (1997).

Opposing insurance companies pointed out to a New York federal district court that the equitable estoppel doctrine "may be applied to preclude a party from contradicting testimony or pleadings successfully maintained in a prior judicial proceeding," just as judicial estoppel is used. Plaintiff's Reply Memorandum of Law in Support of Motion to Remand and in Opposition to Defendants' Cross-Motion (filed Jan. 28, 1992) at 28-29, Travelers Ins. Co. v. Richard John Ratcliffe Keeling, No. 91 Civ. 7753 (JFK) (S.D.N.Y.) (quoting Konstantinidis v. Chen, 626 F.2d 933, 937 (D.C. Cir. 1980)). The doctrine used for this purpose prevents "'inequitable manipulation of courts and litigants . . . .'" *Id.* (quoting *In re* Transrol Navegacao S.A. v. Redirekommanditselskaber Merc Skandia XXIX, No. 90 Civ. 7292 (KMW), slip op. at 12 (S.D.N.Y. Dec. 11, 1991) and citing Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Georgiadis, 903 F.2d 109, 114 (2d Cir. 1990); MOORE, *supra* note 30 at 239). *See also* Defendant's Reply Memorandum of Law (filed Feb. 7, 1992) at 22-23, Travelers Ins. Co. v. Richard John Ratcliffe Keeling, No. 91 Civ. 7753 (JFK) (S.D.N.Y.) (same).

212. *See* Wilson v. City of Chicago, No. 86 C 2360, 1995 U.S. Dist. LEXIS 205, at *15-16 (N.D.Ill. Jan. 5, 1995), *recons. denied*, 1995 U.S. Dist. LEXIS 14493 (Oct. 3, 1995).

213. Although the elements of estoppel are questions of fact, the question of whether equitable estoppel applies under the facts of a particular case is a question for the court. Keefe v. Bahama Cruise Line Inc., 867 F.2d 1318, 1323 (11th Cir. 1989). *See also* Smith v. World Ins. Co., 38 F.3d 1456, 1463 (8th Cir. 1994) (equitable estoppel is question for court, not jury; rejecting insurance company's argument that plaintiff is equitably estopped by acceptance of early retirement package from pursuing constructive discharge claim); Marine Transp. Services Sea-Barge Group, Inc. v. Python High Performance Marine Corp., 16 F.3d 1133, 1138 (11th Cir. 1994) (constituent elements of equitable estoppel are questions of fact) (quoting United

be estopped wilfully or through culpable negligence[214] caused another to believe a certain state of events, and the other person reasonably or justifiably relied upon the belief.[215] Bad faith, fraud and intent to deceive are not required for the doctrine of equitable estoppel to apply.[216]

The doctrine of equitable estoppel applies to bar a litigant from assuming a position when the litigant has misrepresented or concealed a material fact or an opinion.[217] One authority explains that a litigant's opinion forms the basis for equitable estoppel when the opinion was stated under circumstances that render a repudiation inequitable, as in the case of a confidential relationship among the parties or when one party has actual or professed special knowledge.[218]

States v. Walcott, 972 F.2d 323, 325 (11th Cir. 1992); Curico v. John Hancock Mut. Life Ins. Co., 33 F.3d 226, 236 (3d Cir. 1994) (determination of an equitable estoppel claim is a mixed question of law and fact)).

214. *See, e.g.*,Memorandum of Law in Support of Employer's Insurance of Wausau's Motion for Summary Judgment (filed June 21, 1990) at 42, Armotek Industries, Inc. v. Employer's Ins. of Wausau, No. 88-3110 (CSF) 1990 WL 159918 (N.J. Oct. 15, 1990)) (citing *In re* Tallarico's Estate; Appeal of Tallarico, 228 A.2d 736, 741 (Pa. 1967)).

215. *See, e.g.,* Maria v. Freitas, 832 P.2d 259, 264 (Haw. 1992). *See also* Travelers Indem. Co. v. Nationwide Corp., 224 A.2d 185 (Md. 1966) (requisite intent will be found if the act, representation, or silence relied upon could induce a reasonable person to believe that it was intended to be acted upon); *Cf.* Plaintiff's Additional Memorandum in Support of Reply to Great American's Additional Memorandum (filed April 16, 1990) at 1-2, Continental Cas. v. Great Am. Ins. Co., No. 86 C 3938 (N.D. Ill.) ("Michigan courts have defined equitable estoppel as the doctrine that states that a party who is guilty of a misrepresentation of an existing fact upon which the other party justifiably relies to his detriment is estopped from denying his utterances or acts to the detriment of the other party.") (quoting Cuddihy v. Wayne State Univ. Bd. of Governors, 413 N.W.2d 692, 694 (Mich. Ct. App. 1987)).

216. Craver v. Dixie Furniture Co., 447 S.E.2d 789, 794 (N.C. Ct. App. 1994).

217. Hargis v. United Farm Bureau Mut. Ins. Co., N.E.2d 1175, 1179 (Ind. Ct. App. 1979).

218. 31 C.J.S. *Estoppel* § 79 at page 464-75. Insurance companies have often asserted that they are in confidential or fiduciary relationships with policyholders. *See, e.g.,* Defendant Liberty Mutual Insurance Company's Response to Plaintiff Keene Corporation's First Set of Requests for Production of Documents (dated Jan. 1990) at 11, Keene Corp. v. Hartford Accident & Indem. Co., No. 13471-82 (D.D.C.); Statement of Stonewall Insurance Company in Response to the Brief of Rohm and Haas Company in Opposition to the Motion by International Insurance Company for Partial Summary Judgment Regarding Claims Arising from the Lipari Site (dated June 27, 1989) at 4, Rohm and Haas Co. v. United States Liab. Ins. & Indem. Co., No. L-87-4920 (N.J. Super. Ct.); Reply Brief of Defendant-Appellant Executive Insurance Company, et al. (dated Sept. 26, 1989) at 4, Keene Corp. v. Executive Ins. Co., 893 F.2d 517 (2d Cir. 1990); [Plaintiff's] Memorandum of Law for Trial (dated Sept. 11, 1990) at 27, Continental Cas. Co. v. Great Am. Ins. Co., No. 86-C-3839 (N.D. Ill.); Aetna Casualty and

Litigants have described the doctrine in a number of ways to various courts. Insurance companies have explained to California courts that the doctrine has four elements under California law:

> (1) the party to be estopped must know the facts;
> (2) he must intend that his conduct will be acted upon or must so act that the party asserting the estoppel had a right to believe [reliance] was so intended;
> (3) the party asserting estoppel must be ignorant of the true facts; and
> (4) [the party asserting estoppel] must rely upon the conduct to his injury.[219]

Knowledge of the true facts by the litigant to be estopped may be actual or constructive.[220] Courts frequently state the classic definition of the

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Surety Company's Memorandum of Law in Opposition to Textron Inc.'s Motion to Compel (dated Aug. 21, 1989) at 4, 12, 21, Textron Inc. v. Aetna Cas. & Sur., No. 87-3497 (R.I. Super. Ct.); American Home Assurance Company's Reply to Liberty Mutual Insurance Company's Opposition Regarding American Home's Motion for Partial Summary Judgment Regarding Waiver and Estoppel (dated March 9, 1992) at 7-8, Chemstar, Inc. v. Liberty Mut. Ins. Co., No. 90 2904 HLH (BX) (C.D. Cal.).

219. Respondent [Calfarm Insurance Co.]'s Brief (filed Sept. 21, 1992) at 21, Metropolitan Life Ins. Co. v. Calfarm Ins. Co., No. F017991 (Cal. Ct. App.) (citing California Cigarette Concessions, Inc. v. City of Los Angeles, 350 P.2d 715 (Cal. 1950); Insurance Co. of the West v. Haralambos Beverage Co., 241 Cal. Rptr. 427 (Cal. Ct. App. 1987); and Green v. Travelers Indem. Co., 230 Cal. Rptr. 13 (Cal. Ct. App. 1986)); Travelers Indemnity Co.'s Phase VI Pretrial Brief (dated Nov. 7, 1988) at 24, *In re* Asbestos Ins. Coverage Cases (Cal. Super. Ct.) (quoting Insurance Co. of the West v. Haralambos Beverage Co., *supra*; Brief of Plaintiff-Appellee Pennsylvania General Insurance Company (dated June 15, 1992) at 21, Pennsylvania Gen. Ins. Co. v. Dictronics, Inc., No. 92-55142 (9th Cir.) (same and adding that "equitable estoppel is founded on concepts of equity and fair dealing") (citing Strong v. County of Santa Cruz, 543 P.2d 264, 266 (Cal. 1975) and City of Long Beach v. Mansell, 476 P.2d 423, 442 (Cal. 1970)); Petition for Review of Jefferson Insurance Co. of New York (dated July 29, 1996) at 18, Stonewall Ins. Co. v. City of Palos Verdes Estates, Nos. B023805, B045183 (Cal. Ct. App.) (citing Strong v. County of Santa Cruz, 543 P.2d 264, 15 Cal. 3d 720, 724-25 (Cal. 1975) and City of Long Beach v. Mansell, 3 Cal. 3d 462, 488-489 (Cal. 1970)). *See also* Skulnick v. Roberts Express, Inc., 476 P.2d 423, 3 Cal. Rptr. 2d 597, 601 (Cal. 1992) (same elements).

220. Williams v. Workers' Compensation Appeals Bd., 33 Cal. Rptr. 2d 753 (Cal. Ct. App. 1994) (insurance company that represented that insurance policy provided full coverage

doctrine: Equitable estoppel is the effect of a party's voluntary conduct whereby the party is absolutely precluded from asserting rights which might otherwise have existed against another person who in good faith relied thereon and was led to change his position for the worse.[221]

When the party invoking the doctrine has sustained some injury, the litigant to be estopped need not have gained some benefit by its prior conduct.[222] To prove the element of injury, the litigant must show prejudice;[223] in some jurisdictions, the litigant specifically must show that it relied on the other litigant's conduct to its detriment.[224]

The questions of whether the injured party relied on the prior position and whether reliance on the prior position was reasonable often are raised by litigants who seek to avoid preclusion under the doctrine.[225] While noting that

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was estopped to deny coverage for workers' compensation liability because insurance company reasonably should have known that policyholder needed coverage for workers who occasionally would work on property); 31 C.J.S. *Estoppel* § 78 at 460, and cases cited therein.

Lord Mansfield in the early case of Noble v. Kennaway, 2 Doug. 511 (K.B. 1780) stated: "Every underwriter is presumed to be acquainted with the practice of the trade he insures." *Id.* at 512.

221. *See, e.g.,* American Cas. Co. of Reading, Pa. v. Hambleton, 349 S.W.2d 664, 667 (Ark. 1961); Ladd Const. Co. v. Ins. Co. of N.A., 391 N.E.2d 568, 573 (Il. App. Ct. 1979); American Bank & Trust Co. v. Universal Ins. Co., 205 So. 2d 35, 40 (La. 1967); Savonis v. Burke, 216 A.2d 521, 522 (Ma. 1966); and Washington v. McLawhorn, 75 S.E.2d 402, 449 (N.C. 1953). *See also* Eta Chapter of Alpha Kappa Lambda, Inc. v. Great Am. Ins. Co., No. 15497-1-III, 1997 Wash. App. LEXIS 753 (Wash. Ct. App. May 15, 1997).

222. *See* Miller v. Lawlor, 66 N.W.2d 267 (Iowa 1954); Lacy v. Wozencraft, 105 P.2d 781 (Okla. 1940).

223. *See, e.g.*, Plaintiff [Safety Mutual Casualty Corp.]'s Separate Pretrial Memorandum (dated Feb. 15, 1991) at 10, Safety Mut. Cas. Corp. v. Liberty Mut. Ins. Co., Case No. 89-2636-Z (D. Mass.) (urging that Liberty Mutual Ins. Co. should be equitably estopped from reforming policy to reduce coverage regardless of understanding between it and policyholder at policy inception, because reinsurance company would not have sold policy had Liberty Mutual Insurance Company's primary policy contained personal injury liability coverage limit as Liberty Mutual Insurance Company asserted). Safety Mut. Cas. Corp. explained, "The elements of equitable estoppel are a material representation, a party's reliance upon the representation, and resulting *harm or prejudice* to the relying party." (citing Calkins v. Wire Hardware Co., 165 N.E. 889 (Mass. 1929) and 31 C.J.S. *Estoppel* § 63 at 394) (emphasis added).

224. *See* 31 C.J.S. *Estoppel* § 74 at pages 448-49 and cases cited therein.

225. In *In re* Asbestos Insurance Coverage Cases, Judicial Council Coordination Proceeding No. 1072 (San Francisco Superior Ct.), for example, Travelers Indemnity Company urged that it was not equitably estopped to litigate against its policyholder a position which was inconsistent with its prior litigation position of broad coverage because the policyholder did not rely on the prior judicial representation. *See* Travelers Indemnity Co.'s Phase VI Pretrial

there are no hard and fast definitions of what constitutes "reasonable" reliance, one federal district court has commented that all relevant factors should be considered including the degree of sophistication of the litigants and the history behind any negotiation process.[226] Some courts have applied the equitable estoppel doctrine absent proof of reliance when necessary to avoid injustice.[227]

The doctrine of equitable estoppel may be applied when no overt conduct or statement was asserted – courts have applied the doctrine when one by silence has misled another person.[228] Courts and litigants alike recognize that the doctrine may be invoked when "it would be unconscionable to permit [the

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Brief (dated Nov. 7, 1988) at 43, *In re* Asbestos Ins. Coverage Cases (Judicial Council Coordination Proceeding No. 1072, San Francisco Superior Ct.). Travelers argued that only an insurance company that had issued an insurance policy which was in force when the claimant was exposed to asbestos must indemnify a claim (the "exposure" trigger), whereas it had earlier litigated that each insurance company that had issued an insurance policy from exposure to asbestos to when the injury manifests itself must pay its *pro rata* share of the loss (the "continuous" trigger).

In Transit Cas. Co. v. Topeka Transp. Co., Inc., Case No. 82-54377-A (Kan. Ct. App.), furthermore, the insurance company argued that it should not be estopped to assert a position inconsistent with the alleged prior representations of its employee because the policyholder's reliance on the employee's representations was not reasonable. Brief of Appellant Transit Casualty Co. (filed July 20, 1982) at 22-24, Transit Cas. Co. v. Topeka Transp. Co., Inc., Case. No. 82-54377-A, (Kan. Ct. App.) (citing Bank of Denton v. Jesch, 163 P. 150, 152 (Kan.1917)). At the same time, the insurance company argued that by failing to object to a portion of a retrospective premium increase, the policyholder was estopped from disputing the increase. *Id.*

226. *See* Greenberg v. Tomlin, 816 F. Supp. 1039, 1056 (E.D. Pa. 1993) (Maryland and Pennsylvania law).

227. *See, e.g.,* AIG Hawaii Ins. Co. v. Smith, 891 P.2d 261 (Haw. 1995) (usual reliance element of equitable estoppel should not serve as a bar to the application of estoppel when manifest injustice would occur absent application of the doctrine). *See also* discussion of quasi-estoppel at Part III of this article *infra*.

228. *See* Overstreet v. Kentucky Century Life Ins. Co., 950 F.2d 931, 939 (4th Cir. 1991) (silence can trigger estoppel under Virginia law).

See also [Hartford Accident & Indemnity Company's] Brief in Opposition to Plaintiff's Motion for Partial Summary Judgment and in Support of Defendant Hartford Accident & Indemnity Company's Cross-Motion for Summary Judgment (dated Nov. 15, 1995) at 69, Biddle Sawyer Corp. v. Fireman's Fund Ins. Co., No. MON-L-5219-91 (N.J.) (arguing in support of cross-motion for summary judgment that doctrine of equitable estoppel based on silence of policyholder should apply to defeat policyholder's claim for insurance coverage) (citing Summer Cottagers Ass'n of Cape May v. City of Cape May, 117 A.2d 585, 19 N.J. 493, 504 (1955)).

litigant] to maintain a position inconsistent with one in which he has acquiesced."[229] When a person is required by a duty of good faith to speak or act, the person's silence and acquiescence may constitute sufficient conduct to bar the litigant from assuming an inconsistent position.[230]

The equitable estoppel doctrine is founded upon principles of public policy,[231] fair dealing and justice,[232] and good conscience.[233] It enables courts to adjust the relative rights of parties in accordance with the parties' duties of good faith and fair dealing,[234] and "is designed to protect any adversary who may be prejudiced by [an] attempted change of position."[235] It precludes a litigant who has engaged in improper conduct from asserting a claim or a defense, regardless of the substantive validity of the claim or defense.[236]

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229. Brief of Appellant Transit Casualty Co. (filed July 20, 1982) at 24, Transit Cas. Co. v. Topeka Transp., Case No. 82-54377-A (Kan. Ct. App.) (quoting Bank of Denton v. Jesch, 163 P. at 152).

230. *See* O.K. Sand and Gravel, Inc. v. Martin Marietta Corp., 786 F. Supp. 1442 (S.D. Ind. 1992) (Indiana law).

231. *See* Muhleisin v. Allstate Ins. Co., 203 So. 2d 847 (La. Ct. App. 1967); 31 C.J.S. *Estoppel* § 63 page 390.

232. *See* Marine Transp. Services Sea-Barge Group, Inc. v. Python High Performance Marine Corp., 16 F.3d 1133, 1138 (11th Cir. 1994); Johnson v. Johnson, 301 N.W.2d 750, 754 (Iowa 1981). *See also* First Nat'l Bank of Portland v. Dudley, 231 F.2d 396 (D. Or. 1956) (doctrine advances "ordinary fairness toward those who have relied on the conduct of another"); and Caledonia Sand & Gravel Co. v. Campbell, 260 A.2d 221 (1969) (basis of estoppel is equity).

233. *See* Levy v. Empire Ins. Co., 379 F.2d 860, 862 (5th Cir. 1967) (Georgia law); United States v. Federal Ins. Co., 605 F. Supp. 298, 303 (Ct. Int'l. Trade 1985).

234. *See* Johnson v. Johnson, 301 N.W.2d 750, 754 (Iowa 1981); Muhleisin v. Allstate Ins. Co., 203 So.2d 847 (La. Ct. App. 1967); Town of Pamapo v. Village of Spring Valley., 243 N.Y.S.2d 569 (N.Y. Sup. Ct. 1962), *appeal dismissed*, 193 N.E.2d 892 (N.Y. 1963); 31 C.J.S. *Estoppel* § 63 at page 390; RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. e.

235. Brief of Defendant-Appellee Aetna Life Ins. Co. (filed Apr. 12, 1981) at 42, Edwards v. Aetna Life Ins. Co., 690 F.2d 595 (6th Cir. 1982) (quoting Duplan v. Deering Milliken, Inc., 397 F. Supp. 46 (D.S.C. 1974)). The insurance company added that the doctrine is "founded upon a need for finality in the litigation process." *Id. See also* Sure-Snap Corp. v. Bradford Nat'l Bank, 128 B.R. 885, 888 n.4 (D. Vt. 1991) ("equitable estoppel is concerned more with preventing a party from benefiting from a mid-course change of positions where the opposing party relied on the earlier position").

236. *See* Phelps v. Federal Emergency Management Agency, 785 F.2d 13, 16 (1st Cir. 1986) (Mass. law); Arkansas Dept. of Human Serv., Child Support Enforcement Unit, 818 S.W.2d 591, 593 (Ark. Ct. App. 1991). *See also* American Cas. Co. of Reading, Pa. v. Hambleton, 349 S.W.2d 664, 667 (Ark. 1961) (insurance company that deleted endorsement at renewal without notifying the policyholder was equitably estopped to deny coverage for loss

When the equitable estoppel doctrine is applied to prevent a litigant who has engaged in improper conduct from asserting a claim or a defense to which the litigant might otherwise be entitled, one litigant noted, the effect of the doctrine's application is analogous to the effect of another equitable doctrine, the doctrine of unclean hands.[237]

Whereas some courts view the doctrine of equitable estoppel as a doctrine that prohibits a litigant that has misrepresented a fact or opinion from subsequently alleging and proving the truth,[238] other courts view the doctrine as a tool that "not so much shut[s] out the truth as let[s] in the truth, and the whole truth."[239] The equitable estoppel doctrine regularly is invoked to estop

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that would have been covered under the endorsement); Bernson v. Browning-Ferris Industries, 873 P.2d 613 (Cal. 1994) (equitable considerations may justify equitable estoppel to invoke statute of limitations); 31 C.J.S. *Estoppel* § 63 at 398 (doctrine "presupposes the existence of a right with a denial of its judicial enforcement because the circumstances make judicial enforcement inequitable" (citing United States v. Chatham, 298 F.2d 499 (4th Cir. 1962))).

237. In arguing in support of a cross-motion for summary judgment, Hartford Accident & Indemnity Company urged that the policyholder's alleged silence on important matters in the course of an insurance company's investigation of a claim constituted grounds for application of the doctrines of unclean hands and equitable estoppel to defeat the policyholder's claim for insurance coverage. The litigant explained the doctrine of unclean hands:

> The unclean hands doctrine is an ethical concept that has long been applied by the courts. Medical Fabrics Co., Inc. v. D.C. McLintock Company, Inc., 12 N.J. Super. 177, 179-80 (App. Div. 1951). . . . The unclean hands doctrine is applicable when the party seeking affirmative relief is guilty of conduct involving fraud, deceit, unconscionability, or bad faith directly related to the matter in issue that injures other parties and effects the bounds of equity between litigants. Castle v. Cohen, 676 F. Supp 620 (E.D.Pa. 1987), *aff'd and rem'd*, 840 F.2d 173 (3d Cir. 1988).... When applicable, the unclean hands doctrine is invoked not out of regard for the defendant or to punish the plaintiff, but upon larger considerations that make for the advancement of right and justice. [Medical Fabrics Co., Inc., 12 N.J. Super. at 180.] The courts should give consideration to the interests of the public generally.

Id. at 181. [Hartford Accident & Indemnity Company's] Brief in Opposition to Plaintiff's Motion for Partial Summary Judgment and in Support of Defendant Hartford Accident & Indemnity Company's Cross-Motion for Summary Judgment (dated Nov. 15, 1995) at 68-69, Biddle Sawyer Corp. v. Fireman's Fund Ins. Co., No. MON-L-5219-91 (N.J.).

238. *See* Levy v. Empire Ins. Co., 379 F.2d 860, 862 (5th Cir. 1967) (Georgia law).

239. First Nat'l Bank of Opp v. Boles, 165 So. 586, 592 (Ala. 1936); 31 C.J.S. *Estoppel* § 63 at 391.

a litigant from asserting a position inconsistent with prior statements or conduct, although courts and litigants articulate varying elements and formulations of the doctrine. Courts and litigants alike acknowledge that unlike judicial estoppel, which has been met with hostility in a few jurisdictions,[240] "[v]irtually all courts agree"[241] that equitable estoppel precludes a litigant from asserting an inconsistent position under appropriate circumstances.

B. Applications of Equitable Estoppel Doctrine in Insurance Coverage Litigation/The Decision in Morton International, Inc. v. General Accident Insurance Co. of America

The equitable estoppel doctrine frequently is asserted in insurance coverage litigation. Courts have applied the doctrine to preclude insurance companies that have represented or concealed a material fact or opinion from asserting a position inconsistent with the fact or opinion, even when a literal reading of the insurance policy at issue would support the new position.[242]

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240. *See, e.g.*, Konstantinidis v. Chen, 626 F.2d 933 (D.C. Cir. 1980).

241. Plaintiff's Reply Memorandum of Law in Support of Motion to Remand and in Opposition to Defendants' Cross-Motion (filed Jan. 28, 1992) at 28-29, Travelers Ins. Co. v. Richard John Ratcliffe Keeling, No. 91 Civ. 7753 (JFK) (S.D.N.Y.) (quoting Konstantinidis v. Chen, 626 F.2d 933, 937 (D.C. Cir. 1980)).

242. *See* Williams v. Workers' Compensation Appeals Bd., 33 Cal. Rptr. 2d 753 (Cal. Ct. App. 1994), *petition for rev. denied, ordered not published*, No SO41572, 1994 Cal. LEXIS 5998 (Cal. Nov. 3, 1994) (insurance company that represented that insurance policy provided full coverage was estopped to rely on exclusion for workers' compensation liability because insurance company reasonably should have known that policyholder needed coverage for workers who occasionally would work on property); Doe v. Allstate Ins. Co., No. 83,108, 1995 Fla. LEXIS 446 at *5-9 (Fla. March 23, 1995) (discussing circumstances under which an insurance company may be estopped to rely on exclusion contained in insurance policy under Florida law); AIG Hawaii Ins. Co. v. Smith, 891 P.2d 261 (Haw. 1995) (doctrine of equitable estoppel precludes insurance company from relying on exclusionary language contained in insurance policy when injustice would result); 31 C.J.S. *Estoppel* § 59 at 371-72 and cases cited therein. *But see* Kane v. Aetna, 893 F.2d 1283, 1283 n.3 (11th Cir.), *cert. denied*, 498 U.S. 890 (1990) (equitable estoppel may not be invoked to extend or enlarge coverage contained in an insurance policy).

See also Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 977-85 (1970) (estoppel principles bar insurance companies from denying coverage based on policy language when policyholder has relied on the representations of the insurance company); and Appellant's Reply Brief (filed Oct. 12, 1992) at 24, Metropolitan Life Ins. Co. v. Calfarm Ins. Co., No. F017991 (Cal. Ct. App.) ("It would be inherently inequitable

Professors Alan I. Widiss and (now Judge) Robert E. Keeton explain that "[i]n regard to insurance coverage disputes, estoppel involves the imposition of liability (or legal responsibility in some other form) on the basis of acts [of the insurance company] that usually were *not* intended to produce the consequences which are sought by the claimant."[243] The equitable estoppel doctrine is distinguished with the doctrine of waiver, which requires an intentional relinquishment of a known right,[244] or the "loss of an opportunity or a right as a result of a party's failure to perform an act it is required to

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to allow parties to make pro-coverage representations to encourage purchase of certain policies, but later hide those representations from the courts when they attempt to determine what various coverage or exclusionary provisions mean.").

243. ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES § 6.1(b)(3), at 618 (West 1988) (emphasis in original). The authors add that the intent of the insurance company in regard to the consequences of its acts is irrelevant. *Id.*

244. As reaffirmed by a California Court of Appeal,

> estoppel and waiver are two distinct and different doctrines that rest upon different legal principles. Waiver refers to the act, or the consequences of the act, of one side. Waiver is the intentional relinquishment of a known right after full knowledge of the facts and depends upon the intent of one party only. Waiver does not require any act or conduct by the other party. Estoppel is applicable where the conduct of one side has induced the other to take such a position that it would be injured if the first should be permitted to repudiate its acts.

DRG/Beverly Hills Ltd. v. Chopstix Dim Sum Café, 35 Cal. Rptr. 2d 515 (Cal. Ct. App. 1994) (quoted in Kirk A. Pasich, *Laws of Waiver and Estoppel: Same Result, Different Means*, LOS ANGELES DAILY J., Dec. 7, 1994, at 7. The article explains the distinct applications of the two doctrines under California insurance law. The author is a respected commentator and attorney who regularly represents policyholders).

The issue of when an insurance company waives its right to rely on a claim or defense in insurance litigation may arise in any of numerous circumstances. *See, e.g.*, Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d 1551, 1560-61 (9th Cir. 1991) (discussing application of waiver when insurance company denies insurance coverage without asserting all defenses to coverage); First Alabama Bank of Montgomery, N.A. v. First State Ins. Co., 899 F.2d 1045, 1063 (11th Cir. 1990) ("when an insurer specifically denies liability on one ground, it waives other grounds of defenses it might later seek to assert"); North River Ins. Co. v. Columbia Cas. Co., 1995 U.S. Dist. LEXIS 13683 at *3-4, 7-10 (S.D.N.Y. Sept. 12, 1995) (concurring with Columbia Casualty Company's argument that disclosure of privileged material during litigation generally operates as a subject matter waiver, but disagreeing that North River Insurance Company disclosed document during litigation).

perform, regardless of the party's intent to . . . relinquish the right."[245] The insurance company is estopped, based on either the nature of the insurance company's actions or the effect of the insurance company's action on the policyholder, to assert a right that it might otherwise be entitled to assert. The conduct upon which equitable estoppel is based often was asserted by the insurance company or its representative before the insurance policy was issued, Professors Keeton and Widiss note, and may constitute basis for reformation or rescission of the insurance policy by the court to protect the policyholder.[246]

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245. Engalla v. Permanente Medical Group, Inc, 938 P.2d 903, 923 (Cal. 1997) (quoting Platt Pacific, Inc. v. Andelson, 862 P.2d 158 (Cal. 1993)). In *Engalla*, Kaiser Permanente Medical Group misdiagnosed Mr. Engalla's respiratory problems for five years and failed to follow up on lost radiology results before diagnosing him with inoperable cancer in 1991. Upon learning of his true condition, Mr. Engalla immediately submitted his malpractice claim to Kaiser for arbitration as required by the health plan contract executed by his employer and Kaiser. The contract required that Kaiser "shall" appoint an arbitrator within thirty days, and that the chosen arbitrators of the two parties "shall" appoint a neutral arbitrator within thirty days thereafter and commence arbitration within a "reasonable time"; however, Kaiser delayed the appointment and the arbitration procedure such that arbitration had not commenced prior to Engalla's death six months later. Under California statute as interpreted by case law, the patient's $250,000 statutory malpractice recovery limit merges upon death with the spouse's $250,000 statutory loss of consortium recovery limit to allow a single wrongful death recovery. Kaiser's attorney refused to stipulate to permit the separate recovery limits. Engalla's survivors filed a medical malpractice suit against Kaiser and Kaiser responded by filing a petition to compel arbitration. The California Supreme Court overturned the court of appeal's grant of the petition, holding that "the evidence of Kaiser's course of delay, . . . which was arguably unreasonable or undertaken in bad faith, may provide sufficient grounds for a trier of fact to conclude that Kaiser has in fact waived its arbitration agreement." 938 P.2d at 924.

The court further held that "there [was] evidence to support the Engallas' claim that Kaiser fraudulently induced Engalla to enter the arbitration agreement in that it misrepresented the speed of its arbitration program, a misrepresentation on which Engalla's employer relied by selecting Kaiser's health plan for its employees, and that the Engallas suffered delay in the resolution of its malpractice dispute as a result of the reliance, despite Engalla's own reasonable diligence. *See id.* at 922.

246. KEETON & WIDISS, *supra* note 243, § 6.1(b)(3) & (7), at 618, 621. Professors Keeton and Widiss note:

> Estoppel often is more compatible than waiver with applying relatively 'broad' agency concept that precludes an insurer from objecting to the actions of the insurer's representative, and this is especially the case when the individual has exceeded the scope of authority prescribed by express provisions of the contractual relationship between the insurer and the

Professors Keeton and Widiss add that "courts increasingly are viewing estoppel in terms of the standards set forth in the Restatement of Contracts, which envisions the protection of justifiable detrimental reliance"[247] upon a litigant's promise. Known as promissory estoppel, this related application of estoppel aimed at the protection of justifiable detrimental reliance operates "to prevent injustice where the promise is reasonably calculated to and does in fact induce substantial detrimental action by the promisee."[248] In some

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agent.

Id. at § 6.1(b)(3).

247. *Id.* (footnotes omitted). Professors Keeton and Widiss reference Section 90 of the RESTATEMENT (SECOND) OF CONTRACTS, which states:

> (1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

See also substantially similar RESTATEMENT (FIRST) OF CONTRACTS § 90 (1932).

248. 31 C.J.S. *Estoppel* § 80 at page 466-68.

Professor Kenneth S. Abraham of University of Virginia Law School has commented on the promissory and equitable estoppel theories with respect to when an insurance company makes statements regarding coverage at the times an insurance policy is developed and sold, but changes its position once policyholders file claims under the policy. Professor Abraham explains:

> A *promissory [estoppel] theory* would read a policy's drafting history into the policy itself. Once this fundamental move is made then a binding effect follows almost automatically, for the history constitutes part of the policy's terms. In contrast, an *equitable estoppel theory* would acknowledge that when there was inconsistency between the drafting history and current alternative interpretations, the former would be binding only if that were the equitable result.

KENNETH S. ABRAHAM, ENVIRONMENTAL LIABILITY INSURANCE LAW: AN ANALYSIS OF TOXIC TORT AND HAZARDOUS WASTE INSURANCE COVERAGE ISSUES 259 (1991).

Professor Abraham views the problem of inconsistent litigation positions principally as a matter of "private law embodied in the standard form insurance policies . . . ." In the interest of "equal justice, and that like cases should be treated alike," Professor Abraham states that "neither insurers nor insureds should be permitted to take inconsistent positions about what an insurance policy covers." *Id.* at 261. While disapproving the use of litigation positions that are

cases, the doctrines of equitable estoppel and promissory estoppel may apply equally to prevent a litigant from prevailing on a position that is inconsistent with a position that has induced reasonable action or forbearance.[249]

In *Morton International, Inc. v. General Accident Insurance Co. of America*,[250] the New Jersey Supreme Court applied estoppel to bind the insurance industry to its representations of broad environmental liability insurance coverage under the standard form comprehensive liability insurance policy. The Supreme Court of New Jersey reviewed the representations of the Insurance Rating Board, the representative of insurance companies at the time the polluters' exclusion[251] was approved, to state insurance regulators in New Jersey, Georgia, West Virginia, Kansas, Puerto Rico and elsewhere that the exclusion was intended for clarification purposes only and did not limit insurance coverage for unexpected and unintended environmental damage.[252]

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inconsistent, Professor Abraham believes that the issue of what constitutes an inconsistent position does present "considerable difficulty," however. *Id.* at 261, 262.

249. *See, e.g.*, Mazer v. Jackson Insurance Agency, 340 So.2d 770 (Ala. 1976) (applying both equitable estoppel and promissory estoppel to bind litigant to prior statement, and noting that an express promise is not necessary element of promissory estoppel where sufficient "promissory elements" exist).

250. 629 A.2d 831 (N.J. 1993).

251. The exclusion reads:

> It is agreed that the insurance does not apply to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants . . .; but the exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

Insurance Rating Board Endorsement IRB-G335 (emphasis added, emphasis deleted); Circular to Board Members and Associate Members from Edward F. Earle, Counsel, Insurance Rating Board (dated May 18, 1970) (on file with author).

For a discussion of the insurance industry's position in administrative and court proceedings which asserts that broad insurance coverage for environmental liability remains despite introduction of the 1970 polluter's exclusion, see Robert N. Hughes, et al., *The Polluter's Exclusion Was No "Accident:" Why Its Regulatory History Leads Courts to Find Insurance Coverage*, 47 CPCU J. 76 (June 1994) (authors support policyholders). *But see* Richard C. Cavo, et al., *The Polluter's Web: The Pollution Exclusion and the Question of Deception*, 47 CPCU J. 77 (June 1994) (authors support insurance companies).

252. *See Morton*, 629 A.2d at 871-72; *See also* Montrose Chemical Corp. of Cal. v. Admiral Ins. Co., 897 P.2d 1 (Cal. 1995), *as modified on denial of reh'g*, (Aug. 31, 1995) (rejecting insurance company's argument that drafting history of the standardized CGL policy

The court concluded that the insurance industry intended to reduce coverage when it proposed the exclusion but misrepresented its intent because it feared that the regulators would disapprove the endorsement or require a reduction

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provisions and available interpretative materials are irrelevant and should not be considered by courts in interpreting policy provisions). *See also Is Pollution Insurable?*, 4 ENVTL. SCI. & TECH. 1103 (Dec. 1970) which reports:

> Tom O'Day, Director of Public Affairs, American Mutual Insurance Alliance (AMIA) (113 member trade organization of mutual insurance companies) signifies that there has always been coverage for accidental pollution, and the resulting suits were paid off. However, the exclusion endorsement now makes it a matter of record that the insurance companies are not going to pay for deliberate pollution.

One insurance company announced the polluter's exclusion as an insurance coverage *increase*. *See Insuring Against Pollution*, WALL ST. J., Apr. 15, 1970, at 22 ("INA Corp., a large insurance holding company, has announced that it no longer will exclude most pollution coverage from its general liability policies. For the most part this seems a sensible step, not only for INA but for the rest of the insurance industry. . . . INA will deny coverage only if the company or municipality acts deliberately.") (quoted in North Pacific Ins. Co. v. Mai (Grease Monkey), No. 42256-C at 28 (Idaho Super. Ct.), *rev'd*, No. 22331, 1997 Ida. LEXIS 62 (Ida. May 23, 1997)).

The genesis of the insurance industry's choice of the term "sudden and accidental" is helpful in interpreting the meaning and scope of the pollution exclusion. For decades, courts had interpreted the term "sudden and accidental" used in boiler and machinery insurance policies to be synonymous with "unexpected and unintended." *See, e.g.*, Beryllium Corp. v. American Mut. Liab. Ins. Co., 223 F.2d 71 (3d Cir. 1955) ("accident" means "unforeseen and unintended;" five or eight years is "sudden"); Canadian Radium & Uranium Corp. v. Indemnity Ins. Co. of N.A., 104 N.E.2d 250 (Ill. 1952) (seven months was "sudden"); New England Gas & Electric Assoc. v. Ocean Accident & Guar. Corp., 116 N.E.2d 671, 679 (Mass. 1953) ("term accident, unlimited except by the term sudden, should be given its ordinary meaning as denoting an unexpected, undesigned, and unintended happening") ("sudden" has a temporal quality and is not ambiguous when referring to release of pollutants under Lumbermens Mut. Cas. Co. v. Belleville Indus., Inc., 555 N.E.2d 568, 572 (Mass. 1990)); Anderson & Middleton Lumber Co. v. Lumbermen's Mut. Cas. Co., 333 P.2d 938 (Wash. 1959) (undetected crack which developed gradually into leak "sudden and accidental" damage).

See also STEPHEN A. COZEN, INSURING REAL PROPERTY § 5.03(2)(a) (1992) ("Utilizing the 'common meaning' doctrine the courts have uniformly held that the dictionary definition of the terms ["sudden and accidental"] as 'unforeseen, unexpected and unintentional' is controlling.); 10A COUCH ON INSURANCE, 2d 505 (1982) ("When coverage is limited to a sudden 'breaking' of machinery[,] the word 'sudden' should be given its primary meaning as a happening without previous notice, or as something coming or occurring unexpectedly, as unforeseen or unprepared for. That is, 'sudden' is not to be construed as synonymous with instantaneous.").

in rates.[253] The court's indignation was apparent: The court characterized the industry's representations as "paradigms of understatement," the "deliberate" lack of clarity of which was "not only misleading, but comes perilously close to deception."[254]

The New Jersey Supreme Court explained why the insurance industry's misrepresentations render "appropriate and compelling"[255] the application of estoppel to bind insurance companies to their representations of the early 1970's:

> Not only did the insurance industry fail to disclose the intended effect of this significant exclusionary clause, it knowingly misstated [the clause's] intended effect in the industry's submission of the clause to state Departments of Insurance. Having profited from that nondisclosure by maintaining preexisting rates for substantially reduced coverage, the insurance industry should be required to bear the burden of its omission by providing coverage at a level consistent with its representations to regulatory authorities.[256]

The court refused to "construe CGL policies containing the pollution-exclusion clause . . . [to] ignor[e] the industry's misleading presentation to state regulators . . . , and overlook the apparent unfairness that [the insurance industry's present] interpretation would impose on policyholders. . . ."[257]

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253. *See Morton*, 629 A.2d at 872. *See also* Continental Cas. Co. v. Diversified Indus., Inc., 884 F. Supp. 937, 959 (E.D. Pa. 1995) (Pennsylvania law) (parol evidence rule does not bar extrinsic evidence of insurance industry intent at the time the "polluter's exclusion" was approved because the policyholder asserted insurance coverage claim based upon misrepresentations made by the insurance industry to insurance regulators).

254. *Morton*, 629 A.2d at 851, 853.

255. *Id.* at 874.

256. *Id.* at 876.

257. *Id.* at 877. Many insurance companies and their affiliates have sought to persuade courts that insurance coverage exists for environmental liability despite the polluter's exclusion. More often, however, insurance companies appeal to courts to construe the exclusion to preclude insurance coverage for unexpected and unintended pollution harm. Positions in favor of insurance coverage for unexpected and unintended pollution were asserted in: Federated Mutual Insurance Company's Memorandum of Law and Fact in Support of Motion for Partial Summary Judgment (filed April 15, 1987) at 26, Selvig v. Lentz Fertilizer, Inc., 85-CU-456 (Wis. Cir. Ct.) ("The [pollution exclusion] can be interpreted as simply a restatement of the definition of 'occurrence,' that is, that the policy will cover claims where the injury was 'neither expected or intended.'"); Transcript of Deposition of Carl P. Brigada, Jr. [Special Examiner

Instead, the New Jersey Supreme Court held that the "polluter's exclusion" must be construed to continue coverage for unintended pollution that occurs gradually, in accordance with the insurance industry's prior representations and nondisclosures before state insurance regulators.

The New Jersey Supreme Court easily found privity of the parties and reasonable and detrimental reliance on the part of the Commissioner of Insurance and policyholders. The Insurance Rating Board was the insurance industry's "designated agent, in presenting the pollution-exclusion clause to state regulators."[258] The Commissioner of Insurance is charged by New Jersey statute "to protect the interests of policyholders and to assure that 'insurance companies provide reasonable, equitable and fair treatment to the insuring public."[259] In reliance upon the industry's misrepresentations, the Commissioner of Insurance approved the clause, and was deprived of the opportunity to make informed judgments concerning the rate and coverage issues implicated by the clause. Policyholders were lulled from acting "either directly or through intervention by state regulatory authorities, to encourage the industry to provide broader coverage for pollution damage, even at increased rates, perhaps avoiding the litigation explosion that the . . . clause has precipitated."[260] The "litigation explosion" over the meaning of the

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assigned to Appellee Liberty Mutual's Special Claims Unit] (dated October 20, 1988) at Vol. 2, 18 - 26, Liberty Mut. Ins. Co. v. SCA Services, No. 88-6575 (Mass. Super. Ct.) (coverage not precluded for "injuries caused by pollution or contamination resulting from an accident"; Defendant [Insurance Companies'] Joint Memorandum in Opposition to Plaintiffs' Motion to Amend (filed Nov. 10, 1988) at 13, Sharon Steel Corp. v. Aetna Cas. & Sur. Co., Nos. C87-023061, C87-02311 (D. Utah) ("[the term "accidental"] plainly implies that activity undertaken by the insured, and over which the insured might be expected to have some control, is the focus of the exclusion") (brief was signed by Aetna Casualty & Surety Company; Allstate Insurance Company; AIU Insurance Company; American Excess Insurance Company; American Motorists Insurance Company; Employers Mutual Casualty Company; Fireman's Fund Insurance Companies; First State Insurance Company; Gibraltar Casualty Company; Hartford Accident & Indemnity Company; Lexington Insurance Company; North River Insurance Company; Prudential Reinsurance Company; Puritan Insurance Company; and Robson London Market Insurance Companies).

258. *Morton*, 629 A.2d at 874.

259. *Id.* (quoting *In re* N.J.A.C. 1:1-20, 208 N.J. Super. 182, 189 (N.J. Super. Ct. App. Div. 1986)).

260. *Id.* at 873. The court also explained, "'The proposition [that the insurance company is estopped to deny coverage] is one of elementary and simple justice. By justifiably relying on the insurer's superior knowledge, the insured has been prevented from procuring the desired coverage elsewhere.'" *Id.* at 873 (quoting Harr v. Allstate Ins. Co., 255 A.2d 208 (N.J. 1969)). *See* Jesuit High School v. General Ins. Co./Safeco Ins. Co. of Am., CV 95-563-RE (D. Or. Aug.

polluters' exclusion and the vast sums of money at stake in the disputes has prompted litigants to assert a litany of contrary positions regarding the exclusion as the exigencies of the moment change.[261]

18, 1995) (although court dismissed estoppel claim based on alleged misrepresentations of insurance industry when seeking approval of polluters' exclusion because high school had not alleged "what it would have done differently had defendants not made the alleged false representations to the state," court permitted high school to replead facts to show reliance) (discussed in *High School Gets a Lesson in Estoppel*, REAL ESTATE ENVTL. NEWS, Oct. 6, 1995 at 12). *But see* Federal Mut. Ins. Co. v. Bodkin Grain Co., 64 F.3d 537 (10th Cir. 1995) (Kansas law) (because polluter's endorsement is unambiguous, regulatory history is irrelevant); Charter Oil Co. v. American Employers' Ins. Co., 69 F.3d 1160, 1169 (D.C. Cir. 1995) (policyholder failed to establish inconsistency between the representations to regulators and the language of the polluter's exclusion); Anderson v. Minnesota Ins. Guar. Ass'n., 534 N.W.2d 706, 709 (Minn. 1995) (reliance on any explanations contrary to the unambiguous meaning of the policy language is unreasonable); Sunbeam Corp. v. Liberty Mut. Ins. Co., No. GD95-13947 (Pa. Ct. Common Pleas) (estoppel based on representation by insurance industry in memorandum to Pennsylvania Insurance Department not a bar to application of pollution exclusion because argument rested on assumption that Pennsylvania Insurance Department did not independently assess the manner in which the proposed exclusion might be construed).

261. Many insurance companies have advanced inconsistent positions in the vast amount of litigation that has ensued over the meaning of the polluters' exclusion. *See, e.g*, Plaintiff Allstate Insurance Company's Brief in Support of Motion for Partial Summary Judgment (dated April 20, 1988) at 15, Allstate Ins. Co. v. Quinn Constr. Co., 713 F. Supp. 35 (D. Mass. 1989), *settled on appeal*, 784 F. Supp. 927 (D. Mass. 1990) (pollution that occurs gradually not excluded under insurance policy because "[t]he clear, unambiguous meaning of the pollution exclusion is that 'sudden' is an unexpected and unintended incident; it does not mean an incident of limited duration"). Allstate later contended that its corporate position is inconsistent with the position it took in *Quinn*. *See* Affidavit of Lynn S. Crim [Assistant Vice President, Northbrook Property and Casualty, a wholly-owned subsidiary of Allstate Insurance Company] (filed Feb. 23, 1990) at 3, CPC Int'l, Inc. v. Northbrook Excess & Surplus Ins. Co., 759 F. Supp. 966 (D.R.I. 1991); Centennial Ins. Co. v. Lumbermen's Mut. Cas. Co., 677 F. Supp. 342 (E.D. Pa. 1987) (exclusion is inapplicable when the policyholder "did not know, expect or intend" that a discharge of materials "would result in any type of environmental harm"); Brief for Defendants-Respondents Atlantic Mutual Insurance Company at 19 (filed May 5, 1989), Technicon Electronics Corp. v. American Home Assurance Co., 542 N.E.2d 1048 (N.Y. 1989) (disavowing statements made in earlier proceeding and arguing *contra*); Memorandum of Law of Defendant Xerox Corporation [parent company of Crum & Forster] in Support of its Motion to Compel Plaintiff to Produce Documents Requested in Xerox' First Document Request (filed May 12, 1989) at 16-18, Employers Ins. of Wausau v. Xerox Corp., No. B-87-625 (D. Conn.) ("when the 'pollution exclusion' clause was added to the policies, the insurance industry represented that it was simply a clarification of existing coverage"); Motions of Crum & Forster Corporation for Leave to Intervene For Limited Purposes of Correcting Erroneous Non-Record Assertions Made Against Crum & Forster Corporation by *Amici Curiae* and the United States Fire Insurance Company to File Brief Correcting Incorrect and Non-Record Assertions of *Amici Curiae* [and] Brief of Intervenor Crum & Forster Corporation and United States Fire Insurance

The United States Court of Appeals for the Third Circuit extended the New Jersey Supreme Court's decision in *Morton* to the type of pollution exclusion used by London Market Insurers, the NMA 1685, in *Chemical Leaman Tank Lines, Inc. v. Aetna Casualty & Surety Co.*[262] Enforcement of the word "sudden" was at issue in *Chemical Leaman,* as it had been in *Morton.* The federal appeals court noted that in *Morton*, the New Jersey Supreme Court refused to enforce the term "sudden" because the insurance industry misled state regulators and opined that the New Jersey Supreme Court would not enforce the term "sudden" in the NMA 1685 simply because other language in the clauses differed. As a result, the court found that *Morton's* regulatory estoppel holding applied to the NMA 1685 pollution exclusion. The fact that the London Market Insurance companies themselves did not appear before the New Jersey regulators did not affect the court's holding, it stated, because the language in the NMA 1685 clause closely paralleled the language of the standard exclusion, the London Market Insurers benefitted from the misleading explanation submitted to state regulators and the London Market Insurers did not independently submit information to the New Jersey regulators or attempt to explain the impact of the term "sudden" as used in their insurance policies.[263]

Estoppel based on representations made before an administrative agency, as applied in *Morton*, has been labeled "regulatory estoppel" by some

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Company Concerning Non-Record Statements Made by *Amici Curiae* State of Delaware and Commonwealth of Pennsylvania (filed July 24, 1990), New Castle County v. Hartford Accident & Indem. Co., 933 F.2d 1162 (3d Cir. 1991) (arguing *contra*); Plaintiffs' Brief in Support of Motion for Summary Judgment (filed Sept. 7, 1988) at 11, Scarcia v. Maryland Cas. Co., No. 87-6691 (E.D. Pa.) (arguing "pollution exclusion clause has been found to be not applicable in various situations based on the finding of its ambiguity and the fact that it must be strictly construed against the insurance company") and Affidavit of Robert E. Hyland [on behalf of Aetna Life and Casualty Corp.] (filed Feb. 23, 1993) at 23, Linemaster Switch Corp. v. The Aetna Life & Cas. Corp., No. CV-91-0396432 S (Conn. Super. Ct.) ("The brief that was filed in the *Scarcia* case enunciating such a position . . . did not then, nor does it now, correctly state the position of Aetna.).

262. 89 F.3d 976, 992 (3rd Cir. 1995), *cert. denied*, 117 S. Ct. 485 (1996) (applying New Jersey law).

263. *See id.*

courts[264] and litigants,[265] although some have referred to it as "equitable estoppel."[266] Courts most often, however, have invoked the term "regulatory estoppel" to refer to the doctrine that a regulatory agency may be estopped to enforce a regulatory action when it has violated its own procedures in reaching the action.[267] Continued ascription of dual meanings to the term is likely to cause confusion and should be avoided.

The principle that a litigant may not contradict statements that it made during the administrative approval process has been recognized in the patent

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264. *See, e.g.*, St. Paul Fire & Marine Ins. Co. v. Warwick Dyeing Corp., 26 F.3d 1195, 1205 (1st Cir. 1994) (policyholder was estopped to raise for first time on appeal "regulatory estoppel" argument based on alleged misrepresentations of insurance companies to state regulators).

265. *See* Memorandum of Law of CNA in Support of Motion to Dismiss Count 105 for Estoppel (dated Feb. 2, 1996), Continental Cas. Co. v. General Battery Corp., No. 93C-11-088-WCC (Del. Super. Ct.). The insurance company describes "regulatory estoppel" as a "hybrid between equitable and judicial estoppel." Courts have applied the doctrine, the insurance company explains, "to estop insurers from taking positions regarding their interpretation of policies that are allegedly inconsistent with representations made by insurance organizations in presenting the qualified pollution exclusion clause to state regulators." *Id.* at 2-3 (citing *Morton*, 629 A.2d 873).

Two insurance companies told a Maine Superior Court that "nearly one hundred cases . . . have had the opportunity, but have refused, to lend credence to the 'regulatory estoppel' analysis espoused in Morton Int'l v. General Accident Ins. Co." Reply Memorandum of Law on Behalf of Defendants American Home Assurance Company and Birmingham Fire Insurance Company of Pennsylvania, in Support of Certain Defendants' Motions to Dismiss Counts V and VII of Central Maine Power Company's Cross-Claim and Opposition to Central Maine Power Company's Motion to Amend Cross-Claims (dated July 2, 1995) at 1, Moore v. Central Maine Power Co., No. CV-93-489 (Me. Super. Ct.).

266. UTI Corp. v. Fireman's Fund Ins. Co., 896 F. Supp. 362, 370-372 (D.N.J. 1995) (applying Pennsylvania law, court held plaintiff policyholder's argument that insurance company was equitably estopped based upon representations made by insurance industry to state regulatory agencies regarding the meaning of the pollution exclusion was found to be valid).

267. *See, e.g.*, Vallabhbhai Kanji Patel v. INS, 790 F.2d 786, 788 (9th Cir. 1986) (agency's violation of its own regulations is subject to judicial review); Board of School Comm'r v. James, 625 A.2d 361 (Md. Ct. App. 1993) ("generally federal administrative agencies must follow their own rules, and if they do not, the resulting agency action is invalid; no showing of prejudice by the complaining party is necessary") (citing United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260, 268 (1954)); Eye & Ear Hosp. and Presbyterian Univ. Hosp., 514 A.2d 976 (Pa. Commw. Ct. 1986) ("regulatory estoppel" applies to estop agency); Smith v. Houston Chem. Services, 872 S.W.2d 252, 259 (Tex.App. 1994) (same); Renken v. Harris County, 808 S.W.2d 222, 226 (Tex. App. 1991); Peter Raven-Hansen, *Regulatory Estoppel: When Agencies Break Their Own "Laws,"* 64 TEX. L. REV. 1 (1985) (same).

law context by the United States Supreme Court and other courts for decades. In the early case of *Keystone Driller Co. v. Northwest Engineering Corp.*,[268] the Court held that the patentee who had amended his claims during the administrative process in attempt to gain approval of his patent application is estopped to assert subsequently that his patent covered the claims that he had abandoned. This application of estoppel since has been labeled "file wrapper estoppel"[269] or "prosecution history estoppel"[270] and has been applied broadly to bind a patentee to representations made to the Patent and Trademark Office during the patent approval process.[271]

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268. 294 U.S. 42, 47-48 (1935). *See also* Genco, Inc. v. Ace Patents Corp., 315 U.S. 126 (1942) ("where a claim is allowed without a restrictive amendment, it has long been settled that recourse may not be had . . . to recapture claims which the patentee has surrendered by amendment").

269. *See* United Business Communications, Inc. v. Racal-Milgo, Inc., 591 F. Supp. 1172, 1179 (D. Kan. 1984):

> Courts have repeatedly held in a file wrapper estoppel context, as well as in non-patent contexts, that one may not be permitted to play "fast and loose" with the courts in this manner. Scarano v. Central R. Co. New Jersey, 203 F.2d 510, 513 (3d Cir. 1953). Having taken the position it did in the German patent office proceeding, Milgo, at least in the absence of disclosure of that fact, was precluded from urging upon the Kansas Court an inconsistent infringement theory.

See also Smith v. Mid-Continent Inv. Co., 106 F.2d 622, 624 (8th Cir. 1939):

> [One] method [of determining the legal scope of a patent] is by inspection of the file wrapper [the history of claimant's prosecution of the patent]. This is so because such inspection may reveal that the invention claimed in the patent has been limited in the Patent Office and such limitation is accepted by the patentee in order to procure the patent. To allow the language of a patent to include any of such excluded portion would be to extend the contract beyond the true intendment of the parties thereto. This is really an application of the doctrine of estoppel.

270. Wang Laboratories, Inc. v. Toshiba Corp., 993 F.2d 858, 868 (Fed. Cir. 1993) (district court erred in failing to apply prosecution history estoppel to reach the conclusion that the accused lateral memory modules were surrendered during prosecution process); Cedarapids, Inc. v. Nordberg, Inc., 895 F. Supp. 1230, 1268 (N.D. Iowa 1995) ("the prosecution history limits the interpretation of claim terms so as to exclude any interpretation that was disclaimed during prosecution"). *See generally* ANDERSON, *supra* note 211, §12.5.

271. *See, e.g.*, Builders Concrete, Inc. v. Bremerton Concrete Products Co., 757 F.2d 255, 258-59 (Fed. Cir. 1985). *See also* Litton Systems, Inc., v. Whirlpool Corp., 728 F.2d 1423

Litigants recognize the courts' broad discretion to invoke the doctrine of equitable estoppel to bar a litigant from asserting inconsistent position in insurance litigation.[272] The principle that the court may invoke the doctrine to prevent an insurance company, based on its past statements, from asserting terms and coverage limitations contained in the insurance policy was acknowledged by several insurance companies in a brief to the California Supreme Court.[273] Another insurance company argued to a Utah federal district court that equitable estoppel applied to preclude the opponent insurance company from denying insurance coverage to a third person, despite insurance policy language which required the policyholder to obtain separate insurance for the third person.[274] In that case, the insurance company claimed that application of the doctrine was mandated because the insurance company and the policyholder subsequently agreed to alleviate the policyholder of its duty to purchase the separate insurance.[275] Conversely, an insurance company argued in Massachusetts federal district court that because a third party to the insurance policy relied on the language of the policy,

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(Fed. Cir. 1984) ("A patent attorney is often faced with choices during a patent prosecution. . . . A patent attorney should not be able, however, to choose one course of action within the [Patent and Trademark Office] with the anticipation that, if later checked, he or she can always choose an alternate course of prosecution in a trial before a federal judge.").

272. *See, e.g.*, Federal Insurance Co.'s Supplemental Reply Memorandum in Support of Motion for Summary Judgment and in Opposition to Defendants-in Intervention's Cross-Motion for Summary Judgment (filed June 2, 1989) at 9, Federal Ins. Co. v. Emery Mining Corp. Civil No. 86C-0696-G (D. Utah) ("when the conduct by one party leads another party in reliance thereon to adopt a course of action resulting in detrimental damage if the first party is permitted to repudiate his conduct, a party is estopped from asserting that position") (citing Blackhurst v. Transamerica Ins. Co., 699 P.2d 681, 691 (Utah 1985)).

273. *Amici Curiae* Brief of Fire Insurance Exchange and National Association of Independent Insurers in Support of Petitioner Prudential-LMI Commercial Insurance (dated Jan. 8, 1990) at 9, Prudential-LMI v. Super. Ct. of San Diego County, 798 P.2d 1230 (Cal. 1990) (citing Elliano v. Assurance Co. of Am., 83 Cal.Rptr. 509, 511-12 (Cal. Ct. App. 1970)).

274. Federal Insurance Company's Supplemental Reply Memorandum in Support of Motion for Summary Judgment and in Opposition to Defendants-in Intervention's Cross-Motion for Summary Judgment (filed June 2, 1989) at 9, Federal Ins. Co. v. Emery Mining Corp., Civil No. 86C-0696-G (D. Utah). *See also* Federal Insurance Company's Supplemental Memorandum of Points and Authorities in Support of Motion for Summary Judgment and in Opposition to Defendants-in-Intervention's Cross-Motion for Summary Judgment (filed April 14, 1989) at 17-20 in that case (arguing same).

275. *See* Federal Insurance Company's Supplemental Reply Memorandum in Support of Motion for Summary Judgment and in Opposition to Defendants-in-Intervention's Cross-Motion for Summary Judgment (filed June 2, 1989) at 9, Federal Ins. Co. v. Emery Mining Corp., Civil No. 86C-0696-G (D. Utah).

equitable estoppel precluded an insurance company from reforming an insurance policy to reduce coverage, despite the understanding of the insurance company and the policyholder at policy inception.[276] Litigants often have asked courts to determine the circumstances under which the equitable estoppel doctrine requires parties to perform, or precludes a party from relying upon, terms contained in the insurance policy.

Many litigants have acknowledged or argued that an insurance company's conduct after the policyholder has asserted a claim may constitute a basis for equitable estoppel. One insurance company acknowledged to the New York Court of Appeals that equitable estoppel bars an insurance company from denying coverage when it defends a policyholder in an action without reserving its right to assert policy defenses and the policyholder is prejudiced.[277] Another insurance company asserted to a federal district court in Kansas that the other insurance company, because it had litigated the position that the policyholder's loss was never covered, was estopped to argue that the policyholder once had, but forfeited, insurance coverage.[278] Yet another insurance company explained that an insurance company that wrongfully refuses to defend an action against a policyholder is estopped to contest a settlement against the policyholder.[279]

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276. *See* Plaintiff [Safety Mutual Casualty Corp.]'s Separate Pretrial Memorandum (filed Feb. 15, 1991) at 10-12, Safety Mut. Cas. Corp. v. Liberty Mut. Ins. Co., Case No. 89-2636-Z (D. Mass) (citing Calkins v. Wire Hardware Co., 165 N.E.2d 889 (Mass. 1929); 31 C.J.S. *Estoppel* § 63 at 394). The moving insurance company asserted it relied on the other insurance company's representation of coverage when it issued another insurance policy.

277. *See* Reply Memorandum or Cross-Claim Defendant Mission Ins. Co. in Support of Motion to Dismiss Cross-Claims (filed Nov. 12, 1985) at 22-23, Federal Ins. Co. v. Cablevision, No. 85 Civ. 250 (JRB) (citing Albert J. Schiff Ass'n., Inc. v. Flack, 417 N.E.2d 84 (N.Y. 1980)).

278. Supplemental Brief of Travelers in Opposition to [Insurance Company of North America "INA"]'s Motion for Determination of Law and in Support of Traveler's Conclusions of Law (filed Jan. 30, 1981) at 7-8, Travelers Ins. Co. v. Feld Car & Truck Leasing Corp., No. 76-179-C6 (D. Kan.) ("Not only did INA wait too long to raise this defense. INA's denial of the existence of any coverage is wholly inconsistent with the defense it now seeks to raise. . . . Rather than set up a file and commence any investigation, INA did nothing further about the claim until after trial. Such inaction works an equitable estoppel on INA which precludes it from raising the defense at this time.").

279. *See* Memorandum of Law of Plaintiff Continental Casualty Company in Opposition to Defendant Hartford Accident & Indemnity Company's Motion for Reconsideration of Order Denying Motion for Summary Judgment on Alternate Ground (filed July 22, 1993) at 4-7, Continental Cas. Company v. Hartford Accident & Indem. Co., No. 92-5325 (E.D. Pa.). Continental Casualty Company explained:

Travelers Insurance Company argued that two other insurance companies, National Union Fire Insurance Company of Pittsburgh, PA and American International Specialty Lines Insurance Company, were bound as a matter of equitable estoppel from denying the validity of a settlement agreement and binder of new professional liability insurance coverage entered into by the three companies.[280] Travelers stated that it relied upon the agreement and ceased to negotiate for substitute professional liability coverage, which was no longer available. Even if such coverage might be available in the future, Travelers continued, Travelers would not be able to secure retroactive coverage for claims during the period it was uninsured.[281]

The doctrines of judicial estoppel and equitable estoppel are similar in the regard that each seeks "to prevent the unconscientious and inequitable assertion or enforcement of claims or rights which might have existed or been enforceable by other rules of law."[282] The two doctrines, one court has stated, are "founded on the same ethical precept. . . .: [A] party who has induced

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> When an insurer declines coverage, as here, an insured may settle rather than proceed to trial to determine its legal liability . . . . Thus, when an insurer declines coverage and refuses to negotiate [a settlement] on the grounds that the matter is not covered by the policy, it does so at its own peril. If it turns out, as it did here, that the insurer is obligated to indemnify for the incidents in question, the insurer must accept the apportionment arrived at in the negotiations it rebuffed. . . . To the extent that the settlement is not to the Insurers' fancy, we remind them that they had ample opportunity to participate in its negotiation.

Id. at 5-6 (quoting American Int'l Underwriters Corp. v. Zurn Indus., Inc., 771 F. Supp. 690, 702 (W.D. Pa. 1991) (quoting Luria Brothers & Co. v. Alliance Assurance Co., 780 F.2d 1082, 1091 (2d Cir. 1986)). *See also* Petersen Sand and Gravel, Inc. v. Maryland Cas. Co., 881 F. Supp. 309, 313-14 (N.D. Ill. 1995) (insurance company that violates its duty to defend is estopped from denying insurance coverage in a subsequent lawsuit by the policyholder) (citing Maneikis v. St. Paul Ins. Co., 655 F.2d 818, 821 (7th Cir. 1981)). *But see* Appellant [Hartford Accident & Indemnity Co.]'s Reply Brief, Intel Corp. v. Hartford Accident & Indem. Co., No. 89-15165 (9th Cir.) (arguing that district court erred in holding that Environmental Protection Agency consent decree has collateral estoppel effect on insurance company but not policyholder).

280. *See* Plaintiff's Memorandum of Law in Support of Their Application for a Temporary Restraining Order, Specific Performance and Declaratory Relief Enforcing Their Settlement Agreement and Insurance Binder with Defendants (dated Aug. 9, 1993) at 24-25, Travelers Ins. Co. v. National Union Fire Ins. Co., No. 93 Civ. 158 (JES) (S.D.N.Y.).

281. *See id.*

282. Konstantinidis v. Chen, 626 F.2d 933, 937 (D.C. Cir. 1980) (quoting 3 POMEROY'S EQUITY JURISPRUDENCE § 802 (5th ed. 1941)).

someone else to act in a particular manner should not be permitted later to cause loss to the person he has misled by adopting an inconsistent position."[283] The equitable estoppel doctrine is distinguishable from the judicial estoppel doctrine, however, by its focus on the prior conduct or statement of the litigant to be estopped and on the effect of the conduct or statement on another party.[284] One authority has opined that because many courts require reliance, prejudice or other specific elements to invoke the doctrine, equitable estoppel is "[t]he most demanding approach to a claim that inconsistent positions should be precluded. . . ."[285] More often, courts and litigants view equitable estoppel as a "flexible doctrine, to be applied or denied as the equities between the parties preponderate."[286] Regardless of the characterization, the doctrine promotes judicial integrity by barring the assertion of some inconsistent positions in insurance coverage litigation and other litigation when judicial estoppel, and some of the other doctrines discussed in this article, would not apply.

