

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION  
CA 1-98-CV-1373-CC  
CA 1-97-CV-0649

TRAVELERS INDEMNITY

COMPANY OF ILLINOIS

Plaintiff

Vs.

HOLOX, LTD.

-AND-

HOLOX INC

Defendant

-AND-

HOLOX, LTD.

Plaintiff

Vs.

WILLIS CORROON CORP.

AND OTHERS

Defendants

EXPERT REPORT OF TIM RYLES, Ph.D.  
2075 Meadows Road  
Newborn, Georgia 30056

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My name is Tim Ryles, I am *sui juris*, competent to give testimony, and I base the opinions expressed herein on my personal knowledge and experience.

I am the former Commissioner of Insurance, State of Georgia, for the term beginning in January, 1991 and ending in January, 1995.

During the past four years I have operated a litigation support firm and have been associated with other firms engaged in litigation support activities, including expert testimony. I have appeared as expert witness in both deposition and trial testimony with respect to insurance claim handling and coverage questions as well as cases involving the relationships between agents/brokers and insureds.

During my administration as Georgia's Commissioner of Insurance, I endorsed and Georgia enacted new legislation governing insurance agents and agencies. This legislation appears at 33-23-1 through 33-23-45 in the Georgia Insurance Code. In addition, new licensing material was prescribed for prospective agents as learning material in preparation for the examination to qualify as an insurance agent in Georgia. This agents' licensing material covered both property and casualty and life/health licensees.

I was also instrumental in obtaining adoption of the Unfair Claims Practices Statute, a Model Statute developed by the National Association of Insurance Commissioners (NAIC) in the State of Georgia. This statute appears at 33-6-30 through 33-6-37 of the Georgia Insurance Code. I also served as Vice Chair of the NAIC's Market Conduct Committee during the period that regulators were developing standards governing market conduct of insurers. Additionally, I have appeared as expert witness and deponent in a number of cases involving an insurer's duty under claims settlement standards, including bad faith actions.

I have also appeared as an expert witness in several cases involving insurance contract interpretation and the rules pertaining to contract interpretation.

I have been asked to express an opinion in this case by the defendants. Specifically, defendants have requested that I provide an opinion with respect to whether coverage should be granted in this case, the duties of brokers and agents to insureds and insurers, whether any regulatory standard prohibits Travelers from insuring the Carrollton, GA facility where the loss in this case occurred, whether Travelers claims handling practices deviate from recognized claims handling standards and whether the Holox policies issued by insurers other than Travelers offer coverage in the instant case.

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The opinions expressed herein are based upon my review of the documents and sources cited in Attachment A to this report, my experiences as both regulator and insurance litigation consultant, my training, and general knowledge of insurance practices and regulatory matters. A curriculum vitae setting forth my training and experience is appended to this report as Attachment B.

BRIEF SUMMARY OF FACTS

Sunox was acquired by Holox in a stock purchase resulting in Sunox's surrender of its corporate charter, purportedly for tax purposes, at end of year 1996. Sunox was insured by Travelers through broker Willis Corroon of Charlotte, North Carolina under a CGL policy, workers compensation, employers liability, commercial auto, boiler and machinery. The policy year ran from September 1, 1996 through September 1 of 1997. Holox had three separate policies issued through Aon Risk Services agency in Atlanta from Hartford and Federal to cover nonmanufacturing risks and from Chubb/Federal for boiler and machinery coverages. Thus, the two entities had separate agents of record and at least four different policies to cover risks located in several states.

The Travelers policies at issue are: policy M5J660-275K942A (boiler and machinery); GJ-630-196X2991-TIL-96 (property and general liability); CAP-4151176-TIL-96 (commercial auto); G-UB-415J186-A-96 and G-UB-415J186-1-96 (workers compensation).

On January 13, 1996, a tank ruptured at the Carrollton, GA plant site releasing 200,000 gallons of liquid nitrogen, a non-pollutant, into the air along with some Perlite insulation from the tank structure itself. On January 20, Travelers' Rick Williams wrote a memo to file regarding the loss and raised questions about coverage attributable to the change of ownership. Shortly thereafter, on January 22, 1997, Travelers' Account Executive Carla A. Pagotto, Houston, TX, sent a reservation of rights letter to Mr. Bill Matthews and Mr. Douglas Crayton of Holox. The reservation of rights stated:

Travelers fully reserves its rights in this matter, and neither this acknowledgement nor any future communication or investigation shall be deemed or construed as a waiver of the rights and defenses, including, but not limited to, any rights and defenses provided under the contracts of insurance issued to Sunox, Inc.

