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CLEWS

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From the Chairman

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.

Danny Kaye once said, "Life is a great big canvas, and you should throw all the paint on it you can." Like many of you, I am fortunate enough to have known someone who did just that. By now, you probably know that I'm talking about our own **George M. Gottheimer Jr., Ph.D., CPCU, CLU, ARe,** who left us in March. George was a very active member of the CPCU Society and the CLEW Section Committee, but there was much, much more on his canvas.

George was a scholar, educator, author, arbitrator, expert witness, lecturer, entrepreneur, researcher, and noted authority on a wide array of subjects. On the personal side, he was a husband, father, brother, and friend to many. Always nattily attired, George had that old-school combination of charm, gentility, and manners that seems to be getting rarer these days. Getting to know

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What's In This Issue

From the Chairman

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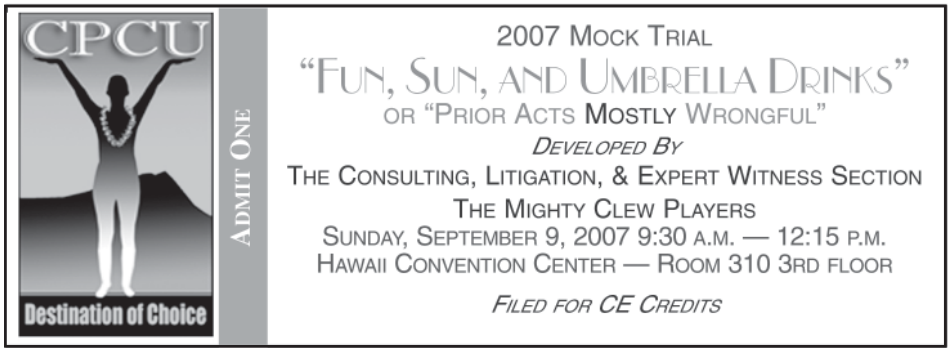
people like George is one of the real advantages of being a CPCU. We have already felt his absence.

On an upbeat note, your section is, as always, on the move. The CLEW Section presented a symposium in Boston, "Directors and Officers Liability Insurance: Understanding Exposures, Coverages and Current Issues," on June 19, which is the work of **Nancy D. Adams, J.D., CPCU.** Never one to be under-worked, Adams also has a related seminar planned for the Annual Meeting and Seminars in Hawaii, entitled, "D&O Liability Insurance 101: What You Need to Know and Why." Check the CLEW Section web page for more details.



Speaking of the Annual Meeting and Seminars, you won't want to miss our mock trial. "Fun, Sun, and Umbrella Drinks." This is the brainchild of **Gregory G. Deimling, CPCU,** and (guess who?) **Nancy D. Adams, J.D., CPCU,** to be performed by the "Mighty CLEW Players." Look for a ticket like the one above in your registration packet and plan to arrive in time for a good seat. Mahalo and Aloha. ■

CPCU Society Interest Sections Evolving!

At the CPCU Society's 2005 Annual Meeting and Seminars, the Board of Governors created a Sections Strategic Task Force, whose charge was to develop a strategic vision for sections.

The task force subsequently proposed a strategy "to position sections as a provider of readily available, high-quality, technical content to stakeholders."

The Board of Governors accepted the task force's recommendations at the 2006 Annual Meeting and Seminars, and the Executive Committee created the Sections Strategic Implementation Task Force to develop detailed implementation recommendations.

You can view their report, and insightful comments from a task force member, on the CPCU Society web site, www.cpcusociety.org in the "Sections" area.

Editor's Notes

by Jean E. Lucey, CPCU

■ **Jean E. 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, she was delighted to find there actually exists an Insurance Library Association of Boston. Serving as director since 1980, Lucey attained her CPCU designation in 1986. She is a member of the CPCU Society's Consulting, Litigation, & Expert Witness Section Committee. The Boston Board of Fire Underwriters honored her as "Insurance Person of the Year" in 1995.

Lucey 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.

I am happy to report that Craig Stanovich's article in the previous issue of the *CLEWS* newsletter elicited a response from a reader (see page 4 of this newsletter), and hope that other items will stimulate similar interest and comment. We can all learn from each other, and in that spirit I encourage you to submit your own original thoughts through articles, as well as to react to the ideas of others.

Two members of our section have joined the committee that plans and oversees our work. We welcome them and their input, and hope that you have a chance to meet and converse with **Joseph G. Burkle, J.D., CPCU, AIM,** and **Douglas J. Zogby, CPCU.** As with all committee members, you should feel free to tell them your ideas about the Consulting, Litigation, & Expert Witness Section, and what you think its direction should be.

