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Consulting, Litigation & Expert Witness Interest Group

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Message from the Chair — They Said What?

by Vincent "Chip" Boylan Jr., CPCU

Vincent "Chip" Boylan Jr., CPCU, is senior vice president of Willis of Maryland, Inc. He is past president and a former education director of the CPCU Society District of Columbia Chapter. Boylan has been a member of the CLEW Interest Group Committee for more than a decade, and has served as the CLEW webmaster. He is a past chairman of the Insurance Agents & Brokers of Maryland, that state's affiliate of the National Association of Professional Insurance Agents.

"Facts are stupid things."

— Ronald Reagan

"This is still the greatest country in the world, if we just steel our wills and lose our minds."

— Bill Clinton

"And now the sequence of events in no particular order."

— Dan Rather

Obviously, these are not the most brilliant comments by three gentlemen who in their heyday many viewed as great communicators. Despite the above less-than-stellar quotes and regardless of our personal view of the political philosophy or leaning of these individuals, most would agree that they indeed deserve their reputations as effective presenters and orators.

Our relatively small universe of the Consulting, Litigation & Expert Witness (CLEW) Interest Group participants is teeming with colleagues who succeed in their professional lives because of their ability to convey information in an understandable and concise manner. And this can be a difficult feat to accomplish given the complexity, and often dryness, of the subject matter.

As with Reagan, Clinton and Rather above, those under the CLEW umbrella are often less than perfect in their emanations. What consultant, attorney or expert witness hasn't wished more than once for a rewind button to recall an imprecise statement, question or opinion?

While our CLEW comrades may expose their human fallibilities from time to time, in large part we benefit from their writing and speaking. I can recall numerous times that I learned something new from a CLEW member in one of the following venues:

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What's in This Issue

Message from the Chair — They Said What?

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- A CPCU Society Annual Meeting seminar.
- Other CPCU Society seminars or workshops.
- Blog, email or other electronic communication.
- CPCU Society webinar.
- CPCU Society publication, especially interest group newsletters like the one you are reading. And remember, CPCU Society members now have access to all interest group newsletters by logging in to the Society's website, www.cpcusociety.org.

The value of CPCU Society membership and CLEW Interest Group involvement will continue to grow as more of us opt to apply our talents toward developing one or more of the communication and education tools listed above. Sure, like Reagan, Clinton and Rather we might violate the old adage, "A closed mouth gathers no feet." But more likely, we'll refine our message — and the means of communicating it — to the point that many others will profit from and enjoy our work.

Please explore opportunities to share your knowledge and experience with others. You can start by contacting **Jean E. Lucey, CPCU,** the editor of this newsletter, at jlucey@insurancelibrary.org, to discuss the article you will author for a future issue.

In conclusion, an ancient Chinese proverb suggests a course of action: "A book tightly shut is but a block of paper." Let's resolve to actively seek ways to open up our minds and expertise to others. ■

CPCU Society Travel Program — A Great Way to See the World!

by Richard A. Vanderbosch, CPCU, CLU, AIS

Richard A. Vanderbosch, CPCU, CLU, AIS, retired in 1999 after a 36-year career with State Farm. Named a CPCU Society Standard Setter in October 1998, he continues to be active in CPCU Society activities. Vanderbosch is coordinator of the CPCU Society Travel Program, member of the CPCU Society Colorado Chapter and contributing writer to the CPCU Society Retirement Resource Interest Group.

Want to travel but do not want the hassle of dealing with details such as research, picking a destination, arranging travel plans, identifying attractions and making sure you have all the required documents?

Why not join us on one (or more) CPCU Society Travel Program adventures and leave all of the details to us. Not only do we make traveling easy, but you will also be able to join other CPCU professionals as you enjoy the wonders of the world. Once you register for a trip, you will be prompted and reminded of all the things you will need to do from a personal standpoint — everything else is taken care of by the travel company. Then, just follow the group leader to enjoy all the sights and attractions of the trip.

Over the past several years, we have traveled to Germany, Canada, Czechoslovakia, Ireland and France. And our upcoming May 2011 adventure, which is now sold out, will be China. Future destinations are selected from the input of past travelers and the general CPCU membership. If you have a travel preference you would like considered, just send me an email at rbosch@aol.com. Selection and announcement of the next year's trip take place each summer.

Give us a try and see for yourself just what you've been missing — a great program established for you, your families, your guests and other CPCUs. You'll be glad you did! ■

Editor's Notes

by Jean E. Lucey, CPCU

Jean E. Lucey, CPCU, earned her undergraduate degree in English and graduate degree in library science through the State University of New York at Albany. After a brief stint as a public school librarian, she spent six years at an independent insurance agency outside of Albany, during which time she obtained her broker's license and learned that insurance could be interesting. Serving as director of the Insurance Library Association of Boston since 1980, Lucey attained her CPCU designation in 1986. She is a member of the CLEW Interest Group Committee.

As we emerge from the somewhat "eventful" winter season of 2011, we can take some time out from watching for icy patches in the roads and on sidewalks to get back to the kind of meaningful reading that helps us in the practice of our professions.

Chairs of groups are selected for good reason, and certainly such is the case with Consulting, Litigation & Expert Witness (CLEW) Interest Group Chair **Vincent "Chip" Boylan Jr., CPCU.** He makes some excellent points through apt use of inept quotations!

If you missed the mock trial presentation by the CLEW Interest Group at the 2010 CPCU Society Annual Meeting and Seminars in Orlando, and even if you didn't miss it, you may well benefit from the synopsis provided by **George M. Wallace, CPCU, J.D.** Being an honorable person, he did not slant his report in favor of the character he played. And in case you disagreed with the findings of the mock trial's "pseudo-judges," you may feel vindicated by the decision of the real court, described in George's penultimate paragraph.

Richard M. Mitchell, CPCU, J.D., gives practical and timely suggestions when discussing "The Insurance Agent as Counselor — When Giving Advice Is Going Too Far." He is careful to stress that states differ in respect to their stances on his subject matter, despite a move toward uniformity, and reminds us that "caution and knowledge of the specific legal principles should be the guiding principles of agents and brokers."

Allocation of latent injury and damage claims is one of the subjects covered in the CGL 50-state review volume that I review later in these pages. And **Kim V. Marrkand, J.D.,** of the Mintz Levin law firm provides a most timely discussion of a case involving this issue, which was recently concluded in the Massachusetts courts. Happily, the case is also cited in the reviewed book — yet another tribute to its relevance and timeliness.

You may recall that **Steven A. Stinson, CPCU, J.D., LL.M., CLU, AIC, AAI,** served in the mock trial as one of the distinguished, albeit pseudo, judges. His contribution to this newsletter, "ABCs of Appellate Practice for the Expert and Adjuster," is intended to provide "an overview of general explanation of the Rules of Appellate procedure; how an appeal is filed, argued and decided; and the possible impact of expert testimony at the trial level on the appellate decision." Specific attention is paid to the structure of the court systems in several states.

CLEW Interest Group and committee member extraordinaire **Donald S. Malecki, CPCU,** would never do what some do, which is to indicate that a policy form is something it is not. Hence his dismay at what sometimes seems like a mini-proliferation of insurance forms and endorsements that bear the Insurance Services Office (ISO) name, when in fact they do not comport with any ISO form at all. It's hard enough sometimes when a form indicates it includes ISO language "with permission!" Copyright violation may be a very real but not the worst exposure to liability for whoever published the form Don discusses in this issue's edition of "Q&A with Donald S. Malecki, CPCU."

And closing this issue is an article by **J. Phillip Bryant, CPCU, J.D.,** who expertly writes on internal audits, which help managers and their departments perform more effectively. He asks us to remember that "the areas to be audited are limited only by imagination." ■

Let Me Take You Higher — CLEW Interest Group Presents Mock Trial/Appeal in Orlando

by George M. Wallace, CPCU, J.D.

