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Note

JUDICIAL MALPRACTICE INSURANCE? THE JUDICIARY
RESPONDS TO THE LOSS OF ABSOLUTE JUDICIAL IMMUNITY

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For several centuries judges enjoyed absolute judicial immunity. Recent years have seen a decrease in the scope of judicial immunity. The increasing success of suits against judges has caused many members of the judiciary to purchase judicial malpractice insurance. The Author questions the current cost of such insurance by examining the amount and necessity of protection it affords and the risk of civil liability not already covered by the state.

I. INTRODUCTION

VIRTUALLY EVERY PRACTICING attorney and law professor is surprised to learn that many judges carry judicial malpractice insurance. This surprise stems from the belief that judges are immune from suit: a “wrong” decision properly invites an appeal, not a lawsuit against the judge.

While it is true that no attorney will prevail against a judge for having ruled incorrectly if the judge has proper jurisdiction, lawsuits against judges for actions undertaken in their role as judges have been increasingly successful.¹ This increase results from rulings limiting the traditional scope of absolute judicial immunity. Judicial malpractice insurance to indemnify judges against liability for damages and the attorney's fees required for the defense of such lawsuits has emerged as one response to such suits.

This note begins with a general description of who is a judge,² why judges are immune,³ and from what judges are immune.⁴ It then traces the history of judicial immunity in the United States and defines the scope of judicial immunity as it exists *268 today.⁵ After an overview of the reaction of the judiciary to the decreasing scope of judicial immunity,⁶ two specified responses are explored: (1) the judiciary's attempts to restore its immunity via legislation,⁷ and (2) the judiciary's resort to judicial malpractice insurance.⁸

Finally, this note critically analyzes the necessity, efficiency, and public policy grounds of state payment for this coverage.⁹ The note concludes that while judicial malpractice insurance serves a valid purpose, the judiciary must demand that the cost of this insurance not outweigh its benefits, and the public should question the use of tax dollars for its procurement.

II. WHO IS IMMUNE TO WHAT AND WHY?

The doctrine of judicial immunity raises three fundamental questions: Who is immune? Why is a judge immune? From what is a judge immune? These preliminary questions are answered below.

A. Who is Immune?

Determining to whom judicial immunity extends is not as straightforward as one might expect. The doctrine's applicability is not restricted to judges of general and limited jurisdiction; sheriffs,¹⁰ prosecutors,¹¹ coroners,¹² court reporters,¹³ clerks of court,¹⁴ jurors,¹⁵ grand jurors,¹⁶ witnesses,¹⁷ bailiffs,¹⁸ arbitrators,¹⁹ and *269 other individuals who have been sued for conduct undertaken in a judicial capacity²⁰ have successfully invoked judicial or "quasi-judicial" immunity. This note examines the doctrine of judicial immunity only with respect to judges as that term is commonly understood.²¹ However, the rationales underlying the doctrine of judicial immunity and the recent limitations that have restricted the scope of that immunity apply equally to judges and "quasi-judges" acting in a judicial capacity.

B. Why are Judges Immune?

Judicial opinions and scholarly articles advance both practical and theoretical support for judicial immunity. The reason most often emphasized is that fear of reprisal would undermine judicial independence from the interests of litigants: "[J]udges must be free to act without fear of harassment by dissatisfied litigants."²² It is easy to see the danger that a judge presiding over a case with *270 the knowledge that the losing party might bring a retaliatory suit, would simply rule against the party least likely to do so.

There are less obvious reasons to protect judges from civil liability. One scholar has suggested several additional justifications:

- (1) The saving to the public of the drain upon judicial time that would otherwise be necessitated for the defense of private litigation; . . . [2] The fear that men of property and responsibility might otherwise be deterred from judicial service; [3] The especial importance of an independent judiciary in the American federal and state constitutional systems; [4] The need somewhere of absolute finality in the litigation of controversies . . . ; [5] The existence of adequate opportunities for change of venue, new trial, or reversal on account of prejudice or error . . . ; [6] The theory . . . that judges in their exercise of the judicial function are under no duty . . . to the individual litigants before them, but are rather under a duty owing only to the public collectively and sanctioned sufficiently by the criminal law and the impeachment or removal power; [7] . . . [T]he feeling . . . that it would be manifestly unfair for the law to place one in a position the very significance of which is to require his opinion and accord it especial deference in the matter in hand, and yet at the same time to penalize him with personal consequences by reference to the opinion of another or others in regard to the same matter.²³

The author added that the continuing vitality of judicial immunity might rest on another very practical, if cynical, reason: judges may simply be protecting their own interests.²⁴

C. Immune to What?

The bases of judicial immunity presented above are insufficient to support an absolute exemption from the imposition of civil *271 liability or criminal culpability. For example, a judge accused of shoplifting could not plead judicial immunity as a defense²⁵ because the principal justification for invoking judicial immunity, fear of reprisal that would bias the judge, is lacking. Similarly, a judge found to have committed the tort of battery cannot raise judicial immunity as a defense.²⁶ The reasons underlying the doctrine of judicial immunity apply to immunize judges qua judges only.

Of course, certain behavior, such as issuing an opinion, is clearly “judicial,” while other behavior, such as shoplifting, clearly is not. However, some behavior is more difficult to categorize — for instance, hiring a relative as court reporter in favor of more qualified applicants. Cases discussing such behavior have defined the boundaries of judicial immunity.

D. The History of Judicial Immunity²⁷

1. Early Doctrine

The doctrine of judicial immunity first emerged in England in the early fourteenth century during the reign of King Edward III.²⁸ Not until this time “did the familiar distinction between the ***272** review of judgments and complaints against judges arise.”²⁹ Before this distinction was recognized, “r eview of a court judgment was, quite simply, a personal action against the judge.”³⁰ The doctrine of judicial immunity thus predates by nearly 400 years the other cornerstone of judicial independence, life tenure of office.³¹

The United States adopted these two cornerstones of judicial independence to build a strong judicial branch of government. The Constitution grants federal judges life tenure,³² and, in the first American cases to address the issue, judges were held immune from liability for actions authorized “by virtue of their judicial power.”³³

2. The Supreme Court Definition of Judicial Immunity

The Supreme Court of the United States did not review the doctrine of judicial immunity until after the Civil War,³⁴ at which time the Court endorsed the doctrine wholeheartedly. In *Randall v. Brigham*,³⁵ a disbarred attorney brought suit alleging that the state justice who disbarred him had acted arbitrarily and without proper authority. The Court, noting that the “doctrine of judicial immunity is as old as the law,”³⁶ ruled in favor of the judge because judges “are not liable to civil actions for their judicial acts ***273** . . . unless perhaps where the acts . . . are done maliciously or corruptly.”³⁷

Three years later, the Court removed even this limitation. In *Bradley v. Fisher*,³⁸ an attorney alleged that a judge, with malicious and corrupt motivation, had blacklisted him from practicing in certain courts.³⁹ Although the Court agreed with the attorney that the judge had improperly blacklisted him, the Court ruled that the judge could not be held liable for damages: “J udges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts . . . are alleged to have been done maliciously or corruptly.”⁴⁰ Addressing *Randall*'s suggestion that malicious judicial acts might carry civil liability,⁴¹ the *Bradley* Court stated, “Those qualifying words . . . were not intended as an expression of opinion that in the cases supposed such liability would exist”⁴²

While the *Bradley* Court broadened the scope of judicial immunity on one front by immunizing judges even when their rulings were clearly based on improper motives, it adopted two rules that served to narrow the range of judicial immunity on other fronts. First, the *Bradley* Court drew an important distinction between judges acting “in excess of their jurisdiction”⁴³ and judges acting “w here there is clearly no jurisdiction over the subject-matter”⁴⁴ The Court ruled that judges acting in clear absence of jurisdiction could be held liable for damages, regardless of whether their actions were malicious or corrupt. For instance, if a probate court judge tried and sentenced a party for a criminal offense, the judge could not assert judicial immunity.⁴⁵ However, ***274** if a judge in a criminal court of general jurisdiction tried and sentenced a party for conduct not proscribed by law, judicial immunity would protect the judge from personal liability.⁴⁶ Hence the *Bradley* Court established the parameters of judicial immunity by looking first to judicial subject matter jurisdiction. No judicial act, even a malicious

one, performed within the jurisdiction of the court could form the basis of a judge's personal liability.⁴⁷ However, if the court acted without subject matter jurisdiction, an honest mistake or an otherwise valid ruling could be grounds for a lawsuit.⁴⁸

The second important limitation which the Bradley Court adopted was the restriction of judicial immunity to “judicial acts.”⁴⁹ An exact definition of the term “judicial act” was not attempted by the Supreme Court until over 100 years later,⁵⁰ and this attempt received much criticism.⁵¹ Put simply, a judicial act is one that particularly requires judicial power and discretion; it is *275 an act that only a judge may perform.⁵² The distinction is that “‘judicial capacity’ . . . is a narrower concept than ‘official capacity,’”⁵³ and only those acts performed within the judicial capacity are immune from civil liability. Thus, a judge's act may be an official act yet not a judicial act.

Judicial immunity does not encompass official acts. Acts that are official but not judicial might be labelled “ministerial, administrative, executive, [or] legislative”⁵⁴ Among these official but nonjudicial acts are selecting jurors (ministerial),⁵⁵ hiring and firing employees (administrative),⁵⁶ evaluating and appointing judicial officers (executive),⁵⁷ and promulgating to the state bar a Code of Professional Responsibility (legislative).⁵⁸ These acts are *276 all, in some sense, job-related, but they are not judicial and, therefore, are subject to liability, because none of the reasons underlying the doctrine of judicial immunity⁵⁹ apply. For instance, protecting a judge's independent discretion in hiring a court clerk is not essential to the dispensation of justice.

Actions of a judge which are neither judicial nor official are, a fortiori, beyond the scope of judicial immunity. Were it otherwise, every action of a judge would be protected from attack. Wholly unofficial conduct involving abuse of judicial power⁶⁰ or criminal behavior⁶¹ is properly not immune from sanction. “Whether the act done by a judge is judicial or not is to be determined by its character, and not by the character of the agent.”⁶²

3. The Supreme Court Creates a Caveat

The broad outlines of judicial immunity laid down in Bradley remain the basis for determining judicial liability today. Judicial acts performed with proper jurisdiction have enjoyed absolute immunity from civil liability since Bradley was decided in 1872 — until recently. Oddly, at the moment that Bradley articulated the rules defining the scope of judicial immunity, Congress enacted seemingly unrelated civil rights legislation that would lead to the first serious erosion of those rules over 100 years later.⁶³

In order to implement the Civil Rights amendments,⁶⁴ Congress enacted the Civil Rights Act of 1871,⁶⁵ codified as *277 42 U.S.C. § 1983 (“section 1983”). Section 1983 imposes civil liability on “every person who under the color of state law causes . . . another person within the jurisdiction of the United States . . . deprivation of any rights, privileges or immunities secured by the Constitution and laws”⁶⁶ At the time of the enactment, certain members of Congress recognized that application of the statute to “every person” would conflict with doctrines of immunity protecting certain government officials, but the issue was not resolved.⁶⁷

The issue of section 1983's impact on judicial immunity first arose in *Pierson v. Ray*.⁶⁸ Several ministers were found guilty of breach of the peace while demonstrating for racial integration in Mississippi.⁶⁹ The presiding judge, Judge Spencer, “convicted the ministers even though he had been made aware of a Supreme Court decision supporting the ministers' actions.”⁷⁰ Later, in a de novo trial, the court directed a verdict of not guilty in favor of one clergyman, and charges against the others were withdrawn. The clergymen then brought suit against Judge Spencer claiming that the conviction violated their civil rights.⁷¹

The Pierson Court found the value of judicial immunity to outweigh that of protecting a citizen's civil rights, holding that judicial immunity was not abolished by [section 1983](#).⁷² Thus, Judge Spencer's immunity was upheld even though he violated the clergymen's civil rights.