III. QUASI-ESTOPPEL

A. The Doctrine of Quasi-Estoppel Generally as a Bar to Inconsistent Positions

In many jurisdictions, a changed position may be barred under the doctrine of quasi-estoppel when "it appeals to the conscience of the court to prevent injustice by precluding a party from asserting a right inconsistent with a position previously taken by him."[287] The doctrine of quasi-estoppel applies to bind a litigant to its prior position similar to the manner in which the

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283. Colonial Refrigerated Transp., Inc. v. Mitchell, 403 F.2d 541, 550 (5th Cir. 1968).

284. *See* Edward v. Aetna Life Ins. Co., 690 F.2d 595, 599 (6th Cir. 1982); WRIGHT & MILLER, *supra* note 16, at 587-88, 591.

285. WRIGHT & MILLER, *supra* note 16, at 779-80.

286. Memorandum of Law in Support of Employer's Insurance of Wausau's Motion for Summary Judgment, (filed June 21, 1990) at 42, Armotek Industries, Inc. v. Employer's Ins. of Wausau, No. 88-3110 (CSF), 1990 WL 159918 (N.J. Oct. 15, 1990) (citing Straup v. Times Herald, 423 A.2d 713, 720 (Pa. Super. Ct. 1980) and *In re* Tallarico's Estate; Appeal of Tallarico, 228 A.2d 736, 741 (Pa. 1967)).

287. Willard v. Ward, 875 P.2d 441, 443 (Okla. Ct. App. 1994) (citing Jamison v. Consolidated Utilities, Inc., 576 P.2d 97, 102 (Alaska 1978)). *See also* Sailes v. Jones, 499 P.2d 721, 724 (Ariz. Ct. App. 1972), *reh'd denied* (quoting Unruh v. Industrial Comm'n, 301 P.2d 1029, 1031 (Ariz. 1956)) (same); Pattison v. State Farm Fire & Cas. Co., 495 P.2d 975, 980 (Kan. 1972) (same).

doctrine of equitable estoppel applies; the doctrine of quasi-estoppel, however, does not require reliance by the litigant asserting the doctrine.[288] Applied by courts to protect the judicial system[289] and litigants,[290] the doctrine of quasi-estoppel "was developed to prevent a party from retaining a benefit by asserting a position to the disadvantage of another and then asserting a right which is inconsistent with that previous position."[291] One court has described the doctrine as a "broadly remedial doctrine, often applied ad hoc to specific fact patterns"[292] to prevent injustice.

The elements of the doctrine of quasi-estoppel are satisfied when a litigant (1) with knowledge of the facts (2) takes a position inconsistent with his or her former position (3) to the disadvantage of another.[293] Recent authority states that the prior position need not even have been taken voluntarily.[294]

The prior position may have been asserted in pre-litigation contacts between the parties,[295] or administrative[296] or courtroom[297] proceedings, and

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288. *See, e.g.*, El Paso Nat'l Bank v. Southwest Numismatic Inv. Group, Ltd., 548 S.W.2d 942, 947 (Tex.App. 1977) (citing 31 C.J.S. *Estoppel* § 107 (1964)). *See* ANDERSON, *supra* note 211, §12.6, at 85.

289. *See, e.g.*, Smith v. Marchant Enter., 791 P.2d 354, 356 (Alaska 1990).

290. *See, e.g.*, Maria v. Freitas, 832 P.2d 259 (Haw. 1992) (citing Aehegma v. Aehegma, 797 P.2d 74, 80 (Haw. Ct. App. 1990), and Hartmann v. Bertelmann, 39 Haw. 619, 628 (1952), (quoting Montclair Trust Co. v. Russell Co., 39 A.2d 641, 643 (N.J. Eq. 1944))).

291. Iberlin v. TCI Cablevision of Wyoming, Inc., 855 P.2d 716, 727 (Wyo. 1993) (citing Neiman-Marcus Group, Inc. v. Dworkin, 919 F.2d 368, 371 (5th Cir. 1990)).

292. Keesee v. Fetzek, 723 P.2d 904, 905 (Idaho Ct. App. 1986).

293. *See* Steubner Realty 19, Ltd. v. Cravens Rd. 88, Ltd., 817 S.W.2d 160, 164 (Tex.App. 1991) (citing Stimpson v. Plano Indep. School Dist., 743 S.W.2d 944, 946 (Tex.App. 1987, *writ denied*); 31 C.J.S. *Estoppel* § 107 (1964)).

294. *See* Carolina Medicorp, Inc. v. Board of Trustees of North Carolina Teachers', 456 S.E.2d 116, 120 (N.C. Ct. App. 1995) (rejecting litigant's position that it should not be estopped to challenge contract that it did not enter voluntarily, and explaining "voluntariness is not an element under the doctrine of quasi estoppel").

295. *See* Missouri Pacific R.R. Co. v. Harbison-Fischer Mfg. Co., 26 F.3d 531 (5th Cir. 1994), *reh'g denied* (Texas law). In *Missouri Pacific R.R. Co.*, the predecessor of the plaintiff railroad leased land to the defendant manufacturing company. The lease provided that within thirty days of the termination of the lease, the manufacturing company would remove its plant and equipment ("plant") from the land and that if the plant were not removed, the railroad could acquire title to the plant upon thirty days notice. The manufacturing company failed to remove the plant and the railroad failed to provide notice, but the railroad leased the plant to a third party for many years. When a fire eventually destroyed the plant and aggravated an environmental hazard, the railroad brought various tort claims against the manufacturing company, relying upon the original lease to establish ownership by the manufacturing company.

may have been asserted through positive conduct or through acquiescence.[298] The prior position may have been asserted directly by the litigant to be estopped or by a witness that the litigant had sponsored in the prior proceeding.[299] The doctrine does not require concealment or misrepresentation by the litigant to be estopped, nor does it require reliance or ignorance of existing facts by the litigant asserting the doctrine.[300] The doctrine usually does require, however, that the litigant to be estopped gained

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The court applied quasi-estoppel, reasoning that the position assumed by the railroad was inconsistent with the position taken by the railroad to its advantage when it leased the plant to the third party. *See id.* at 534-37.

It should be noted that the railroad's conduct, as well as being barred by the doctrine of quasi-estoppel, directly contravenes the Restatement (Second) of Contracts § 205, which imposes upon each party to a contract a duty of good faith and fair dealing in the contract's enforcement. The duty "is violated by dishonest conduct such as . . . asserting an interpretation contrary to one's own understanding . . . ." RESTATEMENT (SECOND) OF CONTRACTS § 205, cmt. e. Clearly, by leasing the plant to a third party, the railroad asserted its understanding that it had assumed ownership of the plant under the original contract, an understanding contrary to its litigation position in *Missouri Pacific R.R. Co. v. Harbison-Fischer Mfg. Co.*.

296. *See, e.g.,* Jamison v. Consolidated Utilities, 576 P.2d 97, 102 n.6 (Alaska 1978) ("Plaintiff can hardly be in a position of asserting the existence of an agreement before a public regulatory body and denying it before a court.") (quoting Lewis v. Atlas Corp., 158 F.2d 599, 602 (3d Cir. 1946)). *Cf.,* Morton Int'l, Inc. v. General Accident Ins. Co. of Am., 629 A.2d 831, 854 (N.J. 1993) (applying estoppel based on same rationale, but finding equitable estoppel elements of reliance and detriment to be present).

297. *See, e.g.,* Wright v. State, 824 P.2d 718, 721 (Alaska 1992) (doctrine of quasi-estoppel barred party from pursuing position regarding lender liability claim which was inconsistent with position in bankruptcy proceeding).

298. *See* Pavlidis v. New England Patriots Football Club, Inc., 675 F. Supp. 696, 698 (D. Mass. 1987) (applying doctrine of quasi-estoppel to bar shareholders from challenging directors' and officers' acts to which shareholders acquiesced); Dressel v. Weeks, 779 P.2d 324 (Alaska 1989) (titleholder who remained silent as third party sold real estate to another is estopped to assert title). *See also* 2 POMEROY, EQUITY JURISPRUDENCE § 816 (4th ed.) (discussing quasi-estoppel by acquiescence).

299. Willard v. Ward, 875 P.2d 441, 443-44 (Okla. Ct. App. 1994) (declining to apply quasi-estoppel based on sponsored witness' testimony in prior proceeding because party to be estopped gained no benefit from the witness' prior testimony).

300. *See, e.g.,* Erie Telecommunications, Inc. v. City of Erie, 659 F. Supp. 580, 585 (W.D. Pa. 1987) (quoting KTVB, Inc. v. Boise City, 486 P.2d 992, 993 (Idaho 1971)). *But cf.* Farkas v. Jarrell, Civil Action No. 1197, 1993 Del. Ch. LEXIS 220 at *6 (Del. Ct. Ch. Sept. 17, 1993) (interpreting Montclair Trust Co. v. Russell Co., 39 A.2d 641 (N.J. Ch. 1944) to require reliance by the party asserting quasi-estoppel and opining that the "term quasi-estoppel generally is included within the synonymous doctrines of equitable estoppel and estoppel in pais").

some benefit from the prior position,[301] or that the inconsistent position would impose a disadvantage upon the litigant seeking estoppel.[302]

Because courts often require that the litigant to be estopped must have gained some benefit from the prior position, the doctrine of quasi-estoppel also is called the doctrine of "estoppel by acceptance of benefits."[303] One court explained that the estoppel is applied to promote the principle that "where one having the right to accept or reject a transaction or instrument takes and retains benefits thereunder, he ratifies it, and cannot avoid its obligation or effect by taking a position inconsistent with it."[304] Other authorities have noted that quasi-estoppel likewise may be based upon election, ratification, affirmance, or acquiescence by the litigant to be estopped.[305]

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301. *See* Missouri Pac. R.R. Co. v. Harbison-Fischer Mfg. Co., 26 F.3d 531, 537 (5th Cir. 1994) (Texas law) (citing Stuebner Realty 19 v. Cravens Road 88, Ltd., 817 S.W.2d 160, 164 (Tex. App. 1991)).

302. Missouri Pac. R.R. Co. v. Harbison-Fischer Mfg. Co., 26 F.3d 531, 537 (5th Cir. 1994), *reh'g denied*, (citing Enochs v. Brown, 872 S.W.2d 312, 317 (Tex.App. 1994) (Texas Law)). *See also* Schiewe v. Farwell, 867 P.2d 920, 926 (Idaho 1993), *reh'g denied,* (McDermott J. and Bistline, J., dissenting) (citing Keesee v. Fetzek, 723 P.2d 904, 906 (Idaho Ct. App. 1986)); 31 C.J.S. *Estoppel* § 107.

303. Brooks v. Hackney, 404 S.E.2d 854, 857 n.3 (N.C. 1991) (plaintiff was estopped to deny the validity of ambiguous written agreement for the purchase and sale of land where plaintiff made the payments required by the agreement for nearly eight years and paid property taxes when requested to do so by defendant, and defendants would reasonably have believed that they were precluded from selling or renting the property to someone else); 31 C.J.S. *Estoppel* §§ 107, 109 (1964 & Supp. 1991).

304. Carolina Medicorp, Inc. v. Board of Trustees of North Carolina Teachers' and State Employees' Comprehensive Major Med. Plan, 456 S.E.2d 116, 120 (N.C. Ct. App. 1995) (quoting Redevelopment Comm'n of Greenville v. Hannaford, 222 S.E.2d 752, 754 (N.C. Ct. App. 1976)). *See also* Matter of Davidson, 947 F.2d 1294, 1296 (5th Cir. 1991) (debtor estopped to assert payments to ex-wife were not in nature of alimony when he had asserted payments were alimony for tax purposes).

305. *See* Erie Telecommunications, Inc. v. City of Erie 659 F. Supp. 580, 585 (W.D.Pa. 1987); Sailes v. Jones, 499 P.2d 721, 724 (Ariz. Ct. App. 1972), *reh'd denied* (citing Godoy v. County of Hawaii, 354 P.2d 78 (Haw. 1960)); Anderson v. Anderson, 585 P.2d 938 (Haw. 1978), 628 (Haw. 1952)); Steubner Realty 19, Ltd. v. Cravens Rd. 88, Ltd., 817 S.W.2d 160, 163 (Tex. App. 1991) (citing 31 C.J.S. *Estoppel* § 107). *See also* Sledge v. Liberty Nat'l Life Ins. Co., 632 So. 2d 1333 (Ala. 1994) (under doctrine of quasi-estoppel by election, a litigant may not take benefits of judgment and then appeal judgment) and Vessels v. Anschutz Corp., 823 S.W.2d 762, 764 (Tex.App. 1992), *writ denied* (explaining that "[r]atification is the adoption or confirmation by a person, with knowledge of all material facts, of a prior act which did not then legally bind that person and which that person had the right to repudiate") (citing Kunkel v. Kunkel, 515 S.W.2d 941, 948 (Tex.App. 1974, *writ ref'd n.r.e.*)).

In determining whether to apply the doctrine, courts often look to the results of the first position[306] and whether the inconsistent position now asserted would lead to unconscionable results.[307] In the leading case of *Jamison v. Consolidated Utilities, Inc.*,[308] for example, the Alaska Supreme Court instructed trial courts to consider "whether the party asserting the inconsistent position has gained an advantage or produced some disadvantage through the first position; whether the inconsistency was of such significance as to make the present assertion unconscionable; and whether the first assertion was based on full knowledge of the facts."[309] The Wyoming Supreme Court has held that courts should consider whether the first position was based upon the same information, as well as whether the litigant against whom estoppel is sought has gained from the change in position and whether that change is unconscionable.[310]

The doctrine of quasi-estoppel frequently is applied in tax law cases, where the doctrine also is known as the doctrine of "the duty of consistency."[311] In the tax law context, the doctrine applies when:

> (1) The taxpayer made a representation or reported an item for federal income tax purposes in one year;
> (2) the Commissioner acquiesced in or relied on that representation or report for that year; and
> (3) the taxpayer attempts to change that representation or report in a subsequent year, after the period of limitations has expired with respect to the year of the representation or report, and the change is detrimental to the Commissioner.[312]

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306. Dressel v. Weeks, 779 P.2d 324, 329 n.4 (Alaska 1989) (quoting Jamison v. Consolidated Utilities, Inc., 576 P.2d 97, 102 (Alaska 1978)).

307. *See* Hondo Oil and Gas Company v. Texas Crude Operator, Inc. 970 F.2d 1433, 1439 (5th Cir. 1992) (quoting Vessels v. Anschutz Corp., 823 S.W.2d 762, 765-66 (Tex.App. 1992, *writ denied*)); Keesee v. Fetzek, 723 P.2d 904, 905 (Idaho Ct. App. 1986).

308. 576 P.2d 97 (Alaska 1978).

309. *Id.* at 103.

310. *See* National Crude, Inc. v. Ruhl, 600 P.2d 716, 720 (Wyo. 1979).

311. Herrington v. Commissioner, 854 F.2d 755, 756 (5th Cir. 1988).

312. Hughes & Luce v. Commissioner, 68 T.C.M. (CCH) 1169 (1994) (citing Herrington v. Commissioner, 854 F.2d 755, 758 (5th Cir. 1988), *aff'g* Glass v. Commissioner, 87 T.C. 1087 (1986)); *see also* Kielmar v. Commissioner, 884 F.2d 959, 965 (7th Cir. 1989), *aff'g,* Glass v. Commissioner, 87 T.C. 1087 (1986); Unvert v. Commissioner, 656 F.2d 483, 485 (9th Cir. 1981); Beltzer v. United States, 495 F.2d 211, 212 (8th Cir. 1974); Mayfair Minerals, Inc. v. Commissioner,

The doctrine precludes the litigant from asserting the second position and allows "the Commissioner to proceed as if the representation or report on which she relied continues to be true, although, in fact, it is not."[313] One commentator has noted that the doctrine has been

> applied to prevent taxpayers from taking inconsistent positions in order to exclude from all tax periods income that clearly is taxable in some period, deduct the same expense in two or more periods, improperly inflate the basis of an asset, convert one type of income into a different, tax-favored type and profit from other sorts of tax abuses.[314]

The doctrine of quasi-estoppel, as applied in the tax law context, thus prevents taxpayers from assuming inconsistent positions over successive tax periods and otherwise mischaracterizing income.

The doctrines of quasi-estoppel, judicial estoppel, and equitable estoppel all produce the same results: The doctrines preclude a litigant from asserting a claim or right which might have existed or which he or she might have been entitled to enforce were it not for the prior conduct.[315] Moreover, the doctrine of quasi-estoppel overlaps each of these other estoppel doctrines in the policy considerations addressed by the doctrines and in the type of prior conduct required to invoke the doctrine. Many courts and litigants that have chosen to invoke the quasi-estoppel doctrine to preclude inconsistent positions have noted the doctrine's broad applicability to prevent injustice whether the prior position was asserted in court and in another setting.

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56 T.C. 82, 87-88 (1971), *aff'd*, 456 F.2d 622 (5th Cir. 1972).

313. *Herrington*, 854 F.2d at 758. *See also, In re* Robb, 23 F.3d 895, 898 (4th Cir. 1994) ("quasi-estoppel forbids a party from accepting the benefits of a transaction or statute and then subsequently taking an inconsistent position to avoid the corresponding obligations or effects") (quoting Matter of Davidson, 947 F.2d 1294, 1297 (5th Cir. 1991)). One federal circuit court has opined that the "'duty of consistency' seems to apply when the earlier taxpayer position amounts to a misstatement of fact, not of law." Lewis v. Commissioner, 18 F.3d 20, 26 (1st Cir. 1994).

314. Steve R. Johnson, *The Taxpayer's Duty of Consistency*, 46 N.Y.U. TAX L. REV. 537 (1991) (footnotes omitted).

315. *See* Konstantinidis v. Chen, 626 F.2d 933, 937 (D.C. Cir. 1980) (quoting 3 Pomeroy, Equity Jurisprudence § 802 (5th ed. 1941)); Sailes v. Jones, 499 P.2d 721, 725 n.1 (Ariz. Ct. App. 1972), *reh'd denied*; 31 C.J.S. *Estoppel* § 107.

B. Public Policy Considerations of the Doctrines of Quasi-Estoppel, Judicial Estoppel and Equitable Estoppel Compared

The doctrine of quasi-estoppel furthers public policy considerations served by the related doctrines of judicial estoppel and equitable estoppel. The doctrine of quasi-estoppel "rests upon principles of equity and is designed to aid the law in the administration of justice when without its intervention injustice would result."[316] Like the related estoppel doctrines, the doctrine of quasi-estoppel protects the judicial system and litigants alike by reducing the burden of unnecessary litigation.[317]

So similar are the doctrines of quasi-estoppel and judicial estoppel, and the policy considerations served by the doctrines, that some courts have used the terms "quasi-estoppel" and "judicial estoppel" interchangeably.[318] Like the doctrine of judicial estoppel, the doctrine of quasi-estoppel protects the integrity of the judiciary[319] and protects the "sanctity of the oath."[320] When applied to preclude inconsistent litigation results,[321] the doctrines of quasi-estoppel and judicial estoppel similarly promote public confidence in the legal system and avert the appearance that the judiciary is controlled by frequent users of the judicial system. Both doctrines protect the judiciary from the threat of "fast and loose"[322] litigation tactics by parties who would use

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316. Brooks v. Hackney, 404 S.E.2d 854, 859 (N.C. 1991) (quoting Thompson v. Soles, 263 S.E.2d 599, 602 (N.C. 1980)) (applying quasi-estoppel).

317. *See, e.g.*, Keesee v. Fetzek, 723 P.2d 904, 906 (Idaho Ct. App. 1986) (applying quasi-estoppel to bar change of position that has subjected other party to the expense of avoidable and unwanted litigation).

318. Caplener v. United States Nat'l Bank of Or., 857 P.2d 830, 837 n.12 (Or. 1993) (applying judicial estoppel to bar position in state court tort proceeding which conflicted with position asserted in bankruptcy position). *See also, id.* at 837 n.12 (distinguishing equitable estoppel) and Union Oil Co. of California v. State, 804 P.2d 62 (Alaska 1990) (discussing the doctrine of "judicial quasi-estoppel" and explaining that the doctrine "precludes a litigant from taking an inconsistent position from prior litigation where the circumstances of the new position would render the previous position unconscionable") (citing Alaska Statebank v. Kirschbaum, 662 P.2d 939, 942-43 & n.13 (Alaska 1983)).

319. *See* Smith v. Marchant Enterprises, Inc., 791 P.2d 354, 356 (Alaska 1990) (citing Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 598 (6th Cir. 1982)). *See* Boyers, *supra* note 85, at 1245 (1986); Caplener v. United States Nat'l Bank of Or., 857 P.2d at 837 n.12.

320. *Marchant Enterprises*, 791 P.2d at 356 (citing Konstantinidis v. Chen, 626 F.2d 933, 937 (D.C. Cir. 1980)).

321. *See, e.g.*, Wright v. State, 824 P.2d 718, 721 (Alaska 1992).

322. Willard v. Ward, 875 P.2d 441, 443 (Okla. Ct. App. 1994) (quoting Coleman v.

intentional self-contradiction as a means of obtaining an unfair advantage. Both doctrines prevent parties from "blow[ing] both hot and cold"[323] in the courts to suit their shifting interests.

The doctrines of quasi-estoppel and judicial estoppel have distinct applications, however. Unlike some formulations of the doctrine of judicial estoppel, quasi-estoppel does not require any type of judicial acceptance of the prior position nor does it even require that the prior position was asserted in a judicial setting. The quasi-estoppel doctrine more closely resembles the equitable estoppel doctrine in this regard. On the other hand, the doctrine of quasi-estoppel generally requires that the litigant to be estopped had knowledge of existing facts or rights at the time when it asserted the conduct upon which estoppel is based,[324] an element not present under the judicial estoppel doctrine. In addition, some courts specifically require a showing that the inconsistent position would lead to unconscionable results for application of the quasi-estoppel doctrine,[325] again an element not present under the judicial estoppel doctrine.

Both the equitable estoppel doctrine and the quasi-estoppel doctrine are applied by modern courts when in good conscience and as a matter of fair dealing, "a party ought not to be permitted to repudiate his previous statements and declarations."[326] Both doctrines protect other litigants from

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Southern Pacific Co., 296 P.2d 386, 392 (Cal. Ct. App. 1956)).

323. Erie Telecommunications, Inc. v. City of Erie, 659 F. Supp. 580, 585 (W.D. Pa. 1987) (quoting KTVB, Inc. v. Boise City, 486 P.2d 992, 994 (Idaho 1971) and Godoy v. County of Hawaii, 354 P.2d 78, 82-83 (Haw. 1960)); Mattos v. Correia, 79 Cal.Rptr. 229, 233 (Cal. Ct. App. 1969) (quoting Estate of Davis, 101 P.2d 761 (Cal. Ct. App. 1940)).

324. *See Erie Telecommunications, Inc.*, 659 F. Supp. at 586 (W.D. Pa. 1987) (quoting KTVB, Inc. v. Boise City, 486 P.2d 992, 995 (Idaho 1971)).

325. *See, e.g.*, Jamison v. Consolidated Utilities, Inc., 576 P.2d 97 (Alaska 1978); Iberlin v. TCI Cablevision of Wyoming, Inc., 855 P.2d 716, 727 (Wyo. 1993).

The *Iberlin* court explained the concept of "unconscionability":

> Unconscionability is . . . considered as a form of fraud recognized in equity, but such fraud should be "apparent from the intrinsic matter and subject of the bargain itself; such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other . . . ."

Iberlin, 855 P.2d at 728 (quoting Cline v. Safeco Ins. Cos., 614 P.2d 1335, 1338 (Wyo. 1980).

326. Branch Banking & Trust Co. v. United States, 98 F. Supp. 757, 768 (Ct. Cl. 1951) (quasi-estoppel); United States v. Federal Ins. Co., 605 F. Supp. 298, 303 (Ct. Int'l Trade 1985) (equitable estoppel); Johnson v. Johnson, 301 N.W.2d 750, 754 (Iowa 1981) (same); Muhleisen

the injury that results when a litigant changes its position in litigation,[327] and both doctrines apply whether the prior position was asserted in a judicial proceeding or in some other context.[328] Because misrepresentation, ignorance and detrimental reliance are not elements of the doctrine of quasi-estoppel, the doctrine applies to avert some inconsistent positions that might be permissible under the doctrine of equitable estoppel doctrine.[329] On the other hand, the doctrine of quasi-estoppel generally requires that the litigant to be estopped gained some benefits from its earlier position, an element not essential under the doctrine of equitable estoppel.[330]

Because the doctrines of quasi-estoppel, judicial estoppel and equitable estoppel rest upon common public policy rationales, specific instances of inconsistency in litigation may be remedied by application of two or all three of these doctrines. In other instances, the effect of the prior position on the litigant to be estopped, on the litigant invoking estoppel, or on a prior or present court will prescribe the application of one of the doctrines over the others. When a litigant's prior position, asserted inside or outside the courtroom, has brought some benefit to the litigant or some disadvantage to another litigant, or has caused some unconscionable result, the doctrine of quasi-estoppel may be the preferred doctrine to prevent the detriment to the

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v. Allstate Ins. Co., 203 So. 2d 847 (La. Ct. App. 1967) (same).

327. *See* Steubner Realty 19, Ltd. v. Cravens Rd. 88, Ltd., 817 S.W.2d 160, 164 (Tex. App. 1991) (citing Stimpson v. Plano Indep. School Dist., 743 S.W.2d 944, 946 (Tex. App. 1987), *writ denied*); 31 C.J.S. *Estoppel* § 107 (1964)).

328. *See, e.g.*, Dressel v. Weeks, 779 P.2d 324 (Alaska 1989) (applying quasi-estoppel to bind party to statement made outside courtroom); Trout v. Garrett, 780 F. Supp. 1396, 1425-26 (D.D.C. 1991) (government not permitted to assume litigation position inconsistent with past representations of counsel that it would promote women Navy employees retroactively to remedy discrimination) (applying equitable estoppel to bind party to statement made outside courtroom).

329. *See* Steubner Realty 19, Ltd. v. Cravens Rd. 88, Ltd., 817 S.W.2d 160 (Tex. App. 1991) (quasi-estoppel applied where appellees did not show that appellants made false representations or concealed material facts from appellees, that appellees were ignorant of the real facts, or that appellees detrimentally relied on prior position).

See also Donaldson v. LeNore, 540 P.2d 671, 674 (Ariz. 1975) ("quasi estoppel differs from other forms of estoppel in that it appeals to the conscience of the court to prevent injustice by precluding a party from asserting a right inconsistent with a position previously taken by him, and does not require ignorance or reliance as essential elements") (citing Unruh v. Industrial Commission, 301 P.2d 1029 (Ariz. 1956); Sailes v. Jones, 499 P.2d 721, 725 & n.1 (Ariz. Ct. App. 1972); 31 C.J.S. *Estoppel* § 107).

330. *See* Miller v. Lawlor, 66 N.W.2d 267 (Iowa 1954); Lacy v. Wozencraft, 105 P.2d 781 (Okla. 1940).

judiciary that the allowance of an inconsistent position would produce.

IV. THE COLLATERAL ESTOPPEL DOCTRINE

A. Collateral Estoppel Generally as Bar to Inconsistent Positions

When a litigant's prior position is incorporated into a judgment of a court or administrative agency, the doctrine of collateral estoppel applies to bar the litigant or one in privity with the litigant from litigating a contrary position. The doctrine provides that when an issue of fact or law has been "litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."[331] It is "a rule of universal law pervading every well regulated system of jurisprudence and is put on two grounds . . ., public policy and necessity, . . . [and] hardship to the individual."[332] Unlike the other doctrines discussed in this article, the doctrine of collateral estoppel, or issue preclusion, not so much analyzes the prior position of the litigant as it focuses on the judicial determination of a specific issue in the prior action.

Today, the collateral estoppel doctrine precludes litigants from asserting positions that may have been permitted in the past. This is so, one litigant observed, because "in the interest of justice and to prevent expensive

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331. RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982), quoted in Letter Brief from Paul J. Soderman, Attorney, [on behalf of United States Liability Ins. Co. and Mt. Vernon Fire Ins. Co.], Zucker, Farcher and Zucker, to The Honorable Judge Philip Caschman (Jan. 12, 1989) (on file with author) at 11-12, Rohm and Haas Co. v. United States Liab. Ins. Co., No. L-87-4920 (N.J. Super. Ct. 1989); and Brief for Defendant/Appellant Liberty Mut. Ins. Co. (Aug. 16, 1985) at 38, Abex Corp. v. Maryland Casualty Co., No. 85-5602 (D.C. Cir.) (citing Ali Baba Co., Inc. v. Wilco, Inc., 482 A.2d 418, 421 (D.C. 1984)). *See also*, Caterpillar Tractor Co. v. International Harvester Co., 120 F.2d 82, 84 (3d Cir. 1941) ("questions determined are conclusive in subsequent actions in which the same questions arise").

The clear majority of courts hold that the doctrine applies to both issues of fact and issues of law. *See, e.g.*, Steve D. Thompson Trucking, Inc. v. Dorsey Trailers, Inc., 677 F. Supp. 478, 481 (S.D. Miss. 1988); F.T.C. v. Evans Products Co., 60 B.R. 829, 832 (W. D. Wash. 1986); Township of Warren v. Suffness, 542 A.2d 931, 936 (N.J. Super. Ct. App. Div. 1988); Gramatan Home Investors Corp. v. Lopez, 386 N.E.2d 1328, 1331 (N.Y. 1979); State v. Ramsay, 499 A.2d 15, 18 (Vt. 1985); Daigle v. City of Portsmouth, 534 A.2d 689, 693 (N.H. 1987). *But see* Torres v. Village of Capitan, 92 N.M. 64, 582 P.2d 1277, 1281 (1978) (collateral estoppel does not apply to unmixed questions of law).

332. 50 C.J.S. *Judgments* § 592 (Supp. 1992).

litigation, [courts] are striving to give effect to judgments...."[333]

333. Notice of Hearing on Scottsdale Ins. Company's Demurrer to the Complaint of Stephen D. Moses; [Insurance Company's] Memorandum of Points and Authorities in Support Thereof at 11 (Oct. 30, 1992), Stephen D. Moses v. International Surplus Lines Ins. Co., No. BC 061 836 (Cal. Super. Ct.).

The policy objectives served by the collateral estoppel doctrine are diminished by vacatur of judgments, the practice whereby wealthy and frequent users of the justice system eradicate decisions that are unfavorable to them. By persuading prevailing opponents to consent to vacatur of judgments, often in consideration of a settlement amount that exceeds the judgment, parties who are likely to litigate the same issue repeatedly deprive future courts and litigants of the collateral estoppel effects of judgments unfavorable to them and skew judicial precedent to appear to favor their positions. *See* Jill E. Fisch, *The Vanishing Precedent: Eduardo Meets Vacatur*, 70 NOTRE DAME L. REV. 325, 356, 367 (1994); Stacy Gordon, *Vanishing Precedents*, BUS. INS., June 15, 1992, at 1; Roger Parloff, *Rigging the Common Law*, AM. LAW., Mar. 1992, at 74; Paul M. Barrett, *Critics Say that Deep-Pocketed Clients Benefit from Vacated Court Judgments*, WALL ST. J., Sept. 24, 1996, at B15 (securities fraud judgment); Eugene R. Anderson and Peter J. Andrews, *Buying and Lying: A Threat to the Integrity of Our Judicial System* (on file with authors). Eugene R. Anderson and Peter J. Andrews regularly represent policyholders in insurance coverage litigation.

Noting the value of judicial precedent to the legal community as a whole and the need for orderly procedure, the United States Supreme Court held in U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18 (1994), that vacatur of a judgment upon review is not justified by settlement rendering a case moot, absent exceptional circumstances beyond the parties' mere agreement to vacate. *See also*, Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 510 U.S. 27 (1993). The majority declined to reach the vacatur question, because to do so would have required the Court to address a second question that was neither presented in the petition for certiorari nor fairly included in the question presented. The dissent rejected the respondent's argument that vacatur of judgment upon request of the settling parties facilitates settlement and explained:

> In the years before the California Supreme Court endorsed routine vacation of judgments on settlement, there was a natural experiment in the California courts of appeals. While most courts routinely granted vacation, Division One of the Fourth Appellate District never did. Comparison of the rates of settlement in that court and the rest of the California appellate courts suggests that the denial of vacation did not discourage settlement. In fact, the rate of settlement in Division One of the Fourth Appellate District was twice as high as that in other appellate courts.

U.S. Philips Corp., 510 U.S. at 40 n.11 (Stevens and Blackmun, J.J., dissenting) (citing Stephen R. Barnett, *Making Decisions Disappear: Depublication and Stipulated Reversal in the California Supreme Court*, 26 LOY. L.A. L. REV. 1033, 1073 (1993)).

In a recent example of vacatur, a Texas court imposed a $2 million sanction on AIG for its "systemic and pervasive discovery abuses." Bristol-Myers Squibb v. AIU Ins. Co., No. A-0145,672 (Tex. Dist. Ct. Apr. 29, 1997). *See* Dan Lonkevich, *Texas Judge Hits AIG with $2M*

Collateral estoppel attaches to the decisions of courts,[334] administrative agencies,[335] juvenile courts,[336] and arbitration proceedings.[337]

A "refined version" of the broader doctrine of res judicata,[338] the doctrine

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Sanction, NAT'L UNDERWRITER, May 12, 1997 at 41. One week later, the order was vacated. *See* Bristol-Myers Squibb v. AIU Ins. Co., No. A-0145,672 (Tex. Dist. Ct. May 7, 1997).

One insurance company obtained vacatur of a Louisiana Supreme Court judgment, which found the insurance company's "absolute pollution exclusion" to be ambiguous and thus unenforceable, by urging on rehearing that the endorsement it had sought to enforce never was a part of the insurance policy issued to the policyholder. South Central Bell Telephone v. KaJon Food Stores of Louisiana, Inc., 644 So. 2d 357 (La. 1994), *vacated and remanded*, 644 So. 2d 368 (La. 1994).

In Bituminous Fire & Marine Ins. Co. v. Fontenot, 907 F. Supp. 193 (M.D. La. 1995), the federal district court soundly rejected the insurance company's argument that vacatur rendered *South Central Bell I* irrelevant. The court stated:

> While *South Central Bell I* may only have the precedential value of an advisory opinion, it does provide clear and unmistakable guidance to state and federal judges as to how, in the future, the Louisiana Supreme Court most likely would interpret [an "absolute"] pollution exclusion clause . . . It is totally inconceivable to this judge that any state or federal judge would not follow the supreme court's opinion in *South Central Bell I*.

Fontenot, 907 F. Supp. at 196-97. For other examples of precedent that have been removed from the law books, see Round Rock Plaza Venture v. Maryland Ins. Co., No. 03-95-00108-CV, 1996 Tex. App. LEXIS 142 (Tex. App. Jan. 17, 1996), *withdrawn, reh'g dismissed, appeal dismissed*, 1996 Tex. App. LEXIS 581 (Tex. App. Feb. 14, 1996); Circle "C" Ranch Co. v. St. Paul Fire & Marine Ins. Co., No. 33-93-388-CV (Tex. App. May 5, 1993), reported in MEALEY'S LITIG. REP.-INS., Section H (May 25, 1993), *withdrawn due to settlement*, 1993 Tex. App. LEXIS 1827 (Tex. App. May 19, 1993), *petition for publication denied*; Bankers Trust Co. v. Hartford Accident & Indem. Co., 518 F. Supp. 371, *order vacated*, 621 F. Supp. 685 (S.D.N.Y. 1981).

Perhaps with the advent of cases appearing on the Internet, this problem of case disappearance will "disappear." *See* Wendy R. Leibowitz, *'Dog' Cases Get Around on the 'Net*, NAT'L L.J., Oct. 14, 1996, at A11; Susan Dominus, *Reviving Dead Rulings on the Web*, AM. LAW. TECH., Spring 1997, at 24; Saundra Torry, *It's a Magical History Tour at 'Vacatur Center'*, WASH. POST, Mar. 10, 1997, at 7; *Firm Uses Web to Tackle Vacatur*, <http://www.ljx.com/litigation/vacatur.html> (re: Anderson Kill & Olick web site devoted to vacatur and vacated decisions).

334. *See, e.g.*, South Carolina Property and Cas. Ins. Guar. Ass'n v. WalMart Stores, Inc., 403 S.E.2d 625, 627 (1991).

335. *See* Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322 (1979).

336. Western Mut. Ins. Co. v. Yamamoto, 35 Cal. Rptr. 2d 698 (Cal. Ct. App. 1994).

337. *See* Marcia A. Mobilia, *Offensive Use of Collateral Estoppel Arising Out of Non-Judicial Proceedings*, 50 ALB. L. REV. 305 (1986), and cases discussed therein.

338. *See* 50 C.J.S. *Judgments* § 593 (Supp. 1992) (citing Lynch v. Commissioner of

of collateral estoppel promotes judicial integrity by preventing inconsistent decisions. Inconsistent decisions, one litigant pointed out to a New Jersey court, "threaten the public's perception of the judicial system as a dispenser of equal justice."[339] The United States Supreme Court has recognized that the doctrine advances the public policy objective of "foster[ing] reliance on judicial action by minimizing the possibility of inconsistent decisions,"[340] and protects the judiciary from acquiring the "aura of the gaming table,"[341] or reflecting "a lack of discipline and of disinterestedness on the part of the lower courts."[342] Absent the doctrine, one commentator has observed, "[t]he integrity of judicial decision-making would be risked at every relitigation."[343] Collateral estoppel protects the finality of judgments[344] and bars repetitive

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Internal Revenue, 216 F.2d 574 (7th Cir. 1954)).

Res judicata means "matter adjudged." BLACK'S LAW DICTIONARY 1305 (6th ed. 1990). Under the res judicata doctrine, a judgment bars a subsequent trial when the parties, subject matter and causes of action are identical or substantially identical. *See* Berisha v. Hardy, 474 A.2d 90, 91 (1984). *See also* Yoakum v. Hartford Fire Ins. Co., 923 P.2d 416 (1996) (claimant's cause of action for civil rights deprivation, racketeering, and various torts not barred under doctrine of res judicata by judgment in wrongful death action, where insurance company hired as expert witness police officer who had investigated accident and then changed testimony, and claims manager allegedly made certain misrepresentations, but finding summary judgment proper for other reasons).

339. Reply Brief of Respondent-Cross-Appellant Liberty Mut. Ins. Co. (Sept. 22, 1988) at 18, Westinghouse Electric Corp. v. Aetna Cas. Co., C.A. Nos. L 069351-87, L 069352-87 (New Jersey Super.Ct. App. Div.) (*citing* Pierce v. Cook & Co., 518 F.2d 720, 723-24 (10th Cir. 1975)). *See also* Schwarz v. Public Adm'n., 246 N.E.2d 725, 730-31, (1969) (collateral estoppel reduces "the number of inconsistent results which are always a blemish on a judicial system"); Colin Hugh Buckley, *Issue Preclusion and Issues of Law: A Doctrinal Framework Based on Rules of Recognition, Jurisdiction and Legal History*, 24 HOUS. L. REV. 875 (1987) (doctrine avoids the "embarrassment of a later decision contradicting an earlier"). *But see* Rex R. Perschbacher, *Rethinking Collateral Estoppel: Limiting the Preclusive Effect of Administrative Determination in Judicial Proceedings*, 35 U. FLA. L. REV. 422, 450 (1983) ("[a]lthough inconsistent decisions are something of an embarrassment, courts seem to be able to live with them").

340. Montana v. United States, 440 U.S. 146, 153-54 (1979). *See also*, United States v. Stauffer, 464 U.S. 165, 176 (1984) (White, J., concurring) (one purpose of doctrine is to prevent inconsistent adjudications).

341. Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322 (1979) (*quoting* Blonder-Tongue Lab., Inc. v. University of Ill. Found., 402 U.S. 313 (1974)).

342. *Id.* (*quoting* Kerotest Mfg. Co. v. C-O-Two Co., 342 U.S. 180 (1952)).

343. *Buckley, supra* note 339, at 875.

344. *See Montana*, 440 U.S. at 153-54. *See also* Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 599 (6th Cir. 1982).

litigation.

The doctrine of collateral estoppel evolved for the purpose of preserving the dignity of judicial decisions and the judicial system, and it also serves additional public policy goals.[345] The doctrine shields litigants from the expense and vexation of multiple lawsuits, and shields courts from the depletion of judicial resources associated with needless relitigation.[346] It prevents estopped litigants from threatening relitigation against nonparties to the first action as a means of coercing concessions, and encourages settlements among litigants who wish to avoid its effect later.[347] The doctrine protects litigants, promoting fairness, while boosting the public's confidence in the judicial system.[348]

The doctrine may be applied "defensively," typically to estop a plaintiff from asserting a claim which the plaintiff previously litigated and lost against another litigant,[349] or "offensively" to estop a defendant from relitigating

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345. *See Buckley, supra* note 339, at 879-880.

346. *See Blonder-Tongue Lab.*, 402 U.S. 313, 328-329 (1974) (doctrine promotes judicial economy); Setter v. A.H. Robbins Co., 748 F.2d 1328, 1331 (8th Cir. 1984)(no judicial economy and hence no collateral estoppel when some parties still would be entitled to assert claim).

See also Insurers' Memorandum of Law in Support of the Application of New York Law (filed Oct. 31, 1990), Hatco v. W.R. Grace Corp., C.A. (No. 89-1031) (D.N.J.) (collateral estoppel "has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation") (*quoting Parklane Hosiery*, 439 U.S. at 326); [Plaintiff Insurance Companies'] Memorandum of Points & Authorities in Support of Plaintiffs' Motion for Summary Judgment (filed Sept. 22, 1989) at 2, 5, Highlands Ins. Co. v. Celotex Corp., C.A. (No. 89-2258) (JHP) (D.D.C. 1989) (*quoting* Montana v. United States, 440 U.S. at 153-54); Memorandum of Law in Support of Hannover Re's Motion for Summary Judgment (filed Nov. 16, 1992) at 6, In the Matter of the Liquidation of Union Indem. Ins. Co. of New York, (Nos. 41292/85, 23453/85) (N.Y.) (doctrine of collateral estoppel conserves resources of courts and litigants) (*citing* Kaufman v. Eli Lilly & Co., 65 N.Y.2d 449, 455 (1985)).

347. *See* Marcia A. Mobilia, *Offensive Use of Collateral Estoppel Arising Out of Non-Judicial Proceedings,* 50 ALB. L. REV. 305, 321 (1986) (*citing* Montana v. United States, 440 U.S. 147, 162-64 (1979)).

348. *See, e.g.*, Jay Carlisle, *Getting a Full Bite of the Apple: When Should the Doctrine of Issue Preclusion Make an Administrative or Arbitral Determination Binding in a Court of Law?*, 55 FORDHAM L. REV. 63, 84 (Oct. 1986), and cases cited therein (policies supporting collateral estoppel: "(1) promote fairness; (2) prevent inconsistent judgments and to achieve uniformity and certainty; (3) finalize disputes among the parties; and (4) conserve judicial resources").

349. *See Parklane Hosiery*, 439 U.S. at 328-29 (1979) (*citing Blonder-Tongue Lab.*, 402 U.S. 313 (1974)).

issues which it previously litigated and lost against another plaintiff.[350] In Parklane Hosiery Co., Inc. v. Shore,[351] the United States Supreme Court sanctioned the offensive use of collateral estoppel, and acknowledged that offensive use of the doctrine presents two problems not associated with defensive use of collateral estoppel.[352] The Court was asked to decide whether the defendants in a stockholders' class action were collaterally estopped to deny that they issued a false proxy statement when the issue had been decided against them in a Securities and Exchange Commission action.[353] Offensive collateral estoppel, the Court initially acknowledged, encourages increased litigation because potential plaintiffs lack incentive to intervene in the first action and have only to gain by bringing a second action once the defendant loses.[354] By contrast, defensive collateral estoppel promotes judicial economy by precluding a litigant from relitigating an issue for as long as the litigant can find new adversaries.[355]

Second, the Court acknowledged that if used indiscriminately, offensive collateral estoppel may prove unfair to a defendant. This might be the case when the defendant lacked sufficient incentive to litigate vigorously in the first action,[356] when the prior judgment is inconsistent with other prior

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350. *Id. See also*, [Plaintiff Insurance Companies'] Reply Memorandum in Support of Their Motion for Summary Judgment (filed Nov. 17, 1989) at 10, Highlands Ins. Co. v. Celotex Corp., C.A. (No. 89-2258) (JHP) (D.D.C. 1989) (explaining offensive and defensive use of collateral estoppel).

351. 439 U.S. at 328-29.

352. *See id.* at 330.

353. *See id.* at 324-25.

354. *See id.* at 330. *See also*, Memorandum of Law of United States Fidelity and Guar. Co. in Opposition to Pepper's Steel and Alloys, Inc.'s and Norton Bloom's Motion for Partial Summary Judgment Based upon the Doctrines of Collateral and Judicial Estoppel (filed Dec. 8, 1988) at 6–7, Pepper's Steel and Alloys, Inc. v. United States Fidelity and Guar. Co., No. 86-1531-CIV-EPS (S.D.Fla. 1998) ("offensive use of collateral estoppel encourages an increase in the total amount of litigation").

355. *See id.* at 329. *See also*, [Plaintiff Insurance Companies'] Reply Memorandum in Support of Their Motion for Summary Judgment (filed Nov. 17, 1989) at 11, Highlands Ins. Co. v. Celotex Corp., C.A. No. 89-2258 (JHP) (D.D.C.) ("'defensive collateral estoppel gives a plaintiff a strong incentive to join all potential defendants in the first action if possible'" (*quoting* Parklane Hosiery Co., Inc., 439 U.S. at 329-30) (*emphasis deleted*)).

356. *See* Memorandum of Law of United States Fidelity and Guar. Co. in Opposition to Pepper's Steel and Alloys, Inc.'s and Norton Bloom's Motion for Partial Summary Judgment Based upon the Doctrines of Collateral and Judicial Estoppel (filed Dec. 8, 1988) at 6, 7, Pepper's Steel and Alloys, Inc. v. United States Fidelity and Guar. Co., No. 86-1531-CIV-EPS

judgments,[357] or when the second action affords procedures unavailable in the first action that could cause a different result.[358] The Court concluded that offensive collateral estoppel was appropriate under the facts of the case, but that trial courts must have broad discretion to determine when to apply the doctrine offensively.[359]

(S.D. Fla.) (courts should not apply collateral estoppel when a party could not have foreseen that its position asserted in one litigation would impact future litigation or when the judgment relied upon is inconsistent with one or more previous judgments) (*citing* Johnson v. United States, 576 F.2d 605, 615 (5th Cir. 1978)).

But see American Ins. Co. v. Messinger, 371 N.E.2d 798, 803 (1977) ("The consequences of issue preclusion between the same parties are not to be vitiated by lack of enthusiasm or effort on the part of the loser.").

357. *See Parklane Hosiery*, 439 U.S. at 330-31; RESTATEMENT (SECOND) OF JUDGMENTS 29 cmt. f (1982) (Collateral estoppel "underl[ies] confidence that the result reached is substantially correct, [but w]here a determination relied on as preclusive is itself inconsistent with some other adjudication of the same issue, that confidence is generally unwarranted."); and Brief of Defendant/Appellant Liberty Mutual Insurance Co. (dated Aug. 16, 1985) at 38, Abex Corp. v. Maryland Casualty Co., No. 85-5602 (D.C. Cir.) (arguing it should not be bound by prior holding of same court finding broad, continuous trigger of coverage because the prior case was "only one of several differing decisions on trigger of coverage to which [it] has been a party").

358. *See Parklane Hosiery*, 439 U.S. at 330-31. *See also* Memorandum of Plaintiff American Motorists Ins. Co. [AMICO] in Opposition to Defendant's Motion to Stay or Dismiss (dated Mar. 20, 1989) at 14, American Motorists Ins. Co. v. International Paper Co., No. 88-CV-898 (N.D.N.Y.) (court's decision in a forum non conveniens motion was insufficient basis for application of *defensive* collaterally estoppel because "[i]ssues are not identical if the second action involves application of a different legal standard, even though the factual setting of both suits be the same") (quoting 18 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4417 (1981) and First Northwestern Trust Co. v. IRS, 622 F.2d 387, 390 (8th Cir. 1980)).

359. *See Parklane Hosiery*, 439 U.S. at 330-31. In District of Columbia court, several insurance companies explained that although the factors laid out in *Parklane* are relevant in determining whether the court should apply offensive collateral estoppel, "these [factors] are not immutable limitations whose existence automatically prevents use of offensive collateral estoppel." [Plaintiff Insurance Companies'] Reply Memorandum in Support of Their Motion for Summary Judgment (filed Nov. 17, 1989) at 12, Highlands Ins. Co. v. Celotex Corp., C.A. No. 89-2258 (JHP) (D.D.C.) (*citing* Parklane Hosiery Co., Inc., 439 U.S. at 331).

See also Designated Defendants' Opposition to FMC's Motion for Partial Summary Adjudication of Issues Respecting Certain Policies Issued by Defendants on Grounds of Judicial Estoppel and Collateral Estoppel (filed Oct. 31, 1988) at 29, FMC Corp. v. Liberty Mut. Ins. Co., No. 643058 (Cal. Super. Ct. 1988) (arguing that non-mutual offensive use of collateral estoppel to preclude insurance companies from asserting effect of pollution exclusion

B. Elements of Collateral Estoppel

Several insurance companies outlined the elements of collateral estoppel to a federal district court in New Jersey in this way:

> 1. the issue decided in the prior litigation is identical to that in the later action;
> 2. the party to be collaterally estopped was a party or in privity with a party to the prior action;
> 3. there is a final judgment on the merits;
> 4. the issue decided was essential to the prior judgment; and 5. the party to be collaterally estopped had a full and fair opportunity to litigate the issue in the prior action.[360]

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counter to insurance industry's successful position in proceeding before the West Virginia Insurance Commissioner would be "inefficient" and "unfair." The insurance companies also contended that collateral estoppel applies only when the party to be estopped *lost* in the prior action and that here, the insurance companies *won* in the prior action. *Id.* at 3, 25.)

See David W. Steuber, *The Doctrines of Judicial and Collateral Estoppel: The 1970 Pollution Exclusion Clause Proceedings Before the West Virginia Insurance Commissioner*, 2 ENV. L. J. 317, 325-28 (1990) (explaining potential judicial estoppel and collateral estoppel effect of West Virginia Insurance Commissioner's approval of 1970 pollution endorsement based on insurance companies' assertion that endorsement does not limit broad pollution coverage). Mr. Steuber is an attorney who regularly represents policyholders.

360. Insurers' Memorandum of Law in Support of the Application of New York Law (filed Oct. 31, 1990) at 9, Hatco v. W.R. Grace Corp., C.A. No. 89-1031 (D.N.J.) (citing Drum v. Nasuti, 648 F. Supp. 888, 889 (E.D. Pa. 1986), *aff'd*, 828 F.2d 104 (3d Cir. 1987)). *See also* Montana v. United States, 440 U.S. 146, 153 (1979); Oldham v. Pritchell, 599 F.2d 274 (8th Cir. 1979); Kauffman v. Moss, 420 F.2d 1270 (3d Cir. 1970); McLendon v. Continental Group, Inc., 660 F.Supp. 1553 (D.N.J. 1987); and Drazin v. Shanik, 171 N.J.Super. 76, 79 - 80 (N.J. Super Ct. App. Div. 1979).

In *Blonder-Tongue Laboratories, Inc.*, 402 U.S. 313, the Supreme Court discarded the mutuality requirement, which had limited the use of collateral estoppel to those cases in which the prior judgment bound both parties. The Court reasoned that a plaintiff should not be allowed to relitigate a decided issue each time the plaintiff is able to identify an unrelated defendant against which to bring a claim. *Id.* at 329. In *Parklane Hosiery* Co., 439 U.S. at 327, the court explained that the mutuality requirement had been criticized almost from inception because it "fail[ed] to recognize the obvious difference in position between a party who has never litigated an issue and one who has fully litigated and lost." *See also* Gary R. Cunningham, Comment, *Collateral Estoppel: The Changing Role of the Rule of Mutuality*, 41 MO. L. REV. 521, 526 (1976).

The threshold inquiry is whether the identical issue was decided in the earlier proceeding. The issues in two actions are said to be "identical" when the same facts and evidence will support the courts' findings in both proceedings.[361]

The next inquiry is whether the litigant to be estopped is the same or in privity with the party in the former action. Courts in recent years have adopted broad definitions of the "parties" and "privies" that may be collaterally estopped by a prior judgment.[362] A question of fact, privity has

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361. *See* Restatement (SECOND) OF JUDGMENTS § 27 cmt. c (1982).

In insurance coverage litigation, often a policyholder has purchased several insurance policies and already has litigated against one of its insurance companies the question of whether a loss is covered. Conversely, the insurance company may have litigated the interpretation of the insurance policy against another policyholder. Insurance companies have asserted inconsistent positions regarding whether collateral estoppel precludes litigation of the coverage question in the second action. *Cf.*, Brief of Appellant Stonewall Ins. Co. (dated June 28, 1989) at 13-14, Penn Re Inc. v. Stonewall Ins. Co., 708 F. Supp. 123 (E.D.N.C. 1988), *aff'd*, 894 F.2d 402 (4th Cir. 1990) (arguing no collateral estoppel effect when "separate [insurance] contracts, and therefore different issues, [are] involved") (*citing* Operating Engineers Pension Trust v. A-C Co., 859 F.2d 1336, 1339 (9th Cir. 1988), and Brief of Appellee Penn Re Inc., Penn Re Inc. v. Stonewall Ins. Co. at 13-14 ("Preclusion ordinarily is proper if the question is one of the legal effect of the document identical in all relevant respects to another document whose effect was adjudicated in a prior action. . . . [W]hen the first litigation establishes the meaning of terms in a contract, the fact that the second litigation involves a different contract does not preclude estoppel, if the second contract contains the same terms." (*quoting* 1B MOORE'S FEDERAL PRACTICE § 0.443(2) n.15 (1984), and National Labor Relations Board v. United Technologies Corp., 706 F.2d 1254 (2d Cir. 1983))); [Plaintiff Insurance Companies'] Memorandum of Points & Authorities in Support of Plaintiffs' Motion for Summary Judgment (filed Sept. 22, 1989) at 7-8, Highlands Ins. Co. v. Celotex Corp., C.A. No. 89-2258 (JHP) (D.D.C.) (arguing in support of collateral estoppel effect of decision of court of another jurisdiction; "[w]here, as here, an insured has litigated specific factual questions against some of its lower layer excess insurers, it is precluded from relitigating those same questions against other higher layer insurers even where the policy language in the higher layer policies differs slightly." (*citing* Pine Top Ins. Co. v. Public Utility District No. 1 of Chelan Cty., 676 F. Supp. 212, 215 (E.D. Wash. 1987); Chrysler Corp. v. New Castle Cty., 464 A.2d 75, 83 (Del. Super. 1983))); and [Plaintiff Insurance Companies'] Reply Memorandum in Support of Their Motion for Summary Judgment (filed Nov. 17, 1989) at 2-4, Highlands Ins. Co. v. Celotex Corp., C.A. No. 89 - 2258 (JHP) (D.D.C.) (same; and contending that identity of issues exists because cases involve same policyholder, broker and agent; similar policy language; insurance policies all took effect after a date when the disputed exclusionary language began to be used; and the policyholder's conduct and statements "admit" all asbestos-related disease claims are excluded).

362. *See* Notice of Hearing on Scottsdale Insurance Company's Demurrer to the

been defined as a "mutual or successive relationship to the same rights of property" that constitutes the subject matter of the litigation.[363]

Courts apply various standards to determine whether the litigant to be estopped is in privity with the litigant of the prior litigation. California courts, one litigant explained, apply the doctrine when the litigant to be estopped and the unsuccessful litigant in the prior litigation have a relationship "'sufficiently close' so as to justify application of the doctrine of collateral estoppel; [t]he emphasis is not on a concept of identity of the parties, but on the practical situation."[364] Michigan courts apply the doctrine of collateral estoppel to bar the relitigation of issues when the parties to be

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Complaint of Stephen D. Moses; [Insurance Company's] Memorandum of Points and Authorities in Support Thereof (dated Oct. 30, 1992) at 11, Stephen D. Moses v. International Surplus Lines Ins. Co., No. BC 061 836 (Cal. Super. Ct.).

363. *See* 50 C.J.S. *Judgments* § 788 (*citing* Crane Boom Life Guard Co. v. Saf-T-Boom Corp., 362 F.2d 317, 322 (1966), *cert. denied*, 386 U.S. 908 (1966)).

364. Notice of Hearing on Scottsdale Insurance Company's Demurrer to the Complaint of Stephen D. Moses; [Insurance Company's] Memorandum of Points and Authorities in Support Thereof (dated Oct. 30, 1992) at 11, Stephen D. Moses v. International Surplus Lines Ins. Co., No. BC 061 836 (Cal. Super. Ct.) (citing 50 C.J.S. *Judgments* § 788 (*citing* Clemmer v. Hartford Ins. Co., 587 P.2d 1098, 1102-03 (Cal. 1978); Ceresino v. Fire Ins. Exchange, 264 Cal.Rptr. 30, 33 (Cal. Ct. App. 1989); Brown v. Rahman, 282 Cal.Rptr. 815 (Cal. Ct. App. 1991); People *ex rel.* California v. Drinkhouse, 84 Cal.Rptr. 773, 776 - 77 (Cal. Ct. App. 1970))).

Insurance companies have argued that they lack privity under California law with the insurance rating bureaus that represented them in the proceedings before the West Virginia Insurance Commissioner regarding the 1970 polluter's exclusion. *See, e.g.,* Designated Defendants' (Insurance Companies') Opposition to FMC's Motion for Partial Summary Adjudication of Issues Respecting Certain Policies Issued by Defendants on Grounds of Judicial Estoppel and Collateral Estoppel (filed Oct. 31, 1988) at 28, FMC Corp. v. Liberty Mutual Ins. Co., No. 643058 (Cal. Super. Ct.). The court explained that a policyholder may establish privity between an insurance company and a rating bureau by proving that the insurance company was a member of the bureau in 1970, when the filings to approve the exclusion were submitted. FMC Corp. v. Liberty Mut. Ins. Co., No. 643058, slip op. at 6 (Cal. Super. Ct. Dec. 9, 1988). However, in Morton Int'l., Inc. v. General Accident Ins. Co. of Am., 629 A.2d 831, 874 (N.J. 1993), the New Jersey Supreme Court found privity between insurance companies and insurance rating bureaus, without regard to whether a particular insurance company was a member of the bureau in 1970, because the bureau acted as a representative of the insurance industry generally. The court's ruling extended to Lloyd's of London, which used language in its exclusion that varied slightly from the endorsement used by the rating bureaus.

estopped are "substantially the same."[365] Litigants have urged that this standard permits application of the doctrine when different sites and different facts are involved in the previous and current actions.[366] New York courts find privity when the litigant in the previous case and the litigant to be estopped "were necessarily interested in obtaining the same outcome as to a certain issue."[367] Explaining the standard to a federal district court, two insurance companies observed that "[p]rivity for this purpose certainly exists whenever the connection between the named party and the non-party is such that the interests of the non-party were effectively represented at the prior trial."[368] New Jersey courts have said that the issue of collateral estoppel is

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365. Memorandum in Support of Argonaut-Midwest Insurance Company's Motion for Summary Judgment Pursuant to Rule 12c or, in the Alternative Rule 56 of the Federal Rules of Civil Procedure (filed May 12, 1989) at 17, ARCO Industries v. Travelers Ins. Co., File No. K88-300A4 (W.D. Mich.) (*citing, e.g.*, Stolaruk Corp. v. Department of State Ins. and Transp., 319 N.W.2d 581, 583 (Mich. Ct. App. 1982)); and Brief in Support of Motion of Defendant Commercial Union Ins. Co. for Summary Judgment (filed April 19, 1989) at 6, ARCO Industries v. Travelers Ins. Co., File No. K88-300A4 (W.D. Mich.) (Under Michigan law, "[c]ollateral estoppel bars the relitigation of issues previously decided in a prior action where the parties to the actions are substantially identical, but the second suit is a different cause of action.") (citing Topps-Toeller, Inc. v. Lansing, 209 N.E.2d 843, 847 (Mich. Ct. App. 1973), *leave denied*, 390 Mich. 788 (1973); Wilcox v. Sealey, 132 Mich.App. 38, 346 N.W.2d 889 (Mich. Ct. App. 1984)).

366. *See* Memorandum in Support of Argonaut-Midwest Insurance Company's Motion for Summary Judgment Pursuant to Rule 12c or, in the Alternative Rule 56 of the Federal Rules of Civil Procedure (filed May 12, 1989) at 2, ARCO Industries v. Travelers Ins. Co., File No. K88-300A4 (W.D. Mich. 1989), (arguing that policyholder was collaterally estopped in federal court by state court holding that insurance companies have no duty to defend "potentially responsible party" letter from Environmental Protection Agency).

See also Insurers' Memorandum of Law in Support of Collaterally Estopping W.R. Grace & Co. from Claiming That New York Law is Inapplicable (filed May 14, 1991) at 4, The Maryland Cas. Co. v. W.R. Grace & Co., No. 88 Civ. 4337 (JSM) (S.D.N.Y.) (even when facts have changed significantly, collateral estoppel applies unless facts were essential to first judgment) (*citing* Montana v. United States, 440 U.S. 147, 159 (1979)).

367. Brief of Plaintiffs-Respondents Continental Casualty Company and Transportation Insurance Company (filed Oct. 2, 1991) at 53-54, Continental Casualty Co. v. Rapid-American Corp., No. 24112/90 (N.Y. Sup. Ct. App. Div.) (*citing, e.g.*, Tolley v. American Transit Ins. Co., 638 F. Supp. 1191, 1194 (S.D.N.Y. 1986); Watts v. Swiss Bank Corp., 265 N.E.2d 739, 743 (N.Y. 1970)). The insurance companies maintained that the policyholder was bound by a judgment against a company that merged with another company to become the policyholder.

368. *Id.* at 53 (citing Watts v. Swiss Bank Corp., 265 N.E.2d at 743).

The question of privity sometimes arises when a first court has found a policyholder liable in tort to a third party, and a second court must determine whether issue determinations

primarily a matter of whether or not a litigant has "had his day in court on an issue, rather than whether he has had his day in court on that issue against a particular defendant."[369]

Most courts and the Restatement, Second, of Judgments apply collateral estoppel when an issue has been "actually litigated" in the prior court and when the litigant to be estopped had "a full and fair opportunity" to litigate the issue, but did not.[370] Litigants, too, generally acknowledge that the issue need not have been actually litigated in the first action if the litigant to be estopped had a "full and fair opportunity" to litigate.[371] Some authorities have

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rendered in the first action have preclusive effect in litigation between the policyholder and the insurance company to determine the insurance company's duty to pay the judgment. Citing the differing issues and standards involved in the two proceedings, policyholders assert that a determination of policyholder liability in the underlying action does not have preclusive effect against the policyholder. *See* John K. DiMugno, *Insurance Coverage for Intentional and Criminal Acts: Special Issues*, INS. L. BRIEFINGS 179, 193 (Dec. 1988) ("The issue of the collateral estoppel effect of the underlying liability suit on a subsequent coverage action rarely arises . . . [because] it is much easier to establish civil liability [in the first action]. . . than to establish that the . . . intentional harm exclusion preclude[s] coverage for that liability.").

Insurance companies have briefed the binding effect upon insurance companies of issues determined in the first action. Brief of Defendant/Appellant Liberty Mutual Insurance Co. (dated Aug. 16, 1985) at 24, Abex Corp. v. Maryland Casualty Co., (No. 85-5602 (D.C. Cir.) (citing Patrons Mutual Ins. Assn. v. Harmon, 732 P.2d 741 (Kan. 1987)) ("The Kansas Supreme Court held that a liability insurer that does not provide a defense to [the policyholder in the underlying action] is indeed to be deemed a 'privy,' and thus is collaterally estopped to relitigate factual issues decided in the liability action."); Brief of Defendant-Appellee (dated Oct. 29, 1982) at 26, American Ins. Co. v. Northern Am. Co. for Property and Cas. Ins., No. 82-7569 (2d Cir.) ("[B]asic collateral estoppel law holds that an insurer who has controlled, or had an opportunity to control, its insured's defense in a litigation is bound by all adverse factual findings in subsequent litigation with third parties." (citing C. APPLEMAN, INSURANCE LAW AND PRACTICE §1521 (1980)).

369. McAndrew v. Mularchuk, 183 A.2d 74 (N.J. 1962).

370. *See* Restatement (SECOND) OF JUDGMENTS § 29 (1980); Schwarz v. Public Adm'r., 246 N.E.2d 725, 729 (N.Y. 1969) (modifying "actually litigated" test). *But see* Konstantinidis v. Chen, 626 F.2d 933, 936 n.6 (D.C. Cir. 1980) (collateral estoppel "doctrine does not apply if the parties did not actually litigate the issue in the prior proceeding").