George M. Wallace, CPCU, J.D., is a partner in the law firm of Wallace & Schwartz in Pasadena, Calif. His practice centers on litigation in the field of insurance coverage and insurance bad faith (for both insurers and insureds) and defense of professional liability claims in addition to general business litigation and appellate practice. He is currently a member of both the CPCU Society Los Angeles and San Gabriel Valley Chapters as well as a member of the Consulting, Litigation & Expert Witness and the Claims Interest Groups.

Hurricanes, humidity, mold and a multiplicity of exclusions provided the background for the CLEW Interest Group's mock trial presentation "Mock Trial 2010 — Broken Building, Broken Trial ... A Miscarriage of Justice?" at the 2010 CPCU Society Annual Meeting and Seminars in Orlando, Fla., on Sept. 26.

In a change from previous years' mock trials, the 2010 program focused on what might occur *after* judgment, when a complex insurance coverage case is reviewed by an appellate court. The facts and legal issues at the core of the dispute were drawn from an actual case — *Rolyn Companies v. R&J Sales et al* — that was decided by the U.S. District Court for the Southern District of Florida. The *Rolyn* case was itself on appeal to the Eleventh Circuit U.S. Court of Appeals when the CLEW Interest Group presented its version.

Rolyn Companies is a contractor that was hired by a condominium association in Florida to oversee the repair of the extensive damage that the condominium buildings suffered when battered by Hurricane Wilma in 2005. Rolyn hired a roofing subcontractor to assist in the work. While repairs were underway, one of the condominium buildings suffered extensive additional interior damage as a result of water intrusion following heavy rains. That damage included wide-ranging mold infestation and the contamination of the entire building with asbestos, released when a waterlogged ceiling collapsed. The new damage was claimed to be a result of negligent or defective work by Rolyn or its roofing subcontractor.

While responsibility was being sorted out, Rolyn went forward with repairs to the interiors, at a cost of more than $1.3 million. It sought reimbursement of those costs from two liability insurers, both of which declined the coverage. The principal grounds for denying coverage were a "voluntary payments" provision — Rolyn incurred the repair expense without any court determination that it owed those sums to the condominium association — and exclusions relating to mold, asbestos and "roofing operations." In an effort to recover its expenditures, Rolyn brought a breach of contract and "bad faith" action against the insurers.

The appeal was heard by a panel of three eminent jurists — From left: Steven A. Stinson, CPCU, J.D., LL.M, CLU, AIC, AAI; Stanley L. Lipshultz, CPCU, J.D.; Nancy D. Adams, CPCU, J.D.

In the actual *Rolyn* litigation, the case never went to a full trial. Instead, the trial judge granted motions for summary judgment in favor of the two insurers.

In the 2010 CLEW Interest Group mock trial version of events, the case proceeded to trial before a jury "randomly" selected from attendees in Orlando. As the program began, the trial had already been going on for more than a month, and the story was joined as the attorneys for each side offered up their closing arguments to the jury. **Robert L. Siems, CPCU, J.D.,** appeared as counsel on behalf the plaintiff, Rolyn Companies. The insurers were represented by **George M. Wallace, CPCU, J.D.** Presiding over the trial proceedings was the Honorable "Judge" **Stanley L. Lipshultz, CPCU, J.D.**

Through their closing arguments, counsel for both sides were able to present a summary of the facts for the benefit of the jury and attendees, and to argue the legal positions favorable to each side's case. On conclusion of argument, Judge Lipshultz instructed the jury briefly, and attendees were able to eavesdrop as the jurors deliberated.

The CPCU jurors reached the same conclusion as the trial judge in the actual *Rolyn* case, ruling in favor of the defendant insurers and against Rolyn. Then Rolyn and its attorney vowed to see justice done, and took the case up on appeal.

The appeal was heard by a panel of three eminent jurists — the Honorable "Judge" **Nancy D. Adams, CPCU, J.D.;** the Honorable "Judge" **Steven A. Stinson, CPCU, J.D., LL.M, CLU, AIC, AAI;** and, in a highly unorthodox move, trial "Judge" Lipshultz, who was mysteriously elevated to the appellate bench and not, for some reason, disqualified from reviewing his own prior ruling.

Nearly 150 attendees listened to the CLEW Interest Group Mock Trial seminar at the 2010 Annual Meeting and Seminars held in Orlando, Fla.

The two attorneys squared off again, this time arguing why the trial decision was or was not justified by the facts and the law that had been presented to the jury. Throughout their presentations, the lawyers were obliged to respond to a battery of questions from the appellate justices, some of which were even relevant to the matters to be decided. Argument, rhetoric and snappy patter flew thick and fast until the three-judge panel concluded it had heard enough. In an altogether unexpected move, the CPCU Court of Appeals ruled by a vote of 2–1, with Judge Lipshultz dissenting, that Judge Lipshultz and the jury had erred and that the case must be remanded for entry of a judgment favorable to the appellant, Rolyn. Counsel for the insurers was last heard rumbling about possible further review in the Supreme Court.

While the CLEW Interest Group presented its fictionalized version, the actual *Rolyn* case was working its way through the actual appellate process before the Eleventh Circuit. The case had been fully briefed, but not argued, when the CPCU Society Annual Meeting and Seminars convened in Orlando. Since then, the Eleventh Circuit has heard argument and decided the case. In an unpublished decision filed in early February 2011, the three-judge panel of the Eleventh Circuit took a different path than the pseudo-judges of the CLEW Interest Group: The court ruled unanimously that the district judge in *Rolyn* had been correct in every respect and affirmed that judge's ruling granting summary judgment in favor of the insurers.

The CLEW Interest Group is now at work developing its programs for the 2011 CPCU Society Annual Meeting and Seminars in Las Vegas. Details will be revealed in the coming months. ■

The Insurance Agent as Counselor — When Giving Advice Is Going Too Far

by Richard M. Mitchell, CPCU, J.D.

Richard M. Mitchell, CPCU, J.D., is a shareholder in the Southfield, Mich., law firm of Maddin, Hauser, Wartell, Roth & Heller PC. Mitchell focuses his practice on professional liability defense, insurance coverage disputes and complex commercial litigation. He is also a past president of the CPCU Society Greater Detroit Chapter. Mitchell can be reached at rmm@maddinhauser.com.

Introduction

The Restoring American Financial Stability Act of 2010 (renamed the Dodd-Frank Wall Street Reform and Consumer Protection Act) established the Office of National Insurance. The primary purpose of this new national body is to regulate the financial solvency of insurance carriers and liquidity in the industry. However, it does not address certain practical issues insurance agents and brokers face in their daily lives. This includes the issue of just how far they can go in offering advice to their clients. Despite substantial new federal regulation, this issue remains the province of the states, although still another federal law provides us with some guidance on its evolution.

In 1999, Congress enacted the Gramm-Leach-Bliley Act ("GLB"). Section 325 of that Act addressed the lack of uniformity amongst the states in registration and licensure of insurance agents and brokers. In 2000, the National Association of Insurance Commissioners (NAIC) responded by adopting the Producer Licensing Model Act (PLMA). The main purpose of the PLMA was to bring tighter regulation regarding licensing issues, but it also spoke to the conduct of insurance agents addressing concerns raised by their clients. Specifically, the PLMA adopted definitions of the terms "negotiate," "sell" and "solicit."

These terms directly affect the duties of insurance agents and brokers when giving advice. They address whether agents and brokers can not only sell insurance, but also advise their clients regarding how much insurance they should have, what risks they should insure, and what their exposures are without obtaining a separate license. Some states have specific statutes defining these types of services as "counseling." Other states have taken a different approach, generally encompassing the roles of insurance agents and counselors under one roof.

This article examines the approaches states have taken since adoption of the PLMA. It also examines how effective those approaches have been, the potential exposures they create, and what the agent or broker can do to protect against increased liability exposures.