In *Stump v. Sparkman*⁷³ the Court more clearly defined the scope of judicial immunity. The mother of a slightly retarded, fifteen year old girl filed a petition requesting Judge Stump to order her daughter to undergo fallopian tubal ligation. The mother feared that her daughter, who had started to date, was unable to *278 comprehend the possible consequences of sexual activity.⁷⁴ Judge Stump granted the petition “in an ex parte proceeding without notice to the minor, without a hearing, and without the appointment of a guardian ad litem.”⁷⁵ The daughter was sterilized less than one week later in an operation which she was told was an appendectomy.⁷⁶ When the daughter, then married, discovered two years afterwards why she could not become pregnant, she brought suit against Judge Stump for violation of her civil rights.⁷⁷ Relying on *Bradley*, the Supreme Court held Judge Stump immune from civil liability because he had not acted “in clear absence of” subject matter jurisdiction;⁷⁸ rather, his order was an erroneous exercise of jurisdiction which, under the *Bradley* formulation of judicial immunity, did not carry with it any liability.⁷⁹

Three justices dissented, agreeing with the majority's analysis of judicial immunity but maintaining that Judge Stump's behavior was so outrageous that it was not a judicial act.⁸⁰ The majority of the Court, however, found that Judge Stump's act was judicial and was also within his jurisdiction; in so finding, the majority “sacrificed the individual to the system in no uncertain terms.”⁸¹

Given this history of strong judicial immunity, one can imagine *279 Magistrate Pulliam's shock when, in 1984, the Supreme Court ruled that she was liable for over \$80,000⁸² because her conduct caused private injury to a plaintiff — even though her actions were indisputably judicial acts within her subject matter jurisdiction.⁸³ Magistrate Pulliam had set bail for several defendants accused of nonjailable offenses.⁸⁴ When some of the accused individuals were unable to make bail, she ordered them incarcerated. Richmond Allen, one of the jailed defendants, sued Magistrate Pulliam for violating his civil rights. Allen did not seek monetary damages; rather, he sought injunctive relief to prevent Pulliam from continuing this practice.⁸⁵ The federal district court found Pulliam's actions unconstitutional and enjoined Pulliam from engaging in such conduct.⁸⁶ In addition, the district court awarded Allen attorney's fees of \$7,038⁸⁷ under [42 U.S.C. § 1988](#).⁸⁸ Pulliam *280 appealed the award, claiming judicial immunity.⁸⁹ The Supreme Court affirmed, despite finding that Pulliam had acted in her judicial capacity and within her subject matter jurisdiction.⁹⁰ The Court held that the doctrine of judicial immunity does not preclude injunctive relief, as opposed to money damages, against a judicial officer acting in a judicial capacity.⁹¹ Moreover, judicial immunity does not preclude a statutory award of attorney's fees generated in obtaining that injunctive relief.⁹²

Pulliam was a 5-4 decision, and the dissent argued that the rationale for immunizing judges against civil liability for monetary damages applies equally to liability for attorney's fees.⁹³ Nevertheless, the majority found support for its holding in both an historical analysis of the judicial immunity doctrine and an analysis of congressional intent in enacting [section 1983](#).⁹⁴ “In so holding, the Court broke with 400 years of common-law doctrine and sent shock waves through the entire judicial community.”⁹⁵ The immunity of judges from economic liability arising from a jurisdictionally proper judicial act was no longer absolute after Pulliam.

III. REACTIONS OF THE JUDICIARY TO THE LOSS OF ABSOLUTE JUDICIAL IMMUNITY

Before the Pulliam decision, one judge and his law clerk wrote a prescient article discussing the possibility of injunctive relief and associated attorney's fees awards against judges.⁹⁶ The article also discussed the range of options that the judiciary as

a whole could take to preserve their immunity. One option was to do nothing: “It is not an irresponsible position, given the continuing strength of judicial immunity”⁹⁷ Of course, *Stump v. Sparkman*⁹⁸ lent support for this confidence, although *Pulliam* proved such reliance misplaced. The judiciary also had the option of proposing a qualified, rather than absolute, immunity.⁹⁹ This option would preempt more serious and uncontrolled erosion of immunity by the courts. Alternatively, the judiciary might seek national legislation instituting qualified or absolute immunity standards.¹⁰⁰ If adequately drafted, such legislation would prevent the erosion of judicial immunity. Finally, “insurance coverage for liability outside the reach of judicial immunity”¹⁰¹ was suggested; coverage could include indemnification against liability for acts not protected under judicial immunity in any case.¹⁰²

The judicial community did not collectively pursue any of these options (except the first) before *Pulliam*. After *Pulliam*, of course, reactions¹⁰³ were swift. The judiciary has since pursued two of the options proposed in order to restore their judicial immunity. First, the judiciary has lobbied Congress for legislation to extend judicial immunity to actions for injunctive relief and attorney's ***282** fees. Second, the judiciary sought and obtained “judicial malpractice insurance” to provide more immediate protection from their exposure to civil liability.

A. Proposed Legislation

The judiciary's concern over the loss of absolute judicial immunity was quickly impressed upon national legislators. Less than nine months after *Pulliam v. Allen*¹⁰⁴ was decided by the Supreme Court, congressional legislation was introduced to reverse its effect.¹⁰⁵ The objective of House Bill 877 was “to prohibit the award of attorney's fees against judges growing out of actions for injunctive relief.”¹⁰⁶ To this end, the legislation proposed amending [section 1988](#) to disallow recovery of attorney's fees when the underlying civil rights action is brought “against a judge or other judicial officer arising out of acts done or omitted in the performance of the duties of that office”¹⁰⁷ Within nine months, three additional bills with the same objective had been introduced in Congress.¹⁰⁸

Of these initial proposals to overturn the ruling of *Pulliam*, Senate Bills 1794 and 1795 were the first to receive hearings.¹⁰⁹ The first two witnesses at these hearings were Judge Peterson, Chairman of the Committee on Judicial Immunity for the Conference of Chief Justices,¹¹⁰ and Judge Dillin, representing the Judicial ***283** Conference of the United States.¹¹¹ Several other legal experts participated in these hearings to urge the expeditious passage of legislation restoring absolute judicial immunity.¹¹² This strong lobbying by the judiciary met with opposition from representatives of civil rights groups¹¹³ who argued that “the only thing that the possibility of injunctions chills, . . . is conduct so outrageous that a federal district judge might enjoin it, and we want to chill that kind of conduct.”¹¹⁴ Senate Bills 1794 and 1795 did not progress beyond committee action, nor did the two similar House Bills.¹¹⁵

Judicial lobbying of Congress did not subside, however, and new legislation attempting to restore judicial immunity has since been introduced in three successive Congresses.¹¹⁶ In fact, the Judicial ***284** Conference of the United States and the Conference of Chief Justices proposed the wording of at least two of the bills introduced to overturn *Pulliam*.¹¹⁷ However, none of these efforts has proceeded beyond committee consideration.¹¹⁸ “Trying to persuade Congress has been anything but easy for the state judges, despite having the support of the policy-making organizations ***285** of the federal and state judiciary and of the American Bar Association.”¹¹⁹ Passing legislation to overturn Supreme Court rulings is normally a long and difficult process. Nonetheless, judicial organizations are likely to continue to press for legislation amending [section 1988](#) until their goal of restoring absolute judicial immunity is achieved.¹²⁰

B. Judicial Malpractice Insurance

The judiciary knew that attempts to restore judicial immunity through legislation would involve at best frequent setbacks and delay, and at worst no success at all. Over six years have passed since judges were first exposed to liability for attorney's fees by Pulliam, and legislation reversing this exposure has yet to be enacted. To protect their members, various judicial organizations contacted commercial insurance companies in 1984 to request the development of judicial malpractice insurance. Insurance companies responded quickly by making professional liability insurance policies available to judges. These policies insure against attorney's fees awards as well as other sources of liability.¹²¹

The most successful effort to procure liability insurance resulted after representatives from the Judicial Immunity Committee of the State Trial Judges Conference and from the Judicial *286 Immunity Committee of the American Bar Association met with the National Union Fire Insurance Company ("National Union").¹²² National Union designed an insurance contract that was later adopted as a model policy of judicial liability insurance by the Conference of Chief Justices. In March 1984, the American Bar Association granted National Union "exclusive underwriting privileges through 1987."¹²³ Herbert L. Jamison and Company, an insurance broker and managing general agent for National Union, began marketing the policy exclusively soon after Pulliam was handed down.

Currently, National Union judicial malpractice insurance policies cover 2,496 state judges.¹²⁴ Most of these judges have bought individual policies for themselves, paying \$800 annually¹²⁵ for a \$2 million policy with no deductible.¹²⁶ Other judges receive the same coverage under a group policy purchased for them by their employer-state at a cost of \$650 per judge.¹²⁷ Coverage *287 under these policies is provided for claims arising out of "any act, error, or omission of the judge, made in an official judicial capacity (including but not limited to judicial, ministerial, administrative, and management acts)."¹²⁸ Thus, a judge covered by the National Union Policy is indemnified against Pulliam-type attorney's fees awards, as well as from damages arising out of hiring decisions, record-keeping mistakes, and any other job-related acts.¹²⁹ The National Union Policy further obligates the company "to defend any suit against the Insured alleging acts, errors or omissions falling within the coverage of this policy."¹³⁰ Accordingly, National Union provides coverage for all legal costs incurred in defending a lawsuit. Finally, the policy covers "all fees, costs and expenses incurred in the defense of claims made to any disciplinary committee, judicial competence committee, or any similar official committee of inquiry . . ."¹³¹ With limited exceptions,¹³² the National Union Policy alleviates most job-related, *288 monetary liability concerns a state judge might have.¹³³

IV. A CLOSER LOOK AT JUDICIAL MALPRACTICE INSURANCE

National Union "doesn't believe in advertising its judicial malpractice coverage."¹³⁴ Consequently, most legal scholars and practitioners are unaware of this new product. A close examination of the public policies and economics behind judicial malpractice insurance has never been published. A "consumer's guide" to judicial malpractice insurance is overdue.

Deciding whether to buy judicial malpractice insurance depends on its price and the identity of the buyer. Specifically, it must be determined whether the coverage is worth the premium, and whether the states or the judges themselves should purchase the coverage.

A. The Insurance is Not Worth the Premium

Compared to malpractice insurance costs for doctors¹³⁵ and lawyers,¹³⁶ \$800 seems inexpensive. In light of the remote potential for liability, however, the value of the coverage does not approach *289 the cost of the premium.

1. An Analysis of Judicial Risk

Since the scope of judicial immunity does not absolutely preclude the risk of civil liability, a judge might pursue four options to manage the residual risk: “risk avoidance, risk retention, . . . [risk] control and risk transfer.”¹³⁷ A judge may choose to avoid the residual risk altogether by leaving office;¹³⁸ retain the risk by personally paying any award of damages or attorney's fees;¹³⁹ control the risk by reducing the frequency or severity of loss, perhaps through legislation overturning Pulliam;¹⁴⁰ or transfer the risk by incurring the certain but limited expense of an insurance premium.¹⁴¹

Choosing among these options requires a judge to first perform an analysis of the residual risk. Judges face six categories of risk under current judicial immunity doctrine:

- 1) “NonJudicial Act Peril¹⁴²”: damage awards or settlement amounts arising from any official but nonjudicial act, such as improperly firing a court clerk;
- 2) “Unofficial Act Peril”: damage awards or settlement amounts arising from wholly unofficial acts undertaken while on the job, such as assaulting a witness during trial;
- 3) “Criminal Act Peril”: damage awards or settlement amounts arising from criminal acts undertaken while on the job, such as conspiring to accept bribes in return for favorable *290 holdings;
- 4) “Defense Fees Peril”: attorney's fees incurred to defend against both valid and spurious allegations connected with the Nonjudicial, Unofficial, and Criminal Act Perils, as well as attorney's fees still necessarily incurred to defend against easily dismissed claims stemming from an immunized judicial act;
- 5) “Misconduct Investigation Peril”: attorney's fees incurred to defend against any claims of judicial misconduct brought by a judicial conduct review board or disciplinary commission; and,
- 6) “Attorney's Fees Award Peril”: attorney's fees awards to plaintiffs bringing successful equitable actions under the Civil Rights Act, as in Pulliam.

An analysis of each of these perils allows an evaluation of judicial malpractice insurance. First, it is noteworthy that the first five perils all existed prior to Pulliam. Thus, a judge who chose not to engage in risk avoidance or risk transfer before Pulliam must determine whether the additional exposure of the Attorney's Fees Award Peril merits any change in risk-managing behavior. The additional exposure created by Pulliam is actually quite small — less than one percent of lawsuits against judges result in attorney's fees awards.¹⁴³ This data suggests that the judiciary's efforts to control or transfer their risk of loss from the Attorney's Fees Award Peril, through legislation or insurance, are excessive in relation to the incremental increase in risk that the peril represents.¹⁴⁴

*291 However, an examination of the aggregate risk of the six perils is necessary to determine the most effective means of risk allocation. Close examination shows that the total risk is less burdensome than it initially appears. The risk to a judge of civil liability flowing from each peril may be quantified as follows.

Defense Fees Peril. This peril represents little risk for most judges, since nearly all jurisdictions provide legal representation to judges when they are sued in their official capacities.¹⁴⁵ Thus, the only risk under the Defense Fees Peril would be legal defense fees incurred when a judge is sued for unofficial misconduct; that is, for alleged criminal or tortious acts committed while on the job. Non-trivial allegations of this sort of judicial behavior are unusual,¹⁴⁶ as one would hope. Since the vast majority of judges does not engage in the conduct that might cause such lawsuits, the Defense Fees Peril represents little risk to the typical judge.