371. *See, e.g.*, Continental Casualty's Supplemental Reply Memorandum on Preclusion of Relitigation That New York Law Applies to These Contracts at 9 n.1, The Maryland Cas. Co. v. W.R. Grace & Co., No. 88 Civ. 4337 (JSM), 1991 U.S. Dist. LEXIS 15354 (S.D.N.Y. Oct. 24, 1991) (arguing "full and fair opportunity" standard and explaining that in Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982), the Supreme Court "equate[d] full and fair opportunity to litigate with the requirements of due process"); Argonaut-Midwest Insurance Company's Motion for Summary Judgment Pursuant to Rule 12c or, in the Alternative Rule

interpreted the litigation element, under either the "actually litigated" or "full or fair opportunity" standard, to allow collateral estoppel only against a litigant that lost in the prior action. Because rarely will a litigant invoke collateral estoppel to bind an adversary to a judgment in the adversary's favor, it is not surprising that many courts in dicta discuss the doctrine in terms of a losing party. When the doctrine specifically is limited to instances in which the litigant to be estopped lost in the prior case, the court usually states that the litigant must have been aggrieved and thus had the right to appeal the prior judgment.[372] Other courts have applied the doctrine to preclude a litigant from asserting a position contrary to its prevailing position

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56 of the Federal Rules of Civil Procedure (filed May 12, 1989) at 3, 17, ARCO Indus. v. Travelers Ins. Co., No. K88-300A4 (W.D. Mich.) ("A broad application [of collateral estoppel] bars . . . those claims arising out of the same transaction which a party could have brought but did not." (citing San Joaquin County v. Dewey, 306 N.W.2d 418 (Mich. Ct. App. 1981))); Memorandum of Law in Support of Hannover Re's Motion for Summary Judgment (filed Nov. 16, 1992) at 6, *In re* the Liquidation of Union Indem. Ins. Co. of New York, Nos. 41292/85, 23453/85 (N.Y. Sup. Ct.) ("Since the issue on this motion [for summary judgment] is identical to one decided in the earlier motion, and the Liquidator has had a full and fair opportunity to litigate the issue in this action, principles of collateral estoppel mandate that this motion be granted."); Insurers' Memorandum of Law in Support of Collaterally Estopping W.R. Grace & Co. from Claiming That New York Law is Inapplicable (filed May 14, 1991) at 4, The Maryland Cas. Co. v. W.R. Grace & Co., No. 88 Civ. 4337 (JSM) (S.D.N.Y. 1991) ("millions of dollars at stake in the prior adjudications provided more than sufficient incentive for [opponent] to fully litigate").

But see Brief of Defendant/Appellant Liberty Mutual Insurance Co. (dated Aug. 16, 1985) at 41-43, Abex Corp. v. Maryland Cas. Co., No. 85-5602 (D.C. Cir.) (contending it should not be collaterally estopped by choice of law determination of prior court because the issue was raised and determined by the court *sua sponte* and thus not actually litigated by the parties).

372. *See, e.g.*, Designated Defendant [Insurance Companies]' Opposition to FMC's Motion for Partial Summary Adjudication of Issues Respecting Certain Policies Issued by Defendants on Grounds of Judicial Estoppel and Collateral Estoppel at 25, FMC Corp. v. Liberty Mut. Ins. Co., No. 643058 (Cal. Super. Ct.) ("[T]he party to be estopped must have had an identity or community of interest with and adequate representation by the losing party in the earlier litigation.") (quoting Torres v. Friedman, 215 Cal. Rptr. 604, 607 (Cal. Ct. App. 1985))). The insurance companies argued that the 1970 pollution exclusion hearings before the West Virginia Insurance Commissioner cannot form the basis for collateral estoppel because the insurance companies won in the first action and thus did not have the right to appeal the favorable judgment (citing Anderson-Cottonwood Disposal Service v. Workers' Compensation Appeals Bd., 185 Cal. Rptr. 336 (Cal. Ct. App. 1982); RESTATEMENT (SECOND) OF JUDGMENTS § 28 (1980)).

in a prior action.[373]

The doctrine is said to apply to issues and facts that are "directly in issue and that are necessary to support the judgment rendered in the prior action."[374]

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373. *See, e.g.*, Welch v. Elevating Boats, 516 F. Supp. 1245 (D. La. 1981) (employee who had succeeded in administrative claim for benefits on theory that he was a seaman was collaterally estopped from pursuing action for damages for same injury on theory he was not a seaman).

Many insurance companies have recognized in the context of litigation that a favorable judgment may constitute the basis of collateral estoppel. *See, e.g.*, Brief of Defendants-Respondents/Cross-Appellants Aetna Casualty & Surety Co. (undated) at 85, Diamond Shamrock Chem. Co. v. Aetna Cas. & Sur. Co., No. A-694-89T1 (N.J. Super. Ct. App. Div.) (arguing collateral estoppel precludes policyholder from asserting a position inconsistent with a successful prior position); Brief of Appellant Seaboard Surety Co. (filed April 17, 1994) at 30, CNA Cas. of Cal. v. Seaboard Sur. Co., No. 761572 (Cal. Super. Ct.) 222 Cal. Rptr. 276 (Cal. Ct. App. 1986), *reh'g denied*, No. 1 Civ. AO 21608 (Feb. 13, 1986) (arguing insurance company which defended suit against the policyholder is collaterally estopped from taking a position inconsistent with the policyholder's successful prior position); Non-Party Insurance Services Office, Inc.'s Response in Opposition to Plaintiff's Motion to Enforce Subpoena (filed Mar. 9, 1992) at 16, Hoechst Celanese Corp. v. National Union Fire Ins. Co. of Pittsburgh, Pa., C.A. No. 89C-SE-35-1-CV (Del. Super. Ct.) (arguing a party is collaterally estopped by favorable and unfavorable results in prior action); Supplemental Memorandum of Points and Authorities of Home [Insurance Company] and Continental [Casualty Company] Re: Application of New York Law (filed Aug. 31, 1991) at 9, Champion Int'l. Corp. v. Aetna Cas. & Sur. Co., No. 90-2-09616-5 (Wash.) "'Having already obtained a favorable judgment premised on her initial position plaintiff is estopped from now taking a conflicting position. Whether this is described as "collateral estoppel" of some other species of estoppel, the result is the same: A District of Columbia court would be giving something less than full faith and credit to the Virginia judgment if, at this stage, it found that district law rather than Virginia law governed the rights and liabilities of the parties." (quoting Semler v. Psychiatric Inst. of Washington, D.C., Inc., 575 F.2d 922 (D.C. Cir. 1978)). The relationship between collateral estoppel and the full faith and credit doctrine is discussed in Gregory S. Getschow, Comment, *If at First You Do Succeed: Recognition of State Preclusion Law in Subsequent Multistate Actions*, 35 VILL. L. REV. 253, 261-66 (1990) ("While full faith and credit applies to entire claims reduced to judgments, issue preclusion concerns only previously litigated issues. Thus, issue preclusion occupies a more ambiguous position with respect to full faith and credit.").

374. Brief of Defendant-Respondent Affiliated FM Ins. Co. and First State Insurance Co. at 31, Morton Int'l. Inc. v. General Accident Ins. Co., 629 A.2d 831 (N.J. 1993), *cert. denied*, 512 U.S. 1245 (1994), *reh'g denied*, 512 U.S. 1277 (1994) (quoting Allesandra v. Gross, 187 N.J. Super. 96, 105 (N.J. Super. Ct. App. Div. 1982), State v. Gonzales, 75 N.J. 181, 189 (1977)).

See Continental Casualty's Supplemental Reply Memorandum on Preclusion of Relitigation That New York Law Applies to These Contracts at 8, The Maryland Casualty Co. v. W.R. Grace & Co., No. 88 Civ. 4337 (JSM) (S.D.N.Y. Oct. 25, 1991) ("Necessary

The requirement that the issue must have been "necessarily decided" or "essential to the judgment" is intended to assure that the court took "appropriate care in determining [the] issue"[375] in the prior action.

Finally, some courts have ruled that the issue to be precluded must have been determined by a valid and "final" judgment or order.[376] The Restatement, Second, of Judgments, section 13, comment q explains that a determination is "final" when it is "adequately deliberated and firm, even if not final in the sense of forming a basis for a judgment already entered."[377]

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determination 'does not mean that the [prior] finding must be so crucial that, without it, the judgment could not stand.' Mother's Restaurant Inc. v. Mama's Pizza, Inc., 723 F.2d 1566, 1571 (Fed. Cir. 1983). It is adequate that prior finding was not 'mere *dicta*.'") (The court ruled that the issue in dispute -- choice of law -- was not necessarily or actually decided in the prior action. Memorandum and Order, The Maryland Cas. Co. v. W.R. Grace & Co., *supra*.

See also [Mid-Century Insurance Co.'s] Petition for Review, Urban v. Mid-Century Insurance Co. (dated Jan. 11, 1996) at 14, Urban v. Mid-Century Insurance Co., No. 17171-6-II (Wash. Ct. App.) ("a fact determined in a trial on the merits will bar a party to that trial from disputing the determined fact under the doctrine of collateral estoppel").

375. Brief of Defendant-Respondent Affiliated FM Ins. Co. and First State Insurance Co. at 24, Morton Int'l. Inc. v. General Accident Ins. Co., 629 A.2d 831 (N.J. 1993) (citing RESTATEMENT (SECOND) OF JUDGMENTS § 27, cmt. h (1981)); Metcalfe Brothers v. American Mut. Liab. Ins. Co., 484 F. Supp. 826, 830 (D.Va. 1980) ("It is only human nature for a trier of fact or law to gloss over a matter that he determines to relate only superficially to the final decision.").

376. *See, e.g.,* Laurel, Inc. v. Commissioner of Transp., 428 A.2d 789 (Conn. App. Ct. 1980) (application of the doctrine of collateral estoppel requires a valid final judgment by a court of competent jurisdiction in the first action) *quoted in* [Republic Insurance Company's and International Insurance Company's] Memorandum of Law in Opposition to Defendants' Motion to Dismiss (undated) at 4, Republic Insurance Co. v. North Am. Philips Corp., A.C. No. 10096, (Conn. App. Ct.). In *Republic Insurance Co.*, the excess insurance companies appealed a ruling that they must "drop down" to pay claims that would have been covered by a now-insolvent primary insurance company. The policyholder countered that the decision was not final and thus the appellate court should dismiss the appeal. Meanwhile, the policyholder invoked collateral estoppel in another action to give preclusive effect to the trial court's determination in this action. The insurance companies castigated the policyholder for asserting "mutually repugnant positions" regarding the finality of the trial court's judgment. *See* [Republic Insurance Company's and International Insurance Company's] Memorandum of Law in Opposition to Defendants' Motion to Dismiss at 4, 5, Republic Ins. Co. v. North Am. Philips Corp., *supra*.

377. RESTATEMENT (SECOND) OF JUDGMENTS § 13, cmt. q (1980) *quoted in* Brief of Defendant/Appellant Liberty Mutual Insurance Co. (dated Aug. 16, 1985) at 11, Abex Corp. v. Maryland Cas. Co., No. 85-5602.(D.C. Cir). Liberty Mutual added, "that the parties were heard, that the court supported its decision with a reasoned opinion, that the decision is subject

California courts hold that an order constitutes a "final judgment" for purposes of the doctrine when it "'is on the merits . . . based on the substantive law,' and 'no further judicial act remains to be done.'"[378] The law differs among jurisdictions as to whether the finality requirement is satisfied to preclude a litigant from asserting a position inconsistent with a judgment which is pending on appeal.[379]

The doctrine of collateral estoppel can be a powerful tool to preclude a litigant from asserting a position that is inconsistent with a prior position that has led to a judicial determination. The doctrine bars a litigant from litigating a position on an issue of fact or law that has been litigated and determined and is essential to a valid and final judgment. The doctrine advances the integrity of the judiciary by fostering reliance on judicial actions and minimizing the possibility of inconsistent decisions, and protects litigants from repetitive litigation. Moreover, decisions of the United States Supreme Court and lower courts over the past three decades have relaxed and clarified the elements of collateral estoppel, resulting in a doctrine that is more easily invoked and thus more effective in precluding litigants from arguing inconsistent positions.[380]

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to appeal or was in fact reviewed on appeal, are factors supporting the conclusion that the decision is final for the purpose of preclusion." *Id.*

378. Notice of Hearing on Scottsdale Insurance Company's Demurrer to the Complaint of Stephen D. Moses; [Insurance Company's] Memorandum of Points and Authorities in Support Thereof (dated Oct. 30, 1992) at 10, Stephen D. Moses v. International. Surplus Lines Ins. Co., No. BC 061 836 (Cal. Super. Ct.) (quoting Boccardo v. Safeway Stores, Inc., 184 Cal. Rptr. 903 (Cal. Ct. App. 1982)).

379. *See* [Plaintiff Insurance Companies'] Memorandum of Points & Authorities in Support of Plaintiffs' Motion for Summary Judgment at 5 n.6, Highlands Ins. Co. v. Celotex Corp., (D.D.C.) No. 89-2258 (JHP) ("The federal rule is that pendency of an appeal does not suspend the operation of final judgment for purposes of collateral estoppel, except where appellate review constitutes a trial de novo." (citing Nixon v. Richey, 513 F.2d 430, 438 n.75 (D.C. Cir. 1975)); and *In re* Amica Mut. Ins. Co. v. Jones, 85 A.D.2d 727, 728, (N.Y. App. Div. 1981) ("[T]he rule in New York . . . is that the mere pendency of an appeal does not prevent the use of the challenged judgment as the basis of collaterally estopping a party to that judgment in a second proceeding."). *But see* 7 WITKIN, CALIFORNIA PROCEDURE: JUDGMENT §§ 211-12, 648-49 (3d ed. 1985) (pending appeal, although appeal is not taken, judgment is not conclusive and may not be given collateral estoppel effect in California) (citing Mueller v. J.C. Penney Co., 219 Cal.Rptr. 272, 277 (Cal. Ct. App. 1985)).

380. *See* Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322 (1979) (recognizing offensive use of collateral estoppel; doctrine applied to administrative determinations); Blonder-Tongue Lab., Inc. v. University of Illinois Found., 402 U.S. 313 (1974) (discarding mutuality requirement); Schwarz

C. Administrative Collateral Estoppel

With the increase over recent years in the proportion of decisions that are litigated before administrative agencies,[381] a body of law has emerged specifically addressing the preclusive effect of administrative determinations. Termed "administrative collateral estoppel," the principle has become broadly accepted that a litigant may be estopped from relitigating in court a decision rendered by an administrative determination.[382]

To be given collateral estoppel effect, the prior administrative proceeding must have been equivalent essentially to a judicial, as distinct from a legislative, proceeding.[383] In Long Island Lighting Co. v. IMO Industries, Inc.,[384] the United States Court of Appeals for the Second Circuit, applying

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v. Public Adm'r., 246 N.E.2d 725, 729 (N.Y. 1969) (adopting "full and fair opportunity to litigate" standard).

381. *See* David A. Brown, Note, *Collateral Estoppel Effects of Administrative Agency Determinations: Where Should Federal Courts Draw the Line?*, 73 CORNELL L. REV. 817, 817 (1988); Rex R. Perschbacher, *Rethinking Collateral Estoppel: Limiting the Preclusive Effect of Administrative Determination in Judicial Proceedings*, 35 U. FLA. L. REV. 422, 454 (1983).

382. *See generally Parklane Hosiery*, 439 U.S. 322 (1979); Spearman v. Delco Remy Div. of General Motors Corp., 717 F. Supp. 1351, 1357 (S.D. Ind. 1989).

The policy favoring finality of administrative decisions was briefed by Aetna Life Insurance Company in Edwards v. Aetna Life Ins. Co., 690 F.2d 595 (6th Cir. 1982). *See* Brief of Defendant Appellee Aetna Life Ins. Co. at 8-9, Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 598 (6th Cir. 1982). The court agreed that repetitive litigation should be prevented, but pointed out that the issue before the court, the cause of the policyholder's disease, had not been fully litigated and decided in the administrative action. *Edwards*, 690 F.2d at 598 (citing Tipler v. E.I. du Pont de Nemours and Co., 443 F.2d 125, 128 (6th Cir. 1971)).

383. *See* Citywide Learning Ctr., Inc. v. William C. Smith & Co., Inc., 488 A.2d 1310 (D.C. 1985). *See also* Designated Defendant [Insurance Companies'] Opposition to FMC's Motion for Partial Summary Adjudication of Issues Respecting Certain Policies Issued by Defendants on Grounds of Judicial Estoppel and Collateral (dated Oct. 31, 1988) at 18, FMC Corp. v. Liberty Mut. Ins. Co., No. 643058 (Cal.Super.Ct.) (administrative decision may be afforded collateral estoppel effect when the agency was "acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate.") (quoting People v. Sims, 186 Cal. Rptr. 77, 83 (Cal. 1982); (United States v. Utah Constr. Co., 384 U.S. 394 (1966)).

For a discussion of New York courts' application of collateral estoppel to preclude positions contrary to administrative and arbitration decisions, see Jay Carlisle, *Getting a Full Bite of the Apple: When Should the Doctrine of Issue Preclusion Make an Administrative or Arbitral Determination Binding in a Court of Law?*, 55 FORDHAM L. REV. 63, 63-64 (1986).

384. 6 F.3d 876 (2d Cir. 1993).

New York law, employed a "'multifaceted inquiry'" to determine whether an administrative proceeding is "quasi-judicial" in nature.[385] The court looked to whether:

> (1) "the agency has the statutory authority to act adjudicatively";
>
> (2) "the procedures employed . . . assure 'that the facts asserted were adequately tested, and that the issue was fully aired'";
>
> (3) "'giving preclusive effect to the [administrative] determination would be unfair, or was in any way unexpected'"; and
>
> (4) upon "look[ing] at the over-all context of the agency's decision[,] according a preclusive effect to a particular agency determination is consistent with the agency's scheme of administration."[386]

The *Long Island Lighting Co.* court focused on the second and third inquiries. In analyzing whether adequate procedures were employed, courts in New York and elsewhere consider such factors as whether a considered, written decision was issued and whether the litigant to be estopped was

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385. *See id.* at 885 (affirming district court's judgment based on administrative determination (quoting Allied Chem. v. Niagara Mohawk Power Corp., 528 N.E.2d 153, 155 (N.Y. 1988), *cert. denied*, 488 U.S. 1005 (1989))).

386. *Long Island Lighting Co.*, 6 F.3d at 886 (quoting Allied Chem. v. Niagara Mohawk Power Corp., 528 N.E.2d at 155). *See also* Spearman v. Delco Remy Division of General Motors Corp., 717 F. Supp. 1351 (S.D. Ind. 1989) (Under Indiana law, a court applying administrative collateral estoppel must consider whether: 1) the issues sought to be estopped are within the statutory jurisdiction of the agency; 2) the agency was acting in a judicial capacity; 3) both parties had a fair opportunity to litigate the issues; and 4) the decision of the administrative tribunal could be appealed to a judicial tribunal.) (citing McClanahan v. Remington Freight Lines, 517 N.E.2d 390, 394 (Ind. 1988) (no administrative collateral estoppel because factors not met – there was no counsel, no appeal, and no potential conflict of interest, and complex issues)); Brief of Appellee Liberty Mutual Ins. Co. (filed Nov. 26, 1991) at 39, Joy Tech. Corp. v. Liberty Mut. Ins. Co., 421 S.E.2d 493 (W. Va. 1992) (Under West Virginia law, collateral estoppel may be given to administrative agency's determination when: "1) a decision is rendered pursuant to the agency's adjudicatory authority; 2) the procedures employed by the agency are substantially similar to those used in a court of law; and 3) the issues involved are similar to those sought to be adjudicated in the second forum." (citing Liller v. West Virginia Human Rights Comm'n, 376 S.E.2d 639 (W. Va. 1988)).

represented by counsel, permitted to cross-examine witnesses, and entitled to appeal.[387] Courts have found preclusion to be "fair" when the litigant to be estopped, particularly a sophisticated litigant, could have foreseen the preclusive effect of the administrative determination.[388]

Administrative collateral estoppel is not precluded when one or more of the factors identified in *Long Island Lighting Co.* would seem to militate against application of the doctrine. Like the parent collateral estoppel doctrine, for example, the administrative collateral estoppel doctrine is applied when a litigant had the opportunity to litigate the issue in the administrative proceeding, but did not litigate it.[389]

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387. *See Long Island Lighting Co.*, 6 F.3d at 886 (party had right to review; record was "extensively litigated"); Spearman v. Delco Remy Div. of General Motors Corp., 717 F.Supp. 1351, 1354-55 (S.D. Ind. 1989) (administrative collateral estoppel elements met where party to be estopped was represented by counsel and called five witnesses to testify, and a three-person Review Board, in a detailed written decision, reversed the hearing officer's determination after a hearing at which the party was represented by counsel and called two witnesses).

388. *See Long Island Lighting Co.*, 6 F.3d at 886; Koch v. Consolidated Edison Co., 468 N.E.2d 1, 6 (1985) (parties who were sophisticated litigants with access to expert counsel could foresee collateral estoppel effect of administrative proceeding).

In California, insurance companies were successful in using the legislative process to limit courts' use of administrative collateral estoppel in workers' compensation insurance fraud prosecution cases. Assembly Bill 891 [Ch. 158 (1995)] amends California Labor Code chapters that govern compromise and release of compensation claims, compensation limitations and proceedings, and findings and awards by the Workers' Compensation Insurance Appeals Board. The new language, codified at CAL. LAB. CODE §§ 5006, 5413, 5816 (Deering 1996), specifies, "A determination of facts by the appeals board under this chapter has no collateral estoppel effect on a subsequent criminal prosecution and does not preclude litigation of those same facts in the criminal proceeding." *Id.* According to the bill's legislative history, the amendment is intended to assure that prosecution for workers' compensation insurance fraud is not precluded by a finding of fact by the appeals board that a worker has sustained a job-related injury.

389. *See* People v. Sims, 186 Cal.Rptr. 77, 83 (Cal. 1982) (doctrine applicable when administrative agency "act[ed] in a judicial capacity and resolve[d] disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate") (quoting United States v. Utah Constr. Co., 384 U.S. 394 (1966)); Liss v. Trans Auto Sys., 496 N.E.2d 851 (N.Y. 1986) (full and fair opportunity standard applied and found to require chance to present evidence and to cross-examine witnesses); Ryan v. New York Tel. Co., 467 N.E.2d 487 (N.Y. 1984) (prior administrative findings that employee was fired because he stole from the employer precluded employee from bringing tort actions where employee in first action was represented by union representative and had chosen not to be represented by attorney).

The preclusive effect of a state administrative agency's determination extends to federal court proceedings. A federal statute directs federal courts to accord state judicial proceedings "the same full faith and credit . . . as they have by law or usage in the courts of such State . . . from which they are taken."[390] The federal courts must apply the "preclusion law of the State in which judgment was rendered."[391] Although the statute does not apply to administrative decisions, the United States Supreme Court has held that "when a state agency 'acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate,' federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts."[392] Preclusive effect in the federal court extends to the agency's determinations of legal, as well as factual, issues.[393]

When an agency, having employed procedures that assure that the facts asserted were adequately tested, has rendered a decision within its statutory authority and consistent with the agency's scheme of administration, courts will afford preclusive effect to the agency's determination if preclusive effect would be fair.[394] To preserve the integrity of judicial and quasi-judicial proceedings, courts will not permit a litigant to assert a position that is an inconsistent with a position asserted before an administrative agency when the agency has incorporated the position into a determination after proper consideration of the issues.

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390. 28 U.S.C. § 1738 (1988).

391. Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 380 (1985).

392. University of Tenn. v. Elliott, 478 U.S. 788, 799 (1986) (quoting United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422 (1966)). *See also*, Zanghi v. Incorporated Village of Old Brookside, 752 F.2d 42, 46 (2d Cir. 1985) (state agency administrative finding given preclusive affect in federal court).

393. *See* Misischia v. Pirie, 60 F.3d 626 (9th Cir. 1995) (state administrative decision is binding in federal court when regulated person had opportunity for judicial review in state court but failed to seek that review) (citing Miller v. County of Santa Cruz, 39 F.3d 1030, 1032 (9th Cir. 1994), *cert. denied*, 515 U.S. 1160 (1995); Guild Wineries and Distilleries v. Whitehall Co., 853 F.2d 755, 758 (9th Cir. 1988)).

394. *See* Long Island Lighting Co. v. IMO Indus., Inc., 6 F.3d 876, 886 (2d Cir. 1993) (quoting Allied Chem. v. Niagara Mohawk Power Corp., 528 N.E.2d 153, 155, (N.Y. 1988) *cert. denied*, 488 U.S. 1005 (1989)).

D. The "Fraud on the Court" Exception to the Collateral Estoppel Doctrine

The doctrine of collateral estoppel protects litigants when an opposing litigant seeks to assert a position that is inconsistent with a prior position that a court or administrative agency has accepted and incorporated into a judgment. The doctrine is not intended, however, to permit a litigant who fraudulently obtains a judgment to invoke that judgment to preclude subsequent litigation. Courts possess the inherent power to set aside judgments induced by the fraud.[395]

In the leading case of Hazel-Atlas Glass Co. v. Hartford-Empire Co.,[396] the United States Supreme Court set aside a twelve-year-old verdict for fraud on the court. The Supreme Court reasoned that the litigant and attorneys, by producing false evidence to obtain a patent and then proffering the evidence to prosecute for infringement of the patent, had perpetrated "a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals."[397] The Court concluded that the "integrity of the judicial process"[398] demands that principles of collateral estoppel yield to "the historic power of equity to set aside fraudulently begotten judgments."[399]

Federal Rule of Civil Procedure 60(b) and parallel state statutes[400] specifically recognize the inherent power of a court to "relieve a party or his legal representative from a final judgment, order, or proceeding" within one year of the final action under various circumstances,[401] and to set aside a

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395. *See* Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 250 (1944).

396. *Id.*

397. *Id.* The Court distinguishing from the "deliberately planned and carefully executed scheme to defraud" the scenario of "a case [in which] a judgment [is] obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury." *Id* at 245.

398. *Id.* at 246.

399. *Id.* at 245.

400. *See, e.g.*, ALASKA R. CIV. PROC. 60(b).

401. FED. R. CIV. P. 60(b) provides, in pertinent part, that

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial

judgment for "fraud upon the court" at any time.[402] The rule specifies fraud as an express ground for relief by motion, and includes a saving clause under which fraud on the court is a basis for relief by independent action.[403] Some courts have stated that relief should be granted in an independent action based on fraud on the court when an aggrieved litigant has established the following elements:

> 1. a judgment which ought not, in equity and good conscience, to be enforced;
> 2. a good defense to the alleged cause of action on which the judgment is founded;
> 3. fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense;
> 4. the absence of fault or negligence on the part of the defendant; and
> 5. the absence of any adequate remedy at law.[404]

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under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

402. *See id.* ("This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, . . . or to set aside a judgment for fraud upon the court."); Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944) (twelve-year-old judgment set aside); Mallonee v. Grow, 502 P.2d 432, 437-38 (Alaska 1972) ("Where, as here, there has been no reliance upon the judgment or order by anyone other than by the party who perpetrated the fraud upon the court, and where, as here, that reliance is minimal and compensable by monetary payment, the time period between the issuance of the fraudulently obtained order and the discovery thereof will be given little weight in determining the reasonableness of the total elapsed time.").

403. *See* Fed. R. Civ. P. 60(b) advisory committee's note on 1946 amendments.

404. *In re* Paternity of Tompkins, 518 N.E.2d 500, 504 (Ind. Ct. App. 1988) *appeal after remand* (1989) (quoting Bankers Mortgage Co. v. United States, 423 F.2d 73, 79 (5th Cir. 1970), *cert. denied*, 399 U.S. 927 (1970)).

The United States Court of Appeals for the Ninth Circuit has explained that Rule 60(b) does not require that the misconduct has prejudiced an opponent nor that the misconduct was perpetrated by an adverse witness; the rule applies when a litigant's conduct has harmed the integrity of the judicial process.[405]

The "fraud on the court" exception to the collateral estoppel doctrine requires the court to "carefully balance the policy favoring adjudication on the merits with . . . the need to maintain institutional integrity and the desirability of deterring future misconduct."[406] The exception serves to uphold judicial integrity when a litigant has litigated a false position by allowing a court to set aside the judgment attained through fraud. In addition to use as an exception to the collateral estoppel doctrine, the "fraud on the court" doctrine may provide relief when a litigant engages in fraudulent conduct which is uncovered in the course of a single action.[407]

The "fraud on the court" doctrine looks to the conduct behind a judgment that normally would command collateral estoppel effect to permit a court to set aside a judgment which in equity and good conscience, should not stand.[408] Just as the collateral estoppel doctrine protects judicial integrity by barring a litigant that has persuaded a court of a position on an issue from litigating a contrary position, the "fraud on the court" exception to the doctrine protects judicial integrity by barring a litigant from benefitting from an ill-begotten judgment. Courts developed the doctrine of collateral estoppel and other estoppel doctrines for the purpose of preserving the dignity of judicial decisions and the judicial system,[409] and developed the "fraud on the court" exception to the collateral estoppel doctrine to provide recourse when a litigant offends the dignity of judicial decisions and the judicial system through dishonest dealings with the court.[410] This article now turns from the

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405. *See* Alexander v. Robertson, 882 F.2d 421, 424 (9th Cir. 1989).

406. Aoude v. Mobile Oil Corp., 892 F.2d 1115, 1118 (1st Cir. 1989).

407. See the doctrine and its role in precluding inconsistency in litigation is discussed further in Part VI, *supra.*

408. *See In re* Paternity of Tompkins, 518 N.E.2d at 504 (quoting *Bankers Mortage Co.*, 423 F.2d at 79).

409. *See* Colin Hugh Buckley, *Issue Preclusion and Issues of Law: A Doctrinal Framework Based on Rules of Recognition, Jurisdiction and Legal History*, 24 HOUS. L. REV. 875, 879-80 (1987) (collateral estoppel); Scarano v. Central R.R., 203 F.2d 510, 513 (3d Cir. 1953) (judicial estoppel); Smith v. Marchant Enter., 791 P.2d 354, 356 (Alaska 1990) (quasi-estoppel).

410. *See* Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246 (1944).

estoppel doctrines to other doctrines and rules available to a court that seeks to safeguard judicial integrity against the harm posed by inconsistent litigation positions.

V. THE "MEND THE HOLD" DOCTRINE

The "mend the hold" doctrine is another doctrine which is applied by courts to bar litigants from asserting litigation positions that are inconsistent with prior positions. Like the equitable estoppel, quasi-estoppel and "fraud on the court" doctrines, and the rule that bars a litigant from contradicting its judicial admissions,[411] the doctrine applies to preclude some changes in position within a single action.[412] It also has been applied to prevent a litigant from arguing inconsistent positions in successive litigation.[413] The doctrine's label derives from nineteenth century wrestling terminology and means "to get a better grip (hold) on your opponent."[414] The "mend the hold" doctrine, after a long[415] but somewhat quiet history, has enjoyed a recent resurgence as a mechanism to combat inconsistent litigation positions.[416]

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411. *See* Part VII, *supra*.

412. *See, e.g.*, Cornhusker Agric. Ass'n, Inc. v. Equitable Gen. Ins. Co., 392 N.W.2d 366, 373 (Neb. 1986) (citing Brown v. Security Mut. Life Ins. Co., 36 N.W.2d 251 (Neb. 1949)).

Some courts also apply the judicial estoppel doctrine to preclude a change of positions within the same action. *See, e.g.*, Tenneco Chem., Inc. v. William T. Burnett & Co., Inc., 691 F.2d 658, 664-65 (4th Cir. 1982); Degen v. Bunce, 1995 U.S. Dist. LEXIS 3576, at *22 (E.D. Pa. March 13, 1995); Colleton Reg'l Hosp. v. MRS Med. Review Sys., Inc., 866 F. Supp. 896, 900 (D.S.C. 1994).

413. *See* Rottmund v. Continental Assurance Co., 813 F. Supp. 1104, 1111 (E.D. Pa. 1992) (doctrine bars insurance company from litigating position inconsistent with position litigated earlier against other parties; application of doctrine against insurance company does not preclude statutory bad faith claim against it).

414. Harbor Ins. Co. v. Continental Bank Corp., 922 F.2d 357, 362 (7th Cir. 1990).

415. *See* Railway Co. v. McCarthy, 96 U.S. 258 (1877); Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908).

See also Heimer v. Travelers Ins. Co., 400 So. 2d. 771, 773-773 (Fla. Dist. Ct. App. 1981) (condemning "sporting theory of justice" and stating, "[i]n earlier times, the rule we apply in this case was said to reflect the feeling that a party may not 'mend his hold,' . . . or 'blow hot and cold at the same time' or 'have his cake and eat it too.' . . . Today, we might say that the courts will not allow the practice of the 'Catch-22' or 'gotcha!' school of litigation to succeed.") (quoting Salcedo v. Asociacion Cubana, Inc., 368 So. 2d 1337, 1339 (Fla. Dist. Ct. App. 1979)).

416. *See* opinion of Chief Judge Posner, then Judge Posner, in *Harbor Ins. Co.*, 922 F.2d

The "mend the hold" doctrine generally "forbids a party to a contract to take inconsistent litigation positions concerning the contract's meaning"[417] and limits the right of a defendant in a breach of contract action to change its defense midway through the lawsuit.[418] It prohibits a litigant from changing litigation positions once the pleadings are complete, and also has been applied to prevent a party to a contract from repudiating a position, at least after the pleadings were complete, when the litigant has asserted a position in a federal court proceeding and sought to maintain a different position in a state court proceeding.[419] An Illinois federal district court has noted that courts have applied the "mend the hold" doctrine most often against insurance companies to preclude the insurance companies from shifting positions during litigation.[420] The same court applied the doctrine to prevent an insurance

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at 362-64 (pointing out that the common law doctrine has been cited by courts in eight other states in the decade preceding the *Harbor Ins. Co.* decision, and earlier, by Judge Learned Hand in Connolly v. Medalie, 58 F.2d 629, 630 (2d Cir. 1932) and by the United States Supreme Court in Railway Co. v. McCarthy, 96 U.S. 258 (1877); Stanley C. Nardoni, Mend the Hold -- A Powerful Weapon for Policyholders, at 1-2 (unpublished manuscript presented at the Spring 1996 Meeting of the Insurance Information Counsel) (on file with authors) (Mr. Nardoni is a commentator and attorney who regularly represents policyholders); Thomas W. Conklin, The Effect of "Mend the Hold" on Insurer's Inconsistent Bases for Denying Coverage, FOR THE DEFENSE, Apr. 1995, at 10, 12 (Mr. Conklin regularly represents insurance companies). *See generally* EUGENE R. ANDERSON ET AL., INSURANCE COVERAGE LITIGATION §12.7 (1997), Robert H. Sitkoff, *Comment: "Mend the Hold" and Erie: Why an Obscure Contracts Doctrine Should Control in Federal Diversity Cases*, 65 U. CHI. L.REV. 1059 (1998).

417. AM Int'l, Inc. v. Graphic Management Assoc., 44 F.3d 572, 576 (7th Cir. 1995).

418. *See* Patz v. St. Paul Fire & Marine Ins. Co., 15 F.3d 699 (7th Cir. 1994) (Wisc. law) (party may not change position; "sudden and accidental" exception to polluter's exclusion applied to allow insurance coverage for liability arising from leakage of hazardous waste); Mellon Bank, N.A. v. Miglin, No. 92 C 4059, 1995 U.S. Dist. LEXIS 2202 at *6, *7 (N.D. Ill. Mar. 7, 1995) (defendant in contract action who has offered a reason for contract nonperformance may not change defense to liability unless the change is based on new information that could not have been obtained at the time of original pleading or based on other changed circumstances); Nortek v. Liberty Mut. Ins. Co., 858 F. Supp. 1231, 1241 n.42 (D.R.I. 1993) ("a party that bases its refusal to perform under a contract on certain stated grounds thereby waives all other potential bases for nonperformance") (citing *Harbor Ins. Co.*, 922 F.2d at 362-65).

419. *See* Horwitz-Matthews, Inc. v. City of Chicago, 78 F.3d 1248 (7th Cir. 1996). *Cf. In re:* Apex Automotive Warehouse, 205 B.R. 547, 554 (Bankr. N.D. Ill. 1997) (mend the hold should not be applied at the pleading stage of a litigation because it would cut "strongly against the design of the Federal Rules to encourage the emergence of the truth").

420. *See* Integrated Measurement Sys., Inc. v. Int'l Comm. Bank, 757 F. Supp. 938, 947

company from amending a pleading to add grounds for refusal to pay an insurance claim, when the grounds were not included in the letter declining insurance coverage initially sent to the policyholder.[421] The doctrine thus applies to prevent insurance companies from introducing new or changed bases for denying insurance coverage once litigation has begun.

Whether the "mend the hold" doctrine is a rule of procedural law or whether it is rule of substantive law remains unsettled. Viewed as a rule of procedural law, the doctrine prevents a litigant, usually in the context of a contract dispute, from asserting a position in litigation "and then when that [position] fails, . . . tr[ying] on another [position] for size."[422] Viewed as a substantive rule of contract law, the doctrine estops a party to a contract from changing grounds for refusal to perform the contract, whether the prior

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n.14 (N.D. Ill. 1991). *See generally* Nardoni, *supra* note 416 at 7 (because "mend the hold" doctrine applies to preclude insurance companies from asserting inconsistent positions when doctrines of equitable estoppel and judicial estoppel would not apply, "policyholder counsel should assert the mend the hold doctrine whenever there are grounds for it").

421. *See* Employers Ins. of Wausau v. Bodi-Wachs Aviation Ins. Agency, Inc., 846 F. Supp. 677, 685 (N.D. Ill. 1994) ("the total omission of that third contention [for denial of insurance coverage] from Employers' original declination of coverage creates a 'mend your hold' type of bar" to amending complaint to include third contention). *See also* Liberty Motor & Mach. Co. v. Hartford Accident & Indem. Co., No. 90-3861-WLB, slip op. at 1-2, 4 (S.D. Ill. Mar. 18, 1992) ("doctrine precludes [insurance company], after presenting grounds for refusal to perform [under insurance policy], from asserting new and/or additional reasons for the refusal" regardless of whether new reasons involve basic contract law or "complicated policy analysis"); Nortek, Inc., 858 F. Supp. at 1241 n.42 (not reaching issue of whether "mend the hold" doctrine precludes insurance company from asserting as defense in litigation insurance policy exclusion not mentioned in prelitigation letters because defenses were invalid for other reasons). *But see* Delaney v. Marchon, Inc., 627 N.E.2d 244, 249 (Ill. App. Ct. 1993) ("[a]lthough the law on the mend the hold doctrine is unclear, it seems to apply only in summary judgment and trial proceedings" and not at the pleading stage).

422. Harbor Ins. Co. v. Continental Bank Corp., 922 F.2d 357, 363 (7th Cir. 1990). *See also*, Salcedo v. Asociacion Cubana, Inc., 368 So. 2d 1337, 1339 (Fla. Dist. Ct. App. 1979) (party who successfully asserted mediation was condition precedent to action may not complain of delay caused by pendency of mediation because "courts will not allow the practice of the Catch 22 or 'gotcha' school of litigation"); Beard v. Montgomery Ward & Co., 524 P.2d 1159 (Kan. 1974) ("If a case has been tried upon one theory it is too late for plaintiff to [mend his hold and] advance, in his motion for new trial, another theory which might have been but was not presented at the trial."); Hill v. Elec. Corp. of Am., 113 N.W.2d 313, 316 (Iowa 1962) (position raised for first time on appeal and not included in opening brief is impermissible attempt to "mend the hold"); Semler v. Cook-Waite Lab., 278 P.2d 150, 154 (Or. 1954) (party may not "mend her hold" by changing litigation position on appeal).

ground was stated in the course of litigation or at another time.[423] The United States Court of Appeals for the Seventh Circuit has concluded that the doctrine mixes procedural and substantive policy concerns.[424]

In the case of Harbor Insurance Co. v. Continental Bank Corporation,[425] the United States Court of Appeals for the Seventh Circuit was persuaded that the "mend the hold" doctrine probably precluded the insurance companies from shifting litigation positions. In *Harbor Insurance Co.*, the policyholder, a bank, collapsed after it purchased $1 billion in uncollectible loans. The shareholders sued the bank and its officers, directors and employees, alleging securities fraud. Two insurance companies then sought a declaratory judgment determining that the bank's directors' and officers' liability insurance policies provided no coverage because the acts alleged were so egregious that federal and state law precludes indemnification.[426] When the

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423. *See* Harbor Ins. Co., 922 F.2d at 364. *See also* Hamlin v. Mut. Life Ins. Co., 487 A.2d 159, 162 (Vt. 1984) ("when [an insurance company] deliberately puts [its] refusal to pay [a claim] on a specified ground, and says no more, [it] should not be allowed to 'mend [its] hold' by asserting other defenses") (quoting Cummings v. Connecticut Gen. Life Ins. Co., 148 A. 484, 486-87 (Vt. 1930)); Bowen v. Lewis, 426 P.2d 244, 246 (Kan. 1967) (applying the doctrine of estoppel because parties may not "mend their hold" by asserting position inconsistent with position relied upon in prior dealings). *See also* Scherer v. Rockwell Int'l Corp., 766 F. Supp. 593, 600 n.7 (N.D. Ill. 1991) (court "is troubled by the use of post-hoc rationalizations as the sole basis for validating an otherwise invalid contract termination (something akin to the shifting of legal positions that courts often bar by invoking the proposition that a litigant cannot 'mend its hold')", but concluding that application of doctrine to bar post-hoc rationalization would not change result here because original rationale was valid).

424. *See* AM Int'l, Inc. v. Graphic Management Assocs., Inc., 44 F.3d 572, 576 (7th Cir. 1995). *See* Cleveland Hair Clinic, Inc. v. Puig, 949 F. Supp. 595, 600 n.10 (N.D. Ill. 1996) (noting the question of whether "mend the hold" doctrine is substantive or procedural is an open question but observing that the general thrust is that the doctrine is substantive); *In re:* Apex Automotive Warehouse, 205 B.R. 547, 554 (Bankr. N.D. Ill. 1997) (noting that the U.S. Court of Appeals for the Seventh Circuit "has not determined the doctrine's outer bounds").

425. *See* 922 F.2d 357 (7th Cir. 1990).

426. The policies required Harbor Insurance Company to reimburse the bank for the first $15 million of loss and Allstate Insurance Company to reimburse the next $10 million when the bank sustained a loss as a result of a claim against a director or officer for wrongful acts committed in the performance of his or her office. The bank's charter obligated the bank to indemnify the litigation expenses incurred by "any person 'who was or is a party or is threatened to be made a party to any threatened, pending or completed action . . . by reason of the fact that he is or was a director [or] officer . . ., if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation.'" *Id.* at 359.

bank settled the securities suit and counterclaimed against the insurance companies for reimbursement, the insurance companies switched their position: They now argued that the directors and officers were not engaged in misconduct and that the bank settled the suits prematurely.[427] Applying Illinois law, the court held that the "mend the hold" doctrine precludes the shift in positions unless the insurance companies had changed positions "based on new information that could not have been obtained at the time of [the contrary] pleading or [based] on other changed circumstances,"[428] and not merely "because the district court threw cold water on their [initial] argument."[429]

In his analysis, now-Chief Judge Richard A. Posner, for the majority, focused on the interaction of the "mend the hold" doctrine and judicial estoppel doctrine and explained that the doctrines are "cousin[s]."[430] Chief Judge Posner pointed out that under Illinois law, the judicial estoppel doctrine precludes an inconsistent position only in successive suits, while the "mend the hold" doctrine precludes a litigant from asserting an inconsistent position in the same suit as well as successive suits. Neither doctrine is superfluous, explained the court, when the "mend the hold" doctrine is viewed substantively "as a corollary of the duty of good faith [and] ethical obligations in contract relations."[431] The "mend the hold" doctrine permits courts that sit

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427. *See id.* at 359-60.

428. *Id.* at 365. *See also* Harbor Insurance Company's Response (filed 1990) at 18, Harbor Ins. Co. v. Continental Bank Corp., 922 F.2d 357 (7th Cir. 1990) (arguing that the policyholder was guilty of mending its hold because it asserted the innocence of its officers and directors and then entered into settlement).

429. *Id.* The court explained, "[t]he indications that the 'mend the hold' doctrine may apply here thus are strong but there have been no findings and [the policyholder] does not argue that the state of the record permits a definitive conclusion at this time."

430. *Harbor Ins. Co.*, 922 F.2d at 364.

431. *Harbor Ins. Co.*, 922 F.2d at 363, 365. *See also* Newman/Haas v. Unelko, 813 F. Supp. 1345, 1349 (N.D. Ill. 1993) (quoting *Harbor Ins. Co.*, 922 F.2d at 363).

The duty of good faith and fair dealing extends to the assertion, settlement and litigation of contract claims and defenses. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt e. In Prudential Ins. v. Evergreen Oak Elect. Employee Benefit Plan, No. 92 C 7908, 1996 U.S. Dist. LEXIS 418 at *12 (N.D. Ill. Jan. 18, 1996), the federal district court barred the plaintiff insurance companies from asserting insurance policy clauses as an affirmative defense to the policyholder's insurance coverage claim after two years of litigation, relying, in part, on the "mend the hold doctrine" and its function as a "corollary of the duty of good faith'" in contracts. *Prudential Ins.*, 1996 U.S. Dist. LEXIS 418 at *12 (quoting *Harbor Ins.*, 922 F.2d at 363).

in jurisdictions that have adopted a "judicial acceptance" requirement for the use of judicial estoppel[432] to enforce contractual duties of good faith and fair dealing and avoid any injustice that would result from a change of position. The *Harbor Insurance Co.* court specifically declined to determine whether the "mend the hold" doctrine is limited to contract disputes.[433]

Recognizing that some authorities have expressed concern that holding a litigant rigidly to its original litigation position may contravene Federal Rule of Civil Procedure 8(e)(2),[434] the *Harbor Insurance Co.* court advocated a flexible rule that permits a litigant to change positions only when newly available information justifies the shift "as a matter of fair procedure under the federal rules."[435] The same court also has adopted in the context of the

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432. *See infra* Part I, C. 2.

433. *See Harbor Ins.*, 922 F.2d at 364-65. *But cf.* Pride v. Peters, No. 94-2025, 1995 U.S. App. LEXIS 36958 at *6 n.7 (7th Cir. 1995) (the United States Court of Appeals for the Seventh Circuit noted that the "mend the hold" doctrine applies only to contract actions). Courts have applied the doctrine in legal contexts other that contract actions, however. *See, e.g.*, Goodman v. Heitman Fin. Serv., 894 F. Supp. 1166, 1172 (N.D. Ill. 1995) (employer that took position in age discrimination case that it terminated employee ostensibly due to his age but in fact used age as a mere cover story for its true intent, "cannot then shift ground to say that its intent was rather to apply a [statutory bona fide occupational qualification defense]," which would permit termination on the basis of age).

434. *See, e.g.*, Konstantinidis v. Chen, 626 F.2d 933 (D.C. Cir. 1980) (rejecting the judicial estoppel doctrine, at least in part, for this reason); Allen v. Zurich Ins., 667 F.2d 1162, 1167 (4th Cir. 1986) (judicial estoppel doctrine "obviously contemplates something other than the permissible practice . . . of simultaneously advancing in the same action inconsistent claims or defenses which can then . . . be evaluated as such by the same tribunal, thus allowing an internally consistent final decision")

435. *Harbor Ins.*, 922 F.2d at 364-65. *See also* Mellon Bank v. Miglin, No. 92 C 4059, 1995 U.S. Dist. LEXIS 2202 at *6-*7 (E.D. Ill. 1995) (denying motion of reconsideration of order upholding trial court judgment based on the "mend the hold" doctrine and explaining that "'mend the hold' doctrine, which is a corollary of the contractual duty of good faith, provides that [litigants] in contract actions who have offered a reason for their nonperformance of the contract may not later change their defense to liability, unless the change is based on new information that could not have been obtained at the time of the original pleading or on other changed circumstances").

Litigants have emphasized that the newly discovered information justifies a change of position under the "mend the hold" doctrine only when the new information "'could not have been obtained at the time' the earlier position was asserted." Certain Insurers' Reply Memorandum in Support of Motion to Preclude Forty-Eight from Taking Inconsistent Coverage Positions (filed Nov. 3, 1993) at 7, Forty-Eight Insulations, Inc. v. Aetna, 162 B.R. 143 (Bankr. N.D. Ill. 1993) (quoting *Harbor Ins.*, 922 F.2d at 365).

judicial estoppel doctrine an exception permitting a shift in positions in some cases when new information is uncovered.[436]

Like the estoppel doctrines and the judicial admissions doctrine,[437] the "mend the hold" doctrine bars a litigant from changing its position to rely on a claim or defense it otherwise would have been entitled to assert. Increasingly, courts are applying the "mend the hold" doctrine to preclude litigants in insurance litigation and other contexts from asserting positions that are inconsistent with prior positions without regard to whether the prior positions were asserted in the present action[438] or a prior action[439] or before litigation began.[440] By providing notice to litigants that courts will not countenance "weathervane arguments which shift with the winds of necessity,"[441] the "mend the hold" doctrine and the other doctrines of preclusion encourage litigants to assert all good faith arguments early in litigation and facilitate prompt, fair resolution of disputes. Judicial resources are preserved and judicial integrity is advanced as the perception of an efficient and fair judicial system boosts the public's confidence in the judiciary.

VI. FRAUD ON THE COURT

The concern for public perception that either the first or the second court has been misled is often cited by courts as a rationale for prohibiting a litigant from litigating a position that is inconsistent with a prior position.[442] Although the reach of the "fraud on the court" doctrine is far broader than the litigation of inconsistent positions, a changed position which is inconsistent

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436. *See* Eagle Found. v. Dole, 813 F.2d 798 (7th Cir. 1987) (intervening determination by department that highway route would kill people is sufficient grounds to change litigation position regarding preferred highway route).

437. The judicial admissions doctrine is discussed in Part VII, *supra*.

438. *See* Cornhusker Agric. Ass'n. v. Equitable Gen. Ins., 392 N.W.2d 366, 372 (1986).

439. *See* Rottmund v. Cont. Assur., 813 F. Supp. 1104, 1110 (E.D. Pa. 1992).

440. *See* Employers Ins. of Wausau v. Bodi-Wachs Aviation Ins. Agency, 846 F. Supp. 677, 685 (N.D. Ill. 1994).

441. Georgia-Pacific Plywood Co. v. U.S. Plywood Corp., 148 F. Supp. 846 (D.C. N.Y. 1956), *rev'd on other grounds*, 258 F.2d 124 (2d Cir. 1958), *cert. denied*, 358 U.S. 884 (1958).

442. *See* Stevens Technical Services v. Wilmington Trust Co., 885 F.2d 584, 588 (9th Cir. 1989) (citing Edwards v. Aetna, 690 F.2d 595, 598 (6th Cir. 1982)).

with the truth may constitute "fraud on the court."[443] The doctrine applies to assertions in litigation that a court finds by clear and convincing evidence[444] are intended to mislead a court or that have the effect of misleading a court. A litigant perpetrates fraud on the court when the litigant engages in "misconduct [that] tampers with the judicial machinery and subverts the integrity of the court itself."[445]

Courts that have attempted to define "fraud on the court" have commented that fraud on the court is distinguished from misrepresentation, misconduct and other varieties of fraud, and that fraud on the court is "a subcategory of fraud, misrepresentation or other misconduct in which the fraud, misrepresentation, or other misconduct . . . 'is directed to the judicial

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443. Other devices have been developed by the courts for handling situations in which a litigant's changed position harms another litigant. One illustrative case is Aufrichtig v. Lowell, 650 N.E.2d 401 (N.Y. 1995). In that case, the plaintiff's physician provided an insurance company with a perjured affidavit. The insurance company submitted the affidavit to the United States District Court. On the eve of trial, the physician admitted that the affidavit had no basis in fact. *See id.* at 403. When the Federal District Judge learned of the false affidavit, he urged the plaintiff to settle the case due to the physician's conflicting statements. *Id.* The plaintiff then sued the physician. The New York Court of Appeals in *Aufrichtig* found that the physician may have breached his duty to provide truthful medical information as was required under the physician-patient confidential relationship and denied the physician's motion for summary judgment. *See id.* at 404. Because the physician stood in a relationship of confidence and trust, he owed the patient a duty of care not to convey false information advanced for the purpose of litigation. *Id.* at 405.

Another potential device for reining in litigants is the tort of malicious defense which derives from the recognized tort of malicious prosecution. This tort has been expressly adopted in New Hampshire. *See* Aranson v. Schroeder, 671 A.2d 1023 (N.H. 1995). It has been said to be needed "to protect the integrity of the judicial process, to deal with dishonest and unethical behavior, and to discourage misuse and abuse of limited judicial resources." Jonathan K. Van Patten & Robert E. Willard, *The Limits of Advocacy: A Proposal for Malicious Defense in Civil Litigation*, 35 HASTINGS L.J. 891, 923 (1984). *But cf.* Hostetter v. Hartford Ins., No. 85C-06-28, 1992 Del. Super. LEXIS 284 (Del. Super. Ct. July 13, 1992) (court declined to recognize malicious defense tort).

444. *See* Aoude v. Mobile Oil Corp., 892 F.2d 1115, 1118 (1st Cir. 1989); Phoceene Sous-Marine v. U.S. Phosmarine, 682 F.2d 802, 806 n.13 (9th Cir. 1982) (citing England v. Doyle, 281 F.2d 304 (9th Cir. 1960)).

445. Prince v. Delaware County Bar Ass'n., No. 92-1942, 1993 U.S. Dist. LEXIS 5827 at *4 -*5 (E.D. Pa. 1993) (citing Eppes v. Snowden, 656 F. Supp. 1267, 1277 (E.D. Ky. 1986); United Business Comm. v. Racal-Milgo, 591 F. Supp. 1172, 1186 (D. Kan. 1984)). "Fraud on the court" is discussed as an exception to the collateral estoppel doctrine *infra* at Part IV, D. of this article.

machinery itself.'"[446] Professor James W. Moore describes two paradigms of fraud on the court: "[(1)] fraud which does or attempts to, subvert the integrity of the court itself, [and (2)] fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases . . . ."[447]

Frequently distinguishing "fraud on the court" from fraud on an adverse party,[448] courts are more inclined to find fraud on the court when an attorney, as an officer of the court, is involved in misleading a court.[449] The enhanced proclivity to find fraud on the court when an attorney is involved in the fraud derives from the duty of every attorney to be completely honest in litigation.[450] Professor Moore explains:

> While an attorney should represent his client with singular loyalty, that loyalty obviously does not demand that he act dishonestly or fraudulently; on the contrary his loyalty to the court, as an officer thereof, demands integrity and honest dealing with the court. And when he departs from that standard in the conduct of a case he perpetrates fraud upon a court.[451]

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446. *In re* Tri-Cran v. Fallon, 98 B.R. 609, 615-16 (D. Mass. 1989) (quoting Bulloch v. United States, 721 F.2d 713, 718 (10th Cir. 1983)).

447. 7 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 60.33 (2d ed. 1987). *See* Paymaster Corp. v. American Bankers Ins., No. 94-56779, 1996 U.S. App. LEXIS 16065, at *8 (9th Cir. 1996) (quoting Professor Moore).

448. *See* Synanon Church v. United States, 579 F. Supp. 967, 972 (D.D.C. 1984), *aff'd*, 820 F.2d 421 (D.D.C. 1987).

449. *See* Demjanjuk v. Petrovsky, 10 F.3d 338, 352 (6th Cir. 1993), *cert. denied*, 513 U.S. 914 (1994). *See also* Raymark Indus. v. Stemple, No. 88-1014-K, 1990 U.S. Dist. LEXIS 6710 at *6 (D. Kan. 1990) (attorneys made a "mockery of the practices of law and medicine" and if "court were now to acquiesce . . . it would make a 'laughingstock' of the court").

450. *See id.* at 352. *See also* H.K. Porter Co. v. Goodyear Tire & Rubber Co., 536 F.2d 1115, 1119 (6th Cir. 1976) ("Since attorneys are officers of the court, their conduct, if dishonest, would constitute fraud on the court.") (citing Kupferman v. Consol. Research 459 F.2d 1072, 1078 (2d Cir. 1972), and RESTATEMENT OF JUDGMENTS §126 cmt. c (Supp. 1948)).

451. 7 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 60.33, at 360 (2d ed. 1987).

Courts resoundingly reject attorneys' contentions that the duties of zeal and advocacy owed to clients justify dishonest or fraudulent conduct in judicial proceedings.[452] The United States Court of Appeals for Sixth Circuit has condemned even unintentional fraud on the court where attorneys' "'win at any cost' attitude"[453] caused them to recklessly disregard and fail to disclose evidence that undermined their case.[454]

Courts have found fraud on the court when a litigant[455] or the litigant's attorney[456] intentionally[457] or with reckless disregard for the truth,[458] "tampers with the fair administration of justice by deceiving 'the institutions set up to protect and safeguard the public' or otherwise abusing or undermining the integrity of the judicial process,"[459] or "interfere[s] with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier

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452. *See Demjanjuk,* 10 F.3d at 352-56; Pesaplastic v. Cincinnati Milacron, 799 F.2d 1510, 1521-23 (11th Cir. 1986); *Raymark Ind.,* 1990 U.S. Dist. LEXIS 6710 at *48-*51; Mallonee v. Grow, 502 P.2d 432, 438-39 (Alaska 1972). *See also* United States v. Assoc. Convalescent Enter., 766 F.2d 1342 (9th Cir. 1985) (upholding a California federal district court's sanctions on an attorney and stating that an attorney does not simply act as an advocate for his client, but is also an officer of the court; as such, attorneys have a duty of good faith and candor in dealing with the judiciary).

453. *Demjanjuk,* 10 F.3d at 355.

454. *See id. See also* National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 643 (1976) ("extreme sanction of dismissal was appropriate . . . by reason of respondents' 'flagrant bad faith' and their counsel's 'callous disregard' of their responsibilities").

455. *See* Prince v. Delaware Cty. Bar Ass'n., No. 92-1942, 1993 U.S. Dist. LEXIS 5827 (E.D. Pa. 1993); Eppes v. Snowden, 656 F. Supp. 1267, 1282 (E.D. Ky. 1986) ([T]he institution this Court represents demands exemplary conduct from all those who are a part of it. And this includes parties. It includes laymen untrained in the law.). *See also Eppes,* 656 F. Supp. at 1279 (E.D. Ky. 1986) (litigant is bound by fraud on court perpetrated by partner/colitigant) (citing Fightmaster v. Leffler, 556 S.W.2d 180, 182 (Ky. App. 1977)).

456. *See* Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238 (1944).

457. *See* Robinson v. Audi Aktiengesellschaft, 56 F.3d 1259, 1267 (10th Cir. 1995), *cert. denied,* 516 U.S. 1045 (1996) ("'fraud on court,' whatever else it embodies, requires a showing that one has acted with an intent to deceive or defraud the court").

458. *See* Demjanjuk v. Petrovsky, 10 F.3d 338, 353-54 (6th Cir. 1993); Virgin Islands Hous. Auth. v. David, 823 F.2d 764, 767 (3d Cir. 1987); Raymark Ind. v. Stemple, No. 88-1014-K, 1990 U.S. Dist. LEXIS 6710 at *41 (D. Kan. 1990). *See also* Wyle v. R.J. Reynolds Indus., 709 F.2d 585, 590 (9th Cir. 1983) (upholding dismissal for fraud on the court and noting that attorneys' deliberate ignorance constituted equivalent of knowledge of the truth) (citing United States v. Nicholson, 677 F.2d 706, 710-11 (9th Cir. 1982)).

459. Rockdale Management Co., Inc. v. Shawmut Bank, 418 Mass. 596, 598 (1994) (quoting Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246 (1944)).

or unfairly hampering the presentation of the opposing party's claim or defense."[460] Some courts find fraud on the court "even where representations are made with a good faith belief in their truth"[461] when the court has been misled.

While an isolated incident of perjury is unlikely to suffice for a finding of fraud on the court, courts find fraud on the court when perjury is combined with some other misconduct.[462] The United States Supreme Court and many lower courts have found fraud on the court when a litigant supports perjured testimony with fabricated evidence.[463] In United Business Communications, Inc. v. Racal-Milgo, Inc.,[464] the Kansas federal district court found fraud on the court because the litigant presented false and misleading testimony and answers to interrogatories, withheld relevant information and failed to respond in good faith to discovery requests, and adopted fabricated theories in favor of patentability.[465] The court concluded that its prior judgment must be set aside because the litigant "deliberately undertook to convince this court of things it knew were untrue, and to otherwise prevent the court from making a fair and well-informed decision."[466] Other examples of conduct that has been found to constitute fraud on the court includes "a pattern of false testimony" and fabrication[467]; nondisclosure of relevant information[468]; attorneys' "blatant disregard of professional and ethical obligations, and of

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460. Aoude v. Mobile Oil Corp., 892 F.2d 1115, 1117, 1118 (1st Cir. 1989).

461. Mallonee v. Grow, 502 P.2d 432, 438 (Alaska 1972) (citing Thompson v. Huston, 135 P.2d 834, 836 (Wash. 1943)).

462. *See* United Business Communications, Inc. v. Racal-Milgo, Inc., 591 F.Supp. 1172, 1187 (D. Kan. 1984); Synanon Church v. United States, 579 F. Supp. 967, 972 (D.D.C. 1984).

463. *See* Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944); Aoude v. Mobil Oil Corp., 862 F.2d 890 (1st. Cir. 1988); Sun World, Inc. v. Lizarazu Olivarria, 144 F.R.D. 384 (E.D. Cal. 1992); Vargas v. Peltz, 901 F. Supp. 1572 (S.D. Fla. 1995); Eppes v. Snowden, 656 F. Supp. 1267 (E.D. Ky. 1986).

Some courts have stated that only extrinsic fraud will support a finding of fraud on the court. The distinction between intrinsic fraud and extrinsic fraud for the purposes of finding "fraud on the court" under Fed. R. Civ. P. 60(b) is persuasively refuted in Gleason v. Jandrucko, 860 F.2d 556, 560 (2d Cir. 1988), and the cases cited therein.

464. 591 F.Supp. 1172 (D. Kan. 1984).

465. *See United Business Communications, Inc.*, 591 F.Supp. at 1187.

466. *Id.*

467. *See id.*

468. *See* Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir. 1993). *See also United Business Communications, Inc.* 591 F.Supp. 1172.

all scientific findings inconsistent with their own findings" in filing claims[469]; filing of pleadings which grossly overstated amounts due and levying on property not owned by the judgment debtor, combined with failing to serve notice of the motion to confirm sale[470]; procurement of a sworn statement "through a scheme totally at odds with the Federal Rules of Civil Procedure and the notions of fairness central to our system of litigation"[471]; and false identification of a party[472] or of oneself as an attorney.[473]

The leading case on the doctrine of fraud on the court is *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*,[474] decided by the United States Supreme Court in 1944. The case was brought by Hazel-Atlas Glass Company ("Hazel") to overturn a decision of the United States Court of Appeals for the Third Circuit which had found it liable for infringement of a patent held since 1928 by Hartford-Empire Company ("Hartford-Empire") on a machine which utilized a particular method of pouring glass into molds. When Hartford-Empire's application for the patent was "confronted with apparently insurmountable Patent Office opposition,"[475] Hartford-Empire attorneys and officials concocted an article that hailed the device as "revolutionary" in the art of fashioning glass, procured the signature of an ostensibly disinterested expert, and had the article published in a trade journal.[476] Attorneys for Hartford-Empire then introduced the article in support of the pending application and the application was approved. A few months later, Hartford-

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469. *See* Raymark Indus., Inc. v. Stemple, No. 88-1014-K, 1990 U.S. Dist. LEXIS 6710 at *37 (D. Kan. May 30, 1990).

470. *See* Mallonee v. Grow, 502 P.2d 432, 438 (Alaska 1972).

471. C.B.H. Resources, Inc. v. Mars Forging Co., 98 F.R.D. 564, 569 (W.D. Pa. 1983).

472. *See* Prince v. Delaware Cty. Bar Ass'n., C.A. No. 92-1942, 1993 U.S. Dist. LEXIS 5827 at *4 - *5 (E.D. Pa. May 3, 1993).

473. Russell v. Dopp, 42 Cal. Rptr.2d 768 (Cal. Ct. App. 1995). *But see* United States v. International Tel. & Tel. Corp., 349 F. Supp. 22, 29 (D. Conn. 1972); *aff'd.*, 410 U.S. 919 (1973) ("Generally speaking, only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated, will constitute a fraud on the court.").

474. 322 U.S. 238 (1944).

475. *Id.* at 240.

476. *See id.* The article was entitled *Introduction of Automatic Glass Working Machinery; How Received by Organized Labor.* Hartford-Empire attorneys and officials attempted to persuade the President of the Bottle Blowers' Association to sign the article, but were unsuccessful. They eventually procured the signature of William P. Clarke, the National President of the Flint Glass Workers' Union.

Empire filed suit alleging that Hazel was infringing upon its patent. A district court dismissed the suit on the ground that no infringement was proved and on appeal, the attorneys for Hartford-Empire resurrected the article along with the expert who supposedly authored it. Relying on the article and its supposed source, the United States Court of Appeals for the Third Circuit held the patent valid and infringed.

