

**INSURANCE LAW
FINAL EXAMINATION
FALL, 1998**

PROFESSOR ANDREA G. CHATFIELD

INSTRUCTIONS: You are required to answer a total of four questions; each is worth 25 points. You must answer Questions 1, 2, and 5; and you must answer either Question 3 or 4. Answers should be written in essay form in the blue books provided. Make sure your examination number is written on the front of each book you use, together with the number of the book out of the total number of books you use. Good Luck!

QUESTION NO. 1

Tony and Tina Lucci, husband and wife, bought a house in Hudson, NH in March, 1996. They received a warranty deed made out to "Mr. and Mrs. Lucci" and executed a mortgage deed in favor of the Hudson Savings Bank. When they purchased the house, Tony met with an insurance agent to procure homeowners fire & property insurance. The agent, Vinnie DeLaria, of the Foss Insurance Agency told Tony that the names of the insureds on the policy should be the same as on the deed to the house. However, Tony told Vinnie he only wanted his own name on the insurance. Vinnie said "I'll see what I can do." On March 23, 1996, the policy was issued in Tony's name only. When Vinnie delivered the policy, he handed it to Tina in an envelope, but Tina never examined the policy. The substance of the policy is attached. The total coverage limitation was \$200,000.00. The mortgagee, Hudson Savings Bank, was named as the loss payee.

Tina and Tony were legally separated in July, 1996, Tony moved out of state, and the family court awarded Tina the house, free and clear of Tony's interest. Tina decided she did not want to live in the house any longer. She moved out of the house in late December, 1996, with the intention of selling it. In early February, 1997, the house and some of its contents were extensively damaged by the freezing and bursting of the pipes in both the upstairs bathrooms, the first floor bathroom and kitchen, and the finished basement. Repairs and renovations were estimated at a cost of \$50,000.00. The burst pipes were caused by the fact that neither Tony nor Tina paid for the next oil delivery, (each thought the other would), and with no oil, the heating system failed. The value of the property before the damage was \$200,000.00. The repairs would restore the market value of the property. Therefore, Tina used her money from a recent inheritance to pay for the repairs. Also destroyed were Tina's personal computer and software (valued at \$2,500.00) and 3 of her Persian rugs (each valued at \$3000.00).

Tina, believing that the homeowner's policy Tony got through Vinnie named her as an insured, put in a claim to Quincy Mutual for the cost of the renovations and her lost personal property. The bank, the loss payee, also notified Quincy Mutual of the loss, but did not make a demand for payment.

**INSURANCE LAW
FINAL EXAMINATION
FALL, 1998**

PROFESSOR ANDREA G. CHATFIELD

The bank also notified Tina that it was planning to foreclose due to delinquent payments. Tina wanted to sell the house unless doing so would hurt her claim for the insurance proceeds. She wrote to Vinnie DeLaria, the agent, and asked whether Quincy Mutual would object to her selling the house and paying off the mortgage. Vinnie responded in a letter stating "such sale would not affect any payment of claim resulting from the February occurrence." Thus, Tina believed that the insurance proceeds payable to either the bank or her at the time of the loss would still be payable to her if she sold the house. She was able to sell the house in May, 1997 for \$200,000.00. She paid approximately \$175,000.00 to the Hudson Savings Bank in June, 1997, satisfying the outstanding mortgage. The bank discharged the mortgage deed. Because of Vinnie's letter, she did not think it was necessary to ask the bank to assign its rights in the insurance to her.

Quincy Mutual denied Tina's claim for coverage. It stated that because no one told Quincy Mutual there were two owners on the home, a policy was not in effect on the Lucci's house, since the named insureds should be the same as the owners of the property under its internal guidelines. The company however, had made exceptions to these guidelines in the past. Further, even if there was a policy in effect, no one is entitled to the insurance proceeds because: Tony Lucci was the named insured when the loss occurred, and he is not entitled to the insurance proceeds because he had no insurable interest in the property when the loss occurred. Further, the bank, which did have an insurable interest when the loss occurred, no longer had an insurable interest in the property because its mortgage was discharged. Finally, Quincy Mutual refused to pay the proceeds to Tina because she was not a named insured when the loss occurred, and even if she had been a named insured, her claim would still be denied, because the damage occurred while the house was vacant.. Can Tina state a claim for coverage against anyone? If so, what should be amount of the coverage award? Explain your reasoning through an analysis of the relevant law in this area.