On March 12, 1997, Travelers filed suit for a declaratory judgment in U.S. District Court alleging that the acquisition of Sunox voided the Travelers policies, that Aon Risk Services' Alan Massey concealed and misrepresented material facts to gain Travelers consent in continuing coverage, and that the policy language required Travelers written consent for continuation of coverage past the 12-31-96 date of dissolution.

AGENT/BROKER DUTIES

It is generally recognized among regulators and insurance industry authorities that while brokers owe a duty of care to both insureds and insurers, in general, brokers represent the interests of the insured. In determining the relationship between broker and insured, the following questions are relevant: Who called the broker into action? Who controls the broker's actions? Who pays the broker? Does the broker act in a dual agency capacity? Does the broker exercise binding authority on behalf of the insurer involved in the transaction?

In this case, Holox had a management contract with broker Aon and relied upon Aon for expert advice in insurance transactions; Sunox had a management agreement with broker Willis Corroon and relied upon the Willis Corroon agency for expert advice and consultation in insurance matters. A management fee was provided to the brokers by the insureds, the brokers were asked by the insureds to take certain actions, and specific requests requiring specific performances were demanded by the insureds of their brokers. None of the documents reviewed thus far refute these relationships.

Yet, unknown to insureds Sunox and Holox, both Aon and Willis Corroon had agency agreements with the insurer, Travelers. Generally, this would establish what is known as a dual agency relationship, but in this particular instance a dual agency cannot be recognized simply because neither Sunox nor Holox knew about the agency agreements and never consented to the dual agency. The brokers' failures in concealing their agency relationships from the insureds constitutes suppression of a material fact. Any belief on the part of the brokers that Holox/Sunox did not need to know of the agency agreements is both ill-informed and prejudicial to the interests of the insureds.

Concealment of the broker-insurer-insured triangular relationship raises troubling questions about whether either Aon, Willis Corroon or Travelers could fulfill good faith obligations to Sunox/Holox and is a recipe for double dealing for both insurer Travelers and brokers Aon and Willis Corroon. As broker, Willis Corroon has a fiduciary duty to Sunox; as insurer, Travelers has a duty of utmost good faith to Sunox; as broker, Aon has a fiduciary duty to Holox.

From the insured's perspective, the brokers-Travelers relationships create a no-win situation. The insured Holox/Sunox could not adequately protect its own interests because it was unaware of the agency agreements and trusted its brokers to take care of insurance matters. Indeed, had Holox/Sunox been aware of the agency relationships, company officials could have taken matters into their own hands and, at the very least, sought independent sources of advice on the insurance issues involved in the transaction. Indeed, the denouement of the deception is reflected in the current posture of Willis Corroon and Travelers in this litigation. Consistent with their contractual arrangement following the claim on the Carrollton, GA loss, both Travelers and Willis Corroon have joined forces against Sunox to avoid payment. Both the current posture of Willis Corroon

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and Travelers and the producer agreement between the two indicate to me that Willis Corroon and Travelers breached their respective duties to Sunox. Additionally, Travelers is placing its interests above those of the insured in the claims settlement process.

The conflict of interest for Willis Corroon is especially harmful for Sunox. The triangle mentioned above is a classic example of the truth represented in the Biblical admonition, "A man cannot serve two masters." In Willis Corroon's case, following Master Travelers proves to be the most financially rewarding choice. Sunox had a right to know up front that Willis Corroon enjoyed a long term, profitable relationship with Travelers and that Willis Corroon's compensation depended in part upon the loss experience of the policies it writes for Travelers. Stated simply, on the one hand, Holox looks to Willis Corroon as trusted adviser and intermediary in the claims process; on the other hand, Willis Corroon must impress Travelers with its ability to keep claims costs as low as possible.