The NAIC and the Model Act

The Office of National Insurance oversees the financial strength of the insurance industry. Traditionally, however, regulation of the specific activities of the industry has been left to the states. It is governed by an amalgamation of 50 statewide regulatory bodies, each having its own set of priorities, goals and requirements. From time to time, there have been calls for more federal government intervention. In the current political climate, including the massive new financial regulatory laws, further federal regulation is likely not forthcoming. Consequently, the states maintain much of their autonomy. The commissioners together comprise the NAIC. While this body includes separate agencies, there is some effort to create uniformity on certain issues. To this end, most states have adopted the PLMA standards.

The PLMA defines the term "insurance producers" to include both agents and brokers. The Act provides that producers are "required to be licensed under the laws of a given state to sell, solicit or negotiate insurance."[1] Further, the Act defines "negotiate" as:

> The act of conferring directly with or **offering advice** directly to a purchaser or prospective purchaser of a particular contract of insurance concerning any of the substantive benefits, terms or conditions of the contract, provided that the person engaged in that act either sells insurance or obtains insurance from insurers for purchasers.[2] (Emphasis added)

Consequently, the Act appears to allow licensed producers to "offer advice" to prospective insureds regarding the substantive benefits, terms and conditions of the insurance being purchased. In fact, the NAIC's Producer Licensing Working Group has stated that one of the purposes of the PLMA is to strive "toward uniform national procedures by eliminating the traditional distinctions between agents and brokers ... ."[3] The PLMA, however, does not expressly address the obligations of insurance counselors or consultants, as many state statutes do.

Two Main Approaches to the Insurance Agent as Advisor

Some states statutorily distinguish the insurance agent or broker from a counselor. Others consider their roles and

duties to be substantially the same. The former could be termed the "minority approach," while most states currently follow the latter.

Insurance Counselors/ Consultants Distinguished from Producers

In some states, performance of insurance counseling services requires a separate license. Several states fall into this category, including: Connecticut, Georgia, Kentucky, Maine, Maryland, Massachusetts, Michigan, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, Ohio, Oregon, Texas, Utah and Wyoming.

Even amongst these states, there are deviations in the statutory provisions. Some states use the PLMA definition of "producer," but also define counselors separately to indicate certain distinctions. Others do not use the PLMA definitions at all. Wyoming, for example, makes the distinction clear, as it specifically bars a producer licensed as a consultant from acting in a dual capacity as a producer.[4]

Most of the states that distinguish producers from counselors require a separate counseling agreement to be in writing and contain specific provisions. Michigan, for example, requires licensure as a "certified insurance counselor" for anyone auditing or abstracting policies or annuities, providing advice, counsel or opinion with respect to insurance policies, or soliciting business as an insurance counselor.[5] The Michigan statute specifically exempts licensed attorneys from this requirement.

Some of the state statutes, however, create an intellectual and practical problem by their very adoption of the PLMA definition of "producer." As discussed above, that definition allows a producer to "offer advice," yet these statutes prohibit doing so without a specific license. Even in the absence of a license, an agent or broker can inadvertently create exposure to heightened liability by offering such advice. For example, in *Harts v. Farmers Ins. Exchange*, 461 Mich. 8, 9 (1999), speaking of the provisions of the statute addressing counselors, the Michigan Supreme Court wrote:

> What is clear from these provisions is that the Legislature has long distinguished between insurance agents and insurance counselors with agents being essentially order takers, while it is insurance counselors who function primarily as advisors.

The court, however, went on to write that:

> [A]s part of his function as an order taker, an insurance agent may, but is not required or under any duty to, give "customary advice." *Id.* at n. 10

Consequently, at least in Michigan, the statute does not operate as a complete bar to agents and brokers providing advice to their clients, although they are not under any duty to do so. When they do, they assume liabilities they would not otherwise have. If they undertake this step, such agents or brokers must be certain their advice is clear and unambiguous. Most importantly, they must also be certain it is accurate.

Insurance Counselors Encompassed in the Definition of "Insurance Producer"

The majority of states do not differentiate between the definition of insurance producers, agents, brokers or counselors, nor do they require a separate license. There are, again, several deviations amongst the states. Examination of the insurance codes in such states, however, provides evidence of a desire to create national uniformity regarding these issues. The fact that these states do not require separate licenses, together with the fees and bureaucracies that such requirements entail, provides a basis for argument that the "majority view" considers a broader role for insurance agents and brokers.

In fact, this is probably more reflective of the reality insurance agents and brokers face. It is perhaps unreasonable to assume that clients do not ask agents or brokers for advice regarding their coverage. It is perhaps even more unreasonable to assume that, in the face of such requests, agents or brokers simply decline to answer those questions because they do not have a separate license issued by the state in which they practice.

Among the states adopting this view, various insurance designations remain attainable. In some, agents or brokers can even obtain separate counseling designations. However, this is not required in order to perform such services. Iowa, for example, simply requires that a person "offering any advice, counsel or service" with respect to any policy of insurance must also be licensed as an insurance producer.[6]

Conclusion

While the federal government has adopted new regulation of the insurance industry, this typically does not include the advice-giving role of insurance agents and brokers in the United States. It is apparent, however, that the states are moving on their own toward uniformity in this regard. Still, in every state, agents and brokers should make sure they do not overstep their boundaries, whether a statutory distinction exists or not. Caution and knowledge of the specific legal principles should be the guiding principles of agents and brokers. ■

Endnotes

(1) PLMA, Sec. 2d.

(2) PLMA, Sec. 2k.

(3) NAIC Producer Licensing Working Group paper, Question No. 4.

(4) Wyo. Stat. ann. 26-9-220f.

(5) M.C.L. 500.1236.

(6) Iowa Code ann. 522B.2(2).

Massachusetts Court Applies Pro-Rata Time-on-the-Risk Allocation to Asbestos-Related Claims

by Kim V. Marrkand, J.D.

Kim V. Marrkand, J.D., a member in the Litigation Section in Mintz Levin's Boston office, chairs the firm's Insurance/Reinsurance Practice Group and Insurance Bankruptcy Group. She is also a member of the firm's Subprime Practice Group. Marrkand's special expertise is in representing and advising insurers and reinsurers on the business and legal implications of a variety of complex coverage issues. Her breadth of experience includes representing insurers with respect to coverage issues involving pollution, environmental, bad faith, tobacco, directors and officers, bankruptcy, asbestos and emerging risks.

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On July 28, 2010, in *New England Insulation Co. v. Liberty Mutual Insurance Co.*, No. 10-2784-BLS2, 2010 WL 3219436 (Mass. Super. Ct. July 28, 2010), a Superior Court judge, sitting in the Business Litigation Sessions[1] of the Suffolk Superior Court in Massachusetts, held that the pro-rata time-on-the-risk allocation rule set forth in *Boston Gas Co. v. Century Indemnity Co.*, 454 Mass. 336, 338-339 (2009), applies to asbestos bodily injury claims.

Accordingly, an insurer is entitled to seek contribution from an insured for the insured's pro-rata share of loss arising from long-term asbestos-related bodily injury claims. The Massachusetts Supreme Judicial Court (SJC) first applied a pro-rata time-on-the-risk allocation methodology to a progressive injury claim in *Boston Gas*. Prior to this decision, however, no Massachusetts court had applied *Boston Gas* to an asbestos-related bodily injury claim.