NonJudicial Act Peril and Attorney's Fees Award Peril. These two risks have both represented little danger historically. Just as most jurisdictions provide resources to relieve judges from paying defense fees, states have indemnified their judges, even in the absence of a legal obligation, from liability for damages or *292 attorney's fees awards arising from their official acts.¹⁴⁷ States have either paid for such awards against judges because of tort claims statutes or other judicial indemnification statutes,¹⁴⁸ or simply as a matter of unwritten policy.¹⁴⁹ Furthermore, it is not *293 unusual for courts to simply find judges totally immune from liability even though the judge's act was official but not judicial.¹⁵⁰ Consequently, both the Nonjudicial Act Peril and the Attorney's Fees Award Peril represent virtually no risk of civil liability to the average judge.

Unofficial Act Peril, Criminal Act Peril, and Misconduct Investigation Peril. State indemnification normally does not alleviate these risks.¹⁵¹ Where damages or settlement amounts for assaulting a witness or accepting a bribe are awarded against a judge, the judge will normally have to bear the cost personally. Similarly, the state is not apt to offer to pay the fees of the defense attorney for a judge who is the subject of disciplinary proceedings.¹⁵² Therefore, the risks attending these three perils ultimately remain with the judge.

The Misconduct Investigation Peril to some extent reiterates the risk represented by the Defense Fees Peril, however, because an unsuccessful defense against allegations of criminal behavior will normally make unnecessary any misconduct investigation. More importantly, the vast majority of judges will not behave in such a way that a misconduct investigation by a disciplinary body will occur. Likewise, few judges will ever pay damages because of misconduct in office. To most judges the Unofficial Act Peril, Criminal Act Peril, and Misconduct Investigation Peril represent a fairly insignificant risk of civil liability.

*294 Summary. Due to judicial immunity protections and voluntary or statutory state risk absorption, the risk of civil liability retained by judges is deceptively low. This suggests that the choice of risk avoidance is inappropriate; judges managing their risk intelligently should not leave office due to fears about their exposure to civil liability.¹⁵³ This leaves the options of risk transfer and risk retention.¹⁵⁴ A reasonable judge might choose to insure against the risk of incurring civil liability, or instead choose to accept the risk and pay for any liability that might arise.¹⁵⁵ The determination depends on how the cost of judicial malpractice insurance compares with the civil liability that a typical judge incurs.

2. A Cost-Benefit Analysis of Risk Transfer

The price of judicial malpractice insurance determines whether its purchase is an appropriate response to the potential for liability. An efficient price for judicial malpractice insurance directly reflects the sum of three elements: the average cost of the risk insured against, the expense involved in administering the insurance, and a reasonable profit.¹⁵⁶

Actual profit, cost, and expense figures from private insurance *295 companies are not easily obtainable, but the price may be too high for National Union's coverage. The State of Ohio, for example, has purchased annually from National Union a group policy covering all of its own state judges every year since 1985.¹⁵⁷ In 1988, this policy covered 790 judges.¹⁵⁸ At the group rate of \$650 per judge, annual premiums of \$513,500 were paid in 1988. Therefore, Ohio paid roughly \$2.0 million in premiums for the period of 1985 through 1988.¹⁵⁹ Over the same period, the total amount paid out by National Union under the Ohio group policy was \$216,870.05, or roughly 10% of premium collected.¹⁶⁰ National Union placed another \$226,593.07 in reserve for cases pending final resolution.¹⁶¹ This represents a total expected loss ratio¹⁶² of approximately twenty-two percent. Thus, National Union expects that less than twenty-five cents from every dollar *296 received for insurance coverage will be needed to pay for claims connected with their Ohio judicial malpractice insurance group policy.

There are several possible explanations for imposing an apparently excessive premium. First, high administrative costs may inflate the insurance premium.¹⁶³ Second, the National Union Policy is unnecessarily broad in its coverage, exceeding the level of protection required to effectively bear the existing risk.¹⁶⁴ Third, the National Union Policy involved a novel type of insurance coverage. Initial rate-setting had to have been largely guesswork. Caution counselled excessive, not inadequate, premium levels.¹⁶⁵ Fourth, the claims experience of Ohio's judges may be an aberration. One claim for a large amount could double the expected loss ratio.¹⁶⁶ Finally, National Union created its policy during a period of accelerating rates of lawsuits against judges.¹⁶⁷ Therefore, avoiding future rate increases required initially high rates. The fact remains, however, that the premiums charged by National *297 Union to provide judicial malpractice insurance far exceed the costs associated with the risk transferred.

It should be noted that National Union responded quickly to the judiciary's requests to create an insurance policy that met certain requirements: high limits of liability, coverage for legal defense costs, and no deductible.¹⁶⁸ This quick response, and a willingness to insure virtually any judge who applied for the insurance, justifiably earned National Union a designation from the Conference of Chief Justices as creators of a "model policy" of judicial malpractice insurance.

After five years of experience, however, buyers of judicial malpractice insurance from National Union are justified in requesting that the company re-examine its rate structure. Judges should not expect an insurer to operate without a profit: "[i]nsurer solvency is essential for the insured" ¹⁶⁹ Neither should judges assume judicial malpractice insurance is worthless at any *298 price. Although most judges carrying such insurance will never make a claim, those who do find great comfort in the coverage.¹⁷⁰ But judges should demand that the rates charged by National Union "not be more than adequate."¹⁷¹

B. States Should Not Purchase Judicial Malpractice Insurance

Separate from the quantitative question of whether judicial malpractice insurance is too expensive is the qualitative question of whether it is appropriate for the state to pay any amount for such insurance. Even if the insurance premium is actuarially valid, states must determine whether they should pay the premium or leave this to judges personally.

Unavoidably, arguments regarding state-paid indemnification reflect arguments for and against judicial immunity. Those who argue in favor of restricting the scope of judicial immunity¹⁷² are likely to argue that judges themselves should pay for damage awards or for insurance against damage awards. Conversely, those who believe that exposure to attorney's fees awards improperly erodes judicial immunity are apt to insist that judicial immunity is best kept intact through state indemnification.

However, to advocate or reject state payment of judicial malpractice insurance premiums based solely on unsubstantiated fears of promoting judicial irresponsibility is simplistic.¹⁷³ Public policy *299 arguments concerning state payment of judicial malpractice insurance premiums are best made in the context of each separate peril insured against by the National Union Policy.¹⁷⁴ Assuming that these risks are sufficient to warrant the purchase of insurance,¹⁷⁵ several arguments can be made in favor of and in opposition to state indemnification of the judge against each peril.

Defense Fees Peril and Misconduct Investigation Peril. Although it may be inappropriate for an insurer to pay for an insured's liability arising from certain types of behavior, courts have held that it is appropriate for an insurer to provide legal defense for an insured against the same claims.¹⁷⁶ Thus, while public policy may not support insurance against a judge's criminal conduct, coverage for legal defense costs against allegations of criminal behavior is not improper. Fears that the result of such insurance would be a subsidy of judicial misconduct are not well-founded.

State payment for such insurance, however, is a concern separate from the advisability of such coverage. Upon first examination, public policy seems to support state payment of the insurance costs connected with the Defense Fees and Misconduct

Investigation Perils. The vast majority of lawsuits against judges, whether civil suits or investigations of misconduct initiated by disgruntled litigants, are dismissed.¹⁷⁷ Thus, a state's payment for its judges' defense or insurance costs protects judges from harassing litigation and prevents wasting valuable judicial time.

An argument can be made, however, that the state should absorb the Defense Fees Peril from its judges only through the use of state-appointed counsel, not state-paid insurance. Counsel provided *300 by the insurance company will not have "the effect of providing greater state supervision over judicial conduct in state courts . . . [which] would . . . provide greater assurances that judges exercise their judicial offices with propriety."¹⁷⁸ Thus, employing private sector attorneys instead of state employees to defend state judges could lead to inappropriate attempts at risk control. The insurance company will be more concerned with teaching judges to avoid any conduct that might lead to a lawsuit, while the state would more properly be concerned only with teaching judges to avoid unconstitutional conduct. In sum, the use of public funds to relieve judges from the burden of defending against mostly frivolous claims may be a valid expenditure, but buying insurance is not an appropriate means of relieving this burden.

Criminal Act Peril. Wilful criminal acts are not and generally cannot be insured against.¹⁷⁹ Therefore, when the state pays for judicial malpractice insurance it is not insuring its judges against liability for damages arising from their criminal acts, although associated legal defense fees are covered. To the extent that judicial malpractice insurance does not insure against the Criminal Act Peril, there is no public policy argument against state payment for the insurance.

Attorney's Fees Award Peril. It has been suggested that, absent insurance, the award of attorney's fees against a judge is largely determined by the state itself. Since states defend their judges as a matter of course,¹⁸⁰ an attorney's fees award against a judge "would accrue only if and to the extent that the state, on behalf of the judge, decided to litigate whether the judge could constitutionally continue the challenged practice."¹⁸¹ Unless a judge decided to fight an injunction despite the state's agreement with the plaintiff's position, only de minimis attorney's fees awards against judges would arise without the state's consent. If the state wrongly defended its judges' actions, fairness dictates that the state should pay for any attorney's fees awards if the plaintiff finally succeeds.

When a state pays for judicial malpractice insurance, however, the enjoined judge determines whether to fight an injunction without input from state-appointed counsel. A judge properly enjoined *301 could, foolishly or stubbornly, decide alone to litigate a clearly unconstitutional practice, causing attorney's fees awards to mount needlessly.¹⁸² Situations could occur where the insurance company might pay settlement costs or attorney's fees awards that far exceed the amount that the state might pay if it refused to litigate on behalf of the judge. State payment for insurance against the Attorney's Fees Award Peril thus removes an appropriate restraint against a judge's pursuit of expensive and groundless litigation.

Unofficial Act Peril. It is almost senseless to argue that the state should pay for damages arising from a judge's actions that are wholly unofficial and clearly represent misconduct. Imagine, for example, a judge who sexually harasses lawyers in the courtroom.¹⁸³ No public policy is served by using public funds to insure against liability stemming from such behavior. In fact, because protecting such behavior serves no tenable interest, insurers normally refuse coverage for such acts.¹⁸⁴ As such, state payment for judicial malpractice insurance might not extend to insuring against the Unofficial Act Peril; the peril is not normally insured against in any event. Like the Criminal Act Peril, then, no public *302 policy argument against state payment for judicial malpractice insurance can be made to the extent that the insurance does not insure against the Unofficial Act Peril.

Nonjudicial Act Peril. Like criminal acts or unofficial misconduct, little justification exists for the state to pay to insure against a judge's liability for improper official acts. Racial, sexual, or religious discrimination in hiring or firing is the archetypal nonjudicial act. The state can properly supply legal defense costs against this type of claim. If the claim is proved valid, however, no public policy argument supports protecting the judge from liability.¹⁸⁵ The existing parameters of judicial immunity allow the liability of a judge for improper official acts.¹⁸⁶ To hold judges personally liable for disregarding anti-discrimination

policies and then to relieve them of that liability via state-paid insurance is inconsistent. Judges who are uncomfortable with exposure to this risk should pay to insure against the risk themselves.

Summary. State payment for its judges' professional liability insurance is inappropriate. By paying for judicial malpractice insurance, the state insulates its judges from liability for wrongful acts of discrimination, may in rare instances relieve judges from liability for criminal acts or acts of serious misconduct, and reduces the level of supervision over its judges. While transfer of certain risks from the judges to the state is appropriate, use of insurance as a risk-transfer mechanism produces undesirable side effects. On balance, if the state were to discontinue paying for its judges' judicial malpractice insurance, judges would remain indemnified against risks properly shouldered by the state but would no longer evade liability they properly should retain.

*303 V. CONCLUSION

The loss of absolute judicial immunity occurred gradually through rulings that judges could be held liable for official but nonjudicial acts, and also occurred suddenly when Pulliam held state judges liable for attorney's fees awards under [section 1988](#).¹⁸⁷

In the marketplace for judicial services, suppliers (judges) and consumers (accused criminals, civil litigants, and the general public) reacted to this loss of absolute judicial immunity. Consumers reacted with more lawsuits against judges. Suppliers responded by obtaining indemnification against liability and by seeking legislation to erase their liability.

Judges obtained indemnification through a new product, commonly called judicial malpractice insurance. Wise purchase of any product, especially a new one, requires a cost-benefit analysis; that is, buyers must be certain that the price is reasonable. If the insurance companies are unable to defend the rates charged, buyers should request a rate reduction or a rebate, seek another insurer, or self-insure with a clear knowledge of the total risk retained. Only through demanding information from their insurance company and acting on it, however, will buyers of this new product cause the marketplace to act efficiently.