It is disturbing to note that Aon also had an undisclosed producer's agreement with Travelers. It, too, contains an indemnification clause. Additionally, while the records do not show that Willis Corroon's producer agreement with Travelers included the authorization to write boiler and machinery insurance, Aon's agreement does contain such authority. (This raises questions as to whether Willis Corroon was writing coverages for which it had not been authorized. Additionally, I have not seen evidence that either agency was licensed to write business outside its own state.) Further, the Travelers' Agency Agreement with both Aon and Willis Corroon stipulates that:

The agent has the authority to solicit applications for proposals for Commercial Lines Insurance, and to bind the Company and issue policies for such classes of Commercial-Lines Property-Casualty insurance as the Company from time to time may authorize; to countersign such policies of insurance, renewal receipts, certificates and endorsements pertaining to such classes of risks; and to collect and receive premiums on such insurance, except for premiums which the company bills directly.

Thus, both agencies were authorized to bind Travelers' coverage, including the issuing of certificates and endorsements. I have seen nothing in the record thus far to indicate that anything prevented Aon from applying this authority had it chosen to do so by simply adding Holox as an additional Named Insured on the Travelers' policies. In his testimony, broker Alan Massey indicates that this option received some consideration:

I felt it wise to have an endorsement that would have named Holox as an additional insured to the (Sunox) Travelers policies. And, in fact, I asked Bob Resnick to add that endorsement; and he didn't. (Alan Massey deposition, p.247.)

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Massey further describes how he then went to Charlotte, North Carolina on January 9, 1997 to meet with Willis Corroon, the agent of record for the Sunox-Travelers insurance arrangement, "to try to get authority from Willis Corroon to issue those kinds of endorsements with the Travelers." (See p. 253.) Although Massey later testified (p.254) that he never specifically asked Willis Corroon to use its authority as broker of record to secure an endorsement regarding continuation of Sunox risks after the Holox acquisition, Willis Corroon was, nevertheless, informed of the acquisition and had ample notice to exercise its authority as broker of record to make such an addition.

So what do we have here? As an outside observer, it appears that we have two brokers playing both sides of the fence with a primary preoccupation with whose going to walk away with the lion's share of the commission on a very attractive insurance account. And perhaps neither broker took steps to provide such an endorsement because both knew that it was not necessary to do so to maintain coverage for Sunox and/or both relied upon Travelers' representations of uninterrupted coverage for the Carrollton facility.

For insurer Travelers, however, the involvement of both brokers as Travelers' producers has favorable consequences for the insured. If we accept the general premise that notice to the agent is notice to the principal, then it naturally follows that Travelers was sufficiently on notice about the details of the Sunox acquisition from both broker sources. Further, the fact that one is the "broker of record" and the other is not does not negate the fact that both are Travelers' agents and this important material fact is concealed from Holox/Sunox.

## UNDERWRITING PRACTICES OF TRAVELERS

My reading of the record persuades me that Travelers' Resnick had continuing knowledge of the pending and later finalized acquisition of Sunox. Yet, Resnick assumed a passive role throughout the transition, choosing to communicate orally with brokers about the most fundamental issue, i.e., assuring no disruption of coverage. To protect the insured's interests, given the position on coverage that Travelers has now assumed, Resnick should have asked for organization charts, officers and directors listings, financial information, number of employees, location of property under the new structure, and for additional information. At the very least, if his intent was to set conditions upon Travelers remaining on the risk, he had a duty to communicate these conditions unequivocally and to advise as to appropriate procedures for uninterrupted coverage. Of course, one of these proper procedures would be that of adding Holox as an additional insured.

Accomplishing these tasks would have been simple because there is no indication that Holox/Sunox officials in any way attempted to conceal the details of the acquisition. An insured that seeks to conceal material facts will not take affirmative steps through its own brokers to assure continuation of coverage. Further, even if Travelers believed it had been

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unable to secure material facts related to the risk, especially as it relates to the workers compensation coverages, the workers compensation policy premium is an estimated premium. Under the policy, Travelers clearly has authority to conduct an audit and assess any additional premium the audit confirms might be due. A similar provision appears in the general liability policy.

Thus, the language in these policies provides a cushion allowing Travelers to assess its risk and modify its premium, even after the policy period has run.

