CPCU SOCIETY INSURING YOUR SUCCESS

Consulting, Litigation, and Expert Witness Section Quarterly CLEWS

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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 (née Northern California) Chapter since 1962. He has been managing director, Creative Risk Concepts International, (Oakland, California) since 1985.

I hope this issue of *CLEWS* reaches each of you before the Annual Meeting and Seminars in New Orleans. We hope to see you there and, if you happen to be in New Orleans on the Saturday (October 11) before the Sunday opening of the Annual Meeting, you're invited to sit in and attend our CLEW Section Committee meeting.

Our committee has increased by three new members, Gregory G. Deimling, CPCU, Jean Lucey, CPCU, and Lawton Swan III, CPCU, CLU. Each of these new committee members is profiled in this issue. We welcome each of them.

How many of you remember attending a CPCU retreat? The last one I remember attending was about 30 years ago in Carmel Valley, California. I'm going to recommend to the committee that we resurrect these retreats. If you feel that you would like to participate and attend one of them, please contact me or John Kelly, CPCU, of the CPCU Society staff. A brief review of a retreat format follows.

CPCU retreats have generally been held in resort-type facilities, which have included a golf course and other attractions for attendees and their spouses. The Carmel Valley retreat was held at the Quail Lodge, which is located about seven miles outside of the town of Carmel. It lasts about two and one-half days. Attendance was limited to about 30 (which means it is not a big money-maker for the Society). Each of three mornings, round-table discussions were held on prearranged subjects. These were not seminars, but truly round-table discussions. The round-table leader was not a presenter, but more of a facilitator. For those of us members of CLEW, the discussion subjects can easily be drawn from cases in which we have either litigated, testified, or researched, and can include topics like continuous liability triggers, additional insured complications, force placement issues, broker E&O, etc.

The afternoons of each of the first two days were free time, allowing time for golf, and, in the case of Carmel Valley, shopping in Carmel, touring 17-mile drive, Pebble Beach, and Monterey. The retreat was adjourned at noon on the third day.

Times are busier now, and these retreats may not be possible for all of us, but if you are interested, please contact John or me. I hope to see many of you in New Orleans. ■

What's in this Issue?

From the Editor

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

I begin by joining our chairman in welcoming Jean Lucey, CPCU, Lawton Swan III, CPCU, CLU, ARM, and Gregory G. Deimling, CPCU, AMIM, ARM, to the CLEW Section Committee. Their bios are included in this issue. We are an active section and their input will be most helpful.

Those who advise policyholders about insurance matters have faced a formidable challenge explaining the Terrorism Risk Insurance Act of 2002 (TRIA) and the insurance coverage made available as a result of its passage. The pricing of the insurance now offered is every bit as inconsistent as the public's willingness to buy it. Moreover, there is considerable doubt about whether our industry will have built enough capacity to alleviate the need for the government backstop when the legislation expires at the end of 2005. In this issue, we provide the thoughts of Professor William J. Warfel, Ph.D., CPCU, CLU, of the School of Insurance and Risk Management at Indiana State University, in his article "Amending TRIA."

Below is part two of the article: "Discoverability of Risk Management Information." If you would like to read the article in its entirety, but do not have the last issue of *CLEWS*, log on to the CLEW Section web site to view part one.

For lawyers and others who may not have much involvement with reinsurance, we include "Reinsurance . . . A Practical Guide" by Andrew J. Barile, CPCU, which provides an overview of this essential financial transaction.

Perhaps you have had the experience of knowing someone for many years only to find out that there is a whole lot you do not know about him or her. This happened to me when I read our profile on Leonard J. Silver, CPCU, ARM, whom I have had the pleasure of knowing for at least 20 years. One of the great things about publishing these profiles is that you learn a lot about a person's life outside the world of insurance. Our special thanks go to associate editor, Vincent "Chip" Boylan Jr., CPCU, for putting this together.

Last but not least, we encourage you to send us your articles for publication in *CLEWS*. Your contributions help support our section and our Society. ■

Discoverability of Risk Management Information—Part II

Editor's Note: This article is reprinted with the permission of *Practical Risk Management (PRM)* and ARM Tech. ARM Tech, an Aon company, publishes *PRM.* For more information, contact the *PRM* web site at www.pracrisk.com. The first installment of this article appeared in *CLEWS* Volume 10, Number 2, June 2003.

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Application of Privilege Rules to Various Risk Management Information

This section discusses the discoverability of certain specific types of risk management information. The principles noted may be applicable by analogy to many other types of information.