In *Boston Gas*, the SJC was faced with a certified question from the First Circuit Court of Appeals regarding the appropriate method of allocating liability for costs incurred as a result of a long-term progressive injury pollution claim.[2] The SJC answered the question by adopting a pro-rata time-on-the-risk allocation method; in other words, where there is a long-term progressive injury and it is difficult to determine precisely when, over a long time period, injury actually occurred, an insurer's liability is limited to a percentage of the damage or injury directly proportionate to the number of years that insurer provided coverage to the policyholder in relation to the total time span of the injury.[3] The SJC further held that the policyholder itself is responsible for the proportionate share of the damage or injury for the years during which the policies were exhausted, an insurer was insolvent or the policyholder was unable to obtain insurance.[4]

Although asbestos claims were not at issue in *Boston Gas*, the Superior Court found that, because the "Supreme Judicial Court's discussion of the problem referenced toxic exposure as well as environmental damage claims," the rationale applied by the SJC was readily applicable to asbestos-related claims. In particular, when explaining the then-current state of law on allocation in the Commonwealth, the SJC specifically noted that it had reserved the issue of allocation in the context of asbestos-related claims:[5]

> [i]n *A.W. Chesterton Co. v. Massachusetts Insurers Insolvency Fund,* 445 Mass. 502, 503, 506 n.3, 838 N.E.2d 1237 (2005), **a case involving asbestos-related liability claims,** we reserved the issue for future decision because neither party challenged the joint and several allocation method used in that case. The First Circuit's certified questions now present us with an opportunity to consider the merits of pro rata versus joint several allocation.[6]

In addition, the SJC began its discussion of the allocation question by directly equating toxic exposure bodily injury claims with environmental contamination property damage claims:

> [t]his allocation issue commonly arises in the context of insurance disputes involving so-called "long-tail claims" for injuries caused by environmental damage or toxic exposure. These long-tail claims cause problems for courts because "[e]nvironmental damage and toxic exposure cases often involve injuries that occur over a number of years, known as 'progressive injuries.'"[7]

The SJC's reliance upon multiple references to toxic exposure cases demonstrated that it indeed was considering asbestos bodily injury claims within the universe of "progressive injury" claims for which it was adopting the pro-rata allocation method.

The SJC further noted that most liability policies are "designed to respond to losses, such as automobile accidents, which occur instantaneously," whereas "losses where damage develops unrecognized over an extended period of time, such as bodily injury claims for toxic exposures and property damage claims for environmental contamination, are more difficult to pinpoint both in time and in degree."[8] Due to the virtual impossibility of determining the quantity of injury caused by a long-term progressive injury during any one policy period, the SJC held that losses should be allocated using the pro-rata time-on-the-risk method.[9]

The Superior Court's ruling arose when Liberty Mutual Insurance Company ("Liberty Mutual") sought to apply the pro-rata allocation rule of Boston Gas in the context of asbestos-related bodily injury claims. The insured filed suit against Liberty Mutual, and moved to enjoin Liberty Mutual from applying *Boston Gas* to the insured's asbestos-related claims.

On July 28, 2010, the Superior Court denied the motion of New England Insulation Co. (NEIC). Applying the decision in *Boston Gas*, the Superior Court held that, where "the evidence does not permit an allocation of liability based on a fact-based determination of the timing of an injury, the [insured] will share with its insurers, pro rata based on time on the risk, the obligation to pay any judgments or settlements that the injured parties may obtain in proportion to the period of exposure during which [the insured] was uninsured."[10] In reaching this decision, the Superior Court noted, "[t]he difficulties of proof of causation that raise the problem of allocation are the same; indeed the Supreme Judicial Court's discussion of the problem referenced toxic exposure as well as environmental damage claims ... ."[11]

Furthermore, on Oct. 20, 2010, the Superior Court affirmed its prior decision, holding, "[a]s this Court previously ruled in its memorandum on plaintiff's motion for preliminary injunction, [Boston Gas] establishes that Liberty Mutual is entitled to seek contribution from NEIC."[12] Thus, as the SJC explained and the Superior Court in New England Insulation Co. affirmed, where there is a long-term progressive injury claim, a pro-rata time-on-the-risk allocation methodology applies. ■

Endnotes

(1) The Business Litigation Sessions were established to handle complex business disputes that require substantial case management.

(2) *Boston Gas Co. v. Century Indemnity Co.,* 454 Mass. 336, 338-339 (2009).

(3) Id. at 370-372.

(4) Id.

(5) Id. at 355.

(6) Id. (emphasis added).

(7) Id. at 348 citing Michael G. Doherty, Comment, *Allocating Progressive Injury Liability Among Successive Insurance Policies,* 64 U. Chicago L. Rev. 257, 257 (1997) (emphasis added)).

(8) Id. at 349.

(9) Id. at 370.

(10) Id. at *2.

(11) *New England Insulation Co.,* 2010 WL 3219436, at *1.

(12) *New England Insulation Co. v. Liberty Mutual Insurance Co.,* No. 10-2784-BLS2 (Mass. Super. Ct. Oct. 20, 2010).

ABCs of Appellate Practice for the Expert and Adjuster

by Steven A. Stinson, CPCU, J.D., LL.M., CLU, AIC, AAI

Steven A. Stinson, CPCU, J.D., LL.M., CLU, AIC, AAI, a member of the CPCU Society Consulting, Litigation & Expert Witness Interest Group Committee, is the principal in both Stinson Forensic Insurance Consulting LLC and Stinson Alternative Dispute Resolution LLC, each with offices in Palm Beach Gardens, Fla., and Nashville, Tenn. He also practices law with James A. Freeman & Associates in Nashville, Tenn. Besides serving as an insurance expert for other attorneys, he is a Certified Circuit Civil Mediator in Florida and a Rule 31 General Civil Mediator in Tennessee; a Qualified Arbitrator in Florida; and listed in the WIND Network Umpire Directory.

Introduction

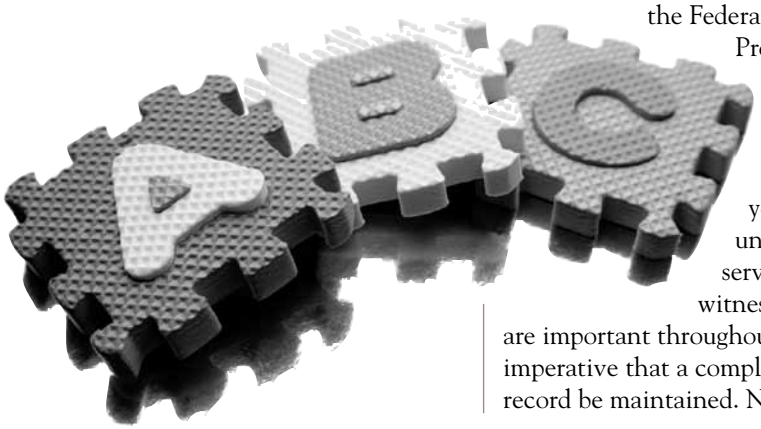
Generally speaking, all experts and adjusters are intimately familiar with the more important provisions of the Rules of Civil Procedure and particularly those pertaining to experts, witnesses and discovery. This may not be true with respect to Rules of Appellate Procedure. This short article is intended to be an overview or general explanation of the Rules of Appellate Procedure; how an appeal is filed, argued and decided; and the possible impact of expert testimony at the trial level on the appellate decision.[1] It also explains the structure of several appellate court systems.