Travelers also had sufficient notice of the Holox acquisition. Sunox and Holox notified their respective brokers who in turn discussed the change in ownership with Travelers. One has to assume knowledge on Travelers' part pursuant to these contacts. This would be especially true of Willis Coroon who was acting as Travelers' agent of record in the process. Again, notice to the agent is notice to the insurer.

#### THE CONTINUING NATURE OF THE SUNOX RISK

A key consideration in this case is whether the nature of the risk changed following the Holox acquisition. I see no evidence that the risk changed in any way. The principal policy at issue is essentially property insurance under a boiler and machinery policy. It is not liability insurance. Upon acquisition by Holox, the work force remained stable; management remained stable; premises operations remained the same; nothing new was added to the location; there were no changes in the immediate environment surrounding the Carrollton facility. While Travelers has opined that Holox could be a less desirable owner than the old management of Sunox, there is no evidence supporting this notion. On the contrary, Bob Cenna's underwriting report on Holox concludes that "Experience for all lines has been excellent."

Further, the risk is separately identifiable and measurable. It is not necessary that the "entity" be a separate corporate or "legal entity" as Travelers opines in defense of its refusal to satisfy the claim. Essentially the only change was one of corporate ownership. Further, if Travelers had any indication that there was an attempt to alter the risk in any way, nothing prevents Travelers from taking the position that it will not assume any risk beyond that for which it initially contracted. Since Sunox/Holox is not asking that Travelers assume any increased risk anyway, this is a moot point.

#### THE CLAIMS PROCESS

As stated above, there has been no intentional attempt on Sunox/Holox's part to conceal any information material to the risk; Travelers' agent Willis Corroon was advised of the stock acquisition and the change of ownership; Travelers' agent Aon was fully aware of the details of the transaction. Among other things, Aon knew that Sunox remained a separate, easily identifiable entity following the acquisition; Sunox/Holox justifiably

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relied upon the professional expertise of the brokers to handle insurance coverage issues relating to the transaction; insurance underwriters had ample opportunity to review the deal and modify their policies if they thought it necessary to do so; Travelers' underwriter had specific knowledge of the transaction.

Commonly accepted standards of fair claims settlement practices have been compromised in this case. For example, liability is reasonably clear but not acknowledged by Travelers; the insured is forced to resort to litigation and its attendant costs to receive the advantages of the contract for which the insured bargained and for which the insured paid a premium; unreasonable delay in paying the claim adds substantially to the damages already suffered by the insured.

Travelers' Resnick also failed to acknowledge the proper policy in advising Alan Massey that he "did not need to add Holox to the Travelers policies." (See pp. 248-250 of Massey deposition.). The language cited by Resnick was the Commercial General Liability policy language, not boiler and machinery policy language; furthermore, it was only later that even the brokers discovered that the Richmond office, not the Kansas City office of Travelers, handled boiler/machinery policies.

Adding to the improper claims practices is Traveler's cancellation of the contract retroactive to January 1, 1997. Such conduct is arbitrary and in violation of the Travelers' contract provisions regarding cancellation, not to mention state law requirements as well. When one considers that Travelers was sufficiently informed through its agents Aon and Willis Corroon and that Resnick also had knowledge of the Holox acquisition, one might reasonably infer that the singularly most salient motivation behind such risky conduct on Travelers' part is to use its market power to force someone else to bear the cost of the loss. Exploiting one's own insureds to achieve such an objective is patently unfair.

It is also disconcerting that the investigation of the claim eventually focused upon issues relating to the "legal entity" of the named insured, not upon the nature of the risk itself. I know of no requirement, either in the insurance policies at issue, regulatory standards, or in industry practice requiring a risk to be a corporate or other "legal entity" for insurance purposes. "Entity" is neither used in nor defined in Travelers' policies. Black's Law Dictionary includes in its definitions of entity the following: "A real being; existence. An existence apart..." and including a "person, estate, trust, governmental unit."

Webster's Dictionary, 9<sup>th</sup> Edition, says an entity is "something that has separate and distinct existence and objective or conceptual reality." Hence, reliance upon both standard legal usage and common language defeat Travelers' contention that the risk is not an entity. Further, assuming, *arguendo*, that Travelers' underwriting guidelines for boiler and machinery coverages set forth requirements that its definition of "entity"



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determine the risks it assumed, it seems to me that this places upon Travelers a substantial burden of notifying the insured of its requirements in a plain, unequivocal, timely manner. Failure to do so and the ensuing insistence that this reasoning be applied *ex post facto* appears to be a dilatory tactic and impresses me as specious conduct.