J. Carlton Sims, CPCU, ARM, has written an admonitory piece about pre-judgment interest, which I am happy to make available to you through this newsletter.

Maria Hall, CPCU, provides us with some extremely useful tips about how to manage the process of being deposed. As an attorney, she has given us most useful advice about how to approach and navigate the shoals of serving as a deposition witness: it's clear that she's both deposed witnesses as well as counseled them.

Frank Licata, CPCU, of Licata Kelleher & Associates presents some considerations for managing product liability risks in the context of the recent spate of poisoning from pet foods. **George M. Wallace, J.D., CPCU,** CLEWS Section Committee member, talks about the bottom line when household pets suffer an untimely demise—a situation in some flux.

Have you been considering a "book roll" or transfer of business (TOB), or know agents who are? **John T. Gilleland Jr., CPCU, API, AIS, AU,** lists some important considerations in this context that may save some anguish down the road.

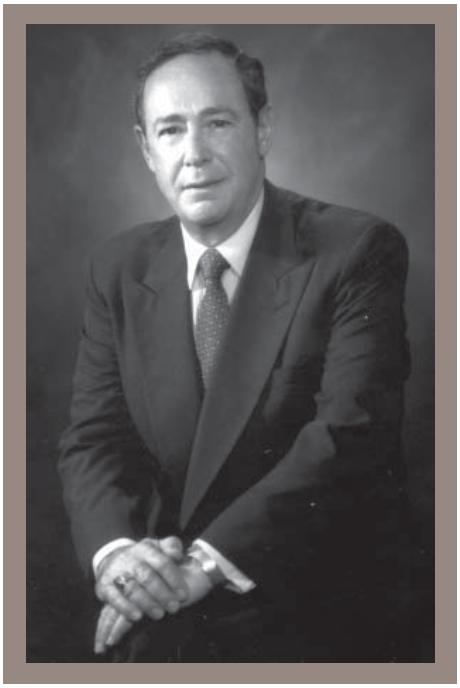
It would seem that the problems of global warming and climate change are finally emerging from the realm of "is it really happening?" and entering the realm of "what do we do now?" **William F. Stewart** expresses his views on what the insurance industry should be most concerned about, and what actions can help with mitigation.

Once again we are extremely fortunate to have **Donald S. Malecki, CPCU,** communicate his knowledge on a specific aspect of insurance coverage, this time on delay in completion coverage. Thank you, Don!

Now to our sad news. Our esteemed colleague **George M. Gottheimer Jr., Ph.D., CPCU, CLU, ARe,** died on March 2 of this year. Dan Free has talked about how George is already missed by his colleagues. My own brief personal remembrance of George follows. If you would like to share your own thoughts about him, please feel free to do so and I will make them available in the next issue of the *CLEWS* newsletter. ■

George M. Gottheimer Jr., Ph.D., CPCU, CLU, ARe

by Jean E. Lucey, CPCU



Those of you who knew George Gottheimer only through mock trials presented at the CPCU Society's Annual Meeting and Seminars might well have formed an imperfect and incorrect impression of the man. In his occasional role as the overbearing, tyrannical, and duplicitous businessowner Sy Onara, he had to play against character. Good sport that George was, he played his role with enthusiasm.

I say this because if anyone embodied the classic definition of "gentleman," it was George. I grew to know him through our work together on the CPCU Society's Consulting, Litigation, & Expert Witness Section. In committee meetings, which sometimes get a bit raucous (but never in my experience rude), George's comments were always well-reasoned and expressed in calm, measured tones. He tended to wait until he had heard and considered what most other people had to say before speaking. And when he did speak, what he said was always pertinent and reasonable. Only once did I see him evidence a bit of consternation, and it was when he was describing some bad treatment received not by him, but by a colleague.

The community of the CLEWS Section has lost a true friend through the death of George Gottheimer on March 2, 2007.

If anyone would like a copy of his obituary, please feel fee to contact me at jlucey@insurancelibrary.org. ■

Letter to the Editor

I read the Craig F. Stanovich, CPCU, CIC, AU, article on interpreting insurance policies with interest based on my background in claims and having been involved in several hundred declaratory judgment actions interpreting insurance coverage including construction defect claims.

It's easy to agree with some of the broad sweeping statements made in the article, but it became more difficult for me to agree with some of the more specific statements. For example, the statement relating to claims falling outside the insuring agreement and an effort by insurers to divert the court's attention away from reading the entire CGL policy. Basic policy analysis requires a claim come within the plain unambiguous language of the insuring agreement. If the claim is not within the grant of coverage, you need not read further, you need not consider exclusions, and you surely do not need to consider exceptions to exclusions as suggested in the article.