Insurance Policy Information

Insurance policies and related information (e.g., applications, binders, correspondence identifying these, etc.) are discoverable. A specific Federal Rule (26(a)(1)(D)) permits discovery of "any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment." The public policy underlying discoverability of available insurance is the promotion of settlements. Where insurance information is not discoverable (i.e., some state courts), it is considered neither relevant to the litigation nor reasonably calculated to lead to the discovery of admissible evidence—the usual standard for discoverability.

Though discoverable, evidence of insurance is not admissible at trial on the issue of whether the person acted negligently or otherwise wrongfully. Evidence of insurance is, however, admissible when offered for another purpose, such as proof of agency, ownership or control, or bias or prejudice of a witness (FRE 411).

Loss Runs

Perhaps surprisingly, no reported federal cases directly address the issue of whether a loss run (i.e., list of claims and amounts paid/reserved) is discoverable. However, rulings on analogous issues suggest that at least those portions of loss runs identifying previous claims and the claimants are proper subjects for discovery. For example, the courts have addressed whether, in a products liability suit, a plaintiff can obtain discovery of a defendant's knowledge of previous injuries or complaints. A loss run would be an example of this information. The courts have generally held that the existence and nature of other complaints *related to the use of defendant's product* is a

proper subject for pretrial discovery. This information is considered relevant to the issues of both whether the product was hazardous and whether the defendant had notice of its dangerous properties. It is also useful for the discovery of other relevant evidence—the general discovery standard.

Thus, it would seem that a defendant is entitled to at least the bare facts of previous claims related to the current case, such as date, nature of the incident, and name of the claimant. However, a loss run containing information on all claims would seemingly not be calculated to lead to the discovery of relevant evidence, as most data would not be relevant to the current claim. Thus, the best answer would seem to be that extracted information or redacted runs would be discoverable, but not the complete run. If an informal agreement to this effect could not be worked out with the claimant or her counsel, a protective order from the court might be necessary.

Traffic Accident Reports

Traffic accident reports are gathered by government officials in compliance with motor vehicle laws, by insurers and by nongovernmental entities involved in traffic accidents. The general rule of discovery, discussed above, is that any information reasonably calculated to lead to the discovery of admissible (at trial) information is discoverable if it is not privileged. If an accident occurs on a public highway and a report is prepared pursuant to a motor vehicle law, the report would be discoverable (although some state vehicle codes expressly provide for confidentiality of reports required in connection with traffic accidents).

If the report was prepared by a governmental entity in anticipation of defending a lawsuit against it, such as for dangerous road design, the report might still be discoverable. The plaintiff would have to show a substantial need and an inability without undue hardship to obtain the substantial equivalent of the information by other means. In some cases, such as where a report is prepared to aid measures to prevent future

accidents, courts will not require disclosure of the report but only of the accident data. As is often the case, courts attempt to balance legitimate competing considerations of public policy in determining what information must be produced. The fact that courts (and legislatures) in different jurisdictions, and in the same jurisdiction over time, will differ in their assessment and weighing of public interests is another reason discovery issues can be extremely complex.

Post-Injury Remediation

A plaintiff in a product liability suit (see Topic G-13, "Product Liability") generally cannot introduce at trial post-injury warnings, repairs or modifications as evidence of negligence or culpable conduct (FRE 407 and similar state statutes). This kind of evidence is likely to be highly prejudicial, and deters manufacturers from acting to eliminate a hazard. As noted above, inadmissibility at trial is not a sufficient basis for protection from discovery.

Moreover, post-injury warning evidence might be admitted at trial for purposes other than establishing negligence, such as impeaching inconsistent testimony or proving the viability of hazard remediation. Most product liability lawsuits include a cause of action (alternative basis of recovery) for strict liability, in which, in effect, the condition of the product is on trial rather than whether the manufacturer's conduct fell below the appropriate standard of care. The courts are divided as to whether evidence of post-injury warnings or remediation is inadmissible when strict liability is sought. If the issue is an alleged failure to give adequate preinjury warnings, the emphasis at trial may indeed be the defendant's conduct, even under a supposed strict liability standard.

Hospital Records in Malpractice Claims

Information in hospital records regarding physician qualifications and evaluations are normally discoverable. However, several states have adopted special statutes shielding disclosure of the evaluative reports of medical staff review committees to help encourage candor in completing the reports. Even such protection would not typically prevent hospital personnel from being required to testify regarding the facts of a particular case.