The real "entity" at issue in the claims process is the triangular entity created by the Travelers, Aon, Willis Corroon relationship that remained a secret pact until this litigation began. It was through this entity that an enterprise was set up permitting the three parties - Aon, Willis Corroon, and Travelers - to profit at Holox/Sunox's expense.

#### COVERAGES UNDER THE OTHER POLICIES

I have also been asked to opine as to whether the following insurance policies provide coverage for the Carrollton, GA facility.

First, Hartford Fire Insurance Company Policy No. 20-MSP LZ5890 issued to Holox, LTD, Holox, Inc. and Holox USA, BV, Inc. covering the 01/01/97 to 10/01/98 time period. This policy contains a Special Property Coverage for Stationary Tanks and Coverage Extensions provision allowing the insured to add Newly Acquired property within 180 days of acquisition. Consequently, by contract Holox had the discretion to add newly acquired property within the 180 day window.

Second, Chubb (Federal Insurance Company) Boiler and Machinery Policy No. 7832-04-70 GID issued to Holox LTD. for the 01/01/96 to 01/01/99 period, changed by endorsement to 09/01/96 to 09/01/97. This policy contains an Automatic Coverage for a Newly Acquired Location beginning "at the time you (the insured) acquire the property and continues for 90 days." The insured has a 90-day window of automatic coverage under this policy.

Third, Pacific Insurance Company Policy No. ZG 0003773 issued to Holox LTD., Holox, Inc., Holox USA, BV Inc. for the period 01/01/97 to 01/01/98 period. This commercial property coverage has a 30-day window in which the insured must notify the insurer of newly acquired property.

Fourth, the Commercial Umbrella Policy No. BE 932-13-67 issued by National Union Fire Insurance Company to Sunox, Inc. for the period 09/01/96 to 009/01/97. The policy coverages rest upon Automobile liability, Commercial General Liability and Employers Liability coverages underwritten by Travelers policies listed in the Underlying Schedule of Insurance. This policy identifies the Named Insured to include newly acquired organizations but stipulates that "prompt notice" of the acquisition be given.

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To the extent that coverage under these policies applies, each insurer is obligated under its own contracts of insurance to provide coverage. The contracts may not be unilaterally amended by fiat. Further, changing the terms and conditions of the contracts without prior regulatory approval would be unlawful. In the absence of fraud, the above referenced contractual commitments must be honored. Based upon my review, I see no evidence of fraud on the part of the insured.

## Holox and Sunox Thoughts

### FACTS

Sunox was acquired by Holox in a stock purchase resulting in Sunox's surrender of its corporate charter, purportedly for tax purposes, at end of year 1996. Sunox was insured by Travelers through broker Willis Corroon of North Carolina under a CGL policy, workers compensation, employers liability, commercial auto, boiler and machinery. The policy year ran from September 1, 1996 through September 1 of 1997. Holox had three separate policies issued through Aon Risk Services agency in Atlanta from Hartford and Federal to cover nonmanufacturing risks and from Chubb/Federal for boiler and machinery coverages. Thus, the two entities had separate agents of record and at least four different policies to cover risks located in several states.

The Travelers policies at issue are: policy M5J660-275K942A (boiler and machinery); GJ-630-196X2991-TIL-96 (property and general liability); CAP-4151176-TIL-96 (commercial auto); G-UB- 415J186 -A-96 and G-UB-415J186-1-96 (workers compensation).

The record indicates that both Sunox and Holox were sensitive to the insurance issues arising from the merger. Both inquired of their respective brokers as to Travelers' willingness to continue coverage for Sunox through the policy period. Traveler's underwriter, Robert Resnick, was the point person for Travelers in the discussions. The record suggests that Mr. Resnick advised brokers that Travelers would remain on the coverage until the policy expiration date of September 1, 1997. Additionally, there is no written indication that Resnick attached any particular conditions to remaining on the Sunox risk, such as reunderwriting, clarification of the named insured, whether officers and directors were changing, how employers liability and workers compensation coverages would be affected, how commercial vehicles would increase or decrease, etc. Further, while Resnick knew that Holox had coverages through another agency with different companies, there is no indication that this raised any significant questions in his mind, except for refusal to change agents of record designation.