I strongly advocate the use of special courts to decide insurance coverage disputes—courts that develop an expertise in reading and understanding insurance policies, courts designed to handle such complex coverage matters. I am not convinced as is the author that the courts "get it right more often than get it wrong." The financial impact of one truly bad decision can far outweigh the financial impact of several obscure coverage decisions.

Donald Huffer, CPCU, AIC, AIM
Senior Consultant
Liability Management Systems

From the Editor

Like me, Craig Stanovich was pleased to get this response to his article and to read comments written from a perspective that differs from his own.

Interestingly enough, as the original item was being written, a case involving several relevant issues was being decided in the Supreme Court of Tennessee at Nashville. If you are interested in following up, the case is *The Travelers Indemnity Company of America et al. v Moore & Associates, Inc.*

If you would like me to send you a copy of that case, send a request by e-mail to jlucey@insurancelibrary.org.

Spotlight on CLEW Section Committee Members

Douglas J. Zogby, CPCU

After spending 25 years in the property and casualty industry holding numerous senior management positions in marketing, underwriting, and operations, **Douglas J. Zogby, CPCU,** started his consulting practice, Got Game! Consulting in 2005. Throughout his management career, Zogby has focused on the benefits of using game theory as a strategic management tool. "Got Game! Theory" analyzes how someone else will act and react and helps individuals and organizations develop strategies and gain bargaining power by understanding the ultimate goals of others and the options open to them. Zogby shows clients how to apply this to support and enhance processes such as strategic planning, negotiations, coaching, bidding, and contracting.

According to Zogby: "We take an academic theory and teach clients how to use it in practical business situations everyday. Using game theory as a strategic practice serves to level the playing field between conflict and resolution. It drives better business decisions and helps everyone involved achieve their desired results, including making more money."

Zogby has used game theory as a basis for a variety of presentations including ones on:

- Game Theory Meets Supply Chain Management
- Management Focusing on HR and Mentoring
- Dynamics of the Multigenerational Workplace

Zogby graduated from the State University of New York. After earning his CPCU designation, Zogby began teaching CPCU classes in the Phoenix area. He is also an adjunct faculty member at Phoenix College and serves as an advisor on the college's Business Advisory Committee.

In addition to his consulting practice, Zogby participates in a volunteer consultancy through the Executive Service Corp of Maricopa County, benefiting non-profit organizations in and around his current home of Phoenix, AZ. He recently completed a strategic planning project for Arizona Action for Foster Children, and is currently working on a board development project for De Colores Shelter, which is an agency of Chicanos Por La Causa. Got Game! is also a supporter of Habitat for Humanity, and plans to continue its corporate sponsorship of its annual fundraising fashion show called "Blueprints and Blue Jeans."

Along with his CPCU Society and CLEW Section participation, Zogby is a member of these organizations:

- American Society for Training and Development
- Institute of Management Consultants
- International Society for Performance Improvement
- The Game Theory Society

Finally, Zogby enjoys public speaking and continues to practice his craft through his membership in Toastmasters International, where he has achieved the prestigious Competent Toastmaster (CTM) designation.

Joseph G. Burkle, J.D., CPCU, AIM

Joseph G. Burkle, J.D., CPCU, AIM, graduated from the University of Northern Iowa with honors in 1989, and Drake Law School in 1992. In 2000, he began his career at EMC as a construction defect litigation specialist.

In 2005, he became the superintendent overseeing all of EMC's larger construction defect and bond files. Prior to EMC, Burkle entered a private law practice and then worked for State Farm Insurance. He is a member of the CPCU Society, the Iowa State Bar Association, the Iowa Defense Counsel Association, and the Construction Defect Claim Managers Association. ■

Pre-Judgment Interest (Beware of)

by J. Carlton Sims, CPCU, ARM

■ **J. Carlton Sims, CPCU, ARM,** of Simsco Consulting, is a 38-year veteran of the commercial property and casualty insurance industry serving most of this time in the various brokerage roles. His most recent experience has been in the risk management and litigation support fields.

We who have been in the commercial insurance/risk management business for any length of time have all read insurance and related contracts containing some of the following terms:

- allocated loss adjustment expense
- supplementary payments
- interest
- loss adjustment expense
- post-judgment interest
- pre-judgment interest

All of these terms are generally found in sections of an insurance policy/program that address either ultimate limits of policy liability (within or in addition to) or expenses to be included or paid outside of a large deductible or self-insurance retention program.