The public should also question the use of state funds to procure insurance for the judiciary as a matter of policy, even if the price is justified. Judges buying their own malpractice insurance are acting as appropriately as doctors or lawyers who buy malpractice insurance for themselves. However, the expenditure of public funds to allow state judicial officials to escape liability for improper or ill-advised conduct is poor public policy. Moreover, it is the duty of the state to supervise its own judges. Paying the private sector to defend judges removes this supervision and may thereby damage the quality of judicial services offered.

Finally, even inefficient marketplace responses to the loss of absolute judicial immunity are preferable to restoration of absolute judicial immunity. Against the alternative of leaving individuals injured by judicial misconduct without remedy, payments for *304 judicial malpractice insurance that are excessive or improperly shouldered by the state are still a better, and more just, solution.

Footnotes

- 1 Middleton, [Immunity in Question, Judges Buy Insurance](#), 67 A.B.A. J. 1248, 1248 (1981).
- 2 See *infra* text accompanying notes 10-21.
- 3 See *infra* text accompanying notes 22-24.
- 4 See *infra* text accompanying notes 25-26.
- 5 See *infra* text accompanying notes 27-95.
- 6 See *infra* text accompanying notes 96-103.

- 7 See infra text accompanying notes 104-20.
- 8 See infra text accompanying notes 121-33.
- 9 See infra text accompanying notes 134-86.
- 10 See, e.g., [Doe v. McFaul](#), 599 F.Supp. 1421, 1430-32 (N.D. Ohio 1984) (sheriff implementing a judge's orders shares absolute immunity under the doctrine of "quasi-judicial" immunity).
- 11 See, e.g., [Imbler v. Pachtman](#), 424 U.S. 409, 420-29 (1976) (same considerations that underlie common law immunity of judges apply to prosecutors).
- 12 See, e.g., [Lambert v. Garlo](#), 19 Ohio App. 3d 295, 299, 484 N.E.2d 260, 265 (1985) (rejecting claim that coroners do not enjoy judicial immunity when conducting investigations).
- 13 See, e.g., [Brown v. Charles](#), 309 F.Supp. 817, 817-18 (E.D. Wis. 1970) (judicial immunity extends to court reporter in cause of action for failure to provide full transcript).
- 14 See, e.g., [Wiggins v. New Mexico State Supreme Court Clerk](#), 664 F.2d 812, 815 (10th Cir. 1981) (judicial immunity encompasses clerks and other functionaries because they are necessary for the court to fulfill its judicial duties), cert. denied, 459 U.S. 840 (1982).
- 15 See, e.g., [White v. Hegerhorst](#), 418 F.2d 894, 895 (9th Cir. 1969) (jurors are immune from civil action for damages), cert. denied, 398 U.S. 912 (1970).
- 16 See, e.g., [Turpen v. Booth](#), 56 Cal. 65, 67 (1880) (common law provides grand jurors immunity).
- 17 See, e.g., [Briscoe v. LaHue](#), 460 U.S. 325, 334 (1983) (witnesses enjoy a common law immunity).
- 18 See, e.g., [Wolff v. Flanagan](#), No. 41746 (Ohio Ct. App. Oct. 2, 1980) (LEXIS) (bailiff immune from liability for damages arising from execution of a ministerial duty).
- 19 See, e.g., [Hill v. Aro Corp.](#), 263 F.Supp. 324, 326 (N.D. Ohio 1967) (an arbitrator is a quasi-judicial officer and arbitration is encouraged by national policy, therefore the common law rule of immunity applies).
- 20 Judicial immunity may also extend to mediators, referees, umpires, elected or appointed officials who preside over disputes, and support staff to these individuals. The doctrine generally applies to immunize neutral parties against liability resulting from their behavior when exhibited pursuant to their responsibility as arbiter of a dispute or administrator of justice. See N. ROGERS & R. SALEM, A STUDENT'S GUIDE TO MEDIATION AND THE LAW 183 (1987) ("[N]ot only the judge, but also those performing judicial acts for the judge, are immune . . .").
- 21 A judge has been defined as "[a]n officer so named in his commission, who presides in some court; a public officer, appointed to preside and to administer the law in a court of justice . . ." BLACK'S LAW DICTIONARY 841 (6th ed. 1990). The term judge is construed here to also include officials commonly called magistrates, defined as "[m]inor officials or officers with limited judicial authority; e.g. justices of the peace, judges of police courts, mayor's courts, or magistrate's courts . . . [I]n a narrow sense [they are] regarded as . . . inferior judicial officer[s]." *Id.* at 857.
- 22 Way, [A Call for Limits to Judicial Immunity: Must Judges Be Kings in their Courts?](#), 64 JUDICATURE 390, 392 (1981). Judicial independence was emphasized as the reason for protecting judicial immunity to civil liability in one of the earliest Supreme Court decisions to address this issue: "For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself." [Bradley v. Fisher](#), 80 U.S. (13 Wall.) 335, 347 (1871).
- 23 Jennings, [Tort Liability of Administrative Officers](#), 21 MINN. L. REV. 263, 271-72 (1937) (footnotes omitted) (emphasis in the original). For a criticism of the reasons behind the policy of judicial immunity listed by Jennings, see King, [Judicial Immunity and Judicial Misconduct: A Proposal for Limited Liability](#), 20 ARIZ. L. REV. 549, 579-89 (1978); Note, [Immunity of Federal and State Judges From Civil Suit — Time For a Qualified Immunity?](#), 27 CASE W. RES. L. REV. 727, 741-43 (1977).

- 24 See Jennings, *supra* note 23, at 272.
- 25 See, e.g., Luttner, Stokes Found Not Guilty of Dog Food Theft, *The Plain Dealer*, July 29, 1989, at 1A, col. 1 (“Although [Judge] Stokes acknowledged he took the \$17.25 bag of dog food June 2 without paying for it, he maintained throughout the two-day trial that he had intended to pay for it and thus was not guilty because he had no criminal intent.”). Judge Stokes, who was acquitted, did not argue that he was insulated from prosecution under the doctrine of judicial immunity.
- 26 See, e.g., [Gregory v. Thompson](#), 500 F.2d 59, 61 (9th Cir. 1974) (judge found civilly liable for assault and battery because he acted in a nonjudicial capacity when he “forced Gregory out the [courtroom] door, threw him to the floor in the process, jumped on him, and began to beat him.”). For a definition of judicial acts performed in a judicial capacity, see *infra* text accompanying notes 49-53.
- 27 More than a brief historical sketch of the development of the judicial immunity doctrine is beyond the scope of this note. For a more detailed discussion of the history of judicial immunity, see Stafford, An Overview of Judicial Immunity, *STATE CT. J.*, Summer 1977, at 3 (discussing the doctrine of judicial immunity as applied by state courts); Weisberger, The Twilight of Judicial Independence — Pulliam v. Allen, 19 *SUFFOLK U.L. REV.* 537 (1985) (examining early American case law on judicial independence); [Note, Pulliam v. Allen: Delineating the Immunity of Judges from Prospective Relief](#), 34 *CATH. U.L. REV.* 829 (1985) (reviewing both the origin and purpose of the judicial immunity doctrine); Case Comment, Judges — Malpractice? Judicial Immunity, Injunctive Relief, and Attorney’s Fees under the Civil Rights Statutes, 14 *MEM. ST. U.L. REV.* 588 (1984) (discussing the history of judicial immunity and the Supreme Court’s decision in *Pulliam v. Allen*).
- 28 See 6 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 235 (1st ed. 1924) (“as early as Edward III’s reign . . . [it was held] that a litigant could not go beyond the record, in order to make a judge civilly or criminally liable for an abuse of his jurisdiction.”).
- 29 Roth & Hagan, Tracing the Judicial Immunity Doctrine: A View From Kingly Times to the Present, *STATE CT. J.*, Summer 1982, at 4, 4 [hereinafter Roth & Hagan, *Kingly Times*], reprinted in Roth & Hagan, [The Judicial Immunity Doctrine Today: Between the Bench and a Hard Place](#), 35 *JUV. & FAM. CT. J.* 3 (1984) [hereinafter Roth & Hagan, *The Judicial Immunity Doctrine Today*].
- 30 *Id.*
- 31 Weisberger, *supra* note 27, at 538 n.8 (“[N]ot until the Act of Settlement 12 and 13 William III (1701) [was it] that judges were given tenure independent of the King during good behavior.”).
- 32 U.S. CONST. art. III, § 2.
- 33 [Lining v. Bentham](#), 2 S.C.L. (2 Bay) 1, 3 (1796); accord [Phelps v. Sill](#), 1 *Day* 315, 329 (Conn. 1804) (“[H]owever erroneous his judgment may be, . . . a judge is never liable, in any civil action, for damages arising from his mistake.”); [Yates v. Lansing](#), 5 *Johns.* 282 (N. Y. Sup. Ct. 1810) (chancellor not liable in a civil suit regarding the chancellor’s habeas corpus decision), *aff’d*, 9 *Johns.* 395 (N.Y. 1811); [Brodie v. Rutledge](#), 2 S.C.L. (2 Bay) 28 (1796) (a judge is liable for misdemeanors in office and is subject to impeachment for misconduct, but cannot be sued for opinions written in his judicial capacity).
- 34 See [Randall v. Brigham](#), 74 U.S. (7 Wall.) 523 (1868) (considering state common law in the absence of Supreme Court precedent).
- 35 *Id.*
- 36 *Id.* at 536.
- 37 *Id.*
- 38 80 U.S. (13 Wall.) 335 (1871).
- 39 *Id.* at 338. The attorney defended an accused conspirator in President Lincoln’s assassination. Shortly after a hung jury trial, the presiding judge issued an order restricting the attorney from appearing in the Supreme Court of the District of Columbia. *Id.* at 336-37.
- 40 *Id.* at 351.
- 41 See *supra* text accompanying note 37.

- 42 [Bradley](#), 80 U.S. (13 Wall.) at 351; see also [Gregoire v. Biddle](#), 177 F.2d 579, 581 (2d Cir. 1949) (Hand, C.J.) (“[I]t has been thought in the end better to leave unredressed the wrongs done by dishonest officers than subject those who try to do their duty to the constant threat of retaliation.”), cert. denied, 339 U.S. 949 (1950). For a list of sources criticizing Judge Hand's position, see *infra* note 99.
- 43 [Bradley](#), 80 U.S. (13 Wall.) at 351.
- 44 *Id.* at 351-52.
- 45 *Id.* at 352; see also, e.g., [Vickrey v. Dunivan](#), 59 N.M. 90, 279 P.2d 853 (1955) (justice of the peace, who tried motorist under a village ordinance he knew did not exist, and who knew offense, if any, occurred outside his village, was not empowered with jurisdiction and thus was not immune).
- 46 [Bradley](#), 80 U.S. (13 Wall.) at 352; see also, e.g., [Huendling v. Jensen](#), 168 N.W.2d 745 (Iowa 1969) (finding justice of the peace who was empowered to issue arrest warrants but did so without probable cause, for purpose of collecting unpaid checks and thereby earning a twenty percent commission, immune from a suit for damages).
- 47 [Bradley](#), 80 U.S. (13 Wall.) at 351.
- 48 *Id.* at 351-52. The “absence of jurisdiction” exception to judicial immunity as adopted by the Bradley Court was first proclaimed in 1612. [King](#), *supra* note 23, at 570 n.158.
- 49 [Bradley](#), 80 U.S. (13 Wall.) at 350. The “nonjudicial act exception” to judicial immunity adopted in Bradley was first recognized in 1589. [King](#), *supra* note 23, at 576 n.223.
- 50 See [Stump v. Sparkman](#), 435 U.S. 349, 360-62 (1978) (enumerating factors that determine whether an act is “judicial”); *infra* note 52 and accompanying text.
- 51 See Note, [What Constitutes a Judicial Act for Purposes of Judicial Immunity?](#), 53 *FORDHAM L. REV.* 1503, 1511 n.61 (1985) [hereinafter Note, Judicial Act] (analyzing various cases in which the Supreme Court's definition of a judicial act has led to holdings of judicial immunity); see also, Note, [Immunity Doctrines and Employment Doctrines of Judges](#), 55 *FORDHAM L. REV.* 621 (1987) [hereinafter Note, Immunity Doctrines] (discussing the inconsistency of the application of the Stump “judicial act” test in determining whether a judge's employment decisions are “judicial” for purposes of immunity); Note, [An Argument Against Judicial Immunity For Employment Decisions](#), 11 *NOVA L. REV.* 1127 (1987) [hereinafter Note, Employment Decisions] (comparing inconsistent cases involving judicial immunity with respect to employment decisions and suggesting that judges not be immune from suit for damages arising from their decisions). Compare [Rheuark v. Shaw](#), 628 F.2d 297 (5th Cir. 1980) (supervision of court reporters held a judicial function), cert. denied sub nom., [Rheuark v. Dallas County](#), 450 U.S. 931 (1981) with [Richardson v. Koshiba](#), 693 F.2d 911 (9th Cir. 1982) (appointment of judicial officers is an administrative, ministerial, or executive act, not judicial in nature).
- 52 As the Supreme Court has noted, “Because [the judge] performed the type of act normally performed only by judges . . . we find no merit to respondents' argument that the informality with which he proceeded rendered his action nonjudicial and deprived him of his absolute immunity.” [Stump](#), 435 U.S. at 362-63 (1978) (emphasis added); see also *BLACK'S LAW DICTIONARY* 846 (6th ed. 1990) (Judicial act defined as “[a]n act by [a] member of judicial department in construing law or applying it to a particular state of facts.”).
- 53 Note, Judicial Act, *supra* note 51, at 1512.
- 54 *Id.* at 1508 (footnotes omitted).
- 55 See, e.g., *Ex Parte Virginia*, 100 U.S. 339, 348 (1879) (“The duty of selecting jurors might as well have been committed to a private person as to one holding the office of a judge . . . It is merely a ministerial act . . .”).
- 56 See, e.g., [Clark v. Campbell](#), 514 F.Supp. 1300, 1302 (W.D. Ark. 1981) (“[T]he Court is not persuaded that a County Judge, in hiring or firing county employees, is exercising a judicial function. It is clear that these duties are purely administrative and ministerial in scope.”). But see [Blackwell v. Cook](#), 570 F.Supp. 474, 477-79 (N.D. Ind. 1983) (firing a probation officer is a judicial act because a probation officer's duties are intertwined with judicial responsibility, and thus judicial immunity protects a judge from liability for monetary damages).
- For the purposes of judicial immunity, the employment decisions of judges have not been recognized consistently as nonjudicial acts. See generally Note, Immunity Doctrines, *supra* note 51 (examines the inconsistency of decisions categorizing the same employment