**INSURANCE LAW
FINAL EXAMINATION
FALL, 1998**

PROFESSOR ANDREA G. CHATFIELD

QUESTION NO. 2

Alice McKenzie is currently an employee of Allied Manufacturing, located in Chelmsford, Massachusetts. She began working for Allied 4 months ago after leaving her job at XYZ Manufacturing. While she was at XYZ, she would suffer from stomach pains from time to time which pains she attributed to indigestion. One month prior to leaving XYZ, Alice went to her doctor complaining of unusually severe stomach pains. He diagnosed her as having food poison, and gave her some medication. The problem abated, but she still felt "twinges of pain" now and again.

When Alice began working for Allied she met with Allied's Benefits Administrator, Polly Purebread. Polly gave Alice the enrollment forms for the Company's group health insurance policy, and explained a little about how the plan worked. The plan was through Green Choice Insurance Co. Polly arranged for the payroll deduction whereby Allied would automatically deduct the 20% of the premium cost from Alice's paycheck for the plan. Allied paid the rest.

Polly routinely answered simple employee questions about the enrollment and claims procedures. If the question involved an answer she was unsure of, she would tell the employee to call the insurance company which provides a toll-free information hot line. Alice noticed in the information booklet she received from Polly, which booklet was prepared by Green Choice, that there was a pre-existing exclusion provision which disallowed coverage of any pre-existing condition that the employee had reason to know of and had seen a physician for within the six months prior to enrollment. The exclusion only applied for the first six months of coverage, and then it was waived by Green Choice. Polly explained to Alice that the exclusion was no longer valid because of a recent change in federal law, and Green Choice was behind in issuing amended booklets.

Four months into her new job at Allied and being on Allied's health plan, Alice collapsed at home, was rushed to the hospital where she underwent some tests. She was diagnosed as having stomach cancer in an advanced stage and needed to be out of work for an indefinite period of time. She submitted her claims for coverage of medical costs to Green Choice, but Green Choice denied coverage under its pre-existing condition exclusion. According to Green Choice, the exclusion is invalid under the federal law only if Alice had been covered under a group health plan with XYZ for at least six months. In fact, Alice did not have group health coverage while she worked with XYZ.

In addition, at the time she began working for Allied, Alice purchased an individual disability policy with Peace of Mind Insurance Company ("POMCO") since Allied did not offer group disability, and Alice is a single mother. On the application form, there was the following question: "Have you ever had any gastro-intestinal disorders within the last

**INSURANCE LAW
FINAL EXAMINATION
FALL, 1998**

PROFESSOR ANDREA G. CHATFIELD

year?" Alice answered this question as no, since she did not believe that food poisoning or indigestion were disorders. She was issued the disability policy soon thereafter. However, after she submitted her claim for disability benefits, POMCO discovered that she had seen her doctor for stomach pains one month prior to applying for the disability policy, and she admitted to an adjuster for POMCO that she had felt pain before and after that visit. POMCO denied disability benefits and cancelled the policy for misrepresentation.

Alice has come to our firm because she wants to fight to get coverage under both the health and disability plans. Because of both denials of coverage, she has been unable to obtain a second opinion as to the best form of treatment, she can get Medicaid coverage for a surgery and some chemotherapy, but not for a new form of chemotherapy whose results are still being studied but which her doctor feels is her best hope. She is close to declaring bankruptcy, and is extremely distressed about how she will be able to provide for her children while she is out of work for medical treatment.