Appellate Procedure

Appellate Concerns during Trial

The appeal, whether to an intermediate or to the highest court in the state, is based on the complete record of the proceedings at the trial level, including all legal arguments and evidentiary proffers made outside the hearing of the impaneled jury.[2] The appellant or party appealing is claiming that the trial judge legally erred in making some decision during trial and such erroneous decision precluded the appellant from obtaining a favorable decision from the jury.[3] Examples include precluding testimony from being presented, which legally should have been allowed and which is favorable to the appellant. Alternatively, there is objection to testimony being presented by the appellee over the objection of the appellant, which appellant claims legally should not have been presented.[4] Other issues may pertain to challenging for cause whether or not a juror should be permitted to serve, if the appellant has already used all of his or her preemptory challenges.[5]

With the use of Rule 26 A (3) of the Federal Rules of Civil Procedure and similar disclosure in most state courts and requirements that all expert witnesses and other witnesses and exhibits be listed in advance, a ruling permitting the testimony of a late-discovered witness or use of a late-discovered exhibit may be a key issue that appellant believes the trial court has erroneously ruled upon. Rule 26 (A) (2) of the Federal Rules of Civil Procedure proscribe what expert witnesses must do during the discovery and pretrial phase, and rulings relative to these procedures may help or hurt one side or the other. Giving or failing to give requested jury instructions, and particularly special jury instructions, or the format of the question in the verdict form may also lead to an appeal. Improper closing arguments such as the use of the Golden Rule argument, that is asking jurors to put themselves in the shoes of the plaintiff, may also be grounds for appeal.[6] Decisions pertaining to the Final Judgment are often appealed.[7]



Understanding that the attorney you work for has to be familiar with both the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure, it is helpful if you have a basic understanding when serving as an expert witness. Several issues are important throughout the trial. It is imperative that a complete and accurate record be maintained. Normally, the

Local Rules indicate which party is responsible for obtaining and possibly paying for the private court reporter. Everything must be recorded, especially including bench conferences, chamber conferences and proceedings when the jury is excused. If the court rules that you will not be permitted to testify at all or not be permitted to testify as to certain issues, your attorney will probably want to proffer your testimony outside the presence of the jury. This will create a record for the court of appeals to see what you would have testified to but for the trial court's ruling, and whether the excluded testimony would have been permitted under the evidentiary standards of material relevancy and case law.[8] Without this, there is no way to determine whether the exclusion was proper or not.

Additionally, it is extremely important that both sides, or all attorneys where more than two, move for a directed verdict in their client's favor at the end of each phase of the trial with appropriate grounds, including insufficiency of the evidence and alternatively that the evidence affirmatively shows that the opponent is not entitled to a verdict and judgment in his or her favor based upon the evidence presented along with any more specific grounds. It is equally important that the attorney demands that the trial judge make a ruling each time, or if he or she reserves ruling, that he or she rules as to all phases before the jury goes out to deliberate.[9] If this is neglected, the appellant (or cross-appellant) cannot raise the insufficiency of the evidence or other similar evidentiary-based arguments on appeal.[10]

Filing the Appeal

The Notice of Appeal and appropriate filing fees are filed with the District Court Clerk not the Court of Appeals Clerk. It must be filed no later than "30 days after the judgment or order appealed from is entered."[11] Filing various post-trial motions, such as a motion for a new trial, a motion to alter or amend judgment, or a motion for attorney's fees, extends the time to file the Notice of Appeal to 30 days after such motion is ruled upon.[12] Rule 5 of the Federal Rules of Appellate Procedure provide for permissive appeals, including interlocutory appeals or appeals prior to the Judgment. This process requires a filing of a motion in both the District Court and Circuit Court of Appeals.

Record on Appeal and Briefs

The Record on appeal includes original papers and all exhibits (whether permitted in or not), the full or partial transcript of proceedings and a certified copy of docket entries prepared by the District Court Clerk.[13] The appellant must order the full or partial transcript within 14 days from filing the Notice of Appeal; if only a partial transcript is ordered, appellant must serve a statement of issues and the portions of the transcript that were ordered. Appellee then has 14 days to order additional portions or the remainder of the transcript.[14] Theoretically, the District Court Clerk has 30 days to compile the entire record and transmit it to the Court of Appeals. If the transcript is long and cannot be done within 30 days, the court reporter may request additional time from the clerk, and the clerk must note the action taken and notify all the parties.[15]

Rules 28 and 32 of the Federal Rules of Appellate Procedure prescribe the format of the various briefs. Appellant's and Appellee's briefs must not exceed 30 pages, and the Reply brief of the Appellant may not exceed 15 pages.[16] The Appellant's brief must contain the following:

(1) Corporate disclosure statement.

(2) Table of contents.

(3) Table of authorities.

(4) Jurisdictional statements for both District Court and Court of Appeals.

(5) Statement of the issues presented for review.

(6) Brief statement of the case.

(7) Statement of the facts.

(8) Summary of argument.

(9) Argument, which includes contentions and reasons for them with citations to authorities and the record.

(10) Conclusion.

(11) Certificate of compliance.[17]

Appellee's brief must conform to the above, except if there is no disagreement, then it may omit 4, 5, 6, 7 and the statement of the standard of review.[18] There are many requirements pertaining to the kind of paper used, type style and size, margins and the like.[19]

Appellate ADR

Most of the Circuit Court of Appeals Local Rules provide for appellate mediation. The 11th Circuit specifically provides for mediation with either a senior or active judge serving as mediator before or after oral argument.[20] The 6th Circuit provides for a designated mediation attorney reviewing the briefs to see whether mediation by either the mediation attorney, circuit judge or staff attorney would be warranted to effect a settlement or at least narrow the issues.[21] Rule 34 of the Tennessee Rules of Appellate Procedure provides for voluntary mediation by a Rule 31 Certified General Mediator.[22]

United States Supreme Court

There are separate rules for the United States Supreme Court.[23] There are very few instances where a case is heard as an original action under Article III of the United States Constitution.[24] In most instances a Petition for Certiorari must be filed, and the Supreme Court determines whether or not to hear the case. Wikipedia notes: "The court denies

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ABCs of Appellate Practice for the Expert and Adjuster

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the vast majority of petitions and thus leaves the decision of the lower court to stand without review; it takes roughly 80 to 150 cases each term. In the term that was most recently concluded as of June 9, 2009, for example, 8,241 petitions were filed, with a grant rate of approximately 1.1 percent."[25]

Oral Argument

Oral argument "must be allowed in every case," unless the parties (1) agree to submit the appeal on briefs or (2) the three-judge panel that is to hear the appeal determines that the appeal is frivolous or (3) the dispositive issues have been authoritatively decided or (4) there is an adequate presentation in the brief.[26] The Circuit Court of Appeals Clerk will notify the parties of the date, time and place of the oral argument and the time allotted to both sides, which usually runs between 30–60 minutes per side.[27]

Rule 35 of the Federal Rules of Appellate Procedure provides for *en banc* argument, that is one in front of the entire Circuit Court of Appeals. The final result is a Final Judgment by the Court of Appeals, but it is not always accompanied by a written opinion that provides the reasoning for the decision. Normally the Circuit Court of Appeals orders the District Court to enter an appropriate Final Judgment or Order for New Trial that is consistent with the Circuit Court of Appeal's Final Judgment and opinion.

Appellate Court Structure

If you are involved with cases in only one jurisdiction, you probably know the structure of the court system in your state. If you testify in or handle files in a number of states or jurisdictions, it is important to ask your attorney to explain the appellate court structure and jurisdiction of the various appellate courts. There are many different appellate court structures throughout the country; several will be explained to highlight such differences.

Florida

Florida has five geographic co-equal District Courts of Appeal.[28] The First District Court of Appeals, which is located in Tallahassee, has exclusive jurisdiction in workers compensation matters[29] and joint statewide jurisdiction in certain matters pertaining to the state government.[30] The five District Courts of Appeal shall review most final orders of trial courts. While the Supreme Court of Florida generally only has mandatory review of death penalty cases, and cases declaring a state statute unconstitutional, it otherwise has discretionary review in a number of circumstances.[31] The Supreme Court of Florida has seven justices and the District Courts of Appeal have from 10 to 15 judges per district, but normally function in three-judge panels.[32] All of these courts hear both civilian and criminal appeals.