Discovery in Arbitration Proceedings

Increasingly, disputes between parties in consensual relationships (e.g., sales contracts, service contracts, trade agreements, employment, etc.) — including torts that occur during those relationships — must be resolved through binding arbitration. Under the Federal Arbitration Act (FAA) (9 U.S.C. Sec. 1 et. seq.), a written provision in a contract "evidencing a transaction in commerce to settle by arbitration a controversy . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Although the FAA contains numerous provisions governing the conduct of arbitration, it does not address the extent, if at all, of discovery permitted under such arbitration. Here are a few general principles that apply.

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Discoverability of Risk Management Information

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1. If the arbitration agreement provides for an established ADR (alternative dispute resolution) agency to handle the arbitration, that agency will likely have discovery rules that will apply unless the parties have also stipulated in the agreement to follow other rules (such as the FRCP and FRE).

The *American Arbitration Association Commercial Dispute Resolution Procedures* (including *Mediation and Arbitration Rules*), as amended and effective on July 1, 2002, are illustrative. Rule R-23, subpart (a), provides that "At the request of any party or at the discretion of the arbitrator, consistent with the expedited nature of arbitration, the arbitrator may direct (i) the production of documents and other information, and (ii) the identification of any witnesses to be called." Subpart (c) authorizes the arbitrator to "resolve any disputes concerning the exchange of information."

Rule R-33, subpart (a), permits the parties to offer "such evidence as is relevant and material to the dispute" and directs that the parties "shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. Conformity to legal rules of evidence shall not be necessary." Under subpart (b), the arbitrator determines the admissibility, relevance and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant. Interestingly, subpart (c) of the rule directs the arbitrator to "take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client."

However, "take into account" is a far more general standard than "follow," and which "principles" would apply and how are also left to the arbitrator. Somewhat expanded discovery provisions, including depositions, are contained in the AAA's Rules for Large, Complex Commercial Cases. The lack of expressly permitted, expansive discovery, such as exists in civil litigation, is one reason consumer claimants often consider arbitration biased against them. A particular problem is the inability of claimants to obtain discovery from third parties. The courts are divided as to whether arbitrators may subpoena documents from third parties, although they apparently may not compel non-party depositions. Since the claimant has the burden of proving its case, these limitations may seriously impede its ability to prepare. The FAA expressly grants arbitrators the authority to compel non-parties to appear and testify at the arbitration hearing (9. U.S.C. 7).

2. Arbitrators are more likely to let in marginal evidence "for what's it worth," rather than exclude it. First, judicial concerns about potentially confusing or prejudicing a lay jury are not present. Second, while arbitration awards are contestable in court upon only a few grounds, "refusing to hear evidence pertinent and material to the controversy" is one of them (9 U.S.C. Sec. 10(3)).

Conversely, admission of irrelevant or prejudicial evidence is not grounds to vacate an award.

3. State statutes may provide supplemental arbitration provisions potentially affecting discovery, although such statutes may neither impede arbitration (such as by imposing state discovery rules) nor conflict with the FAA. For example, as noted above, the FAA does not provide for depositions, but authorizes the arbitrator to compel witnesses to attend the hearing. What if the witnesses cannot be compelled to do so (e.g., for health reasons)? In that case, California Code of Civil Procedure Sec. 1283 permits a deposition to be taken "for use as evidence and not for discovery."

Hence, the risk manager should recognize that even less information may be legally protected from disclosure in an arbitration proceeding than in litigation. Some practical protection results from the fact that many arbitrators are former judges or highly experienced attorneys, and are inclined to adopt long-established legal customs, including customary privileges. However, this does not assure protection from required disclosure—or negative consequences if the party refuses to comply with the arbitrator's disclosure request/order. Accordingly, risk managers who have confidentiality concerns and input into contract terms should suggest that discovery rules and limitations be specifically included in arbitration provisions.

Sources and Additional Information

American Law Reports, published by Lawyers Cooperative Publishing, Rochester, New York. Vols. 1 to 100 (1948–1965) out of print but available used at www.bandn.com. $388.70 to $460.94. Vols. 1 to 175 (1919–1948) $651.89 to $773.44.