We need to determine if we can sue Green Choice on the health plan and/or POMCO on the disability plan. If so, can we claim not only lost benefits, but also a bad faith breach by either or both companies. If so, would Alice be eligible to collect damages for pain and suffering, or possibly punitive damages? Also, can Alice sue her employer for coverage under the group health plan for Polly's assurances that the pre-existing condition exclusion would not apply to Alice? Please provide me with an office memorandum outlining the significant issues and possible outcomes supported by your understanding of the relevant law in this area.

**INSURANCE LAW
FINAL EXAMINATION
FALL, 1998**

PROFESSOR ANDREA G. CHATFIELD

QUESTIONS 3, 4 AND 5

Assume the following fact pattern for Questions 3, 4 and 5:

W.R. Grace has a manufacturing plant in Reading, Massachusetts which it has operated since 1981. Based upon investigations sponsored by the Environmental Protection Agency (EPA) and a local resident group, from 1981 to 1991, employees who worked in the plant's paint shop would regularly dump used solvents into ditches behind the plant. The solvents would seep into the ground or run downhill into the local river during rainy weather. There is no clear evidence whether any manager ever ordered the employees to dump the solvents, or whether the employees did this on their own. Grace had written procedures for proper disposal of used solvents and insists that it required employees to use these procedures.

Beginning in 1990, the town supplied certain nearby residents (the Federal Street Group) with town water from a new well dug between the Federal Street area where the residents lived and the Grace plant. Beginning in 1991 and continuing until 1995 when the well was closed for good, the residents of the Federal Street Group complained of various maladies from severe headaches, nausea, vomiting, burning eyes (especially just after taking a shower), and chronic skin rashes. Several children developed terminal leukemia, and several adults terminal cancer. Eventually the EPA discovered that the well was contaminated with TCE, a toxic substance, and ordered the well closed.

Through a joint investigation between the EPA and the Federal Street Group, the TCE was traced back to Grace's backyard. TCE is one of the main ingredients of the solvents used by Grace's paint shop. In 1998, the Federal Street Group sued Grace and three of its executives (the President, Executive Vice President, and the Vice President of Plant Operations) for over \$50 million dollars for assault and battery, negligence and wrongful death, for dumping TCE in a manner which led to the contamination of the well and poisoning of residents. The damages include actual damages, pain and suffering, and punitive damages.

While the EPA has not yet instituted action against Grace, it has begun the process of having the well, surrounding groundwater, river, and the back of Grace's property leading down to the river declared a Superfund site for purposes of cleanup under the CERCLA law. Grace has decided to begin a major cleanup project for its land leading down to the river, parts of the river, and the groundwater surrounding the well, and construct a system to prevent any further run-off into the river or the groundwater, which project is estimated to cost close to \$10 million.

**INSURANCE LAW
FINAL EXAMINATION
FALL, 1998**

PROFESSOR ANDREA G. CHATFIELD

Grace has had commercial general liability insurance policies in place for each year from 1981 to 1998 with endorsements granting pollution coverage. Each policy had a term of one year, and was generally renewed from year to year. The policies had \$10 million coverage limitations per occurrence for each policy period. The policies for these years had the following standard language:

We will pay those sums that the insured (Grace) becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend any suit seeking those damages. We may at our discretion investigate any "occurrence" and settle any claim or suit that may result.

The "bodily injury" or "property damage" must be caused by an "occurrence" that occurs during the policy period.

"Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

EXCLUSIONS: This policy does not apply to bodily injury or property damage expected or intended from the standpoint of the insured, property damage to property the insured owns, rents or occupies . . . or bodily injury or property damage which the insured caused through activity which created a substantial increase of risk of the type of loss suffered.

From 1981 to 1995, the policies were occurrence based and were with American Insurance ("AI"). In 1995, Grace switched to claims-made CGL policies with Liberty Mutual, and every year since has renewed this type of policy. The Liberty Mutual policies have similar language and a pollution endorsement, but only cover claims on occurrences that occurred during or after 1994. (Therefore, they do not contain the second paragraph quoted above from the AI policies.) Grace has made claims against all of the CGL's it held from 1981 to 1998. The claims are for the costs of its cleanup project and for coverage and defense of the lawsuit brought by the Federal Street Group. Both AI and Liberty Mutual have denied coverage and Grace has brought an action in federal district court for an order determining which company must provide coverage and defense.

