A "KEENE" STORY

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I had always imagined that when I made my mark in the law, it would be in the area of taxation. I wanted to be a tax lawyer and earned an LL.M. in Taxation from New York University School of Law. It never occurred to me that my most recognized achievement in the law would lead me to become, as one periodical put it, one of twenty persons who "have left their mark on risk management and property/casualty insurance."[1] I was the only lawyer on the list. Pretty heady stuff!

The case that made the difference was *Keene*.[2] My client, the Keene Corporation, manufactured thermal insulation products that contained asbestos. As we now know, asbestos gets into and then stays in the lungs of the people who breathe it. Once it is in the lungs, it wreaks havoc, even if no more asbestos is inhaled. People who have inhaled asbestos, whether over a short period of time or over a long period of time, often become seriously ill years later.

Most asbestos workers inhaled asbestos produced by a number of different manufacturers. The question of which asbestos manufacturers would be legally liable for which asbestos-related injuries was answered in 1973.[3] The *Borel* case placed the entire asbestos industry on the hook for any and all injuries to people who breathed asbestos, regardless of which manufacturer's asbestos caused the injury.[4] The *Borel* court applied the theory of joint and several liability and ruled that each manufacturer-tortfeasor who contributed to the injury was responsible for the entire injury.[5] We now know that *Borel* was the beginning of economic demise for virtually every company that had ever produced asbestos.

Assume a construction worker inhaled asbestos manufactured by Johns Manville. Those asbestos fibers would lodge in the worker's lungs and begin the long, slow process of causing illness. Assume the worker continued installing insulation, and two years later, his employer began purchasing insulation products manufactured by Keene. The progression of the lung disease would continue. Now assume that five years after the worker retired from his job he

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1 Ron Judd, *Risk Managers to Make Views Known*, BUSINESS INSURANCE, Oct. 21, 1987, at 48.

2 Keene Corp. v. Ins. Co. of N. Am., 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982), *rev'g* 513 F. Supp. 47 (D.D.C. 1981).

3 Borel v. Fibreboard Paper Prods., 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

4 *See id.* at 1093, 1103-04.

5 *See id.* at 1102.

was diagnosed with lung cancer. Under *Borel*, Keene is liable for all his injuries, including his lung cancer.

In the aftermath of *Borel*, Keene Corporation turned to its insurance companies for coverage – companies to whom Keene had paid premiums for many years in exchange for agreements by the companies to defend and indemnify Keene if Keene was sued for causing injury to another. But the insurance companies balked at paying the substantial claims for which the asbestos manufacturers were liable in the post-*Borel* world. The insurance companies relied on a very narrow interpretation of when coverage was "triggered" in order to deny asbestos-related claims. Insurers took the position that standard commercial general liability (CGL) insurance policies would cover companies like Keene only when the illness came to light during the policy period. This interpretation left asbestos manufacturers like Keene sitting between the metaphorical rock and the proverbial "hard place." Under *Borel*, Keene would be liable whenever Keene was *one of* the manufacturers whose asbestos products had been inhaled at any point during the progression of the worker's injury. Under the tort system, as enunciated in *Borel*, Keene would almost always be "liable," if a worker had inhaled a Keene product at any time during the decades asbestos was in common use. But under the insurer's purported system of policy triggering, that liability would be covered only for the relatively short period of time when the ravages of asbestos injury were dramatically prominent. In other words, Keene and other manufacturers, would almost never be covered by the liability insurance they had faithfully purchased over so many years.

I. The Standard Commercial General Liability Policy[6]

A Standard Commercial General Liability (CGL) insurance policy is a legal liability insurance policy.[7] It protects against legal liability. This is both "litigation insurance" and "tort liability insurance." The purpose is both to compensate victims and to protect policyholders, even if they engaged in tortious conduct. Thus, CGL coverage exists whenever someone imposes, or

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[6] The Devil's or cynic's view of CGL insurance is that tortfeasors are bad people or bad companies, and therefore depriving them of insurance is socially acceptable. In the 1960s, the insurance industry revised the form of its liability insurance policies, primarily under the auspices of two insurance industry organizations: the National Bureau of Casualty Underwriters (NBCU) and the Mutual Insurance Rating Bureau (MIRB). These were predecessors of the current Insurance Services Office, Inc. (ISO). One of the functions of these organizations was to draft insurance policy forms for their member insurance companies. Many of the insurance policies involved in insurance coverage cases are standard form CGL insurance policies adopted in 1966, with uniform language adopted as a result of the policy revisions formulated by these insurance industry associations.