This set, which in hard copy is comprised of hundreds of bound volumes containing thousands of articles on diverse legal topics (mostly compiling state and federal decisions), is available at www.bandn.com and at most law libraries. For complete rules of the American Arbitration Association, visit its web site at www.adr.org. ■

Reinsurance . . . A Practical Guide

by Andrew J. Barile, CPCU

■ **Andrew J. Barile, CPCU,** is president and CEO of the Andrew Barile Consulting Corporation, Inc., located in California and New York City (www.abarileconsult.com). Barile has 40 years of reinsurance experience, having been a buyer of reinsurance, a treaty reinsurance underwriter, and a reinsurance intermediary. He also provides insurance and reinsurance litigation consulting services to law firms.

Editor's note: The following are excerpts from Barile's white paper on *Reinsurance . . . A Practical Guide,* available for purchase from the Andrew Barile Consulting Corporation, Inc. This white paper has been designed to give the reader a basic understanding of the reinsurance industry.

Introduction—Reinsurance Defined

Simply defined, reinsurance is transacted on the basis of one insurance company, the "*reinsurer*," agreeing to indemnify another insurance company, the "*reinsured*" for all or part of the insurance risks underwritten by the reinsured. While other parties are affected by the coverage and pricing under a reinsurance contract, only the insurer and reinsurer are involved in negotiations.

Two Forms of Reinsurance: Pro Rata and Excess of Loss

The pro-rata form is a sharing concept whereby the insurance company shares with the reinsurance company all of the premiums and losses, in some predetermined percentage.

A contrast to the pro-rata form of reinsurance is the excess-of-loss reinsurance agreement. The emphasis here shifts from a sharing of liability concept and focuses on the amount of loss incurred by the insurance company. Under excess-of-loss reinsurance, the reinsurer for a premium agrees to reimburse the insurance company for all losses in excess of a predetermined amount commonly referred to as the insurance company's retention.

The structure of a reinsurance program for an insurance company usually involves both pro-rata and excess-of-loss reinsurance. Therefore, the reinsurance buyer must be able to use the two forms of reinsurance to achieve the optimum results for the insurance company.

Two Types of Reinsurance Agreements: Treaty and Facultative Reinsurance

1. Treaty Reinsurance Agreements—Pro Rata
   (a) Quota Share Treaty Reinsurance Agreement (predetermined fixed share)
   (b) Surplus Share Treaty Reinsurance Agreement (variable share)

Ceding Commissions

A commission payable by the reinsurer to the insurer under surplus share reinsurance can be structured in any of three ways:

1. flat ceding commission
2. flat ceding commission with a profit commission
3. sliding scale commission

Treaty Reinsurance Agreement: Excess of Loss

Each of the pro-rata reinsurance agreements, quota share and surplus share, differ from excess-of-loss treaty reinsurance. The reinsurance company under excess of loss is no longer concerned with sharing premiums and losses, but is providing reinsurance protection on individual insurance policies coming within the terms of the excess treaty in excess of some predetermined amount of loss, referred to as the retention of the primary company. On this basis, the reinsurer is concerned with the amount of loss, whereas under the surplus share treaty, the amount of liability is the controlling factor.

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Reinsurance . . . A Practical Guide

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Since space limitations do not permit inclusion herein, the interested reader may wish to obtain a copy of the white paper, which includes a discussion on the following:

1. per-risk reinsurance agreement
2. characteristics of a per-risk, excess-of-loss reinsurance
3. catastrophe reinsurance agreement
4. characteristics of a catastrophe excess-of-loss reinsurance agreement
5. aggregate excess-of-loss reinsurance agreement
6. characteristics of an aggregate excess-of-loss reinsurance agreement
7. facultative reinsurance agreement
   a. pro rata
   b. excess of loss
8. functions of reinsurance agreements
9. finite risk insurance and reinsurance

The Insurance Company's Reinsurance Program

The buyer of reinsurance must understand the mechanisms for each of the treaty reinsurance agreements and their functions, and how to implement and design a cost-effective treaty reinsurance program. The art of negotiation plays a vital role in reinsurance buying since all terms and conditions of reinsurance contracts are free of regulatory supervision. ■

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Bourbon Street restaurants, taverns, and music
City Park and Creole/Cajun cooking
D-Day Museum
Emeril's restaurants
French Quarter shopping, food, and fun
Gallier Hall, the Garden District, and golf
Harrah's New Orleans
IMAX Theatre
Jackson Square and jambalaya
King for a day
Louisiana swamps and bayous
Mansions on St. Charles Avenue
Napoleon House
Old U.S. Mint
Preservation Hall and plantation homes
Queen and king cakes
Riverboat cruises
St. Patrick's Church
The Cabildo
Undead Tours: cemeteries, ghosts, and vampires!
Voodoo Museum
Weekly Farmers' Market
Xylophones for playing the blues
Young-at-heart
Zydeco music

Get Ready for *Your* New Orleans Experience!