**INSURANCE LAW
FINAL EXAMINATION
FALL, 1998**

PROFESSOR ANDREA G. CHATFIELD

QUESTION NO. 3:

The Grace action has been assigned to me for decision. As my law clerk, please write a memo to assist me in drafting my opinion and decision regarding the cleanup costs. You should analyze the relevant issues as to whether AI or Liberty Mutual must provide coverage for some or all of the clean up costs. Please be specific as to which policy or policies and which cleanup costs coverage should be extended, and to what limit, or if any coverage should be extended to Grace. Also, be specific as to what your legal reasoning is.

OR

QUESTION NO. 4:

The Grace action has been assigned to me for decision. As my law clerk, please write a memo to assist me in drafting my opinion and decision regarding the coverage and defense of the Federal Street Group lawsuit against Grace. You should analyze the relevant issues as to whether AI or Liberty Mutual must provide Grace with a defense in the Federal Street Group lawsuit, and assuming the plaintiffs can prevail, what if any coverage either AI or Liberty Mutual must provide as to damages assessed against Grace in the lawsuit. Please be specific as to what your legal reasoning is.

**INSURANCE LAW
FINAL EXAMINATION
FALL, 1998**

PROFESSOR ANDREA G. CHATFIELD

QUESTION NO. 5:

Assume the same fact pattern as described above, except that AI has agreed to provide Grace and its executives with a defense in the Federal Street Group lawsuit, but it has reserved its rights (through a reservation of rights letter) to later deny coverage if Grace loses and is ordered to pay damages. You are the attorney hired by AI to represent Grace and its executives. During the discovery phase, the Vice President of Operations calls you. He has testified in deposition and through interrogatory answers that he had no knowledge of the dumping, he never authorized it, and he had implemented the procedures for proper waste disposal including contracting with a waste disposal company to haul the waste away

He tells you that he recently was diagnosed as having HIV and has been "reassessing his life". He asks you what would happen in the following "hypothetical situation": what if he knew employees were dumping the used solvents on the ground behind the plant, and he did not always use the disposal company because of its high cost. What if he also had created false records showing the solvents had been disposed of appropriately, and destroyed records showing how much solvent the Grace plant used to disguise the fact that some of the solvent had not been properly disposed of. What if the false records were the ones the Company had produced to the EPA during its investigation. The Vice President "speculates" that no one at the plant ever suspected that the solvents would seep into the groundwater and contaminate public wells. They thought it would at most just harm Grace's property which was private and whatever ran off into the river would be washed out to sea.

You explain to the Vice President that under this "hypothetical", the EPA would probably order Grace to clean up the entire mess and impose fines for lying, the case against Grace by the Federal Street Group would be extremely difficult to defend, and there may not be coverage under the CGL for any of this. There could even be criminal penalties imposed on the Company and the executives for the fraud and cover up. After a long pause, the Vice President tells you to never mention this conversation to anyone.

What do you tell AI who requires you to provide regular reports as to the lawsuit and assessments on the desirability and feasibility to settle or assert certain defenses, and what do you do in connection with the lawsuit and Grace, in which the records mentioned by the Vice President have already been produced through discovery to the plaintiffs, and the Vice President has already given deposition testimony denying any knowledge of illegal dumping of the solvents?

