CPCU SOCIETY INSURING YOUR SUCCESS

Consulting, Litigation, and Expert Witness Section Quarterly CLEWS

Volume 10 Number 4 January 2004

From the Chairman

by Donn P. McVeigh, CPCU, ARM

Donn P. McVeigh, CPCU, ARM, is nationally prominent in the risk-management and captive-insurance fields. His proficiency is built on a solid base of experience as an underwriter, broker, and consultant since 1951. He has authored many articles and other publications; participated in numerous national and local seminars; has taught insurance and risk-management subjects at the university level; and has led various CPCU and ARM classes. McVeigh holds a B.A. degree in insurance and an M.S. degree in risk management from San Jose State University (Evening Division). He has been a member of the CPCU Society's Golden Gate (nee Northern California) Chapter since 1962. He has been managing director, Creative Risk Concepts International, (Oakland, California) since 1985.

The CLEW-sponsored seminars at the Annual Meeting and Seminars in New Orleans were well received and well attended. Both were held on Sunday, October 12. The mock trial was held in the morning and focused on D&O, borrowing heavily from the Enron debacle. As usual, the jury held against our old reliable insurer, Shifting Sands Mutual Insurance Co. The eminent author of the trial scenario, Stanley L. Lipshultz, J.D., CPCU, was the judge. Members of the CLEW Section Committee played the many witnesses. Edward W.S. Neff, CPCU, was the bailiff.

The Sunday afternoon seminar, "Technology in the Courtroom," was a one-man presentation by a real judge, the Honorable Thomas W. Brothers, J.D., State circuit court of Tennessee. This seminar also was well attended and well received. Judge Brothers is obviously a "high-tech" guy, and his presentation was fascinating, particularly with regard to virtual simulation and video imaging. He controls everything from the bench.

At the CLEW Section Committee meeting, John G. DiLiberto, CPCU, CLU, ChFC, was appointed chairman of a new seminar subcommittee. His responsibilities include: retreats (discussed in this column in the last issue of *CLEWS*, Annual Meeting seminars (which includes the mock trial), CLEW-sponsored symposia, and an annual symposium (more on this below).

Norman F. Steinberg, CPCU, will head the effort to develop the first CLEW-sponsored retreat. It probably will be held in some resort area, or could be held offshore in some country such as Bermuda. When full details are finalized, all of you will be notified.

George M. Gotthiemer Jr., Ph.D, CPCU, CLU, James A. Robertson, CPCU, and Kevin S. Letcher, J.D., CPCU, make up the annual CLEW symposium committee. This is intended to be a one-day seminar on a topic of national interest with recognized national leaders in that field. The probable location is suburban Chicago, and it will either be held in March 2004 or March 2005, depending on the speed with which this committee can get everything put together. Further details will follow.

At next year's Annual Meeting and Seminars in Los Angeles, plans are underway for another mock trial, again to be scripted by Stanley L. Lipshultz, J.D., CPCU. The insurance issue will be time element, in keeping with a theme that other interest sections will be presenting at the Annual Meeting and Seminars. A second CLEW-sponsored seminar at the Annual Meeting will discuss recent

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What's in this Issue?

From the Editor

by Daniel C. Free, J.D., CPCU, ARM

Daniel C. Free, J.D., CPCU, ARM, is president and general counsel of Insurance Audit & Inspection Company, an independent insurance and risk management consulting organization founded in 1901 by his great-grandfather. He is past president of the Society of Risk Management Consultants (SRMC), an international association of independent insurance advisors.

Free is also a founding member of the CPCU Society's CLEW Section, and currently serves as editor of *CLEWS*.

The CLEW Section proves once again to be very prolific. In this issue, Jean E. Lucey, CPCU, librarian at the Insurance Library in Boston, reviews *Spreading the Risks: Insuring the American Experience*. Jean is a new member of the CLEW Section Committee and has made an immediate impact. We also have two articles by Thomas H. Veitch, J.D., CPCU, CLU, CIC, on the issue of bad-faith conduct by an insurer. Being alert readers of *CLEWS* you are no doubt aware of the many contributions Tom has made to our newsletter over the years.