See page 12 for more details.

Amending TRIA

by William J. Warfel, Ph.D., CPCU, CLU

■ **William J. Warfel, Ph.D., CPCU, CLU,** is professor of insurance and risk management at Indiana State University. Warfel has served as an expert witness in a number of cases involving insurance agent and broker liability, property/casualty insurance coverage disputes, and bad faith. Also, he is a frequent contributor to the *CPCU eJournal* and *Risk Management Magazine.*

The Terrorism Risk Insurance Act of 2002 (TRIA) will expire at the conclusion of 2005 in the absence of legislative action by the U.S. Congress to the contrary. Over the next two and one-half years, issues that were not resolved when the legislation was enacted and the debate over letting the Act expire will be revisited. To achieve long-term market stability and minimize the potential cost to the federal government of an act of terrorism, the legislation should be reenacted with the following amendments:

- The sunset clause in the legislation was based on the hope that three years would be sufficient to allow the insurance industry to replenish its surplus, stabilizing the market and resulting in an adequate supply of reasonably priced terrorism insurance. If another act of terrorism were to occur beyond 2005, however, severe disruption would ensue.

The only way to assure long-term market stability is to make the legislation permanent. Moreover, the legislation should be amended to allow for a tax-free catastrophe reserve fund. Commercial policyholder rates would include a surcharge, which would be remitted to the Treasury to establish this fund. Exempting retained earnings from taxation would allow the reserve fund to accumulate quickly. Most importantly, policyholders would not be given an option concerning the purchase of terrorism insurance. Currently, only about a quarter of policyholders offered the coverage mandated by the TRIA are buying it. A reserve fund can accumulate

quickly only if the purchase of terrorism insurance is compulsory.

Prefunding would spread the cost of an infrequent, catastrophic loss associated with terrorism over a longer period of time. The delay financing formula in the current legislation, by comparison, could stretch the payment of insured losses far into the future. With this, political pressure could mount against a bailout, leading to the demise of the backstop. The reserve fund, however, reduces liability to the federal government. And assuming that the surcharge is imposed on a particular policyholder based on its terrorism exposure, the reserve would minimize the current issue of cross-subsidization.

- TRIA does not directly facilitate the creation of additional capacity. To remedy this, the legislation should be amended to incorporate the National Risk Retention Association's proposal to expand the lines of coverage that risk retention groups (RRGs) can underwrite (e.g., commercial property and excess workers compensation for self-insureds).
- Since September 11, group life catastrophic reinsurance rates have increased by multiples, with tighter terms and withdrawn capacity. The need for a backstop with respect to this insurance is apparent. TRIA should be amended to allow group life insurers to participate in the federal program.
- Some insurers—particularly small carriers—are facing retentions under the current legislation that may be higher than their capacity to absorb losses generated by an act of terrorism. Since the individual carrier trigger in TRIA is supposed to assure the solvency of a small insurance carrier in the event it sustains disproportionate losses, these smaller carriers need a reduced retention.
- While the backstop provided in the current legislation applies to property and casualty insurance, it has a gap in commercial liability exposure coverage; it applies only to compensatory damages and not punitive damages. This compromises the backstop's integrity given the substantial punitive damages exposure arising out of an act of terrorism.

The standard of conduct warranting punitive damages generally requires only reckless disregard to public safety. If another terrorist event occurred, absent security measures would be found conducive to the Act by a plaintiff's attorney, and given the notice provided by September 11, these security failures could be characterized as reckless or wanton. In addition, most courts have construed the general liability policy to cover vicariously imposed punitive damages.

Punitive damages should thus be counted as an insured loss applicable to the backstop. Legislative amendments should also include tort reform measures that control these awards: (1) raising the burden of proof standard from "preponderance of the evidence" to "clear and convincing;" (2) a judge, not a jury, should decide whether punitive damages are warranted and their amount; (3) a hard dollar cap should apply to all punitive damages awards; and (4) a portion of a punitive damages award should be directed to a government agency charged with mitigating the terrorism exposure rather than to the plaintiff. Assuming another Victims Compensation Fund were established after a terrorist event, these controls would encourage victims to opt for compensation under the fund, rather than pursue costly, time-consuming litigation. ■

War Stories: Why Consultants Have a Bad Image

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*.