On January 13, 1996, a tank ruptured at the Carrollton, GA plant site releasing 200,000 gallons of liquid nitrogen, a non-pollutant, into the air along with some Perlite insulation from the tank structure itself. On January 20, Travelers' Rick Williams wrote a memo to file regarding the loss and raising questions about coverage attributable to the change of ownership. Shortly thereafter, on January 22, 1997, Travelers' Account Executive Carla A. Pagotto, Houston, TX, sent a limited in scope reservation of rights letter to Mr. Bill Matthews and Mr. Douglas Crayton of Holox. The reservation of rights stated:

Travelers fully reserves its rights in this matter, and neither this acknowledgement nor any future communication or investigation shall be deemed or construed as a waiver of the rights and defenses, including, but not limited to, any rights and defenses provided under the contracts of insurance issued to Sunox, Inc.

On March 12, 1997, Travelers filed suit for a declaratory judgment in U.S. District Court alleging that the acquisition of Sunox voided the Travelers policies, that Aon Risk Services' Alan Massey concealed and misrepresented material facts to gain Travelers consent in continuing coverage, and that the policy language required Travelers written consent for continuation of coverage past the 12-31-96 date of dissolution.

## QUESTIONS FOR TESTIMONY

The case raises the following questions to which I may give testimony.

### 1. What are the respective duties of brokers?

While brokers owe a duty of care to both insureds and insurers, in general, brokers, represent the interests of the insured. In determining the relationship between broker and insured, the following questions are often dispositive: Who called the broker into action? Who controls the broker's actions? Who pays the broker? And whose interests is the broker to represent.

In this case, a management fee was provided to the brokers by the insureds, the brokers were asked by the insureds to take certain actions, brokers were under the control of insureds, and specific requests requiring specific performances were demanded by the insureds of their brokers. Hence, in my opinion, any negligence on the brokers' parts resulted in a breach of duty to the insureds.

There is also the evidence of concealment from Sunox on the part of Willis Corroon whose principals failed to inform Sunox of a producer agreement with the insurer, Travelers. The Willis Corroon, Travelers, and Sunox triangle raises troubling questions about whether either Willis Corroon or Travelers could fulfill good faith obligations to Sunox. On the one hand, Sunox viewed Willis Corroon as its broker charged with fulfilling a broker's duty on behalf of Sunox; on the other hand, and unknown to Sunox, Willis Corroon had a producer's contract with Travelers that rewards Willis Corroon financially for its role in controlling losses on the business it writes for Travelers. The producer contract also has an indemnification agreement under which Travelers agrees to defend Willis Corroon in litigation arising under the producer agreement.

This triangular relationship is a recipe for double dealing for both insurer Travelers and broker Willis Corroon. As broker, Willis Corroon has a fiduciary duty to Sunox; as insurer, Travelers has a duty of utmost good faith to Sunox. Yet, both conceal their relationship from the insured and one rewards the other for keeping costs down. Consistent with their contractual arrangement following the claim, both Travelers and Willis Corroon have joined forces against Sunox to avoid payment. Both the current posture of Willis Corroon and Travelers and the producer agreement raise serious questions as to whether Willis Corroon breached its duty to Sunox and to whether Travelers is placing the insured's interest on a level well below its own in the claims settlement process.

### 2. What are the underwriting duties of the insurer?

My reading of the record thus far persuades me that Travelers' Resnick had continuing knowledge of the pending and later finalized acquisition of Sunox. Yet, Resnick assumed a passive role throughout the transition, choosing to communicate orally with brokers about the most fundamental issue, i.e., assuring no disruption of coverage. To protect not only the interests of the insured but also the insurer, Resnick should have asked for organization charts, officers and directors listings, financial information, number of employees, location of property under the new structure, and for additional information. At the very least, if his intent was to set conditions upon Travelers remaining on the risk, he had a duty to communicate these conditions unequivocally. He did not do so, and in this particular instance, I am at a loss to find a reason

why Resnick remained silent because no corporate structure has experienced more restructuring through acquisition in recent years than Travelers. Stated differently, if any insurer should have an appreciation for the possible consequences of merger/acquisition activity, it should be Travelers.