For those of you who missed the Annual Meetings and Seminars, it would be a good idea to mark your calendar for next year, as these are exciting events. The CLEW Section mock trial was particularly entertaining. Gregory G. Deimling, CPCU, and I played a couple of high-rolling executives who (allegedly) rewarded ourselves millions at the expense of the shareholders. Of course, we were capably represented by Anna K. Bennett, J.D., CPCU, and did our best to withstand a searing cross-examination by Steven A. Stinson, J.D., CPCU. Every once in awhile it is fun to play the bad guy and even though our side lost, we had a great time doing it. The audience enjoyed it and the event was well attended. ■

From the Chairman

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legal issues and will be presented by Mike Brady, J.D., and some of his colleagues from the law firm of Ropers, Majeski, Kohn & Bentley, a Redwood City, California-based law firm with offices across the country.

CLEW is willing to cosponsor seminars in your local chapter on either of two symposia it has presented in the past. They are "Order in the Court!" and "How to Start Your Own Consulting Practice." If you are interested, please contact John G. DiLiberto, CPCU, CLU, ChFC, at jdiliberto@mindspring.com.

CLEW's first research project on the subject of truckers, insurance companies, and government regulation is due to be completed by December first of this year. The research committee is comprised of Donald S. Malecki, CPCU, Gregory G. Deimling, CPCU, and George M. Gottheimer Jr., Ph.D., CPCU, CLU. Details will follow.

I hope to see many of you at next year's Annual Meeting in Los Angeles. ■

Evaluating Bad Faith

by Thomas H. Veitch, J.D., CPCU, CLU, CIC

■ **Thomas H. Veitch, J.D., CPCU, CLU, CIC,** is a partner with the law firm of Soules & Wallace in San Antonio, TX. He has been associated with the insurance business for more than 39 years serving in claims adjusting, underwriting, sales agent, and branch manager positions prior to commencing the practice of law in 1973.

Veitch has earned the professional insurance designations of CPCU, CIC, and CLU in addition to being selected to Who's Who in American Insurance and Who's Who in American Law. He is also board certified in estate planning and probate law by the Texas Board of Specialization.

His law practice includes representation of insurers, insureds, and agents in a wide variety of insurance law matters as well as serving as a mediator, arbitrator, consultant, or expert witness in insurance disputes. Veitch is also actively engaged in estate planning and wills, trusts, and estates including contested matters and litigation.

He is the author of many insurance or trust and estates-related articles and speeches and also authored the book, *What You Need to Know to Settle with Insurance Companies,* Wiley Publishing Co. 1991.

Insurance experts and consultants are frequently asked to evaluate or testify regarding the alleged bad-faith conduct of an insurer.

An underlying concept for bad-faith claims is the principle that every contract imposes on each party a duty of good faith and fair dealing in its performance and enforcement. Therefore, the duty of good faith is an implied term of a contract and is derived by law, as opposed to arising from the contract per se. Breach of this covenant of fairness and reasonableness allows recovery and tort for what would otherwise be a contractual duty and broadens damage recovery potential beyond ordinary contract damages.

The relationship between insurers and insureds is deemed a special relationship in many jurisdictions and is the justification for the extension of bad-faith liability into the first-party claim's contacts. The inherent trust and dependence of insureds on their insurers, the unequal bargaining power between the parties, overall public interest, and the insurers control over the language of their insurance policies establishes the basis for this special relationship. Although some states raise this relationship to a fiduciary standard, many states have declined to do so. Generally, this implied covenant provides a cause of action in both first-party and third-party cases, although some jurisdictions do not recognize a bad-faith cause of action in first-party cases.

While some jurisdictions ground the bad-faith action in common law, others decline to recognize common-law bad faith, but may have a bad-faith statute or statutes. Some states may recognize common-law bad faith and have a bad-faith statute as well. It is, therefore, critical to have some knowledge of the laws of the applicable jurisdiction before embarking on opinions in an insurance bad-faith case.

Most jurisdictions have ruled that the determination of bad faith is a factual issue based on the applicable evidence in the case. Accordingly, an insured's expert should carefully ground his or her opinions based upon the relevant facts in order for that opinion to be considered reasonable or credible.