Editor's Note: This story was submitted by alert reader and CLEW Section Committee Member Thomas H. Veitch, CPCU. He says he got it off of the Internet, which, as we all know, is a virtual guarantee that it is the absolute truth.

A shepherd was herding his flock in a remote pasture when suddenly a brand-new BMW advanced out of a dust cloud toward him. The driver, a young man in a Broni suit, Gucci shoes, Ray Ban sunglasses, and YSL tie, leans out the window and asks the shepherd, "If I tell you exactly how many sheep you have in your flock, will you give me one?"

The shepherd looks at the man, obviously a yuppie, then looks at his peacefully grazing flock and calmly answers, "Sure. Why not?"

The yuppie parks his car, whips out his Dell notebook computer, connects it to his AT&T cell phone, surfs to a NASA page on the Internet, where he calls up a GPS satellite navigation system to get an exact fix on his location, which he then feeds to another NASA satellite that scans the area in an ultra-high-resolution photo.

The young man then opens the digital photo in Adobe Photoshop and exports it to an image processing facility in Hamburg, Germany. Within seconds, he receives an e-mail on his Palm Pilot that the image has been processed and the data stored.

He then accesses a MS-SQL database through an ODBC connected Excel spreadsheet with hundreds of complex formulas. He uploads all of this data via an e-mail on his Blackberry and after a few minutes, receives a response.

Finally, he prints out a full-color, 150-page report on his hi-tech, miniaturized HP Laser Jet printer and finally turns to the shepherd and says, "You have exactly 1,586 sheep." Well, I guess you can take one of my sheep, says the shepherd. He watches the young man select one of the animals and looks on amused as the young man stuffs it into the trunk of his car.

Then the shepherd says to the young man, "Hey, if I can tell you exactly what your business is, will you give me back my sheep?" The young man thinks about it for a second and then says, "Okay, why not?" "You're a consultant," says the shepherd. "Wow! That's correct," says the yuppie, "but how did you guess that?" "No guessing required," answered the shepherd. "You showed up here even though nobody called you; you want to get paid for an answer I already knew; to a question I never asked; and you don't know anything about my business . . ."

". . . Now give me back my dog."

CLEW Section Committee Member Profiles

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Position

President, First Risk Management, Inc., Jenkintown, PA (suburban Philadelphia); risk and insurance consulting firm specializing in litigation support and expert witness testimony.

Education

- B.S. in business administration (majoring in insurance), Temple University, Philadelphia, PA—1948
- CPCU—1951
- ARM—1967

Family

- Born and raised in Philadelphia, and still there.
- My wife's name is Eva but is best known as Penny. We were married 54 years ago, come this November. Penny and I have two children (Jill, who lives in New Jersey with her husband, and Brian who lives in Los Angeles). We also have two grandchildren—Jared who lives in New Jersey, and Jennifer who lives in Virginia. Via Jared's marriage to Tricia, we acquired another granddaughter.
- By way of family tree, my father was an immigrant from Russia in 1914 and my mother was an immigrant from Rumania somewhere around 1916.

Hobbies and Interests

- Up until a few years ago, my main non-working activity was sailing. I sailed for 27 years, mostly in the Chesapeake but once on a three-month ocean voyage from the Chesapeake to the Caribbean and back via the Bahamas, having mastered old-fashioned navigation by compass, dead reckoning, and sextant.
- Penny and I travel a great deal and have probably visited 30 countries and most of the United States.
- My main hobby is fine art photography. Photography has been a hobby of mine since I have been about 12 years old.

What has been your involvement in the CPCU Society as well as other professional activities?
Generally, being an individual proprietorship most of my career, my involvement with CPCU has been less than I would have liked it to have been, though I have been a member of the CPCU Society since I was awarded my designation, and have attended many seminars over the years.

The other organization that has taken a great deal of my attention is the Society of Risk Management Consultants (SRMC) and its predecessor organization—the Insurance Consultants' Society (ICS). I was a founding member of the ICS and am a past president, have served on numerous committees of ICS and SRMC, and have been a past director of SRMC. I am also a member of The Chartered Insurance Institute (London, U.K.).

Len, tell me about your background.
As mentioned above, I come from immigrant parents. Their parents bringing them to this country was unquestionably the best thing anyone ever did for me.

My father was a watchmaker and my mother worked in the small neighborhood store they had until my father died. I was the first person in either of their families to ever graduate from college.