decision as judicial and ministerial, and concludes that the qualified immunity applicable to government executives should be applied to judicial employment decisions); Note, *Judicial Act*, supra note 51 (examines substantive and procedural problems arising from the Stump decision's broad definition of a judicial act); Note, *Employment Decisions*, supra note 51. The Supreme Court, addressing the issue for the first time, found that employment decisions are not protected by judicial immunity. *Forrester v. White*, 484 U.S. 219 (1988).

57 See, e.g., *Richardson v. Koshiba*, 693 F.2d 911, 914 (9th Cir. 1982) (“[R]esponsibilities of recommending candidates for judicial office to the appointing officials and of reviewing reappointment petitions . . . bear little resemblance to the characteristic of the judicial process that gave rise to the recognition of absolute immunity for judicial officers Rather, these responsibilities . . . are executive in nature” (citations omitted)).

58 See, e.g., *Supreme Court v. Consumer's Union of the United States, Inc.*, 446 U.S. 719, 731 (1980) (“[P]ropounding the Code was not an act of adjudication but one of rulemaking.”). Acts undertaken by a judge that are classified as “legislative” rather than judicial may be protected nonetheless under “legislative immunity”; this was the holding in *Consumer's Union*. *Id.* at 731-34.

59 See supra text accompanying notes 22-24.

60 See, e.g., *Zarcone v. Perry*, 572 F.2d 52 (2d Cir. 1978) (damage award upheld against judge who had a coffee and frankfurter vendor brought in handcuffs to his chambers where the judge berated and threatened the vendor for selling a “putrid” cup of coffee).

61 See, e.g., *Braatelen v. United States*, 147 F.2d 888, 895 (8th Cir. 1945) (“Judicial title does not render its holder immune to crime even when committed behind the shield of judicial office.” (citation omitted)). For an overview of judicial misconduct, criminal and otherwise, see *King*, supra note 23, at 555-63.

62 Ex Parte *Virginia*, 100 U.S. 339, 348 (1879). Decided only seven years after *Bradley*, the Supreme Court, in Ex Parte *Virginia*, seized upon the distinction between judicial and nonjudicial acts to find a judge liable for purposefully excluding “citizens . . . of African race and black color” from juries. *Id.* at 340.

63 Congress enacted the Civil Rights Act of 1871 while *Bradley* was being argued before the Supreme Court. Note, supra note 23, at 734.

64 U.S. CONST. amends. XIII, XIV & XV.

65 Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983 (1982 & Supp. V 1987)).

66 42 U.S.C. § 1983 (1982) (emphasis added).

67 See Note, supra note 23, at 738-40; Case Comment, supra note 27, at 591 n.24 (discussing the legislative history of Section 1983 and recounting the Congressional debate over the possibility that section 1983 would limit judicial immunity).

68 386 U.S. 547 (1967). The impact of section 1983 on legislative immunity had already been adjudicated. See *Tenney v. Brandhove*, 341 U.S. 367 (1951) (holding that the Civil Rights Act of 1871 did not affect legislative immunity). Other forms of immunity have been successfully raised by defendants to shield themselves from section 1983 liability. See Note, supra note 27, at 831 n.15.

69 *Pierson*, 386 U.S. at 549.

70 Case Comment, supra note 27, at 592.

71 *Pierson*, 386 U.S. at 550.

72 *Id.* at 554.

73 435 U.S. 349, reh'g denied, 436 U.S. 951 (1978).

74 *Id.* at 351 n.1. It is questionable whether the daughter was even slightly retarded. The only evidence to this effect was the mother's sworn affidavit. In fact, the daughter “attended public school and had been promoted each year with her class.” *Id.* at 351.

75 *Id.* at 360.

76 *Id.* at 353.

- 77 Id. The daughter also brought suit against the doctors and hospital involved in the operation, her mother, and her mother's attorney. Id. Modern judicial action of this type is not peculiar to Judge Stump. See, e.g., [Scott v. Hayes](#), 719 F.2d 1562 (11th Cir. 1983) (judge held immune from liability for ordering husband to undergo a vasectomy as a condition of a favorable property settlement in a divorce proceeding).
- 78 [Stump](#), 435 U.S. at 357.
- 79 Id. at 364.
- 80 See Id. at 368-69 (Stewart, J., dissenting).
- 81 Roth & Hagan, *Kingly Times*, supra note 29, at 7. It is not surprising, as Roth and Hagan note, that “Stump has elicited a uniformly critical response from scholarly writers.” Id.; see, e.g., Maher, *Federally-Defined Judicial Immunity: Some Quixotic Reflections on an Unwarranted Imposition*, 88 DICK. L. REV. 326 (1984). The Stump ruling is especially threatening because it violates the doctrine of *ubi jus ibi remedium* (“where there is a right, there is a remedy”). Id. at 333 n.43. This doctrine is at the core of any credible system of justice. “The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.” Id. at 329 (quoting [Marbury v. Madison](#), 5 U.S. (1 Cranch.) 137, 163 (1803)); see also Comment, *Pulliam's Pacific Progeny: Deep Pockets in the Judge's Robes?*, 17 PAC. L.J. 461, 479 n.176 (1985) (listing sources critical of Pulliam).
- 82 Magistrate Pulliam was found liable for \$7,038 in attorney's fees by the district court in which the original lawsuit was heard. [Pulliam v. Allen](#), 466 U.S. 522, 526 (1984). After appeals through the Supreme Court, however, Magistrate Pulliam's liability for attorney's fees had increased to over \$80,000. Legal Fees Equity Act: Hearings on S. 1580, S. 1794 and S. 1795 before the Subcomm. on the Constitution of the Comm. on the Judiciary, 99th Cong., 1st Sess. 194 (1985) [hereinafter *Legal Fees Equity Act Hearings*]. By agreement of the parties this sum was reduced to \$43,691.09. Weisberger, supra note 27, at 554.
- 83 [Pulliam v. Allen](#), 466 U.S. 522 (1984). The Supreme Court had previously indicated in dicta that injunctive relief against judges coupled with an award of attorney's fees might be appropriate in some circumstances. [Supreme Court of Va. v. Consumers Union of the United States, Inc.](#), 446 U.S. 719, 738-39 (1980). Moreover, at least one article discussed the possibility of a Pulliam-type decision as early as 1982. See Roth & Hagan, *Kingly Times*, supra note 29, at 19 (discussing the possibility that if judicial immunity did not bar injunctive and declaratory relief, attorney's fees awards could be granted).
- 84 [Pulliam](#), 466 U.S. at 525 (the maximum penalty for the underlying offense was simply a fine).
- 85 Id.
- 86 [Allen v. Burke](#), 690 F.2d 376, 377 (4th Cir. 1982), aff'd sub nom., [Pulliam v. Allen](#), 466 U.S. 522 (1984).
- 87 Id. at 380.
- 88 42 U.S.C. § 1988 (1988) (“In any action or proceeding to enforce a provision of section[] . . . 1983 . . . of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.”) Section 1988 has been called a “fee-shifting” statute in that it provides an exception to the “American Rule” that each party bears its own attorney's fees. See Comment, supra note 81, at 480-82 (discussing the American law of attorneys' fees awards). The Supreme Court has found it “clear from the legislative history that § 1988 was enacted because existing fee arrangements were thought not to provide an adequate incentive to lawyers particularly to represent plaintiffs in unpopular civil rights cases.” [City of Riverside v. Rivera](#), 477 U.S. 561, 586 (1986). This rationale has also been called the “private attorney general” doctrine. The availability of attorney's fees encourages private parties to bring injunctive actions seeking to prohibit inappropriate judicial conduct. Since such an action is prospective in its effect, it redounds to the benefit of the general public. [Newman v. Piggie Park Enters.](#), 390 U.S. 400, 402 (1968).
- 89 [Pulliam](#), 466 U.S. at 527.
- 90 Id. at 524-25.
- 91 Id. at 541-42.
- 92 Id. at 544.

- 93 [Id. at 557.](#)
- 94 [Id. at 529-44.](#)
- 95 SENATE COMMITTEE ON THE JUDICIARY, JUDICIAL IMMUNITY RESTORATION ACT, S. REP. No. 556, 100th Cong., 2d Sess. 5 (1988) (recommending passage of a bill to reverse Pulliam).
- 96 Roth & Hagan, *Kingly Times*, *supra* note 29. Judge Roth serves in the Multnomah County Circuit Court in Portland, Oregon and is the Chairman of the Judicial Immunity Committee of the American Bar Association.
- 97 [Id. at 19.](#)
- 98 [435 U.S. 349](#), *reh'g denied*, [436 U.S. 951](#) (1978).
- 99 Roth & Hagan, *Kingly Times*, *supra* note 29, at 20-21. The authors suggested holding judges liable for only those monetary damages resulting from malicious acts undertaken within their jurisdiction. *Id.* Also discussed, but dismissed as less attractive, was a version of judicial immunity making judges liable for negligent acts within their jurisdiction. *Id.* at 21. Another suggestion was that perhaps different levels of immunity should be applied to non-judicial acts, to judicial acts that do not involve constitutional or civil rights violations, and to judicial acts that do involve such violations. *Id.*
 Many commentators criticized Pierson and Stump for extending judicial immunity to actions for damages brought under [section 1983](#) and called for limits on judicial immunity. See, e.g., King, *supra* note 23 (calling for a lifting of the privilege in the case of grossly reckless or intentionally malicious judicial acts); Way, *supra* note 22 (arguing against immunity for malicious or negligent judicial acts); Note, *supra* note 23 (proposal for limiting immunity to good faith judicial acts); Note, *Employment Decisions*, *supra* note 51 (arguing that traditional rationales for judicial immunity do not apply to suits based on judges employment decisions). By 1982 “commentators [were] nearly unanimous in their call for an end to absolute judicial immunity. . . .” Aliperti & Fitch, *A Glance at the Recent Literature Concerning Judicial Immunity*, *STATE CT. J.*, Summer 1982, at 15, 15.
- 100 Roth & Hagan, *Kingly Times*, *supra* note 29, at 21-22 (examining promulgation of congressional legislation or a model act to establish immunity standard).
- 101 [Id. at 22.](#)
- 102 Acts not protected by judicial immunity in any case include “the kinds of acts for which there is precedent for exposure . . . administrative, ministerial, enforcement, and nonjudicial [acts].” *Id.*; see *supra* text accompanying notes 52-59.
- 103 In fact, these might be considered over-reactions. See *infra* text accompanying notes 143-44. It should be noted that [section 1983](#) prohibits violation of a person's civil rights under color of any state law. See *supra* text accompanying note 66. As such, only state judges, not federal judges, are liable for attorney's fees and injunctive relief under Pulliam. Thus, the judiciary's reaction, or over-reaction, to Pulliam represents the response of state judges.
- 104 [466 U.S. 522](#) (1984).
- 105 Pulliam was decided on May 14, 1984. [Id. at 522](#). House Bill 877, H.R. 877, 99th Cong., 1st Sess. (1985), was introduced on January 31, 1985 and referred to the House Judiciary Committee. [1985-86] 2 Cong. Index (CCH) 28,199.
- 106 H.R. 877, 99th Cong., 1st Sess., at 1 (1985).
- 107 [Id. at 2.](#)
- 108 See H.R. 2170, 99th Cong., 1st Sess. (1985) (proposing amendment of the Civil Rights Attorney's Fees Award Act of 1976, [42 U.S.C. § 1988](#) (1988), to provide that attorney's fees may not be assessed under that act against members of judiciary acting in judicial capacity); S. 1794, 99th Cong., 1st Sess. (1985) (proposing amendment of [section 1988](#) to exempt state judges and judicial officers from assessment of attorney's fees in cases where such a judge would be immune from damages arising out of the same act or omission on which the complaint is founded); S. 1795, 99th Cong., 1st Sess. (1985) (proposing amendment of [section 1988](#) to provide that in actions against state judges, such judges shall not be held liable for attorney's fees).