INSURANCE LAW FINAL EXAMINATION
FALL, 1999
PROFESSOR: ANDREA G. CHATFIELD

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QUESTION NO. 1

Bill and Hillary Preston had a very bad run of luck last November-December, and they have come to our law firm to see if there is anything we can do for them. The Prestons' bought an old house in Andover, Mass. in July, 1998. At the time they bought the house, Bill contacted Vern Carville, an old friend of Bill and Hillary's, and an insurance agent with his family's agency, The Carville Insurance Agency. Vern told Bill that he could get him a homeowner's policy with Quincy Mutual Insurance at an inexpensive rate, but that Quincy Mutual required a house inspection to make sure the house's wiring was up to code given its age. Bill produced a home inspection report prepared for the sale of the house. The report indicated that the wiring in the house was adequate for the uses intended. It did not say specifically that the house was in compliance with local code requirements. This seemed odd to Bill, but Vern took the report, checked off the box on the insurance application form that indicated the house was up to code, and said he would see what he could do. Bill signed the application form without reading it carefully. Above where Bill signed the application, it states: "I represent the statements and answers on this form are true and complete to the best of my knowledge." One week later, Bill and Hillary received a notice that Quincy Mutual issued a homeowners' policy to them with the following declarations: dwelling coverage \$250,000; other structures \$25,000; personal property \$50,000; and loss of use \$25,000. (The terms of the Prestons' policy are the same as those in the sample homeowner's policy in your casebook.)

Bill's employer was transferring him to Massachusetts, which is why they bought the house, but his job kept him in Washington, D.C. for most of 1998. The Prestons' remained in D.C. and did not physically move in to the house until late November, 1998. Because their lease was up in D.C., they had almost all of their furniture and other personal property items moved into the house in July, and they lived in a rented townhouse for the remaining months they were in D.C. At the beginning of November, prior to Bill and Hillary moving in, the Crawford Oil Co. made a scheduled delivery of heating oil to the house in Andover. The previous owners of the house told the Prestons that the house was on a scheduled oil delivery program, and that they need not do anything but call and have the name on the bill changed, which Hillary did. However, the Crawford Oil Co. did not realize that the house remained vacant from July through

INSURANCE LAW FINAL EXAMINATION
FALL, 1999
PROFESSOR: ANDREA G. CHATFIELD

November, and therefore used no oil in those months. Thus, there was more oil in the tank than normally would be there when Crawford delivered oil in early November. The result was that a gasket burst and 75 gallons of heating oil flooded the cellar.

When Bill and Hillary tried to move in two days later, they discovered the situation. All of the contents of the cellar were ruined: washer, dryer, a sofa, rolled up rugs, exercise equipment, boxes of winter clothes, skis and ski boots, etc. The Prestons' incurred substantial costs for: oil removal and disposal (\$25,000); replacement of personal property (\$25,000); structural repairs to the cellar walls and floors (\$5,000); and living costs because they had to live in a motel for two weeks while the damage was fixed (\$1,500). The Prestons filed a claim with Quincy Mutual immediately, and were denied. Quincy Mutual stated that such damage was excluded from the policy. Between the house purchase and moving, they were very strapped for cash and were maxed out on their credit cards. Thus, when they had to incur further costs to clean oil residue and fumes from the cellar and first floor, they could only afford to spend \$500. The cleaning service originally told them that a thorough job would cost about \$2000.

Bill and Hillary tried to get over the disaster and enjoy the holidays. They had Christmas lights left over from their prior home which they strung on the outside of the Andover house. One week before Christmas, during the night, the lights caused a short in the old wiring which caused the house to catch on fire. The fire destroyed part of the kitchen and dining room and an upstairs bedroom, not to mention more of their personal property. The Prestons called 911, and then had to be rescued from the second floor by the fire department because the fire quickly trapped them. The fire chief felt that the damage would not have been so extensive, but the fire fed on the left over oil fumes that had seeped into the house from the oil flood and therefore became a stronger fire than it normally would have been. Again they had to live in a motel for four weeks while the house was repaired. And again Quincy Mutual denied their claim. This time however, the insurance company cancelled the policy stating that Bill made a misrepresentation on the application for insurance that the house was up to code.

Bill and Hillary claim they relied on the home inspection report and their good friend Vern's judgement in claiming the house was up to code. They want the full limits of the homeowners' policy to reimburse them for all the damage done to the house by oil and fire. They also feel that Quincy Mutual's first denial of coverage for the oil damage was wrong, and because of it they were not able to get the house cleaned thoroughly which led to the fire getting out of control and their being trapped. They want the insurance company to provide damages for their emotional distress in being trapped in the house by the fire, and for their distress in dealing with the whole situation.