[7] As Aetna alleged in its complaint in *Aetna Causalty & Surety Co. v. Abbott Laboratories*, 636 F. Supp. 546 (D. Conn. 1986):

> Each of the defendants is or has been insured by Aetna under various policies against legal liability for bodily injury caused by its products.

Liberty Mutual Insurance Company wrote in its brief to the Court of Appeals in *Keene*:

> [T]he policies require the insurer to pay claims for which the insured is "legally liable."
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> Keene Corp. v. Ins. Co. of N. Am., 667 F.2d 1034 (D.C. Cir. 1981), *cert denied*, 455 U.S. 1007 (1982).

attempts to impose legal liability upon a policyholder, unless a specific exclusion applies.[8]

As noted, CGL policies insure against legal liability. Thus viewed, most insurance coverage disputes should evaporate.

II. Trigger of Coverage

The standard CGL policy language sets forth the trigger of insurance coverage (i.e., the event that requires an insurance policy to provide insurance coverage for a claim). Under the CGL policies, the trigger of coverage is "injury during the policy period." The dispute in the *Keene* case was over what constituted an "injury during the policy period." Did the first breath of asbestos fibers constitute an injury? That would be exposure. Was it the diagnosis of asbestosis, or lung cancer? That would be manifestation. How about the silent, hidden deterioration of the lungs after exposure, but before manifestation? That would be exposure in residence. Was that the injury that triggered coverage?

III. The Distrct Court Action

On behalf of Keene, our firm filed a declaratory judgment action in 1978 against four insurance companies - Insurance Company of North America (INA), Aetna Casualty and Surety Company, Liberty Mutual Insurance Company, and Hartford Accident and Indemnity Company.[9] These insurance companies had sold CGL insurance to Keene almost continuously from 1961 to 1980.

The case was heard by Judge June L. Green of the United States District Court for the District of Columbia. Lawyers interested in insurance litigation and in justice must see the movie made of John Grisham's novel *The Rainmaker*.[10] Rudy Baylor, the hero, was blessed with a policyholder friendly judge. I have never had a policyholder friendly judge. Judge Green was not friendly to me but at least she did not appear overly friendly to the insurance company lawyers in the case. On one occasion she castigated me for sending her a letter (with copies, of course, to all counsel). That, she said, was not the proper way to communicate with her court. Perhaps, but it hardly struck me as a heinous sin since it was not an attempted *ex parte* communication.

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[8] The contractual rule of thumb enunciated by courts is that they narrowly construe exclusions and thus maintain the expected broad coverage of the CGL policy. Typical exclusions are: Contractual; Automobile; Aircraft; Transportation of Mobile Equipment; Watercraft; War; Liquor Liability; Workers Compensation; Employers' Liability; Care, Custody or Control; Alienated Premises; Design Error; Injury to Product; Injury to Completed Work; Pollution; Sistership; Explosion; Collapse and Underground Damage; and Water Damage. *See generally* 1B Appleman, Insurance Law and Practice §§ 371 *et seq.* (1983). *See also* Jeffrey W. Stempel, Law of Insurance Contract Disputes § 14.06 (2d ed. 1999 & Supp. 2002) (discussing different CGL triggers utilized by courts).

[9] In a separate case, we sued Pennsylvania Manufacturers' Association Insurance Company, which had insured Keene from 1948 to 1959. *See* Keene Corp. v. Pa. Mfr. Ass'n Ins. Co., 513 F. Supp. 47 (D.D.C. 1981), *reversed and remanded*, 667 F.2d 1034 (D.C. Cir. 1981).

[10] John Grisham, The Rainmaker (1995).