In 1941, after having paid fines and licensing agreement fees years earlier, Hazel learned of the scheme in the course of a separate anti-trust prosecution of Hartford-Empire, and commenced suit to overturn the infringement determination.[477] The suit eventually reached the United States Supreme Court. Reversing the United States Court of Appeals for the Third Circuit, the Supreme Court explained that the facts before it "demands the exercise of the historic power of equity to set aside fraudulently begotten judgments."[478]

The Supreme Court found that Hartford-Empire officials and attorneys had perpetrated "a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals."[479] Noting that the fraud concerned more than the litigants involved, the Court rejected the intermediate court's conclusion that Hazel had not exerted sufficient diligence to uncover the fraud. The Court held that because Hartford-Empire had "tamper[ed] with the administration of justice" in a manner that imperiled the "integrity of the judicial process,"[480] the United States Court of Appeals for the Third Circuit had "both the duty and the power to vacate its own judgment"[481] arising from the fraud on the court.

The United States Supreme Court recently denied certiorari when asked to revisit *Hazel-Atlas Glass Co. v. Hartford-Empire Co.* to determine the necessary scienter of a litigant or attorney who misleads a court to warrant a later finding of fraud on the court.[482] The United States Court of Appeals for

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477. *See id.* at 241-43.

478. *Id.* at 245.

479. *Id.* The Court distinguished between the "deliberately planned and carefully executed scheme to defraud" the scenario of "a case [in which] a judgment [is] obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury." *Id.*

480. *Id.* at 246.

481. *Id.* at 250.

482. *See id.* Robinson v. Audi Aktiengesellschaft (*Robinson II*), 56 F.3d 1259 (10th Cir. 1995).

the Tenth Circuit has interpreted the fraud on the court doctrine as laid out in *Hazel-Atlas Glass Co.* to require a specific intent to defraud on the part of the litigant or attorney.[483] In *Robinson v. Audi Aktiengesellschaft* ("Robinson I"),[484] brought by victims of a automobile collision who were severely burned when the fuel tank of their 1976 Audi burst into flames, counsel for Audi failed to disclose information regarding history and contracts tying Audi to Volkswagen Aktiengesellschaft.[485] Because the district court was not apprised of the information, the court refused to admit into evidence against Audi documents that indicated that Volkswagen knew of the risk of combustion,[486] and a subsequent jury verdict in favor of Audi was upheld on appeal.[487]

When they learned of the information omitted by counsel for Audi, the accident victims filed *Robinson II*[488] to obtain relief from the judgment under the "fraud on the court" doctrine. The United States Court of Appeals for the Tenth Circuit affirmed a district court decision denying relief, reasoning that the plaintiffs had not proven "a deliberately planned and carefully executed scheme to defraud," as had been found by the United States Supreme Court in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*[489] *Arguing that the scienter* standard adopted in *Robinson II* "encourage[s] dishonesty and lack of candor in the processing of cases in the federal courts" and conflicts with the less-stringent "reckless disregard for the truth" standard recently adopted by the United States Court of Appeals for the Sixth Circuit,[490] the plaintiff petitioned the Supreme Court for a writ of certiorari "to resolve the conflict among the Courts of Appeal in regard to this important issue of judicial administration and professional integrity."[491] The petition was denied, however, and the

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483. *See id.*

484. 739 F.2d 1481 (10th Cir. 1984).

485. *See Robinson II*, 56 F.3d at 1263. As explained by the United States Court of Appeals for the Tenth Circuit, counsel for Audi stated in a memorandum in support of Audi's motion in limine that "the fact that both of the defendants were subsidiaries of Volkswagen [is] irrelevant, [because] Volkswagen AG 'had nothing whatever to do with the design, manufacture or sale of the subject Audi 100 LS.'" *Id.* at 1261.

486. *See id.*

487. *See Robinson I*, 739 F.2d 1481 (10th Cir. 1984).

488. 56 F.3d 1259 (10th Cir. 1995).

489. *See id.* at 1264 (quoting Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 245 (1944)).

490. *See* Demjanjuk v. Petrovsky, 10 F.3d 338, 354 (6th Cir. 1993).

491. [Plaintiffs'] Petition for Writ of Certiorari (filed Oct. 19, 1995) at 22, Robinson v.

conflict regarding requisite intent to defraud persists.[492]

The trial court is afforded broad discretion in fashioning a remedy for fraud on the court and a selected remedy will be disturbed by the appellate court only for abuse of that discretion.[493] Remedies for fraud on the court may include *sua sponte*[494] dismissal,[495] striking of an answer to a complaint and entry of default[496] or setting aside of a judgment or settlement.[497]

In *Eppes v. Snowden*,[498] a case brought by plaintiff Lloyd's of London underwriters to absolve them from any liability under an insurance policy insuring a horse, a Kentucky federal district court considered the purpose and intended effect of the remedy for fraud on the court:

> The remedy must serve as a deterrent to the defendant and all others that might be similarly tempted to [defraud the court]. The remedy must be sufficient to serve universal notice that this conduct will not be tolerated. . . . The remedy must reflect the Court's zealous concern for the integrity – the absolute and unquestioned integrity – of its orderly procedures. . . . The remedy must assure all those who seek the resolution of their disputes in this Court and these persons include the rich, as well as the poor – the Lexingtonian – the stranger, that this ill-conceived and poorly executed enterprise shall not be repeated.[499]

The *Eppes* court fashioned a remedy, as urged by the plaintiff Lloyd's of

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Audi Aktiengesellschaft, 56 F.3d 1259 (10th Cir. 1995).

492. *See* 516 U.S. 1045.

493. *See* Aoude v. Mobil Oil Corp., 892 F.2d 1115, 1117 (1st Cir. 1989). A court's failure to remedy fraud on the court constitutes grounds for reversal.

494. *See* Kupferman v. Consolidated Research & Mfg. Corp., 459 F.2d 1072, 1074 n.1 (2d Cir. 1972) ("a finding of fraud on the court empowers the district court to set aside the judgment *sua sponte*").

495. *See Aoude*, 892 at 1122; Vargas v. Peltz, 901 F.Supp. 1572 (S.D. Fla. 1995).

496. *See* Sun World, Inc. v. Lizarazu Olivarria, 144 F.R.D. 384, 389-90 (E.D. Cal. 1992).

497. *See* Raymark Indus., Inc. v. Stemple, No. 88-1014-K, 1990 U.S. Dist. LEXIS 6710 at 53 n.7 (D. Kan. May 30, 1990) ("Although fraud on the court is generally applied to grant a party relief from a final judgment of the court, this court believes that such a remedy is equally applicable where the court must approve the settlement agreement as fair, adequate and reasonable, and that it is not the product of fraud or collusion among the negotiating parties.").

498. 656 F.Supp. 1267 (E.D. Ky. 1986).

499. *Id.* at 1281.

London underwriters, which (1) struck the defendants' answer and counterclaim; (2) awarded declaratory judgment in favor of the underwriters; and (3) directed one of the defendants to pay the underwriters' costs and expenses with interest, including but not limited to attorneys' fees and witness fees.[500] Courts' willingness to impose such severe sanctions and to upset principles of collateral estoppel and res judicata underscores the gravity with which fraud on the court is viewed.

The fraud on the court doctrine stands in firm recognition that "[c]ourts cannot lack the power to defend their integrity against unscrupulous marauders; if that were so, it would place at risk the very fundament of the judicial system."[501] The doctrine applies to remedy various forms of misconduct before the courts. Often found in instances of attorney misconduct, the doctrine is applied by courts to preserve the fair administration of justice against deception,[502] and to protect against interference with courts' ability to adjudicate matters impartially and litigants' ability to present claims and defenses for fair adjudication.[503] The doctrine provides yet another safeguard of the integrity of the judicial system.[504]

VII. THE JUDICIAL ADMISSIONS DOCTRINE

The doctrine of judicial admissions may preclude inconsistent statements that are not barred under the estoppel doctrines, the "mend the hold" doctrine, or the "fraud on the court" doctrine. The weight that the court gives to a prior admission when a litigant attempts to contradict the admission in litigation depends on whether the prior statement is a judicial admission asserted in the course of a judicial proceeding, or an evidentiary admission,[505] which may have been made anytime. Most jurisdictions recognize that a litigant's

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500. *See id.* at 1273.

501. *Aoude*, 892 at 1118.

502. *See* Rockdale Management Co. v. Shawmut Bank, 418 Mass. 596 (1994) (quoting Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246 (1944)).

503. *See Aoude*, 892 at 1117.

504. *See* Prince v. Delaware Cty. Bar Ass'n., C.A. No. 92-1942, 1993 U.S. Dist. LEXIS 5827 at *4 - *5 (E.D. Pa. May 3, 1993) (citing Eppes v. Snowden, 656 F. Supp. 1267, 1277 (E.D. Ky. 1986); United Business Communications, Inc. v. Racal-Milgo, Inc., 591 F. Supp. 1172, 1186 (D. Kan. 1984)). "Fraud on the court" is discussed as an exception to the collateral estoppel doctrine in Part IV of this article, *infra*.

505. Evidentiary admissions are discussed in Part VIII of this article, *supra*.

judicial admission or "judicial confession"[506] is binding upon the speaker and may not be contradicted later in the proceeding.[507]

The effects of a judicial admission are powerful: Under the Uniform Commercial Code[508] and under the case law of some jurisdictions, a judicial admission of an oral agreement is sufficient to overcome the Statute of Frauds.[509] More commonly, the effect of a judicial admission is that the

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506. Under the Louisiana Civil Code, the term "judicial confessions" is used to refer to judicial admissions. *See* Farmers-Merchants Bank and Trust Co. v. St. Katherine Insurance, 640 So.2d 353, 357 (La. App. 1994); and La. Civ. Code art. 1853 (West Annotated Date):

> A judicial confession is a declaration made by a party in a judicial proceeding. That confession constitutes full proof against the party who made it.
>
> A judicial confession is indivisible and it may be revoked only on the ground of error of fact.

507. *See* Davis v. A.G. Edwards & Sons, Inc., 823 F.2d 105, 107-08 (5th Cir. 1987); Travelers Indem. Co. v. Engel, C.A. No. 92 - 4866, 1994 U.S. Dist. LEXIS 10539 (E.D. Pa. July 29, 1994) (granting Travelers' motion for summary judgment based on judicial admission in answer and disallowing affidavit to contradict answer); International Harvester Co. v. Industrial Comm'n, 523 N.E.2d 1303, 1305 (Ill. App. Ct. 1988); Gallagher v. Haffner, 44 N.W.2d 491 (N.D. 1950) (same); 32 C.J.S. *Evidence* § 379 (same).

508. U.C.C. § 2-201(3)(b) (1977) permits enforcement, to the amount of sale judicially admitted, of an otherwise unenforceable oral contract for the sale of movable items of personal property of $500 or more "if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made . . . ." *See also* U.C.C. § 1-206 (judicial admissions exception for sale of personal property in excess of $5,000); U.C.C. § 8-319 (judicial admissions exception for sale of securities); U.C.C. § 9-203 (judicial admissions exception for security agreements). *But see* Michael J. Herbert, *Procedure and Promise: Rethinking the Admissions Exception to the Statute of Frauds Under U.C.C. Articles 2, 2A and 8*, 45 OKLA. L. REV. 203 (1992) (arguing exception too broad).

509. *See* Anchorage-Hynning & Co. v. Moringiello, 697 F.2d 356 (D.C. Cir. 1983) (judicial admission during stipulation of oral contract for lease of land and purchase of building on land barred Statute of Frauds defense); Bentley v. Potter, 694 P.2d 617, 621 (Utah 1984) (judicial admission in pleadings or at trial of oral guarantee of debt of another sufficient to overcome Statute of Frauds); Smith v. Boyd, 553 A.2d 131, 133-34 (R.I. 1989) (judicial admission of contract to sell land overcomes Statute of Frauds, but no oral contract was reached under facts of case). *But see* Boylan v. G.L. Morrow Co., 468 N.E.2d 681, (N.Y. 1984) (defendant's concession that for purposes of motion to dismiss, all facts in complaint must be accepted as true did not amount to affirmative judicial admission of oral contract so as to defeat Statute of Frauds). For a thorough discussion of the judicial admissions exception to the Statute of Frauds, see Peter J. Shedd, *The Judicial Admissions Exception to the Statute of Fraud in Real Estate Transactions*, 19 REAL ESTATE L.J. 232 (1991), and the authorities and

matter admitted is conclusive against the admitting litigant in the court or administrative proceedings in which the statement was asserted.[510] The admission may form the basis for summary judgment against that litigant.[511]

At least two United States Courts of Appeals have described judicial admissions as "proof possessing the highest possible probative value; . . . facts established not only beyond the need of evidence to prove them, but beyond the power of evidence to controvert them."[512] A judicial admission is not evidence in the proceeding, but rather "a substitute for evidence, in that it does away with the need for evidence."[513] When a litigant, directly or through counsel[514] or agent,[515] has made a judicial admission, the litigant may

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cases cited therein.

510. *See* International Harvester Co. v. Industrial Comm'n, 523 N.E.2d 1303, 1306 (Ill. App. Ct. 1988) (assuming one is bound by judicial admissions asserted in administrative proceedings, but holding workers' compensation insurance claimant's testimony that his condition had not worsened was not judicial admission because claimant's medical condition was not within his personal knowledge); Saltzman v. Liebman, 63 A.D.2d 621 (N.Y. App. Div. 1978) (summary judgment proper based on sworn statements before the Board of Standards and Appeals and in a prior, unsuccessful Article 78 proceeding); 1 WITKIN, CAL. EVIDENCE § 644, at 630 (3d ed. 1986) (statements made during administrative proceedings may constitute judicial admissions).

511. *See* Roberts v. Burkett, 802 S.W.2d 42, 45 (Tex. App. 1990) (judicial admissions may be basis for summary judgment); Saltzman v. Liebman, 63 A.D.2d 621 (N.Y. App. Div. 1978) (summary judgment proper based on defendant's sworn statements before the Board of Standards and Appeals and in a prior, unsuccessful proceeding). *See also* [Six Insurance Companies'] Reply to Response and Opposition of Browning-Ferris Industries, Inc. to [Comprehensive General Liability Insurance] Carriers' Motion for Summary Judgment (filed Jan. 7, 1993) at 9 n.10, Browning-Ferris Indus., Inc. v. Evanston Ins. Co., No. 90-059406 (Tex. Dist. Ct.) (facts alleged in pleadings constitute judicial admissions and basis for summary judgment).

512. Best Canvas Products & Supplies v. Ploof Truck Lines, 713 F.2d 618, 621 (11th Cir. 1983) (quoting Hill v. Federal Trade Comm'n, 124 F.2d 104, 106 (5th Cir. 1941)).

513. Futterleib v. Mr. Happy's Inc., 548 A.2d 728, 732 (Conn. App. Ct. 1988) (quoting State v. Rodriguez, 429 A.2d 919 (Conn. 1980)); 9 WIGMORE, EVIDENCE § 2588 (3d ed.).

514. *See* United States v. McKeon, 738 F.2d 26, 30 (2d Cir. 1984) (statement of counsel is binding as judicial admission); Isabelle v. Iron Cliffs Co., 57 Mich. 120, 23 N.W. 613 (Mich. 1885) (same); Sepulveda v. Krishnan, 839 S.W.2d 132, 135 (Tex. App. 1992) (same); *In re* Marriage Schweihs, 650 N.E.2d 569, 574 (Ill. App. Ct. 1995) (same); Kohne v. Yost, 818 P.2d 360 (Mont. 1991) (same); 1 WITKIN, CAL. EVIDENCE §648 at 633 (3d ed. 1986) (statement of counsel may be deemed judicial admission). *See also* Certain Third-Party Defendants' [Insurance Companies] Memorandum of Law in Further Support of Motion for Summary Judgment in Action 1 (filed Mar. 15, 1989) at 16, Michigan Nat'l. Bank-Oakland v. American Centennial Ins. Co., Index No. 23453/85 (N.Y. Sup. Ct. 1989) ("If anything, papers 'deliberately drafted by counsel for the express purpose of limiting and defining the facts in

not introduce evidence to contradict its judicial admission.[516] Similarly, the opposing litigant need not produce evidence to prove the fact judicially admitted.[517]

Courts rely upon the rule binding a litigant to its judicial admissions to advance judicial integrity. The Supreme Court of Pennsylvania has explained that "[w]hen a man alleges a fact in a court of justice, for his advantage, he shall not be allowed to contradict it afterwards. It is against good morals to permit such double dealings in the administration of justice."[518] The doctrine protects the judiciary from the assertion of statements that are perjurious[519] or that the speaker does not reasonably believe to be true.[520]

A judicial admission is said to bind not the court but the speaker[521] and courts may exercise broad discretion in application of the rule. Courts have refused to bind a litigant to a judicial admission when to do so would work an

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issue' should be given *greater* conclusiveness as judicial admissions than a party's testimony uttered by a layman in the stress of examination.") (emphasis in original) (quoting Skelka v. Metropolitan Transit Auth., 76 A.D.2d 492 (N.Y. App. Div. 1980),; Alan Mansfield, *Lawyer's Admissions*, 12 LITIG. 39, 40 (Fall 1985) (explaining effect of lawyer's admissions).

515. *See* Memorandum of Law of Defendant Royal Indemnity Company in Opposition to Plaintiffs' Order to Show Cause Dated December 9, 1994 (dated Dec. 22, 1994) at 7, 9, Gold Fields Am. Corp. v. Aetna Cas. and Sur. Co., No. 19879/89 (N.Y. Sup. Ct. 1994) ("doctrine of judicial admissions provides that statements by a party, or a party's agent, made in connection with judicial proceedings, may establish proof of facts which is admissible later in the proceedings." (citing United States v. McKeon, 738 F.2d 26, 30 (2d Cir. 1984))).

516. *See, e.g.*, International Harvester Co. v. Industrial Comm'n, 523 N.E.2d 1303, 1305 (Ill. App. Ct. 1988) ("Judicial admissions are binding upon the party making them and may not be contradicted."); Daily v. Somberg, 49 N.J.Super. 469, 140 A.2d 429, 435 (N.J. Super. Ct. 1958) (judicial admission is conclusive upon party making it and party may not dispute the fact further nor introduce evidence to dispute it); State v. McWilliams, 352 S.E.2d 120, 127 (W. Va. 1986) (judicial admission withdraws particular fact from realm of dispute); Defendants American Home Assurance Company, Granite State Insurance Company, the Insurance Company of the State of Pennsylvania and National Union Fire Insurance Company of Pittsburgh, PA's Memorandum Regarding Use of Admissions by Plaintiff (dated July 16, 1997) at 1-2, Cascade Corp. v. American Home Assurance Co., No. 9205-03083 (Or. Cir. Ct. 1997) (judicial admission is conclusive and dispenses wholly with the need for proof of the fact).

517. *See* Hofer v. Bituminous Cas. Corp., 148 N.W.2d 485, 486 (Iowa 1967); Harmon v. Christy Lumber, Inc., 402 N.W.2d 690, 692 (S.D. 1987).

518. Tops Apparel Mfg. Co. v. Rothman, 244 A.2d 436, 438 n.8 (Pa. 1968) (quoting Wills v. Kane, 2 Grant 60, 63 (Pa. 1853)).

519. *See* Eidson v. Audrey's CTL, Inc., 621 N.E.2d 921, 923 (Ill. App. Ct. 1993) (citing Smith v. Ashley, 332 N.E.2d 32, 34 (Ill. App. Ct. 1975)).

520. *See* Drier v. Upjohn Co., 492 A.2d 164, 167 (Conn. 1985).

521. *See* 31A C.J.S. *Evidence* § 381.

injustice against the judicial system,[522] or would otherwise hamper the efficient administration of justice.[523]

Depending on the law of a particular jurisdiction,[524] a litigant's binding judicial admission may be contained in a pleading,[525] stipulation,[526] oral argument,[527] testimony or affidavit,[528] or admission pursuant to request to

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522. Gallagher v. Haffner, 44 N.W.2d 491 (N.D. 1950) (court refused to bind party to untrue admission of fact which would have effect of depriving court of jurisdiction or importing jurisdiction to the tribunal).

523. *See, e.g.*, Baldwin v. Vantage Corp., 676 P.2d 413 (Utah 1984) (Although "a judicial admission is normally conclusive on the party making it[,] ... [t]he trial court may relieve a party from the consequences of a judicial admission"; judicial admission was "waived" because other party treated admitted fact as an issue in remainder of proceedings).

524. In Michigan, for example, statutory law prescribes that statements in signed pleadings, but not statements in deposition testimony, answers to interrogatories, nor answers to request for admission, may constitute judicial admissions. MICH. R. CT. 2.110 (1996); MICH. R. EVID. 801(d)(2), 801(d)(2)(A), 801(d)(2)8(C), 801(d)(2)8(D).

525. *See* Schott Motorcycle Supply, Inc. v. American Honda Motor Co., Inc., 976 F.2d 58, 61 (1st Cir. 1992) (assertion is binding throughout course of proceeding); Missouri Housing Dev. Comm'n v. Brice, 919 F.2d 1306, 1315 (8th Cir. 1990) ("Even if the post-pleading evidence conflicts with the evidence in the pleadings, admissions in the pleadings are binding on the parties and may support summary judgment against the party making such admissions."); Coraci v. Yurkin, 174 N.Y.S.2d 540 (N.Y. Sup. Ct. 1957) (admission in answer constitutes "highest form" of evidence); Baldwin v. Vantage Corp., 676 P.2d 413 (Utah 1984) ("admission of fact in a pleading is a judicial admission and is normally conclusive on the party making it"); WITKIN, CAL. EVIDENCE §644 (judicial admission contained in pleading or allegation is "conclusive concession of the truth of a matter which has the effect of removing it from the issues") (citing 4 CAL. PROC. 3D, PLEADINGS, §§ 408, 409, 410)); 31A C.J.S. *Evidence* § 381(c)). *See also* [Great American Insurance Company's] Reply Memorandum in Opposition to Plaintiff's Motion and in Further Support of Defendant's Cross-Motion for Partial Summary Judgment (filed Feb. 8, 1990) at 25, Christiana General Ins. Corp. of New York v. Great American Ins. Co., 87 Civ. 8310 (PKL) (S.D.N.Y. 1990) (statement in complaint that parties acted at arms' length constitutes judicial admission).

526. *See* Wheeler v. John Deere Co., 935 F.2d 1090, 1097-99 (10th Cir. 1991) (stipulation is admission which may not be set aside at will but may be withdrawn to prevent injustice, stipulation from first trial held binding in second trial); *In re* Schraiber, 141 B.R. 1000, 1006 (N.D. Ill. 1992) (judicial admissions result from assertions in pleadings, stipulations, statements and pretrial orders, and by responses to request to admit); Cortez v. Liberty Mut. Fire Ins. Co., 885 S.W.2d 466, 470 (Tex.App. Ct. 1994) (doctrines of collateral estoppel and judicial admissions precluded plaintiff from asserting action against insurance company that was inconsistent with agreed judgment in underlying action).

527. *See* Kempter v. Hurd, 713 P.2d 1274, 1279 (Colo. 1986) (statement of attorney in oral argument that remaining defendants had been abandoned was judicial admission which

admit.[529] Courts and the Federal Rules of Civil Procedure hold that a judicial admission in a pleading results when a litigant affirmatively alleges a matter, states in its answer that another litigant's allegation is true, or fails properly to deny the other litigant's allegation.[530]

Ordinarily, no judicial admission will result from the permissive use of inconsistent counts or defenses.[531] Some authorities except from this rule a

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precluded petitioners from maintaining action against remaining defendants); Horn v. Atchison, Topeka & Santa Fe Ry. Co., 394 P.2d 561 (Cal. 1964) (statement in oral argument is judicial admission).

528. *See* International Harvester Co. v. Indus. Comm'n, 523 N.E.2d 1303, 1306 (Ill. App. Ct. 1988) (testimony is binding if the matter testified to is within party's personal knowledge, without reasonable chance of mistake, and is clear and unequivocal); E-Tex Dairy Queen, Inc. v. Adair, 566 S.W.2d 37, 39 (Tex. 1978) (testimonial declarations of a party may constitute judicial admissions if they are clear, deliberate and unequivocal). *But see* Pako Corp. v. Thomas, 855 S.W.2d 215, 217 (Tex.App. Ct. 1993) (party's testimonial declarations are considered "quasi-admissions" and not judicial admissions); 31A C.J.S. *Evidence* § 381(d) ("Where a party in the course of his testimony makes statements contrary to his position in the litigation, such statements may be viewed as conclusive judicial admissions. They may also be viewed as ordinary evidence . . ."). *See also* Certain Third-Party Defendants' [Insurance Companies] Memorandum of Law in Further Support of Motion for Summary Judgment in Action 1 (filed Mar. 15, 1989) at 16, Michigan Nat'l Bank-Oakland v. American Centennial Ins. Co., Index No. 23453/85 (N.Y. Sup. Ct. 1989) (extrinsic evidence proffered with attorney's affidavit constitutes adoptive judicial admission) (citing Yannon v. RCA Corp., 100 A.D.2d 966 (N.Y. 1980)).

529. *See* Tops Apparel Mfg. Co. v. Rothman, 244 A.2d 436, 438 (Pa. 1968). FED. R. CIV. P. 36 provides that an admission in response to a request to admit is binding for the purpose of the present action only. *See also* N.C. GEN. STAT. §1A-1, rule 36 (b) (1996): "any admission made pursuant to this rule is for the purposes of the pending action only and is not an admission by him for any other purpose *nor may it be used against him in any other proceeding.*" (emphasis added).

530. *See* Deputron v. Young, 134 U.S. 241 (1890); *In re* Marriage of Maupin, 829 S.W.2d 125, 127 (Mo. App. 1992); FED. R. CIV. P. 8(d); JACK H. FRIEDENTHAL, ET AL., CIVIL PROCEDURE 283 (1985); WITKIN, CAL. EVIDENCE § 644.

531. *See, e.g.,* Allendale Mut. Ins. Co. v. Bull Data System, 91-C-6103, 1994 U.S. Dist. LEXIS 17444 at *5 & *5 n.2 (N.D .Ill. Dec. 7, 1994) (pleading should not be construed as an admission against another alternative or inconsistent pleading in the same case; even if inconsistent pleadings may be considered judicial admissions, court would grant party leave to amend to clarify contradiction); Nicholls v. Barwick, 792 F.2d 1520, 1523 (11th Cir. 1986) (plaintiff could not use allegation in the defendants' third-party complaint to prove defendants' negligence when the defendants asserted "inconsistent positions in their pleadings in order to lay a basis for establishing the contingent liability" of third-party defendants); Molbergen v. United States, 757 F.2d 1016 (9th Cir.1985) (inconsistent or alternative claims in the same

contradiction of fact in a verified pleading.[532] Neither is a litigant bound by superseded pleadings[533] or pleadings or admissions asserted in other proceedings. However, prior pleadings and judicial admissions of other proceedings are admissible against the litigant as evidentiary admissions.[534]

There is not a clear consensus regarding whether both statements of law and opinion may result in judicial admissions, or whether only a statement of fact may constitute a judicial admission.[535] In 1970, Federal Rule of Civil

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complaint should not be read as judicial or evidentiary admissions against one another); Garman v. Griffin, 666 F.2d 1156 (8th Cir. 1981) (in negligence-based wrongful death action, it was error to permit defense counsel to read to jury strict liability allegations against alleged bus seller regarding defective condition of bus that were contained in dismissed portion of plaintiff's amended complaint); Continental Ins. Co. of New York v. Sherman, 439 F.2d 1294, 1298-99 (5th Cir. 1971) (usual rule that facts in pleadings constitute judicial admissions did not apply to allow into evidence inconsistent cross-claim against third party because to do so would "place . . . litigant at his peril in exercising the liberal pleading and joinder provisions of . . . Rule 8(e)(2)").

532. *See* WITKIN, CAL. EVIDENCE § 644 (describing California law); Morse/Diesel, Inc. v. Fidelity and Deposit Co. of Md., 763 F. Supp. 28, 32 (S.D.N.Y. 1991) (subcontractor's surety's judicial admission in answer that general contractor believed cost overrun would result upon subcontractor's completion of work barred surety from asserting fraud counterclaim against general contractor, despite surety's characterization of statement as alternative claims or defenses); Fibreboard Paper Products Corp. v. East Bay Union of Machinists, 39 Cal. Rptr. 64 (Cal. Ct. App. 1964) ("To hold that a party may plead inconsistent defenses in different proceedings without incurring procedural sanctions would stultify the rule which permits the use of pleadings in prior proceedings as evidentiary admissions in subsequent proceedings.").

533. At least one court has held that an admission made in a stricken pleading is binding. *See* Heimer v. Travelers Ins. Co., 400 So. 2d 771, 773-74 (Fla. Dist. Ct. App. 1981) (judgment for insurance company reversed based on admission in answer that was stricken as sanction for failure to respond to interrogatories).

534. *See, e.g.,* United States v. McKeon, 738 F.2d 26, 30 (2d Cir. 1984) (superseded pleadings are admissible against party, but do not constitute judicial admissions); Cook v. Beerman, 276 N.W.2d 84, 85 (Neb. 1979) (same); MCCORMICK, EVIDENCE 3d §265 (3d. ed); 4 WIGMORE, EVIDENCE §1067 (Chadbourn Rev.) § 1067; 52 A.L.R.2d 516. Pleadings in other proceedings: Hibernia Savings Bank v. Bomba, 620 N.E.2d 787, 791 (Mass. App. Ct. 1993) (pleading admissible but not binding in subsequent action); Cruz v. Liberty Mut. Ins. Co., 853 S.W.2d 714, 717 (Tex.App. Ct. 1993) (rejecting insurance company's assertion that statement in prior proceeding is judicial admission). Rules governing evidentiary admissions are discussed at Part VIII of this article, *supra*.

535. *Compare* FED R. CIV. P. 36 ("statements or opinions of fact or of the application of law to fact" constitute judicial admissions); Choiniere v. Sulikowski, 229 A.2d 305, 307 (Vt. 1967) (it was reversible error for the trial court to submit to the jury the issue of whether the defendant was negligent when defendant's counsel admitted during closing argument that defendant had crossed the center line and thus was negligent) *with* Roberts v. Burkett, 802

Procedure 36, governing admissions made in response to requests for admission, was amended to recognize as conclusive not only a litigant's factual assertion, but also its "statements or opinions of fact or of the application of law to fact."[536] The matter which is the subject of a request to admit is admitted by operation of law "unless, within 30 days after service of the request, . . . the party to whom the request is directed serves a written answer or objection . . . ."[537] As the advisory committee's note points out, nonfactual assertion should be binding because "[n]ot only is it difficult as a practical matter to separate 'fact' from 'opinion,' . . . but an admission on a matter of opinion may facilitate proof or narrow the issues or both."[538] Following the federal lead, many states amended their codes of procedure to reflect the 1970 amendment.[539]

Courts have construed the judicial admissions doctrine broadly to bind a litigant to its judicial admissions of opinion and legal theory in contexts other than admissions pursuant to Rule 36.[540] Litigants, too, have advocated

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S.W.2d 42, 45 (Tex.App. Ct. 1990) (party not bound by admissions made during oral argument regarding other parties' negligence because statements of opinion are not judicial admissions; to qualify as judicial admission, a statement must be (1) made in judicial proceeding; (2) contrary to an essential fact for the party's recovery; (3) deliberate, clear and unequivocal; (4) related to a fact upon which judgment for the opposing party could be based; and (5) enforcing the admission would be consistent with public policy); State v. McWilliams, 352 S.E.2d 120, 127 (W. Va. 1992) (to constitute judicial admission, statement must be of fact, not opinion); State v. Ward, 314 So. 2d 383, 389-90 (La. Ct. App. 1975) (state not bound by judicial admission that it was donee because the allegation was conclusion of law, not fact).

Some courts have stated that the fact admitted must have been in the personal knowledge of the declarant. *See* Burns v. Michelotte, 604 N.E.2d 1144, 1151 (Ill. App. Ct. 1992) (to constitute judicial admission, fact must be within party's personal knowledge).

536. FED. R. CIV. P. 36(a). The Rule formerly recognized the binding effect of statements of fact only.

537. FED. R. CIV. P. 36(a). *See also* American Auto Assn., Inc. v. AAA Legal Clinic of Jefferson Crooke, P.C., 930 F.2d 1117 (5th Cir. 1991) (district court erred at end of trial by *sua sponte* ignoring, or by treating as withdrawn, party's Rule 36 admissions); Vermont v. Staco, 684 F. Supp. 822, 829-30 (D. Vt. 1988) (because mercury thermometer manufacturer failed timely to answer state's requests for admissions regarding release of toxic substances, requests for admissions deemed admitted).

538. FED. R. CIV. P. 36 advisory committee's note.

539. *See, e.g.*, VT. R. CIV. P. 36 (1997).

540. *See, e.g.*, Horn v. Atchison, Topeka & Santa Fe Ry. Co., 394 P.2d 561 (Cal. 1964) (statement to jury in defense counsel's opening statement telling the jury to allow some recovery to plaintiff was judicial admission of liability which removed the issue from the case); *In re* R.S., L.S. and B.S., 469 A.2d 751 (Vt. 1983) (statement by counsel that children were in

expanded construction of the doctrine to bar inconsistent positions by other litigants. In New York Supreme Court, insurance companies argued that the State Superintendent of Insurance's allegations of fraud in a prior proceeding constituted binding judicial admissions in subsequent litigation.[541] In Missouri, an insurance company argued without success that the doctrine should bind a policyholder even to out-of-court statements made to a claims representative when the policyholder did not dispute the statement on the stand.[542]

Courts occasionally apply the judicial admissions doctrine to bind a litigant to judicial admissions asserted in other proceedings. The United States Court of Appeals for the Tenth Circuit, for example, in determining whether a litigant should be bound by a position asserted in a stipulation in a former proceeding, looked to whether precluding an inconsistent position in the second proceeding would result in manifest injustice and determined that the litigant should be bound.[543]

Litigants frequently argue that the doctrine should preclude other litigants from asserting positions inconsistent with judicial admissions of previous actions. In an Iowa court, for example, an insurance company urged the court to hold binding a litigant's statement in a prior proceeding that the Iowa State Commerce Commission revoked the license of third-party elevator company on a specific date.[544] And in a California court, another insurance company sought to bind the policyholder to statements asserted in a foreign action, explaining that the doctrine should apply to preclude the policyholder from "speak[ing] out of the other side of its mouth on this side of the Atlantic."[545]

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need of care or supervision constitutes judicial admission).

541. *See* Certain Reinsurers' Memorandum of Law in Opposition to Motions for Leave to Renew and Reargue (filed Feb. 12, 1990) at 15, Michigan Nat'l Bank-Oakland v. American Centennial Ins. Co., Nos. 41292/85, 23453/85 (N.Y. Sup. Ct. 1990).

542. *See* State Farm Mut'l Auto. Ins. Co. v. Allen, 744 S.W.2d 782, 787 (Mo. 1988). *See also* [Great American Insurance Company's] Reply Memorandum in Opposition to Plaintiff's Motion and in Further Support of Defendant's Cross-Motion for Partial Summary Judgment (filed Feb. 8, 1990) at 25, Christiana General Ins. Corp. of New York v. Great Am. Ins. Co., 87 Civ. 8310 (PKL) (S.D.N.Y. 1990) (other insurance company's statement in testimony that term "fiduciary" "doesn't sound right" should constitute binding judicial admission).

543. *See* Wheeler v. John Deere Co., 935 F.2d 1090, 1097-99 (10th Cir. 1991).

544. *See* Brief and Argument for Appellant IGF Insurance Company (received July 22, 1986) at 11, Vennerberg Farms, Inc. v. IGF Ins. Co., No. 86-506 (Iowa Dist. Ct. 1986), *aff'd*, 405 N.W.2d 810 (Iowa 1987).

545. Industrial's Memorandum Opposing Apple Computer's Motion for Summary

In *Travelers Insurance Co. v. Richard John Ratcliffe Keeling*[546] plaintiff and defendant insurance companies reversed positions regarding whether a dispute was arbitrable under a reinsurance agreement. Keeling, an underwriter at Lloyd's of London, filed suit in England asserting that the dispute was not arbitrable and Travelers Insurance Company argued that it was arbitrable. In the second lawsuit filed in New York by Travelers, Lloyd's (Keeling) argued that the dispute was arbitrable and asserted federal question jurisdiction to determine arbitrability.[547] Travelers Insurance Company explained the public policy reasons for the judicial admissions doctrine and urged the court to bind Lloyd's to statements asserted in the prior action:

> [A] party may not freely take inconsistent positions in a law suit and simply ignore the effect of a prior filed document. This policy against permitting a party to play "fast and loose" with the courts seems particularly applicable . . . where [plaintiff] makes the far from frivolous charge that [the defendant's] change in position is not merely the product of honest error, but is a tactic in a war of

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Adjudication (filed Dec. 3, 1992) at 5, Industrial Indem. Co. v. Apple Computer, Inc., No. 938666 (Cal. Super. Ct. 1992). *See also,* Memorandum of Law of Aneco Reinsurance Underwriting Limited in Opposition to the Motions of the Superintendent of Insurance and Michigan National Bank to Renew and Reargue (filed Feb. 12, 1990) at 6, Michigan National Bank-Oakland v. American Centennial Ins. Co., Index Nos. 41292/85, 23453/85 (N.Y. Sup. Ct. 1991) (party should be bound by judicial admission in earlier proceeding against another party); Memorandum of Law in Opposition to Defendant's Motion to Dismiss (dated Oct. 21, 1991) at 6, Republic Ins. Co. v. North Am. Philips Corp., No. 10096 (Conn. Ct. App. 1991) (policyholder should be bound by statements made during prior litigation against another insurance company). *But see* [Great American Insurance Company's] Reply Memorandum in Opposition to Plaintiff's Motion and in Further Support of Defendant's Cross-Motion for Partial Summary Judgment (filed Feb. 8, 1990) at 25, Christiana General Ins. Corp. of New York v. Great Am. Ins. Co., 87 Civ. 8310 (PKL) (S.D.N.Y. 1990) (other insurance company's allegation that pleadings, affidavits and briefs filed in other case constitute judicial admissions in current proceeding is "utterly absurd").

546. No. 91 Civ. 7753 (S.D.N.Y. 1991).

547. *See* Defendants (Richard John Ratcliffe Keeling and Certain Underwriters at Lloyd's of London) Memorandum of Law in Opposition to Remand and in Support of Cross-Motion to Compel Arbitration, for Judgment on the Pleadings as to the Nonarbitrable Claims, and to Stay the Action Pending Arbitration (filed Jan. 7, 1992) at 21, Travelers Ins. Co. v. Richard John Ratcliffe Keeling, No. 91 Civ. 7753 (S.D.N.Y. 1992).

attrition...[548]

When invoked as urged by this litigant, the doctrine of judicial admissions prevents litigants from making inconsistent statements under facts and for public policy reasons to which the doctrine of judicial estoppel also is applicable.

Unlike the judicial estoppel doctrine and other doctrines discussed in this article, the judicial admissions doctrine usually is applied to preclude inconsistent positions within the same proceeding only.[549] Therefore, the rule generally would not preclude a litigant from "winning twice on the basis of incompatible positions"[550] in successive litigation, nor from "blow[ing] hot and cold as the occasion demands"[551] in successive suits. The rule advances judicial integrity, however, by precluding some inconsistent positions within the same suit – when the doctrine of collateral estoppel, and sometimes judicial estoppel, are inapplicable.[552] Moreover, because judicial admissions may arise in the course of litigation from statements contained in a court document such as a pleadings[553] admissions pursuant to request to admit[554] or

548. Plaintiffs' (The Travelers Ins. Co., the Travelers Indemnity Co. and the Charter Oak Fire Insurance Co.) Memorandum of Law in Support of its Motion to Remand (filed Dec. 16, 1991) at 19, Travelers Insurance Co. v. Richard John Ratcliffe Keeling, No. 91 Civ. 7753 (S.D.N.Y. 1991) (quoting Gilmore v. Shearson/American Express, 811 F.2d 108, 113 (2d Cir. 1987)).

549. *See, e.g.,* Slate Printing Co. v. Metro Envelope Co., 532 F. Supp. 431, 436 (N.D. Ill. 1982) (judicial admission not binding in subsequent action); Cook v. Beermann, 276 N.W.2d 84, 85 (Neb. 1979) (pleadings constitute judicial admissions in present proceeding but only simple admissions in subsequent proceedings and when pleadings are superseded).

550. 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER AND EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4477 (1981 ed., 1997 Supp.).

551. Allen v. Zurich Ins. Co., 667 F.2d 1162, 1167 n.3 (4th Cir. 1982).

552. Courts that require "prior judicial acceptance" as an element for judicial estoppel usually bar inconsistent positions under that doctrine in successive suits only. *See, e.g.*, Kimco of N.Y., Inc. v. Devon, 558 N.Y.S.2d 630, 632 (N.Y. App. Div. 1990) (doctrine of judicial estoppel "rests upon the principle that a litigant should not be permitted . . . to lead a court to find a fact one way and then contend in another judicial proceeding that a fact should be found otherwise").

553. *See* Schott Motorcycle Supply, Inc. v. American Honda Motor Co., Inc., 976 F.2d 58, 61 (1st Cir. 1992).

554. *See* Tops Apparel Mfg. Co. v. Rothman, 244 A.2d 436, 438 (Pa. 1968).

stipulations,[555] or from statements made in oral argument,[556] affidavits or testimony,[557] and because the doctrine enjoys universal acceptance as establishing incontrovertible proof of the matter admitted,[558] the doctrine serves as a substantial bar to litigants who would controvert prior positions in litigation.

VIII. EVIDENTIARY ADMISSIONS

A litigant's prior inconsistent positions may constitute extra-judicial admissions against the litigant even though the prior positions are not conclusively established against the litigant for the purpose of litigation under any of the estoppel doctrines, the "mend the hold" doctrine or the judicial admission doctrine. An extra-judicial admission, also known as an evidentiary admission, arises from a litigant's relevant[559] statement which may have been spoken either inside or outside of the courtroom,[560] but unlike a judicial admission, an extra-judicial admission may be controverted or explained by the speaker.[561] The statement is admissible under state and

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555. *See* Wheeler v. John Deere Co., 935 F.2d 1090, 1097-99 (10th Cir. 1991).

556. *See* Kempter v. Hurd, 713 P.2d 1274, 1279 (Colo. 1986).

557. *See* International Harvester Co. v. Industrial Comm'n, 523 N.E.2d 1303, 1306 (Ill. 1988).

558. *See* Best Canvas Prod. & Supplies, Inc. v. Ploof Truck Lines, Inc., 713 F.2d 618, 621 (11th Cir. 1983) (quoting Hill v. Federal Trade Comm'n, 124 F.2d 104, 106 (5th Cir. 1941)).

559. Irrelevant evidence is inadmissible pursuant to FED. R. EVID. 402. The advisory committee's note accompanying the Rule explains, "The provisions that all relevant evidence is admissible, with certain exceptions, and that evidence which is not relevant is not admissible are 'a presupposition involved in the very conception of a rational system of evidence.'" (quoting JAMES BRADLEY THAYER, PRELIMINARY TREATISE ON EVIDENCE 264 (1898)).

560. *See, e.g.*, Boogaert v. Occidental Life Ins. Co., 198 Cal. Rptr. 357 (Cal. Ct. App. 1983) (admissions of a party made prior to trial are affirmative evidence); Columbia Picture Indus. Inc. v. Stein for Senator Comm., 431 N.Y.S.2d 23 (N.Y. App. Div. 1980) (holding summary judgment should have been granted based on defendant's statements in a letter and in sworn filings under the Federal Election Law); GRAHAM, FEDERAL PRACTICE AND PROCEDURE, EVIDENCE § 6715 (1992 interim ed.), and cases cited therein.

561. *See, e.g.*, Brummet v. Farel, 576 N.E.2d 1232, 1234 (Ill. 1991) (evidentiary admission may be controverted or explained and may be made in, among other things, pleadings in another case, pleadings that have been superseded or withdrawn, answers to interrogatories, and depositions pursuant to Fed. R. Evid. 801(d)(2)); *Boogaert*, 198 Cal. Rptr. at 357 (admissions of a party made prior to trial are affirmative, substantive evidence but are not conclusive against the party). *See also*, Pryor v. American Cent. Transp., Inc., 629 N.E.2d

federal rules that allow into evidence a party's prior statements as "not hearsay"[562] or under an exception to the hearsay rule.[563]

1205, 1212 (Ill. 1994) ("Because of the difference in treatment of an evidentiary admission and a judicial admission . . ., it was incumbent upon plaintiff to state specifically the type of admission she was seeking, . . . [rather than m]erely assert[ing] that the answer to the interrogatory was an 'admission....'").

See also Memorandum in Opposition to Selby, Battersby & Company's Motion for Leave to Amend Its Counterclaim to Assert Additional Acts of Bad Faith; in Opposition to Selby's Motion to Reopen Discovery for Thirty Days; and in Reply to Selby's Opposition to Maryland's Motions for Summary Judgment (dated Feb. 27, 1995) at 16, Maryland Cas. Co. v. Selby, Battersby & Co., E.D. Pa Civ. No. 93-6441 (E.D. Pa. 1995) ("Although pleadings filed by a party in prior litigation are admissible in subsequent litigation, they are admissible as prior inconsistent statements or party admissions, and not as judicial admissions.") (citing Derby & Co., v. Seaview Petroleum Co. 756 F.Supp. 868, 877 (E.D. Pa. 1991) (emphasis ommitted)).

562. FED. R. EVID. 801(d)(2) provides:

> (d) Statements which are not hearsay. A statement is not hearsay if –
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> . . .
>
> (2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

563. *See, e.g.*, CAL. EVID. CODE §§ 1220, 1222 (West 1998):

> § 1220 Admission of Party
> Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity.
>
> . . .
>
> § 1222 Authorized Admission
> Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:

Courts freely allow into evidence as "informal judicial admissions"[564] a party's relevant statements of fact, opinion or conclusion of law[565] which are asserted in prior or concurrent proceedings in oral arguments,[566] pleadings,[567] testimony or depositions,[568] or answers to interrogatories.[569] Superseded or

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(a) The statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement; and

(b) The evidence is offered either after admission of evidence sufficient to sustain a finding of such authority or, in the court's discretion as to the order of proof, subject to the admission of such evidence.

Admissions that are not judicial admissions are not binding upon the speaker, but "may be explained, rebutted or contradicted in absence of estoppel . . . ." 31A C.J.S. *Evidence* § 379.

564. *See In re* Union Indemn. Ins. Co., 611 N.Y.S.2d 506, (N.Y. App. Div. 1994) (granting summary judgment based on affidavits submitted in prior proceeding because party failed to introduce sufficient evidence to dispute affidavits).

565. *See* GRAHAM, FEDERAL PRACTICE AND PROCEDURE, EVIDENCE § 6715 at 487 (1992 interim ed.).

566. *See* United States v. McKeon, 738 F.2d 26, 30-34 (2d Cir. 1984) (counsel's opening statement in prior trial that ended in mistrial, which stated that defendant's wife had not photocopied documents, was admissible in subsequent trial in which counsel argued wife photocopied documents for innocent reasons).

567. *See* Konstantinidis v. Chen, 626 F.2d 933, 940 (D.C. Cir. 1980) (party's pleadings and submissions in prior administrative proceeding admissible in subsequent trial against third party); *Brummet,* 576 N.E.2d at 1234 (evidentiary admission may be controverted or explained and may be made in, among other things, pleadings in another case, pleadings that have been superseded or withdrawn, answers to interrogatories, and depositions); Winfield v. St. Paul Fire & Marine Ins. Co., 872 S.W.2d 483 (Mo. Ct. App. 1994) (under Missouri law, an abandoned pleading is evidence subject to admission against the party who filed the pleading if it contains admissions or statements of fact against the interest of the party); Westchester Fire Ins. Co. v. Lowe, 888 S.W.2d 243, 251 (Tex. Ct. App. 1994) (Abandoned or superseded pleadings "remain forceful as an important crucial statement once seriously made. Hence, like any other utterance or statement, if the abandoned pleading is inconsistent with the party's . . . present position at trial, then the abandoned pleading is admissible and receivable into evidence as an admission . . . .").

568. *See* Weyerhaeuser Co. v. United States, 32 Fed. Cl. 80 (1994) (evidentiary admissions can be in the form of witness testimony given in depositions, expert witness testimony, or party exhibits), *rev'd on other grounds*, 92 F.3d 1148 (Fed. Cir. 1996).

569. *See* Fidelity & Deposit Co. v. Hudson United Bank, 653 F.2d 766, 776-78 (3d Cir. 1981) (answer to interrogatory in first suit admissible, but explainable, in subsequent suit). *See also* Certain Third-Party Defendant [Insurance Companies'] Memorandum of Law in Support of Motion for Summary Judgment in Action No. 1 (dated Dec. 12, 1988) at 9 n.2, *In re* Matter of the Liquidation of Union Indem. Ins. Co. of N. Y., No. 41292/85 (N.Y. Sup. Ct. 1988)

withdrawn pleadings may be admitted as substantive evidence of the matter admitted in the original proceeding or in a subsequent proceeding,[570] even with today's liberal pleading rules.[571] The use of appellate briefs submitted in one action as evidentiary admissions against a litigant in other actions may present distinct issues that are not present when trial court pleadings are used as evidentiary admissions in other cases, and thus the admissibility of appellate briefs has been more problematic for some courts.[572]

To introduce the admission of a party-opponent, whether stated in the context of litigation or at some other time, a litigant need not show that the prior statement was within the speaker's personal knowledge or otherwise was trustworthy, nor must the litigant show that the statement regarded fact.[573]

("admissions made in a prior proceeding by a party's attorney, whether in affidavits or briefs, in letters or in open court, all constitute admissible evidence against the party on whose behalf these representations are made").

570. *See, e.g.*, Dugan v. EMS Helicopters, Inc., 915 F.2d 1428, 1432 (10th Cir. 1990) ("other circuits have allowed introduction of prior inconsistent pleadings as substantive evidence pursuant to Fed.R.Evid. 801(d)(2)") (citations omitted); Continental Ins. Co. of N.Y. v. Sherman, 439 F.2d 1294, 1298 (5th Cir. 1971) ("the pleading of a party made in another action, as well as pleadings in the same action which have been superseded by amendment, withdrawn or dismissed are admissible..."); GRAHAM, FEDERAL PRACTICE AND PROCEDURE, EVIDENCE § 6726 at 534 (1992 interim ed.).

571. *See, e.g.*, Dreier v. Upjohn Co., 492 A.2d 164, 167 (Conn. 1985) (prior pleadings are admissible because "[w]hile alternative and inconsistent pleading is permitted, it would be an abuse of such permission for a plaintiff to make an assertion in a complaint that he does not reasonably believe to be the truth").

572. *See, e.g.*, Hardy v. Johns-Manville Sales Corp., 851 F.2d 742, 745 (5th Cir. 1988). The court held that "absent some highly unusual circumstances," appellate briefs submitted in other cases are not admissible as evidence. The court reasoned that because appellate briefs "must of necessity refer to what the [trial court] record reflects as distinguished from what the real world facts actually are, and because these two sets of facts are not necessarily identical . . ., using statements about record facts as substantive evidence . . . is bound to be uncertain in the best of circumstances and dangerously misleading in most others." Furthermore, the danger of jury confusion is great, especially when the cases are very different in nature. *Id.* at 745-46.

In Kassel v. Gannett Co., Inc., 875 F.2d 935 (1st Cir. 1989), the court found "highly unusual circumstances" present because the plaintiff had written the brief himself; the issue presented "seem[ed] common to both cases"; and "[the plaintiff's] claims in the Brief, on the whole, did not purport to be other than his views' of what the real world facts are." *Id.* at 952 n.17 (quoting *Hardy*, 851 F.2d at 745).

573. *See* FED. R. EVID. 801 advisory committee's note, which provides that:

So broad is the rule permitting into evidence a party's prior admissions, that a party's failure to respond to a communication is admissible when "the party would under all circumstances naturally be expected" to respond.[574] The statement need not have been against the litigant's interest when made, a rule sometimes confused with the rule allowing into evidence a statement against interest of a nonparty declarant who is unavailable as a witness.[575]

> No guarantee of trustworthiness is required in the case of an admission. The freedom which admissions have enjoyed from technical demands of searching for an assurance of trustworthiness in some [Fed. R. Evid. 804(3)] against-interest circumstances and from the restrictive influences of the opinion rule and the rule requiring firsthand knowledge, when taken with the apparently prevalent satisfaction with the results, calls for generous treatment of this avenue to admissibility.

See also GRAHAM, FEDERAL PRACTICE AND PROCEDURE, EVIDENCE § 6716 at 489 (1992 interim ed.):

> As with all admissions by a party-opponent, no requirement of mental capacity of the declarant is imposed; the statement need not relate to a matter as to which the party had personal knowledge; it need not be against interest when made or when offered; it may contain opinions or conclusions of law; and it may be offered whether or not the party is unavailable, available, or actually testifies. If the party does testify, no foundation need be laid preliminary to its introduction in evidence, [Fed. R. Evid.] 613(b).

574. *See* Graham, FEDERAL PRACTICE AND PROCEDURE, EVIDENCE § 6721 at 497-98 (1992 interim ed.) (citing CHARLES TILFORD MCCORMICK, EVIDENCE § 262 at 177-78 (4th ed. 1992)).

575. *Compare* FED R. EVID. 801(d)(2) *with* FED R. EVID. 804(b)(3):

> (b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
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> . . .
>
> (3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. . . .

See GRAHAM, FEDERAL PRACTICE AND PROCEDURE, EVIDENCE § 6715 at 486-87 (1992

Nonetheless, the statement usually was against interest when made, a factor that boosts the trustworthiness and probative value of the statement.[576]

Often the prior position that a litigant wishes to disavow in litigation was spoken by the litigant's employee. A statement by a party's "agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship" is admissible as not hearsay.[577] The statement need not be "authorized" by the principal or employer[578] and need not have been addressed to the public – a statement spoken among employees is an admission of the company.[579] An advisory committee's note explains that the trend favoring broad admissibility of employees' and agents' statements is prompted by dissatisfaction over the possible loss of this "valuable and helpful evidence" under more restrictive hearsay rules.[580]

A litigant seeking to persuade a court not to allow prior admissions into evidence often will dispute the relevance of its prior statements. In environmental liability insurance coverage disputes, evidence challenged by insurance companies frequently consists of explanatory documents developed during the administrative approval process of insurance policy language at issue. The California Supreme Court, in the long-anticipated decision of

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interim ed.) ("[N]either Rule 801(d)(2) nor the common law cases lay down a requirement that the statement be against interest either when made or when offered, and the theory of the [admissions] exception [to the hearsay rule] is not based thereon. The often encountered label 'admissions against interest,' is inaccurate, serves only to confuse, and should be abandoned.") (footnotes omitted.) *See also*, WITKIN, CAL. EVIDENCE § 639 (same, California law).

576. *See* Roger Park, *The Rationale of Personal Admissions*, 21 IND. L. REV. 509, 516-18 (1988) (rationale for admissibility of personal admission: (1) usually statement was against interest, so trustworthiness guaranteed; (2) declarant may testify and explain, so admissibility is fair; (3) party was present when the statement was made, so surprise is unlikely; (4) statement has probative value, even if untrue when spoken; and (5) rule is clear and leaves little room for judicial discretion).

577. *See* Fed. R. EVID 801(d)(2)(D).

578. *See* Graham, FEDERAL PRACTICE AND PROCEDURE, EVIDENCE § 6723 at 509 (1992 interim ed.).

579. *See* United States v. Young, 736 F.2d 565, 567 (10th Cir. 1983), *rev'd on other grounds*, 470 U.S. 1 (1985), *on remand*, 758 F.2d 514 (10th Cir. 1985) ("The fact that the statement was made by a corporate employee to another corporate employee, rather than to a third party, would not preclude the admission of that statement against the corporation under Rule 801(d)(2)(D)") (citing Mahlandt v. Wild Canid Survival & Research Center, Inc., 588 F.2d 626 (8th Cir. 1978)).

580. *See* FED. R. EVID. 801(d)(2) advisory committee's note.

Montrose Chemical Corp. of California v. Admiral Insurance Co.,[581] rejected the insurance companies' argument challenging relevance and recognized the relevance and admissibility of the regulatory history of standardized Comprehensive General Liability (CGL) insurance policy provisions and available interpretative materials, and concluded that the materials show that the insurance industry intended the continuous trigger of coverage to apply to determine insurance coverage in cases involving injury or damage that occurs over successive policy periods.[582] Other courts have concurred in the

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581. 913 P.2d 878 (Cal. 1995).

582. *See id.* (rejecting insurance company's argument that drafting history of the standardized CGL policy provisions and available interpretative materials are irrelevant and should not be considered by courts in interpreting policy provisions). *See also High Court Ruling Hits Insurers Hard in Toxic Dump Case*, THE RECORDER 1, 11 (July 6, 1995) (lawyer who usually represents insurance companies concedes *Montrose* court "came to the right conclusion").

A comprehensive general liability insurance policy is "triggered," that is, obligated to provide coverage, whenever an occurrence results in bodily injury or property damage during the policy period. Due in part to the assertion of inconsistent positions by insurance companies in environmental insurance coverage litigation, five different rules have emerged to determine which insurance policies are triggered:

> (1) The Exposure Rule – damage occurs when the environment is first exposed to the toxic chemical; i.e. when the toxin is deposited in the landfill.
> (2) The Manifestation Rule – damage occurs when it becomes apparent to the injured party; i.e. damage occurs when the [Environmental Protection Agency or state agency] or private owner discovers that toxic waste has leaked onto the soil or into the groundwater.
> (3) The Double Trigger Rule – damage occurs when the environment is first exposed to the toxic chemical and at the time the damage becomes apparent to the injured party.
> (4) The Triple or Continuous Trigger Rule – damage occurs when the environment is first exposed to the toxic chemical, at the time the damage becomes apparent, and at all times in between.
> (5) The Actual Injury Rule – damage occurs when the property is actually harmed by the toxic chemical, but the damage does not have to be apparent because symptoms may manifest themselves well after the injury occurs.

Village of Morrisville Water & Light Department v. United States Fidelity and Guaranty Co., 775 F. Supp. 718, 730-31 (D. Vt. 1991). *See also* Brief for Amicus Curiae, Liberty Mutual Insurance Company (filed Mar. 24, 1992) at 10, Maryland Cas. Co. v. W.R. Grace & Co., No. 91-9322 (2d Cir. 1992) (espousing a new "discovery" trigger).

For a full discussion of the trigger of coverage issue, *see* Eugene R. Anderson, et al.,

California Supreme Court's conclusions regarding the relevance of drafting history[583] and many insurance companies have concurred with the California Supreme Court's trigger of coverage conclusions.[584]

Liability Insurance Coverage for Pollution Claims, 12 U. HAW. L. REV. 83, 105-10 (1990); Eugene R. Anderson & John W. Fried, *Insurance Coverage for Environmental Liabilities*, PUB. RISK 13, 15 (Jan./Feb. 1991) (the authors regularly represent policyholders in insurance coverage disputes). *See also* Note, *Developments in the Law–Toxic Waste Litigation*, 99 HARV. L. REV. 1573, 1574-1576 (1986) (continuous trigger rule adopted in Keene Corporation v. Insurance Co. of North Am., 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982), and its progeny rule promotes efficient risk reduction); Timothy E. Johns, Note, *The Applicability of General Liability Insurance to Hazardous Waste Disposal*, 57 S. CAL. L. REV. 745, 758-59 (1984) (discussing continuous trigger); *Special Project–An Analysis of the Legal, Social and Political Issues Raised by Asbestos Litigation*, 36 VAND. L. REV. 573, 726 (1983) (discussing *Keene*). *But see* Barbara Wrubel, Comment, *Liability Insurance for Insidious Disease: Who Picks Up the Tab?*, 48 FORDHAM L. REV. 657, 692 (1980) (urging "factual finding extracted from actual and reasonably hypothetical medical evidence," not terms of insurance policy, should dictate trigger of insurance policy in insidious disease cases).

583. *See, e.g.*, Continental Cas. Co. v. Diversified Indus., Inc., 884 F. Supp. 937, 958-59 (E.D. Pa. 1995) (applying Pennsylvania law) (rejecting argument that drafting history is inadmissible under the parol evidence rule because insurance policy coverage claim sounds in misrepresentation); Morton Int'l., Inc. v. General Accident Ins. Co. of Am., 629 A.2d 831 (N.J. 1993), (drafting history is relevant in interpretation of insurance policy language); Joy Technologies v. Liberty Mut. Ins. Co., 421 S.E.2d 493, 498-99 (W Va. 1992) (same); Union Pacific Resources Co. v. Aetna Casualty & Surety Co., 894 S.W.2d 401 (Tex.App. Ct. 1994), (trial court abused its discretion in not allowing discovery to determine the intent of the parties from drafting history, regulatory history, and relevant action of the State Board of Insurance, as well as other circumstances surrounding the making of the policy); Just v. Land Reclamation, Ltd., 456 N.W.2d 570, 575 (Wis. 1990) (rejecting argument that drafting history is irrelevant). *Cf.*, Sylvester Bros. Dev. Co. v. Great Century Ins. Co., 480 N.W.2d 368, 376 (Minn. Ct. App. 1992) (drafting history inadmissible when insurance policy language is unambiguous).

584. *See, e.g.*, Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment at 6, Centennial Ins. Co. v. Lumbermens Mut. Cas. Co., 677 F. Supp. 342 (E.D. Pa. 1987) (No. 86-6064) ("an occurrence took place on each occasion when the insured's allegedly hazardous wastes were delivered to the [disposal] site and then [again when the wastes] were discharged or otherwise released upon the [disposal] site soil"); Brief of Respondent and Cross-Appellant, American Star Insurance Company at 14, American Star Ins. Co. v. American Employers' Ins. Co., 210 Cal. Rptr. 836 (Cal. Ct. App. 1985) (No. 60-0189) (continuous trigger applies "to the instant case due to the latent and cumulative nature of the process which was active from installation of the defective pipe until the inevitable and eventual damage in the form of leaks"); Memorandum of Points and Authorities in Opposition to Motion of Great American Surplus Lines Insurance Company to Dismiss USF&G's Third Amended Third-Party Complaint at 5, Hobart Bros. Co. v. United States Fidelity & Guar. Co., No. 86-518 (D.D.C.) (court "should hold that an insurer with a policy in effect at any point in time between a claimant's initial exposure to a toxic substance and a manifestation of injury is liable in the full amount of indemnity due"); Brief on Behalf of The North River Insurance Company in Support

Extrinsic evidence of a prior inconsistent statement of a non-party witness is admissible under Fed. R. Evid. 613 to impeach the witness' testimony so long as the witness is afforded an opportunity to explain or deny the statement and the party offering the evidence is permitted to interrogate the witness on the statement, "or the interests of justice otherwise require."[585] The rule allows for the admissibility of a prior statement made by the witness'

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of Plaintiff's Motion for Summary Judgment and Defendant's Cross-Motion for Summary Judgment at 11, Madsen & Howell, Inc. v. Sentry Ins. Co., No. L-021632-85 (N.J. Super. Ct. Law Div.) ("The persuasive logic of its rationale, and the valid public policy objective of maximizing available insurance coverage to compensate injured victims of asbestos exposure, mitigate in favor of the adoption of the [continuous trigger] of coverage. . . ."); Brief of Amicus Curiae American Motorists Insurance Company at 8, Insurance Co. of North Am. v. Forty-Eight Insulations, Inc., 451 F.Supp. 1230 (E.D. Mich. 1978), *aff'd*, 633 F.2d 1212 (6th Cir. 1980), *modified*, 657 F.2d 814 (6th Cir. 1981), *cert. denied*, 454 U.S. 1109 (1981) (Nos. 78-1322/23/24/25/26); Brief of Defendant-Appellant-Cross-Appellee The Home Ins. Company at 16, Schering Corp. v. Home Insurance Co., 712 F.2d 4 (2d Cir. 1983) (Nos. 83-7056, 7102) ("most reasonable inference to be drawn from the fact that an express 'manifestation' trigger is only now being considered by Home and the insurance industry for inclusion in the CGL policy is that discovery of injury . . . was never intended to be a requirement of trigger of coverage); Letter from Gary Redditt, Jr., plaintiff's attorney, to the Honorable Daniel H. Thomas, Judge, United States District Court (June 15, 1978) at 3, Commercial Union Assurance Co. v. Zurich Am. Ins. Co., 471 F. Supp. 1011 (S.D. Ala. 1979) ("all carriers insuring [the policyholder] over the years in which the Plaintiffs were exposed to the disease are obligated to participate in the defense and possible indemnification") (Commercial Union later disavowed that the brief was authorized); Plaintiff Appellants [First State Insurance Company and a large number of Lloyd's of London insurance syndicates] Brief on Appeal at 48, Upjohn Co. v. New Hampshire Ins. Co., 444 N.W.2d 392 (Mich. Ct. App. 1989), *rev'd*, 476 N.W.2d 392 (Mich. 1991) (No. 99145) (asserting continuous or multiple trigger approach is the most appropriate theory to be applied in the case); Brief on Behalf of Defendant North Star Reinsurance Corporation in Opposition to Defendant-Appellants' Motion for Leave to Appeal at 17-19, Solvents Recovery Service of New England, Inc. v. Midland Ins. Co., 526 A.2d 1112 (N.J. Super. Ct. App. Div. 1987) (Nos. L-025610-83, L-082722-85) (arguing continuous trigger should be applied); Revised Brief in Support of RLI Insurance Company's Cross-Motion for Summary Judgment and in Opposition to Motion for Summary Judgment (filed May 7, 1990) at 42, Marotta Scientific Controls, Inc. v. RLI Insurance Co., No. 87-4438 (D.N.J. 1990) (refuting manifestation trigger); Opening Brief of Appellant Fireman's Fund Insurance Company at 13, Fireman's Fund Ins. Co. v. Aetna Casualty & Surety Co., 273 Cal. Rptr. 431 (Cal. Ct. App. 1990) (No. D011199)(same); [California Union Insurance Company's] Reply Brief at 6, California Union Insurance Co. v. Landmark Insurance Co., 193 Cal.Rptr. 461 (Cal. Ct. App. 1983) (No. 67843) (same); Brief of Appellee Travelers Indemnity of Rhode Island (filed Dec. 7, 1978) at 12, Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., *supra* (same).