- 109 Hearings on both Senate Bill 1794 and Senate Bill 1795 were held before the Subcommittee on the Constitution of the Senate Judiciary Committee on October 29, 1985. Legal Fees Equity Act Hearings, *supra* note 82 (purpose of the hearings was to allow Congress an opportunity to comprehensively review attorney's fees policies).
- 110 See Legal Fees Equity Act Hearings, *supra* note 82, at 180. The Conference of Chief Justices is an organization composed of “the highest judicial officer[s] of the fifty states, the District of Columbia, the Commonwealth[s] of Puerto Rico . . . [and] the Northern Mariana Islands, and the territories of American Samoa, Guam and the Virgin Islands.” Informational Literature on the Conference of Chief Justices (1989) (available from the National Center for State Courts). The group was founded “to meet and discuss matters of importance in improving the administration of justice, rules and methods of procedure, and the organization and operation of state courts and judicial systems, and to make recommendations and bring about improvements on such matters.” *Id.*
- 111 The Judicial Conference of the United States is a statutorily mandated annual conference of federal judges, which has as its purpose “prepar [ing] plans for assignment of judges to or from circuits or districts [,] . . . [and] promot[ing] uniformity of management procedures and the expeditious conduct of court business.” 28 U.S.C. § 331 (1988). The conference also “submit[s] to Congress an annual report of . . . its recommendations for legislation.” *Id.*
- 112 See Legal Fees Equity Act Hearings, *supra* note 82, at 252, 287.
- 113 E. Richard Larson, representing the American Civil Liberties Union, argued against Senate Bills 1794 and 1795 during the Senate hearings. Legal Fees Equity Act Hearings, *supra* note 82, at 312-15; see also Wermeil, Judges Make Little Headway in Seeking Legislative Remedy to High Court Ruling, *Wall St. J.*, Nov. 13, 1989, at B5, col. 1 (“[legislative] proposals this year and in the past have faced stiff opposition from civil-rights groups that view the federal courts as a check on state judges.”).
- 114 Wermeil, *supra* note 113, at B5, col. 1. Civil liberties lawyers supported the Pulliam decision: “‘We argued that absolute immunity for judges was wrong in the first place,’ . . . ‘[No] judge who systematically violates her trust [as in Pulliam] should be allowed to get away with it.’” Frank, Judicial Jeopardy: Liability Alarm in Rights Cases, 70 A.B.A. J., Oct. 1984, at 29, 9 (quoting Burt Neuborne, legal director of the American Civil Liberties Union in New York City) (brackets in original).
- 115 Of the four bills introduced in the 99th Congress designed to overrule *Pulliam v. Allen*, 466 U.S. 522 (1984), only Senate Bills 1794 and 1795 were referred to the appropriate committee for discussion; none made it to a full floor debate in Congress. See *infra* note 118.
- 116 The following legislation has been introduced attempting to overturn Pulliam:
H.R. 877, 99th Cong., 1st Sess. (1985) [hereinafter House Bill 877] (preventing the award of attorney's fees arising out of actions against judges for injunctive relief);
H.R. 2170, 99th Cong., 1st Sess. (1985) [hereinafter House Bill 2170] (preventing the award of attorney's fees against judges acting in a judicial capacity);
S. 1795, 99th Cong., 1st Sess. (1985) [hereinafter Senate Bill 1794] (excusing state judges and judicial officers from award of attorney's fees if they would be immunized from the underlying action);
S. 1794, 99th Cong., 1st Sess. (1985) [hereinafter Senate Bill 1795] (prohibiting the liability of state judges for attorney's fees in judicial actions);
S. 1482, 100th Cong., 1st Sess. § 614 (1987) [hereinafter Senate Bill 1482] (preventing award of attorney's fees against judges or judicial officers immunized from the underlying action);
S. 1512, 100th Cong., 1st Sess. (1987) [hereinafter Senate Bill 1512] (preventing liability for attorney's fees for state judges in judicial actions);
S. 1515, 100th Cong., 1st Sess. (1987) [hereinafter Senate Bill 1515] (immunizing judicial officers for actions made in an official capacity);
S. 590, 101st Cong., 1st Sess. (1989) [hereinafter Senate Bill 590] (conferring immunity on judicial officers for official acts).
The status of these pieces of legislation is discussed *infra*, note 118.
- 117 S. REP. NO. 556, 100th Cong., 2d Sess. 3 n.3 (1988) (“The bills . . . are S. 1512 and Section 614 of S. 1482, proposed respectively by the Conference of Chief Justices and the Judicial Conference of the United States.”).
- 118 Status of the legislation listed *supra*, note 116, is as follows:
Ninety-Ninth Congress: Senate Bill 1794 was not approved by the Constitution Sub-committee of the Judiciary Committee. [1985-1986] 1 Cong. Index (CCH) 21,034. Senate Bill 1795 was approved by the Constitution Subcommittee of the Judiciary

Committee, but “was never considered by the full Judiciary Committee.” S. REP. NO. 556, 100th Cong., 2d Sess. 3 (1988). Neither House Bill 877 nor 2170 received any hearing at all within the House Judiciary Committee. [1985-1986] 2 Cong. Index (CCH) 35,008, 35,032.

One Hundredth Congress: The critical language conferring judicial immunity in Senate Bill 1482 was excised before the Bill was passed by the full Senate, incorporated into House Bill 4870, and signed into law. [1987-1988] 1 Cong. Index (CCH) 21,031. Senate Bill 1512 received hearings in the Courts Subcommittee of the Senate Judiciary Committee, but was never reported by the full Judiciary Committee. *Id.* at 21,032. Senate Bill 1515 was favorably reported by the full Judiciary Committee, but was never considered or voted upon by the entire Senate. *Id.*

One Hundred First Congress: Senate Bill 590 was favorably reported by the full Judiciary Committee on September 18, 1990. S. REP. NO. 465, 101st Cong., 2d Sess. (1990). However, Senate Bill 590 was not considered by the full Senate before the 101st Congress adjourned on October 28, 1990. Telephone interview with Janie Osborne, staff member of the office of Senator Howard Metzenbaum (November 26, 1990). There are two legislative means to prevent the passage of a bill; the legislature may reject a bill or allow it to die. A rejected bill, one which has received an unfavorable vote by a full house of the legislature, is generally not reintroduced. A bill dies when it has not been voted on by a full house of the legislature by the end of a session. A bill that dies is often reintroduced in a subsequent session. While a legislative decision to allow a bill to die prevents its present enactment, such a decision is not tantamount to rejection.

119 Wermeil, *supra* note 113, at B5, col. 1.

120 The Conference of Chief Justices, for example, sent a letter to all of its members dated January 15, 1988, which mentioned that “efforts to amend 43 [sic] U.S.C. 1988 remain in progress,” and which informed its members that an annual survey would be undertaken to study the impact of *Pulliam v. Allen*, 466 U.S. 522 (1984). National Center for State Courts, 42 U.S.C. § 1983 Litigation Against Judges: 1988 Survey Results app. B at 1 (July 1989) [hereinafter Litigation Survey].

121 Complete Equities Markets, Inc. actually began offering professional liability insurance to state and federal judges in 1981. Hagedorn, Judges, Immune No More, Seek Malpractice Insurance, Wall St. J., July 26, 1989, at B1, col. 3; see also Middleton, *supra* note 1, at 1248 (“At least two insurance companies and six brokers now offer such policies nationwide . . .”). These policies insured against exposure to liability for legal defense fees and for work-related administrative, legislative, or executive acts which were not covered by judicial immunity even before *Pulliam*. See *supra* text accompanying notes 52-59.

After *Pulliam*, various state judicial organizations contacted Complete Equities Markets, Inc., as well as National Union Fire Insurance Company, American Home Insurance Company, and St. Paul Fire and Marine Insurance Company, to obtain insurance coverage against *Pulliam*-type awards. National Union agreed to design a new policy for state judges; the other companies agreed to endorse policies originally designed as attorney's malpractice policies. All four companies provide judicial malpractice insurance today, although National Union is by far the largest provider of this coverage because its policy was endorsed by the American Bar Association. Telephone interview with Judge Phillip J. Roth, Chairman, Judicial Immunity Committee, American Bar Association (Oct. 5, 1989).

122 National Union Fire Insurance Company of Pittsburgh, Pennsylvania is a member company of American International Group (“A.I.G.”). A.I.G. is a holding company for various insurance companies operating throughout the United States. A.M. BEST CO., BEST'S INSURANCE REPORTS (PROPERTY-CASUALTY) 213 (1989).

“[M]embers of the American International Group . . . are assigned a Best's [financial strength] Rating of A (Superior)” and “[t]he financial size category of the group is Class XV.” *Id.* at 215. A Class XV financial size category rating means that A.I.G. has a policyholder's surplus of over two billion dollars. Policyholder's surplus “is the difference between total admitted assets and total liabilities” of the company. *Id.* at xiii.

123 Roth & Hagan, *Kingly Times*, *supra* note 29, at 13.

124 Letter to author from Ernest S. Zavodnyik, Staff Director, Judicial Administration Division, American Bar Association (Nov. 27, 1989). Of the 2,496 judges covered, 1,005 were covered by master policies bought by states to insure all their judges. *Id.* The 2,496 judges insured by National Union represent roughly ten percent of the market: “[a]bout 20,000 state judges, justices of the peace, magistrates, referees, hearing examiners and commissioners are eligible for coverage” Quade, *Judicial Insurance*, 71 A.B.A. J. 21, 21 (1985).

125 The annual premium for the National Union Policy was \$425 when it was first made available; the rate was increased to \$800 in 1986. Telephone interview with Lou Barbaro, Vice President, Herbert L. Jamison & Co. (Feb. 23, 1990).