Although there may be variations from state to state, the following list of acts is indicative of the types of acts that could constitute unfair claim-settlement practices:

1. Misrepresenting to claimants pertinent facts or policy provisions relating to coverages at issue.
2. Failing to acknowledge with reasonable promptness pertinent communications with respect to claims notices arising under the insurer's policies. An acknowledgment of claim within 15 business days is presumed to be reasonably prompt.
3. Failing to adopt and implement reasonable standards for prompt investigations of claims arising under policies.
4. Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims submitted in which liability has become reasonably clear.
5. Compelling policyholders to institute suits to recover amounts due under policies by offering substantially less than the amounts ultimately recovered in suits brought by policyholders.

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Evaluating Bad Faith

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6. Failing to provide promptly, when provided for in the policy, claim forms when the insurer requires such forms as a prerequisite for a claim settlement.
7. Not attempting in good faith to settle claims promptly when liability has become reasonably clear under one portion of the policy, in order to influence settlement under other portions of the policy coverage.
8. Failing to provide promptly to a policyholder a reasonable explanation of the basis in the insurance policy, in relation to the facts or applicable law, for denial of a claim or for the offer of a compromise settlement.
9. Failing to affirm or deny coverage of a claim to a policyholder within a reasonable time. The reasonable submission of a reservation of rights letter by an insurer to a policyholder within a reasonable time is deemed acceptable.
10. Except as may be specifically provided in the policy, refusing, failing, or unreasonably delaying offer of settlement under applicable first-party coverage on the basis that other coverage may be available or that third parties are responsible in law for damages suffered.
11. Attempting to settle a claim for less than the amount to which a reasonable person would have believed she or he was entitled by reference to an advertisement, made by an insurer or person acting on behalf of an insurer.
12. Undertaking to enforce a full and final release from a policyholder when, in fact, only a partial payment has been made.
13. Refusing to pay claims without conducting a reasonable investigation based upon all available information.
14. Failing to respond promptly to a request by a claimant for personal contact about or review of the claim.
15. Delay in the prompt processing and payment of claims including failure to comply with the provisions specifically stated in the policy.
16. Misrepresentations of an insurance policy including untrue statements of material facts, failure to state facts that are necessary to make other statements made not misleading, making material misstatements of law, failure to disclose any matter required by law to be disclosed, and other misleading misrepresentations.

In summary, the insurance expert engaged in evaluating bad faith must carefully review and evaluate all of the facts and apply those considerations to the customs and standards in the industry, applicable case law, statutory bad-faith requirements, and other considerations that impinge upon the conduct and actions of the insurer. What the insurance experts should not do is render opinions without substantive support and reasoning. ■

Evaluation of the Insurer's Claims Investigation

by Thomas H. Veitch, J.D., CPCU, CLU, CIC

As part of a bad-faith analysis, the insurance expert will frequently need to focus on the claims investigation performed by the insurer. It is commonly recognized that the insurer does have the duty to perform a reasonable investigation. This is generally regarded as a fair and reasonable investigation based on the facts and circumstances of the case. The following are some factors to consider in performing an evaluation:

1. Was an adequate investigation conducted? On occasion, policyholders take the position that the insurer should have performed a more exhaustive investigation than it did. Determination of the adequacy and reasonableness of the investigation based upon the facts and circumstances of the case is a fertile field for the analysis and opinions of the insurance expert.
2. Was a competent investigator utilized? This requires focus on the credentials, track record, and partisanship of the investigator. Many cases focus on whether the investigator is, in fact, an insurance company "hired hand" as opposed to having a more balanced background or experience.
3. Was the investigation slanted or biased? Here the focus is whether the investigation was slanted or biased towards claim denial. Many case decisions have been rendered regarding complaints that the investigation was "outcome oriented," or predetermined. Again, this will require a close analysis of the facts and evidence at hand.
4. Was the investigation timely? This requires a careful review of the claims activity logs, correspondence, and usually the depositions of the primary claims handlers and the insureds.
5. Was the investigation thorough? This pertains to the reasonableness of the investigation based upon the facts and circumstances involved. The underlying focus is whether reasonable steps have been taken to uncover pertinent information. In some instances it may be perfectly reasonable for the insurer to terminate an investigation and deny a claim on the basis of the evidence on hand. The analysis and opinions of the experts will be very important in this regard.
6. What damage has occurred as a result of the insurer's bad-faith failure to investigate? The entitlement to damages will vary by jurisdiction and may be a law issue rather than a factual issue. However, whether damages have occurred, or the extent of the damages, may generate factual issues for the analysis or evaluation of the insurance expert. Moreover, in some instances there may be an improper investigation, but no damage resulting from such failure. Again, this needs to be carefully analyzed.
7. To what extent can insurers rely on the investigations of other agencies in making claims denial decisions? Generally an attempt should be made to gather all reasonable pertinent evidence, regardless of the source. Normally, the investigations of outside agencies do form a part of the overall information required as a reasonable basis for a decision.