The non-jury trial of the *Keene* case attracted a number of observers. One was a lawyer from Boston who was counsel for Eagle-Picher, another manufacturer of products containing asbestos. Eagle-Picher was interested in the case but was not a party. The lawyer was being paid his normal hourly rate simply to watch the proceedings and report.[11]

We closed the trial late one afternoon. Perhaps predictably, I was relieved to have finished. The Eagle-Picher lawyer had been observing from the jury box. He bounced out of the box with an encouraging *"GOOD JOB! I HOPE YOU LOSE!"* With friends like that . . . . He must have thought Eagle-Picher's interests were better served by the narrower insurance coverage that Keene was seeking. The "less is more" principle appeals to many lawyers who represent policyholders against insurance companies.

Judge Green held that the cost of indemnifying and defending Keene should be prorated among the insurance companies according to the relative extent of exposure during their respective policy periods.[12] She also held that Keene should be liable for a pro-rata share of the costs if a worker's injury occurred during a period in which Keene had no liability insurance.[13]

Keene appealed.

IV. The Appeal

I had never before been in the courtroom of the United States Court of Appeal for the District of Columbia Circuit. It is 1930s stark-grand. When the Keene crew arrived at about 9:30 a.m. for the argument of the appeal, there seemed to be a rather full crowd in the hallways. We headed into the lawyers' waiting room, only to find that it was full. I saw the lawyer for INA with a yellow pad writing out his argument. As I recall, each party had twenty minutes. The last minute preparation by the INA lawyer struck me because I had spent three days holed up in a hotel room in Washington, D.C., preparing for my fifteen minutes in the sun. (I had ceded five minutes to Robert Saylor of Covington & Burling. Saylor had filed an amicus brief in the case on behalf of some of the other asbestos producers). Glenn W. Bailey, the principal owner and chairman of Keene, was there.[14] We went into the courtroom, which was jam-packed. The panel of judges was comprised of David L. Bazelon, Patricia

[11] Eagle-Picher was also facing asbestos liability and would also bring an insurance coverage action for coverage of asbestos liabilities.

[12] *Keene*, 513 F. Supp. at 51.

[13] *See id.*

[14] Glenn W. Bailey is one of the most extraordinary men I have ever known – and a true victim of the asbestos litigation epidemic. He was a follower of Harold Geneen, who put together ITT and Royal Little, and was the founder of Textron. The business history is that these conglomerates were to be the wave of the future because of superior management. Bailey bought Keene and brought management excellence. I was Bailey's principal lawyer, and I handled, among other things, his purchase of Baldwin-Ehret-Hill, Inc. (BEH), a small Pennsylvania based manufacturer of asbestos products. BEH purchased raw asbestos from Johns Manville Corp., which was a miner, and from the United States government wartime stockpile. BEH was owned principally by the Corson family, an old Pennsylvania Quaker family. It seems clear as a bell to me that BEH and the Corson family gave Keene the asbestos litigation disease aided and abetted by Johns Manville. Many years after the BEH purchase, a company named "Nosroc" sued Keene, alleging that Keene was somehow

Wald, and Malcolm R. Wilkey. Bob Sayler and I made our pitch. At one point I was asked:

> Court: Counselor, let's see if I have your point: What you are saying is that each insurance company on the risk at any time, from first inhalation of asbestos until manifestation of disease, is fully responsible for indemnity and defense?
> Anderson: Your Honor, you've got it!

I knew at that moment that at least one person other than my partner, Irene Warshauer, had gotten the point. Credit for support also goes to Howard Mileaf, Keene's general counsel.

John P. (Jack) Arness of Hogan & Hartson argued for Hartford. I had earlier been advised to "be nice" to Mr. Arness because he was "on Keene's side."[15] Mr. Arness had been the victor in the only bad faith case[16] against an insurance company in the District of Columbia, so there was some reason to "be nice" to him. My observation from earlier meetings was that if an insurance company executive were present, Arness would cozy up to him. (There were no "hers" in the executive ranks of the insurance companies at that time). Mr. Arness argued that there should be no insurance coverage for Keene because Keene and the other producers of materials containing asbestos were "killers." So much for insurance being the "Safe Hands" and "Good Neighbor" industry.

During the hearing, Judge Wald stated that she had an asbestos pad on her kitchen stove and asked me whether it might be a health problem. I responded that, were it not unethical, I would handle her personal injury case against the pad manufacturers on a contingent fee basis. That brought a laugh from the crowd.