Tennessee and Texas

Tennessee's appellate structure has an intermediate Tennessee Court of Appeals, which handles civil matters everywhere in the State, a separate Tennessee Court of Criminal Appeals, which handles only criminal matters everywhere in the State, and a single Supreme Court of Tennessee, which handles both civil and criminal matters.[33] Texas, on the other hand, has a unified intermediate Courts of Appeal and separate Supreme Court of Texas, which hears only civil matters, and a Court of Criminal Appeals, which is the highest court for certain criminal appeals. Both sit *en banc* with nine justices or judges. The Texas Courts of Appeal comprise 14 courts with a total of 80 judges.[34]

New York and Massachusetts

New York has trial courts, which are called Supreme Court (Trial Divisions), with 346 judges in 12 divisions. Their intermediate appeals courts are either called Supreme Court-Appellate Divisions (3rd & 4th Departments) or Supreme Court Appellate Terms (1st & 2nd Departments). The Court of Appeal, with seven judges, is the highest appellate court in the State of New York, and it hears civil and criminal appeals, as do the intermediate courts.[35] Massachusetts has an Appeals Court with 25 justices sitting in three-judge panels and a Supreme Judicial Court with seven justices, but it only needs five justices to sit *en banc*.[36]

Federal Court System

The Federal Court System is comprised of 94 judicial districts with at least one district in each state and a number of states with multiple districts. There are 12 geographic Circuit Courts of Appeal and the Court of Appeal for the Federal Circuit. The United States Supreme Court hears appeals from the various intermediate federal courts of appeal, as well as from the state court systems.[37] Federal courts hear matters that either involve a "federal question" or a diversity matter. However, the plaintiff in a diversity matter must allege that the controversy exceeds $75,000. There must also be complete diversity; thus if an entity or individual from Indiana is both a plaintiff and a defendant, complete diversity is destroyed.[38]

Conclusion

It is vitally important that an accurate and complete record goes from the Trial Court to the Court of Appeals, and your testimony as an expert may be important on appeal, even if you are not allowed to testify at the trial level. It may be grounds for a new trial and subsequent expert testimony at the second trial. ■

Endnotes

(1) See generally, 4 & 5 *Am. Jur. 2d* Appellate Review and 4 & 5 *C.J.S.2d* Appeal and Error and Hornstein, Alan, *Appellate Advocacy in a Nutshell,* St. Paul, Minn., West Group, 1998.

(2) 4 *C.J.S. 2d* Appeal and Error §§564, 565 & 627.

(3) 4 *C.J.S. 2d* Appeal and Error § 699.

(4) 5 *Am. Jur. 2d* Appellate Review §§ 699-701 & 703.

(5) 5 *Am. Jur. 2d* Appellate Review §§ 686-687.

(6) See generally, 4 *C.J.S. 2d* Appeal and Error § 311.

(7) This very short article is intended to explain the basic procedure surrounding an appeal and not examine all the rules and particularly the case law relative to myriad issues that may be appealed. 5 *Am. Jur. 2d Appellate Review* § 692.

(8) See generally, Federal Rules of Evidence, Rules 401 and 402.

(9) Unfortunately, in the heat and stress of battle and with all the other things to think about an attorney will frequently fail to do this at the end of one or more phase and will not obtain a specific ruling from the judge on the record.

(10) See generally, 4 *C.J.S. 2d* Appeal and Error § 311.

(11) Rules 4 (a) (1) (A) and 3 (e) of the Federal Rules of Appellate Procedure. If a "party shows excusable neglect or good cause" and moves for an extension of time within which to file within the prescribed 30 days, the District Court may grant an extension, not exceeding 30 days. Rules 4 (a) (5) of the Federal Rules of Appellate Procedure. The District Court can reopen the time within which to file an appeal for 14 days, if it is shown that such party received no notice of the entry of judgment. Rules 4 (a) (6) of the Federal Rules of Appellate Procedure.

(12) Rule 4 (a) (4)(A) of the Federal Rules of Appellate Procedure.

(13) Rule 10 (a) of the Federal Rules of Appellate Procedure. If no court reporter transcript is available for whatever reason, there can be either a Statement of Evidence or an Agreed Statement as the Record on Appeal. Rule 10 (c) and (d) of the Federal Rules of Appellate Procedure.

(14) Rule 10 (b) of the Federal Rules of Appellate Procedure.

(15) Rule 11 (a) of the Federal Rules of Appellate Procedure.

(16) Rule 32 (a) (7) (A) of the Federal Rules of Appellate Procedure. There are alternative word and line limitations.

(17) Rule 28 (a) of the Federal Rules of Appellate Procedure.

(18) Rule 28 (b) of the Federal Rules of Appellate Procedure.

(19) Rule 32 of the Federal Rules of Appellate Procedure.

(20) U.S. Ct. App. 11th Cir. Rule 33-1 (c).

(21) U.S. Ct. App. 6th Cir. Rule 33.

(22) See generally, Rule 31 of the Tennessee Supreme Court Rules, which provide a detailed systems for all types of neutrals, including mediators and Rule 34 of the Tennessee Rules of Appeal for the voluntary mediation provisions.

(23) United States Supreme Court Rules.

(24) "In all cases affecting Ambassadors, other Public Ministers and Consuls, and those in which a state shall be a Party, the Supreme Court shall have original jurisdiction." Article III, Section 2, United States Constitution.

(25) Wikipedia, "Certiorari" at footnote 14: *"Caperton v. Massey Coal,* 556 U.S. __, __ (2009) (Roberts, C.J., dissenting) (slip op. at 11). See also http://www.supremecourt.gov/about/justicecaseload.pdf (10,000 cases in the mid-2000s); Melanie Wachtell & David Thompson, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures;* 16 Geo. Mason U. L. Rev. 237, 241 (2009) (7500 cases per term); Chief Justice William H. Rehnquist, Remarks at University of Guanajuato, Mexico, 9/27/01 (same)."

(26) Rule 34 of the Federal Rules of Appellate Procedure.

(27) Id.

(28) Florida Statute § 35.01 et. seq.

(29) Florida Statute § 440.271.

(30) Florida Statute § 120.68.

(31) Florida Rule of Appellate Procedure, Rule 9.030. These include: (i) declaring a state statute valid; (ii) construing provision of federal or state constitution; (iii) affect class of constitutional or state officers; (iv)express and direct conflict with another District or the Supreme Court; (v) question certified of great public importance; (vi) certified to be in direct conflict decisions of other Districts. Rule 9.030 (2).

(32) http://www.ncsconline.org/D_Research/Ct_Struct/state_inc.asp?STATE=FL This website and the one presented in the subsequent end notes lists the court structures for each of the 50 states. These are provided by the National Center for State Courts, along with much other information on state courts.

(33) http://www.ncsconline.org/D_Research/Ct_Struct/state_inc.asp?STATE=TN. Tennessee is one of only two states in the U.S. which still has separate Chancery or Equity Courts.

(34) http://www.ncsconline.org/D_Research/Ct_Struct/state_inc.asp?STATE=TX.

(35) http://www.ncsconline.org/D_Research/Ct_Struct/state_inc.asp?STATE=NY.

(36) http://www.ncsconline.org/D_Research/Ct_Struct/state_inc.asp?STATE=MA.

(37) http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/FederalCourtsStructure.aspx. Florida has the Southern, Middle and Northern Districts and Tennessee has the Eastern, Middle and Western Districts.

(38) http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/Jurisdiction.aspx

Q&A with Donald S. Malecki, CPCU

by Donald S. Malecki, CPCU

Donald S. Malecki, CPCU, is a principal at Malecki Deimling Nielander & Associates LLC, based in Erlanger, Ky. During his more than 50-year career, he has worked as a broker, consultant, archivist-historian, teacher, underwriter, insurance company claims consultant and as publisher of *Malecki on Insurance,* a highly regarded monthly newsletter.

One of our insureds, a general contractor, received an additional insured endorsement, which is reproduced here, from one of its subcontractors, along with a certificate of insurance. Note that this endorsement purports to be the "well-known and highly sought-after" ISO additional insured endorsement replaced some years earlier.

What is puzzling about this endorsement is that it includes two paragraphs not found in the "genuine" CG 20 10 11-85 endorsement that was replaced, but still states that it is a product of the Insurance Services Office, based on the copyright at the bottom of the endorsement.