585. FED. R. EVID. 613(b); United States v. Hale, 422 U.S. 171 (1975).

attorney[586] or through the witness' silence at time of the operative events.[587] The prior inconsistent statement need not amount to a plain contradiction of the present statement if a "significant difference" between the prior and present statements is shown.[588] Once a portion of a witness' testimony is impeached, the jury may be instructed to disregard the witness' entire testimony and consider instead the prior statement.[589]

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586. *See* Williams v. Union Carbide Corp., 790 F.2d 552 (6th Cir. 1986).

587. *See* Doyle v. Ohio, 426 U.S. 610 (1976) (but noting exception that silence is not admissible when witness is the accused and has remained silent in reliance on privilege against self-incrimination).

588. *See* United States v. Barrett, 539 F.2d 244 (1st Cir. 1976); United States v. Rogers, 549 F.2d 490 (8th Cir. 1976), *cert. denied*, 431 U.S. 918 (1976).

589. *See* CAL. JURY INSTRUCTIONS, CIV. (8th Ed.), BAJI 2.22, Witness Willfully False, provides:

> A witness false in one part of his or her testimony is to be distrusted in others. You may reject the entire testimony of a witness who willfully has testified falsely on a material point unless, from all the evidence, you believe that the probability of truth favors his or her testimony in other particulars.

See also CAL. EVID. CODE § 780 (West 1997), setting forth the general rule as to credibility:

> Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following: . . . (h) A statement made by him that is inconsistent with any part of his testimony at the hearing. . . .

Employers' Surplus Lines Insurance Company, a member of the Commercial Union group of companies, asked for and received the following jury instruction permitting the jury to consider the prior position:

> You have heard evidence claiming that certain witnesses made statements before this trial which were inconsistent with what the witness said in this trial. If you find these statements were made and were inconsistent, then you may consider them as if they were made at this trial. Decide whether to consider the earlier statements for any purpose and what weight to give them.

Proposed Jury Instruction by Defendant Employers' Surplus Lines Insurance Company (May 18, 1995), ESLIC's Proposed Jury Instruction No. 9, Murphy Oil USA, Inc. v. United States

Litigants have asserted the relevance and probative value of out-of-court statements to counter inconsistent positions assumed in litigation. In Metropolitan Life Insurance Co. v. Calfarm Insurance Co.,[590] for example, Metropolitan Life Insurance Company asserted the relevancy of Calfarm Insurance Company's pre-litigation statements that its policy provides broad insurance coverage, statements which Calfarm Insurance Company wished to exclude from evidence in the current coverage dispute.[591] Quoting a nineteenth-century Supreme Court opinion, Metropolitan Life Insurance Company explained:

> "The practical interpretation of an agreement by a party to [the contract] is always a consideration of great weight. The construction of a contract is as much a part of it as anything else. There is no surer way to find out what parties meant, than to see what they have done."[592]

Metropolitan Life Insurance Company concluded, "[I]t would be difficult to conceive of anything that would be more relevant than these representations by the insurance industry itself of the limited scope of the exclusions relied on by Calfarm here."[593]

Fidelity & Guar. Co., No. 91-439-2 (Ark. Cir. Ct.).

590. Appellant's Opening Brief (dated July 24, 1992), Metropolitan Life Ins. Co. v. Calfarm Ins. Co., No. F017991 (Cal. Ct. App. 1992).

591. *See* Appellant's Reply Brief (dated Oct. 12, 1992) at 19-20, Metropolitan Life Ins. Co. v. Calfarm Ins. Co., *supra*, note 590.

592. *Id.* (quoting Brooklyn Ins. Co. v. Dutcher, 95 U.S. 269, 273 (1877)). "It would be inherently inequitable," added Metropolitan Life Insurance Company to the court, "to allow parties to make pro-coverage representations to encourage purchase of certain policies, but [to] later hide those representations from the courts when they attempt to determine what various coverage or exclusionary provisions mean." *Id.* at 24.

See also Montrose Chem. Corp. of Cal. v. Admiral Ins. Co., 913 P.2d 878, 890 (Cal. 1995) ("Most courts and commentators have recognized that the presence of standardized industry provisions and the availability of interpretative literature are of considerable assistance in determining coverage issues.... Such interpretative materials have been widely cited and relied on in the relevant case law and authorities construing standardized insurance policy language.") (citations omitted) (rejecting insurance company's argument that drafting history of standard form comprehensive general liability insurance policy is irrelevant and should be excluded, and determining that insurance industry intended continuous trigger of coverage to apply when damage occurs over several policy periods).

593. *Metropolitan Life*, *supra* note 590 at 24.

Another insurance company argued to the United States Court of Appeals for the Second Circuit the probative value of letters and internal reports written before the policyholder's claim was settled in which the other insurance company had determined coverage issues contrary to the position it litigated in the present case.[594] The insurance company urged the court to accept the "important evidence" which, in its view, proved "so convincing."[595] Such extrinsic evidence is particularly useful in interpreting documents such as insurance policies which, even if easy to read facially, incorporate language and meaning that render them difficult to understand absent the use of extrinsic evidence.[596]

Evidence of a litigant's prior statements may be used in insurance litigation in order to show the usage and intent, within the insurance industry, of certain insurance policy terms. As explained by Travelers Insurance Company:

> Because of the way the insurance industry operates, most of the relevant policy language is found in standardized insurance forms, drafted by insurance associations or

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594. *See* Brief of Defendant-Appellant General Reinsurance Corp., (June 3, 1991) at 26, United States Fire Ins. Co. v. General Reinsurance Corp., No. 91 - 7394 (2d Cir. 1991).

595. *Id.*

596. *See* Cary Phillips, *Insurance Education: A Two Way Street*, CLAIMS 37, 38 (Feb. 1995) (Mr. Phillips is a Vice-President of Employers Reinsurance Company):

> The problem is that policyholders want an insurance policy that's easy to read. . . . However, just because a document is easy to read doesn't mean it's easy to understand. Again, consider the Constitution and the Bill of Rights. Both documents are easy to read. And yet for the past 200 years, the primary purpose of the United States Supreme Court has been to try to figure out what those words mean, when applied to a particular set of facts.

Arguing that the terms of an insurance policy are clear and unambiguous, insurance companies sometimes attempt to invoke the parol evidence rule to exclude extrinsic evidence of insurance industry intent in insurance coverage disputes. In Continental Casualty Co. v. Diversified Industries, Inc., 884 F. Supp. 937, 958-59 (E.D. Pa. 1995) (applying Pennsylvania law), the federal district court rejected the argument that the parol evidence rule precludes consideration of the evidence because the policyholder asserted insurance coverage based not on the contract terms, but based on misrepresentations made by the insurance industry to insurance regulators at the time the "polluter's exclusion" was approved. Further, the court noted that the policyholder did not seek to alter the language of the exclusion, but rather sought to void the clause.

> bureaus, and used industry-wide. Thus questions of intent may be addressed on a standardized basis. Predictably, there will be precious little evidence of the negotiations of individual policies. The primary evidence of the intent of the parties drafting the contracts, and their expectations about scope of coverage, will be obtained through document productions from key industry-wide organizations and depositions of their personnel.[597]

Without the benefit of extrinsic evidence to show the intent of the insurance associations that drafted the insurance policies, in the view of this litigant, courts might lack the evidence necessary to determine the intended scope of insurance coverage of policies issued to individual policyholders. The prior statements provide insight into custom and usage, context, and trade usage within the insurance industry and indicate the drafters' interpretation of insurance policy terms, which the litigant introducing the evidence seeks to show is a reasonable interpretation that should prevail over any changed position asserted by a litigant regarding the scope of insurance coverage.[598]

When extrinsic evidence of the drafters' intent regarding the meaning of terms used in a contract establishes that a litigant's current litigation position is inconsistent with the original intent, the litigant may be found to be in

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597. Travelers' Reply Memorandum in Support of Coordination; In Opposition to GAF's Motion for Separate Hearing; and Exhibits in Support Thereof (Jan. 2, 1981) at 7-8, Armstrong Cork Co. v. Aetna Cas. & Sur. Co., No. C 315367 (Cal. Super. Ct. 1981).

598. *See, e.g.*, Fireguard Sprinkler Sys., Inc., v. Scottsdale Ins. Co., 864 F.2d 648, 651 (9th Cir. 1988) (statements of drafters are highly probative of contractual intent); 13 J. APPLEMAN, INSURANCE LAW AND PRACTICE, § 7407 (Supp. 1997) ("Both drafting history and insurance industry interpretations of intent, purpose and effect have been recognized as sources of construing standard form policy provisions."). *See also* Memorandum of Plaintiffs in Opposition to the Motion of Defendant to Strike Certain Portions of Plaintiffs' Memorandum in Opposition to Certain Defendants' Motion for Partial Summary Judgment (Jan. 5, 1994) at 1, 3, 7-9, Caterpillar, Inc. and Solar Turbines, Inc. v. Aetna Cas. and Sur. Co., No. 94 - CH - 614 (Ill. Cir. Ct. 1994) (stating that at very least, position of insurance company in prior litigation that "[t]here is no requirement that the ownership interest [in a domestic subsidiary] must exist during the policy period," is a reasonable interpretation of insurance policy language,and that the prior position should prevail in current litigation over insurance company's changed position that ownership interest must exist during policy period) (quoting National Union's Memorandum of Points and Authorities in Opposition to Motions for Summary Judgment (Jan. 3, 1991) at 9, National Union Fire Ins. Co. v. Liberty Mut. Ins. Co., No. C 89-3973-DLJ (N.D. Cal. 1991)).

violation of the litigant's duty of good faith and fair dealing in the contract's enforcement.[599] A comment of the Restatement, Second, of Contracts § 205 makes clear that:

> [t]he obligation of good faith and fair dealing extends to the assertion, settlement and litigation of contract claims and defenses. *See, e.g.,* [Restatement, Second, of Contracts] §§ 73, 89. The obligation is violated by dishonest conduct such as conjuring up a pretended dispute, asserting an interpretation contrary to one's own understanding or falsification of facts.[600]

The duty of good faith and fair dealing is violated when a litigant litigates a claim or defense which is inconsistent with its intent and understanding regarding of the meaning of contract terms at the time it drafted the contract.

Because the rules which allow into evidence a litigant's admissions and inconsistent statements also allow the litigant to present conflicting evidence, the rules do not protect courts from the need to expend finite resources adjudicating inconsistent positions, and are of limited efficacy in preventing parties from "blowing hot and cold" as the occasion demands. Nonetheless, the rules advance judicial integrity by permitting courts to consider past positions that were asserted outside of a judicial proceeding, and past positions that otherwise do not fit within the confines of one of the estoppel doctrines or the "mend the hold" or "fraud on the court" doctrines.

CONCLUSION

The practice of asserting inconsistent positions in litigation is widely

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599. *See* RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981).

600. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. e (quoted in Aetna Casualty and Surety Co.'s Brief in Opposition to Nestle's Motion for Partial Summary Judgment (Dec. 20, 1993) at 27, Nestle Foods Corp. v. Aetna Cas. and Sur. Co., No. 89-1701 CSF (D.N.J.)). *See also* Letter Memorandum of Aetna Casualty and Surety Co. to The Honorable Robert E. Francis, Judge (June 8, 1994) at 2-3, Aetna Casualty and Surety Co. v. Morton Int'l., Inc., Nos. L-2568-93, L-1033-93 (N.J. 1994) (explaining that "violation [of the duty under the Restatement] is derived from the *fact* of the party's understanding and the act of asserting a different interpretation in the context of enforcing the agreement" [in litigation]) (emphasis in original).

criticized. Courts and litigants know that a litigant cannot reasonably believe to be true a position that cannot be reconciled with a position asserted at a different time or in a different place,[601] whether the earlier position was asserted in a court proceeding,[602] an administrative proceeding,[603] regulatory licensing proceeding,[604] or outside the courtroom. The practice is a "wrong against institutions set up to protect and safeguard the public,"[605] and threatens "perversion of [the] judicial machinery."[606] The practice leads to inconsistent judicial determinations which weaken public confidence in the judiciary, and fosters the appearance that the judiciary is controlled by powerful and frequent users of the court system. In addition, inconsistent positions burden the courts and other litigants with unnecessary litigation.

Courts need not sit as "mute and helpless victims"[607] while litigants assault judicial integrity by assuming whichever position seems most promising to avoid or limit liability. Courts have available the doctrines of judicial estoppel, quasi-estoppel, judicial admissions and "mend the hold" to preclude a party from litigating a position that is inconsistent with a position asserted before a judicial or an administrative tribunal. The quasi-estoppel doctrine also is applicable when the prior position was asserted before the dispute reached a judicial or an administrative tribunal. When another party has relied upon a prior position, the court may invoke the doctrine of equitable estoppel to prevent a party from litigating an inconsistent position. The "fraud on the court" doctrine is available to courts when a litigant's use of inconsistent positions constitutes "misconduct [that] tampers with the judicial machinery and subverts the integrity of the court itself."[608] When not

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601. *See* Drier v. Upjohn Co., 492 A.2d 164, 167 (1985).

602. *See* Sturm v. Boker, 150 U.S. 312, 334 (1893) ("wise and salutary doctrine [of judicial estoppel . . .] binds a party to his judicial declarations, and forbids him from subsequently contradicting his statements thus made").

603. *See* Smith v. Pinner, 891 F.2d 784, 787 (10th Cir. 1989) (applying Colorado judicial estoppel law to bar contradiction of stipulation made in workers' compensation proceeding).

604. *See* Keystone Driller Co. v. Northwest Eng'g. Corp., 294 U.S. 42, 47-48 (1935) (patentee who had amended claims during the administrative process to gain approval of a patent application is estopped to assert patent covered claims abandoned by amendment); *See also* Genco, Inc. v. Ace Patents Corp., 315 U.S. 126, 135 (1942) ("where a claim is allowed without a restrictive amendment, it has long been settled that recourse may not be had . . . to recapture claims which the patentee has surrendered by amendment").

605. Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246 (1944).

606. Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 599 (6th Cir. 1982).

607. *Hazel-Atlas Glass Co.*, 322 U.S. at 246.

608. Prince v. Delaware Cty. Bar Ass'n., 1993 U.S. Dist. LEXIS 5827 at *4 - *5 (1993)

binding, a party's prior statements and conduct, whether asserted in or out of the courtroom, are admissions which may be used as evidence to contradict recently-assumed positions. And when a party's earlier position resulted in a judicial or administrative determination, the court may apply the doctrine of collateral estoppel to bar relitigation of the issue.

Each of these doctrines should be used to encourage forthright dealings with the courts and consistent judicial decisions. When used aggressively by courts to prevent abuse, these doctrines bolster the faith of the public in the integrity and impartiality of the judiciary. Absent use of the doctrines, confidence in the judiciary risks erosion as the public watches the judicial system's powerful and frequent users win repeatedly based on incompatible positions. The doctrines that prevent litigants from assuming inconsistent positions protect judicial integrity and ultimately, the public's trust in the rule of law.

(citing Eppes v. Snowden, 656 F. Supp. 1267, 1277 (E.D. Ky. 1986); United Bus. Communications, Inc. v. Racal-Milgo, Inc., 591 F. Supp. 1172, 1186 (D. Kan. 1984)).

HOMEOWNERS INSURANCE REDLINING: THE INADEQUACY OF FEDERAL REMEDIES AND THE FUTURE OF THE PROPERTY INSURANCE WAR

William E. Murray[1]

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INTRODUCTION

For over 30 years, inner-city property insurance availability has been a topic of concern.[2] However, in the wake of the 1992 riots in Los Angeles, we were reminded once again that the age old problem of property insurance availability and "insurance redlining" had not disappeared.[3] The term "insurance redlining" originally referred to the drawing of red lines around specific geographic areas on a map within which insurance companies would not sell insurance.[4] However, today the term is often used to refer to a property insurance company's cancellation or refusal to renew an insurance policy based on the insured structure's geographic location[5] or the racial or ethnic make-up of the neighborhood in which the structure is located.[6] A broader definition and one with less negative connotations has been offered by the Illinois Department of Insurance, which defines homeowners insurance redlining as "any practice, legitimate or not, that affects the availability, affordability, or accessability of homeowners insurance in any geographical

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2. *See* Robert W. Klein, *Availability and Affordablity Problems in Urban Homeowners Insurance Markets*, *in* INSURANCE REDLINING: DISINVESTMENT, REINVESTMENT, AND THE EVOLVING ROLE OF FINANCIAL INSTITUTIONS 43 (Gregory D. Squires ed. 1997).

3. The availability of property insurance gained considerable attention in the 1960s due to the prevalence of property damage resulting from urban riots. *See* INSURANCE INFORMATION INSTITUTE, URBAN INSURANCE ISSUES 104 (Ruth Gastel ed. 1996).

4. ILLINOIS DEPARTMENT OF INSURANCE, STATUS OF HOMEOWNERS INSURANCE IN ILLINOIS 19 (1994).

5. *See* URBAN INSURANCE ISSUES, *supra* note 3.

6. *See* Sara K. Pratt, *The History of Insurance Redlining* (statement made at the John Marshall School of Law's conference on mortgage discrimination and insurance redlining) (visited Feb. 6, 1997) <http://www.fairhousing.com/sara.htm>; *see also* Gregory D. Squires & William Velez, *Insurance Redlining and the Transformation of an Urban Metropolis*, 23 URB. AFF. Q. 63 (1987); Mackey v. Nationwide Ins. Co., 724 F.2d 419, 420 (4th Cir. 1984) (defining "redlining" as "the arbitrary refusal to underwrite the risks of persons residing in predominantly black neighborhoods."); Dunn v. Midwestern Indem. Mid-American Fire & Cas. Co., 472 F. Supp. 1106, 1107 n.3 (S.D. Ohio 1979) (defining "redlining" as "the restriction of insurance based on the racial composition of the neighborhood, apart from any consideration of risk."); *Hearing on Homeowners Insurance Discrimination Before the Senate Comm. on Banking, Housing and Urban Affairs*, 103d Cong., Sess. 1 (1994) (statement of Roberta Achtenberg, Assistant Secretary, Department of Housing and Urban Development) [hereinafter Achtenberg Statement] (defining redlining as "[d]iscrimination on the basis of race and national origin in the provision of property insurance."); BARRON'S DICTIONARY OF INSURANCE TERMS (2d ed. 1991) (defining "redlining" as the "refusal by an insurance company to underwrite or continue to underwrite questionable risks in a given geographical area.").

location."[7] In fact, it is this broad definition that seems to be the most widely accepted due to the increased focus on more subtle redlining techniques such as agent location, price and product differentials, and discriminatory use of property inspections.[8]

In its infancy, insurance redlining exhibited a totally different character than it does today. In the early 1900s, insurers openly discriminated on the basis of race in the provision of homeowners insurance, a practice which was supported by many communities.[9] During this time period, policies and practices discriminating based on race were often embodied in written manuals and reports.[10] In fact, some underwriting manuals contained maps on which were drawn red lines to indicate the geographical areas where policies should not be written.[11]

Today, however, increased awareness and the existence of both state and federal remedies for victims of property insurance redlining have changed the nature of the redlining problem. Although this practice may still exist, it is more subtle and much more difficult to prove. As one study conducted in 1986 indicated, the subtleties of homeowner's insurance redlining may appear only in the treatment of prospective customers.[12] This study conducted 60 tests whereby potential customers would call the insurance company inquiring about the availability of homeowners insurance. During these tests, callers from predominantly white areas were more frequently asked to reveal their names, were asked more detailed information about their existing homeowners policies, and were more frequently offered a minimum inspection of the property.[13] However, more rigorous types of inspection of the callers' property was requested of a significantly larger portion of those callers calling from non-white neighborhoods.[14] As this study surely indicates, an individual unsuspecting homeowner would probably never know that she was being treated differently based upon the neighborhood in which she lived.

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7. STATUS OF HOMEOWNERS INSURANCE IN ILLINOIS, *supra* note 4, at 19.

8. *See id.* at 21-22.

9. *See* Pratt, *supra* note 6.

10. *See id*; *see also* Squires & Velez, *supra* note 6, at 63, 66 (giving an example of overtly discriminatory language published in an insurance trade journal).

11. *See* Pratt, *supra* note 6.

12. *See id.*

13. *See id.*

14. *See id.*

One of the factors most hindering efforts to resolve the problem of insurance redlining is the nature of the insurance business itself. In an industry like insurance where discrimination based on risk is central to an insurer's decision to insure[15] and where property in the inner cities is older, less valuable, and more prone to destruction and damage, in what ways can we accurately determine and prove racially discriminatory property insurance practices? Some have argued that in order to eradicate this problem, insurance companies should adopt highly standardized objective criteria for evaluating risk and make a conscious effort to educate employees regarding impermissible discrimination.[16] At least one state has attempted to differentiate between solid underwriting practices and impermissible discrimination by enacting legislation that requires insurers to file detailed information regarding loss experience.[17]

Another factor that contributes to the inability to recognize discriminatory insurance practices is the failure of property insurance companies to maintain records of property insurance applications that are rejected.[18] Additionally, very rarely do these insurers record the race of applicants for insurance.[19]

Aside from difficulties in differentiating redlining from proper insurance underwriting, there may be other more deeply rooted problems contributing to the tenacity of the homeowners insurance redlining problem. In spite of the continued utilization of the Fair Housing Act to attack property insurance redlining practices as well as the evolution of more intrusive state regulation, this problem continues to thrive . . . or does it? In fact, some have suggested that the problem of homeowners insurance redlining is not real.[20] Instead they have argued that it is a product of the public's imagination, a false perception of unfairness rather than a reality, that is incapable of eradication because it is a reflection of the "larger social and economic realities of urban life."[21] Such perceptions or beliefs have been labeled "psycho-facts" and have been

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15. *See* David I. Badain, *Insurance Redlining and the Future of the Urban Core*, 16 COLUM. J.L. & SOC. PROBS. 1, 3 (1980).

16. *See* Pratt, *supra* note 6.

17. *See* H.B. 5649, 1996 Reg. Sess. § 3 (Mass. 1996) (enacted); *see also* MASS. GEN. LAWS ANN. ch. 175 § 4A (West 1996).

18. *See Hearing on Homeowners Insurance Discrimination before the Senate Comm. On Banking, Housing and Urban Affairs*, 103d Cong., Sess.1 (statement of Deval Patrick, Assistant Attorney General, Civil Rights Division)[hereinafter Patrick Statement].

19. *See id.*

20. *See* STATUS OF HOMEOWNERS INSURANCE IN ILLINOIS, *supra* note 4, at 12.

21. *Id.* at 23.

defined as:

> . . . beliefs that, though not supported by hard evidence, are taken as real because their constant repetition changes the way we experience life. We feel assaulted by rising crime, increasing health hazards, falling living standards and a worsening environment. These are all psycho-facts. The underlying conditions aren't true, but we feel they are and, therefore, they become so.
>
> Journalists—trafficking in the sensational and the simplistic—are heavily implicated in the explosion of psycho-facts. But so are politicians, policy advocates and promoters of various causes and lifestyles. Rarely does any of us deliberately lie. However, we do peddle incomplete or selective information that inspires misleading exaggerations or unwarranted inferences.[22]

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22. Robert J. Samuelson, *The Triumph of the Psycho-Fact,* NEWSWEEK, May 9, 1994, at 73. One consumer advocate has pointed to the laws of supply and demand as the true cause of the urban property insurance problem:

> Since insurance prices must cover expected costs in order for insurers to remain in business–and continue to offer the insurance services that consumers value–prices for insurance services inevitably differ for differing groups of consumers. It is simply a reality that for many insurance services, costs are higher in lower-income, urban areas.
>
> Moreover, the demand for insurance services is lower in such areas precisely because lower incomes make insurance services less valuable and less affordable. Since demand is lower, and costs higher, in urban areas, it is inevitable that the amount of insurance services consumed in urban areas is lower than that in other areas. This condition yields an ancillary effect: Fewer activities associated with insurance services–advertising, agent services, etc.–are observed in urban areas for precisely the same reasons.

Benjamin Zycher, Issue Brief, *Consumers and Insurance "Redlining": Consumers Take Charge Agenda for the 104th Congress* (visited Apr. 14, 1997) <http://www.his.com/~calert/issues/other/insur_br.htm>. Additionally, it is interesting to note that a report published in November of 1995 by the Massachusetts Department of Banking and Insurance concluded that "[w]hile some statistical evidence indicates that insurers generally

Is the problem of homeowners insurance redlining a psycho-fact or is it real? If it is a psycho-fact, how can we alter the American psyche to rid us of this problem?

Property insurance redlining continues to be a problem in reality and in the minds of the American people partly because there are no adequate remedies for the problem. The remedies that do exist are inconsistent and uncertain. Federal Fair Housing Act claims, although currently allowed by a number of circuits, are still not unanimously accepted. Furthermore, as states begin to regulate this field of the law, federal claims may face a renewed attack under the McCarran-Ferguson Act. In addition, disparate impact analysis, although considered a proper means to attack other types of discriminatory housing practices, has not yet been employed to combat property insurance redlining. Although some states have attempted to plug the holes left by the federal law, the majority have failed to answer the call. Those states that have taken the initiative to provide better remedies for property insurance redlining have increased the risk of preempting the existing federal claims.

The state and federal legislators' inability to provide more definitive and universal remedies has created a perception in the minds of those affected that their cries are falling on deaf ears. In addition to these contributing psychological factors, the very real economic impact of insurance redlining on inner city neighborhoods further fuels the struggle for action. In light of these considerations the only real solution to the problem of insurance redlining is the enactment of a comprehensive federal law specifically defining and prohibiting the practice of insurance redlining. In order to be most effective, this legislation would have to incorporate parts of the existing federal and state remedies.

I. THE PROBLEM OF INSURANCE REDLINING

Much of the concern with the problem of homeowners insurance redlining focuses on the nexus between insurance and the availability of housing. The problem is that banks and other lenders will fail to approve

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take a more conservative marketing and underwriting approach to urban homeowner risks in the Boston area, the Division's examinations did not reveal any illegal discrimination on the part of the eight insurers examined." DIV. OF INS., DEP'T OF BANKING AND INS., COMMONWEALTH OF MASS., REPORT OF EXAMINATION OF HOMEOWNER INSURANCE AVAILABILITY IN THE METROPOLITAN BOSTON AREA (1995).

mortgages based solely upon the absence of sufficient homeowners insurance without regard for the creditworthiness of an applicant. As Assistant Secretary of the Department of Housing and Urban Development stated, "Insurance is required to purchase or improve a home or to start or expand a business."[23] To put it another way, "no insurance, no loan; no loan, no house . . . ."[24] The unavailability of insurance "exacerbates and accelerates disinvestment. For the minority home buyer in the urban environment, the resultant depressing effect on housing opportunity is devastating."[25] However, insurance redlining goes beyond merely hindering efforts to achieve fair housing. It creates an exclusionary status which stigmatizes those neighborhoods excluded.[26] Redlining can also decrease economic opportunity and one's ability "to secure the basic rights of citizenship."[27]

These basic rights begin with jobs, and the unavailability of property insurance has a tendency to decrease employment prospects in neighborhoods that are redlined.[28] Just as financing is directly related to the availability of insurance, employment (or unemployment) is directly related to access to financing. One author has described this link by referring to two "economic truths":

> (1) Persistent unemployment is likely to develop among members of *any racial or socioeconomic group* when members of that group are regularly and systematically denied access to capital and credit; and, (2) small businesses—the primary creators of jobs and economic opportunity—are likely to fold or abandon *any geographic area* if they are unable to secure working capital or credit

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23. Achtenberg Statement *supra* note 6.

24. NAACP v. American Family Mut. Ins. Co., 978 F.2d 287 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 2335 (1993).

25. Christopher P. McCormack, *Business Necessity in Title VIII: Importing an Employment Discrimination Doctrine into the Fair Housing Act*, 54 FORDHAM L. REV. 563, 599 (1986).

26. OFFICE OF THE ATT'Y GEN., COMMONWEALTH OF MASSACHUSETTS, A SPECIAL REPORT ON REDLINING IN THE HOMEOWNERS INSURANCE MARKET 23 (1995) [hereinafter MASS. REDLINING].

27. Gregory D. Squires, *Race Politics and the Law: Recurring Themes in the Insurance Redlining Debate*, *in* INSURANCE REDLINING: DISINVESTMENT, REINVESTMENT, AND THE EVOLVING ROLE OF FINANCIAL INSTITUTIONS 1, 3 (Gregory D. Squires ed. 1997).

28. *See* McCormack, *supra* note 25, at 577.

> from banks or other lenders. To be sure this latter problem increases the likelihood of long-term unemployment, blight, and even more disinvestment in capital-starved neighborhoods and communities.[29]

Due to this close nexus between property insurance and financing, insurance redlining plays a major role in the downward spiral of today's urban communities.

Often, the geographic areas where redlining occurs are the areas that are in the greatest need of reinvestment. "Efforts to revitalize declining urban neighborhoods must incorporate provisions for securing adequate financial services. Consequently, the practice of redlining . . . generates severe social costs for communities that are adversely affected."[30] It cuts off access to these basic financial services necessary for the future growth and development of urban communities, thereby creating a self-fulfilling prophecy and "sealing the doom of today's urban neighborhoods."[31]

II. DISPARATE IMPACT ANALYSIS

Insurance redlining can take a number of forms. Overt discrimination is, of course, the most obvious. Evidence of this type of redlining may take the form of a statement by a supervisor telling agents to stop writing insurance in predominantly minority areas, or it may take the form of providing agents with maps and instructions not to write insurance in designated low income and minority areas.[32] Redlining may also occur in marketing, advertising, or in the application process[33] through the use of discriminatory underwriting guidelines.[34] The third and most subtle form that redlining may take is that of disparate impact.

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29. Willy E. Rice, *Race, Gender, "Redlining," and the Discriminatory Access to Loans, Credit, and Insurance: An Historical and Empirical Analysis of Consumers Who Sued Lenders and Insurers in Federal and State Courts, 1950-1995*, 33 SAN DIEGO L. REV. 583, 583-84 (1996).

30. Squires & Velez, *supra* note 6, at 63, 64.

31. *Id.* at 63 (citation omitted).

32. *See* Achtenberg Statement, *supra* note 6. Some examples of overtly discriminatory language used by those in the insurance industry can be found in an article by Gregory Squires. *See* Squires, *supra* note 27, at 6.

33. *See* Squires, *supra* note 27, at 13.

34. *See* Achtenberg Statement, *supra* note 6; *see also* Squires, *supra* note 27, at 10-12.

Under disparate impact theory, a facially neutral policy may be discriminatory when it has a disproportionate effect on members of protected classes. An example of a policy in the homeowners insurance realm that has a disparate impact is the setting of minimum value or maximum age requirements for insurable structures. As Assistant Secretary for the Department of Housing and Urban Development Roberta Achtenberg points out:

> Homes valued at less than $50,000 or built before 1950 often do not qualify for insurance, or only qualify for limited policies like basic fire or market value policies rather than full replacement cost policies. These practices have a clear adverse impact on racial minorities because among owner-occupants in single family dwellings, Black households are more than twice as likely as white households . . . to reside in homes that are valued at less than $50,000. Similarly, 40% of black households but only 29% of white households live in homes that were built prior to 1950.[35]

Insurers claim that the types of underwriting decisions illustrated above are permissible forms of discrimination. They argue that increased cost and decreased availability of homeowners insurance is an accurate reflection of the increased risk of insuring property in urban communities.[36] However, critics of these policies disagree. They argue that different pricing and availability is a result of inaccurate stereotypes of urban communities rather than an objective assessment of risk.[37] In reality, both of these concerns may be valid.

"The challenge is to sort out the extent to which various perceptions and practices result in availability and affordability problems, and to develop appropriate remedies."[38] This challenge is made more difficult by a dearth of adequate data concerning insurers' underwriting practices.[39] Disparate impact claims under the Fair Housing Act may help us to meet the challenge by forcing insurers to disclose the data and rationale underlying underwriting

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35. Achtenberg Statement, *supra* note 6.
36. *See* Squires, *supra* note 27, at 5.
37. *See* Squires & Velez, *supra* note 6, at 65; *see also* Squires, *supra* note 27, at 5.
38. Squires, *supra* note 27, at 5.
39. *See* MASS. REDLINING, *supra* note 26, at 23.

practices.

Redlining claims based on a theory disparate impact or "discriminatory effect," as it is sometimes referred to, should require the parties to bear the same burdens of proof as in disparate impact claims under Title VII.[40] Under the established *Griggs*[41] Title VII disparate impact model, in order to make out a *prima facie* case of discrimination, a plaintiff must prove that a particular policy, practice, or underwriting guideline of an insurance company has a disproportionate effect on one of the protected classes of people.[42] A defendant-insurer may then defeat this claim by showing that the allegedly discriminatory policy, practice, or underwriting guideline is a "business necessity."[43] In order to show business necessity, the defendant-insurer must show both a compelling need for the allegedly discriminatory policy and the lack of an alternative policy with a less disproportionate impact.[44]

One of the main problems with redlining claims based upon a theory of disparate impact is that of proof. The plaintiff's initial burden of proving disparate impact generally will involve information readily available to both the plaintiff and the defendant. At first glance, the initial showing required of a plaintiff under the *Griggs* disparate impact model may seem relatively easy to establish. However, the plaintiff's burden is not as easy as it may seem. Cases allowing the use of the disparate impact theory for Fair Housing Claims have required the plaintiff to identify a specific practice of the defendant that is producing a disparate effect.[45] In addition to this difficulty, a defendant's showing of business necessity will surely rest upon underwriting data readily available only to the insurer. Therefore, in the

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40. The seminal disparate impact case under Title VII is *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

41. *See Griggs*, 401 U.S. 424.

42. *See id.*; *see also* Stephen M. Dane, *Application of the Federal Fair Housing Act to Homeowners Insurance*, *in* INSURANCE REDLINING: DISINVESTMENT, REINVESTMENT, AND THE EVOLVING ROLE OF FINANCIAL INSTITUTIONS 27, 37 (1997).

43. *See Griggs*, 401 U.S. at 431.

44. *See* Bradley v. Pizzaco, 7 F.3d 795, 797 (8th Cir. 1993); Hawkins v. Anheuser-Busch, Inc., 697 F.2d 810, 815 (8th Cir. 1983); *Griggs*, 401 U.S. 431-32; 42 U.S.C.A. §§ 2000e-2(k)(1)(A)(ii), 2000e-2(k)(1)(C) (West 1996); *see also* Stephen M. Dane, *supra* note 42, at 27, 37. It should be noted that the use of the "business necessity" standard in the context of housing and under the Fair Housing Act is considered by some to be less predictable than it is under Title VII. *See Reno Approves "Disparate Impact" for Housing Cases,* 4 No. 2 DOJ Alert 5, 6 (February 7, 1994) [hereinafter DOJ Alert].

45. *See* Simms v. First Gibraltar Bank, 83 F.3d 1546 (5th Cir. 1996); Hanson v. Veterans Admin., 800 F.2d 1381, 1386 (5th Cir. 1986).

absence of a lawsuit, victims of insurance underwriting practices that have a disparate discriminatory impact are unable to assess the merits of their claims because they lack access to the data and rationale underlying underwriting decisions. This secrecy is a major problem, both real and psychological, to the creation of adequate remedies for the redlining problem. In fact, recent efforts by states have focused on disclosure of loss experience and underwriting data as a way to combat the insurance redlining problem.[46] Any federal anti-redlining legislation that hopes to be effective should recognize the need for disclosure of underwriting data and criteria and should contain provisions requiring property insurers to regularly disclose such data.

There is another proof-related problem with contemporary disparate impact redlining claims. As was previously discussed, the current model of proof employed in Title VII disparate impact claims is that set forth in *Griggs v. Duke Power Co.*[47] However, there still remains some question of whether the disparate impact approach has been properly applied under the Fair Housing Act and, if so, whether the *Griggs* model of proof is the proper one. Although numerous Courts of Appeals have held that disparate impact theory does apply to claims under the Fair Housing Act,[48] the United States Supreme Court has yet to decide that issue. In fact, in *Town of Huntington v. NAACP*,[49] the Supreme Court, faced with an opportunity to condone the use of disparate impact theory under the Fair Housing Act and to decide which model of proof was appropriate, refrained from deciding that issue.

In *Town of Huntington*, the Court addressed the issue of whether a town ordinance violated the Fair Housing Act. The ordinance in question restricted the private construction of multifamily housing projects to areas where there was a heavy concentration of minority residents. The lower court held that the Town of Huntington's failure to amend this zoning ordinance caused a discriminatory impact "because a disproportionately high percentage of

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46. *See infra* pp. 22-24.

47. *Griggs*, 401 U.S. at 424; 42 U.S.C.A. § 2000e-2(k)(1)(A) (West 1996).

48. *See, e.g.*, Simms v. First Gibraltar Bank, 83 F.3d 1546, 1555 (5th Cir. 1996); Bangerter v. Orem City Corp., 46 F.3d 1491 (10th Cir. 1995); Mountain Side Mobile Estates Partnership v. Secretary of Hous. and Urban Dev., 56 F.3d (10th Cir. 1995). In February of 1994, Attorney General Janet Reno issued an official statement explaining that the Department of Justice would once again begin using disparate impact theory in fair housing cases. *See* DOJ Alert, *supra* note 44. This policy change marked a reversal of the Reagan Administration's discontinuance of the use of disparate impact theory. *See id.*

49. 488 U.S. 15 (1988).

households that use and that would be eligible for subsidized rental units are minorities, and because the ordinance restricts private construction of low-income housing to the largely minority urban renewal area, which significantly perpetuated segregation in the Town."[50] In avoiding a discussion of the merits of the disparate impact claim, the Court reasoned:

> Since appellants conceded the applicability of the disparate-impact test for evaluating the zoning ordinance under Title VII, we do not reach the question whether that test is the appropriate one. Without endorsing the precise analysis of the Court of Appeals, we are satisfied on this record that disparate impact was shown, and that the sole justification proffered to rebut the prima facie case was inadequate.[51]

In light of the Supreme Court's holding in *Town of Huntington*, there still remains some question as to whether the use of disparate impact analysis is appropriate in cases under the Fair Housing Act in general. This uncertainty may be even greater in cases where property insurance redlining is the underlying basis for the plaintiff's claim.

The nature of the insurance business itself with all of its complex underwriting and actuarial data make the use of disparate impact analysis an extremely complex endeavor. Add to this mix the difficulties that would arise trying to discern which underwriting practices are a fair reflection of risk for the purposes of determining "business necessity,"[52] and you can surely see why the disparate impact approach has yet to be applied to an insurance redlining case.[53] Additionally, uncertainty still exists as to whether the *Griggs* burden of proof model or some other less stringent model will govern

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50. *Id.* at 17 (internal quotations and citations omitted).

51. *Town of Huntington*, 488 U.S. at 18.

52. The Department of Justice itself recognized that the business necessity standard in the Title VII context will most likely take a different form than its Title VII counterpart. *See* DOJ Alert, *supra* note 44.

53. Although the court in *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1363 (6th Cir. 1995) touched on the issue, it stated: "[I]t is not clear that HUD will apply a disparate impact analysis to its regulation governing insurance providers in the future, and it is not clear what considerations would violate this analysis. Thus, even though plaintiffs might feel uneasy about potential applications of the regulation, they are not under any present legal obligation to base their insurance underwriting practices on factors other than neutral risk considerations."

disparate impact claims under the Fair Housing Act.[54]

III. REDLINING CLAIMS UNDER FEDERAL LAW

A. Redlining Claims Under the Fair Housing Act

Federal claims for insurance redlining are most often brought under the Fair Housing Act. However, the major problem with bringing these claims is that, despite what the Department of Housing and Urban Development and many civil rights activists claim, there has been no definitive legislative or judicial decision holding that the Fair Housing Act applies to insurance redlining. In fact, those federal Courts of Appeals that have addressed the issue remain divided.[55]

However, this division has been characterized by a recent trend allowing redlining claims under the Fair Housing Act, an event which has prompted fair housing advocates to argue that the law is now "clear" that the Fair Housing Act proscribes insurance redlining.[56] As support for this claim, fair housing advocates argue that the United States Supreme Court's denial of *certiorari* in the two most recent cases[57] allowing redlining claims under the Fair Housing Act is a signal of its approval of the results of these cases. However, anybody even remotely familiar with Supreme Court jurisprudence knows that this argument is entirely unfounded. The Supreme Court itself has on countless occasions taken the time to remind its audience as to the

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54. In fact, this problem was recognized by the Department of Justice in 1994: "The circuits generally have recognized disparate impact as a violation of the Fair Housing Act, but most of those courts give more leeway to defendants offering justification arguments than in the employment context. There is little conformity among the circuits on how lenders, landlords, municipal zoning authorities, real estate agents, and the like can justify practices that affect protected groups disproportionately." DOJ, *supra* note 44. Consider also whether courts will impose a scheme of proof like that in the Title VII case of *Wards Cove*, where the plaintiff was required to show both discriminatory effect and to show that the defendant's challenged employment practice was not necessary. Note that the decision in *Wards Cove*, which modified the *Griggs* model of proof, was overturned by an amendment to Title VII that specifically reinstated the *Griggs* model. *See* 42 U.S.C.A. § 2000e-2(k)(1)(A) (West 1994).

55. *Compare Mackey*, 724 F.2d 419 *with Dunn*, 472 F. Supp. 1106.

56. *See, e.g.*, Squires, *supra* note 27, at 10 (stating that "currently the case law clearly indicates that discrimination in the provision of property insurance violates the Federal Fair Housing Act.").

57. *See* N.A.A.C.P. v. American Family Mut. Ins. Co., 978 F.2d 287 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2335 (1993); Nationwide Mut. Ins. Co. v. Cisneros, 52 F.3d 1351 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 973 (1996).

meaning of a denial of *certiorari*. As Justice Stevens so aptly states: "There is a critical difference between a judgment of affirmance and an order denying a petition for a writ of certiorari. The former determines the rights of the parties; the latter expresses no opinion on the merits of the case."[58] A denial of *certiorari* simply means that there were not enough votes by the members of the Court to review the decision of the lower court.[59] Therefore, in the absence of a definitive ruling by the United States Supreme Court or explicit language from Congress, the applicability of the Fair Housing Act to insurance redlining claims is still not entirely clear.[60]

1. The Conflict Between the Circuits

Although the recent trend has been to allow homeowners insurance redlining claims under the Fair Housing Act,[61] the Fourth Circuit's decision in *Mackey v. Nationwide Insurance Co.*[62] still stands as a reminder that redlining claims based on the Fair Housing Act brought in circuits where the issue has not yet been decided may not survive a Rule 12(b)(6) motion. The typical argument in favor of allowing homeowners insurance redlining claims under the Fair Housing Act is fully discussed in *Mackey*.

The plaintiff in *Mackey* was a former agent of Nationwide Insurance Company and an African American. After Nationwide terminated his employment, Mackey claimed, among other things, that Nationwide's practice of redlining predominantly black neighborhoods had hindered his ability to

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58. Schiro v. Indiana, 493 U.S. 910 (1989) (opinion of Justice Stevens respecting the denial of certiorari).

59. *See* Agoston v. Pennsylvania, 340 U.S. 844, 844 (1950) (opinion of Justice Frankfurter stating: "A denial simply means that as a matter of 'sound judicial discretion' fewer than four members of the Court deemed it desirable to review a decision of a lower court."); *see also* U.S. v. Carver, 260 U.S. 482, 490 (1923) (stating that a denial of certiorari "imports no expression of opinion upon the merits of the case.").

60. Even those that assert the continued validity of redlining claims under the Fair Housing Act acknowledge, albeit in a subtle way, the fact that the question still lacks a definitive answer. *See* Squires, *supra* note 27, at 8 ("The consensus of caselaw to date rejects the industry's arguments and asserts that the act does apply, but future legal and political developments could change the terms of this jurisdictional debate.").

61. *See* N.A.A.C.P. v. Amer. Family Mut. Ins. Co., 978 F.2d 287 (7th Cir. 1992), *cert. denied,* 113 S. Ct. 2335 (1993); Nationwide Mut. Ins. Co. v. Cisneros, 52 F.3d 1351 (6th Cir. 1995); Strange v. Nationwide Mut. Ins. Co., 867 F. Supp. 1209 (E.D. Pa. 1994).

62. 724 F.2d 419 (4th Cir. 1984).

sell and renew homeowners insurance policies in these neighborhoods.[63] Mackey's claim under the Fair Housing Act was based primarily upon Section 3604.[64]

Section 3604(a) provides that it is unlawful to "refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, *or otherwise make unavailable* or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin."[65] Section 3604(b) provides that it is unlawful to "discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or *in the provision of services* or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin."[66] The plaintiff's argument in *Mackey* was based upon both of these provisions.

Mackey argued that homeowners insurance redlining practices violated Section 3604(a) because they made housing "unavailable" within the meaning of that section of the Fair Housing Act.[67] Arguments like this are understandable given the dependence of banks' decisions to approve mortgage applications on the availability of adequate homeowners insurance. Mackey's second argument was that homeowners insurance was a "service" within the meaning of § 3604(b) of the Fair Housing Act.[68]

However, the *Mackey* court rejected both of the plaintiff's arguments and granted the defendant's Rule 12(b)(6) motion with regard to the plaintiff's Fair Housing Act claim. In so doing, the *Mackey* court looked first to the legislative history, which it said "contains no discussion of a barrier to fair housing created by the insurance industry."[69] In addition, the court interpreted Section 3604 in light of Section 3605,[70] which prohibits discrimination in lending, selling or appraising with regard to real estate.[71] The *Mackey* court reasoned that if § 3604 "was designed to reach every discriminatory act that might conceivably affect the availability of housing, [§ 3605's] specific prohibition of discrimination in the provision of financing

63. *See id.* at 420.
64. 42 U.S.C.A. § 3604 (West 1994).
65. *Id.* at § 3604(a) (emphasis added).
66. *Id.* at § 3604(b) (emphasis added).
67. *See* Mackey v. Nationwide Ins. Co., 724 F.2d 419, 423 (4th Cir. 1984).
68. *Id.*
69. *Id.*
70. 42 U.S.C.A. § 3605 (West 1994).
71. *Mackey*, 724 F.2d at 423.

would have been superfluous."[72] Furthermore, the court reasoned that at the time that the Fair Housing Act was enacted, Congress was well aware of the availability problems of homeowners insurance, a fact which is evident from the enactment of the Urban Property Protection and Reinsurance Act of 1968.[73]

Another unpersuasive argument made by the *Mackey* court was that subsequent attempts to amend the Fair Housing Act to include a prohibition on redlining have failed thereby supporting the argument that redlining was never intended to fall within the scope of the Fair Housing Act.[74] In this part of its decision, the *Mackey* court severely criticized the arguments embraced by the U.S. District Court for the Southern District of Ohio in *Dunn v. Midwestern Indemnity Mid-American Fire & Cas. Co.*[75]

The plaintiffs in *Dunn* were black homeowners who lived in a predominantly black neighborhood.[76] After purchasing homeowners insurance from the defendant for twenty two years, the plaintiffs were notified that their policy would not be renewed because Midwestern had terminated the portfolio with the agent through which the plaintiffs obtained their insurance.[77] The plaintiffs alleged that Midwestern's decision to terminate the agent's portfolio was based upon the high percentage of black homeowners insured by that agent.[78]

The *Dunn* court held that homeowners insurance redlining violates § 3604 of the Fair Housing Act.[79] In so holding, the *Dunn* court focused specifically on the language in § 3604 which makes it unlawful to "otherwise make unavailable or deny" housing based on race.[80] The court stated that:

> Since insurance is a precondition to adequate housing, a discriminatory denial of insurance would prevent a person economically able to do so from buying a house. Consequently, although insurance redlining is not expressly

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72. *Id.*
73. *See id.* at 424.
74. *See id.*
75. 472 F. Supp. 1106 (S.D. Ohio 1979).
76. *See id.* at 1107.
77. *See id.*
78. *See id.*
79. *See id.* at 1109.
80. *See* 42 U.S.C.A. § 3604(a) (West 1994).

> proscribed by the Act, it is encompassed by both the broad language of § 3604(a) and the legislative design of the Act which seeks to eliminate discrimination within the housing field.[81]

The *Dunn* court viewed this connection between insurance and financing in light of its previous decision in *Laufman v. Oakley Bldg. & Loan Co.*,[82] in which it held that § 3604(a) of the Fair Housing Act prohibited "mortgage redlining," the refusal to provide financing in racially integrated areas. Therefore, the *Dunn* court reasoned that since insurance redlining had virtually the same effect as mortgage redlining, it was also proscribed by § 3604(a).

Having interpreted § 3604(a) to prohibit insurance redlining practices, the *Dunn* court did not decide "whether § 3605(b) reaches discrimination by a third party after the sale has been completed." However, the court did go on to decide that § 3605 of the Fair Housing Act,[83] which applies to banks and other institutions, including insurance companies, who are in the business of making real estate loans, "does not contemplate proscription of insurance redlining by an insurance company not engaged 'in the making of commercial real estate loans.'"[84]

2. HUD's Response to the Mackey Decision

In response to the *Mackey* decision, the Department of Housing and Urban Development published a regulation on January 23, 1989 that specifically proscribes insurance redlining under the Fair Housing Act. This regulation provides a general proscription that states:

> It shall be unlawful, because of race, color, religion, sex, handicap, familial status, or national origin, to engage in any conduct relating to the provision of housing or of *services* and facilities in connection therewith that *otherwise makes*

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81. Dunn v. Midwestern Indem. Mid-Am. Fire & Cas. Co, 472 F. Supp. 1106, 1109 (S.D. Ohio 1979).

82. 408 F. Supp. 489 (S.D. Ohio 1976).

83. 42 U.S.C.A. §§ 3625 (West 1994).

84. *Dunn*, 472 F. Supp. at 1110 (quoting 42 U.S.C.A. § 3605 (West 1994)).

unavailable or denies dwellings to persons.[85]

The regulation then enumerates some of the types of activities that are prohibited under this section. These include, but are not limited to "[r]efusing to provide municipal *services* or property or hazard insurance for dwellings or providing such services or insurance differently because of race, color, religion, sex, handicap, familial status, or national origin."[86]

Which section of the Fair Housing Act this regulation is interpreting is not entirely clear. Since the general proscription uses both the terms "services" and "otherwise make unavailable or deny," one could argue that the regulation interprets both § 3604(a) and § 3604(b) of the Fair Housing Act as proscribing homeowners insurance redlining. However, as one can see from the provision specifically referring to property insurance, insurance redlining is specifically referred to as something other than a "service." Therefore, through this regulation, HUD seems to have interpreted § 3604(a) of the Fair Housing Act as prohibiting homeowners insurance redlining.

Since the publication of 24 C.F.R. § 100.70, a number of federal courts have followed HUD's lead and thereby created more doubt about the validity of the *Mackey* decision.[87] In deciding to follow HUD's interpretation of the Fair Housing Act, these courts have had to determine whether the Department of Housing and Urban Development's interpretation of the Fair Housing Act as proscribing the practice of homeowners insurance redlining is a reasonable

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85. 24 C.F.R. § 100.70(b) (1996) (emphasis added).

86. 24 C.F.R. § 100.70(d)(4) (1996) (emphasis added).

87. *See* N.A.A.C.P. v. American Family Mut. Ins. Co., 978 F.2d 287 (7th Cir. 1992); Nationwide Mut. Ins. Co. v. Cisneros, 52 F.3d 1351 (6th Cir. 1995); Strange v. Nationwide Mut. Ins. Co., 867 F. Supp. 1209 (E.D. Pa. 1994). Note that after examining the rationale of the *N.A.A.C.P.* decision, the *Strange* court stated:

> While I am not completely convinced by the first four reasons given by the [*N.A.A.C.P.* court], I do find their fifth and final argument compelling: the court of appeals found that after *Mackey* was decided the Department of Housing and Urban Development had promulgated regulations explicitly stating that Section 804 covers discrimination in the provision of property and hazard insurance. . . . Given the deference that is due to an agency's congressionally delegated and plausible construction of a statute, the existence of this regulation supports plaintiffs' position that Section 804 applies to the business of insurance.

Id. at 1214 (citations omitted).

construction of the statute. As stated by the United States Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*:[88]

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter . . . If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[89]

Applying the *Chevron* test to HUD's interpretation of § 3604 of the Fair Housing Act, we can see that HUD's interpretation of the Fair Housing act is probably permissible.

As attempts to interpret § 3604 prior to the enactment of the regulations indicate, Congress has not spoken directly on whether insurance redlining is within the purview of the Fair Housing Act. For example, the *Mackey* court pointed out that "there is no mention in the Fair Housing Act of insurance."[90] That court also admitted that the legislative history "contains no discussion of a barrier to fair housing created by the insurance industry."[91] Likewise, the *Dunn* court also recognized the lack of a direct congressional voice on whether insurance redlining is proscribed by the Fair Housing Act.[92]

Proponents of the applicability of the Fair Housing Act to redlining claims often point to Congress' many failed attempts to amend the Fair

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88. 467 U.S. 837 (1984).

89. Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 843 (1984).

90. Mackey v. Nationwide Ins. Co., 724 F.2d 419, 423 (4th Cir. 1984).

91. *Id.*

92. Dunn v. Midwestern Indem. Mid-American Fire & Cas. Co., 472 F. Supp. 1106, 1108 (S.D. Ohio 1979) (stating: "Although these sections do not explicitly proscribe insurance redlining, plaintiffs contend that the terms and history of §§ 3604(a) and (b), 3605 and 3617 establish an intent by Congress to embrace insurance redlining within the ambit of the Act.").

Housing Act to specifically exclude insurance redlining as evidence of Congress' intent that redlining be covered by the Fair Housing Act. However, as one might imagine, this argument is remotely persuasive at best. As the United States Supreme Court has acknowledged, "Though 'instructive,' failure to act on the proposed bill is not conclusive of Congress' view."[93] This is due to the fact that there are a great many reasons why Congress does not pass particular bills:

> Some Members of Congress may oppose the proposal on the merits; others may think it unnecessary and therefore not worth the political capital needed to write the "clarification" into the statute over opposition; still others may be indifferent, or seek to use the bill as a vehicle for some unrelated change. Congress may run out of time, as a noncontroversial bill sits in a queue while a contentious proposal is debated.[94]

Furthermore, the argument that the opinion of today's Congress regarding the interpretation of the Fair Housing Act is evidence of the intent of a prior Congress is simply untenable.[95]

Some have interpreted Congress' amendment of § 3614 (a) of the Fair Housing Act in 1988 as giving HUD a congressional mandate to promulgate regulations under the Fair Housing Act that would proscribe insurance redlining.[96] However, since § 3614 (a) merely provides that the "Secretary may make rules . . . to carry out this subchapter,"[97] the argument that this amendment speaks directly to the problem of insurance redlining, at least for the purposes of a *Chevron* type analysis, is really implausible.

Having decided that Congress has not spoken directly on whether

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93. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989); *see also* Bowsher v. Merck & Co., 460 U.S. 824 (1983).

94. N.A.A.C.P. v. Amer. Family Mut. Ins. Co., 978 F.2d 287, 299 (7th Cir. 1992); *see also* McDiarmid v. Econ. Fire & Cas. Co., 604 F. Supp. 105, 107-08 (S.D. Ohio 1984).

95. *See* U.S. v. Price, 361 U.S. 304, 313 (1960) (stating that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.").

96. *See* N.A.A.C.P. v. American Family Mut. Ins. Co., 978 F.2d 287, 300 (7th Cir. 1992) (stating that in enacting § 3614a, Congress gave HUD the power to make rules knowing full well that for a number of years HUD Secretaries have interpreted the Fair Housing Act as proscribing property insurance redlining.).

97. 42 U.S.C.A. § 3614(a) (West 1994).

insurance redlining is prohibited by the Fair Housing Act, the next stage of the *Chevron* inquiry is whether HUD's construction of § 3604 of the Fair Housing Act is reasonable. In *Nationwide Mut. Insurance Co. v. Cisneros*,[98] the United States Court of Appeals for the Sixth Circuit found that HUD's interpretation of the Fair Housing Act as set forth in 24 C.F.R. § 100.70 passed the test set forth in *Chevron*. The *Nationwide* court rejected that plaintiff's argument that HUD's construction of the "otherwise make unavailable or deny" language of the Fair Housing Act was too tenuous when applied to the context of providing homeowners insurance, pointing to the close nexus between insurance and mortgage financing.[99] Keeping in mind this nexus and the overall purpose of the Fair Housing Act "to eliminate the discriminatory business practices which might prevent a person economically able to do so from purchasing a house regardless of his race,"[100] the *Nationwide* court held that HUD's interpretation of the language of the Fair Housing Act in a way that proscribes the practice of property insurance redlining was "reasonable."

3. McCarran-Ferguson and Preemption of Redlining Claims Under the Fair Housing Act

Past federal court decisions have universally held that property insurance redlining claims under the Fair Housing Act are not preempted by the McCarran-Ferguson Act and state law. The consistency of this history has virtually eliminated any concern about preemption of redlining claims under the Fair Housing Act[101] and prompted at least one expert to label the possibility of McCarran-Ferguson preemption a "dead" issue.[102] However, in light of the increased regulation of redlining by the states, claims under the Fair Housing Act may face a renewed attack under the McCarran-Ferguson Act.

The McCarran-Ferguson Act was passed by Congress in response to the decision of the United States Supreme Court in *U.S. v. Southeastern*

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98. 52 F.3d 1351 (6th Cir. 1995).

99. *Id.* at 1359-60.

100. *Id.* at 1359 (quoting *Dunn*, 472 F. Supp. at 1109).

101. *See* Stephen M. Dane, *Application of the Federal Fair Housing Act to Homeowners Insurance*, *in* INSURANCE REDLINING: DISINVESTMENT, REINVESTMENT, AND THE EVOLVING ROLE OF FINANCIAL INSTITUTIONS 27, 34 (Gregory D. Squires ed. 1997).

102. *Id.* at 35.

Underwriters Association,[103] in which the Court reversed its previous ruling that insurance companies were immune from federal regulation under the Commerce Clause. In enacting McCarran-Ferguson, Congress hoped to preserve what had come to be the traditional role of the states in the regulation of insurance.[104] Section 1012 of the McCarran-Ferguson Act allows state regulation of insurance to preempt federal regulation. This section provides, in pertinent part, that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance."[105] As can be gleaned from the discussion above, it is very difficult to make an argument that the Fair Housing Act "specifically relates to the business of insurance." In fact, this is a point on which both the *Mackey* and *N.A.A.C.P.* courts seem to agree.

The *N.A.A.C.P.* court embraced the plaintiffs' argument that the "Fair Housing Act requires race-blind practices in housing and related services; it does not tell anyone how to write insurance and therefore does not regulate the business of insurance."[106] The court then went on to the second part of the McCarran-Ferguson analysis: since the Fair Housing Act is not a statute which specifically relates to insurance, does this law "invalidate, impair or supersede" any state insurance law? In deciding this issue, the court examined the two Wisconsin statutes at issue. One of these statutes prohibited discrimination by casualty insurers on the basis of race,[107] and the other statute proscribed generally all unfair discrimination in the insurance business.[108] Despite the existence of these two statutes the *N.A.A.C.P.* court held that an overlap does not always equal preemption. It specifically stated, "American Family needs to show that the Fair Housing Act conflicts with state law. *Duplication is not conflict.*"[109] The court went on to state:

> If Wisconsin wants to authorize redlining, it need only say so; if it does, any challenge to that practice under the auspices of the Fair Housing Act becomes untenable.

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103. 322 U.S. 533 (1944).
104. *See* Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 217-218 (1979).
105. 15 U.S.C.A. § 1012(b) (West 1997).
106. N.A.A.C.P. v. Amer. Family Mut. Ins. Co., 978 F.2d 287, 294 (7th Cir. 1992).
107. *See id.* at 295.
108. *See N.A.A.C.P.*, 978 F.2d at 295; *see* Wisc. Stat. § 628.34(3) (West 1997).
109. *N.A.A.C.P.*, 978 F.2d at 295 (emphasis added).

> American Family has not drawn to our attention, however, any law, regulation, or decision in Wisconsin requiring redlining, condoning that practice, committing to insurers all decisions about redlining, or holding that redlining with discriminatory intent (or disparate impact) does not violate state law. . . . No official of Wisconsin has appeared in this litigation to say that a federal remedy under the Fair Housing Act would frustrate any state policy.[110]

The language in *Mackey*, though far less specific about what types of state regulation might preempt redlining claims under the Fair Housing Act, is certainly consistent with *N.A.A.C.P.*:

> We are not pointed to any law enacted by North Carolina which would be "impaired" by application of the Fair Housing Act or the Civil Rights Acts. The presence of a general regulatory scheme does not show that any particular state law would be invalidated, impaired or superseded by the application of the Fair Housing Act . . . .[111]

Although the *N.A.A.C.P.* and *Mackey* courts seem to agree that redlining under the Fair Housing Act is not preempted, at least one court has distinguished the two cases.

In holding that the application of the Racketeering and Corrupt Organizations Act (RICO) to certain health insurance practices was preempted under McCarran-Ferguson by the existence of a state unfair trade practices statute, the court in *Ambrose v. Blue Cross & Blue Shield*[112] criticized the holdings in *N.A.A.C.P* and *Nationwide* with regard to McCarran-Ferguson preemption. This criticism was based partially upon these courts' reliance on *Mackey* for guidance in deciding the preemption issue.[113] For as the *Ambrose* court stated:

> The Fourth Circuit's decision in *Mackey* did not go so far as

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110. *Id.* at 297; *see also* Nationwide Mut. Ins. Co. v. Cisneros, 52 F.3d 1351, 1363 (6th Cir. 1995), *cert. denied,* 113 S. Ct. 2335. (1993).

111. Mackey v. Nationwide Ins. Co., 724 F.2d 419, 421 (4th Cir. 1984).

112. 891 F. Supp. 1153 (E.D. Va. 1995).

113. *See id.* at 1168.

> the Sixth and Seventh Circuits suggest. What the Fourth Circuit held was that the existence of a comprehensive regulatory scheme was not, in and of itself, sufficient to show that application of a federal law would "invalidate, impair or supersede" any particular state law. The Fourth Circuit did not hold that only a direct conflict between the prohibitions of federal and state law would trigger the McCarran-Ferguson Act.[114]

Rather, the *Mackey* court stated that there was no preemption because the defendants failed to point the court to a specific state law that would be "impaired." Because this was the case, the *Mackey* court held that barring the federal claims was "unnecessary to the effectuation of the congressional goals in enacting McCarran-Ferguson, insuring that the states retain the power to regulate the business of insurance."[115]

The *Ambrose* court also called the holdings of *N.A.A.C.P* and *Nationwide* "overly broad and inconsistent with the plain meaning" of the language of the McCarran-Ferguson Act.[116] As the *Ambrose* court pointed out, the "invalidate, impair, or supersede" language of the McCarran-Ferguson Act "does not lend itself to a blanket rule that certain types of inconsistencies can never satisfy that language."[117] Rather, in deciding whether a federal claim is preempted under the McCarran-Ferguson Act, a court should assess the "actual effect of the federal law on the specific state law."[118]

In a third criticism, the *Ambrose* court pointed out that federal and state laws that proscribe the same conduct but differ in remedies are conflicting laws within the meaning of the McCarran-Ferguson Act:

> A state law that prohibits an act, punishes it with a specific range of fines, makes it the subject of remedial action, and vests enforcement in a state quasi-judicial entity cannot be said to be consistent with a federal law that prohibits the same act, permits treble damages, fees, and costs, and

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114. *Id.*

115. *Mackey*, 724 F.2d at 421.

116. Ambrose v. Blue Cross & Blue Shield of Va., Inc., 891 F. Supp. 1153, 1166 (E.D. Va. 1995).

117. *Id.*

118. *Id.*

expressly creates a personal cause of action.[119]

The *Ambrose* further unraveled *N.A.A.C.P.* and *Nationwide* by criticizing the approach that these courts took toward the preemption issue. The *Ambrose* court argued that these courts analyzed the McCarran-Ferguson preemption issue as if they were deciding preemption under the Supremacy Clause of the Constitution, an analysis that requires a direct conflict between federal and state law.[120] This type of analysis is flawed because the McCarran-Ferguson Act "does not turn on status, i.e., supremacy of a body of law, but on the effect of the law, i.e., whether an act of Congress 'invalidates, impairs, or supersedes' certain kinds of state law."[121]

As the rationale of the *Ambrose* case suggests, the issue of preemption of redlining claims under the Fair Housing Act may not be "dead" but rather sleeping. Arguments in favor of preemption of Fair Housing Act claims may begin to resurface, especially in light of continued state efforts to regulate and proscribe redlining practices.