Please prepare a memo for me analyzing only the following: Is there any coverage for the oil flood; is there coverage for the fire; did the statement on the application form amount to a misrepresentation that voided the policy; can the Prestons prove that the insurance

**INSURANCE LAW FINAL EXAMINATION
FALL, 1999
PROFESSOR: ANDREA G. CHATFIELD**

company breached the insurance contract in bad faith when they denied coverage for the oil flood or the fire; and if so, could the Prestons recover emotional distress damages. Please explain your analysis in detail.

QUESTION NO. 2

From 1990 to 1996, Alan Greenspun was an independent pit trader for the New York Stock Exchange. As part of his job, he would engage in high pressure transactions of buying and seller stock, usually while yelling at the top of his voice. While he was an independent trader, he had coverage under individual disability and health plans offered at a discount through the Pit Traders Association. Metropolitan Life provided the disability policy. It provided disability benefits equal to 75% of Alan's salary for up to two years of disability. The disability policy also contained the following provisions:

“Disability” and “disabled” means that due to sickness or injury you are unable to perform the substantial and material duties of your regular occupation.”

The policy also provided that if Alan became disabled, but entered a different occupation while still disabled, he would continue to receive his monthly disability benefits from his regular occupation, regardless of his earnings in his new occupation. However, if he engaged in his regular occupation for any amount of time while disabled, he would be ineligible for further benefits.

The policy also covered recurring disabilities. This means that if Alan had a recurrent disability that he could relate back to the first disability, he would be entitled to benefits as follows: If, after a period of disability, he returns to his regular occupation for a continuous period of six months or more, any recurrent disability will be considered a new disability subject to another new 2-year period of disability benefits. If he returned to his regular occupation for less than six months, the recurrent disability would be considered part of the same original disability and subject to the original 2-year period of benefits, even if the policy had expired prior to the recurrent disability. A recurrent disability “is a period of disability which results from the same or related cause or causes as a previous period of disability.”

In 1995, he began to suffer from debilitating daily headaches and stomach pains. They would become worse over the course of the week and subside on weekends when he was not working. He went to see two specialists (a neurologist and a gastroenterologist) who diagnosed him as having severe tension headaches and severe reflux disease, all as a result of the constant pressure of his job. The neurologist also noted he experienced periodic

INSURANCE LAW FINAL EXAMINATION
FALL, 1999
PROFESSOR: ANDREA G. CHATFIELD

mild hoarseness, probably due to his occupation also. He recommended over-the-counter lozenges for the condition, which Alan took from time to time. The headaches and reflux became so severe that both specialists supported Alan's claim for disability benefits under the group disability policy with Metropolitan Life.

Alan remained disabled for 6 months and took medication that somewhat controlled his headaches and reflux disease. He trained himself to trade by computer and began working for ETRADE, a business that represented investors by trading stocks and options by computer. In this job, he became eligible for ETRADE's group health insurance with Blue Cross. ETRADE did not provide disability coverage. Alan was dropped from the health and disability plans through the Pit Traders' Association Plan because he was no longer an independent trader.

When Alan began work as a computer trader, Metropolitan Life ceased his disability benefits saying that he was engaging in his regular occupation. It also claimed that he could no longer provide sufficient evidence of his disability. However, under the terms of the Metropolitan Life plan, if he suffered from a recurrent disability within six months of the end of his initial disability, it would be deemed a continuation of the initial disability period, and he would be entitled to the remaining balance of the 2-year maximum benefits.

Two months after Alan began working for ETRADE and Met Life ceased his benefits, Alan began to lose his voice. He also suffered from throat pain, soreness, dryness, and hoarseness. He saw a throat specialist (otolaryngologist) who diagnosed him as having chronic irritative laryngitis, due to the reflux condition and overuse of his voice when he was pit trading. Over time, both conditions cause progressive damage to his vocal tissue which ended up becoming permanently scarred.