The argument ended and the courtroom emptied. It was not until that moment that I realized that the entire audience in the packed courtroom was there to hear the Keene argument. That may not seem unusual, but it is. The audience for an appellate argument usually consists of a small handful of lawyers waiting for their cases to be called, two (at most) observers, and three homeless persons there to get out of the cold (or heat, depending on the season).

V. The Circuit Court Opinion

When the D.C. Circuit Court issued its opinion, written by Chief Judge Bazelon and joined by Judge Wilkey, with Judge Wald concurring in part, we won one and we lost one.

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responsible for its asbestos litigation problems. Spell "Nosroc" backwards and you get Corson. No wonder Bailey rails against lawyers.

[15] Hartford's arguments before the court did indeed provide for greater coverage than would result from the arguments offered by the other insurance companies. INA, Liberty, and Aetna argued that coverage was triggered only by the manifestation of either asbestosis, mesothelioma, or lung cancer. Hartford, in contrast, argued that continued exposure to asbestos would trigger continued coverage, but at the same time argued that continued progression of the disease, without continued exposure, would not trigger additional coverage. This was roughly the position adopted by the district court.

[16] Cent. Armature Works, Inc. v. Am. Motorists Ins. Co., 520 F. Supp. 283 (D.D.C. 1980).

First, the good news: the court agreed with Keene that its GCL policies were triggered by exposure to asbestos, by the progression of asbestos-related illness, and by manifestation of that illness. The words of the court echoed the crucial question above:

> We conclude, therefore, that inhalation exposure, exposure in residence, and manifestation all trigger coverage under the policies. We interpret "bodily injury" to mean any part of the single injurious process that asbestos-related diseases entail.[17]

More good news for Keene was the court's decision that the insurance companies on the risk could not discount their liability for the time Keene was uninsured.[18] The court said it had no authority to pretend that Keene had a "self-insurance" policy during that time period.[19] While the insurance companies could certainly apportion the risk among themselves according to the "other insurance" provisions of each policy,[20] they could not apportion any of that risk to Keene.[21]

Judge Bazelon's decision in *Keene* had some bad news for us, too. We had argued that for each injury for which Keene was sued, Keene was entitled to full indemnity up to the sum of the limits of all the policies that applied to the injury. The court flatly rejected this argument.[22] It held instead that only one policy's limits could apply to each injury. We could choose which policy would indemnify us for which injury, but we could not "stack" the applicable policies' limits of liability.[23]

An old proverb tells us that success has a thousand fathers but failure is an orphan. After the Court of Appeal's decision, the inventors of the "triple trigger," or as some preferred to call it the "comprehensive trigger," were legion. In one of the strangest twists of all, one of the losing lawyers, counsel for Liberty Mutual, billed himself as "Trial Counsel in the *Keene* case."

I am still amazed that *Keene* continues to be controversial, even infamous. As it turned out, all we did was tell the court what was in the insurance company files, underwriting materials, and sales pitches.

The *Keene* decision exploded on the insurance scene in 1981. *Business Insurance*, a major insurance trade publication, headlined:

KEENE HITS A 300 MILLION DOLLAR JACKPOT.

All parties moved for rehearing, and the insurance companies applied to the United States Supreme Court for certiorari. It was denied.[24]

The case went back to Judge Green in the District Court. My partner, Arthur S. Olick, ably handled the wrap-up.

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[17] Keene Corp. v. Ins. Co. of N. Am., 667 F.2d 1034, 1047 (D.C. Cir. 1981). In interpreting "bodily injury" in this manner, the court rejected our characterization of asbestos-related diseases as a series of discrete injuries beginning with inhalation exposure and continuing throughout the development of the disease. The court instead treated the diseases at issue as single injuries that occur over extended periods of time. *Id.* at 1044 nn. 19-20.

[18] *Id.* at 1048-49.

[19] *Id.*

[20] *Id.* at 1050.

[21] *Id.* at 1048-49.

[22] *Id.* at 1049.

[23] *Id.*

[24] Ins. Co. of N. Am. v. Keene Corp., 456 U.S. 951 (1981).