- 126 The limits of liability are \$1 million per claim, and \$2 million per year for all claims. These liability limits represent the maximum amounts the company will pay for the total of settlement or damage award payments to a claimant and payments for the legal defense of the judge. *Id.*
- 127 For a description of the changes in the group rate charged since the policy was first made available, see *infra* note 159. Ohio, Rhode Island, South Dakota, Vermont, and the District of Columbia have purchased coverage for all their judges under a “master policy.” Telephone conversation with Marnell Brunelli, Claims Coordinator, National Union Insurance Co. (Oct. 18, 1989). The lower cost for the master policy as compared to the individual policy reflects the lower administrative cost per judge associated with the master policy.
- 128 National Union State Judges Professional Liability Policy, Form No. 40197 at 1 (March 1984) [hereinafter National Union Policy] (copies of this policy are available from Herbert L. Jamison & Co., 300 Executive Drive, West Orange, N.J., 07052).
- 129 The National Union Policy is a “claims-made” policy. See *id.* at 1. A claims-made policy obligates the insurance company to “defend and indemnify the insured only for those claims actually made against the insured during the policy period.” Block, Professional and General Liability Insurance Coverage, 13 BARRISTER 31, 31 (1986). This type of insurance assigns less risk to the insurer than an “occurrence” policy, which obligates the insurer “to defend and indemnify the insured for any claims that arise . . . in the future as long as [the] policy [was] in force at the time” the act, error, or omission occurred. *Id.* In other words, a claims-made policy provides coverage only for claims actually reported to the company during the policy period, while an occurrence policy covers claims which arise during the policy period, no matter when reported.
- For an extra, one-time premium payment of \$2,040, or 225% of the insured's last annual premium to National Union, a judge who discontinues the insurance coverage but stays in office many procure an “Extended Reporting Endorsement;” the endorsement extends the claim reporting period into perpetuity, essentially converting the policy into an “occurrence” policy. National Union Policy, *supra* note 128, at 4. The judge may also extend the reporting period for three or six years by making an extra, one-time premium payment of \$800, or 100% of the insured's last annual premium, for a three year extension and \$1,200, or 150% of the last annual premium, for a six year extension. *Id.* A judge who discontinues the insurance coverage upon leaving office may make a payment of \$100 to extend the claim reporting period into perpetuity. Death or disablement of the judge results in free extension of the reporting period into perpetuity. *Id.*
- 130 National Union Policy, *supra* note 128, at 1.
- 131 *Id.*
- 132 Specific exclusions from coverage include: damages arising from, but not legal fees incurred in defense of, criminal acts; injury or death caused by any act other than a judicial decision; damages arising out of, but not legal fees incurred in defense of, a conflict of interest; acts that the judge knew created liability and were performed prior to the initiation of coverage; and punitive damages that are uninsurable by law. *Id.* at 2-3.
- 133 National Union also provides insurance coverage for federal judges. The federal judge insurance policy is virtually identical to the state judge insurance policy except that: 1) the policy is an occurrence policy instead of a claims-made policy, compare *supra* note 129 (the state judge policy is written on a “claims-made” basis); 2) the limits of liability are \$500,000 per claim and \$500,000 per year for all claims, compare *supra*, note 126 (the state judge policy has liability limits of \$1 million per claim and \$2 million per year); and 3) the annual premium today is \$200 compared to \$100 when the policy was first made available to federal judges in 1983, compare *supra* note 125 (the annual premium today is \$800 compared to \$425 when the state judge policy was first made available in 1984). Approximately 225 federal judges have purchased this insurance coverage from National Union. Telephone interview with Lou Barbaro, Vice President, Herbert L. Jamison & Co. (Feb. 23, 1990).
- 134 Hagedorn, *supra* note 121 at B1, col. 3. Insurers reason that public awareness of this coverage would increase the likelihood of lawsuits. *Id.*; see also Middleton, *supra* note 1, at 1248 (“Many judges and court administrators foresee serious problems with the insurance, including the fear that judges, once they start getting liability insurance, will invite lawsuits from discontented litigants.”).
- 135 The annual cost of a medical professional malpractice insurance policy, with limits of liability similar to the judicial malpractice insurance policy, can range anywhere from approximately \$3,000 for a psychiatrist to over \$100,000 for neurosurgeons. Telephone interview with Thomas Visconsi, Chairman of the Board, Interstate Insurance Company, (Feb. 19, 1990).

- 136 The average annual cost of an attorney's professional malpractice insurance policy, with limits of liability similar to the judicial malpractice insurance policy, is approximately \$3,000. *Id.*; see also Jensen, *Malpractice Insurance Rates Falling*, *Nat'l. L.J.*, Sept. 12, 1988, at 1, col. 1 (malpractice insurance rates for attorneys practicing in large firms fell from roughly \$4,000 to \$3500 per attorney).
- 137 F. CRANE, *INSURANCE PRINCIPLES AND PRACTICES* 6 (1980).
- 138 For example, the high risk of malpractice suits which attends medical specialties such as obstetrics has caused many doctors to either change their specialty or cease practicing altogether. See Bunch, *No-Fault Malpractice Urged*, *Newsday*, Nassau Ed., Jan. 25, 1990, at 2, 33, col. 1 (seventy percent of obstetricians nationwide have been the subject of a malpractice suit and approximately one-sixth of the obstetricians in New York State have ceased practicing due to insurance costs).
- 139 Limited, as opposed to full, risk retention is also possible; this is the function of a "deductible." An insurance policy with a \$250 deductible represents retention of \$250 worth of risk and transfer of the remainder of the risk. F. CRANE, *supra* note 137, at 37.
- 140 Risk control "is not an alternative to the other methods of handling risk but is used in addition to one or more of them." *Id.* at 7. Risk control involves reducing both the absolute number of losses that occur ("loss frequency") as well as the amount of those losses that still do occur ("loss severity"). *Id.* Legislation overturning Pulliam would be an absolute risk control mechanism, as it would reduce to zero both the number and amount of attorney's fees awards against judges.
- 141 See *supra* note 126 and accompanying text.
- 142 The term "peril" is defined as the "risk, hazard, or contingency insured against by a policy of insurance." *BLACK'S LAW DICTIONARY* 1138 (6th ed. 1990).
- 143 *Litigation Survey*, *supra* note 120, at 45. Of the 1,974 surveyed cases involving lawsuits filed against state judges during the years 1982 through 1987, 383 cases (19.4%) included requests for attorney's fees. Only 18 cases (0.9% of the total, or 4.9% of those cases requesting attorney's fees) ended with an actual attorney's fees award. *Id.* No dollar amounts are listed in the survey.
- 144 This is not to say that Pulliam should be allowed to stand. In addition to creating exposure to economic liability, Pulliam arguably deters judges from enforcing the law.
[I]mposing the strait jacket of injunctive limitations destroys judges' usefulness to a greater extent than the possibility of a suit for damages. . . . [O]nce a judge is enjoined by an order restricting his or her discretion in setting bail, the usefulness of that judge in the arraignment process is, for all practical purposes, eliminated.
Weisberger, *supra* note 27, at 552; see also *Legal Fees Equity Act Hearings*, *supra* note 82, at 197 (statement of Edwin Peterson, Chief Justice of the Supreme Court of Oregon) ("Pulliam . . . deters state judges from enforcing the law."). But see generally Shapiro, *The Propriety of Prospective Relief and Attorney's Fees Awards Against State-Court Judges in Federal Civil Rights Actions*, 17 *AKRON L. REV.* 25, 36 (1983) (arguing that injunctive relief does not deter law enforcement since it only requires that a judge act in a manner consistent with the constitution and has no personal impact on the judge.)
- 145 See *AMERICAN BAR ASS'N, A SURVEY OF STATE JUDICIAL FRINGE BENEFITS* (1988) (available from Information Service, National Center for State Courts) [hereinafter *Fringe Benefits Survey*]. The *Fringe Benefits Survey* is a complete, state-by-state comparison of fringe benefits provided by each state to its judges. The survey determined that of the 53 states and territories surveyed, all of them provided their judges with either legal representation or reimbursement for representation when the judges were sued for "damages arising out of acts not wanton, reckless or malicious performed in the discharge of official duties." *Id.* at 3. Furthermore, only Guam reported that it would not pay any attorney's fees awards assessed against its judges. See also Ito, *A National Survey Shows Wide Variation in Actions Against Court Personnel*, *STATE CT. J.*, Summer 1982, at 9 (describing state variations in legal representation provided to judicial officers); Stafford, *supra* note 27, at 37 (survey of fifty states and four territories revealed that all but two jurisdictions cover the cost of a judge's representation and that the vast majority of these jurisdictions employ the office of the state attorney general as official counsel).
- 146 For example, judicial conduct committees in Michigan disposed of 367 complaints during 1986. Of these, 329, or 89.6% were dismissed as unfounded or frivolous. Of the remaining 38 complaints, two complaints led to voluntary resignations of judges, two complaints produced a public reprimand, and two resulted in removal of the judge from office. The balance of the complaints led to no formal action. Other states reveal similar patterns. *BUREAU OF JUSTICE STATISTICS, UNITED STATES DEPARTMENT OF JUSTICE, SOURCEBOOK OF CRIMINAL STATISTICS — 1988* 580-81 (1989) [hereinafter *BUREAU OF JUSTICE STATISTICS*] (available from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402, catalog

no. NCJ-118318). These statistics suggest that valid allegations of official misconduct by judges are exceptional. But see King, *supra* note 23, at 559 (“Injury to litigants cannot be called rare; many judges have been implicated through the years.”).

147 See *supra* note 145 and accompanying text. Specific evidence for this assertion is largely anecdotal. Magistrate Pulliam, while personally liable for the attorney’s fees award settlement of \$43,691.09, was relieved from making this payment; the State of Virginia paid for it. Legal Fees Equity Act Hearings, *supra* note 82, at 194. Similarly, Judge Dillin conceded that in all three of the other cases he mentioned during Senate hearings to illustrate substantial attorney’s fees awards against judges, “attorney fees . . . were ultimately paid by a governmental unit . . .” *Id.* at 207. These three other cases involved payments of \$98,000, \$35,000, and \$24,211. *Id.* The payments were made by the states even though, in two of the three cases, no tort claims statute or judicial indemnification statute explicitly required the state to do so. See *id.* at 207, 212-225.

In the same Senate hearings, Justice Peterson testified that he knew “of no case in which a judge has personally paid fees.” *Id.* at 314. Justice Peterson is in a position to know of such cases, as he chaired the Task Force to Prepare a Report on the Impact of Pulliam v. Allen for the Conference of Chief Justices; his Task Force conducted surveys of 1984 and 1988 litigation against judges, compiling reports of virtually all pertinent cases. See Conference of Chief Justices, Survey of State Statutes and Current Activities Regarding Judicial Immunity, Indemnification and Insurance (January 1985) (report on 1984 survey results); Litigation Survey, *supra* note 120 (report on 1988 survey results). When questioned recently, Justice Peterson reaffirmed his assertion that he knows of no judge who has personally paid damages or attorney’s fees awards stemming from liability for an official act. Telephone conversation with Oregon State Supreme Court Justice Edwin Peterson (Jan. 18, 1990).

Justice Peterson’s statement is echoed by the compiler of the statistics used in the 1988 Task Force Survey, Phillip A. Latimore. Mr. Latimore reports that 1,132 cases involving claims against judges and other court personnel have reached final settlement or judgment between 1982 and 1987. Litigation Survey, *supra* note 120, at 42. He further reports that to his knowledge, none of these final determinations required payment by the judges themselves: “the state finds the money.” Telephone interview with Phillip A. Latimore III, Staff Attorney, National Center for State Courts (Dec. 13, 1989).

These expert statements demonstrate that, in the end, judges are not held personally liable for attorney’s fees or damages awards, even though only about half of the fifty states provide statutory or insurance liability coverage for their judges. Legal Fees Equity Act Hearings, *supra* note 82, at 234-39. This outcome was predicted pending the Pulliam decision. See Shapiro, *supra* note 144, at 38-41.

148 Delaware, for example, has such a statute. Section 4001 of the Delaware Code entitles any public employee to immunity so long as the act or omission complained of was work related, was committed in good faith, and was not grossly negligent. Section 4002 states that an employee who meets the requirements of section 4001 “shall be indemnified by the State against any expenses (including attorneys fees and disbursements), judgments, fines and costs, actually and reasonably incurred . . . in defending against [an] action, suit or proceeding giving rise thereto.” Tort Claims Act, DEL. CODE ANN. tit. 10, §§ 4001-02 (Michie Supp. 1988). All states with such statutes have consistently indemnified their judges even though “state indemnifications statutes reveal[] widely varying and discretionary standards for indemnifying the defendant judge.” Roth & Hagan, The Judicial Immunity Doctrine Today, *supra* note 29, at 11.

149 For example, even though it “was not legally bound to pay the fees assessed in Pulliam,” the State of Virginia intervened to pay the award. LEGAL FEES EQUITY ACT HEARINGS, *supra* note 82, at 207; see also *id.* at 194.

150 See, e.g., *Chalk v. Elliot*, 449 F.Supp. 65 (N.D. Texas 1978) (holding judge immune from damages arising out of admittedly ministerial act of denying application for liquor license). For cases finding judges immune from liability for nonjudicial acts, see Way, *supra* note 22 (examining federal and state cases from 1966-1978 involving judges as defendants claiming judicial immunity); Note, Immunity Doctrines, *supra* note 51 (examining the inconsistent application of absolute judicial immunity in employment discrimination and wrongful discharge cases and recommending qualified immunity in its place); Note, Judicial Act, *supra* note 51 (citing cases in which judges were granted immunity for administrative acts).

151 Telephone interview with Oregon State Supreme Court Chief Justice Edwin Peterson, Chairman of the Task Force to Prepare a Report on the Impact of Pulliam v. Allen for the Conference of Chief Justices (Jan. 18, 1990). Judge Peterson reports that a judge being investigated for criminal activity or misconduct normally pays defense costs and damages unless the judge has purchased insurance personally. Statutory indemnification and unwritten indemnificatory policy is often not triggered by allegations of such serious misconduct. *Id.*

152 But see Fringe Benefits Survey, *supra* note 145, at 17-21 (of 53 states and territories in the United States surveyed, 7 paid for attorney’s fees for judges involved in disciplinary or ethics proceedings in certain circumstances; the remaining 47 did not pay for such fees).