All of these terms can have extensive effects on who is ultimately responsible for paying these costs—the insured/self-insured or insurer—depending upon how they are used and defined in the policy program contract.

However, one term we see less often but one that can cause real problems is "pre-judgment interest." From a legal and insurance perspective, it does not always fit within any of the other terms mentioned above, except as outlined in the ISO "supplemental payments" section of the Commercial General Liability policy. Even in the case of an ISO form, you need to be aware of any manuscript SIR or deductible endorsement attached to the policy.

Pre-judgment interest is available to a plaintiff in some states in an attempt to level the playing field between Big Old Insurance Company and Little Old Claimant. Big Old Insurance Company with all of the money in the world can deny a liability claim and drag it through the courts for years. Little Old Claimant can't afford the expense and, depending on the circumstances, a plaintiffs' firm may not be willing to gamble on a contingency basis.

However, if Little Old Claimant or his lawyer does manage to hang in there and ultimately is awarded damages, the defendant and his insurance carrier are, in addition to actual damages, responsible for interest accruing on the judgment from the date of injury or the regulation pursuant to which the suit is brought in cases of non-contractual claims. In the case of contractual claims, the contractual language governs.

Using 8 percent annual simple interest, for example, on a $1 million award on a case that was dragged out for five years, the compound interest is $469,316. On a $10 million award, the interest is $4,693,160.

So what's the point? The point is that if your policy or rating program contract states that pre-judgment interest is not within your self-insured retention but rather in addition to it, you have a potential problem.

It's strange. Some insurance companies refer simply to "interest," others to "post-judgment interest." Post-judgment interest is normally not a big problem but the word "interest" is construed by some claims adjusters to mean all types of interest.

Another point is: pre-judgment interest is part of the damages that are awarded to the plaintiff—they are damages just like compensatory or punitive damages. It is not "allocated loss adjustment expense," the largest part of this being attorney fees and court costs.

Therefore, pre-judgment interest ideally should always be considered in your program as damages and part or your self-insured retention or deductible. As such, it would also be within and subject to your policy limit and should be included in your umbrella program.

If "allocated loss adjustment expense" or any of the other terms are also within your self-insured retention or deductible, so much the better.

I learned a valuable lesson on this subject in dealing with a retrospective rating plan. The carrier wanted pre-judgment interest to apply outside of the retrospective plan limits—that is, in addition to. We won a summary judgment in this case as the judge agreed with us that this award constituted damages. ■

An Effective Deponent Knows that the Witness Can Be in the Driver's Seat

by Maria Hall, CPCU

■ **Maria Hall, CPCU,** is an attorney at Jackson and Campbell, PC, in Washington, DC. Her practice consists primarily of representing liability insurers in coverage disputes relating to toxic and product liability claims. Hall is also an experienced personal injury litigation attorney. In addition to being a member of the CLEW Section, Hall is active in the CPCU Society's District of Columbia Chapter as co-chairman of the Education Committee, and is a director on the Board of Directors for the chapter. She has also served as a CPCU instructor in commercial risk management and insurance.

Author's note: The views expressed in this article are those of the author and are not intended to reflect the opinions of her firm or its clients.

The American justice system is largely based upon the discovery of truth through the testimony of witnesses. That is why it is critical that a company representative be a good deposition witness, should a coverage matter result in litigation. There are numerous ways to be an effective and credible deponent, but realizing the ability to control a deposition is a key element.

There are at least four ways to assert control. First, a witness controls the pace of the deposition. This can be accomplished through full sentence responses and the use of pauses. You do not need to be in a hurry to answer the questions. Think about your answer before you say anything. Do not let the deposing attorney control the rhythm of the testimony. Avoid giving rapid answers to rapid questions. Unless in a video deposition, do not worry about lengthy pauses. The court reporter does not record pauses, but only what the witness says. In fact, pausing long enough can throw off the deposing attorney. Remember that unless a question is pending, most jurisdictions allow you to ask to confer in private with counsel whenever you like. If your answer might potentially divulge privileged information, you can confer with counsel even before answering the question. You are also free to ask for a break whenever you need one, and it's a good idea to take a short break at least every 45 minutes to an hour.

Assuring that you understand the question being asked, by asking for and obtaining sufficient clarification of the question, is another way of maintaining control. A witness need not be helpful in asking for clarification of questions he or she does not understand. The first step should be to simply say that you do not understand the question and ask to have it rephrased (not repeated). If that does not result in getting sufficient clarification, the witness might next say, "I don't understand what you mean by _____." A witness should be careful not to give information in asking for clarification. If a question is compound, ask the deposing attorney to rephrase the question and break it down into parts.