VI. Assessing the Circuit Court Opinion

It was not a coincidence that the circuit court's holding on the trigger of coverage was almost identical to the insurance industry's own interpretation of its policies before *Keene* was filed. At the *Keene* trial, we introduced, among other things, a document containing the minutes of an April 21, 1977 insurance industry wide meeting in New York City with respect to potential asbestos and DES liability. At the meeting, the insurance industry heavyweights discussed the *Borel* decision, and how that case's application of joint and several liability would affect liability insurance companies:

> The majority view was that coverage existed for each carrier thoughout [sic] the period of time the asbestosis condition developed, i.e. from the first exposure through the discovery and diagnosis. The majority also contended that each carrier on risk during any part of the period could be fully responsible for the cost of defense and loss. The majority relied on *Borel v. Fibreboard Paper Products Corporation.*

The majority was cognizant of the fact that *Borel* was not a coverage case. Despite this, however, the majority believed that the essential holding of *Borel*, i.e., that the injury was cumulative and that with each exposure the plaintiff suffered an injury, would lead to the courts holding that each insurance company covered the loss and would be liable for the full defense and possibly the full loss as well.[25]

The impact this document had on the circuit court's decision taught me a very important lesson about how to litigate an insurance case. Lawyers handling insurance coverage cases for policyholders suffer from a near fatal illness. They know what is in the law books but they do not know what is in the insurance books. They know the "law" of insurance, but they do not know the "lore." Insurance lore is an anathema to insurance company lawyers (and to most judges).

Talk to a lawyer representing an insurance company and you will hear about cases. Insurance companies want to litigate insurance coverage cases on the level of "my cases are better than your cases." This style of litigation is perfectly acceptable to policyholder and claimants' lawyers, even though it is a trap. This style also fits judges to a tee. The judiciary is very comfortable with a case involving only legal questions. The result is that insurance coverage cases boil down to "my gray flannel suit is better than your gray flannel suit." By this means, "insurance nullification by litigation" prospers.

What lawyers and judges do not realize is that reported cases are not a representative sample. The countless cases in which all goes well produce no second round of litigation about insurance coverage after conclusion of the tort claim. Every reported insurance coverage case is one with a problem. That distorts the case law picture. In particular, one loses sight of the fact that almost all cases that are defended by the insurance company are fully covered, and of no concern to anyone but the insurance company. Reading cases is like reading tombstones. Precious little can be learned about how to live from reading tombstones or obituaries.

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[25] Minutes of April 21, 1977 Meeting of the American Insurance Association and American Mutual Insurance Discussion Group on Asbestos at 2 (citation omitted). *Keene*, Joint Appendix III at 987.

The secret to litigating a claim against an insurance company is to rely not on the cases in the law books but rather on the documents that come out of the insurance companies' own files. Insurance companies fight like cornered tigers to avoid disclosing internal manuals or any other internal documents because they know that their litigation stances are completely contradictory to their internal policies. Insurance companies do not want outsiders to know how insurance works; they do not want anyone to know the "lore" of insurance. No surgeon would perform an appendectomy without knowing anatomy. Why is it that lawyers regularly do the equivalent? (I hasten to note that when I handled the *Keene* case I was a believer in reading cases. Only later did I learn that the "lore" of insurance is more important than the "law.") Judges warm up to "law" and avoid "lore."

The result in the *Keene* case was a miracle of sorts because "corporate-type" litigators represented the policyholder. There is a recognized and vast difference between the American Trial Lawyers Association (ATLA), who represent plaintiffs, and the Defense Research Institute (DRI), who represent defendants. One is fish and the other is fowl. There are precious few lawyers who can both swim underwater and fly. *Keene* was a learning experience and a personal conversion that continued for many years. It was a fight against the financial establishment. (Sort of fun when you get the knack of it). The *Keene* team approached the case as though we were defending an anti-trust case or a massive products liability case. We were naïve. We knew how to get to "NO," but we did not know how to get to "YES." We geared efforts to get to settlement. Fortunately, settlement efforts were unsuccessful. We trusted the insurance company lawyers and we trusted their clients. In the beginning, I thought they were worthy of our trust. Why not? We were all members of the same fraternity. All gray flannel suits were equal.

Corporate America is wedded to the proposition that it has an affinity with the insurance industry. Both wear gray flannel suits, the lions and lambs. In their minds, they have a common enemy: the unwashed American Trial Lawyers Association. ATLA is an organization of plaintiffs' lawyers, advocates who are trying to hold corporations to their contractual, as well as civic obligations. For this, ATLA is accused of draining the country of its blood and sap, its industrial might. Never mind that if tort lawyers were abolished, the insurance industry would be emasculated. Who would bother to purchase Comprehensive General Liability insurance if there were no tort lawyers? The insurance industry has a symbiotic relationship with plaintiffs' attorneys, which it would rather not admit.