The following cases are examples of court decisions on investigation issues:

1. A policyholder could not recover bad-faith damages for inadequate investigation when the policy coverage did not apply. *McMillin Scripps North Partnership v Royal Insurance Co.*, 23 Cal. Rptr. 2d 243 (Ct. App. 1993).
2. Many cases arise when insurers readily determine that coverage does not apply, conduct no further investigation, and deny the claim. In just such a scenario, the Arkansas Supreme Court held that a failure to investigate, per se, did not provide a basis for a bad-faith damage claim. *Reynolds v Shelter Mutual Insurance Co.*, 852 S.W. 2d 799 (Ark. 1993).
3. In a Louisiana case, the court held that an insurer acted in bad faith when a claims supervisor read only the police report and told the adjuster to deny the claim. *Romero v Gary*, 619 So. 2d 1244 (La. Ct. App. 1993).
4. The Oklahoma Supreme Court upheld bad-faith findings when there was evidence indicating that the insurer's investigator was totally incompetent. *McCoy v Oklahoma Farm Bureau Mutual Insurance Co.*, 841 P.2d 568 (Okla. 1992).

   Practice Tip: The basic determinant in most issues of adequacy of investigation is whether the insurer has a reasonable basis for its claims position. In other words, the investigation forms part of the basis for the decision. Thus, an inadequate investigation could equal an unreasonable basis.
5. In setting aside a summary judgment for the insurer, a court determined that the evidence could have supported a jury finding that the insurer's denial of coverage resulted from the insurer's established company practice of deliberately restricting investigations. *Amadeo v Principal Mutual Life Insurance Co.*, 290 F. 3d 1152 (9th Cir. 2002).

In summary, it is important to know the extent of the duty to investigate under the law of the applicable jurisdiction as well as the applicable bad-faith legal requirements of the state. In some states, mere negligence in the adjustment or investigation of a claim is not actionable. Therefore, it is important to have an understanding of the applicable legal standards in analyzing the underlying facts and circumstances before rendering an opinion. ■

A Review of *Spreading the Risks: Insuring the American Experience*

by Jean E. Lucey, CPCU

Editor's note: This article is a review of *Spreading the Risks: Insuring the American Experience* by John A. Bogardus Jr., with Robert H. Moore. Posterity Press, Inc. Chevy Chase, MD, 2003.

It's heartening when first-rate initial impressions are borne out by subsequent close examination. My early personal impression of John A. Bogardus Jr., author (with help from Robert H. Moore) of *Spreading the Risks: Insuring the American Experience*, was that of a meticulous researcher and unfailingly courteous library patron (albeit from some distance). The product of his efforts certainly bears out the thorough nature of the research, and his gracious acknowledgement of helpful sources confirms the latter. While production of a sequel is difficult to imagine at this time, I hope that the resources—both personal and material—of the Insurance Library Association of Boston will be called upon early and freely for any future undertakings by the author.

■ *The word that comes to mind when describing the volume is "classy."*

Bogardus began his career with Alexander & Alexander as a trainee in 1950 and rose steadily through the ranks, serving in time as president, CEO, and chairman, and was a member of the board from 1963 to 1995. Robert H. Moore, Ph.D., worked for A&A from 1977 to 1995 in various positions. In a poignant aside, Bogardus describes the December 1996 acceptance of Aon's tender offer for A&A's shares as disappointing for most A&A shareholders, but for him ". . . after a forty-five business career with A&A, its sale was a deep disappointment. I had always envisioned the firm vying with M&M for industry leadership into the 21st century." It's certainly not difficult to empathize with these feelings.