- 153 See Middleton, *Suing a Judge: Malpractice Worries Grow*, 69 A.B.A. J. 1808 (1983) (“Insurance seems more appropriate than wholesale flight from the bench.”).
- 154 The option of risk control should always be pursued in conjunction with the choice of risk transfer or risk retention. Regardless of whether a judge buys judicial malpractice insurance, judges should always refrain from criminal activity and avoid situations or behavior suggesting misconduct in order to limit the possibility of incurring civil liability. See *supra* note 140.
- 155 Not all of the risk remaining may be transferred; some of this risk must be retained by the judge. For example, no insurance policy will insure against liability arising out of wilful tortious or criminal acts, as a matter of law and public policy. This public policy is “designed to prevent an insured from acting wrongfully with the security of knowing that his insurance company will ‘pay the piper’ for the damages.” *Transamerica Ins. Group v. Meere*, 143 Ariz. 351, 356, 694 P.2d 181, 186 (1984); see also *infra* note 184 (noting that the “damn fool doctrine” has developed to exclude coverage for certain acts on social policy grounds). See generally R. KEETON & A. WIDISS, *INSURANCE LAW* 493-99 (1988) (discussing the “widespread judicial recognition of . . . the public’s interest in restricting the use of insurance to transfer . . . risk . . .”).
- Accordingly, the National Union Policy contains the following provision: “This policy does not apply . . . to any claim arising out of any criminal act or omission; however, the Company shall defend any such claims until a final adjudication of such liability” National Union Policy, *supra* note 128, at 2. The policy also excludes from coverage “any punitive or exemplary damages where such damages are uninsurable pursuant to the law under which such damages are awarded; however, the Company shall provide a defense for any claims covered by this policy seeking such damages.” *Id.* at 3.
- 156 F. CRANE, *supra* note 137, at 29 (“[T]he company’s premium income . . . must be sufficient to pay its policyholder’s losses and meet company expenses.”).
- 157 Telephone interview with Steven Stover, Administrator of Ohio Courts (Oct. 23, 1989).
- 158 *Id.*
- 159 The fluctuation in the group rate since 1985 has been as follows.

| YEAR | RATE |
|------|-----------------|
| 1985 | \$475 per judge |
| 1986 | \$675 per judge |
| 1987 | \$675 per judge |
| 1988 | \$675 per judge |
| 1989 | \$650 per judge |

The number of judges insured under the Ohio master policy has also fluctuated, generally ranging near 800 per year. Telephone interview with Lou Barbaro, Vice President, Herbert L. Jamison & Co. (Feb. 23, 1990). The \$2 million total premium paid during the period 1985 through 1988 is thus approximate and may in fact be low, depending on when during the year the rate changes went into effect, when during the year the group policy was purchased, and how many judges were actually insured.

- 160 Herbert L. Jamison & Co., *Lawyers Professional Liability* (April 12, 1989) (computer generated claims listing provided by Marnell Brunelli, Claims Coordinator, National Union Insurance Co.). The entire amount represents payments of legal fees to defend judges against claims. The claims listing shows that National Union made no expenditure for actual damages or attorney’s fees awards. *Id.*
- 161 *Id.* This amount is commonly called a “loss reserve” and “represent [s] the estimated cost to the company of settling all of the claims for losses that already have occurred but have not yet been paid.” F. CRANE, *supra*, note 137 at 439. Thus, National Union currently expects future claims stemming from the 1985 through 1988 period of Ohio group policy coverage to total no more than \$226,593.07. This estimate is comprised of projected costs for defending Ohio judges against future claims and for paying future settlements and damage awards.
- 162 “The loss ratio is the percentage of the premium paid by insureds required to pay losses.” J. ATHEARN, *RISK AND INSURANCE* 403 (1977). National Union’s expected loss ratio for its judicial malpractice insurance is thus represented by a fraction whose numerator is the amount of claims actually paid plus the amount of claims expected to be paid by National Union for its insured judges, and whose denominator is the amount of premiums paid by all judges for their insurance.

- 163 This explanation is not persuasive because National Union is a very large company. See supra note 121. Start-up costs for its judicial malpractice insurance program were probably minimal, and most of the claims adjustment and other necessary systems were already in place.
- 164 For example, the National Union Policy originally allowed the judge, with written consent from the company, to select and retain counsel of the judge's own choosing. National Union Policy, supra note 128, part II(c) at 1. Pure risk transfer merely calls for providing the judge with counsel of the company's own choosing, and only when necessary because the state attorney's office does not provide counsel. The policy thus insured against incompetent or inadequate representation. This generosity, however, has been limited. National Union now endorses all of its policies to disallow judges this option. *Id.* at Endorsement A. Furthermore, this increment of "additional insurance" was small and would in any event have been reflected in the loss costs already included in the Defense Fees Peril. See supra text accompanying notes 145-46.
- 165 Knowledge of historical losses allows a company to accurately quantify its risk and set premiums accordingly. With no historical loss data, premiums are best kept high to ensure adequate capital from which loss payments may be made. A company can always make subsequent downward adjustments. See F. CRANE, supra note 137, at 402-03.
- 166 The claims experience of Ohio's insured judges is unlikely to differ significantly from the claims experience of the entire population of judges insured by National Union, simply because Ohio's insured judges make up nearly one third (790/2496) of this population. But the occurrence of one very large loss that changes Ohio's claims experience is not inconceivable. See infra note 170.
- 167 As early as 1981, judges were concerned with "the soaring increase in lawsuits" filed against them. Middleton, supra note 1, at 1248; see also Moskowitz, *State Jurists Become Targets in Wave of Litigation*, Wash. Post, April 15, 1985, Washington Business, at 19, col. 1 (noting the increase in suits against judges in their official capacity). The table below shows the number of lawsuits based on civil rights violations brought during this period against court personnel, acting in their official capacity:

| YEAR | CASES |
|------|-------|
| 1982 | 198 |
| 1983 | 286 |
| 1984 | 433 |

After this period, however, the number of lawsuits brought leveled off:

| YEAR | CASES |
|------|-------|
| 1985 | 281 |
| 1986 | 418 |
| 1987 | 358 |

Litigation Survey, supra note 120, at 35. The latter data illustrates that National Union's anticipated increase in lawsuits against judges did not occur.

- 168 The requirements set by the judiciary, however, were not necessarily good ones. One of the "basic rules" for buying insurance is "not to insure small losses even if they occur frequently." F. CRANE, supra note 137, at 40 (emphasis in original). For this reason the judiciary should have insisted on a deductible. According to Crane:
 Insuring small losses is unnecessary, wastes money, and drains away funds that can be spent more wisely on other insurance. Many people ignore this rule.
 Insuring small losses is uneconomical for two reasons. First, as many small [claims] . . . are bound to [be made], premiums on policies that cover them must be high simply to reimburse policyholders for them. Second, the premiums must also allow for the overhead costs of handling the numerous small claims. If it costs \$20 just to process a small claim, an insurer must spend a total of \$45 to pay a \$25 loss. It therefore makes sense to pay small losses out of one's own pocket, perhaps by use of policy deductibles, and to buy insurance to cover large losses only.
Id. at 40-41.

Another “basic rule[.]” for buying insurance is to “[g]et help from a good agent.” *Id.* at 40. “Good insurance agents provide risk management counselling and advice. They offer valuable suggestions concerning the kinds and amounts of protection that are most appropriate for their clients.” *Id.* at 42.

169 J. ATHEARN, *supra* note 162, at 401.

170 For example, one Massachusetts judge is reported to have incurred over \$300,000 in legal defense fees alone, before the claims against him were finally resolved. Telephone interview with Robert Gault, outside counsel for A.I.G. (Nov. 8, 1990). See generally Strahinich, *The Case Against Judge Monte Basbas*, BOSTON MAG., Mar. 1989, at 116 (detailing numerous misconduct charges filed against Judge Basbas with the Massachusetts Judicial Conduct Commission.). Judge Basbas's National Union Policy covered virtually the entire amount of his liability. Even if the state would have considered paying for this expense, any judge in this position would likely believe that assured coverage was worth the \$800 policy premium.

171 J. ATHEARN, *supra* note 162, at 401.

172 See *supra* note 99 (list of sources critical of absolute judicial immunity).

173 The experience in Nevada is instructive:
[Nevada's] Senate Finance Committee rejected a request by the Nevada District Judges Association to appropriate \$41,300 to provide up to \$2 Million in insurance coverage for each of the state's 108 judges.

....

Sen. Joe Neal of Las Vegas, [sic] added, “I don't think it should be the committee's duty to ensure mediocrity in the judiciary. Judges should render decisions based on what the law states. If they go beyond the law, they should accept the consequences like everyone else.

Comment, *supra* note 81, at 493 n.280 (quoting *Judges Due Help in Rights Suits*, A.G. Opinion Says, L.A. Daily Journal, June 7, 1985 at 19, col. 2).

174 See *supra* pp. 289-90 (the perils insured against include the Nonjudicial Act Peril, the Unofficial Act Peril, the Criminal Act Peril, the Defense Fees Peril, the Misconduct Investigation Peril, and the Attorney's Fees Award Peril).

175 Some of these perils are insignificant, either because the state already pays for the costs associated with the peril, as is the case with the Defense Fees Peril, or because judges rarely find themselves faced with situations that would force payment of the costs associated with the peril, as with the Attorney's Fees Award Peril. See *supra* text accompanying notes 145-50.

176 See, e.g., *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 419 P.2d 168, 54 Cal. Rptr. 104 (1966) (reasoning that relief from responsibility for legal defense against alleged misconduct does not eliminate responsibility for actual misconduct).

177 Of the 1,139 reported lawsuits against judges based on claims of civil rights violations that were resolved between 1982 and 1987, the judge prevailed in 1,085 (95.3%) of them. *Litigation Survey*, *supra* note 120, at 42. Many of the lawsuits were frivolous pro se actions. *Id.* at 1. In one year, 90% or more of the complaints made to judicial conduct commissions were dismissed, or led to no formal action. See BUREAU OF JUSTICE STATISTICS, *supra* note 146, at 580-81.

178 Comment, *supra* note 81, at 493.

179 See *supra* note 155.

180 See *supra* note 145 and accompanying text.

181 Shapiro, *supra* note 144, at 40-41.



182 The only limitation on such abuse is the insurance company's right to settle. National Union's right to settle is stated in the National Union Policy as follows:

It is agreed that if the Insured shall refuse to consent to any settlement recommended by the Company and acceptable to the claimant that the Company's liability under this policy shall not exceed the amount for which the claim could have been settled together with claims expenses incurred as of the time of the Insured's refusal to settle.

National Union Policy, *supra* note 128, at 1.

- 183 See, e.g., [Geiler v. Commission on Judicial Qualifications](#), 10 Cal. 3d 270, 277-79 n.6, 515 P.2d 1, 5-6 n.6, 110 Cal. Rptr. 201, 205-06 n.6 (1973) (detailing the appalling behavior of Judge Geiler), cert. denied, 417 U.S. 932 (1974).
- 184 Nonpayment for liability of this sort would not depend solely on an explicit coverage exclusion in the insurance policy. The National Union Policy excludes from coverage “any claim for bodily injury to or sickness, disease or death of any person or for injury to or destruction of any tangible property including the loss of use thereof, except when arising out of a judicial decision or order” National Union Policy, supra note 128, at 2.
Even without this exclusion, however, National Union could rely on the “damn fool” doctrine:
[C]ourts usually sustain an insurer's denial of claims when the losses result from incredibly foolish conduct.
A “damn fool” doctrine is embodied in the statement that insurance coverage, especially liability coverage, is not provided for acts which are simply too ill conceived [sic] to warrant allowing the actor to transfer the risk of such conduct to an insurer.
R. KEETON & A. WIDISS, supra note 155, at 539.
- 185 In fact, if a discrimination claim against a judge is adjudicated and results in an award for the plaintiff, judicial malpractice insurance would not cover the award. Coverage would be excluded because a successful discrimination claim requires “persuading the trier of fact that the defendant intentionally discriminated against the plaintiff” [Texas Dep't of Community Affairs v. Burdine](#), 450 U.S. 248, 253 (1981). As such, coverage would be denied under the wilful act exclusion, leaving the judge to pay the damage award personally. See supra note 155.
Nonetheless, state payment of judicial malpractice insurance premiums still has the effect of relieving judges from liability for discriminatory practices because many valid discrimination claims are not adjudicated, but are settled without admission of fault. The National Union Policy would cover such settlement amounts, thus insulating the judge from liability for actual but unacknowledged misconduct.
- 186 Because hiring and firing decisions are not judicial acts, judicial immunity does not protect these employment decisions. See supra note 56.
- 187 Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1988).





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