VII. Subsequent Applications of *Keene*

Another area of law in which *Keene* ultimately had a significant impact is environmental litigation. During the 1980s and 1990s, many chemical manufacturers were sued for the damage that their products caused to the environment. These companies turned to their comprehensive general liability policies to pay the costs of defending the claims and the costs of any damage awards that the manufacturers had to pay. Not surprisingly, the insurance companies denied coverage on the ground that the "injury" that triggered the policy did not occur during the policy period.

But decisions like *Montrose Chemical Co. v. Admiral Insurance Co.*[26] applied *Keene* in this context. In that case, Montrose, a manufacturer of DDT, had been sued by the state for reimbursement of the money that the state had spent for investigation, removal, and remediation of Montrose's toxic waste site. In addition, individuals had sued Montrose for personal injuries, including wrongful death and property damage, caused by the manufacturer's hazardous waste disposal practices. Montrose expected that its insurance companies would indemnify this liability. The California Supreme Court held that all policies in effect during the time of continuous or progressively deteriorating bodily injury or property damage were triggered, and each carrier owes an independent duty to respond in full up to their policy limits on behalf of its policyholder:

> We therefore conclude that the continuous injury trigger of coverage should be applied to the underlying third party claims of continuous or progressively deteriorating damage or injury alleged to have occurred during Admiral's policy periods. Where, as here, successive CGL policy periods are implicated, bodily injury and property damage which is continuous or progressively deteriorating throughout several policy periods is potentially covered by all policies in effect during those periods.[27]

VIII. *Keene's* Legacy

It must have been a year or more before the significance of the *Keene* decision really sank in for me. Naïvely, I assumed that since *Keene* held the insurance companies to their own underwriting practices, their marketing pitches, and their own uniform claims handling practices, that would be the end of the matter. I assumed that, from then on, it would be standard for courts to honor the admitted interpretations of the insurance policy language. Insurance companies would no longer be able to weasel out of insurance coverage. Not so. Onto the stage marched an army of what might be called "insurance nullification lawyers,"[28] armed with all new techniques for denying coverage. The insurance companies have even described their own lawyers as crooked lawyers.[29]

In New York – and across the country – lawyers were importuned to attend seminars on insurance law and there was an entirely new branch of the publishing industry selling the latest news and propaganda about insurance. The *Keene* case, instead of simplifying insurance coverage, became an evil in the mind of the insurance companies, one that they thought would take

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[26] 42 Cal. Rptr. 2d 324 (1995).

[27] *Id.*

[28] *See* Eugene R. Anderson, Stacy L. Gordon & Paul Liben, *Insurance Nullification by Litigation*, Risk Management, Apr. 1994, at 46.

[29] *See* Eugene R. Anderson, *Insurance Companies Expose Insurance Industry Crooked Lawyers*, Coverage, Mar./Apr. 2001, at 20. Insurance companies even fight having to pay the lawyers that the insurance companies themselves hire to defend policyholders against third parties.

thousands of legal witchdoctors to exorcise. And all of that could have been settled for $5,000,000 when the case was first tried before Judge Green.

IX. Insurance Company Strategies Post-*Keene*

Here are some of the strategies that insurance companies have adopted in the years since *Keene* in order to avoid paying claims:

A. *Defame Policyholders*

Insurance companies try to convince courts that tortfeasors are not entitled to the insurance coverage they purchased because they are tortfeasors. Hartford did not invent the concept that policyholders are bad. Hartford's charge that Keene was a killer did not ring a bell with the *Keene* court, but it is overall very effective. Shell Oil was crucified by Travelers in the *Rocky Mountain Arsenal* case with what came to be known as "The Dead Duck" defense.[30] Shell killed ducks with its effluent; therefore, it was not entitled to insurance coverage. It may strike some as strange that an insurance company can sell tortfeasor insurance and then deny coverage because the purchaser is a tortfeasor.