Alan renewed his claim for disability benefits under the Met Life policy, claiming that the vocal condition was a recurrent disability, and it disabled him permanently from pit trading. Thus, he was entitled to another 18 months of benefits (which constitutes the remainder of the 2 year period of benefits). Met Life denied the claim because of two reasons: (1) the vocal disability did not disable Alan from his "regular occupation", he could still trade by computer which requires no use of his voice at all (in fact, Alan has continued in his job as a computer trader); and (2) the vocal disability is a separate disability, not a recurrent one, from the reflux/headache disability which was brought on by the high pressure of the job, not overuse of the voice.

Alan has also been denied by Blue Cross for his claim of payment for the health care costs he incurred in seeking diagnosis and treatment of his laryngitis and medication for his headaches and reflux disease. In a denial of benefits notice, Blue Cross states that such costs are in connection with pre-existing conditions. Both the reflux and headache conditions had been treated within six months of Alan joining the Blue Cross plan.

INSURANCE LAW FINAL EXAMINATION
FALL, 1999
PROFESSOR: ANDREA G. CHATFIELD

Moreover, the neurologist had treated Alan for hoarseness during that same period of time, and the laryngitis was part of Alan's pre-existing condition.

Alan has come to our office to see if we can help him in pursuing any legal claims against Metropolitan Life and/or Blue Cross. Please prepare a memo analyzing the strength of any potential claims Alan may have against each of these companies. Be sure to explain your analysis in detail.

FACT PATTERN FOR QUESTION NOS. 3 & 4

Pulsetech is a manufacturer of pacemakers and other medical devices. It has been in business for over 25 years, and has been a closely held company, owned and operated by the Martin family. Pulsetech pacemakers are used by surgeons and hospitals all over the country. Pulsetech has always maintained commercial general liability policies. They are basically renewed each year, and the policies have always been occurrence based. From 1985-1996, Pulsetech purchased its CGL coverage from Insurance Company of America (ICA). Total coverage was \$5 million per occurrence, and \$20 million aggregate, with a deductible to be borne by Pulsetech of \$50,000 per occurrence. (Assume the definitions section of the CGL policy in your casebook is the same as the definitions section in the Pulsetech policy.) Beginning in 1997, Pulsetech purchased its CGL coverage from Lloyds of London (Lloyds). The terms and coverages were basically the same.

In early 1999, Pulsetech became the target of over 50 lawsuits alleging that its pacemakers were defective. 20 of the suits allege wrongful death, and the other 30 claim damages for medical costs and emotional distress suffered by plaintiffs whose pacemakers failed and had to be replaced. All 50 suits contain claims of punitive damages. Pulsetech immediately notified ICA that its 1995 policy was on the risk for all of the suits, and Pulsetech requested that ICA provide Pulsetech's defense in all 50 lawsuits. After investigation, the following facts became known: the faulty pacemakers contained wire leads that had corroded and became useless. The leads could not carry the electrical impulse, thus the pacemakers failed. The defective pacemakers were manufactured between 1995 and 1997, and installed by doctors into patients between 1996 and 1998. The leads were part of four separate shipments that Pulsetech purchased from a now defunct importer back in 1995. The leads sat for almost a year in a warehouse near the ocean, prior to being purchased by Pulsetech. Once the pacemakers were manufactured, they sat for varying periods of time in a warehouse owned by an independent medical products distributor that purchased them from Pulsetech. The distributor's warehouse, located in Florida, had very poor climate control. More than likely, salt air or humidity contaminated several packages that were not completely sealed of either the leads or the pacemakers. Salt air and high humidity cause electrical leads of this kind to begin to

INSURANCE LAW FINAL EXAMINATION
FALL, 1999
PROFESSOR: ANDREA G. CHATFIELD

corrode. Pulsetech has worked with the FDA in sending out appropriate recall notices and warnings on its pacemakers, and has developed a tighter quality control process for thoroughly testing pacemakers before they are shipped.