Though my goal was to become a lawyer, when I got discharged from the Army in 1947, I ended up working with an uncle who was an insurance broker—Samuel J. Milgram, CPCU. Sam ran a very upscale, small boutique of an insurance brokerage—professional and of high quality. When I came to the realization that I liked the field and wanted to stay with it, he agreed to be my mentor if I agreed to be the best insurance professional that I could possibly be, never co-mingling it with real estate, notary public, or any other business activity. Having that presented to me in that way and agreeing to live up to his demand has proven over the years that he and that requirement comprised the most influential single item in my career, and has formed the bedrock of my career.

This year marks my 55th year in insurance and risk management. During those years I was an insurance broker, excess and surplus lines broker, teacher, and insurance and risk management consultant. My practice was such that as it developed, I did a great deal of work in foreign countries and throughout the United States, became very involved in reinsurance, forensic work, and highly active in the London marketplace through numerous Lloyd's brokers. Under the name of American Excess Company, I managed the U.S. interests of nine European insurance companies, did their underwriting, supervised their claims handling, and handled their administration and finances in this country.

What was the most fascinating/problem/case in which you have been involved?
From a standpoint of other than litigation consulting, the most fascinating case was investigation and research in Fidel Castro's Havana, Cuba, on behalf of a group of French reinsurers trying to straighten out their account with a group of Latin American insurers after the Cuban members were seized by the Castro government. There has since been a price on my head by the Cuban Revolutionary Government.

From a standpoint of litigation work, it was the use of manual classifications for blood products being classified under premises and operations and not products liability, involving an insurer sued for

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CLEW Section Committee Member Profiles

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coverage concerning AIDS arising from their client's blood products when their client had no products liability coverage. This concept came about from the development of strict liability and the demands of the Red Cross at the time.

Professionally, what is your main focus and where are you headed in your career?
Presently and in the foreseeable future, my focus is almost exclusively to do consulting work concerning insurance and risk management where litigation is concerned, and accompanying expert testimony where called for. I am presently in the process of downsizing my operation though I do not ever intend to voluntarily retire. I like the work too much.

My practice is almost entirely with attorneys. I accept cases be they pro-insurer or against insurers predicated on my agreement with the hiring attorney that his case and position is, in my opinion, correct. I have represented numerous Fortune 500 companies, many insurers, the leading brokers of this country, and numerous others. I try to maintain a highly professional, low-keyed operation. My office maintains a very substantial and unusual insurance library that is maintained by Jean Walsh-Rickard, my paralegal, and is utilized not only by me on behalf of those that I am working for, but by many attorneys who have availed themselves of my material. I intend to continue this operation in just this way as long as possible.

Len, what do you mean by expert testimony?
To me, expert testimony is merely part of litigation support consulting. I provide expert testimony in court or in deposition (or sometimes limited merely to extensive reports) when attorneys need insurance or risk management information of a technical nature, concerning custom and practice where I can often testify to having lived and worked through it for more than half of a century and resulting from extensive research. I am not an advocate. My function is to supply the attorney and his client (and the court) with the necessary information to substantiate the case and many of the points that make it up.

From your perspective, what is good and what is bad about the insurance industry?
What is good? My experience in the insurance industry has been that it has proven to be the most exciting, most interesting, most challenging, and most mentally stimulating business that anyone could ever want. Fifty-five years ago this past May I sold my first insurance policy—a $12.50 premium fur floater. I earned $1.25 commission. In the last couple of years I have provided professional consulting services to firms such as AT&T, Bausch & Lomb, Bristol-Myers Squibb, General Dynamics, Kaiser Aluminum, Revlon, and many other well-known and not so well-known corporations. In between has been a whirlwind of hard work, fun, and gratification. But, it doesn't happen by sitting back and selling unremarkable insurance products. It required imagination, hard work, endless studying and educating oneself, and chutzpah at the right times and places. It has been a ball!

However, that takes me to "what is bad." When I first started in the insurance field it was very much a professional activity. I met and associated with some of the most dedicated and intelligent professionals that one could imagine. I still remember stimulating conversations and challenging propositions. However, that has changed over the years. The insurance industry has transformed itself from a profession to, often times, a greedy business. Though every business, firm, and profession must make a profit, my conclusion is that today's insurance industry is disproportionately driven by a grab for profits as opposed to providing its customer base with a commitment to deliver on their underwriting promises and paying their claims without agonizing those customers. Especially in the litigation field, when I see the stupidity of some insurers turning claims down that should have been paid and are ultimately forced to be paid, I realize how far the industry has moved from the profession I originally joined. One of the reasons for this, I am firmly convinced, is the engagement by insurers of executive management and claims people inadequately trained, inadequately educated, and who inadequately understand insurance.