The word that comes to mind when describing the volume is "classy." The handsome jacket, a beautiful glossy blue, protects sturdy binding that is too rare these days. The paper is thick and creamy. The type is clear and unfussy. These physical attributes serve to enhance publishing decisions that were probably not particularly cost-effective, but are certainly appreciated by readers. The most noticeable of these is the inclusion of footnotes (perhaps a better word would be "annotations") in the margins immediately abutting the accompanying text. The volume is replete with such additions, and while readers can choose to ignore them and read straight on, I advise against doing so. In describing a clandestine three-day conference held northeast of London involving Alexander & Alexander executives and top officers of Sedgwick Forbes and Bland Payne, Bogardus notes that "during short periods of relaxation, the Americans were almost able to hold their own in games of darts. A Sedgwick host became so relaxed in his bath one evening that he dozed off with the taps running and was only discovered when water leaked into the dining room below." Relaxed is, of course, usually a good thing to be, but one wonders if factors other than strenuous turns at the dartboard might have induced it to such a perilous state!

The history of insurance is treated from ancient days through the modern era, with particular attention to the brokerage system. As is natural, much of the volume is devoted to the evolution and development—and eventual absorption—of Alexander and Alexander. I found most interesting the efforts of the firm's leaders to establish a U.K. brokerage partnership. The chapter "Innocents Abroad: A&A goes to Britain" includes anecdotes reflecting its choice of title:

> We participated in several intense meetings, one with Sedgwick . . . Another was with all the senior officers of Howden. Yet another was at an elaborate dinner hosted by eight of C.T. Bowring's most senior executives and their wives. This gracious affair was pulled off without a hint of the following day's announcement that C.T. Bowring and Marsh & McLennan intended to enter into a profit-pooling arrangement.

■ *Not only is the book an excellent read, it will serve to some as a reference source . . .*

As might be expected, the tone is darker and grimmer when describing the debacle that arose out of A&A's disastrous involvement in "The Howden Affair." Still, while the author seems clearly nonplussed by and contemptuous of the activities of the Howden "Gang of Four" and of Ian Posgate, he largely leaves their denouncement to the reports issued by the British Department of Trade and Industry. A cogent discussion of the long-developing problems at Lloyd's and the efforts made to reestablish it as a viable market flows smoothly from the tale of A&A's woes.

This volume is admirably supplemented by a section giving chapter by chapter notes on sources, a complete bibliography, and an index that is far too good to have been produced by standard publishing software. Not only is the book an excellent read, it will serve to some (including the Insurance Library) as a reference source, particularly for questions such as "whatever happened to R.B. Jones & Company?" ■

Free Internet Legal Resources—A Commentary

by Daniel C. Free, J.D., CPCU, ARM

I took interest in a recent e-mail dialogue among some colleagues who were discussing free legal research web sites. Two of the three participants are lawyers who engage in risk management consulting, rather than the traditional practice of law. The third was CLEW Section Committee member Jim Robertson, CPCU.

Jim prompted the discussion by directing us to an article published in the American Bar Association's *ABA Journal E-Report* entitled "No Cost Research Resources: Go Online To Find Free Cases, Codes, Articles and More" by attorney Hope Viner Samborn. The article can be viewed at http://www.abanet.org/journal/ereport/oct3web.html. Most everyone knows about Westlaw and Lexis, the giant subscription research vehicles; but non-practicing attorneys may not do enough research to justify the subscription cost. Also, there was something about the word "free" that was compelling.

It should be understood that a number of years have passed since I practiced law, even more since law school. Back then, legal research meant going to a law library at a local law school or courthouse and, quite literally, hitting the books. Lexis and Westlaw were in their infancy. Our law library had one computer terminal and nobody knew how to use it. People who experimented with it complained that it took so long to narrow an inquiry that they could find the case more quickly by looking it up manually. Others said that it took so long to retrieve information that it was too expensive. This was long before the days of high-speed modems, local dialups, ISDN, DSL, T1, and other conveniences we now take for granted. It was like making a long-distance phone call.