We are not sure if the insurer added the two paragraphs or if the subcontractor or someone representing it actually added that wording. What we would like to know, however, is whether the additional insured wording is misleading and if you note any potential problems with it.

First of all, you are right that the ISO additional insured endorsement CG 20 10 11-85 was replaced but not withdrawn. In fact, some insurers are still issuing this earlier endorsement.

Apart from the aforementioned, the added provisions make the endorsement misleading and potentially troublesome. Note that the endorsement's title refers to Form B. This reference to Form B was of significance at the time a Form A was also available, but both references were eliminated in the mid-1990s. In fact, the only way reference to Form B would have any significance would be if the two added paragraphs in capital letters were to be eliminated. Form B would then signify coverage not only for the sole fault of the additional insured but also coverage after work has been completed.

Traditionally, this ISO endorsement has been on a scheduled basis; this means that a name of the additional insured has to be designated. Note that by the addition of the statement "Any person or organization as required by written contract," this scheduled endorsement has been transformed into a blanket additional insured endorsement. ISO has a blanket endorsement.

The first added paragraph in capital letters attempts to clarify that the insurer of this endorsement waives its right of subrogation against the additional insured. This waiver, however, is superfluous, because an insurer cannot exercise its right of subrogation against an insured. The problem here is that the waiver of subrogation is said to apply only for claims arising out of the *negligent acts* of the *named* insured. This makes no sense, given that the additional insured, under this endorsement, has coverage for both intentional and unintentional (negligent) acts. Apparently, the person who prepared this paragraph is confused over the terms "named insured" and "additional insured."

The second paragraph is equally confusing. What it appears to be saying is that any claims or liability attributable solely to the named insured that affects an additional insured will be on a primary basis and that the additional insured's insurance will apply on an excess and noncontributory basis. Assuming this is correct, this is supposed to mean that when any claim or liability arises out of the sole fault of the additional insured during its operations for the named insured, the named insured's policy applies on an excess basis.

Conclusion

Some insurers have been known to produce some incomprehensible and absurd policy language, and this endorsement does appear to be the work of an insurer. It also is not a product of ISO. If it is the work of a producer, that person is courting some big problems, not only with the insurer on whose policy this endorsement applies, but also with a copyright violation of ISO.

Note too that this kind of endorsement may be null and void depending on the state where it is to apply. The reason is that some states have anti-indemnity statutes that do not permit assumptions of sole or partial fault of the indemnitee (additional insured), nor additional insured coverage encompassing those kinds of assumptions.

This is not an isolated case where an additional insured endorsement reflects an ISO copyright but includes amendments to it that are troubling. One of these days, the culprits need to be found and dealt with because these practices are likely to continue and be harmful to persons who innocently accept and rely on these endorsements to their detriment. ■

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

CG 20 10 11-85

ADDITIONAL INSURED-OWNERS, LESSEES OR CONTRACTORS (FORM B)

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name of Person or Organization:

Any person organization as required by written contract

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of "your work" for that insured by or for you.

SUBJECT TO ALL OF THE TERMS AND CONDITIONS OF THE INSURANCE INCLUDING, BUT NOT LIMITED TO THE FOREGOING LIMITATIONS AND EXCLUSIONS, IT IS AGREED THAT THE COMPANY WAIVES ANY RIGHT OF SUBROGATION, TO WHICH IT IS ENTITLED UNDER THIS INSURANCE, WITH RESPECT TO CLAIMS AGAINST THE ABOVE NAMED ADDITIONAL INSURED, ARISING OUT OF THE NEGLIGENT ACTS OF THE NAMED INSURED.

IT IS AGREED THAT SUCH INSURANCE AS IS AFFORDED BY THIS POLICY FOR THE BENEFIT OF THE ADDITIONAL INSURED SHALL BE PRIMARY INSURANCE AS RESPECTS ANY CLAIMS, LOSS OR LIABILITY ARISING DIRECTLY FROM THE NAMED INSURED'S OPERATION AND ANY OTHER INSURANCE MAINTAINED BY THE ADDITIONAL INSURED SHALL BE EXCESS AND NON-CONTRIBUTORY WITH THE INSURANCE PROVIDED HEREUNDER.

CL 246 (11-85)
CG 20 10 1185

For the Bookshelf — *General Liability Insurance Coverage: Key Issues in Every State*

Reviewed (and recommended) by Jean E. Lucey, CPCU

I've learned over the years to count on the advice and opinions of people who have consistently demonstrated their wide-ranging knowledge and good judgment to be eminently reliable. Thus, when I saw that **William "Bill" C. Wilson, CPCU, ARM, AIM, AAM,** and **Donald S. Malecki, CPCU,** had good things to say about the new book *General Liability Insurance Coverage: Key Issues in Every State* (Oxford University Press, 2011), by **Randy J. Maniloff, J.D.,** and **Jeffrey W. Stempel, Ph.D., J.D.,** I knew that we needed it for the Insurance Library Association of Boston's collection. And they were most certainly right!

(As an aside, both Bill and Don have been recipients of the Consulting, Litigation & Expert Witness Interest Group's annual Gottheimer Award, so the recognition of their perspicacity and good judgment goes far beyond me.)

The following is taken from the introductory "About the Authors" section:

> Randy Maniloff is a partner at White and Williams LLP in Philadelphia.

> He concentrates his practice in the representation of insurers in coverage disputes over primary and excess obligations under a host of policies, including commercial general liability and various professional liability policies ... Jeffrey W. Stempel, the Doris S. & Theodore B. Lee Professor of Law, teaches legal ethics, civil procedure, insurance and contracts at the William S. Boyd School of Law, University of Nevada Las Vegas.

The collaboration of these two attorneys, along with a number of people whom they acknowledge for their help, has produced a handsome and sturdy soft cover volume that includes an overview of commercial general liability insurance (with attention to the structure and development of coverage; organization of the form, its construction and interpretation; occurrence and claims-made format comparison; bodily injury, property damage and personal injury and advertising injury coverage as well as exclusions).

Following the overview, 20 discreet subjects are treated on a state-by-state basis. The state-by-state treatment includes cogent and concise narrative peppered with case citations. Thus, when considering the subject of "Choice of Law for Coverage Disputes" (the first of the 20 subjects), we read that "Alabama law follows the traditional conflict-of-law principles of *lex loci contractus*," a Latin phrase meaning "the law of the place where an agreement is made" (which is explained), and see three cases listed with brief descriptions of the fact situations involved in each case. We also read in this section that "Wyoming has close to no authority on choice-of-law for insurance policies, and none for liability policies," after which we see two case citations.

All of the topics covered for each state in this fashion are topics that are often the subject of research, and include: Insured's Right to Independent Counsel; Number of Occurrences; Is Faulty Workmanship an 'Occurrence?'; 'Absolute' Pollution Exclusion, Allocation of Latent Injury and Damage Claims; and First- and Third-Party Bad Faith Standards.

It is a particular strength of this work that it, unlike some compendiums that merely summarize the writers' interpretation of various subjects, directs you to the legal cases and decisions that have caused them to develop their interpretations on a state-specific basis. Readers can look at the cases themselves and decide to use them in their argument, or they may note some nuance that will help them argue an opposing "take" in any particular situation.

This is a volume that belongs on the bookshelves of many Chartered Property Casualty Underwriters, whatever their connection with commercial general liability insurance policies. ■

Mastering the Art of Claim File Auditing

By J. Phillip Bryant, CPCU, J.D.

J. Phillip Bryant, CPCU, J.D., is a principal of Rabbitt, Pitzer & Snodgrass PC, in St. Louis, Mo. Before joining the firm, he was a claims adjuster for several years. Bryant earned his CPCU in 1994 and his J.D. from Saint Louis University School of Law in 1999. He is admitted to the Missouri and Illinois Bars and also admitted to practice in the United States District Court of the Eastern District of Missouri and the Southern District of Illinois. Bryant is a member of the CPCU Society St. Louis Chapter and the Consulting, Litigation & Expert Witness Interest Group.