IV. THE FUTURE OF PROPERTY INSURANCE REDLINING: WHERE DO WE GO FROM HERE?

Some may argue that, as with most types of discrimination, total eradication of property insurance redlining practices is virtually impossible. However, that does not mean that the struggle is over. In fact, it has only just begun. As previously discussed, the uncertainty of the continuing applicability of the federal Fair Housing Act to redlining claims has rendered the federal law inadequate. Although state attempts to fill in the gaps are encouraging, they are few and far between. Furthermore, a state by state remedial effort would be significantly slower than the creation of comprehensive and definitive federal legislation. Therefore, the most effective means to combat property insurance redlining and alleviate the problems caused by it is to enact federal legislation specifically addressing the issue. By so doing, Congress would eliminate the possibility of preemption under McCarran-Ferguson because this legislation would "specifically relate" to insurance. Furthermore, new federal legislation would eliminate the existing uncertainty and conflict that now exists regarding the

119. *Id.* at 1167.
120. *See id.*
121. *Id.*

very viability of redlining claims under the Fair Housing Act. This federal anti-redlining legislation should also contain a provision, much like that already contained in Title VII, allowing disparate impact claims. Additionally, this legislation should incorporate some of the disclosure mechanisms already in place in states like Massachusetts, where despite fervent opposition from the insurance industry[122] and after a significant amount of research,[123] the legislature has enacted a rather comprehensive anti-redlining statute.

The Massachusetts anti-redlining legislation requires insurance companies to disclose extensive geographical data with regard to underwriting and renewal practices.[124] These disclosure provisions provide that:

> Every admitted insurer writing homeowners insurance in the commonwealth . . . shall furnish for examination and inspection by the commissioner of insurance . . . *by standard statistical territories* approved by the commissioner, a statistical report of its homeowners insurance experience showing the following data: written premiums; earned premiums; incurred losses, including loss adjustment expenses; loss ratio; number of incurred claims; and number of exposures.[125]

The bill also provides that no later than July 1, 1997, these disclosure

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122. *See* Independent Insurance Agents of America, *1997 Where We Stand: Insurance Redlining* (visited Apr. 14, 1997) <http://www.iiaa.iix.com/redwws.htm> ("Redlining is inexcusable and cannot be tolerated. IIAA opposes even the perception of redlining. IIAA would oppose any renewed HUD efforts to impose provisions that would force insurers and the federal government to make wholesale and prohibitively costly changes to their information-gathering systems. IIAA believes HUD does not have the authority under the FHA to issue rules regulating insurance.").

123. *See* SCOTT HARSHBARGER, ATT'Y GEN., COMMONWEALTH OF MASS., A SPECIAL REPORT ON REDLINING IN THE HOMEOWNERS INSURANCE MARKET (July 1995); THE COMMONWEALTH OF MASS., DEPARTMENT OF BANKING AND INSURANCE, DIVISION OF INSURANCE, REPORT OF EXAMINATION OF HOMEOWNER INSURANCE AVAILABILITY IN THE METROPOLITAN BOSTON AREA (November 1995).

124. *See Keno, Redlining Measures Enacted*, BOSTON GLOBE, May 21, 1996, at 24.

125. H.B. 5649, 1996 Reg. Sess. § 3 (Mass. 1996) (enacted) (emphasis added); *see also* MASS. GEN. LAWS ANN. ch. 175 § 4A (West 1996). Other state legislatures have exhibited similar disclosure provisions in their redlining initiatives. *See, e.g.*, H.B. 1227, 1996 Reg. Sess. § 1 (Ind. 1996); S. 336, Jan. Sess. § 1 (R.I. 1997).

requirements will only apply to the "twenty-five admitted insurers with the largest homeowners market share in the commonwealth."[126]

In order to make sense of the data collected from insurers through these disclosure requirements, the Massachusetts redlining bill also contains provisions that create a program to annually compile and publish statistics regarding incidents of fire and other structural property damage.[127] Undoubtedly, this data will be compared to the data produced by the homeowners insurance companies in order to differentiate between permissible underwriting and impermissible discrimination. Certainly the data compiled under these two provisions could be used in a redlining claim based upon disparate impact to determine whether a certain insurance policy or practice is motivated by "business necessity." However, these disclosure provisions seem to suggest that the Massachusetts legislature was more concerned with prohibiting disparate treatment of like risks. This is confirmed by the general provision proscribing redlining that was contained in that bill. This provision states:

> No insurer licensed to write and engaged in the writing of homeowners insurance in this commonwealth nor the joint underwriting association . . . *shall take into consideration* when deciding whether to provide, renew, or cancel homeowners insurance the race, color, religious creed, national origin, sex, age, ancestry, sexual orientation, children, marital status, veteran status, the receipt of public assistance or disability of the applicant or insured.[128]

Federal legislation should go a step further than this law. In addition to the disclosure requirements contained in the Massachusetts legislation, the federal legislation should incorporate the existing Title VII disparate impact claim. This would provide a more in-depth review of property insurance practices as well as a broader range of definite remedies for the victims of property insurance discrimination. Ultimately, these disclosure provisions

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126. H.B. 5649, 1996 Reg. Sess. § 3 (Mass. 1996) (enacted) (emphasis added); *see also* MASS. GEN. LAWS ANN. ch. 175 § 4A (West 1996).

127. *See* H.B. 5649, 1996 Reg. Sess. § 1 (Mass. 1996) (enacted); *see also* MASS. GEN. LAWS ANN. ch. 6A § 18 3/4 (West 1996).

128. H.B. 5649, 1996 Reg. Sess. § 3 (Mass. 1996) (enacted) (emphasis added); *see also* MASS. GEN. LAWS ANN. ch. 175 § 4C (West 1996).

and the allowance of disparate impact claims would prevent insurers from utilizing the underwriting process to mask impermissible discrimination.

CONCLUSION

Past attempts to eliminate property insurance redlining have been inadequate. As many civil rights activists and politicians will admit, the redlining problem still thrives in our inner city neighborhoods. The lack of definite federal remedies and state regulation has certainly played a large part in the continued presence of this problem. The uncertainty generated by inadequate federal and state laws along with the secrecy of insurance underwriting standards have undoubtedly contributed to heightened perceptions about the redlining problem.

New federal legislation must be enacted to combat the problem of homeowners insurance redlining. First, this legislation must explicitly define and proscribe the practice of property insurance redlining and provide definite remedies. This new legislation would solve both the potential McCarran-Ferguson preemption problem and the psychological problems created by the indefinite nature of current Fair Housing Act claims. Second, efforts to combat redlining must, like the Massachusetts legislation, contain specific provisions to allow review of insurers' underwriting practices. Although this may seem to insurers to be a rather intrusive mechanism, it is really the only way to determine that insurers underwriting is an accurate reflection of risk and not a product of social stereotypes.

APPENDIX

MODEL STATUTE TO PROHIBIT PROPERTY INSURANCE REDLINING

Be it enacted by the Senate and House of Representatives of the United States in Congress assembled,

A Bill to proscribe discrimination in the provision of property insurance in interstate commerce.

§ 1. SHORT TITLE

This act may be cited as the Anti-Redlining in Property Insurance Act of 1998.

§ 2. FINDINGS

(a) Congress finds that–

(1) There currently exist great disparities in property insurance coverage, pricing, and availability.

(2) These disparities appear most prevalent when one compares areas that have drastically different income levels and racial and ethnic compositions.

(3) These disparities result in the denial of property insurance coverage to those people living in areas that need it the most.

(4) Since obtaining property insurance is a prerequisite for obtaining a mortgage, discrimination in the provision of property insurance can have a severe impact upon a person's ability to purchase a house.

§ 3.

(a) It shall be an unlawful insurance practice

(1) to fail to provide, to cancel, or to refuse to renew property insurance coverage for any person because of that person's race, color, creed, national

origin, ancestry, or receipt of public assistance.

(2) to charge a higher premium for property insurance because of the race, color, creed, national origin, ancestry, or receipt of public assistance of an applicant or insured.

(3) to provide different levels of property insurance coverage or to vary the location of agents or the treatment of applicants because of race, color, creed, national origin, ancestry, or receipt of public assistance of an applicant or insured.

(b) Notwithstanding any other provision of this subchapter, it shall not be an unlawful insurance practice to fail to provide, to cancel, or to refuse to renew property insurance coverage or to charge a higher premium for such coverage where the decision not to provide, to cancel, or to refuse to renew such coverage, or the decision to charge a higher premium is legitimately based upon bona fide underwriting data as defined by the Secretary of the Department of Housing and Urban Development and required to be disclosed under Section 4.

(c) An unlawful insurance practice based on disparate impact is established under this Act only if–

(1) a complaining party demonstrates that a respondent uses a particular practice that causes disparate impact on the basis of race, color, creed, national origin, ancestry, or receipt of public assistance of an applicant or insured and the respondent fails to demonstrate that the challenged practice is risk related and consistent with business necessity.

§ 4.

(a) The Secretary of the Department of Housing and Urban Development is authorized to require all companies engaging in the underwriting of property insurance in interstate commerce to submit on an annual basis data regarding the number of agents and their principal place of operation; the total number of policies issued; the types of coverage provided; the premiums charged; the number of policies canceled or not renewed; and any other information that

the Secretary might find relevant to the enforcement of this Act.[129]

(b) Due to the confidential and proprietary nature of the data required to be disclosed under this section, the Secretary shall take measures to ensure that, in the absence of a claim under this Act, such data is kept in the utmost confidence. In circumstances where a claim is being asserted under this act, the Secretary and all parties thereto shall also prevent the disclosure of such information to the extent possible.[130]

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129. This disclosure provision was drafted based upon the difficulties in combating redlining claims due to the dearth of available information regarding the insurers' rejection of applicants for property insurance and regarding the racial and ethnic composition of all applicants. *See* Patrick Statement, *supra* note 18. This provision is meant to allow for the same type of disclosure that is required under the Massachusetts redlining statute. *See* H.B. 5649, 1996 Reg. Sess. § 3 (Mass. 1996) (enacted); *see also* MASS. GEN. LAWS ANN. ch. 175 § 4A (West 1996).

130. The National Fair Housing Alliance has published a worksheet that contrasts the "facts" with the "fictions" in the context of property insurance redlining. *See* National Fair Housing Alliance, *Insurance Industry Fiction* (copy in possession of author). In this worksheet, the NFHA downplays insurers' confidentiality concerns with regard to underwriting data:

> Fiction: Insurance companies claim that disclosure of underwriting and pricing mechanisms would violate trade secrets damaging their [sic] business profits.
>
> Fact: The State of Connecticut requires filing of underwriting guidelines and makes them publicly available; again there is no evidence that supports that this has had a detrimental effect on any company's profits or business . performance.

Id.

MUST INSURERS TREAT ALL ILLNESSES EQUALLY?–MENTAL VS. PHYSICAL ILLNESS: CONGRESSIONAL AND ADMINISTRATIVE FAILURE TO END LIMITATIONS TO AND EXCLUSIONS FROM COVERAGE FOR MENTAL ILLNESS IN EMPLOYER-PROVIDED HEALTH BENEFITS UNDER THE MENTAL HEALTH PARITY ACT AND THE AMERICANS WITH DISABILITIES ACT

Maggie D. Gold[1]

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INTRODUCTION

A key issue confronting United States legislators is how to provide appropriate and affordable health care for all Americans.[2] As the nation rethinks the structure and costs of general health care in the United States, a goal must be to create a system enabling Americans suffering from mental illnesses to obtain the critical care they need and deserve.[3]

In the debate about health care programs, the two primary issues are access and cost.[4] The cost-access problem is particularly apparent in providing insurance to the mentally ill.[5] Most Americans receive insurance

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2. *See* NATIONAL ADVISORY MENTAL HEALTH COUNCIL, HEALTH CARE REFORM FOR AMERICANS WITH SEVERE MENTAL ILLNESSES, 1448 (Oct. 1993) (hereinafter NAMHC 1993 Report) (comprised of a report requested by the Senate Appropriations Committee addressing the costs of providing coverage for the medical treatment of severe mental illnesses commensurate with other illnesses and assessing of the efficacy of the treatment of severe mental illness). *See also* Leonard S. Rubenstein, *Ending Discrimination Against Mental Health Treatment in Publicly Financed Health Care*, 40 ST. LOUIS U. L.J. 315, 315-18 (1996).

3. *See* NAMHC 1993 Report, *supra* note 2, at 1448.

4. Providing greater access usually results in cost increases or in loss of other needed services. *See* Jeffrey Rubin, *Paying for Care: Legal Developments in the Financing of Mental Health Services*, 28 HOUS. L. REV. 143, 146 (1991); David Orentlicher, *Destructuring Disability: Rationing of Health Care and Unfair Discrimination Against the Sick*, 31 HARV. C.R.-C.L. L. REV. 49, 49-50 (1996); Christopher Aaron Jones, *Special Project: Current Issues in Mental Health Care: Legislative "Subterfuge"?: Failing to Insure Persons with Mental Illness*, 50 VAND. L. REV. 753 (1997). A report submitted to the National Alliance for the Mentally Ill contends that evidence suggests that a general plan to contain costs and improve access may not be mutually exclusive. *See* TAMI L. MARK, PROJECT HOPE CENTER FOR HEALTH AFFAIRS STUDY, ESTIMATES OF THE COST OF MENTAL HEALTH PARITY AND EXPANDED MENTAL HEALTH COVERAGE: A SYNTHESIS OF EXISTING ANALYSES (May 10, 1996) (on file with author).

5. Access problems are particularly pronounced with the mentally ill when policy efforts are concentrated on cost containment. *See* M. Susan Ridgely and Howard H. Goldman, *Putting the Failure of National Health Care Reform in Perspective: Mental Health Benefits and the "Benefit" of Incrementalism*, 40 ST. LOUIS U. L.J. 407, 416 (1996). *See also* Rubin, *supra* note 4, at 146.

from their employers through employer-provided health benefit plans.[6] In these plans mental health benefits are the most common target of coverage limitations;[7] capping benefits for mental health care at far lower levels than those for traditional medical and surgical care.[8] The insurance industry articulates several reasons for limiting mental health care benefits. In particular, the insurance industry specifies cost containment (the need to keep premiums affordable) and the relative subjectivity of the diagnosis and treatment for mental illness in comparison to that for physical illness as the two primary reasons for the disparity between limitations for physical care and mental health care.[9]

The National Institute for Mental Health estimates 22% of Americans (roughly 40 million people) suffer from some type of mental illness each year, and that 2.8% (roughly 5.5 million people) of those suffer from a severe mental illness.[10] Most persons treated repeatedly for mental health services quickly exhaust the insurance limits of their employer-provided health benefit

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6. *See* Jones, *supra* note 4, at 755 (citing Thomas G. McGuire, *Predicting the Cost of Mental Health Benefits*, 72 MILBANK Q. 3, 4 (1994)). Studies estimate that 64% of Americans receive some kind of employer sponsored coverage. *Id.*

7. *See* Rubenstein, *supra* note 2, at 315 (stating that compared to physical health care, mental health care has been subjected to more stringent limits).

8. These limitations, include but are not limited to, lower limits on utilization, higher co-payments and co-insurance for mental illness, lower annual and lifetime monetary caps and lower annual inpatient and outpatient hospitalization visit caps. *See id.* The US Bureau of Labor Statistics estimates that 96% of insurance plans impose limits on mental health care that are not imposed on physical health care. *See* Stacy J. Willis, *Activists Urging Mental Health Parity*, ARIZ. BUS. GAZETTE, Aug. 21, 1997, at 17.

9. Insurers "believe that judgments about medical necessity in mental health are less precise than similar judgments in other areas of medicine. As a result they fear that if mental health services [are] given parity with other medical services . . . insurance funds will be siphoned into a 'bottomless pit.'" Youndy C. Cook, *Messing With Our Minds: The Mental Illness Limitation in Health Insurance*, 50 U. MIAMI L. REV. 345, 346 n.6 (1996) (citations omitted) (stressing that where cost reduction is the goal, mental health services seem to be an easy target; as the services are relatively confined to a single area of medicine, socially stigmatized, and the efficacy of treatment is believed to be less documented and less obvious).

10. *See* NAMHC 1993 Report, *supra* note 2 (citing epidemiological data from the National Institute of Mental Health). A severe mental illness is defined as schizophrenia, major depression or manic depression.

plan. The mental health community advocates parity for those suffering from mental illness by demanding equality in insurance coverage.[11] In the 1990s mental health advocates gained supporters in Congress, most notably, Senator Pete Domenici of Arizona.[12] However, this congressional recognition of the parity issue did not translate into an automatic "win" for mental health advocates, in fact early congressional parity proposals in the 1990s failed.[13]

In the Spring of 1996, the United States Senate approved statutory language requiring full parity in insurance coverage for mental health services.[14] However, Congress did not enact this expansive parity legislation as initially proposed, instead, it passed a substantially pared down version, the Mental Health Parity Act of 1996 ("MHPA").[15] The main thrust of the MHPA precludes employers and health plans from setting minimal annual and lifetime caps on available insurance benefits for mental health treatment while maintaining substantially higher limits for other physical medical conditions. While the MHPA made some progress, the Act did not address a host of important insurance limitation devices.[16] Some commentators argue that the enactment of the MHPA mimics passage of other pieces of health care legislation: idealistic access goals bargained away and dismantled by cost-containment concerns.[17]

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11. *See* NATIONAL ALLIANCE FOR THE MENTALLY ILL, PARITY UPDATE (Sept. 27, 1996) (on file with author) (hereinafter the "NAMI Parity Update"). Additionally, the parity issue has come to the fore of legal scholarship. *See generally* Brian D. Shannon, *The Brain Gets Sick Too - The Case for Equal Insurance for Serious Mental Illness,* 24 ST. MARY'S L.J. 365 (1993); Wayne E. Ramage, Note, *The Pariah Patient: The Lack of Funding for Mental Health Care*, 45 VAND. L. REV. 951 (1992).

12. Senator Domenici has introduced several parity proposals in Congress, the first being the "Equitable Health Care for Severe Mental Illnesses Act of 1992." S. 2696, 102d Cong., 2d Sess. (1992); *see* 138 Cong. Rec. S. 6490 (May 12, 1992). S. 2696 never became law.

13. *See* text accompanying note 12.

14. S. 1028, 104th Cong. § 3670 (1996).

15. Pub. L. No. 104-204, 110 Stat. 2944 (1996).

16. *See* Jones, *supra* note 4, at 757. The MHPA also includes several important exemptions, making the true reach of the Act even more limited. The exemptions of the Act are discussed *infra*, section II. B. (3)(b).

17. *See* Jones, *supra* note 4, at 757 (describing this phenomenon as "legislative schizophrenia").

These scholars also contend that the ambiguous insurance provisions[18] of the Americans with Disabilities Act ("ADA")[19] follow the same legislative trend. The ADA does not explicitly address the relationship between Title I's broad prohibition of discrimination in employee benefits and the disability based distinctions common in many employer provided health insurance benefit plans regarding mental health benefits. To clarify matters regarding the conflicting tension between Title I and the insurance provision, section 501(c), the EEOC published the "Interim Enforcement Guidance on the Application of the Americans with Disabilities Act of 1990 to Disability-Based Distinctions in Employer-Provided Health Insurance" ("EEOC Guidance" or "Guidance").[20] The Guidance states that the Act does not preclude insurers from discriminating in the provision of insurance coverage to persons with mental illness in employer-provided health benefit plans. The EEOC suggests that this is because a distinction based on "mental illness" is not a disability based distinction warranting scrutiny under the ADA.[21]

This paper examines the federal government's failure to extend necessary protection to individuals suffering from mental illness in their employer provided mental health insurance benefit plans under both the MHPA and the ADA. The paper begins with an examination of the differing views in the debate on mental health parity. Next, the paper provides a detailed review of the history and statutory provisions of the MHPA, concluding that the MHPA is likely to have a limited impact in resolving the mental-physical disparity problem. The paper then considers whether Title I of the ADA provides any protection for persons with mental disabilities seeking parity in employer-provided health benefit plans and concludes that given the current EEOC Guidance, Title I of the ADA is not a solution to the disparity problem. Finally, the paper discusses the EEOC's misplaced and faulty interpretation of the ADA's insurance provisions in determining that the ADA prevents

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18. 42 U.S.C. § 12201(c) (1990).

19. *See* Jones, *supra* note 4, at 757.

20. U.S. EQUAL EMPLOYMENT OPP. COMM., APPLICATION OF THE AMERICANS WITH DISABILITIES ACT OF 1990 TO DISABILITY-BASED DISTINCTIONS IN EMPLOYER PROVIDED HEALTH INSURANCE, *reported in* 109 BNA DAILY LAB. REP., at E-3 (June 9, 1993) (hereinafter EEOC Guidance or Guidance).

21. *See id.* at E-4.

persons with mental disabilities from gaining medical parity by dismissing the inquiry as not a disability-based distinction. The paper suggests the EEOC revise the Guidance to reflect the true statutory meaning and purpose of the ADA -- treating mental illness as it treats physical illness.

I. THE MENTAL HEALTH PARITY ACT OF 1996

A. The Players in the Parity Debate[22]

1. Opponents of Parity: Mental Health Limitations Are Appropriate

Insurers cite cost containment considerations as the most significant justification for the lack of parity and equity in insurance coverage for mental health care.[23] Coverage for mental illness is generally subject to higher deductibles and co-payments (cost-sharing agreements), lower limits on the number of covered visits and inpatient days and lower annual and lifetime limits than those for physical illnesses.[24] By declining to cover mental illnesses or covering them only up to a minimal level, insurers and employers argue they can hold down costs and maintain premium levels and services to other insureds; thus, granting health care access to a greater number of people.[25]

Additionally, insurers present two consumer behavior related cost bases

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22. For a more detailed review of the differing views in the parity debate see Jones, *supra* note 4, at 758 (providing a discussion of the competing views).

23. Insurers try to contain costs via risk classification. Risk classification involves the insurer trying to quantify the burden that a particular individual places on the insurance pool, and then charging the individual policyholder in accordance with that burden. The traditional explanation of risk classification is that it is an exercise in "fair discrimination." *See* Leah Wortham, *Insurance Classification: Too Important to be Left to the Actuaries*, 19 U. MICH. J.L. REFORM 349, 361 (1986) (arguing that mental-physical distinction in insurance provisions "masquerades" as a risk classification because it is not feasible to predict mental illness with enough accuracy to classify the risk of contracting a mental illness. Therefore, the risk classification assessment is a "masquerade" because insurers create broad limitations on all mental illnesses to avoid the expenses incurred by those few at high risk for mental illness).

24. *See* Rubenstein, *supra* note 2, at 315.

25. *See* Wortham, *supra* note 23, at 361 (providing a general discussion of these issues); *see also* NAMHC 1993 Report, *supra* note 2, at 11-12; Cook, *supra* note 9, at 359.

for this more restricted coverage for mental illness: moral hazard and adverse selection. Moral hazard (increased demand in response to plan generosity) is related to what economists call the price elasticity of demand. In general the lower the out-of-pocket price (or cost-sharing) of health services, the higher demand for these services.[26] Mental illness heightens insurers fears of moral hazard. Specifically, they point out that "demand for mental health services has been shown to be highly responsive to the presence or absence of insurance coverage" and that "some forms of treatment . . . [are] similar to nonprofessional forms of human support and interaction."[27] The basic premise of this insurer's argument is that mental illness has vague end points, severe diagnostic ambiguity and more uncertain and less efficacious treatment than other areas of physical medicine – creating considerable moral hazard.[28] Many who defend unequal treatment argue that those with mental illness have either caused their own problems or are hopelessly incurable, therefore, deserving of fewer benefits.[29] The bottom line of the moral hazard argument is the economic rationale that providing such benefits is not worth the cost if the policyholder would not seek the care if he had to pay the entire cost

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26. *See* David Mechanic, *Mental Health Services in the Context of Health Insurance Reform*, 71 MILBANK Q. 349, 352-53 (1993).

27. *See* JAMES E. SABIN & NORMAN DANIELS, HASTINGS CENTER REP., DETERMINING 'MEDICAL NECESSITY' IN MENTAL HEALTH PRACTICE 10 (Nov.-Dec. 1994), *cited in* Cook, *supra* note 9, at 359.

28. *See* Jones, *supra* note 4, at 760 n.31; John K. Iglehart, *Managed Care and Mental Health*, 334 NEW ENG. J. MED. 131, 131-35 (1996) ("The nature of mental illness - its less well-defined boundaries and the greater uncertainty of clinical diagnosis and treatment - has left most payers unwilling to provide unlimited coverage."); SABIN AND DANIELS, *supra* note 27, at 5 ("[m]any insurance administrators believe that judgments about medical necessity (i.e. appropriateness of treatment) in mental health are less precise than similar judgments in other areas of medicine"). Although some commentators believe the view of the insurers to be true, *see* Mechanic, *supra* note 26, at 354, other commentators challenge the validity and truth of this view. *See* Shannon, 24 ST. MARY'S L.J., *supra* note 11, at 369 (discussing the efficacy of treatment for several mental illnesses). *See also* NAMHC 1993 Report, *supra* note 2, at 1450 (stating that "the therapeutic options available to clinicians for treating mental disorders have become more numerous, more specific, and more effective").

29. *See* Philip Boyle, *Managed Care in Mental Health: A Cure or a Cure Worse Than Disease?*, 40 ST. LOUIS U. L.J. 437, 440 (1996).

himself.

The second consumer behavior related cost argument that insurers make for disparity is adverse selection. This argument deals with the fact that consumers have a choice of several health insurance plans. If some plans offer substantially higher mental health benefits, insurers fear those certain plans will disproportionately attract higher cost populations.[30] Insurers and employers fear that because an increased number of high risk enrollees raises costs, the result of the adverse selection dilemma is either a reduction in coverage or an increase in premium cost.[31]

2. Proponents of Parity: Justification for Equal Mental and Physical Benefits

Mental health advocates[32] contend that the mental health limitations and exclusions are based on myths and misunderstandings; a discriminatory insurance practice, contributing to the stigmatization, fear and ignorance of persons with mental illness in the United States.[33] Some mental health advocates refer to the disparity between physical and mental illness as "the

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30. *See* U.S. DEPT. OF HEALTH AND HUMAN SERVICES, PARITY IN COVERAGE OF MENTAL HEALTH SERVICES IN AN ERA OF MANAGED CARE: AN INTERIM REPORT TO CONGRESS BY THE NATIONAL ADVISORY MENTAL HEALTH COUNCIL 12 (Apr. 1997) (hereinafter HHS Interim Report) (on file with author).

31. Note that an argument for mandatory mental illness parity in all health plans is that such parity would render the adverse selection argument moot as no plan would "suffer" from being preferred by people with mental illness.

32. The advocates of parity for mental illness include legal commentators, congressional supporters, and federal and state mental health organizations. In addition, The Coalition for Fairness in Mental Illness Coverage endorses equality in mental illness health coverage. This Coalition is comprised of the National Alliance for the Mentally Ill, National Mental Health Association, American Managed Behavioral Health Association, American Medical Association, American Psychiatric Association, American Psychological Association, Federation of American Health Systems, and National Association of Psychiatric Health Systems. *See* Mark, *supra* note 4, at 2.

33. *See Testimony of Harold I. Eist, President of the American Psychiatric Association on Federal Employees Health Benefits Program Oversight, Before the House Government Reform and Oversight Committee* (Sept. 5, 1996). In his testimony, Mr. Eist details several important reasons for mental health parity, discussing the stigma and fear associated with the mentally ill. *See id.*

last bastion of open discrimination in health insurance in this country."[34] These advocates argue that historical public and political biases and stigmas associated with individuals suffering from mental illness are the primary reason for the prevalence of coverage limitations,[35] and contend that the costs of ending insurance discrimination against people with mental illness are minimal and estimable.[36] Furthermore, mental health advocates respond to opponents' concerns regarding cost containment with data demonstrating that the insurance industry can accomplish full mental health parity in a cost-effective manner.[37] The data consists of both projections of costs from actuarial studies and data available from several states that have enacted legislation ending insurer discrimination against severe mental illnesses.[38] Considering this data and other recent scientific studies, current mental illness insurance limitations present clear evidence of intentional bias against the mentally ill.[39]

Advocates also respond to the opponents' moral hazard concerns. The

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34. *CBO Analysis Doesn't Tell Full Story on Mental Health Parity, Coalition Says*, 4 BNA HEALTH CARE POL'Y REP., 908 (May 27, 1996), *cited in* Jones, *supra* note 4, at 761 (quoting a press release of the Coalition for Fairness in Mental Illness Coverage).

35. *See* Ramage, *supra* note 11, at 951 ("Anglo-American society historically has viewed the mentally ill as outsiders"). *See also* Shannon, *supra* note 11, at 368 (discussing that many members of the insurance industry still view individuals with mental illness as causing their own mental problems).

36. A study conducted by Project HOPE for the National Alliance for the Mentally Ill identified eight (8) studies conducted in the last ten (10) years that projected the cost of ending discrimination against biologically based mental illnesses. Estimates ranged from less than one percent (1%) increase in premiums to an eleven percent (11%) increase in premiums. Of the eight (8) estimates reviewed, seven (7) found that premium increases would be four percent (4%) or less. The highest estimate of eleven percent (11%) was calculated in 1996 by Watson Wyatt Worldwide for the Association of Private Pension and Welfare Plans. *See* Mark, *supra* note 4, at 1-6.

37. In a press release, Senator Domenici unveiled the NAMHC 1993 Report to Congress, indicating that parity is affordable. Pete Domenici, *Report: Mental Health Parity Affordable* (Apr. 29, 1997).

38. *See id.* Maine, New Hampshire and Rhode Island have required all insurers to end discrimination against severe mental illnesses and Texas has required nondiscriminatory coverage of severe mental illnesses for state employees.

39. *See* Jones, *supra* note 4, at 761 n.38.

underlying premise of the moral hazard argument is that mental illness has more diagnostic ambiguity and uncertain treatment success than that for physical diseases. Advocates, however, stress that there is a plethora of evidence demonstrating that diagnosis and treatment for many mental illnesses are as precise, effective and successful as for other medical disorders.[40]

Advocates for parity also argue that there is no sound biological basis for the disparate treatment of mental and physical disorders.[41] The current medical understanding is that many serious mental illnesses are physical diseases of the brain and as such are biologically based. Thus, proponents of parity argue that insurance practices for physical illness should be equal for mental illnesses which result from a physical malfunction of the brain.[42]

Although purity proponents do not overtly respond to the opponents' arguments regarding the adverse selection issue, it appears that policy reasons for providing parity trump any concerns regarding adverse selection. Furthermore, if parity were to become the law and thus the norm in insurance plans, the adverse selection problem would disappear because all plans would be offering mental illness benefits equal to those for physical illness.

In sum, mental health advocates maintain that the distinction drawn between mental and physical for purposes of insurance coverage is baseless: the limitations are discriminatory, arbitrary and without sound scientific or economic basis.

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40. NAMI Parity Update, *supra* note 11, at 2. *See also* TEXAS ALLIANCE FOR THE MENTALLY ILL, THE CASE FOR PARITY AND NON-DISCRIMINATION IN HEALTH CARE FOR SERIOUS MENTAL ILLNESS 1 (Nov. 1995) (on file with author) (citing data from the National Institute of Mental Health that schizophrenia has a 60% success rate; major depression 65%; and bipolar disorder 80%). Yet commonly covered cardiovascular procedures such as angioplasty and atherectomy have only a 41% and 52% success rate.

41. *See* Shannon, *supra* note 11, at 370-72. *See also* Cook, *supra* note 9, at 360 ("... medical research is breaking down the traditional distinction between mental and physical diseases . . . many mental illnesses are caused by measurable physiological affects in the brain").

42. *See* Shannon, *supra* note 11, at 371-72. "People with severe mental illness and their families know what so many in our society do not: severe mental illnesses like schizophrenia and manic-depressive illnesses are biological illnesses." NAMI Parity Update, *supra* note 11, at 2.

B. Impetus for a Federal Approach: History of the MHPA

1. The Call for a Federal Solution

State legislatures were ahead of the United States Congress in answering the call for insurance parity for mental illness.[43] Prior to the enactment of the MHPA in 1996, several states had already enacted variations of parity legislation to change health insurance policy in their states. By 1996, six states had enacted some type of parity legislation[44] and several other states had already introduced parity-type legislation.[45] These legislative efforts in several of the states represent the initial attempt to eradicate insurance discrimination against persons suffering from mental illnesses.[46]

The federal courts also heard cases regarding the legality of mental health benefit limitations prior to the enactment of the MHPA.[47] Plaintiffs challenged the provisions in their respective insurance plans that limited coverage for their biologically based "mental" conditions by invoking the

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43. *See* Jones, *supra* note 4, at 765.

44. NATIONAL ALLIANCE FOR THE MENTALLY ILL, REVIEW OF STATE PARITY LEGISLATION (hereinafter the "NAMI Review") (on file with author). These states are Maine, Maryland, Minnesota, New Hampshire, Rhode Island and Texas. Maine passed legislation in 1995 mandating non-discriminatory coverage for seven specified mental illnesses. Maryland passed legislation in 1994 requiring non-discriminatory coverage for mental illness and emotional disorders. Minnesota passed legislation in 1995 banning health plans from imposing benefit limitations and cost-sharing requirements on outpatient and inpatient mental health services that are not placed on medical disorders. New Hampshire passed legislation in 1994 mandating that health insurers provide non-discriminatory coverage for specified biologically based mental illnesses. Rhode Island passed legislation in 1994 requiring health insurers to provide non-discriminatory coverage for defined serious mental illnesses. Texas passed legislation in 1991 mandating non-discriminatory coverage in state and local government employees' health contracts for defined serious mental illnesses. *See* Project HOPE Report, *supra* note 36, at 2 (detailing parity measure in the states).

45. Arizona, Delaware, Massachusetts, North Carolina, California, Illinois, Michigan, New York and Ohio are all states that have introduced some type of parity legislation. See Project HOPE Report, *supra* note 36, at tbl. 2. (providing a full review of state parity efforts).

46. *See id.* at 1-3.

47. For a more complete discussion of these cases, *see generally* Cook, *supra* note 9, at 345; Shannon, *supra* note 11, at 375-86; Ramage, *supra* note 11, at 963-68; Jones, *supra* note 4, at 764-65.

broad standards applicable to "physical" illness under the plan.[48] These lawsuits left the courts with the burden of determining what was "mental" or "physical" under a particular insurance plan. Because each jurisdiction had adopted a different approach to solving the problem, results of this judicial inquiry were inconsistent.[49] Additionally, the long term success of a judicial decision was negligible as insurers could easily adjust their policy language to preclude further judicial intervention.[50]

Given this situation, mental health advocates, legal commentators and mental health allies in Congress began to recognize that a solution, such as the MHPA, was necessary if parity were to be obtained in insurance for mental illness.

2. Paving the Path to the MHPA: Parity Efforts in Congress

During the 104th Congress, several measures were introduced which required insurers to cover mental health services in the same way they cover physical ailments. Most notable was the 1996 introduction of the Domenici - Wellstone Amendment[51] which represented an attempt to enact full parity for

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48. The judiciary developed three approaches for determining whether an illness is physical or mental under a specific insurance plan: 1) the symptom-manifestation approach; 2) the causation approach; and 3) the treatment approach. Cook, *supra* note 9, at 348-49.

49. *See* Jones, *supra* note 4, at 765-66.

50. *See* Cook, *supra* note 9; Jones, *supra* note 4, at 765-66.

51. The amendment states as follows:

> PARITY FOR MENTAL HEALTH SERVICES.
>
> (a) PROHIBITION. An employee health benefit plan, or health plan issuer offering a group health plan or an individual health plan, shall not impose treatment limitations or financial requirements on the coverage of mental health services if similar limitations or requirements are not imposed on coverage for services for other conditions.
>
> (b) RULE OF CONSTRUCTION. Nothing in subsection (a) shall be construed as prohibiting an employee health benefit plan, or health plan issuer offering a group health plan or an individual health plan, from requiring preadmission screening prior to the authorization of services to those services that are medically necessary.

all mental health coverage. The Domenici-Wellstone Amendment would have forbidden health insurance plans from establishing or continuing "treatment limitations or financial requirements on the coverage of mental health services" that are not included for treatment or services for other physical illnesses.[52] The amendment passed the senate by voice vote on April 18, 1996, by a vote of 100-0.[53] This triumphant conquest for mental health advocates, however, was short lived.

Development of the Amendment came to a halt due to a congressional debate regarding the potential cost of parity. Insurers and employers were strongly against passage of the Domenici-Wellstone Amendment. Business group lobbyists argued that this mental health parity amendment was ambiguous and would drive up insurance costs.[54] Advocates both for and against the measure identified studies pointing in different directions about the costs of the amendment.[55] Once the opposition grew, the sponsors stated that they would retreat to a less comprehensive parity measure and announced that they would be amenable to a more humble parity provision "that would prohibit insurers from setting lower annual or lifetime caps on mental health

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Amendment No. 3681, S. 1028, 104th Cong., 142 CONG. REC. 3670 (Apr. 18, 1996) (hereinafter Domenici-Wellstone Amendment). The Domenici-Wellstone Amendment arose as an amendment to the Health Insurance Reform Act of 1996, S. 1028, 104th Cong. (1996), a health insurance reform measure referred to as the Kennedy-Kassenbaum bill.

52. *See id*

53. *See generally* Brian D. Shannon, *Paving the Way to Parity in Health Insurance Coverage for Mental Illness: New Law or Merely Good Intentions*, 68 U. COLO. L. REV. 63 at 88 (1994) (discussing the 1996 congressional parity efforts in detail).

54. *Employer Groups' Study Bolsters Claims of Negative Side of Mental Health Parity*, 4 BNA HEALTH CARE POL'Y REP., 995 (June 10, 1996) (reporting a study that estimated the parity bill would cause a loss of employer-sponsored insurance by 1.7 million workers and their dependents and an 8.7% average increase in private health insurance premiums). *See generally* Shannon, *supra* note 53, at 88-89.

55. The Congressional Budget Office conducted a study that estimated that the amendment would result in an average premium increase of 4%. *See* Letter from June E. O'Neill to Senator Nancy Kassenbaum (Apr. 23, 1996) (regarding the costs of the parity proposal) (on file with author).

payments."[56]

This compromise in reducing the scope of the amendment did not result in its ultimate inclusion in the final version of the 1996 health insurance reform bill. House and Senate conferees considered the bill and filed a conference report on July 31, 1996. Requirements for parity in health insurance coverage for the mentally ill were not included in the final conference report.[57] On August 2, the Senate agreed to accept the conference report without the parity measure and the reform bill was cleared for the President's signature.[58] Senators Domenici and Wellstone, however, did not give up their effort and continued to try to pass parity type legislation through Congress in 1996.

On September 5, 1996, Senators Domenici and Wellstone took steps to append a parity initiative, identified as the Mental Health Parity Act of 1996 ("MHPA"), to the annual appropriations bill for the Departments of Veterans Affairs and Housing and Urban Development.[59] This measure was essentially a rubberstamp of the earlier compromise measure to require parity for annual caps and lifetime limits on mental health benefits.[60] After deliberations about the costs and some tweaking of the coverage provisions, the parity initiative proved successful; the Senate passed the Act as an amendment to H.R. 3666 and the House adopted it in its amended form on September 24, 1996. President Clinton signed the bill on September 26, 1996.[61]

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56. Shannon, *supra* note 53, at 98 (citing HEALTH CARE: COMPROMISE SET ON MENTAL HEALTH PARITY TO ENSURE PROVISION IN FINAL HEALTH BILL, DAILY REP. FOR EXECUTIVES (July 19, 1996)).

57. *See id.* at 98.

58. *See id.* at 99-100.

59. *See id.*

60. *See id.*

61. *See* Jon Healy, *VA-HUD Spending Bill Clears with Bipartisan Support*, 54 CONG. Q. 2762 (Oct. 4, 1996).

3. A National Step Toward Ending Discrimination Against the Mentally Ill: Substance of the MHPA[62]

a. What Does the Act Really Say?

At first blush the MHPA has the appearance of a fierce grizzly bear, but after a careful review of the statutory text, it appears that the grizzly bear's teeth and claws have been removed. The MHPA does little to end disparities between physical and mental health benefits; it is a mere shadow of the original parity proposal.[63] Though couched in the rhetoric of antidiscrimination law, the MHPA in practice does little to get to the heart of the discrimination it seeks to remedy.

The Act,[64] requires annual and aggregate lifetime dollar limits for mental health coverage to be the same as for physical health coverage in group health plans.[65] A plan that covers mental health and medical/surgical conditions and has annual or aggregate lifetime dollar limits for medical/surgical conditions must establish either an inclusive limit for all benefits (i.e., $1 million lifetime

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62. Since the MHPA became law, a number of complicated issues related to its impact on state mental illness parity laws have arisen. One of these issues is whether the new federal law preempts state parity initiatives or serves to erode political support for parity in states that have yet to enact such legislation. In an attempt to clear up this issue, the National Alliance for the Mentally Ill prepared a report on the Federal Act's impact on state parity laws. *See* NATIONAL ALLIANCE FOR THE MENTALLY ILL, DOMENICI-WELLSTONE AND ITS IMPACT ON STATE PARITY LAWS AND ELIGIBILITY FOR SSI & MEDICAID (on file with author). This report details that the legislative history of Domenici-Wellstone indicates that Congress did not intend the MHPA to preempt state parity laws. Specifically, the conference report that accompanied P.L. 104-204 states " it is the intent of the conferees that . . . the operation of any State law or provision which requires more favorable treatment of mental health benefits under health insurance coverage than required by this section." H. Rpt. 104-812 at 89. Therefore, although there is no mention of reverse preemption language in the actual text, NAMI suggests that the congressional intent as demonstrated in the legislative history indicates that Congress intended for stronger state laws to operate independently of the potentially more limited federal parity provision. *See id.*

63. *Health Provisions Finalized in VA-HUD Measure*, NAT'L JOURNAL'S CONGRESS DAILY, Sept. 20, 1996 (available in LEXIS, News Library, CNGDLY File).

64. Mental Health Parity Act of 1996 (the "MHPA"), 42 U.S.C. 300gg-5 (1996).

65. *See id.*

limit for all benefits) or separate limits for mental health services that are no more restrictive than those for medical/surgical services (i.e., separate lifetime limits of $1 million for each type of benefit).[66] However, it is what the Act does not cover that is even more significant.

The Act expressly provides that it does not govern with respect to any terms or conditions relating to mental health benefits other than lifetime caps or annual limits relating to benefits.[67]

The Act provides that it does not reach common insurance practices as cost-sharing, limits on numbers of visits or days of coverage, coinsurance or medical necessity requirements.[68] Therefore, insurers may react to the law in a number of ways. For example, an employer's health plan could cover up to a certain percentage of the costs of mental health care, even though the plan might cover a higher percentage of the cost of physical care. The percentage in the above example applies to cost-sharing, and as such, is not proscribed by the MHPA – the percentage is not a lifetime annual cap in terms of years or dollars.[69] Additionally, cost conscious employers and insurers could impose an exorbitantly high coinsurance rate and dollar and day limits to further minimize mental health coverage under the plan. Because the Act leaves insurers and employers free to manipulate these other pieces of the benefit structure without the requirement of parity, cost-conscious plans will likely use these uncovered practices to circumvent the Act, keeping mental health costs at current levels.[70]

The Act does not require that mental health benefits be offered as part of a health insurance package.[71] The Act expressly does not require "a group

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66. *See id.*

67. *See id.* at § 300gg-5(b)(2).

68. *See id.*

69. *See* Miriam H. Farber, *Subterfuge: Do Coverage Limitation and Exclusions in Employer Provided Health Care Plans Violate the Americans with Disabilities Act?* 69 N.Y.U. L. REV. 850, 929 (1994).

70. For a discussion of the unintended consequences of the MHPA, see generally Leslie Hann, *Unintended Consequences: New Federal Law to Expand Mental Health Benefits Could Result in Less Coverage*, 97 BEST'S REV. 11 (Mar. 1, 1997).

71. *See* 42 U.S.C. § 300gg-5 (b)(1) (providing that nothing in the MHPA shall be construed as requiring a group health plan to provide any mental health benefits).

health plan (or health insurance coverage offered in connection with such a plan) to provide any mental health benefits."[72] Thus, an employer could maintain an insurance plan that covers physical impairments but provides no mental health benefits at all. As such, the Act appears to place an extra burden on employers who do provide these benefits, while employers that do not provide mental health benefits receive no added burden. Additionally, if a plan does cover mental illness benefits, the Act allows the employer or insurer to define what constitutes a mental health benefit.[73] Thus, mental illness services not listed as such under a plan's definitions section could be excluded from the scope of the Act – leaving employers and insurers another cost containment device to keep mental illness benefits at current levels.

While the original Domenici – Wellstone proposal would have required parity of benefits for all employers and insurance plans, the MHPA automatically exempts employers with fewer than fifty employees from scrutiny under the Act.[74] According to figures from the U.S. Census Bureau, firms having fewer than 50 workers employ approximately half of all U.S. workers. Moreover, such firms make up about 97% of U.S. employers.[75] Therefore, many employees and dependents (approximately 80 million) will not be covered by this legislation.[76]

Moreover, the MHPA does not apply if its application would cause the

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72. *Id.*

73. *See id.*

74. *See id.* at § 300gg-5 (c)(1). The Act defines a small employer as "an employer who employed an average of at least 2 but no more than 50 employees on business days during the preceding calendar year and who employs at least 2 employees on the first day of the plan year." *Id.* at § 712(c)(1)(B). Congress inserted this provision to placate fears faced by small employers regarding increased costs from one or two chronic users of mental health services would drop benefits altogether. This concern ignores the fact that small employers could use other mechanisms to limit mental health services or not cover mental health services at all.

75. *See* Jennifer Neisner, *Mental Health Parity Under P.L. 104-204*, CRS REPORT FOR CONGRESS, at 1. (Oct. 15, 1996) (on file with author) (citing THE BUREAU OF THE CENSUS: ECONOMICS AND STATISTICS ADMINISTRATION, 1992 ECONOMIC CENSUS: WOMEN-OWNED BUSINESSES (1996) (defining the universe of all U.S. firms as those firms employing at least one person)).

76. *See* HHS Report to Congress, *supra* note 30, at 6.

cost of insurance to increase by more than one percent.[77] The Senate adopted this one percent exemption amendment to the Act which was offered by Senator Phil Gramm as a way to get the parity measure approved.[78] Confusion looms about how to measure or calculate the one percent increase.[79] Does the increase apply to total medical costs or only to mental health costs? Must the employer experience the loss before claiming the exemption or will an employer provided actuarial projection suffice? Once proven, how long does the exemption last?[80] Employer groups have requested federal agencies to issue a guidance regarding these issues.[81] The government is expected to issue a Guidance on the Act this fall or winter.[82]

As the statutory provisions of the Act make clear, the MHPA is likely to have a negligible impact in resolving the issue of parity among physical and

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77. *See* 42 U.S.C. §300gg-5(c)(2). "This section shall not apply with respect to group health plan (or health insurance coverage offered in connection with a group health plan) if the application of this section to such plan (or to such coverage) results in an increase in the cost under the plan (or for such coverage) of at least 1 percent." *Id.* The Congressional Budget Office (the "CBO") estimates that the cost increase in premiums as a result of the MHPA will be 0.4 percent, 0.16 percent of which will be borne by the employer. *See* Letter from Jeff Lemieux of the CBO to Dean Rosen (regarding a preliminary Federal Cost Estimate of the MHPA) (June 4, 1996) (on file with author). If this anticipated projection by the CBO is accurate, the one percent exemption should seldom come into play.

78. *See* Shannon, *supra* note 53, at 97 (discussing the compromise to get the parity provision passed).

79. *See id.* at 102-03.

80. *See* Geri Aston, *Employer Exemption Key in New Mental Health Parity Law*, 40 AM. MED. NEWS (No. 30) (Aug. 11, 1997). Mental Health Advocates argue that the MHPA should be in effect for one year before businesses could apply for an exemption. This way the businesses would have data to prove their need for an exemption. Conversely, employers argue that they should not be forced to see their costs rise more than one percent before they can be exempted from the parity rules. Additionally, business groups contend that the exemption should last at least three years because consistency in benefit plans is important. In contrast, mental health advocates suggest that the exemption should be reviewed annually because most insurance contracts are written or changed on an annual basis. *Id.*

81. *Employers Ask For Guidance on Mental Health Parity Mandates*, BNA EMPLOYMENT POL'Y & L. DAILY (Apr. 21, 1997).

82. *See* Aston, *supra* note 80. The Department of Health and Human Services and the Department of Labor are the two offices responsible for developing the rules and guidelines governing the MHPA.

mental health benefits. What appeared as a federal law aimed at expanding coverage for mental health benefits, may allow, or even encourage, employers and insurers who plan carefully to provide less coverage or drop mental health coverage altogether. Despite the Act's limitations and shortcomings, however, mental health advocates consider the MHPA a huge victory in overcoming discrimination against the mentally ill.[83] Senator Domenici described its enactment as a "a historic step, a breakthrough, for the severely mentally ill . . . [and Congress has taken] one step to get rid of the terrible stigma and discrimination that is based on mystique, mystery and Dark Age Concepts."[84]

b. What Does the MHPA Mean for Parity in the Long Run?

Mental health advocates believe that passage of the MHPA not only demonstrates that a majority of congress is concerned and interested in the parity issue, but more importantly, advocates believe that the passage is demonstrative of congressional intent to eventually introduce and pass a more broad parity initiative.[85] Additionally, passage of the MHPA has served as the impetus for Congress to learn more about the "real" costs of different types of parity initiatives. For example, after passing the MHPA, Congress requested the National Advisory Mental Health Council to prepare a report on the costs of providing equitable coverage for people with mental illness, particularly severe mental illnesses.[86]

The United States Senate made a historic effort in 1996 in attempting to pass legislation that would mandate full parity in insurance coverage for the treatment of the mentally ill. Although 1996 turned out to be the wrong time

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83. *See* Shannon, *supra* note 53, at 101-02.

84. Robert Pear, *Conferees Agree on More Coverage for Health Care,* N.Y. TIMES, Sept. 20, 1996, at A1 (quoting Senator Domenici). The National Alliance for the Mentally Ill also views the passage of the Act as a significant step toward achieving full parity. Interview with Dee, Staff Attorney, NAMI; *see also* NAMI Parity Update, *supra* note 11, at 3 (labeling the Act an "auspicious beginning – but only a beginning").

85. *See* NAMI Parity Update, *supra* note 11.

86. *See* HHS Report, *supra* note 30, at 6. The Interim Report to Congress was completed in April 1997.

for implementing full parity, the MHPA that Congress ultimately passed, is a signal that the massive wall of destructive discrimination against the mentally ill is crumbling. Further congressional action is needed to secure full parity for mental illness. Perhaps this next Congress will take additional strides to assure that greater parity becomes reality.

II. THE AMERICANS WITH DISABILITIES ACT AND DISPARATE PHYSICAL AND MENTAL HEALTH BENEFITS IN EMPLOYER PROVIDED HEALTH BENEFIT PLANS

As discussed in part II of this paper, the MHPA does not touch a myriad of other benefit limitations that employers and insurers can manipulate to keep mental illness coverage at current low levels (as compared to physical illness). The MHPA only precludes the use of aggregate annual and lifetime dollar limitations for mental illness in employer-provided health plans and services that are not equal to physical health limitations. However, certain provisions of the ADA may accomplish what the MHPA cannot: establishing the invalidity of all clauses limiting mental health care benefits.[87]

This section of the paper deals with the question of whether Title I[88] of

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87. One could argue that because Congress enacted a specific parity statute, the ADA is not meant to address or require parity in insurance plans. In this author's opinion this argument is unfounded. In the ADA, Congress was exceptionally vague in its insurance provisions for various political reasons. Nevertheless, it is important to recognize that the ADA is a broad anti-discrimination statute. It would go against the purpose of the ADA to summarily determine (without invoking sections of the ADA) that the disparity between mental and physical health benefits is not worthy of scrutiny under the ADA. Congress enacted the MHPA as a way to make disparity in aggregate and lifetime limitations illegal, per se. Thus, a potential claimant does not have to endure proving a violation of section 501(c) of the ADA in these situations. The MHPA simply affords the potential plaintiff a second avenue on which to base a claim of this type of discrimination. As such, the author of this paper contends that the passage of the MHPA is not evidence of Congressional intent that the ADA not preclude mental health limitations in insurance plans.

88. This paper will only focus on the mental health insurance limitation in employer-provided health plans under Title I, the employment title of the ADA. However, it is important to note that an individual who claims to have been discriminated against in the provisions of an employer-provided insurance plan may also file suit against the insurance provider under Title III. *See* 42 U.S.C. § 12112-12117 (1994). Title III of the ADA prohibits discrimination

the ADA precludes employers and insurers from discrimination in the provision of insurance coverage to persons with mental illness for the remaining types of mental illness limitations. Although presently, given the current EEOC interpretation of the ADA's role in employer-provided insurance plans, Title I of the ADA does nothing to resolve the mental-physical disparity, several legal commentators have contended that the ADA should preclude the mental-physical distinction.[89]

A. Goals of the ADA

On July 26, 1990, the United States took a major step toward eliminating discrimination against individuals with disability when President Bush signed into law the ADA. President Bush described the ADA as "the world's first comprehensive declaration of equality for people with disabilities."[90] The ADA's concerns regarding persons with disabilities extend far beyond thoughtlessness and neglect. The ADA has a mission to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities . . .[and to] provide clear, strong, consistent,

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on the "basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." *Id.* at § 12182(a). A public accommodation is defined as a "private entity that owns, leases (or leases to), or operates a place of public accommodation." 28 C.F.R. § 36.104 (1996). Title III contains a list of twelve categories of private entities that are public accommodations governed by the ADA. *See* 42 U.S.C. § 12181(7). The issue in parity actions under Title III, is whether the list of twelve categories of public accommodations includes only physical structures that a person enters in order to obtain goods or services or whether the list also includes services provided by public accommodations even when clients do not enter physical structures to obtain such goods or services. *See, e.g.*, Carparts Distrib. Ctr. v. Auto Wholesaler's Ass'n of New England, 37 F.3d 12, 18-20 (1st Cir. 1994). There is currently a split in the circuits regarding this issue. *See* Parker v. Metropolitan Life Ins., 121 F.3d 1006 (6th Cir. 1997).

For a more detailed discussion of Title III and insurance see Bonnie Tucker, *Insurance and the ADA*, 46 DEPAUL L. REV. 915 (1997).

89. *See* Cook, *supra* note 9, at 365-66; Orentlicher, *supra* note 4, at 85 (contending that certain limitations could be prohibited by the ADA under the proposed "deconstructed disability standard"); *see also* Ramage, *supra* note 11, at 970-71.

90. *Bush Signs Disabilities Act at White House Ceremony*, BNA WASH. INSIDER (July 27, 1990).

enforceable standards addressing discrimination against individuals with disabilities."[91] The congressional findings contain recitations about a history of efforts to "isolate and segregate individuals with disabilities"[92] and state that people with disabilities are "a discrete and insular minority who have been faced with restrictions and limitations . . . and relegated to a position of political powerlessness . . . resulting from stereotypic assumptions . . .."[93]

This sweeping mandate ends discrimination against persons with disabilities in employment, public services and public accommodations provided by private entities.

Title I of the ADA addresses employment practices, Title II concerns public services and Title III addresses public accommodations provided by private entities.[94]

1. The Substantive Law

a. Title I: The Employment Title

The ADA expressly prohibits disability-based discrimination in employment.[95] Under the ADA, a "covered entity"[96] cannot discriminate in all aspects of the employment relationship: application, hiring, advancement, compensation, training, termination and all other privileges of employment against a "qualified individual with a disability"[97] because of the disability.[98]

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91. 42 U.S.C. § 12101 (detailing the purpose of the ADA chapter).

92. *Id.* at § 12101(a)(5).

93. *Id.* at § 12101 (a)(7).

94. *See id.* at §§ 12101- 12213.

95. *See id.* at §§ 12111-12117.

96. "Covered entity" is defined to include employers, employment agencies, labor organizations, and joint labor-management committees. 42 U.S.C. § 12111(2). An employer is "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person." 42 U.S.C. § 12111(5)(A).

97. "Qualified individual with a disability" is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8).

98. Section 102(a) provides in full:

> No covered entity shall discriminate against a qualified individual with a

The EEOC regulations implementing section 102(a) state that it is "unlawful for a covered entity to discriminate on the basis of disability against a qualified individual with a disability in regard to . . . [f]ringe benefits available by virtue of employment, whether or not administered by the covered entity."[99] Prohibited acts also include subjecting the qualified employee to discrimination through the employer's contractual relationship with an employment or referral agency, labor union, or an organization that provides fringe benefits.[100] This provision creates liability for employers who enter into contractual agreements involving the provision or administration of employee health benefit plans that result in discrimination against employees with disabilities.[101]

Section 102(b)(5) mandates the provision of equal employment opportunities to qualified applicants or employees with disabilities by reasonably accommodating their known physical or mental limitations.[102] This extends to "all employment decisions and to the job application process;"[103] thus, appearing to require reasonable accommodation in the provision of fringe benefits.

The ADA's definition of "disability" includes any "physical or mental impairment that substantially limits one or more of the major life activities."[104] A mental impairment is defined as "any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or

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> disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a).

99. 29 C.F.R. § 1630.4(f).

100. *See* 42 U.S.C. § 12112(b)(2).

101. *See id.*

102. *See id.* at § 12112(b)(5); *see also* 29 C.F.R. § 1630.9.

103. 29 C.F.R. § 1630.9.

104. 42 U.S.C. § 12102(2)(A). In addition, anyone having "a record of such impairment" or "regarded as such an impairment" is considered disabled under the ADA. 42 U.S.C. § 12102(B)-(C). Major life activities include: caring for one's self, working, walking, speaking, learning and breathing. *See* 28 C.F.R. § 35.104.

mental illness and specific learning disabilities."[105]

Title I explicitly authorizes both disparate treatment and disparate impact challenges to alleged discriminatory actions by an employer.[106] The EEOC regulations reinforce this textual reading of the Act by providing both disparate treatment and disparate impact defenses to claims of employment discrimination on the basis of an individual's disability.[107]

Many employer provided health benefit plans and insurance practices appear to violate the ADA under Title I's broad nondiscrimination mandate. Mental illness limitations that are not on equal par with physical limitations seem extremely suspect. Congress, however, with a great deal of ambiguity, inserted a provision to curb the effect of the broad reaching employment statute on the provision of employee insurance benefits. Specifically, Congress added section 501(c) of Title V to the Act to insulate traditional insurance practices from the sweeping antidiscrimination provisions of Title I.[108]

b. The Safe Harbor Provision: Section 501(c): Legislative History and Statutory Text The Insurance Provision: Congress Takes the Sting out of Title I

As federal lawmakers were debating the content of the ADA, lobbyists for employer and insurance groups fought hard to maintain the flexibility in

105. EEOC, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT II-2 (1992).

106. *See* 42 U.S.C. 12112(b)(2)-(3). "Disparate treatment" discrimination under Title I occurs when an individual is intentionally treated differently on account of his or her disability. "Disparate Impact" discrimination under Title I occurs when the employer's conduct, though affording equal treatment to all individuals, adversely impacts an individual with disabilities or results in a disproportionately negative impact on a class of individuals with disabilities. *See* 29 C.F.R. § 1630.15(b)-(c).

107. *See* 29 C.F.R. § 1630.15(a)-(c).

108. *See* 42 U.S.C. § 12201(c).

benefit limitations that they had been enjoying under ERISA.[109] Meanwhile, those suffering with disabilities and their advocates were encouraged by the possibility that the ADA would preclude limitations based merely on classification of illness – a practice prevalent in employer-provided health plans.[110] Section 501(c), called the "safe-harbor" provision, is the congressional answer to those promoting anti-discrimination efforts and those wishing to uphold current insurance practices. Section 501(c) was intended to reassure insurers that the ADA would not disturb insurance underwriting practices and reliance on risk classifications.[111]

2. The Statutory Text of 501(c)

Section 501(c) provides:

> Subchapters I through III of this chapter and Title IV of this Act shall not be construed to prohibit or restrict:
>
> (1) an insurer, hospital, or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from

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109. The federal government regulates employer-provided benefit plans through the Employment Retirement Income Security Act ("ERISA") of 1974. 29 U.S.C. § 1001-1461 (1994). The pre-MHPA did in fact contain a non-discrimination provision - however, the scope of this provision was held as not reaching benefit limitations. *See* McGann v. H&H Music Co., 946 F.2d 401, 408 (5th Cir. 1991) (holding that an employer's reduction in benefits under ERISA for AIDS did not discriminate against an employee suffering from that disease). *Id.* Thus, the court in *McGann* determined that ERISA did not require employers to provide any certain configuration of benefits and as such employers had the absolute right to determine the contours of their benefit plans. *See id.* at 406-07.

110. *See* Jones, *supra* note 4, at 775; *see also* Farber, *supra* note 69, at 861.

111. Section 501(c) was not included in the original drafts of the Act, but was added later to reassure the insurance industry that the ADA would not infringe on their traditional insurance practices. This provision was developed in response to insurance group lobby efforts. *See generally* Farber, *supra* note 69, at 861-63 (providing a general discussion of the origins of Section 501(c)).

> underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with state law; or
>
> (2) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with state law; or
>
> (3) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.
>
> Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of subchapters I and III of this chapter.[112]

Thus, section 501(c) of the ADA states that insurers may underwrite, classify or administer risks that are consistent with state law and may establish or observe the terms of bona fide benefit plans that are consistent with state law, as long as such insurance plans are not utilized as a subterfuge to evade the intent of the ADA.[113] The legislative history of the ADA supports this facial interpretation, noting that insurers may limit insurance coverage based on "classification of risks" creating limitations and exclusions based on an individual's disability when such practice is "based on sound actuarial principles or is related to actual or reasonably anticipated experience."[114]

On the surface, section 501(c) is a victory for the insurance industry and employer, as it appears to leave employer provided benefit plans and

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112. 42 U.S.C. § 12201(c).

113. *See* 42 U.S.C. § 12201(c); *see also* 28 C.F.R. 36.212. "Principles of risk classification" and "actuarial principles" are simply cost measurement and cost projection techniques that permit the cost of benefit program designs to be estimated. *See* Farber, *supra* note 69, at 865.

114. 42 U.S.C. § 12201(c); *see* 28 C.F.R. 36.212. "Principles of risk classification" and "actuarial principles" are simply cost measurement and cost projection techniques that permit the cost of benefit program designs to be estimated. *See* Farber, *supra* note 69, at 865.

insurance practices untouched and exempt from Title I's broad nondiscrimination requirements. So long as it is bona fide, consistent with state law and based on sound actuarial principles it will not constitute a subterfuge to circumvent the ADA. However, the subterfuge caveat is important in analyzing whether mental health limitations in an employer provided insurance plan violate the Title I of the ADA.

The subterfuge clause has generated controversy over the true reach of section 501(c)'s exemption provision. The statute is silent on the meaning or exact contours of the subterfuge phrase.[115] The subterfuge language appears to "trump" paragraphs 1-3 of the text, but, unfortunately does not define the term "subterfuge." Congress was probably vague in order to satisfy contending interest groups.[116] Furthermore, the ADA section does not address the interrelationship between Title I's prohibition of discrimination in employee benefits and the mental-physical disability based distinctions

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115. Additionally, the legislative history does not define or delineate the scope of the subterfuge provision. The legislative history merely offers an overarching principle about the nature of the ADA's impact on insurance practices: "Under the ADA, a person with a disability cannot be denied insurance or be subject to different terms or conditions of insurance based on disability alone, if the disability does not pose increased risks." *See* Farber, *supra* note 69, at 877 (quoting S. Rep. No. 116, at 84 (1989)).

The courts have grappled with the proper meaning of the subterfuge clause of section 501(c). Two definitions of the subterfuge clause have surfaced. The first involves the Supreme Court's interpretation of similar language under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634 (1994 ed.). The second involves the interpretation of the subterfuge provision by the EEOC. *See generally* EEOC Guidance, *supra* note 20; *see also* Jones, *supra* note 4, at 775 (providing a more detailed review of the competing definitions of subterfuge).

116. Parker v. Metropolitan Life Ins. Co., 99 F.3d 181 (6th Cir. 1996), *rev'd en banc*, 121 F.3d 1006 (6th Cir. Aug. 1, 1997). Judge Gilbert Merritt of the Sixth Circuit described Congress's approach to insurance practices in the ADA when he wrote: " [T]he meaning of the "safe harbor" provision is not self-evident . . . [u]nable to decide exactly what it intended to legislate, Congress inserted language which looks in two directions . . . [in] so doing, Congress has again left this Court in the position to give meaning to conflicting statutory language designed as a political compromise." *Id.* at 190.

common in many health insurance plans.[117] Unfortunately, the question remains: what does section 501(c) mean in the context of employer provided benefit plans which impose limitations on coverage for mental illness? Although Congress did not explicitly detail the relationship between Title I and mental health limitations common in employer provided health benefit plans, the EEOC has published a Guidance which delineates a framework for invoking section 501(c) in cases involving employer provided health insurance.[118]

B. Analysis of the EEOC Guidance: Disability Based Distinctions in Employer-Provided Health Benefit Plans: Leaving Mental Illness Distinctions Out of the Act

In June of 1993, the EEOC issued the "Interim Enforcement Guidance on the Application of the Americans with Disabilities Act of 1990 to Disability Based Distinctions in Employer-Provided Health Insurance" ("EEOC Guidance") as an effort to clarify the unique and complex interplay between Title I's nondiscrimination principles and health related distinctions common in health plans.[119] The Guidance endorses a framework for filing and challenging claims regarding allegedly discriminatory insurance terms in employer provided health benefit plans under the ADA.[120] The EEOC has proffered a two-step process for determining whether a provision violates the ADA.