How times change. Not knowing where to begin, I went to the web sites listed in the *ABA E-Report* article. The first one was www.llrx.com. The site is quite broad, touching on a number of topics such as technology and legal research, reviews of legal and nonlegal web sites for researchers, technology training resources, and congressional activities that involve technology, research, and libraries. The columns and articles are put together by law librarians, attorneys, information technology specialists, and legal technology people. It has links to all kinds of other sites, including 1,400 sources for state and federal court rules, forms, and dockets.

The next one visited was Findlaw, which is affiliated with West Group, the legal publishing firm that has been an industry leader for generations. This is a huge web site with a vast number of links to sites that provide business, public, consumer, and student resources, as well as pages and links to all manner of things of interest to legal professionals. It has a search engine called LawCrawler that has links to sites for everything from federal and state statutes and case law, down to local ordinances. It also has document retrieval payable at the point of sale by credit card or Westlaw subscription.

LexisOne is billed as a resource for small law firms and offers a free research service where you can search for a case by citation or jurisdiction. In order to conduct a search, you have to register, but there is no cost. The site also offers an extensive library of forms that can be downloaded for free, as well as a forms subscription service that utilizes specialized software. There are links to many other legal web sites here as well.

Click on a link for expert witnesses and you will be taken to a list of sites that promote the services of every conceivable type of expert. There are several CPCUs, including some CLEW Section members, that are listed as insurance experts.

At the PACER web site, (which stands for Public Access to Court Electronic Records), you can obtain case and docket information from federal, appellate, district, and bankruptcy courts, and from an index of parties and cases. The courts actually provide the information and are linked to PACER. PACER is not entirely free. There is a usage charge, but if you do not accumulate at least $10 worth of fees in a calendar year, all charges are deleted. You must register and receive a password before you can conduct any research.

Most state and local bar associations have web sites. These sites tend to have downloadable versions of state and local statutes and ordinances, local rules, and specialized local forms, but no case law. With some, you have to be a member of the state bar and provide your membership number. Others are not so restrictive, being operated as a public service, available to anyone with a personal computer. I can attest that people use them.

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Free Internet Legal Resources—A Commentary

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Quite recently, I informed my 16-year old son that I believed the law in Indiana provided for an 11 p.m. curfew on Friday and Saturday nights for those under the age of 18 years. He disagreed. Within minutes he had printed a copy of the specific statute in question, which provided for a 1 a.m. curfew. This brings me to our next point.

■ *The accuracy of legal web sites can vary widely. Users of these resources need to be certain that the information they have obtained is both current and accurate . . .*

The accuracy of legal web sites can vary widely. Users of these resources need to be certain that the information they have obtained is both current and accurate, which is how this whole subject of conversation began. After reading the above article, Dan Buser, J.D., a consultant with Cleveland, Ohio-based Crain, Langner & Co., offered the following warning: "Free legal research sources are a great starting point. However . . . if a conclusion or position is based upon incomplete or inaccurate legal research (whether regarding case law, rules, regulations, statutes, legislative history, etc.) you are skating on thin ice. Many of these sources are excellent but not to be relied upon necessarily to reach irrefutable, Teflon-coated conclusions."

Jim Robertson, CPCU, responded to Buser's comments by adding that ". . . the article provided cautions on how to check the currency of the site, which all users should heed." He noted that the statutes and administrative regulations may be of greater importance to consultants: "What is required most often in my work is access to insurance codes and administrative regulations in various states, which are available for free online."

After three or four hours surfing the net, looking at various legal resource web sites, you will probably conclude that there are too many to count. It is obvious that some are better, more accurate, and updated more frequently than others. Anyone conducting serious legal research online should either use one of the subscription services, or very carefully verify the results before citing any statute or case in an argument or brief. And finally, sometimes a trip to the law library might be worth it, particularly if you are looking for a specific legal precedent, like one to help you to "wire around" a curfew statute. ■

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