Internal auditing is an independent, objective assurance and consulting activity designed to add value and improve an organization's operations, as stated by the Institute of Internal Auditors Standard. It helps an organization accomplish its objectives by bringing a systemic disciplined approach to evaluate and improve the effectiveness of management, control and governance processes.

Why Audit?

Internal auditing of claims operations should be conducted regularly for various reasons, including financial stability of the operation, reinsurance requirements and marketing, in anticipation of regulatory agency audits and to avoid practices that may lead to extra-contractual damages. The financial aspect of internal audits should ensure that reserves are set timely and with accuracy, and are promptly adjusted to changing information.

Expense management should be considered to identify those expenses that may be avoided or those goods and services that could be secured more efficiently. Examples of expenses to be considered are those for rental car, additional living expenses, contents valuation, expert services, legal services and police reports.

Loss payment trends should be examined in an effort to identify those that are unacceptable and to learn their causes. Perhaps those trends call for the fine-tuning of the investigation process, claim analysis, individual authority levels or negotiation strategy.

Reinsurers typically perform their own audits of insurance company operations. They like to see that the insurers have a formal audit plan in place and that it is an active process. Similarly, regulatory agencies conduct audits. The stated mission of the National Association of Insurance Commissioners (NAIC), in part, is to facilitate the fair and equitable treatment of insurance consumers. The NAIC strives to promote the reliability, solvency and financial solidity of insurance institutions.

The NAIC promotes these goals with its Model Unfair Claims Practices Act. Every state has enacted all or part of the Model Act that specifically sets forth matters that are deemed to be unfair claim practices. A frequent market conduct issue is an insurer's failure to acknowledge, pay or deny claims within specified time frames. Similarly, a common failure is to pay claims properly, such as including amounts for sales tax or loss of use.

Other common issues are improper documentation of claim files and failure to communicate a delay of claim settlements in writing. If an insurance commissioner finds that an insurer has engaged in unfair claims practices, the commissioner may order the insurer to cease and desist and may require the payment of monetary penalties. For flagrant violations, the commissioner may go so far as to suspend or revoke the insurer's license.

Some states consider their particular Unfair Claims Practices Act as only a regulatory scheme that does not create a private cause of action under the Act. Other states permit a first-party cause of action only, while a small number of states also allow a third-party

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Mastering the Art of Claim File Auditing

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cause of action. Even if a direct action is not permitted under the particular Unfair Claims Practices Act, most states have a separate vexatious refusal statute. Many times, courts are permitted to look at the standards set forth within the Unfair Claims Practices Act in context of a vexatious refusal action.

The financial aspect of internal audits should ensure that reserves are set timely and with accuracy, and are promptly adjusted to changing information.

Vexatious refusal penalties may be awarded if the insurer exhibited a recalcitrant attitude that resulted in an unreasonable delay in settling a claim. An insurer's actions are not deemed vexatious merely by unsuccessfully litigating a dispute. Generally, a delay in settling is not unreasonable if the delay resulted from a bona fide dispute. However, the insurer's actions may be unreasonable if it refuses to settle without presenting a bona fide defense. The specific vexatious refusal penalties vary among the states but have a common thread of allowing a penal monetary award that is determined by a formula. Perhaps more significantly, an insurer found to have acted vexatiously may be ordered to pay the insured's attorneys' fees in prosecuting the action.

How to Audit

The axiomatic first step is to plan an audit. The audit team should be identified as well as the subject area of the audit, the sample size and the time requirement. Information should be gathered from the claims department for things such as average loss cost and the average age of claims. Depending upon the scope of the particular audit, information should be gathered for the payment and reserve authority of each adjuster, claims involving extra-contractual damages, claims closed without payment and claims denied for coverage or liability issues.

During planning, benchmarking information should be gathered, such as the number of new claims, number of new policies, expenses per claim and average reserves. Prior audit reports related to the particular department should be reviewed as well as departments at other locations. Industry standards, consumer complaints and financial analyses should also be considered.

The claim department should be notified of the upcoming audit and of its scope. The department's management should be encouraged to discuss concerns or areas management would like the auditors to review. This is with the goal that the auditors are to assist management in improving the operation and that the audit process should be collaborative.

During the fieldwork, auditors may review claim files, procedure manuals and speak with staff. They may assess the adequacy of internal controls and test for compliance of policies, laws and regulations.

The auditors are to prepare a written report that provides an overview of the audited unit and identifies the scope of the audit. It should specify any major audit concerns and provide recommended solutions along with a follow-up date. For instance, the auditors may suggest the development or redesign of operating procedures or they may urge further training on particular issues.

The department's management should prepare a written response stating agreement or disagreement with the findings, an action plan to correct any issues along with an expected completion date. A closing meeting among the auditors and management should be held during which the reports are discussed and any remaining issues are resolved. The reports are then to be distributed among the auditors, the auditor unit, management and senior management. Follow-up is to be made on an issue-by-issue basis shortly after the expected completion date to verify implementation of action plans.

What to Look for

A process review audit may conduct a walk-through of claims processing to learn how information is reported and how data is captured. The auditors look for duplication of procedures and consider automated versus manual activities. The auditors may evaluate the appropriateness of authority levels and the standard for investigation.

If the audit focuses on the claims investigation, the auditors may ask if the investigations are timely, thorough, accurate and proper. They may seek to determine if photographs are secured when warranted to exhibit the level of damage claimed or a lack of damage. They may seek to determine if a proof of loss is promptly requested when appropriate.

Coverage issues may be addressed to learn if all policy forms are properly identified and considered. Evaluation should be given to relevant terms, conditions and exclusions, and the insurer's duty to

defend should be properly recognized. The assistance of others, including attorneys, should be secured when warranted. Coverage denials and reservations of rights should be fully set forth in writing to the insured.

Audits that focus on a claim department's strategy and analysis should look for adjusters' evaluations of coverage, facts, identification of potential exposures, an overall plan for resolution, reserves and a time for a next report. Consideration should be given to determine if damages are properly determined and supported.

The auditors may look to learn if subrogation interests are recognized early and that notices are properly sent when warranted. In those instances, the relevant statute of limitations should be recognized and a subrogation demand should be timely sent.

If litigation handling is targeted by the audit, there should be an analysis of fees and expenses among approved defense firms. It is often helpful to audit a legal file parallel to the claim file. The auditors may confer with the claim staff. They should look for abandonment of cases to defense counsel and should evaluate litigation management tools for effectiveness and enforcement. The auditors may want to obtain background information of current firms. They may personally meet the firms to evaluate their willingness for meaningful reform. The auditors may create revised litigation guidelines and may recommend termination of relationships, as warranted.

Often, the only "face" the public sees of the insurance company is the correspondence sent by adjusters. An audit may focus on the quality of those letters to determine if they accurately and succinctly convey the intended thought. Sentence and paragraph structure should be examined as well as spelling, punctuation and margins. Deficiencies may warrant further training.

Claim audits may also evaluate the presence and effectiveness of negotiation strategies. If needed, refinement of strategy should result in better settlements.

Claim audits may also evaluate the presence and effectiveness of negotiation strategies.

Recorded statements should be routinely audited to determine that they are conducted when warranted, such as in the presence of liability or coverage issues or when a special investigation unit may participate in the claim. The quality of recorded statements depends upon asking the right questions and following up on answers given. Preparation should be made for each recorded statement to key in on the particular issues associated with the individual claim.

The purpose of internal audits is to help managers and the department to perform more effectively. Those audits should be a collaborative effort between the department and the auditors. The areas to be audited are limited only by imagination. Used effectively, audits will produce improved results in the department. ■

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