B. *Insurance Nullification by Litigation*

Insurance companies make money by saying "NO."[31] The American legal rules reward opportunistic breach of contract. The law and economics school recognizes this. Judge Richard Posner has articulated it. Insurance companies bank on it. Judges pander to it. When an insurance company breaches its contract, the legal system is arrayed against the policyholder. Lloyds (and its stepchild, Equitas) has a well-formulated alternative to paying claims. It is litigation. Lloyds can explain quick as a wink that policyholders are better off financially to accept 37 cents on the dollar rather than to litigate. This is the "37 cent solution."[32] Contrast the "37 cent solution" with Lloyds' current advertising themes. The author of Lloyds' "37 cent solution," Scott Moser, received his training from Aetna in Connecticut.

C. *Hide Your Files*

Insurance company employees are taught the honest and honorable ways to handle claims.[33] They are also taught that they must protect the legitimate beneficiaries of their trust by fighting off the hordes of wrongdoers and assorted scalawags intent on plundering the insurance company coffers. Underwriters write insurance to cover. But claims department employees, despite what they are taught about honesty and customer service, learn on the job to interpret insurance to negate coverage.

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[30] *See* United States v. Shell Oil Co., 605 F. Supp. 1064 (D. Colo. 1985).

[31] Anderson, Gordon & Liben, *supra* note 28, at 46.

[32] *See* http://www.jtw-re.co.uk/botresearch.htm (Scott Moser, Claims Director for Equitas Ltd., last visited Jan. 14, 1999).

[33] *See* James J. Markham et al., The Claims Environment (1st ed. Insurance Institute of America 1993).

A generation ago insurance company lawyers talked about the "intent of the underwriters." Now they hide the documents that might shed some light on that intent. Insurance companies no longer want the intent of the underwriter to be disclosed in court. A focus on underwriting intent might lead some nosy claimant or policyholder's lawyer to seek to take the pre-trial deposition of the underwriter!

D. *Change the Rules by Getting the Policyholder Into Court*

Insurance company lawyers are the best contract nullifiers in the world. Once in court they claim that there is no longer any duty of good faith. No longer is there any risk that some claims department employee will become fed up and break ranks. The accepted rule for lawyers defending insurance companies against claims in court is the same as that for defending accused criminals against a criminal prosecution, as set forth by Justice Byron White in *United States v. Wade*:

> [D]efense counsel has no . . . obligation to ascertain or present the truth. Our system assigns him a different mission. He must . . . defend his client whether he is innocent or guilty. . . . If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth . . . . In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.[34]

E. *Paralysis by Analysis*

Another legal phenomenon which encumbers policyholders (and others) with claims against the insurance industry is "paralysis by analysis." The insurance companies convince the courts that there are no simple answers and that each insurance claim must be examined with a high-powered, perverse microscope. Each word must be given special esoteric meaning. Every court decision favoring insurance coverage gets extensive analysis in the trade press. This analysis is designed to show that nothing has really changed.

This practice of fighting over every nuance of every syllable of every policy has fostered the specious "reasonably debatable" rule. Courts have ruled that an insurance company cannot be held liable in tort for bad faith denial of coverage if its position is "reasonably debatable."[35] This holding, in essence, gives permission – and incentive – to insurance companies to wrangle endlessly with their policyholders. After all, if enough money is involved, every position can be debated. But this practice is patently unethical. While everything is reasonably debatable, it is not reasonable to debate everything. Paralysis by analysis is a recurring phenomenon in courts, and in other areas of the law, particularly when the financial establishment is in jeopardy. An antitrust case, for example, is a forty year journey into the wilderness.

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[34] 388 U.S. 218, 256-57 (1967).

[35] *See, e.g.*, Van Holt v. Liberty Mut. Fire Ins. Co., 163 F.3d 161 (3d Cir. 1998); Radecki v. Mut. of Omaha Ins. Co., 583 N.W.2d 320 (Neb. 1998).

X. Lessons for Policyholders

These strategies on the part of insurance companies have forced policyholders to learn certain lessons too. Here are some of them:

A. *Insurance Is a Defective Product*

The homeowner with an insurance claim soon learns that insurance is a defective product. It does not work. Corporate policyholders get the same treatment. The insurance business for many, many generations, even centuries, was an honorable profession. There were miscreants, but the industry had a tradition of integrity. No longer. It is now a financial game and an inefficient one at that. Insurance companies recycle money. As in a poker game, they take in a "pot," rake off a share, and redistribute the pot. But even a Las Vegas casino operates on a mere two percent rake off. The insurance industry operates on a sixty percent rake off. Insurance is a completely uneconomic delivery mechanism for benefits.