Len, in your opinion, what mistakes do you see carriers, agents, brokers, and witnesses commonly make?
Too often, insurance carriers have a cookie-cutter mentality instead of tailoring wording to suit the risk exposure that they intend to insure. This breeds post-loss underwriting, which, in my opinion, is equivalent to a surgeon losing a patient on the operating table. I believe this results from a combination of greed and inadequate insurance education.

In my opinion, too many brokers and agents (and, today, producers) also suffer from a lack of education and an excess hunger to put business on the books. Too often that hunger and lack of thoroughness comes back to haunt them in the form of malpractice claims against them.

As far as witnesses are concerned, my experience has been that witnesses sought out and decided upon by attorneys are generally very good. Those appointed by insurers to represent them in testimony can't know everything from every aspect and in my eyes have proven to be generally inferior. This helps neither the insurance company nor those suing them.

It all boils down to education, education, education, care, and thoroughness. It all boils down to running a profession as a profession.

Lawton Swan III, CPCU, CLU, ARM, is president of Interisk Corporation, Tampa, Florida, which provides risk management and employee benefits consulting services to clients. Swan has more than 40 years of experience in the insurance industry as a consultant, vice president of a multi-line property and casualty insurance company, underwriter, and claims adjuster. He is a past president of the CPCU Society.

He specializes in employee benefit plans; risk management evaluations; the design and implementation of loss prevention and safety programs; self-insurance analysis and feasibility studies; captive insurance company feasibility studies and implementation; and reinsurance negotiations.

He is past president of the CPCU Society's Florida Suncoast Chapter and the Suncoast Chapter of The Society of Chartered Life Underwriter and Chartered Financial Consultants, and the Tampa Bay Underwriters Association. Swan is a graduate of Florida State University, and holds the Associate Risk Management (ARM) designation conferred by The Insurance Institute of America. In addition, he is a Chartered Property and Casualty Underwriter (CPCU), a Chartered Life Underwriter (CLU), Certified Systems Professional (CSP), and Certified Management Consultant (CMC).

Swan is a member of the national Risk Management Research Council (RMRC) and is a frequent lecturer on risk management topics. He has authored numerous articles on risk management. He is co-author of the publication *A Lawyer's Checklist for Buying Insurance* for the American Bar Association and served as editor for the publication *Insurance and Reinsurance in Bermuda*. Swan has also published numerous articles for *The Broker*, the *CPCU Journal*, and *Agents Periodical*, as well as given numerous seminars within the United States.

He has served as regional vice president for the CPCU Society as well as chairman of the Intra-Industry Affairs Committee and is the former editor of the national publication *Your Business Today*, a current events journal for the insurance industry. Swan is an approved instructor for the State of Florida Insurance Department Qualification Courses.

Jean Lucey, CPCU, earned her undergraduate degree (English) and graduate degree (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.

Upon moving to Boston in 1979 because of a career opportunity for her husband, Jean was delighted to find there actually exists an Insurance Library Association of Boston. Serving as director since 1980, Jean attained her CPCU designation in 1986. The Boston Board of Fire Underwriters honored her as "Insurance Person of the Year" in 1995.

Jean continues to learn on the job every day through constant exposure to insurance literature and the myriad of questions asked by people working in the insurance industry as well as lawyers, consultants, accountants, bankers, academics, consumers, and students.

Gregory G. Deimling, CPCU, AMIM, ARM, is principal of Gregory G. Deimling and Associates, a risk, insurance, and management consulting firm located in Cincinnati, Ohio. He has been in the insurance and risk management industry as an agent and consultant for more than 30 years. He serves as an expert witness regarding insurance coverage interpretation, policy formation, technical analysis of insurance contracts, and agent, broker, and insurer standards of conduct. A member and past president of the CPCU Society's Cincinnati Chapter, he has also served nationally as secretary-treasurer, regional vice president, governor, member of the Strategic Planning Committee, and chairman of the Interest Sections Governing Committee and Budget & Finance Committee. In addition to earning the CPCU designation, Deimling also holds the AMIM and ARM designations from the Insurance Institute of America and is a graduate of the National Leadership Institute. Additional professional affiliations include the national and Ohio Association of IIAA, the Risk Education Society, Cincinnati Insurance Board, and ACORD. ■

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