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117. *See* Mary T. Gilibirti, *The Application of the ADA to Distinctions Based on Mental Disability in Employer-Provided Health and Longterm Disability Insurance Plans*, 18 MENTAL AND DISABILITY L. REP. 600 (1994).

118. *See generally* EEOC Guidance, *supra* note 20.

119. *See* EEOC Guidance, *supra* note 20. The EEOC Guidance has never been published in the Federal Register or adopted as a regulation. However, courts may give it weight as the opinion of the enforcing agency. The EEOC Guidance was released on June 9, 1993 and remains effective "until rescinded or superseded," *id.* at E-1, and is to be used "on an interim basis until the Commission issues final guidance." *Id.* As of October 24, 1997, the Interim Guidance has not been made final.

120. The Guidance expressly pertains only to health insurance provisions; it does not apply to other employer-provided insurance plans.

First, whenever an employee alleges that a health related term of an employer provided insurance plan violates the ADA, the plaintiff must show that the challenged plan, provision or term uses a "disability-based" distinction.[121] If the plaintiff meets this burden to the Commission's satisfaction, the defendant has the burden of establishing that the disability-based distinction is protected under section 501(c), which permits classification by actuarial risk.[122] Thus, the first issue to resolve when determining whether a term or provision constitutes a subterfuge, violating Title I, is to determine whether or not it makes a disability-based distinction.

The EEOC states that not all health related distinctions discriminate on the basis of disability; only disability-based distinctions can be discriminatory and subject to further review and scrutiny under Title I and section 501(c).[123] In its guidance, the EEOC has provided instruction on what constitutes a "disability-based distinction."[124]

According to the EEOC: "[a] term or provision is 'disability-based' if it singles out a particular disability (e.g. deafness, AIDS, schizophrenia), a discrete group of disabilities (e.g., cancers, muscular dystrophy's, kidney diseases), or disability in general (e.g., non-coverage of all conditions that substantially limit a major life activity)."[125] Additionally, the Guidance states that a provision is "disability based" if "the insurance term, provision, or condition singles out a procedure or treatment used exclusively, or nearly exclusively, for the treatment of a particular disability or discrete group of disabilities."[126] Conversely, the EEOC states that "[i]nsurance distinctions

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121. EEOC Guidance, *supra* note 20, at d22.

122. *See id.* at d22. "[I]f the Commission determines that the challenged term or provision is a disability-based distinction, the respondent will be required to prove that: 1) the health insurance plan is either a bona fide insured health insurance plan not inconsistent with state law, or a bona fide self-insured health insurance plan; and 2) the challenged disability-based distinctions not being used as a subterfuge." *Id.* If the defendant meets this burden, the Commission will conclude that the challenged disability-based distinction is within the protection of section 501(c) and thus does not violate Title I of the ADA. *See id.*

123. *See id.*

124. *Id.*

125. *Id.*

126. *Id.*

that are *not* based on disability, that are applied equally to all employees, do not discriminate on the basis of disability and so do not violate the ADA."[127]

In illustrating this view, the Guidance provides two examples of disparities in employer-provided health insurance plans that are not disability based.[128] One example cites that distinctions between the level of benefits provided to treat physical conditions versus that provided to treat mental/nervous conditions is not a disability-based distinction.[129] The EEOC opines that distinctions in benefits between the treatment for physical and mental health conditions are not disability-based because they apply "to the treatment of a multitude of dissimilar conditions and . . . constrain individuals both with and without disabilities."[130] As support for its position that mental illness limitations in employer provided health benefit plans do not violate Title I of the ADA as a "disability based" distinction, the EEOC cites to court decisions under section 504 of the Rehabilitation Act of 1973.[131]

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127. *Id.* (emphasis added).

128. *See id.* (providing examples of eye care/physical distinction and mental/physical distinction).

129. *See id.*

130. *Id.* Note that the EEOC has not determined that the same reasoning applies to long term disability plans. For example, in EEOC v. CNA Ins. Cos., 96 F.3d 1039 (7th Cir. 1996), the EEOC filed a suit on behalf of a person who claimed that her employer's long-term disability plan violated Title I of the ADA by providing benefits for physical disabilities until age 65, while only providing benefits for mental/nervous conditions for two years. *Id.* at 1041. The EEOC unsuccessfully sought a preliminary injunction until it had investigated the merits of the claim. *See id.* at 1041-42. As such, the EEOC did not decide the issue in the context of that case.

In other cases, however, differentials between physical and mental health care in long-term disability plans have been recognized to violate, or to possibly violate, Title I. *See* Esfahani v. Medical College of Pa., 919 F. Supp. 832 (E.D. Pa. 1996) (recognizing that distinctions between mental and physical health care benefits in long-term disability plans may, in some circumstances, violate Title I).

131. Rehabilitation Act of 1973, 29 U.S.C. § 794. *See also* EEOC Guidance, *supra* note 20, at d22. The Rehabilitation Act is the predecessor of the ADA. *Id.* The Guidance states in a footnote, that courts faced with challenges to insurance plan distinctions under the Rehabilitation Act have held that such distinctions are rational and do not discriminate on the basis of disability. The Guidance cites to: Doe v. Colautti, 592 F.2d 704 (3d Cir. 1979) (concluding that section 504 does not require that the same level of benefits be provided for

Although the broad distinction of "mental illness" may disparately impact individuals with mental conditions, the EEOC opines that these distinctions do not intentionally discriminate on the basis of disability, and as such do not support claims of discrimination under the ADA.[132] Thus, the EEOC explicitly states that distinctions in employer-provided health insurance plans that have a disparate impact on people with disabilities do not violate the Act.[133] Only those health-related distinctions that, using an intentional discrimination standard, are shown to be disability based will be actionable. Disparate impact showings do not support a claim of discrimination in this context, and therefore an insurance distinction that is not based on disability and applies equally to all employees does not give rise to an ADA claim. Interestingly, the EEOC reaches this disparate treatment definition of disability discrimination without invoking section 501(c) at all.[134] As support for the position of the unavailability of the disparate impact theory of discrimination in this context, the EEOC cites the Supreme Court's rejection of disparate impact claims under section 504 of the Rehabilitation Act in *Alexander v. Choate*.[135]

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inpatient treatment of physical illness); Doe v. Devine, 545 F. Supp. 576 (D.D.C. 1982), *aff'd on other grounds*, 703 F.2d 1319 (D.C. Cir. 1983) (concluding that cutbacks in mental health benefits but not physical health benefits did not violate section 504).

Note that the D.C. Circuit reaffirmed this outcome under the Rehabilitation Act. *See* Moderno v. King, 82 F.3d 1059, 1065 (D.C. Cir. 1996).

132. *See* EEOC Guidance, *supra* note 20, at d22.

133. *See id.*

134. *See id.*

135. 469 U.S. 287 (1985). In *Alexander*, Medicaid recipients in Tennessee filed suit and argued that Medicaid's diminution in payment coverage for inpatient psychiatric hospitalization would have a disparate impact on them as a group of disabled individuals. The Supreme Court rejected the Medicaid recipients' arguments and held that service rationing that has a disparate impact is permissible as long as persons with disabilities still have "meaningful access" to their health program. The Court held that Tennessee's new limitation would still provide meaningful access to those with mental disabilities. *Id.*

III. ADMINISTRATIVE SUBTERFUGE: EEOC'S GUIDANCE INCORRECTLY WRITES OFF MENTAL ILLNESS BASED DISTINCTIONS FROM SCRUTINY UNDER THE ADA

Congress explicitly chose to treat both physical and mental disabilities as qualified impairments under the ADA.[136] In so choosing, Congress recognized that both types of impairments lead to exclusion and stigmatization in the United States, a country that historically disfavors those with disabilities in the operation of society's policies and structures.[137] The EEOC's Guidance in contradicting this legislative decision, effectively dodges the explicit antidiscrimination efforts of Congress by encouraging insurers and employers to group impairments in a way which allows exclusion and promotes discrimination against particularly stigmatizing mental disabilities.

This section of the paper analyzes the method by which the EEOC determined that mental illness limitations in employer-provided health benefit plans are not distinctions based on disability, and as such, not worthy of scrutiny under the Act and section 501(c). Although the statutory language of 501(c) and its impact on Title I is ambiguous, this paper argues that the EEOC's position is questionable. The Guidance has an illogical premise in that it fails to adhere to the statutory language of the ADA in providing the framework for challenging disability-based distinctions in insurance provisions.

A. Conflict: The EEOC Guidance and the Statutory Text of the ADA

Section 102 of the ADA expressly permits disparate impact, as well as, disparate treatment claims of discrimination under the Act.[138] The EEOC, however, rejects the possibility for a plaintiff to pursue disparate impact claims in challenging terms or exclusions for mental health care in their

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136. *See* Cong. Rec. S.10785-86 (daily ed. Sept. 7, 1989) (noting a compromise amendment to exclude certain conditions such as compulsive gambling, but retaining protection for mental impairments). *See* Gilibirti, *supra* note 117, at 601.

137. *See* 42 U.S.C. § 12101(a).

138. *See* 42 U.S.C. § 12112(b)(2)-(3). *See supra* text accompanying note 106.

employer provided health benefit plans without reference to the statutory language of 501(c), the insurance "safe-harbor" provision.[139] It seems that because Title I expressly sanctions disparate impact claims, the EEOC would have to rely on 501(c) to reach the conclusion that the disparate impact type of claim is barred in cases involving insurance provisions in employer-provided health benefit plans. However, the EEOC does not partake in a 501(c) analysis.

In supporting its position, the EEOC cites to the Supreme Court's rejection of disparate impact claims under section 504 of the Rehabilitation Act in *Alexander v. Choate*.[140] Although the Rehabilitation Act is the statutory predecessor to the ADA, section 504 of the Rehabilitation Act does not expressly permit disparate impact claims, whereas, section 102 in Title I of the ADA does expressly permit disparate impact claims.[141] Therefore reliance on *Alexander v. Choate* and the Supreme Court's analysis of the availability of disparate impact claims under section 504 of the Rehabilitation Act is misplaced. Thus, the EEOC's rejection of disparate impact claims in this context without invocation of a 501(c) analysis of how the insurance provision exempts insurance practices from disparate impact challenges otherwise authorized by section 102 runs counter to the express language of Title I.[142]

Even if the EEOC had invoked section 501(c) in denying the availability of disparate impact claims, it appears that relying on 501(c) for this proposition would also be misplaced. The statutory text of 501(c) does not mention the unavailability of disparate impact claims in insurance cases.[143] Therefore, this paper contends that disability-based distinctions in insurance provisions and the availability of disparate impact claims for mental illness limitations and exclusions should be defined in accordance with the statute as terms adversely affecting the opportunities of persons with disabilities to

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139. *See* EEOC Guidance, *supra* note 20, at d22 .

140. 469 U.S. 287 (1985).

141. *Compare* 29 U.S.C. § 794 *with* 42 U.S.C. § 12112(b).

142. *See* Farber, *supra* note 69, at 904 (discussing whether the use of disparate treatment, and not disparate impact, in insurance cases involving disability based distinctions is warranted without invocation of 501(c)).

143. *See* text of 501(c).

benefit from their employer-provided health insurance.[144] Insurance terms that limit treatment for mental illnesses would affect the ability of persons with mental disabilities to benefit from employer-provided health benefits and thus would be unlawful unless supported by actuarial data.

Additionally, the Guidance relies on several Rehabilitation Act cases to support its condoning less coverage of mental conditions.[145] These cases, however, were decided under section 504 of the Rehabilitation Act, which does not include language discussing the insurance insurance industry.[146] The ADA expressly goes beyond section 504 of the Rehabilitation Act by addressing the insurance industry, making it clear that employers and insurers cannot use subterfuge to circumnavigate the ADA's broad nondiscrimination mandates.[147] The Commission must recognize these important distinctions between the two Acts – however, it fails to do so.

B. Physical Impairments Can Also be Dissimilar and Affect Persons with and without Disability

The Guidance puts forth two reasons in support of its conclusion that the mental/physical disparity common in employer-provided health benefit plans is not a disability-based distinction warranting scrutiny under the subterfuge provision of 501(c). First, mental conditions constrain individuals both with and without disabilities; and second, mental conditions include dissimilar disorders.[148]

However, the Guidance fails to recognize that many types of physical

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144. *See* 42 U.S.C. § 12112(b)(1).

145. *See* EEOC Guidance, *supra* note 20, at n.6 (citing Doe v. Colautti, 592 F.2d 704 (3d Cir. 1979); Doe v. Devine, 545 F. Supp. 576 (D.C. Cir. 1982), *aff'd on other grounds*, 703 F.2d 1319 (D.C. Cir. 1983)).

146. Note that the Rehabilitation Act was amended in 1992 by incorporating certain sections of the ADA that relate to employment discrimination. *See* Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, 106 Stat. 4344, *codified at* 29 U.S.C. § 794. The Amendments incorporate Title I of the ADA and section 501(c). The Rehabilitation Act cases that the EEOC cites are cases that were decided prior to these amendments.

147. *See* Gilibirti, *supra* note 117, at 602.

148. *See* EEOC Guidance, *supra* note 20, at d22.

impairments protected by the ADA also affect persons with and without disabilities and also include conditions that are dissimilar.[149] The Guidance's list of physical disabilities covered under the ADA includes: cancers, muscular dystrophies and kidney diseases.[150] Yet not all individuals with these conditions would be deemed a person with a disability. For example, kidney diseases comprise a multitude of dissimilar conditions – often based on severity. A person with severe lupus nephritis is probably covered under the ADA, whereas, a person with a kidney abscess is probably not a person with a disability under the Act.[151] Thus, the Guidance considers distinctions based on groups of kidney diseases (a group of physical impairments which includes dissimilar conditions) to be a disability-based distinction which must be supported by actuarial data per § 501. However, the EEOC asserts that distinctions based on mental disabilities are simply not scrutinized further. The EEOC makes this discriminatory and arbitrary distinction between physical and mental conditions, a distinction that the ADA was specifically designed to address.

Furthermore, the EEOC allows the manner in which conditions are grouped for coverage purposes to control determinations about discrimination. Under the EEOC's reasoning, an employer or insurer could avoid a determination that it has made a disability-based distinction by simply grouping the condition it seeks to avoid covering with conditions that are not disabilities. As one legal commentator, Mary Gilibirti, from the Bazelon Center for Mental Health has noted, this reasoning would suggest that an insurer who did not want to cover AIDS related costs could refuse to cover immunodeficiency diseases because this category includes such dissimilar conditions as common allergies and AIDS; conditions affecting persons with and without disabilities.[152] If an insurer did this, Gilibirti argues, the EEOC would probably suspect such a limitation as one intended to limit payments for treating AIDS, the most impairing and stigmatizing of the conditions,

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149. *See* Gilibirti, *supra* note 117, at 602.

150. *See* EEOC Guidance, *supra* note 20, at d22.

151. *See* Gilibirti, *supra* note 117, at 601 (providing a more comprehensive discussion of this issue and making this argument using cancers (a group of physical impairments) as the example).

152. *See* Rubenstein, *supra* note 2, at 353; Gilibirti, *supra* note 117, at 602.

requiring the insurer to justify the denial of coverage per § 501(c). Yet, the EEOC permits treatment for many of the most severe mental conditions such as schizophrenia, multiple personality disorder and manic depression to remain limited or excluded from employer-provided benefit plans, without making insurers justify their denial of coverage. Insurers and employers limit coverage for all mental illnesses because they are motivated by a desire to avoid what they view as the potentially high costs associated with the more severe long-term mental illnesses, such as, schizophrenia and manic depression. The EEOC's Guidance basically encourages insurers to group impairments in such a way as to allow them to exclude mental illnesses that are particularly stigmatized.[153]

C. Guidance Perpetuates Inconsistencies Between Medical Research and Insurance Coverage of Mental Illness

The EEOC's conclusion that mental illness limitations in employer-provided insurance plans do not create disability-based distinctions under the ADA disregards the overwhelming medical findings that many serious mental illnesses are in fact organic brain diseases.[154] The Commission does not allow a plaintiff challenging an insurance provision based on mental health limitations protection under the ADA. The plaintiff is told that his claim is not cognizable because mental health limitations are not disability-based distinctions and are not worthy of scrutiny under section 501(c).[155] It appears that the EEOC is prolonging the outdated propositions that mental illnesses are mythical and unworthy of protection, sending a message to insurers that if they create broad enough categories, such as that of "mental illness," the insurer can limit many mental illnesses that are in fact based in physiology and hard medical research.

The EEOC's blanket exclusion of challenges of mental illness limitations

153. Legal commentator and mental health advocate, Mary Gilibirti, also notes that as a result of the EEOC's position, persons with mental disabilities are unable to secure treatment and receive care simply because their illness happens to fall into the "mental" rather than "physical" category. *See* Gilbirti, *supra* note 117, at 603.

154. *See* Shannon, *supra* note 11, at 365.

155. *See generally* EEOC Guidance, *supra* note 20.

under Title I does not allow a person disabled from a mental illness to demonstrate subterfuge under 501(c). The potential challenger cannot assert that a distinction in her health care plan between certain biologically based mental illnesses and physical diseases is evidence of a lack of sound principles or of stereotypical notions which have no cost-effectiveness basis when compared to certain physical diseases.[156] The result is the continuation of ignorant stigmatization for mental illnesses, even where the illness emanates from apparent physical changes in the brain.

It is important to remember in this discussion that all that would happen if the Guidance did view mental illness limitations and exclusions in employer-provided benefit plans as a disability based distinction would be that potential claimants would get to the second stage of the 501(c) inquiry: subterfuge – where the insurer/employer must provide an affirmative defense for the terms of their plan. At this point in the 501(c) analysis, the insurer would be required to provide actuarial data supporting their practice of distinguishing between physical and mental disabilities. Therefore, determining that a mental health limitation is a disability based distinction would not mean that the mental health distinction in an insurance provision is a per se violation of the ADA. If there were actuarial data supporting the limitation in that instance, the limitation would not be deemed a subterfuge and as such would be valid under 501(c). However, in determining that mental health limitations are not a disability-based distinction, the EEOC does not permit any inquiry into whether there is actuarial data to support the insurer's creation of the mental-physical distinction. In fact, there are legal commentators and mental health advocates who contend that there is no solid actuarial data supporting the disparity between mental and physical benefit limitations.[157] Therefore, by not viewing the distinction as disability based, the EEOC allows insurers to continue to "safely" discriminate against those with mental illness because the second stage of the 501(c) inquiry, the actuarial question, is never scrutinized.

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156. *See* Rubenstein, *supra* note 2, at 350-51 ("When measured by typical rationing criteria, such as efficacy, cost-effectiveness, or quality of life, many health interventions emerge quite well.").

157. *See generally* HHS Interim Report, *supra* note 30.

D. Consequences of the Guidance

The Guidance is incongruous with the ADA provisions regarding employer-provided insurance benefits. The Guidance allows insurers to discriminate against those with mental disabilities without making insurers justify their denial of care for those illnesses, merely because their conditions fall into the "mental" category. The Guidance reinforces the historical stigma against mental illness that mental disabilities are less valid and "real" than physical disabilities. The EEOC's view is not validated by the ADA's statutory language or legislative history and serves to spit in the face of Congressional efforts to protect all individuals with disabilities.

CONCLUSION

Congress has made strides to end discrimination against those suffering from mental illness. However, antidiscrimination efforts, such as the MHPA and the ADA, continue to afford almost no protection to those suffering from disparity in their employer-provided health benefit plans.

Although the MHPA provides mild relief to those suffering from mental illness, it is not the "huge victory"[158] that its supporters had hoped it would be. The MHPA does little to afford protection for individuals with mental illness against several important limitation devices which create disparity in employer-provided insurance plans. Furthermore given the EEOC Interim Guidance, Title I of the ADA does not currently offer any relief for individuals with mental disabilities in challenging mental health limitations in employer-provided health benefit plans.

Hopefully, the problems with the Interim Guidance identified in this paper will be remedied by the EEOC when they issue a final Guidance. Congress has sanctioned the Department of Health and Human Services to perform a detailed study of parity for mental health care.[159] When the final

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158. Statement of Senator Wellstone at a September 19, 1996 press conference. BNA, *Health Care, VA-HUD Conferees Keep Amendments on Maternity Stay, Mental Health Parity*, BNA EMPLOYMENT POL'Y & L. DAILY, Sept. 23, 1996, at d12.

159. *See* HHS Interim Report, *supra* note 30.

version of the study is presented to Congress, the findings will hopefully help clarify the misunderstandings and misperceptions of mental illness that persist. Perhaps then, a new parity measure will be introduced in Congress and the gap between coverage for mental and physical illness will be narrowed and one day closed.

THE DEATH OF DEATH FUTURES?:[1] THE EFFECTS OF THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT OF 1996 ON THE INSURANCE AND VIATICAL SETTLEMENT INDUSTRIES

Andrew Spurrier[2]

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1. The expression "death futures" as relating to the viatical settlement industry originally appeared in a Spy magazine article from 1993.

2. J.D. expected in May of 1999. The author would like to thank Gary Chodes, Lecturer in Law John G. Day and Professor of Law Stephen G. Utz for their assistance in the preparation of this comment.

INTRODUCTION

For people who are reminded daily of the swift approach of death, the cost of medical care and other expenses is a difficult burden to bear. The costs of treatment for serious illness can be high, and a patient's inability to work can make medical bills impossible to pay. Those employed up until the time of their incapacity and the retired patient alike often have to resort to government programs in order to obtain some form of treatment – often having no choice but to discard the ability to settle their final affairs along with the hope of leaving something behind for those they love. Furthermore, many cannot adequately provide for the costs of custodial care or experimental treatments from funds obtained from savings and programs.[3]

For more than ten years, products have been offered which can provide financial resources for those with a life-threatening illness ("terminally ill") or debilitating physical condition ("chronically ill"). Accelerated death benefits and viatical settlements are two ways of allowing dying insureds access to the value of their life insurance death benefits.

Demand for early access to life insurance benefits grew in the 1980s, coincidentally with the spread of the AIDS epidemic.[4] As the viatical settlement industry developed, insurance companies began to respond to the needs of dying insureds by providing accelerated death benefit provisions and riders as part of life insurance coverage. Providing insureds access to their death benefits before death has now become an industry standard.[5]

The viatical settlement industry is built around the viatical settlement transaction - the sale of an insured's interest in a life insurance policy to an investor. Formerly provided only by brokers, many viatical settlement

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3. *See* Dennis J. Nirtaut, *Ask A Benefit Manager: Perspective - Accelerated Death Benefits A Comfort In Some Cases*, BUS. INS., July 1, 1996 at 28.

4. *See id.*

5. *See* Joe Niedzielski, *Flexibility Key To Group Term Success*, NAT'L UNDERWRITER LIFE & HEALTH/FINANCIAL SERV. ED., Sept. 9, 1996, at 7.

providers are now well established and highly capitalized public companies. Viatical settlement providers allow insureds to cash in their life insurance policies even if the policies do not carry accelerated death benefits. Accelerated death benefits provided by insurers can contain special provisions or riders which may limit or deny benefits depending on an insured's circumstances; viatical settlement providers allow insureds access to financial resources regardless of insurance policy classification.

Up until 1997, however, receipt of these early benefits was included in the income of insureds. This changed with Congress' enactment of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") on January 3, 1996. Brought about by bipartisan efforts culminating in the Kennedy-Kassebaum Bill, the HIPAA was designed to improve health insurance continuity and to encourage the use of medical savings accounts, and significantly changed the tax treatment of accelerated death benefits and viatical settlements.[6]

This comment contains an explanation of accelerated death benefits and viatical settlements, the related tax issues, a description of HIPAA provisions as they relate to accelerated death benefits and viatical settlements, and an analysis of the foreseeable future of the viatical settlement industry in light of the changes brought about by the HIPAA. The comment ends with the conclusion that, if current trends continue, there is likely to be a synthesis of the viatical settlement and insurance industries.

I. THE FUNCTION OF ACCELERATED DEATH BENEFITS AND VIATICAL SETTLEMENTS

A. Accelerated Death Benefits

Under certain circumstances, accelerated death benefits allow insureds to receive a portion of their death benefits payable under their life insurance policies before death occurs. Accelerated death benefits are either expressly provided for in the life insurance contract or are attached in a rider. Death benefits are accelerated by the anticipated death or the experience of life-threatening conditions of the insured; the death benefit normally paid on the

6. *See* H.R. 3103, 104th Cong. (1996) (hereinafter HIPAA). HIPAA contained changes to the 1986 Internal Revenue Code (IRC) – section references hereafter refer to the new sections of the IRC, not sections of the HIPAA. *See also* 141 CONG. REC. H12841, 12852-53 (1995).

occurrence of the insured's death is then eliminated or reduced by the payment of the accelerated death benefit.

Insurance companies developed three methods of paying out accelerated death benefits:

> 1. The company pays the amount of the present, or "discounted," value of the death benefit. The amount is determined by deducting any premiums due, or adding any dividends expected to be paid, and considering market interest rates during the remainder of the insured's life.
>
> 2. The company charges the insured an additional premium for the accelerated death benefit, and the company pays either the full value or a portion of the death benefit.
>
> 3. The company uses the "lien" method. The company advances the insured a portion of the death benefit secured by a lien against the death benefit. Interest accrues on the amount advanced between the dates of the advance and the insured's death. After the insured's death, the company takes the amount of the advance, and the interest accrued, from the insured's original death benefit, and any amount left over goes to the insured's beneficiaries.[7]

B. Viatical Settlements

"Viatical" comes from the Latin verb viaticum, or "preparing for the long journey." [8] The insured, or viator, either sells, exchanges, or assigns part or all of the life insurance policy amount to a viaticator, usually a third party investor, for cash.[9] Sometimes individual brokers act as intermediaries

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7. *See* Aaron G. Chambers & Frederic J. Gelfond, *Provisions for the Journey: Accelerated Death Benefits and Viatical Settlements for the Terminally or Chronically Ill*, 12 INS. TAX REV. 153, 154 (1997).

8. WEBSTER'S NEW WORLD DICTIONARY 1581 (2d ed. 1980).

9. The Supreme Court paved the way for the development of the viatical settlement industry in *Grigsby v. Russell*, 222 U.S. 149 (1911). The Court held that an insured's assignment of a life insurance policy to a buyer not having any insurable interest who then paid the policy premiums was valid (and did not result in the voiding of the policy) - the assignee,

between viators and investors: the broker receives a commission for connecting investor and viator, the viator gets the investor's cash, and the investor maintains the policy until the insured's death, when the investor collects the policy's death benefit.

When the viaticator is a viatical settlement provider, the transaction gets more involved, but is potentially more secure for the investor and more lucrative for the insured. The insured is paid the present, or "discounted," amount of the death benefit, the viatical settlement provider using the same method that an insurance company might use. In most situations, the viatical settlement provider, now the owner of the insurance policy, assumes the costs and benefits of maintaining the policy: paying premiums to prevent the policy from lapsing, collecting dividends, and receiving the insured's death benefit when death occurs. With expected returns of 12% - 18%,[10] investors can be found to put up the settlement amount, especially when the viatical settlement provider guarantees policy maintenance cost coverage through the use of escrow accounts.

There are still risks for investors. Not all viatical settlement providers assume responsibility for policy maintenance, and those that do may not adequately provide for the "unfortunate" risk that the viator may not die on a schedule conducive to high investment returns. A living viator's premiums must be paid, and if escrow accounts run out it can become the investor's responsibility to pay. Every premium paid by the investor, especially when added to the settlement already paid, reduces the profit when the death benefit is received. The investment also has no liquidity, as the policy interest cannot be turned into cash until the death benefit is paid.

Despite these drawbacks, viatical settlements are an attractive investment. They are not dependent on the stock or bond markets, and viatical settlement providers further lessen investment risks by dealing with viators with illnesses that have predictably short mortality periods, such as AIDS, cancer, and Lou Gehrig's disease.[11] Furthermore, the lure of high returns is not the only draw for investors, as many feel they are helping the insureds whose policies they

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and not the heirs of the deceased, was entitled to the policy proceeds. The public policy rule preventing gambling on another's life (insurance cannot be taken out by one on the life of another in which the purchaser has no insurable interest) was therefore held inapplicable to policy assignments by insureds to others not having insurable interest.

10. *See* Lore Postman, *Investors pay the dying, yield high returns*, INDIANAPOLIS BUS. J., Apr. 1, 1996, at A10.

11. *See id.*

buy.[12]

C. The Pre-1997 Tax Treatment of Accelerated Death Benefits and Viatical Settlements

Before the passing of HIPAA, insurance and viatical settlement providers, interest groups for the terminally and chronically ill, and the Treasury Department were at loggerheads over the tax treatment of accelerated death benefits and viatical settlements. Insureds wanted to get the most out of the benefits available and were an obvious cause for sympathy, as the taxation of those about to die can easily be seen as a morally uncomfortable marriage of the two certainties in life. Insurance companies and viatical settlement providers wanted to maintain competitiveness and the ability to respond to insureds' needs. The Treasury Department did not want a potentially massive loss of revenue from an excessive enlargement of the definition of life insurance, the proceeds of which were historically considered non-taxable. Furthermore, if insureds could access life insurance proceeds before the agreed upon time, was not this income? And if it is not income, then what sort of contract is a life insurance contract that pays benefits regardless of whether the insured is living or not? A danger to insureds, insurance companies and viatical settlement providers was that the Treasury might view early access to life insurance proceeds as a failure of the life insurance contract - creating a taxable event for insureds, and reducing the profitability of the life insurance industry and its dependent, the viatical settlement industry.[13]

In 1992, the Treasury Department issued proposed regulations which partially responded to the conflict. The proposed regulations allowed for the excludability of "qualified accelerated death benefits" for terminally ill insureds from gross income under Section 101 of the 1986 Internal Revenue Code.[14] Accelerated death benefits could be added to existing contracts

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12. *See* Marcia Vickers, *For 'Death Futures,' the Playing Field is Slippery*, N.Y. TIMES, Apr. 27, 1997, § 3, at 5.

13. If accelerated death benefits were considered to be part of a life insurance policy's cash value, contracts having accelerated death benefit provisions might fail either the cash value accumulation test of § 7702(b) or the guideline premium test of § 7702(d). *See* Aaron G. Chambers and Frederic J. Gelfond, *supra* note 7, at 153, n.6.

14. *See* Qualified Accelerated Death Benefits Under Life Insurance Contracts, 26 C.F.R. § 1(1997); 57 Fed. Reg. 59,319 (1992). A qualified accelerated death benefit rider is any rider on a life insurance contract that provides only for payments of a type that are excludable under § 101(g).

without causing them to be considered a part of a policy's cash value, and would not affect the contract's qualification as a life insurance contract. But the proposed regulations made no mention of the tax treatment of payments made to chronically ill insureds,[15] payments to terminally ill insureds being the only ones clearly excluded.[16] The proposed regulations also prevented the use of the "lien method" of paying accelerated death benefits.[17] Both insureds and insurance companies desired clarification of this issue, and continued to push for legally binding regulations to confirm the tax treatment of all accelerated death benefits.

The proposed regulations were silent on the tax treatment of viatical settlements, but the Treasury, through the Internal Revenue Service ("IRS"), was not silent for long. The IRS' letter of July 22, 1994 dealt with the situation of a terminally ill insured who had received a cash viatical settlement from a viatical settlement provider.[18] The IRS ruled that since the cash was not received under the policy by reason of the insured's death, the assignment of the life insurance contract to the viatical settlement provider constituted a sale of property, and was therefore includable in the insured's gross income to the extent that the cash he received exceeded his basis (the total amount of premiums paid) in the life insurance policy. This was clearly not the desired end sought by insureds and viatical service providers.

II. HIPAA

After the growth of the viatical settlement industry in the 1980s, more and more insurance companies began to offer accelerated death benefits. The number of insureds taking advantage of accelerated death benefits increased drastically from an estimated 1.13 million policyholders in 1991 to at least

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15. *See id.* §§ 1.7702-2(b)(2)(iii) and (f), extending accelerated death benefits to the chronically ill.

16. *See id.* § 1.7702-2(d)(1)(i); *see also* JCT Tax Legislation "Blue Book," Part 5, "Health insurance tax reform provision in H.R. 3103." General explanation of tax legislation enacted in the 104th Cong., JCS-12-96, Release date: Dec. 18, 1996, Doc. 96-32501, 96 TNT 246-11.

17. Exclusion was linked to the proportionate reduction of the insurance policy's cash surrender value and the death benefit after payment of the accelerated death benefit. Since the lien method reduced the cash surrender value when the accelerated benefit was paid, but did not reduce the death benefit until the lien was satisfied after the insured's death, benefits paid using the lien method were not excludable from gross income. Prop. Treas. Reg. § 1.7702-2(d)(1)(iii). *See Unofficial Transcript of IRS Hearing on Accelerated Death Benefit Regulations*, 93 TAX NOTES TODAY 66-39.

18. Priv. Ltr. Rul. 9443020 (July 22, 1994).

18.1 million in 1994.[19]

Despite the growing numbers, many more insureds may have been discouraged from pursuing the accelerated death benefit or viatical settlement route due to confusion over the tax treatment of life insurance benefits paid before their death.[20] Viatical settlements, while given tax-free treatment in some states,[21] were still not considered tax-free by the Federal government, and therefore offered little gain except to the most desperate. Obtaining viatical settlements might provide some quick cash, but viators would increase their tax burden, adding to pre-existing financial pressures on the viators and their survivors.

Instead of approving the proposed Treasury regulations, Congress enacted HIPAA, which included provisions declaring income from accelerated death benefits and viatical settlements received after December 31, 1996 excludable from taxable income.[22] This result clearly favored the industries and insureds at the Treasury's expense; estimates from 1996 predicted that HIPAA would reduce Federal budget receipts by over three billion dollars by 2006.[23]

III. THE EXCLUSION OF DEATH BENEFITS UNDER THE HIPAA

Amounts received under a life insurance contract by reason of the death of the insured are not includable in the beneficiary's gross income.[24] The HIPAA added to this older rule: generally, any amount received under an

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19. *See* Mary Jane Fisher, *ACLI Supports Accelerated Death Benefits Bills*, NAT'L UNDERWRITER LIFE & HEALTH/FINANCIAL SERV. ED., Jan. 30, 1995, at 4.

20. *See* Steven Brostoff, *Hopes Rise For Tax-Free Living Benefits*, NAT'L UNDERWRITER LIFE & HEALTH/FINANCIAL SERV. ED., Aug. 24, 1992 at 2.

21. New York and California. *See* Mary Jane Fisher, *supra* note 19 at 4.

22. H.R. 3103, 104th Cong. (1996).

23. $10 million in 1197, $107 million in 1998, $166 million in 1999, $214 million in 2000, $265 million in 2001, $316 million in 2002, $376 million in 2003, $446 million in 2004, $527 million in 2005, and $599 million in 2006. *See* JCT Tax Legislation "Blue Book," Part 5, "Health insurance tax reform provision in H.R. 3103." General explanation of tax legislation enacted in the 104th Cong., JCS-12-96, Release date: Dec. 18, 1996, Doc. 96-32501, 96 TNT 246-11. While not a response to the estimated Treasury losses, there have been rumblings in the House of possible legislation being introduced to alter the tax treatment of large mutual companies, possibly raising revenues of two billion dollars. Attributed to Michael Kerly, National Association of Life Underwriters senior vice president, speaking of a proposal of Representative Bob Filner, D-CA, from article by Steven Brostoff, *Congress May Keep Industry Busy on Taxes, Pensions,* NAT'L UNDERWRITER LIFE AND HEALTH/FINANCIAL SERV. ED., Jan. 6, 1997, at 6.

24. *See* I.R.C. § 101(a) (1986).

insurance contract on the life of a terminally or chronically ill insured will now be treated as an amount paid by reason of the death of the insured.[25] The exclusion is also applicable to amounts received by these insureds.[26]

There were clear differences between the Treasury's proposed regulations and the HIPAA: the exclusion of viatical settlements,[27] the extension of excludability of payments to chronically ill individuals,[28] and the exclusion of accelerated death benefits provided by way of the lien method.[29]

A. The Exclusion of Death Benefits for the Terminally Ill

An insured is considered terminally ill under HIPAA if a physician, as defined in Section 101,[30] certifies that the illness or physical condition is reasonably expected to result in death within 24 months from the date of the certification.[31] Unlike the requirements of the proposed Treasury regulations, an insurance company is no longer required to determine whether an insured is terminally ill.[32] Physician certification removes the potential conflict of interest in having insurance companies determining whether and when accelerated death benefits are dispersed, and ensures fulfillment of the

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25. *See id.*, § 101(g)(1). Excludability is still prohibited for business-related policies under § 101(g)(5). The exclusion is not available for either accelerated death benefits or viatical settlements if the taxpayer has an insurable interest in the insured's life because of the insured's status as a director, officer, or employee of the taxpayer, or if the insured has a financial interest in any trade or business of the taxpayer.

26. *See* I.R.C. § 101(g)(1) (1986). Excludable amounts paid to chronically ill insureds are still subject to some of the limitations relating to long-term care services. § 101(g)(3)(D), § 7702B(d).

27. HIPAA has clearly reversed the private letter ruling in LTR 9443020. *See* note 13.

28. *See id.*

29. HIPAA made the exclusion of accelerated death benefits dependent on the purpose of the payment, rather than the fulfillment of Section 7702 qualifications. *See supra* note 16.

30. The term 'physician' has the same definition as that given by § 1861(r)(1) of the Social Security Act, 42 U.S.C. 1395x(r)(1). *See* I.R.C. § 101(g)(4)(D) (1986). Section 1861(r)(1) of the Social Security Act defines "physician" as "a doctor of medicine or osteopathy legally authorized to practice medicine and surgery by the State in which he performs such function or action, including a physician within the meaning of Section 1101(a)(7)." 42 U.S.C. 1301(a)(7). Section 1101(a)(7) of the Social Security Act provides that the terms "physician," medical care" and "hospitalization" "include osteopathic practitioners or the services of osteopathic practitioners and hospitals within the scope of their practice as defined by State law."

31. *See* I.R.C. § 101(g)(4)(A) (1986).

32. *Compare id. with* Prop. Treas. Reg. § 1.7702-2(e).

requirements that allow for viatical settlement excludability.

HIPAA increased the period in which death must be reasonably expected to occur within twelve to twenty-four months,[33] measured from the date of physician certification.[34] The proposed Treasury regulations measured the period from the date of the company's payment of the accelerated death benefit, and did not address viatical settlement issues at all.[35]

The nature of the expectation of death was changed. Prop.Treas. Reg. 1.7702-2(e) provided that "[a]n individual is terminally ill if the insurer determines that the individual has an illness or physical condition that, notwithstanding appropriate medical care, is reasonably expected to result in death within 12 months from the date of payment of the accelerated death benefit." The HIPAA definition drops the phrase "notwithstanding appropriate medical care." This is especially significant when the HIPAA definition is compared with the relevant provisions of the Model Regulations of the National Association of Insurance Commissioners ("NAIC") concerning circumstances allowing for the payment of accelerated death benefits, or the "qualifying event."

Section 2.B of the NAIC's Accelerated Benefits Model Regulation defines a "qualifying" event as a

> (1) A medical condition which would result in a drastically limited life span as specified in the contract, for example, twenty-four (24) months or less; or
>
> (2) A medical condition which has required or requires extraordinary medical intervention, such as, but not limited to, major organ transplant or continuous artificial life support, without which the insured would die; or
>
> (3) Any condition which usually requires continuous confinement in an eligible institution as defined in the contract if the insured is expected to remain there for the rest of his or her life; or

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33. *Compare id.with* Prop. Treas. Reg . § 1.7702-2(e).
34. *See id.*
35. *See* Prop. Treas. Reg. § 1.7702-2(e).

(4) A medical condition which would, in the absence of extensive or extraordinary medical treatment, result in a drastically limited life span. Such conditions may include, but are not limited to, one or more of the following:

(a) Coronary artery disease resulting in an acute infarction or requiring surgery;
(b) Permanent neurological deficit resulting from cerebral vascular accident;
(c) End stage renal failure;
(d) Acquired Immune Deficiency Syndrome; or
(e) Other medical conditions which the [state insurance] commissioner shall approve for any particular filing; or

(5) Other qualifying events which the commissioner shall approve for any particular filing.[36]

Applied to these qualifying events, the phrase "notwithstanding appropriate medical care" clearly would exclude the circumstance of the terminally ill insured as described by 2.B.(2), leading to the grim result that the accelerated death benefit is to be excluded from income only if the insured is denied extraordinary measures and dies within the one- or two-year period, even though the insured would have most likely lived beyond the period if such measures had been provided. Under the HIPAA definition, this grim result does not occur, and payments of accelerated death benefits as well as viatical settlements under Section 2.B.(2) conditions are excludable from gross income. The HIPAA certification requires only that the illness or physical condition of the individual be such that death can reasonably be expected to occur within 24 months. This prevents a conflict of interest for the certifying physician, who does not have to certify that the accelerated death benefit or viatical settlement will not be used to extend the life of the terminally ill insured beyond the defined period.[37]

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36. NAIC Model Reg. Serv., at 620-21.

37. This does not leave insurance companies and viatical service providers out on a limb; they can factor increased life span probabilities into the amount of the accelerated death benefit paid.

B. The Exclusion of Death Benefits for the Chronically Ill

The HIPAA's new IRC Section 101(g) adopts the definition for a "chronically ill individual" found in the long-term care provisions of IRC Section 7702B. The legislature developed Section 101 in order to treat viatical settlement and accelerated death benefit payments made to chronically ill insureds in a reasonably similar manner as the treatment of payments made to chronically ill insureds under insurance contracts subject to the long-term care rules of Section 7702B.[38] A chronically ill individual is a person who is not terminally ill who: has been certified by a licensed health care practitioner as being unable to perform two of the activities of daily living,[39] without substantial assistance, for at least 90 days; has a similar level of disability or a disability as determined by federal regulations; or has been certified by a health care practitioner within the previous 12 months as requiring substantial supervision for the protection of personal health and safety due to severe cognitive impairment.[40] A "licensed health care practitioner" is defined by the Social Security Act definition of "physician," but also includes "any registered professional nurse, licensed social worker or other individual who meets requirements prescribed by the Secretary." [41]

The excludability of viatical settlement payments depends on whether the viator's state requires viatical settlement providers to be licensed to make payments to chronically ill insureds. If viators receive payments from unlicensed viatical settlement providers in these jurisdictions, then the benefit is includable for federal purposes. If a state does not require the licensing of viatical settlement providers, or the viatical settlement provider is licensed as required, then the provider must satisfy the requirements specified in Section 101(g) of the HIPAA in order for settlement payments to be excludable from

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38. Committee Reports, 104th Congress; 2nd Session, House Rpt. 104-736, 104 H.Rpt. 736, Health Insurance Portability and Accountability Act of 1996, July 31, 1996.

39. These are eating, toileting, transferring (moving from bed to chair), bathing, dressing and continence. *See* I.R.C. § 7702B(c)(2)(B) (1986).

40. *See* §§ 101(g)(4)(B), 7702B(c)(2)(A). This qualification raises some relevancy questions, as such an individual would probably be incapable of obtaining an accelerated death benefit or viatical settlement without having previously executed a living will or power of attorney.

41. *Id.* § 7702B(c)(4). § 7702B, and not § 101, applies when the portion of a life insurance contract that provides for payments to chronically ill individuals meets all the requirements of a 'qualified long-term care insurance contract." The portion of the premium attributable to long-term coverage may be deductible under § 213.

federal income tax.[42]

Under HIPAA, an insurance contract's accelerated death benefit to a chronically ill insured is also excludable when the long-term care portion of the contract does not fulfill all of the requirements of Section 7702B(b)(1),[43] but does meet certain minimum requirements, as discussed in the following two sections.

1. The Requirements for Exclusion

In order for viatical settlements and accelerated death benefits to be excludable from gross income, a chronically ill insured's receipt of such payments must be spent on costs incurred for qualified long-term care services not compensated by insurance or otherwise.[44] Qualified long-term care services are those medical or personal care services provided to a chronically ill individual under a plan of care prescribed by a licensed health care practitioner.[45] This clearly discourages chronically ill viators from using viatical settlement proceeds without regard for potential tax liability.

The next requirement is that the payment must not be considered under the terms of the life insurance contract as a payment for, or reimbursement of, expenses reimbursable under Medicare,[46] unless Medicare is the secondary payor – paying only after the insured is unable to pay.[47]

Finally, the payment must comply with the Section 7702B(g) (policy requirements) and Section 4980C (marketing and disclosure requirements) "consumer protection" provisions, specified by the Secretary of the Treasury. Congress intended that the provisions specified by the Secretary incorporate

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42. I.R.C. § 101(g)(2)(B)(I)(II).

43. I.R.C. § 7702B(b)(1) requirements: the contract must (1) be guaranteed renewable; (2) not provide cash surrender or other value that can be paid, assigned, pledged, or borrowed; (3) allow refunds (other than by reason of death or complete surrender or cancellation of the contract) and dividends to be used only to reduce future premiums or increase future benefits; (4) not pay or reimburse expenses reimbursable under Medicare (unless Medicare is the secondary payor, or the contract makes per diem or other periodic payments without regard to actual expenses); and (5) meets the requirements of the consumer protection provisions contained in §§ 7702B(g).

44. *See* I.R.C. § 101(g)(3)(A)(I).

45. Qualified long-term care services are "necessary diagnostic, preventive, therapeutic, curing. treating, mitigating, and rehabilitative services, and maintenance or personal care services." *Id.* §§ 101(g)(4)(C), 7702B(c)(1).

46. *See id.* §§ 101(g)(3)(A)(ii)(I), 7702B(b)(1)(B).

47. *See id.* §§ 101(g)(3)(A)(ii), 7702B(b)(2)(B).

rules similar to Sections 6F and 13 of the NAIC's Long-Term Care Insurance Model Regulation (the "Model Regulations") which were based the marketing and disclosure requirements of Section 4980C (which was originally drafted to apply to long-term care insurance).[48] There could be potential trouble for insureds in that Section 4980C imposes a tax of $ 100 per insured for each day any of the requirements of Section 4980C are not met.[49]

2. The Amount Excluded

Unlike payments made to terminally ill insureds, the amount of the exclusion for payments made to chronically ill insureds is limited to payments for actual costs incurred by the insured for qualified long-term care services that are not compensated by insurance or otherwise, and per diem or periodic payments are further limited. While the first limitation still results in all actual costs incurred for qualified long-term care services being excluded from gross income, the per diem or periodic payment exclusion is limited to $ 175 per day, or $ 63,875 annually.[50] This per year limitation applies to the total of all amounts of per diem type long-term care accelerated death benefits and viatical settlements received, reduced by all reimbursed and compensated expenses of qualified long-term care services. This reduction occurs regardless of whether or not the insured received these expense payments directly.[51] This limitation does not necessitate the keeping of receipts in order to determine the actual cost incurred; only when the accelerated death benefit or viatical settlement amount paid exceeds the per diem limitation must the extent of actual costs be established. Any amounts paid under a per diem arrangement exceeding the limitation and the actual costs incurred are fully includable in gross income.[52]

The terms of the contract under which payments are made must also comply with the following requirements and standards:

1. The requirements of Section 7702(B)(b)(1)(B).

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48. Committee Reports, 104th Congress; 2nd Session, House Rpt. 104-736, 104 H.Rpt. 736, Health Insurance Portability and Accountability Act of 1996, July 31, 1996.

49. *See* I.R.C. § 4980C(a).

50. *See id.* §§ 101(g)(3)(C), 7702B(d).

51. *See id.* § 101(g)(3)(D).

52. These excess amounts also cannot be offset by the return of basis rules of Section 72. *See* 1986 IRC § 7702B(d)(1).

2. The requirements of Sections 7702B(g) and 4980C which the Secretary has specified as applying to the given purchase, assignment or arrangement.

3. Any standards adopted by the NAIC which apply to chronically ill insureds (in which case the requirements of number 2 above do not apply).

4. Any standards adopted by the state in which the policyholder resides (in which case the standards under number 2 and, subject to Section 4980C(f) standards, number 3 above do not apply).[53]

IV. THE EFFECTS OF THE HIPAA ON THE LIFE INSURANCE INDUSTRY

The HIPAA ensured that accelerated death benefits would be properly regarded as integral parts of life insurance contracts, and that insureds could have a certain degree of confidence that such benefits would receive proper tax treatment. HIPAA added Section 818(g) to the IRC which provides that, for the purposes of subchapter L, part 1, any reference to a life insurance contract also refers to the qualified accelerated death benefit rider on that contract, the only exception being when a rider is treated as a qualified long-term care insurance contract under Section 7702B.

Life insurance companies benefit from the application of Section 7702B in that they can receive favorable tax treatment by reserving benefits for the chronically ill using the one-year preliminary term method instead of the two-year preliminary term method, thereby setting up a reserve to cover costs.[54] This also clarifies the treatment of accelerated death benefits when determining the life insurance company's taxable income. Section 7702B(e) also provides some guidance on whether or not the long-term care portion of the life insurance contract is treated as a qualified long-term care contract under Section 7702B. Unfortunately, HIPAA does not provide any guidance on how to apply Section 7702 with respect to accelerated death benefits that are not triggered by chronic illness.

53. *Id.* § 101(G)(3)(B).

54. For a discussion of the preliminary term method see National States Ins. Co. v. Commissioner, 758 F.2d 1277, 1277-79 (8th Cir. 1985).

The HIPAA also created new information regarding the reporting requirements insurance companies must comply with under Section 6050Q. The requirements apply to "long-term care benefits" - any payment that is excludable from gross income by reason of Section 101(g).[55] Payors of these benefits must report to the IRS the aggregate amount of benefits paid to any individual, the extent to which the payments are per diem, and the name, address, and taxpayer identification number of both the payee and the chronically or terminally ill individual on whose behalf the payments were made.[56] Payors also have to provide a written statement showing the payor's name and the total amount of benefits paid to the payee and the chronically or terminally ill individual.[57]

V. THE EFFECTS OF THE HIPAA ON THE VIATICAL SETTLEMENT INDUSTRY

A viatical settlement provider is a person or entity who regularly purchases or accepts the assignment of life insurance contracts that cover the lives of terminally or chronically ill insureds - the viators. For purposes of a settlement's excludability from income tax, a viatical settlement provider is defined as any individual or legal person "regularly engaged in the trade or business of purchasing, or taking assignments of, life insurance contracts on the lives of the insureds" who are terminally or chronically ill, provided that certain licensing and other requirements are met.[58] The inclusion of "assignments" in the definition allows excludability for transactions that might not be considered an outright sale of a whole policy.

A viator's sale or assignment of an insurance policy to a qualified viatical settlement provider must be of a life insurance contract.[59] The sale or assignment of a contract with a rider providing for long-term care insurance with payments that are funded by and reduce the death benefit would be considered the sale or assignment of the death benefit. However, the sale or assignment of a contract with a rider providing for long-term care insurance

55. I.R.C. § 6050Q(c)(2) (1986).
56. *See id.* § 6050Q(a).
57. *See id.* § 6050Q(b).
58. *Id.* § 101(g)(2)(B)(I).
59. *See id.* § 101(g)(2)(A).

not funded by the death benefit would not qualify.[60]

Despite the changes brought about by the HIPAA, it is the viator's state of residence which has the final say over what specific requirements that the parties in a viatical settlement transaction must meet in order for its amounts paid to be excluded from income. If the prospective viator's state of residence requires licensing, then the viatical settlement provider must be licensed accordingly for the viatical settlement to be excludable. If the state of residence does not require licensing or has no requirements, then the prospective viator and viatical settlement provider must meet the standards required by IRC Sec.101(g)(2)(B)(ii). This Section utilizes the previously non-binding rules and regulations of the NAIC's Viatical Settlements Model Act and Regulations.

In 1992, the Life Insurance Committee of the NAIC created a regulatory model for the viatical settlement industry. The impetus for the Model Act and Regulations was the NAIC's desire to develop a guide that would preserve the right of the terminally and, to a lesser extent, the chronically ill to sell their policies in a competitive market environment while providing for adequate industry oversight. The NAIC also wanted to appeal to the divergent interests of the states: those that sought to regulate the viatical settlement industry and those that did not.[61]

The NAIC adopted the Model Act ("VSMA") in 1993 and the Model Regulation ("VSMR") in 1994. These instruments deal with issues of disclosure, reasonableness of payments, confidentiality, minimum capital requirements, sanctions for deceptive practices or advertising, applicability of Unfair Trade Practices Acts, rights of rescission, broker oversight, and viatical settlement company/broker licensing and examination.[62]

Under the HIPAA, the viator who resides in a state that does not require viatical settlement provider licensing must meet the requirements of Sections 8 and 9 of the VSMA, and the amounts paid by the insured for the settlement must meet the requirements of Section 4 of the VSMR. For amounts paid to terminally ill viators to be excludable, the viatical settlement provider must meet the disclosure requirements of Section 8 and the general rules of Section 9 of the VSMA, and the standards for evaluation of reasonable payments of

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60. Committee Reports, 104th Congress; 2nd Session, H. Rpt. 104-736, 104 H.Rpt. 736, Health Insurance Portability and Accountability Act of 1996, July 31, 1996.

61. *See* Viatical Settlement Model Act, Legislative History, NAIC Model Reg. Serv., at 697-7.

62. *See id.*

Section 4 of the VSMR.[63] With respect to amounts paid to chronically ill viators, the viatical settlement provider must also meet the requirements of VSMA Sections 8 and 9, and any standards adopted by the NAIC for evaluating the reasonableness of the amount paid in order for the settlement to be excludable.[64]

The relevant VSMA and VSMR sections are as follows:

> Act Section 8. A viatical settlement provider shall disclose the following information to the viator no later than the date the viatical settlement contract is signed by all parties:
>
> A. Possible alternatives to viatical settlement contracts for persons with catastrophic or life threatening illnesses, including, but not limited to, accelerated benefits offered by the issuer of the life insurance policy;
>
> B. The fact that some or all of the proceeds of the viatical settlement may be taxable, and that assistance should be sought from a personal tax advisor;
>
> C. The fact that the viatical settlement could be subject to the claims of creditors;
>
> D. The fact that receipt of a viatical settlement may adversely affect the recipients' eligibility for Medicaid or other government benefits or entitlements, and that advice should be obtained from the appropriate agencies;
>
> E. The policyowner's right to rescind a viatical settlement contract within thirty (30) days of the date is executed by all parties or fifteen (15) days of the receipt of the viatical settlement proceeds by the viator, whichever is less, as provided in Section 9C; and

63. *See* I.R.C. § 101(g)(2)(B)(ii).

64. *See id.* at § 101(g)(2)(B)(iii). As of the writing of this article the NAIC had yet to adopt any such standards.

F. The date by which the funds will be available to the viator and the source of the funds.[65]

Act Section 9:

A. A viatical settlement provider entering into a viatical settlement contract with any person with a catastrophic or life threatening illness or condition shall first obtain:

1. A written statement from a licensed attending physician that the person is of sound mind and under no constraint or undue influence; and

2. A witnessed document in which the person consents to the viatical settlement contract, acknowledges the catastrophic or life threatening illness, represents that he or she has a full and complete understanding of the viatical settlement contract, that he or she has a full and complete understanding of the benefits of the life insurance policy, releases his or her medical records, and acknowledges that he or she has entered into the viatical settlement contract freely and voluntarily.

B. All medical information solicited or obtained by any licensee shall be subject to the applicable provision of state law relating to confidentiality of medical information.

C. All viatical settlement contracts entered into in this state shall contain an unconditional refund provision of at least thirty (30) days from the date of the contract, or fifteen (15) days of the receipt of the viatical settlement proceeds, whichever is less.

D. Immediately upon receipt from the viator of documents to effect the transfer of the insurance policy, the viatical settlement provider shall pay the proceeds of the settlement to an escrow or trust account managed by a trustee

65. NAIC Model Reg. Serv., at 697-4.

or escrow agent in a bank approved by the commissioner, pending acknowledgment of the transfer by the issuer of the policy. The trustee or escrow agent shall be required to transfer the proceeds due to the viator immediately upon receipt of acknowledgment of the transfer from the insurer.

E. Failure to tender the viatical settlement by the date disclosed to the viator renders the contract null and void. [66]

Regulation Section 4. In order to assure that viators receive a reasonable return for viaticating an insurance policy, the following shall be minimum discounts:

Insured's Life Expectancy	Minimum Percentage of Face Value Less Outstanding Loans
Less than 6 months	80%
At least 6 but less than 12 months	70%
At least 12 but less than 18 months	65%
At least 18 but less than 24 months	60%
Twenty-four months or more	50%

The percentage may be reduced by 5% for viaticating a policy written by an insurer rated less than the highest 4 categories by A.M. Best, or a comparable rating by another

66. *See id.* at. 697-5.

rating agency.[67]

VI. ANALYSIS

A. The Growth of the Viatical Settlement Industry

As of early 1997 there were approximately 100 viatical settlement providers of one size or another in the United States.[68] An estimated $400 million worth of life insurance policies were purchased by approximately 25,000 viatical settlement investors in 1996,[69] as compared with approximately $300 million in 1994.[70] These figures are also indicative of the considerable growth which has occurred in the viatical settlement industry in the nineties - the value of policies handled in 1989 being $30 million.[71] The Viatical Association of America ("VAA") estimated that the viatical settlement provider industry would handle $1 billion worth of policies in 1997.[72] States are expected to follow the Federal cue on the tax-excludability of viatical settlements, which will probably encourage short-term business growth at least.[73]

Viatical settlement investors can earn between 15% and 45% on viatical settlements, with brokers, agents, financial planners and those who fund viatical settlements generally earning between 4% to 7% commission on viatical settlement transactions.[74] Even banks are getting into the viatical

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67. *Id.* at 698-2.

68. *See Viaticals Business Now a Respected Growth Industry*, STATE J. REG., Mar. 30, 1997, at 45.

69. *See* Barbara Mannino, *Moving Beyond the Learning Curve; the Emergence of Viatical Insurance Settlements*, BEST'S REV. – LIFE-HEALTH INS. ED., Aug. 1997, at 72; Jo-Ann Johnston, *For the Terminally Ill, a Path to Financial Peace; New Options to Allow Sick to Pay Bills and Live Rest of Lives More Completely; Home Economics: Viatical Settlements*, BOSTON GLOBE, Oct. 13, 1997, at A10.

70. Dorothy Stonely, *Limited Life Expectancy is Forecast for Viatical Firms*, THE BUS. J. - SAN JOSE, Mar. 3, 1997, at 16.

71. *See supra* note 68.

72. *See* Matt Roush, *Accelerated Death Benefits Are Alive and Well*, CRAIN'S DET. BUS., Oct. 28, 1996, at 36.

73. As of third-quarter 1997, California, New York and Wisconsin, in addition to those states without income taxes, excluded viatical settlements from state income. *See* Robert A. Moe, *Tax-free Viatical Settlements - a Lifesaver for the Seriously Ill*, 28 TAX ADVISER 570 (1997).

74. *See* Mannino, *supra* note 69.

settlement industry as intermediaries for brokers - allowing viatical settlement providers access to their clientele, and charging fees for this access.[75]

B. The Changing Viatical Settlement Clientele

In the eighties, there were viatical settlement provider advertisements in publications catering to homosexual readers. Now, AIDS is recognized as representing only 1% of a "market" made up of potential viators who are cancer, heart disease, or Lou Gehrig's disease patients,[76] – and publications with elderly readers carry advertisements by viatical settlement providers.[77]

Just as viatical settlement providers are not attracted to policies carrying large loans or high premiums, or having low value, viatical companies lose money when the policy holder dies later rather than sooner.[78] Due to recent advances against AIDS, some viatical settlement providers have gone out of business, and many have drastically changed their policies regarding AIDS patients.[79] One of the original viatical settlement providers, Dignity Partners, Inc., of San Francisco, stopped purchasing policies from AIDS victims based on the information presented at a world AIDS conference held in Vancouver, Canada, in July 1996,[80] and eventually closed.[81] Some viatical settlement providers no longer buy policies from AIDS patients, or require patients to try the latest medications (without success) before acceptance.[82]

Protease inhibitors and medicinal cocktails can significantly extend the lives of AIDS viators, pushing viatical contracts well beyond predicted

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75. Dedicated Resources, a Florida-based viatical settlement provider, has access to the clients of three banks. *See* Amy S. Friedman, *Banks Now Selling Viatical Investments*, NAT'L UNDERWRITER - LIFE AND HEALTH/FINANCIAL SERV. ED., Nov. 3, 1997, at 41.

76. *See* Brian R. Ball, *Pre-death Benefits Shift as AIDS Fades*, BUS. FIRST (Columbus), May 30, 1997, at 33.

77. *See* Marilyn Askin, *Viatical Settlements: Creative Tool for Planning*, N.J. LAW., Mar. 30, 1997, at 33.

78. *See* Stonely, *supra* note 70.

79. *See* Jim Gallagher, *Let's Hope You Never Have To Use This Column* ST. LOUIS POST-DISPATCH, Business Plus Section, March 17, 1997, at 7.

80. *See* Tom Hals, *Legislation May Restrict Arcane Viatical Settlements*, PHILADELPHIA BUS. J., Aug. 16, 1996, at 3.

81. *See* Mannino, *supra* note 69. It is interesting to note that Dignity Partners had investment backing from a subsidiary of the large insurance company TransAmerica. *See* Samuel Goldreich, *Battle to the Death? Viatical Firms Fight Insurers Over Rules on Settlements*, WASHINGTON TIMES, Nov. 5, 1996, at B6.

82. *See* Stonely, *supra* note 70.

"maturity" dates and drying up escrow accounts set up to pay premiums. Investors or viatical settlement providers have to keep policies from lapsing by paying premiums, which diminishes the rate of return on the initial investment.[83] The number of viators who are AIDS patients has also declined because increased life expectancies have reduced the percentage of policy face-values viatical settlement providers will pay AIDS patients.[84]

The viatical settlement industry has already made steps into other "illness markets." Viatical settlement providers are now looking for patients with cancer or Lou Gehrig's, Alzheimer's or heart disease.[85] Viatical settlement marketing to cancer patients may be particularly lucrative, as the disease claims fifteen times as many victims as AIDS does. The endorsement of the viatical settlement industry by the American Cancer Society can only benefit viatical settlement providers in the pursuit of this market.[86]

The new patients the viatical settlement providers are seeking tend to be older, wealthier and have a number of beneficiaries to whom they wish to leave something.[87] The National Viatical Association ("NVA") has stated that this is quite a contrast with the old AIDS patients - who were generally insureds solely due to employee benefit, died at a predictable time and did not have spouses or children.[88] The overall numbers of potential viators may be growing as well, as the baby boom generation continues to age.

C. The Regulation of the Viatical Settlement Industry

As far as self-regulation, there are currently two trade associations serving the viatical settlement industry: the NVA and the VAA. The NVA is opposed to regulation of the industry, objecting to licensing and payout requirements in particular.[89] The VAA does not oppose regulation,

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83. *See generally* Mannino, *supra* note 69; Roush, *supra* note 72.

84. *See* Ball, *supra* note 76.

85. *See* Shankar Vedantam, *Financial Peace for the Dying: New law may help the selling of insurance policies*, DES MOINES REG., Jan. 1, 1997, at 5; Gallagher, *supra* note 79. According to one insider, viatical settlement providers have been doing this for a while. In 1996, Alan Perper, former president of the now-defunct Dignity Partners said, "We've been buying cancer and heart disease for a long time; it's just that we haven't been buying very many . . . Because of the marketing aspects, it's been difficult to reach them." Vedantam, *supra*.

86. *See* Hals, *supra* note 80.

87. *See id.*

88. *See id.* The NVA's assumptions here are startling for a supposed industry self-regulator - that homosexuals have no beneficiaries or desire to plan for retirement.

89. *See* Stonely, *supra* note 70.

considering it a reasonable consumer protection measure.[90] The VAA's motives may not be entirely philanthropic in this regard - as regulations are likely to discourage new companies from entering the market and competing with the larger and well-established VAA firms. Both associations appear to serve public relations purposes as much as self-regulatory ones.

The states have started to take up the slack. Licensing of viatical settlement providers occurred in many states prior to the passage of HIPAA due to legislative response to consumer complaints of high-pressure sales tactics by viatical settlement providers.[91] By late 1996, sixteen states had adopted or had legislation similar to the VSMA, requiring licensing of viatical settlement providers and establishing consumer protection requirements: California, Florida, Illinois, Indiana, Kansas, Louisiana, Minnesota, New York, North Carolina, North Dakota, Oregon, Pennsylvania, Texas, Vermont, Washington, and Wisconsin.[92] Indiana, Louisiana, New York, North Carolina, Oregon, Texas, Vermont and Washington had adopted or had legislation similar to the VSMR.[93] Legislation similar to the VSMA was pending in Virginia, and both New Mexico and Utah had legislation pertaining to the viatical settlement industry.[94] The passage of HIPAA will undoubtedly encourage further regulatory efforts. Viatical settlement providers will incur expenses in order to do business in the increasing number of states with licensing regulations. Licensing fees vary from $50 to close to $3,000; besides an initial licensing fee, some states charge annual renewal fees as well.[95]

State regulations also control the operation of viatical settlement transactions in ways that may result in viatical settlement provider losses. The standard licensing process in those states requiring licensing usually starts with the state's insurance department running financial, legal and criminal background checks on all viatical settlement provider employees. The viatical settlement provider's financial strength is evaluated, and it must

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90. *See id.*

91. *See* Alan Lavine, *Sick, Dying Can Cash In On Insurance*, BROWARD DAILY BUS. REV., Feb. 25, 1997, Personal Finance Section, at A1.