The United States government social security delivery system is more efficient. It charges 1¾ cents to deliver 98 ¼ cents. Though comparing the insurance industry to the social security system may be comparing apples to oranges, they are both fruit.

B. *Insurance Regulation Does Not Work*

Policyholders and claimants who go to the state insurance departments learn very rapidly that these public servants serve only the insurance industry. Claims controversies are seldom resolved satisfactorily. Insurance department employees move with ease into well-paid executive positions in the insurance industry. The regulated control the regulators.

C. *Insurance Coverage Litigation Is Expensive and Long Drawn Out*

Policyholders and claimants do not live forever, and few have the fortitude for a battle that may take one-third of their expected lifetime. In 1996, the Wall Street Journal reported that insurance companies spend at least $1 billion a year on legal wrangling with customers.[36]

Corporate memories are ten years or shorter. The policyholder corporation that has been stiffed by Great Benefit Insurance Company will be back in ten years asking Great Benefit for a new insurance policy.

Insurance companies are litigation machines. Policyholders and claimants, on the other hand, are litigation averse. The cultural difference causes major injustices. One of the insurance industry's worst sins is the practice of vacatur. The way this scheme works is this: if a lower court issues a pro-insurance company decision, the insurance company offers the policyholder a portion of the policy amount as a settlement – some might call it a bribe – in exchange for the policyholder's agreement not to appeal the decision. If a lower court issues a pro-policyholder decision, the insurance company offers a settlement over and above the policy amount in exchange for the policyholder's

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[36] Leslie Scism, *Disputed Claims: Tight-Fisted Insurers Fight Their Customers to Limit Big Awards*, Wall Street J., Oct. 15, 1996, at 1.

agreement to sign onto a joint motion to vacate the decision. In this manner, insurance companies wipe fifty percent of the pro-policyholder decisions off the books.

D. *Litigants Get Settlements but Not Justice*

The romantic notion of a working civil justice system may be a myth. The judiciary, with enthusiastic cheers from business, politicians, and the legislature, is busy reducing the role of the jury. In reality, we do not have a litigation system as much as we have a civil settlement system. Insurance companies know the system and, for them, it is money in the bank. The common insurer refrain is "We pay what we owe; not a penny more; not a penny less." Hardly. The policyholder who takes an insurance claim to court pays a lawyer. The judge (or the system) forces a settlement. The policyholder ends up with a lot less than justice.

Courts need the cooperation of insurance companies in order to settle cases and clear the dockets. If a judge angers an insurance company in one case, it is not long before that same insurance company stops cooperating in its other cases. The insurance company will simply refuse to settle with any policyholders, and the court's docket will balloon.

E. *Judges Make Lousy Underwriters*

The judicial system has been brainwashed into believing that judges are effective underwriters. Serious automobile accident cases are tried with the assistance of experts. No judge would try a medical malpractice case involving a botched appendectomy without medical experts. A case involving defective construction of a nuclear power plant brings forth an army of experts.

Not so for insurance! Judges have been led to believe that they can read, understand, and apply an insurance policy. This makes them "underwriters by hindsight." Hindsight underwriting severely limits policyholder rights. When an insurance company engages in hindsight underwriting, it is venal. When a judge does it, the insurance company pockets the proceeds. Insurance companies want judges to rule on insurance matters because they know that judges are biased in favor of the insurance industry.[37]

XI. Conclusion

Despite the path-breaking nature of the *Keene* case, the story of Keene Corporation has a sad ending. Although ably led by general counsel Howard Mileaf, Keene could not be saved from asbestos litigation disease. With insufficient access to insurance proceeds (notwithstanding the continuous trigger), Keene's claims against its suppliers, Johns Manville and others, came to naught because Keene lacked the money to fight alone. Keene filed for bankruptcy. In litigation, business, and life, initial appearances can be deceiving and victories in battle hardly guaranty that the war will be won.

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[37] *See* Marc Galanter, *Why The "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, LAW & SOC'Y REV. 95 (1974).