After Pulsetech sent notice of the lawsuits to ICA, the law firm representing most of the plaintiffs in the lawsuits sent a global settlement offer to ICA for \$20 million. ICA refused the settlement, denied coverage, and refused to provide Pulsetech a defense. Pulsetech brought action for a declaratory judgement in federal district court and seeks an order determining that ICA must provide coverage and defense, and that if Pulsetech is held liable for more than \$20 million, ICA must pay the excess because of its denial of the settlement. Pulsetech also has requested a determination that each decision to purchase a shipment of the contaminated leads was the cause of the occurrences, thus only four occurrences happened in 1995. ICA interpleaded Lloyds, and argued that coverage was triggered when the pacemakers failed, which began in 1997. Thus Lloyds was on the risk, and since the cause of the harm was the actual failure of the pacemaker, fifty different occurrences happened. Lloyds argued that the coverage was triggered when the contaminated leads were put into the pacemakers, and since this began in 1995, ICA is on the risk. Lloyds also claims that since contaminated leads were put into 50 pacemakers, 50 occurrences happened.

QUESTION NO. 3

The Pulsetech declaratory action has been assigned to my court for decision. As my law clerk, please write a draft opinion and decision as to whether or not ICA or Lloyds, or both, must provide a defense for Pulsetech in the defective pacemaker lawsuits, and assuming the plaintiffs in those lawsuits can prevail, what, if any, coverage, and amounts in excess of coverage, either ICA or Lloyds must provide as to damages, both punitive and non-punitive, assessed against Pulsetech in the lawsuits. Also, what, if any, deductibles will Pulsetech be responsible for. Please be specific as to what your legal reasoning is and what the relevant law is since these are issues of first impression in this jurisdiction.

QUESTION NO. 4

Assume the same fact pattern as described in Question No. 3 above, except that ICA agreed to provide Pulsetech with a defense in the lawsuits, but it reserved its rights (through a reservation of rights letter) to later deny coverage if Pulsetech loses and is ordered to pay damages. Moreover, the settlement demand for \$20 million is still on the table and has not been refused by ICA, nor has it been accepted. You are the attorney

INSURANCE LAW FINAL EXAMINATION
FALL, 1999
PROFESSOR: ANDREA G. CHATFIELD

hired by ICA to represent Pulsetech. During the discovery phase of the lawsuits, the Vice President of Operations, Rick Martin, calls you. He has already testified in depositions that he had no knowledge that the leads could be contaminated or faulty. He relied on Pulsetech quality control records prepared by the Quality Control Manager, which records indicate that nothing was wrong with the pacemakers when they left Pulsetech. Therefore, the corrosion must have begun when the pacemakers sat in the distributor's warehouse. The Quality Control Manager died in a drunk driving accident one year ago.

However, Rick tells you that something has been bothering him. At the time he bought the leads, he knew they had been sitting in the warehouse for a long time and he suspected that the leads may not be "best quality" because he was able to get them at such a cheap price. Plus he noticed that the seals were not always intact on the packages of leads. So he tested most of the first shipment and discovered that 30% of them tested bad. He said that he tried to weed out the bad ones in the first shipment, and he instructed the Quality Control Manager to "fix" the quality control records. However, the company was experiencing a severe cash flow problem and in order to stay solvent they had to cut costs, but increase production. Moreover, his father, the President, suffered a heart attack which meant that Rick had to serve as Interim President and Vice President around that time. He felt that if the company went under, it would kill his father. So he again bought cheap leads, which led to the second and third shipments of contaminated leads. He was so busy, he never had time to test them. He again told the Quality Control Manager to create records that indicated no problem. He believed no one would be hurt because the doctors and hospitals would test the pacemakers prior to being used in patients. He is beginning to feel some remorse because he has just learned that the pacemaker put into his father was manufactured by Pulsetech in 1996 and is subject to one of the FDA warnings, but he also tells you that he is confiding this in you as his lawyer, and expects you to tell no one. Since the Quality Control Manager is dead, no one else knows about the false records.

What do you do?