92. Insurance News Network, *State Laws Regarding Viatical Settlements* (visited Jan. 4, 1998), <http:\\www.insure.com/life/viatical/viatical/vstate.html.

93. *See id.*

94. *See id.*

95. Two high-end examples are New York - $2,500 initial fee, $1,000 annual renewal - and California - $2,833 initial, $500 annual renewal. *See* Askin, *supra* note 77.

disclose its funding sources, reputable financial institutions being the preferred source for funding and escrow accounts. Regulations often mandate that viatical settlement providers disclose the possibility of alternative financial opportunities to prospective viators, use confidentiality agreements regarding viators' medical records, allow viators to rescind the viatical settlement within a predetermined period, and establish guarantees regarding fund availability. Small viatical settlement providers may not have the requisite amount of capital or surety bonds to ensure funding for the purchase and maintenance of life insurance policies; state regulations may force these companies to move or close, and discourage new company formation.[96]

D. Accelerated Death Benefits v. Viatical Settlements

Insurers first offered accelerated benefits through individual policies; group policy provisions first appeared in the late eighties.[97] Administering living death benefits for groups is now considered less risky and more attractive to insurers than administering them for individual insureds, as risks can be spread among a number of individuals.[98] Despite this fact, accelerated death benefit certificate values for group life insurance have been inexplicably lower than the values for individual policies.[99]

In 1997, 25% of insurers offering accelerated death benefits offered them only on new policies; the remainder offered accelerated death benefits as an add-on to existing policies as well.[100] About 25% of insurers required additional premiums from the day an accelerated death benefit policy came into effect; 50% charged only when the accelerated death benefit was used; the remaining 25% did not charge at all.[101]

As of 1994, about 281 of the nation's 1,700 insurers offered accelerated death benefits to approximately 5 million insureds, allowing terminally ill insureds to receive between 25 percent and 100 percent of the death benefit

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96. *See generally id*; Lavine, *supra* note 91.

97. *See* Alison Bell, *Living Benefits Become Typical On Group Life*, NAT'L UNDERWRITER - LIFE & HEALTH/FIN. SERVICES ED., Apr. 14, 1997, at S4.

98. *See* Matthew P. Schwartz, *Insurers Add Living Benefits to Group Life*, NAT'L UNDERWRITER - LIFE AND HEALTH/FIN. SERVICES ED., July 18, 1997, at 7.

99. *See* Bell, *supra* note 97.

100. *See Viaticals business now a respected growth industry*, THE STATE J.-REG., Mar. 30, 1997, at 45.

101. *See id.*

up to 24 months before the expected date of death.[102] These numbers had not changed significantly by 1997.[103] In contrast to the nearly half a billion dollars worth of policy value handled through viatical settlements, life insurance companies only dispensed an estimated $25 million through accelerated death benefits.[104]

Accelerated death benefits are not only less used than viatical settlements, they are less useful. Viatical settlements allow the terminally ill to pay medical and long-term care bills, finance a vacation, buy anything the insured desires or set up accounts for dependents and descendants.[105] Viatical settlements may also be used in a variety of ways for estate planning.[106] Accelerated death benefits may only be used to pay for medical care.[107] Those who are dying without dependents may also have an easier time deciding to use viatical settlements - planning for future needs obviously diminishing in importance to meeting current needs, when those needs will also be the last. Accelerated death benefits could also be marketed towards these individuals, especially as concerns over the costs of long-term care increase,[108] but if there has been any such marketing effort it has yet to reap rewards. Finally, while there are exceptions, insureds can generally get more cash up front from viatical settlements than from accelerated death benefits.[109] Insurers generally allow group insureds to access 50% of the death benefit; some offer the choice of a percentage or a maximum of between $100,000 and $175,000 of

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102. *See* Bell, *supra* note 97; Kathy Kristof, *Insurers Give 'Life' Benefit to Deathbed Policyholders*, FRESNO BEE, Dec. 14, 1997, at C1.

103. *See* Bell, *supra* note 97.

104. *See* Lavine, *supra* note 91.

105. Of course, chronically ill viators are not given this freedom, and there may be further limitations resulting from state licensing requirements. How many chronically ill insureds are discouraged from using viatical settlements, or are detrimentally affected for tax purposes when they are not so discouraged, due to this fact has yet to be determined.

106. There may be a way to offset current tax liability by establishing a charitable lead trust deferring receipt of viatical settlement proceeds by beneficiaries. For an introductory discussion of options, *see* Askin, *supra* note 77; Norse N. Blazzard and Judith A. Hasenauer, *New Law Has Accelerated Benefits "Catch" In It*, NAT'L UNDERWRITER - LIFE AND HEALTH/FIN. SERVICES ED., Sales News and Trends - A Matter of Law Section, May 19, 1997, at 7; Dennis J. Nirtaut, *Ask a Benefit Manager - Perspective: Accelerated Death Benefits - A comfort in some cases,* BUS. INS., July 1, 1996, at 28.

107. *See* Askin, *supra* note 77.

108. *See* Schwartz, *supra* note 98.

109. *See* Bell, *supra* note 97.

the death benefit.[110]

The crucial difference is that accelerated death benefits generally leave cash for the insured and beneficiaries - viatical settlements usually cause policies to become the sole property of the investor, with the result that there are no funds left for the viator or the original beneficiaries. One reason for the limitation on accelerated death benefit payout amounts is due to the fact that accelerated death benefits are an intrinsic part of life insurance policies - which are primarily set up in the interest of the insured's beneficiaries. Limiting early payout amounts preserves the integrity of the insurance contract, as well as the original purpose of life insurance. Viatical settlements do neither, as the purpose of the transaction is the sale of the whole policy in order to maximize gain for viators and investors as quickly as possible.

In some ways the viatical settlement industry may increase business for insurers. The tax treatment of viatical settlements may bring individuals who have not traditionally felt the need for life insurance into the market, or cause insureds who intend to drop coverage when their children are no longer dependents to keep policies active in order to maintain the ability to access tax-free funds for future expenses.[111] If this trend comes to pass, the only potential downside is that insurers will not receive the "benefit" of life insurance policies lapsing when insureds let their premiums go unpaid in times of financial stress. While life insurance lapses total approximately $3 billion per year - money which insurers do not have to pay out,[112] insurers still have to pay cash values, and would be foolish to base product profits solely on the lapsing of policies.

E. The Securities and Exchange Commission v. the Viatical Settlement Industry

Further Federal regulation of the viatical settlement industry may ultimately arise due to the increased scrutiny of the industry by the Securities and Exchange Commission ("SEC"), especially in the wake of new viatical settlement provider investment strategies and outbreaks of broker malfeasance.

At least one viatical settlement provider has broken into the market involving contestable policies - policies issued within the legal window in

110. *See* Schwartz, *supra* note 98.
111. *See* Moe, *supra* note 73.
112. *See* Hals, *supra* note 80.

which insurance companies can deny coverage, the idea being that insureds who have gotten sick within two years after (or before, a situation connoting fraud) purchasing their policies can cash in even when they might not otherwise be able to access their benefits.[113] The viators of these policies usually have very short life expectancies, thus giving investors high rates of return, and viatical settlement providers can pay less to viators with limited choices.[114] Some viatical settlement providers now utilize more investment options - such as buying policies from viators with long-range life expectancies at low cost, then reselling closer to the predicted death date for a higher price.[115] This sort of active investing is difficult to see as being simply a transfer of interest in an insurance policy, and could easily be seen as falling under SEC regulation.

Fractionalizing by viatical settlement providers allows one policy to be purchased by several investors, allowing less affluent investors to participate, and for all investors to spread risk by investing in more than one policy.[116] While a successful way to attract more investors, fractionalizing results in the splitting of the interests concerning one insurance policy, and an insurance policy owned and subsidized by a large number of individuals unrelated except by virtue of their co-ownership can hardly be considered a traditional life insurance policy. According to the SEC, insurance policies sold as fractional interests constitute securities, which places them under SEC regulatory control.[117]

In July of 1996, the District of Columbia Circuit Court of Appeals ruled on the issue of fractionalizing by a viatical settlement provider, Life Partners.[118] The court held that viatical settlements were not securities within the meaning of the Securities Act of 1933, reversing the district court's finding that viatical settlements are indeed investment contracts subject to federal securities law, and dismissed an SEC suit seeking to penalize Life Partners' fractionalizing efforts.[119] In a two-to-one opinion, the court found

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113. *See* Mannino, *supra* note 69.

114. *See id.*

115. *See id.*

116. *See id.*

117. *See* Askin, *supra* note 77.

118. SEC v. Life Partners, Inc., 87 F.3d 536 (D.C. Cir. 1996).

119. Leo F. Orenstein, SEC assistant chief litigation counsel, made it clear that the SEC was not seeking to regulate the entire viatical market, just the practice of fractionalizing. *See* Askin, *supra* note 77.

that the transactions failed to meet the final requirement of the three-prong definition of a security as outlined in *SEC v. W.J. Howey Co.*[120] (1946). In *Howey*, the Supreme Court said that an investment contract can be considered a security only when the investors (1) expect profits from a (2) common enterprise that (3) depends upon the efforts of others. While Life Partners' investors expected profits from a common enterprise, there was no dependence on the efforts of others once the contracts had been arranged. Furthermore, Life Partners did not provide any post-purchase services. Judge Patricia M. Wald based her dissent on this last point; the services upon which the investors depended were done pre-purchase and thus could be seen as satisfying the third *Howey* prong. When the SEC attempted a rehearing in December of 1996, they were shot down by the same 2-1 majority.

The SEC has also been watching how viatical settlement providers require investors to make premium payments when the escrow money reserved to make premium payments becomes exhausted.[121] Along these lines - and acting outside of the Federal courts - the SEC recently caught several viatical settlement brokers in the perpetration of fraud. In *In the Matter of Conners*[122] and *In the Matter of Michael D. Gibson*,[123] bond salesman sold $7 million worth of C'est Lestial Waters, Inc., collateral trust bonds, created from pooled viatical settlements, from October 1993 to January 1995. The salesmen made over $400,000 in commissions selling the bonds and defrauding investors by presenting the bonds as being fully secured through an irrevocable lien interest in favor of the investors and exempt from SEC registration, and that the financial security of the viatical settlement provider C'est Lestial Waters was "irrelevant" because the bonds were fully secured – none of which was true.

Viatical settlement providers have even received FBI scrutiny for securities fraud. Palm Springs-based Personal Choice Opportunities was caught by undercover FBI agents in a scheme to bring in viatical settlement investments without actually buying any insurance policies, a variation of the "Ponzi" scheme.[124] The viatical settlement brokers used money from new investors to pay old investors, and raised between $30 and $40 million

120. 328 U.S. 293 (1946).

121. *See* Askin, *supra* note 77.

122. No. 3-9125, 1997 SEC Lexis 849 (SEC, Apr. 15, 1997).

123. No. 3-9124 (SEC, Sept. 12, 1997).

124. *See Viatical Settlement Investors Charge Fraud After Sting Operation*, MEALEY'S LITIG. REP.: INS. FRAUD, May 22, 1997, at 5.

between June 1996 and March 1997.[125] This "viatical settlement provider" netted over two million dollars in commissions before being closed down.[126]

SEC regulation could result in viatical settlements being offered only through mutual fund-type arrangements, preventing investment on an individual investor basis and generally shaking up the industry.[127] Regulation could potentially reduce competition and eventually lower returns due to decreased viator screening - or it could weed out the viatical settlement providers that cannot simultaneously manage their finances properly and offer a lucrative investment vehicle.

F. Ethical Considerations

Ethical issues are raised for all three participants in the viatical settlement transaction: viator, viatical settlement provider and investor.

Viators may not know what they are getting into. The viatical settlement process, while easier to negotiate than most insurance policies which govern accelerated death benefits, still poses many hazards for the unwary viator. If the insurance policy cash value increases, the viator may not be compensated for the increase that will be available when the policy is sold. Also, the viator's beneficiaries do not necessarily collect their share of death benefits for a policy with double indemnity or accelerated death benefit riders. Formerly penniless viators can be subject to successful claims by creditors, bankruptcy trustees and receivers as soon as they receive their viatical settlement proceeds. Eligibility for Medicaid, Aid To Families with Dependent Children, and supplemental Social Security income or other government benefits and entitlements may be adversely affected by the receipt of a viatical settlement.[128]

Viators may also have their privacy infringed upon during the viatical settlement process, as viatical settlement provider review of medical records may not preserve confidentiality. While viators may want their medical records to be kept confidential, viatical settlement providers need to

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125. *See id.*

126. *See id.* After the investors have brought a complaint against the viatical settlement brokers in Manhattan Federal Court. United States v. Laing, No. 97-0638 (S.D.N.Y. [get date filed]1997), the brokers pled guildty to criminal charges of conspiracy to commit mail and wire fraud. *See* Marcia Vickers, *For 'Death Futures,' the Playing Field is Slippery*, N.Y. TIMES, § 3, Apr. 27, 1997 at 5; *Briefs: Insurance*, J. OF COMMERCE, 13A (Nov. 18, 1997).

127. *See* Mannino, *supra* note 69.

128. *See* Lavine, *supra* note 91.

determine whether viators are really ill. A viatical settlement provider wishing some degree of return rate reliability would understandably want full access to medical records and a life expectancy estimate from the viator's doctor.[129] In determining policy pricing rates, some viatical settlement providers use outside companies to evaluate potential viators.[130] The viatical settlement providers own medical experts may review the file, or the viatical settlement provider may use outside authorities.[131] Some viatical settlement providers purchase policies directly using committed funds, which allows for quick completion of the settlement process quicker and increased protection of viator confidentiality.[132] But the vast majority of viatical settlement providers are dependent on investor funds and cannot guarantee confidentiality, as viators are shopped around to prospective investors.[133] The viator may never know how many people have looked at his or her medical file.

Viatical settlement providers must also be on the lookout for viator fraud. Computer whizzes can generate fraudulent medical records. Viators can wait until after their viatical medical evaluations to begin new therapies which may significantly extend their life expectancy.[134]

Sharing viatical settlement provider concern over viator fraud, investors must also worry about hidden costs. Due to the need to account for payment of premiums, the longer the insured's life expectancy, the less cash paid - the odd result being that there is less money for a longer life. Investors may have to pay insurance premiums when escrow accounts run out, and may find themselves in the uncomfortable position of rooting for Death.

Investors may also not know what they are getting into. Viatical settlement providers can require waivers from the viator's beneficiaries, to ensure control over all policy proceeds and maximize potential profits, but this does not guarantee that investors will not be sued by the viator's family or estate.[135] Allegations of the viator's incapacity to contract would not be

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129. *See* Gallagher, *supra* note 79.

130. *See* Mannino, *supra* note 69.

131. *See* Gallagher, *supra* note 79.

132. *See* Moe, *supra* note 73.

133. *See id.*

134. *See* Mannino, *supra* note 69. For a general discussion of the possibilities of viator fraud, *see* Vickers, *supra* note 126; *Incontestability Clause Trumps Imposter Defense in California HIV Case*, MEALEY'S INS. LAW WKLY., Mar. 6, 1997 at 5.

135. APS Financial Services, *Viatical Settlements* (visited November 8, 1997) <http://apsfinserv.com/apsvqna.html.

insupportable: viatical settlement contracts cannot always be canceled, nor funds returned, after the viator signs on the dotted line,[136] despite the obvious argument that persons facing death should have some time to reconsider decisions of this sort.

Although investors may still be drawn to viatical settlements due to the knowledge that there are existing protections, investor confidence in viatical settlement brokers is unlikely to spring from regulation-mandated honesty.[137] There have been efforts from the viatical settlement industry to improve its reputation. Viatical settlement providers belonging to the two trade associations subscribe to a code of ethics.[138] Both associations require their members to hold anticipated premium payments in escrow, to disclose the amount and schedule of premiums the investor may have to pay, and to have third party trust agents handle funds and disburse death benefits.[139] More active viatical settlement industry self-policing has occurred in at least one instance: an informant sparked the investigation into the sardonically-named Credit Life, a Florida firm which "bought" policies without paying the viators.[140]

Despite the multiplicity of ethical pitfalls, the American Bar Association has endorsed the use of properly regulated viatical settlements: the ultimate reason being that the advantages outweigh the disadvantages, whichever may be real or imagined.[141]

VII. CONCLUSION

The HIPAA's provisions regarding the tax excludability of accelerated death benefits and viatical settlements will undoubtedly be of considerable help to the terminally and chronically ill. The viatical settlement industry can still help those who find themselves very ill, without health insurance benefits, and are unable or unwilling to wait for Social Security Disability

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136. *See* Lavine, *supra* note 91.

137. *See* Mannino, *supra* note 69.

138. *See* Askin, *supra* note 77.

139. *See* Mannino, *supra* note 69.

140. This story had a happy ending: Florida's insurance department and attorney general closed the firm, requiring the insurers to reissue and return the policies to the viators. Two viatical settlement providers relieved some of the burden from the insurance industry by purchasing the majority of the policies. *See id.*

141. *See* Stonely, *supra* note 70.

Insurance or Medicare benefits, and who have either a poor financial condition or dreams of wish-fulfillment that mandate swift access to cash. Accelerated death benefits remain an effective way to handle final medical expenses without sacrificing all life insurance benefits. But the question remains as to whether these benefits will continue as the viatical settlement and insurance industries respond to the needs of growing numbers of hungry investors and aging insureds.

The differences between the insurance and viatical settlement industries are beginning to blur. The HIPAA has given the viatical settlement industry a measure of legitimacy it has historically lacked; the full effect of federal recognition on viatical settlement providers remains to be seen. Some viatical settlement providers are now offering supplemental insurance to offer investors some protection against risk.[142] These policies cover some premium payments in the event insureds live longer than expected. Dealing with established insurers for supplemental insurance could compel viatical settlement providers to use medical examination companies to increase the accuracy of life expectancy assessment, thereby increasing investor confidence.[143] Companies that formerly avoided being associated with an industry of ill repute may consider the creation of viatical settlement provider subsidiaries as a legitimate means of reaching more investors. Insurers could justify offering "death future" investment services in order to exert some measure of control over losses attributable to viatical settlements, as well as a means of beating the viatical settlement providers at their own game.

The shape of things to come may be in the form of the industry giant Viaticus, Inc. of Chicago. Started in 1994 after the wife of its CEO died from cancer, Viaticus handled approximately one quarter of the total value of insurance policies processed through viatical settlements in 1996.[144] Viaticus markets its services though financial and estate planners and at hospitals,[145] and is working with insurance companies in order to increase agent involvement in viatical settlements.[146] Viaticus' estimated first-quarter 1997

142. A new insurance company has even been formed - "ProfitShield," founded by the viatical settlement provider Life Partners and several financiers from the U.S. and the U.K. *See* Mannino, *supra* note 69.

143. *See id.*

144. *See* Ball, *supra* note 76.

145. *See id.*

146. Telephone interview with Gary Chodes, President of Viaticus, Inc. (Mar. 31, 1998) [hereinafter Chodes].

sales were up 300 percent over fourth-quarter 1996,[147] and over $100 million worth of policies had been purchased in the first quarter of 1998.[148] Non-AIDS business amounted to just 25 percent of Viaticus policies in 1996 compared to 85 percent for the first quarter of 1997;[149] in the first quarter of 1998 the amount of non-AIDS business was near the 98 percent mark.[150]

Viaticus' president, Gary Chodes, confirmed the existence of a large and growing market among non-AIDS and elderly insureds.[151] Mr. Chodes said that over $1 billion in policies could be purchased this year from senior citizens who are not necessarily terminally and chronically ill.[152] Having larger numbers to work from, Viaticus can predict mortality and determine investment risks better than smaller providers, and can enter into transactions with insureds who are not traditional candidates for viatical settlements.[153] These opportunities are out of the reach of small investors, said Mr. Chodes, as money is not made quickly.[154] But unlike many viatical service providers, Viaticus owns the policies it buys; there is no selling to investors.[155] Most significantly, Viaticus is the only insurance-linked viatical settlement provider.[156]

It will probably not be the last - the financial power of the insurance industry linked with growing viatical settlement market potential would be a formidable, if not overwhelming, force in the viatical settlement industry, not to mention its possible effects on securities trading and financial planning. Small viatical service providers could be put out of business, and small individual investors might drop out of the picture if viatical settlement providers follow Viaticus' lead. Such a situation could be either a blessing for potential viators; arguably, a larger community could be served by providers with the finances to cover larger investment risks. However, viators would still have to fulfill the HIPAA requirements in order to exclude settlement proceeds from income, and the SEC's position that viatical settlements are

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147. *See* Ball, *supra* note 76.
148. *See* Chodes, *supra* note 146.
149. *See* Ball, *supra* note 76.
150. *See* Chodes, *supra* note 146.
151. *See id.*
152. *See id.*
153. *See id.*
154. *See id.*
155. *See id.*
156. Viaticus is a subsidiary of CNA Financial, the parent company of CNA Insurance. *See* Ball, *supra* note 76.

securities might find legislative favor with the advent of a multi-billion dollar viatical settlement industry.[157] Regulatory action could also result from insurance companies buying and owning policies they had sold. Whether HIPAA will mean the death of death futures may be an irrelevant question. The more pressing question may be whether HIPAA will be the undoing of the purpose of HIPAA.

157. Estimates are that death benefits total $20 billion annually. *See* Askin, *supra* note 77.

FROM THE JOURNALS: INSURANCE LAW ABSTRACTS

Edited by Jeffrey E. Thomas[1]

AUTOMOBILE INSURANCE

Thomas D. Bixby, Note, *Resolving A Peculiar Paradox: Uninsured Motorist Coverage Applied To An Underinsured Tortfeasor*, 62 MO. L. REV. 591 (1997).

This Note analyzes the gap in insurance coverage that results when an individual covered by an uninsured motorist policy is injured by an underinsured tortfeasor from a state with a Motor Vehicle Financial Responsibility Law with a lower minimum limit of financial responsibility than the state in which the injured individual resides. It focuses on the recent Missouri Supreme Court decision, *Ragsdale v. Armstrong*, to show the paradox that a victim may be better off if the tortfeasor were completely uninsured rather than underinsured.

The author analyzes the tension between public policy and contract law in the area of mandatory uninsured motorist coverage, and discusses decisions from different states that have tried to resolve the tension. The note identifies two approaches that courts have used to protect the injured party from underinsured motorists: (1) liberally construing uninsured motorists to include underinsured motorists, and (2) liberally construing uninsured vehicle to invoke coverage under the policy. The author then considers the four different approaches used by the judges of the Missouri Supreme Court in *Ragsdale*, ranging from a strict contract language interpretation (uninsured motorist coverage cannot be invoked because the tortfeasor was not uninsured, only underinsured) to allowing the victims to recover by stacking their insurance policies subject only to an offset for the liability insurance carried by the underinsured motorist. The author suggests that the gap should

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be resolved by judicial application of the "reasonable expectations doctrine." A reasonable consumer of insurance would not expect an uninsured motorist provision to be limited only to accidents involving uninsured motorists, not to underinsured motorists.

HEALTH INSURANCE

Sharon L. Davies and Timothy Stoltzfus Jost, *Managed Care: Placebo or Wonder Drug for Health Care Fraud and Abuse?*, 31 GA. L. REV. 373 (1997).

This Article examines the problems of fraud and abuse in the American health care industry under managed care. The authors begin with a detailed review of the definitions of "fraud," "abuse," and "managed care," and then delineate the different parties involved in health care transactions and their relationships with one another under both a traditional fee for service and managed care structure. They then discuss the new forms of fraud and abuse that have emerged under managed care, concluding that fraud and abuse remain a significant problem under this new structure. After a detailed review of the manifestations of fraud and abuse in managed care, the authors analyze the current approaches to detect and punish fraud and abuse, finding that both civil and criminal responses are insufficient. The authors conclude with suggestions of several potential ways to alter the law and investigative techniques to better fight fraud and abuse in a managed care setting.

Beth Mandel Rosenthal, Note, *Drive-Through Deliveries, and the Newborns' and Mothers' Health Protection Act of 1996*, 28 RUTGERS L.J. 753 (1997).

This Note suggests that managed health care companies have taken drastic measures to keep health care costs down, including adopting insurance guidelines to require new mothers and their babies to be discharged from the hospital within twelve to twenty-four hours after uncomplicated vaginal births. However, the author maintains that such "drive through deliveries" have resulted in an increase in newborn medical complications. The complications—including congenital heart defects, jaundice, dehydration, and streptococcal infections—have failed to be properly diagnosed because they

are normally not apparent until the newborn's second or third day in the nursery.

In response to this medical crisis, the Newborns' and Mothers' Health Protection Act of 1996 was enacted, taking effect on January 1, 1998. The Act is an attempt to fill in the existing loopholes in some state statutes, thereby providing more protection to newborns and mothers. While the Note endorses the Act, the author identifies concerns implicated by such federal legislation. The author concludes that the Act provides cost savings for health care and improved support for vulnerable young families.

Suzanne Seaman, Comment, *Putting the Brakes on Drive-Through Deliveries*, 13 J. CONTEMP. HEALTH L. & POL'Y 497 (1997).

This Comment examines the recently emerging problem of insurance providers mandating maximum allowable hospital stays for women and newborns. The proliferation of HMOs and PPOs, while addressing the problem of high costs inherent in traditional fee-for-service insurance, has led increasingly to cost-cutting measures such as maximum limits on hospital stays. One standard limit has been for 24 hours following "uncomplicated" childbirth. However, several common and entirely treatable infant diseases are not detectable in the first 24 hours of life, and if left untreated can have serious consequences such as permanent brain damage or even death.

In response to several notorious wrongful death law suits brought by parents (in which the courts reluctantly found no liability on the part of health care insurers), slightly less than half of the states passed legislation mandating minimum hospital stays following childbirth. Several other states have similar legislation currently pending. The Federal Government followed suit when it signed The New Borns' and Mothers' Health Protection Act of 1995 into law on September 26, 1996.

While the author encourages the passage of such legislation, she goes on to enumerate the lingering problems facing patients attempting to take advantage of the protection afforded by these laws. One important limitation is ERISA preemption on state insurance regulation. As a result, state laws mandating minimum hospital stays for mothers and newborns are not enforceable in certain situations. ERISA preemption has also limited the ability of plaintiffs to pursue other traditional state remedies such as wrongful death suits against insurers. Furthermore, ERISA remedies afford little relief

because they are based on breach of contract and the courts have found the policies of the insurance companies to be in accordance with acceptable medical standards. The U.S. Supreme Court has allowed disparate treatment between self-insured programs and other types of insurance providers under ERISA, and has held any remedy would require amendment of clear statutory language by Congress. The article concludes that mandatory minimum hospital stay legislation will continue to be ineffective unless it is uniform throughout the country and until ERISA's preemption provisions are amended to provide an adequate remedy against insurers who fail to comply with the legislation.

Lewis D. Solomon and Tricia Asaro, *Community-Based Health Care: A Legal and Policy Analysis*, 24 FORDHAM URB. L.J. 235 (1997).

This Article examines the health care system's fiscal problems and suggests the use of community based health care to address some of these problems. The authors identify two main health care concerns: (1) reigning in costs; and (2) extending medical coverage to the millions of people who are uninsured or underinsured. The authors suggest a community-based, "bottom-up" approach to health care to address these concerns. This approach would rely substantially on private donations and volunteerism of doctors and other professionals. The state and federal governments could facilitate the community approach by raising some funds and by adopting statutes to shield volunteers from liability.

INSURANCE REGULATION

Jesselyn Alicia Brown, Note, *ERISA and State Health Care Reform: Roadblock or Scapegoat?,* 13 YALE L. & POL'Y REV. 339 (1995).

Although the primary purpose of ERISA is to regulate pension plans sponsored by private employers, ERISA covers other plans that provide employee health care, disability and accident benefits. ERISA preempts many forms of state regulation of self-funded health benefit plans. Because self-

funded plans constitute an increasingly large portion of the health care market, meaningful reform at the state level has become increasingly difficult.

This Note proposes that although ERISA's preemption clause places limits on state reform efforts of health care, it does not block those efforts altogether. The author maintains that ERISA allows substantial flexibility to enact state reform initiatives. The author seeks to provide direction to state policy makers, who are seeking reform, about what they can and cannot do under ERISA.

Timothy P. Davis, *Should Viatical Settlements be Considered "Securities" Under the 1933 Securities Act?*, 6 KAN. J.L. & PUB. POL'Y 75 (1997).

This Article considers how the arrangement between a viatical company and its investors should be regulated. Regulation may be necessary to protect the potential vulnerability of a terminally-ill purchaser of a viatical settlement. Conceding that a viatical settlement is not controlled by state insurance law because it does not transfer or spread risk, the author turns to securities law to determine if viatical settlements should be regulated by the Securities Act of 1933 and the Exchange Act of 1934. Under the Supreme Court's decision in *SEC v. Howey Co.,* the author concludes that viatical settlements are not securities. However, the author contends that strong public policy arguments favor regulating viatical settlements under state law instead of federal securities law.

Elizabeth L. Deeley, Note, *Viatical Settlements Are Not Securities: Is It Law or Sympathy?*, 66 GEO. WASH. L. REV. 382 (1998).

This Note analyzes the D.C. Circuit Court's decision in *S.E.C. v. Life Partners, Inc.*, that investors' fractional interests in viatical settlements are not securities for the purposes of S.E.C. regulation. Providing an overview of the viatical settlement industry as well as federal securities law, the author suggests that the S.E.C. exempt viatical settlements from registration and

reporting requirements to relieve viators' burdens, but that it continue to run anti-fraud checks on the viatical industry.

Mark Alan Edwards, Comment, *Protections for ERISA Self-Insured Employee Welfare Benefit Plan Participants: New Possibilities for State Action in the Event of Plan Failure*, 1997 WIS. L. REV. 351 (1997).

This Comment discusses the impact of ERISA on self-insured employer health plans. Because of ERISA's broad preemptive effect, self-insured plans are currently exempt from state regulation. The author maintains however, that ERISA fails to provide sufficient protection to those covered under these plans. Although Wisconsin attempts to protect in the event of health plan failure by imposing mandatory contributions to state funds on insurance companies, self-insured employers are not required to contribute to these funds and their insureds are therefore not protected in the event of plan failure. Recent rulings by the United States Supreme Court and several Courts of Appeals have sought to limit ERISA preemption and provide states with opportunities to assure protection to those covered under self-insured plans.

The author describes the critical issues that determine whether a state law is preempted by ERISA: the scope of the preemption clause itself (which reaches all state regulation that "relates to" an ERISA benefit plan, unless the regulation is general in application or affects an ERISA plan only remotely), the savings clause (which allows states to pass laws that regulate the insurance industry), and the deeming provisions (which preempt otherwise permissible insurance laws if they attempt to regulate self-insured plans). The author then summarizes recent court decisions that have limited the preemptive provisions of ERISA. These decisions have upheld state statutes forcing self-insured plans to pay hospital use surcharges and which allowed states to tax the sale of "stop-loss" insurance to self-insured plans.

Although the best protection for employees covered under self-insured plans would be provided by amending ERISA, the author notes that just such an amendment was recently proposed by the Clinton Administration and summarily rejected by Congress. The author concludes by encouraging the

states to take advantage of recent limitations imposed on the scope of ERISA preemption to protect employees currently receiving health care under self-funded programs.

Kyle G. French, Note, *The Elderly and the Discriminatory Use of Genetic Information*, 5 ELDER L.J. 147 (1997).

This Note examines the legal and ethical issues concerning the use of genetic information about the elderly. After reviewing the history and development of genetic testing and its beneficial use to diagnose diseases, the author identifies the exploitative potential that such information may have for the elderly. The author notes that there is little control over one's genetic test results and that the information in the hands of a third party may be used to unfairly discriminate against that person. The author also discusses the lack of federal laws concerning the privacy of genetic results. He argues that such regulation is especially needed to prevent inequitable and improper use of genetic information to deny health insurance coverage. The author concludes that genetic testing issues are important to an elder law practitioner, who plays a critical role in protecting against genetic information discrimination.

Deborah S. Hellman, *Is Actuarially Fair Insurance Pricing Actually Fair?: A Case Study In Insuring Battered Women*, 32 HARV. C.R.-C.L. L. REV. 355 (1997).

This Article discusses whether the classification "abuse victim" is a valid classification in insurance pricing schemes – whether the greater chance an individual will draw from the insurance pool as a result of domestic violence justifies a risk rating similar to other conditions (e.g. high blood pressure). It also discusses the moral underpinnings of health insurance pricing and proposed federal and state legislation to limit the use of abuse victim status in underwriting and rating decisions.

The author criticizes the argument that a battered woman who stays with her batterer can be charged higher rates or denied coverage because she is

accountable for her increased risk of injury. She compares the situation of an abuse victim to individuals who refuse treatment for treatable medical conditions, and dispels the analogy with a two prong approach – whether the individual can control the decline in her health and whether the remedy is overly burdensome. Both prongs must be satisfied for the individual to be accountable for the condition. Because leaving a relationship can be a great sacrifice, the abuse victim fails the second prong. The author explores the social incentives for remaining in an abusive relationship and considers the morality of denying coverage or increasing premiums on the basis of being a victim of crime.

The author concludes that the differences between the abuse victim classification and other classifications justify recent legislation in several states to limit the ability of insurance companies to use abuse victim status in rating decisions. Because the state has an obligation to protect its citizens from crime, society must share the in the costs borne by the victim in the manner proposed by the legislation discussed.

Bryce A. Lenox, Comment, *Genetic Discrimination in Insurance and Employment: Spoiled Fruits Of The Human Genome Project*, 23 U. DAYTON L. REV. 189 (1997).

This Comment examines the implications of genetic discrimination with respect to employment and insurance. The author discusses the basics of genetic discrimination, including its consequences and its relationship to the Human Genome Project. He then considers the state and federal and statutory law concerning genetic testing. He concludes that genetics related technological developments have outpaced the legal regulation of testing, and that immediate federal legislation is needed to balance the rights of individuals with the benefits of genetic testing.

Kevin M. Lesperance, Note, *A Unique Preemption Problem: The Insurance and Banking Industries Engage in War*, 31 VAL. U. L. REV. 1141 (1997).

This Note chronicles the latest chapter in the ongoing battle between the insurance industry and the banking industry over a bank's right to sell insurance. The author discusses the background for this conflict. The insurance industry contends that state anti-affiliation statutes (precluding banks from conducting insurance activities) are saved from federal preemption by the McCarran-Ferguson Act, but the banking industry claims that 12 U.S.C. § 92 preempts state anti-affiliation statutes. The Note analyzes the split in circuit authority on the issue, between the Sixth Circuit and the Eleventh Circuit, and the subsequent Supreme Court review. The author concludes that the Sixth Circuit and the Supreme Court incorrectly ignored the legislative history of § 92 and the McCarran-Ferguson Act, and applied incorrect criteria to define "business of insurance." Finally, the article proposes a model amendment to § 92 to reinvest the states with the power to control the insurance industry outside of the limited exception created by § 92. This, it is claimed, will put the law back in line with the original intentions of Congress, and with the state of the law in 1945 when the McCarran-Ferguson Act was enacted.

Edward Alburo Morrissey, *Deem and Deemer: ERISA Preemption Under the Deemer Clause as Applied to Employer Health Care Plans with Stop-Loss Insurance*, 23 J. LEGIS. 307 (1997).

This Article discusses the problem of ERISA preemption under the deemer clause as applied to plans where the employer self-insures to a certain monetary amount and purchases a stop-loss policy to cover any claim over that amount (a partially funded plan). The author begins with the proposition that ERISA preemption of state law applicable to a partially funded plan remains an open question. The Supreme Court has not addressed this issue, and the federal circuits are split. The Ninth and Fourth Circuits have concluded that a partially-funded plan does not constitute a self-funded plan

subject to the deemer clause. The Sixth Circuit has held that a state mandated benefit statute fell within the scope of the deemer clause as applied to a partially funded plan. The author suggests legislative reform to eliminate the current disparate provision of benefits between self-funded, partially-funded and unfunded plans.

Jeffrey H. Thomas, Barnett Bank *Brings the Business of Insurance to the Attention of Congress*, 20 U. ARK. LITTLE ROCK L.J. 129 (1997).

This Article analyzes the United States Supreme Court decision in *Barnett Bank of Marion County, N.A. v. Nelson*, as well as a line of cases upholding Federal Reserve Board determinations that banks can engage in certain securities activities, including insurance product marketing and sales. The author reviews the provisions of the McCarran-Ferguson Act, which delegate regulatory powers over the insurance industry to the states, and describes the reactions of state and federal legislatures and administrative bodies, independent insurance agents and the national banks to the *Barnett* decision. The author suggests that, contrary to the purposes of McCarran-Ferguson, the *Barnett* decision may lead to increased federal involvement in the regulation of the insurance industry.

Bonnie Poitras Tucker, *Insurance and the ADA*, 46 DEPAUL L. REV. 915 (1997).

This Article analyzes the relationship between the Americans with Disabilities Act of 1990 (ADA) and insurance coverage, with a primary focus on insurance in the employment setting. It begins with a broad overview of the current state of the law under Title I, as interpreted by regulatory agencies and the courts. The overview first discusses the issue of who may assert an action against an employer in protest of discriminatory insurance coverage, looking especially at part-time employees and former employees. It then proceeds to discuss disability-based distinctions including physical/mental distinctions, benefit caps, disability and the service retirement plans, and dependent coverage. Next, the author examines whether an action or practice

of an insurance or benefit plan constitutes an illegal subterfuge in violation of the ADA. She then provides a detailed example of how the prohibition against the use of deceit to deny coverage applies in the situation where an insurer refuses to pay for cochlear implants. Finally, the author looks at the situation where an individual perceives disability discrimination with his or her private insurance carrier, which is only actionable under Title III.

LIABILITY INSURANCE

Nancy J. Moore, *Ethical Issues In Third-Party Payment: Beyond The Insurance Defense Paradigm*, 16 REV. LITIG. 585 (1997).

This Article addresses ethical issues involving third-party representation, with particular attention to the ongoing work of the proposed Restatement. The author provides a brief summary of the insurance defense paradigm and the controversy surrounding Section 215 of the Restatement. She explores the dilemmas which commonly present themselves to attorneys who are paid by third parties including the sharing of otherwise confidential information, the ability of a third-party payer to direct some aspect of the representation, and questions concerning the conflicts considered so severe that according to the Model Rules they are "non-consentable." The Restatement reporters have recognized and attempted to remedy some of these problems; however, the suggested changes seem directed towards the problems in insurance defense representation, and it is unclear that the chosen solutions will work in other contexts. This author explores some of the other contexts in which the representation dilemma could arise including employers providing attorneys for their employees, parents providing representation for their children, and public interest lawyers paid by government entities or nonprofit corporations. This author concludes that the law of third-party conflicts needs clarification and recognition beyond the current Restatement proposals.

Ellen S. Pryor, *The Stories We Tell: Intentional Harm and the Quest for Insurance Funding*, 75 TEX. L. REV. 1721 (1997).

This Article examines the phenomenon of plaintiffs who underlitigate their tort claims by pleading and proving negligence in addition to, or instead of, intentional tort theories. The author contends that underlitigation is caused by the desire to avoid an exclusion in the standard liability policy for intentional harms caused by the insured. She then considers whether underlitigation poses a problem for the legal system. Although underlitigation probably does not undermine efficiency, deterrence or corrective justice, it may lead to inappropriate indemnity coverage and may distort the narrative and declaratory roles of tort law. Finally, the author discusses how underlitigating concerns might be addressed. She concludes that sanction rules, professional responsibility requirements, and tort doctrines probably cannot limit the practice, but that modification of some insurance law doctrines may reduce underlitigation to some extent. However the author concludes underlitigation is an inevitable result of American insurance and tort law and cannot be completely eliminated at an acceptable cost.

RECENT CASE DEVELOPMENTS

Jeffrey W. Stempel[1]

CONSTRUING FORTUITY REQUIREMENT IN COVERAGE FOR "ACCIDENT," THIRD CIRCUIT BORROWS APPROACH OF "EXPECTED OR INTENDED" EXCLUSION AND APPLIES "STANDPOINT OF THE INSURED" ANALYSIS TO FIND COVERAGE

Nationwide Mutual Fire Insurance Co. v. Pipher, 140 F.3d 222, 1998 (3d Cir. 1998) (applying Pennsylvania law).

Insurance policies are designed to provide coverage only for losses that occur by chance. Paying and defending policyholders for damage wrought by their conscious design would run counter to this basic principle and raise significant concerns of moral hazard (insured entities would be less careful in curbing venal or mean-spirited impulses) and adverse selection (persons with a predisposition toward intentional misconduct would exhibit a disproportionate demand for insurance). Although many courts and commentators argue that this "fortuity" requirement is an implicit condition precedent in any insurance policy, most liability insurers expressly codify the requirement in part by providing that the policy will not provide coverage where the damage underlying the claim was "expected or intended from the standpoint of the insured."

Similarly, most liability policies define a covered occurrence as an "accident" or other fortuitous event. But what if the insured is sued because its negligence contributed to the harm caused by the intentional acts of a noninsured? In facing this issue, the United States Court of Appeals for the Third Circuit, applying Pennsylvania law, resolved the textual and structural conflict of these common policy provisions by holding that a claim alleging negligence by the policyholder is covered even if the actual cause of the harm was not "accidental" as such.

Policyholder Linda Pipher, who held a "Tenant's Policy," leased a second floor apartment in her home to Francis and Bernine McFadden. In

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undertaking to install new carpeting in the apartment, Pipher or the prior tenants had removed the doors to the apartment, which were never reinstalled and hired a painter with an allegedly troubled past to repaint the unit. The painter assaulted and killed Bernine McFadden. Her widower husband filed a wrongful death action not only against the perpetrator but also against Pipher as landlord, alleging that Pipher had been negligent in hiring the painter and in failing to have the apartment doors reinstalled.

Nationwide defended Pipher with a reservation of rights and argued that the there was no coverage because the claim did not arise out of an "accident" but from an intentional murder, albeit not one committed by the insured. The Policy provided liability coverage for "damages [the insured] is legally obligated to pay due to an occurrence," with an "occurrence" defined as bodily injury resulting from an "accident." The policy also contained the common express "intentional act" exclusion barring coverage for losses that were "expected or intended from the standpoint of the insured."

Nationwide cited a relatively recent Pennsylvania Supreme Court precedent (Gene's Restaurant, Inc. v. Nationwide Ins. Co., 548 A.2d 246 (Pa. 1988)) and progeny holding that "to constitute an accident, and thus a covered occurrence, the court must focus on the nature of the act which inflicted the injury or directly caused the death, and that act must be unintentional, even when an insured is sued for negligently failing to prevent or for contributing to the harmful intentional acts of the person who directly inflicted the injury or cause the death." 140 F.3d at 224 (footnote omitted). The Third Circuit in *Pipher* distinguished *Gene's Restaurant* as inapposite because the complaint in that case "contained no allegations of negligence on the part of the insured" but instead "merely alleged that while she was a patron in the defendant insured's restaurant, the defendant [not an insured] assaulted and violently beat her, causing injuries and damages." 140 F. 3d at 224. *See also* Britamco Underwriters, Inc. v. Weiner, 636 A.2d 649 (Pa. Super. Ct. 1994)(Pennsylvania court distinguishes *Gene's Restaurant* on basis that instant complaint alleges alternative theories of liability, one alleging intentional conduct and the other alleging negligent conduct).

Thus, although the federal appellate court is required under the *Erie* doctrine to follow controlling state law as enunciated by the highest court of the relevant state, the *Pipher* Court avoided the seeming command of the *Gene's Restaurant* decision in order to align itself with other precedents holding that "'the fact that the event causing [injury] may be traceable to an intentional act of a third patry does not preclude the occurrence from being

an 'accident.'", 140 F.3d at 225 (quoting Mohn v. American Cas. Co. of Reading, 326 A.2d 346, 348 (Pa. 1974)). In *Mohn*, an innocent insured father was able to obtain health insurance coverage for his son, who was injured when shot by the police during a foiled burglary.[2]

Against this backdrop, the Third Circuit in *Pipher* had no difficulty finding coverage since the McFadden wrongful death action alleged negligence conduct by Pipher that facilitated the intentional wrongdoing of a non-insured. "From the Pipher's standpoint, Bernadine McFadden's assault and death was unexpected, entirely fortuitious, and therefore, an accident." 140 F.3d at 226.

In other words, the *Pipher* Court read the definition of "accident" in the Nationwide Tenant's Policy in harmony with the intentional act exclusion, which requires that the question of intent and fortuity be determined from the standpoint of the insured rather than that of third parties. This approach is not only most consistent with the policy language and common sense but also best serves the purpose of liability insurance. Liability insurance is designed to protect the insured from the consequences of its negligence. So long as the insured is not indemnified for intentional wrongdoing, this objective is met.

Any other construction would, as a practical matter, begin to unravel a significant part the existing system of liability insurance. For example, policyholders are frequently sued – and covered – for incidents involving inadequate security. The *Pipher* Court noted that its approach was followed in other jurisdictions, citing cases from Florida, Louisiana, New York, and Ohio.

As the *Pipher* Court points out, the holding of a case like *Gene's Restaurant* is not at all inconsistent with the *Pipher* approach. In *Gene's Restaurant*, there was no coverage because the plaintiff simply failed to allege any negligence or other covered liability-creating conduct by the policyholder. Hence, in the absence of the allegation of a covered loss, there could be no coverage. The *Gene's Restaurant* Court almost certainly did not

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2. The *Pipher* Court also cited Wetzel v. Westinghouse Elec. Corp., 392 A.2d 470, 472-73 (Pa. Super. Ct. 1978), a somewhat notorious case often noted in casebooks and treatises, arising out of a father-son altercation over the preparation of a tax return. Because both father and son were martial arts experts, the high tension often found around April 15 turned deadly. The father, enraged by something in the son's preparation of the return, attacked the son with a sword. The son, defending himself with nanchukas and sticks, accidently killed his father rather than merely subduing him. The *Wetzel* Court deemed the killing a covered accident rather than an uncovered intended murder.

purport to change the "rule of the game" that the intentional act exclusion relates to the policyholder's state of mind rather than that of other persons connected to the case. The quotation above about focusing on the event rather than the insured's state of mind is just an unfortunate misstatement of insurance law by the Pennsylvania Supreme Court that the federal appeals court wisely sidestepped without violating its duty to follow state law in claims based on diversity jurisdiction.

The *Pipher* Court thus rightly rejected Nationwide's attempt to argue that the term "accident" had a meaning separate and distinct from the intentional act exclusion contained elsewhere in the policy. Rather, *Pipher* read the insurance policy as a whole and construed the two provisions harmonioiusly and sensibly. Unfortunately, at the close of the opinion, the *Pipher* Court attempted to buttress its analysis by invoking the doctrine that ambiguity is to be construed against the contract-drafting insurer, finding the term "accident" ambiguous as applied to the McFadden claim. The *Pipher* Court's gilding of the coverage lilly is unfortunate in that it represents another overuse of the perfectly defensible ambiguity doctrine through unnecessary invocation. More logically, the term "accident" is not ambiguous at all -- it simply means a loss event fortuitous insofar as the insured is concerned. This logical assessment of the meaning of a liability insurance policy would seemingly hold even if the policy did not contain the "expected or intended from the standpoint of the insured" language as well as the "accident" language unless the insurer used clear language precluding coverage for claims arising out of murder or other criminal acts by third parties.

IN CASE INVOLVING SEXUAL MOLESTATION, SEVENTH CIRCUIT APPLIES BROAD INTERPRETATION OF COMPLAINT TO TRIGGER DUTY TO DEFEND AND IMPLIES TRIGGER ANALYSIS SIMILAR TO THAT FOUND IN ASBESTOS AND POLLUTION CASES

Roman Catholic Diocese of Springfield, Ill. v. Maryland Casualty Co., 139 F. 3d 561 (7th Cir. 1998) (applying Illinois law).

Analogies between sexual abuse of minors and product liability or pollution claims are not intuitively obvious but these disparate torts are related in that, for purposes of insurance coverage, all are subject to the general rule of liability insurance that there have been an injury during the

policy period caused by a covered occurrence if there is to be coverage for the claim.

Maryland Casualty provided general liability insurance to the Diocese from 1977 through 1981. From approximately 1978 through 1981, a formet associate pastor at a Diocese parish allegedly had sexually abused several boys entrusted to his supervision. Five of the alleged victims filed suit in 1993, with the claims dismissed as untimely under that statute of limitations. In 1995, parents of two other victims filed another action, alleging particularized abuse and also attempting to establish grounds for tolling the statute of limitations on the ground that the priest had admonished the boys never to disclose the abuse, permitting the parents to be unaware of the abuse until mid-1993. The Diocese tendered the new suits to its insurers, but defense and coverage were denied, with the insurers taking the position that the parents where not injured during the 1977-1981 period in which the Maryland Casualty policy was in force since the parents had no knowledge of the abuse until 1993.

The trial court accepted the insurer's argument, expressly rejecting the Diocese's argument that the injury from child abuse was like the damage caused by asbestos or other contaminants that causes insidious injury for years prior to visible manifestation and discovery. The Seventh Circuit unanimously reversed, finding that

> a judgment declaring that Maryland has no duty to defend the Diocese is appropriate only if we can say with confidence that no injuries comprehended by the complaint would potentially trigger coverage.
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> * * *
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> Reading the complaint generously [as required by Illinois law, and most state law, regarding the duty to defend], it is easy to imagine that the parents of the abused children were in fact injured long before 1993, and within the period of Maryland's coverage, but that the parents simply remained in the dark as to the source of their injuries until then. As we have noted, the complaint identifies a variety of harms that the children suffered as a result of the abuse: "severe and medically diagnosable emotional distress, embarrassment, loss of self-esteem, disgrace, humiliation, psychological

> injury, loss of enjoyment of life, wage loss and deprivation of earning capacity." [citing to complaint]. Surely some of these injuries occurred during the period of Maryland's coverage. Common sense suggests that these injuries could in turn have resulted in concrete, identifieable harm to the parents within the same period. If the children required medical and psychological treatment at that time, for example, the parents would have borne the costs of that care. If the chilrden became withdrawn as a result of the abuse, their relationships with their parent almost certainly suffered. And so on. [citations omitted] . . . . Although the identified injuries are attributed in part to the 1993 revelations [and thus are not covered by the 1977-1981 Maryland Casualty policies since damage from "knowing" of the abuse occurred during 1993]. . . they are also attributed directly to the abuse by [priest] Havey [citing complaint] and that allegation leaves the door open to claims for injuries that pre-date the expiration of the Maryland policies.

139 F.3d at 566-67.

Although the Seventh Circuit did not specifically address the issue of the Diocese's analogy to the asbestos trigger that was rejected by the district court, the appellate court's analysis, although based expressly on a broad view of the liability insurer's duty to defend, is very consistent with the more enlightened views of an "actual injury" or "injury-in-fact" trigger utilized by the courts ruling on insurance coverage disputes involving asbestos claims. *See, e.g., American Home Prod. Corp. v. Liberty Mut. Ins. Co.*, 748 F. 2d 760 (2d Cir. 1984)(finding injury-in-fact to have resulted from inhalation of asbestos fibers without requirement that injury be manifest or medically diagnosable at the time in order to trigger coverage).

In the asbestos coverage cases, courts adopted a variety of triggers of coverage: (1) exposure; (2) injury; (3) manifestation; and (4) continuous or multiple trigger. Of these, the dominant approach is the actual injury trigger, which also most comports with insurance policy language and the purpose of insurance, which is to provide coverage for "bodily injury" that took place during an occurrence policy period. *See generally* JEFFREY W. STEMPEL, INTERPRETATION OF INSURANCE CONTRACTS §T3.2 (1994 and 1998 Supp.). However, on closer examination in light of the allegations actually pleaded

or the facts actually shown or assumed by the courts, the four triggers tend to converge upon one another in that the courts adopting an "exposure" trigger were usually finding or assuming that the mere exposure to the asbestos was instantly injurious to some degree. The manifestation courts can be characterized as insisting upon what many regarded as too much blatant evidence of injury but were nonetheless concerned not with the date of negligence, discovery, or judgment but with the date of injury. Multiple or successive trigger approaches build on this commonality. *See* Alan I. Widiss with Jeffrey W. Stempel, *Pulling Triggers from Coverage Provisions of Liability Insurance Policies* (manuscript 1998) (on file with author).

The actual injury cases that do not require so much evidence of injury as to amount to manifestation are the best reasoned of the asbestos coverage cases (and their cousins the pollution coverage cases) in that these cases recognized that an injury can be taking place inside the human body (or in the water table or on land) well before it is consciously recognized or diagnosable. Newspapers and medical histories are, for example, filled with instances where a person suffers for perhaps years with an infection or other malady before it is detected, diagnosed, or treated. As the *Diocese* Court implicitly notes, psychological and social injury can resemble insidious physical injury. Just as the asbestos victims were suffering lung and other damage for years prior to becoming consciously short of breath, the families of the abused children in *Diocese* probably where injured in their intra-family relations and mental well-being long before the parents (and perhaps even the abused children) knew of or recognized the agent of disease.

Although the Seventh Circuit chose to rest its decision expressly upon broad construction of the complaints and the substantial requirements of the liability insurers' duty to defend, the analogy to the long-tail trigger coverage cases of the 1980s and 1990s seems apt regarding the type of child abuse at issue in *Diocese* and could provide a useful tool for assessing the coverage questions concerning the date of psychological or emotional injury.

CHANGE IN APPLICABLE LAW CONSTITUTES EVENT SUBJECT TO PREMIUM ADJUSTMENT BASED ON LOSS EXPERIENCE FOR WASHINGTON REDSKINS' WORKERS COMPENSATION INSURER

Hartford Accident & Indemnity Co. v. Pro-Football, Inc., 127 F.3d 1111 (D.C. Cir. 1997) (applying District of Columbia law).

As one might expect, on-the-job injuries are rather frequent for professional football players such as the Washington Redskins. The team's ownership obtained workers compensation coverage through a risk pool arrangement operated by the State of Virginia, where the team maintains a practice facility.

The policy itself, like many policies in high-risk or limited market areas provides something of a bet-hedging device for both insurer and insured – a provision for having premiums adjusted based on the actual loss experience of the policyholder. For example, if the team had enjoyed an injury-free season, the premium would be retroactively adjusted downward. However, if the season brought more injuries than expected at the time of underwriting, the insurer would be entitled to a retroactive premium increase. Such retroacive premium adjustment provisions are found fairly frequently for coverages in which the risk assumed is difficult to calculate at the inception of the policy period.

The *Washington Redskins* case itself presents an interesting question regarding what counts as a premium rating factor other than actual injury experience, missed work, and the severity and cost of the injuries. Because the team has facilities in Virginia and workers compensation rates are noticably lower in Virginia than in the District of Columbia, the team understandably (and successfully at first) sought to have the policy priced as though the applicable rates of compensation to injured workers would be based on the Virginia schedule of benefits. However, several of the Redskins players successfully argued to District of Columbia authorities that the District's benefits schedule should control because the players' real locus of work was RFK Stadium in D.C., where the Redskins played NFL games even though gametime pales in comparison to practice time (although no team ever grabs the title by winning practices). Subsequently, the team's games have moved to the new Jack Kent Cooke Stadium in Landover, Maryland, perhaps serving the needs of a new premium adjustment dispute.

Consequently, the workers compensation policy originally written as

though benefits were to be calculated according the lower Virginia schedule became subject to the higher D.C. schedule, making the policy considerably more expensive. The insurer sought a retroactive premium adjustment of more than $5 million (for a three-year policy period) based on the change in applicable law by which benefits were calculated. The trial court rejected this retroactive premium adjustment by the insurer but the Circuit Court of Appeals reversed, finding that a change in the legal yardstick for determining benefits was similar to the team's actual injury rate in terms of affecting the cost and value of the policy and the premium that the insurer should be allowed to charge in view of the clear and broad restrospective premium adjustment language contained in the policy at issue.

FLORIDA SUPREME COURT REQUIRES EXCESS JUDGMENT AGAINST INSURED BEFORE BAD FAITH ACTION MAY LIE, LIMITING THIRD-PARTY CLAIMANT'S ABILITY TO BRING BAD FAITH CLAIM AGAINST INSURER

State Farm Fire & Casualty Co.v. Zebrowski, 706 So. 2d 275 (Fla. Nov. 26, 1997).

Florida's bad faith statute permits "any person" to bring an action against an insurer for unfair claims practices and also provides "any person" with a right of action against an insurer for bad faith failure to attempt settlement. *See* FLA. STAT. § 624.155(1)(b)(1) (1997). However, this broad statutory language does not permit a third-party claimant to sue an insurer for bad faith refusal to settle during the course of the claimant's action against the insured tortfeasor. In order to sue the insurer for bad faith in refusing to attempt settlement, there must first be a judgment against the insured that exceeds the insured's liability policy limits.

In so ruling, the Florida Supreme Court noted that the statutory "cause of action is predicated on the failure of the insurer to act `fairly and honestly toward its insured and with due regard for his interests.' The duty runs only to the insured. Therefore, in the absence of an excess judgment, a third-party plaintiff cannot demonstrate that the insurer breached a duty toward its insured." State Farm Fire & Casualty Co.v. Zebrowski, 706 So.2d at 276-77, (1997) (quoting FLA. STAT. § 624.155(1)(B)(1)).

According to the Florida high court, permitting the third party to

simultaneously sue the insured and its insurer would create an intractable conflict of interest for the insurer and raise the costs of providing liability insurance. *See* 706 So.2d at 277. Although the liability insurer is not permitted to gamble with the financial future of its insured, the insurer is permitted to defend claims against the insured with vigor, which is more easily accomplished if the insured (and not a third-party claimant as well) is the only entity toward whom the insurer owes a duty. If the insurer breaches this duty by making inadequate attempts to settle a claim against the insured, there is nonetheless no harm to the insured (at least not in the form of personal liability faced by the insured) absent an excess judgment. Hence, the excess judgment is a prerequisite for this type of bad faith claim by a third party.

However, where a judgment in excess of policy limits is obtained, the third-party claimant may under Florida law then sue the insurer directly without obtaining an assignment from the insured defendant tortfeasor. Furthermore, the third-party claimant succeeding in this nonassigned bad faith claim against the insurer may recover counsel fees under the statute.

MASSACHUSETTS EXPRESSLY ADOPTS SUBJECTIVE APPROACH AND REQUIRES SPECIFIC INTENT TO INJURE BY INSURED BEFORE INSURER MAY VOID COVERAGE PURSUANT TO INTENTIONAL ACT EXCLUSION; COURT ALSO EXERCISES COMMON LAW POWER TO CREATE EXCEPTION TO "AMERICAN RULE" AND PERMITS INSUREDS PREVAILING IN COVERAGE DISPUTES TO RECOVER COUNSEL FEES FROM INSURER

Preferred Mutual Insurance Co.v. Gamache, 686 N.E.2d 989;(Mass. 1997).

Insured James Gamache was in an altercation with police officers, who subdued Gamache after considerable effort when called to the scene of a fight. Gamache was apparently under the influence of alcohol but fought fiercely, injuring the knee of one of the policemen, who brought suit against Gamache for "negligent, reckless and/or wanton conduct." Gamache was insured under his parent's homeowners policy.

The insurer denied coverage, citing the intentional act exclusion of the policy, which stated that the insurance "does not apply to bodily injury . . .

which results directly or indirectly from . . . an intentional act of the insured," wording slightly different from the intentional act exclusions of most liability policies (which normally state that coverage is precluded when the loss is "expected or intended from the standpoint of the insured").

The Court held that the policy's limiting language precluded coverage where the injury in question was intentionally caused but did not bar coverage simply because the conduct at issue was volitional. For example, Gamache may have intended to lash out at the policemen in order to avoid being restrained or to continue fighting his nonpolice opponents. But this intentional behavior by Gamache may not have aimed to injure the policy officer. To avoid coverage, the insurer would be required to demonstrate at trial that the injury was subjectively intended by the insured, not merely that the insured voluntarily engaged in the conduct that caused the injury or that a reasonable person in the position of the insured would have expected the injury to result as a consequence of the insured's voluntary conduct. *See* 686 N.E.2d at 990.

Although the Supreme Judicial Court is not clear on the burden of proof, its affirmance of the Appeals Court decision in *Gamache* shows that on remand, the insurer is required to prove the requisite degree of intent to injure in order to avoid coverage because the intentional act language is contained in a policy "Exclusion." *See Preferred Mut. Ins. Co. v. Gamache*, 675 N.E. 2d 438 (Mass. App. Ct. 1997). Although the intended injury defense has come to be known by the shorthand reference of the "intentional act exclusion," its limitations on coverage are often contained in the insuring agreement, which provides coverage for an "occurrence" and defines a covered "occurrence" as loss not expected or intended by the insured. Even where the intentional act limitation is not in the "Exclusions" section of the policy per se, many courts place the burden of persuasion on the insurer because the intentional injury limitation operates in the nature of an exclusion, wherever it is located in the policy.

In taking this position,the Massachusetts High Court aligned itself with the majority of jurisdictions, adopting the so-called "subjective" approach to construing the intentional act exclusion (focusing on what the insured in question intended) rather than using an objective approach (what a reasonable insured should have expected from its behavior). The majority approach adopted in Massachusetts of course tends to provide for broader coverage: insureds often act below the standard of a reasonable person in causing injury but seldom willfully cause injury. The *Gamache* Court reasonsed that using

the objective standard would tend to undermine the purpose of the liability insurance provisions of a policy by eliminating coverage where the insured acted negligently, an improper result because coverage for negligence is the basic purpose of liability insurance.

In addition, the *Gamache* Court determined that policyholders prevailing in coverage disputes with an insurer could recover the reasonable counsel fees incurred in obtaining coverage. Massachusetts, like most every American court, follows the "American Rule" that in litigation each party must pay for its own legal fees regardless of the results. By contrast, the "English Rule" prevailing in Great Britain and other countries provides that that the losing party must pay a reasonable attorney's fee to the winner. The Court determined that a departure from the American Rule is required where an insurer incorrectly refuses to defend the insured because the insurer-insured relationship is the type of special relationship that warrants a departure from the American Rule because of the importance for insureds in having a ready defense against potentially bankrupting liability claims.

The American Rule has historically been subject to several well-established exceptions such as when a contract provides for fee-shifting or where fee-shifting is authorized by statute, where a litigant conveys a common benefit to others or creates a common fund available for others, where the victor vindicates an interest of the judicial system (such as enforcing contempt sanctions against the opponent) or when special circumstances warrant, such as when the losing party has acted with fraud, bad faith, or vexatiousness. The *Gamache* Court took the "special circumstances" exception a step further and determined that outright bad faith by the insurer should not be required for fees recovery by the prevailing insured in view of the importance of the duty to defend to the insured.

Although other jurisdictions have a similar policy regarding fees recovery in duty to defend cases, most of these exceptions to the American Rule are established by statute rather than a common law decision of the courts. *See* 686 N.E.2d at 991-92 (discussing rationale of American Rule and exceptions and indicating other states allowing insured to recover fees).

TWO ADDITIONAL COURTS LIMIT REACH OF ABSOLUTE POLLUTION EXCLUSION AND REJECT INSURERS' ATTEMPTS TO AVOID COVERAGE FOR CLAIMS ARISING OUT OF CARBON MONOXIDE POISONING

Western Alliance Ins. Co. v. Gill, 686 N.E. 2d 997 (Mass. 1997); *American States Ins. Co. v. Koloms*, 687 N.E.2d 72 (Ill. 1997).

The Supreme Courts of Massachusetts and Illinois both determined that the so-called absolute pollution exclusion in contemporary commercial general liability policies does not bar coverage for claims related to negligence resulting in carbon monoxide poisoning simply because carbon monoxide is a dangerous gas and as such falls within the literal reach of the pollution exclusion, which on its face states that it excludes liability claims related to any "actual, alleged or threatened discharge, dispersal, release or escape of pollutants," with pollutants defined as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste."

The Illinois Court faced a situation where the claim was against an insured landlord for failure to properly maintain a building furnace which emitted the CO fumes that caused the injuries resulting in the claim. Examining the background, history, and purpose of the exclusion, the *Koloms* Court determined that the exclusion -- despite its broad literal language -- was intended only to bar coverage for the traditional sort of waste discharge and diffuse contamination ordinarily thought of as pollution. Claims for the type of injuries traditionally arising from nonpolluting forms of insured negligence were not to be excluded. Hence, despite the linguistic breadth of the exclusion, the Illinois Court limited the reach of the exclusion in order to render a coverage determination the Court viewed as more consistent with the purpose of the Commercial General Liability (CGL) and the exclusion and the intent of the drafters. *See American States Ins. Co. v. Koloms*, 687 N.E.2d 72, 77.

Citing *Koloms*, the Massachusetts Court stated that the absolute pollution exclusion "should not be reflexively applied to accidents arising during the course of normal business activities simply because they involve a 'discharge, dispersal, release or escape' of an 'irritant or contaminant.'" *Western Alliance Insurance Co. v. Gill*, 686 N.E.2d 997,999 (Mass. 1997). Following this analysis and confronted with a claim by a restaurant patron who suffered carbon monoxide poisoning as a result of poor ventilation at the restaurant,

the *Gill* Court found coverage not to be thwarted by the exclusion or the contaminant's role in bringing about the injury.