3. Did Sunox/Holox attempt to conceal material facts from the insurers?

An insured that seeks to conceal material facts will not take affirmative steps through its own broker to assure continuation of coverage. While this may be a fact issue more than an issue for an expert opinion, I am familiar with instances in which insureds have attempted to conceal material facts and this case does not fit such a pattern. Further, even if Travelers believed it had been unable to secure material facts related to the risk, the workers compensation policy premium is an estimated premium. Under the policy, Travelers clearly has authority to conduct an audit and assess any additional premium the audit confirms might be due. A similar provision appears in the general liability policy.

Thus, the policy language provides a cushion allowing Travelers to assess its risk and modify its premium, even after the policy period has run.

4. Did Travelers have adequate notice of the change in ownership?

Sunox and Holox notified their respective brokers who in turn discussed the change in ownership with Travelers. One has to assume knowledge on Travelers part pursuant to these contacts. This would be especially true of Willis Coroon who was acting as Travelers' agent in the process. Notice to the agent is notice to the insurer.

It is also instructive to review the policy language regarding simple notice versus written notice and just what requires notice under the Travelers policy. Section F of the Conditions portion of the Travelers contract refers to "Transfer of Your Rights And Duties Under This Policy" and states: "Your rights and duties under this policy may not be transferred without our written consent except in the case of death of an individual named insured." Section B "CHANGES" stipulates that "The first named insured shown in the Declarations is authorized to make changes in the terms of this policy with our consent." Written consent is not required in this provision. Written notice is required under the workers compensation policy when changes in ownership occur, but failure to do so is not cause for claims denial. Indeed, this 90-day notice is essentially a way of assuring the insurer that it will be apprised of any new employees and employee classifications for rating purposes.

Arguably, Section F references the duties of the First Named Insured and is Travelers' way of identifying the person or persons to whom it will look and to whom it will assign responsibility for any changes in the terms and conditions of the policy and the accompanying endorsements. It does not contain any specific language prohibiting assignment or non-assignment of risk. For example, the typical language suggested by the International Risk Management Institute to govern assignment matters reads: "Assignment of the interest under this policy shall not bind the company (meaning the insurance company) until its consent is endorsed thereon." The purpose of this language is to protect the insurer from assuming risks for which it has not contracted and for which it has not charged a premium. This is the type of language Travelers chose not to include in its policy.

5. Do policies provided by the other insurers include coverage for the new corporate entity?

Yes. All policies have provisions for a 90 day window during which the insured is granted automatic coverage for newly acquired companies, risks, etc.

6. Did Sunox become an indivisible, unidentifiable entity after 12-31-96?

No. The risk is separately identifiable and measurable. Essentially the only change was one of corporate ownership. And since Sunox was being acquired and was not the acquiring entity, it passed no additional exposure along to Travelers. Further, if Travelers had any indication that there was an attempt to alter the risk in any way, nothing prevents Travelers from taking the position that it will not assume any risk beyond that for which it initially contracted. Since Sunox/Holox is not asking that Travelers assume any increased risk anyway, this is a moot point.

7. Has the insured Sunox been disadvantaged by the insurers' conduct in the claims process?

Yes. There has been no intentional attempt on Sunox/Holox's part to conceal any information material to the risk; Travelers' agent Willis Corroon was advised of the stock acquisition and the change of ownership; Sunox remained a separate, easily identifiable entity following the acquisition; Sunox/Holox justifiably relied upon the professional expertise of the brokers to handle insurance coverage issues relating to the transaction; insurance underwriters had ample opportunity to review the deal and modify their policies if they thought it necessary to do so; Travelers' underwriter had specific knowledge of the transaction; and policy language itself is silent on assignment of interests. The claim is legitimate; it is verifiable; it should have been paid in a timely manner.

Commonly accepted standards of fair claims settlement practices have been violated in this case. For example, liability is reasonably clear but not acknowledged by Travelers and the other insurers; the insured is forced to resort to litigation and its attendant costs to receive the advantages of the contract for which the insured bargained and for which it paid a premium; unreasonable delay in paying the claim adds substantially to the damages already suffered by the insured.