Control is also maintained by answering only the question that is asked. Do not ramble on and volunteer information. An answer that is truthful, but limited to the scope of the question, is the best. It is perfectly acceptable to respond to a question by saying truthfully that you do not know, cannot recall, or do not have the expertise to give an opinion. When you're finished with your answer, stop. Often, attorneys will continue to look expectantly at a witness who has fully responded to a question in an attempt to elicit further information. Don't fall into that trap. Indeed, consider in a video deposition focusing entirely on the camera and not even looking at the deposing attorney.

Finally, a witness should use appropriate and adequate limitations and caveats in the response. Use qualifiers in an answer even if they have been put in the question. For example, a witness should be careful of and reluctant to answer hypothetical questions. Lawyers defending depositions generally object to them as impossible to answer. A witness cannot testify about something that is not within the scope of his or her work, and work is about real factual situations, not hypotheticals. If a witness nonetheless answers a hypothetical question, he or she might limit the response by beginning it with "based on the limited facts you have given me." While unnecessary qualifiers dilute credibility and authority, the use of categorical phrases such as "I never" or "I always" tend to come back to haunt you. If you think a question in any way misrepresents your prior testimony, respond with "that was not my testimony" or state that you rely on your prior testimony.

The judicial system cannot work without witnesses. Witnesses allow fact finders to determine what happened and to resolve the dispute before them. A confident deposition witness who knows that he or she can be in the driver's seat will more likely convey accurate and credible testimony. ■

Who's Liable for Pet Food Contamination—The Risk of Product Liability

China the Source of the Problem

by Frank Licata, CPCU

Pet food contamination has been traced to Chinese suppliers. Wheat gluten purchased from a company in Xuzhou, China, north of Shanghai, contained the hazardous material, and other Chinese companies are now implicated.

Food product sellers have a special product liability exposure, which is highlighted by this incident. This applies to all players in the supply chain from farmers to manufacturers to retailers. Liability arising from death or injury can be substantial, and with products in general, and food products in particular, there is the likelihood that the defective product will affect large numbers of victims, resulting in multiple claims.

With respect to components (or ingredients) purchased from suppliers outside the United States, there are the further problems of uncertainty regarding quality control, and possibly lack of recourse against the supplier. Some foreign suppliers may not have substantial assets or may not carry any or enough product liability insurance (this of course could also be the case with a U.S. supplier). Furthermore, distance and difference in legal systems could prevent recovery. Plaintiffs who cannot reach the ultimate culprit will go after the U.S. company. These same recovery problems would apply to your insurer as it tries to subrogate after paying your claims.

Risk Management

Consider the following in managing your product liability risk:

- Know the *ultimate* source of components you buy from suppliers; consider your immediate supplier may not be the originator.
- Know the level of product quality, and government oversight of same, of the source country.

- Obtain indemnification and insurance protection from suppliers if you are simply a downstream distributor.
- Review your product liability limits for adequacy with an understanding of how your limits apply: per claim or aggregate. If your limits are on an "aggregate" basis, this is all the protection you will have for all claims in total.
- Make sure there is full disclosure to underwriters of the exposure, and this could include disclosure of suppliers.
- Don't necessarily rely on inspection or analysis provided by the foreign supplier; it may be necessary to have this verified in the United States.

For more information, contact Debora Wu, at DWU@LicataKelleher.com. ■

Global Warming and You: What Every Insurance Professional Should Know About Climate Change

by William F. Stewart

The good news is, if you are reading this article, you are employed in a growth industry. The overwhelming weight of evidence suggests that global warming will dramatically increase both the frequency and severity of property and liability claims. The bad news? Unfortunately, in the coming decades, our planet will experience some combination of unprecedented hurricanes, wildfires, floods, hail, heat waves, and drought. This article endeavors to provide practical commentary on what is happening, how it will impact insurers, and what the insurance industry can do in response.

Isn't Global Warming Just Scientific Conjecture?

In the 1890s, a Swedish scientist named Svante Arrhanius made a novel prediction about climate change. He opined that, if humans continued to release high levels of carbon dioxide into the air, it would trap heat within the atmosphere and increase temperatures on the planet's surface. Although Arrhanius' theory was rejected in his own time, the "greenhouse effect" is almost universally accepted by contemporary environmentalists. Indeed, according to an April 6, 2007, article published by the *Insurance Journal:* "no serious scientist today disputes the existence of global warming, even though its potential impact remains the subject of continued analysis." In February 2007, the United Nation's Intergovernmental Panel on Climate Change (IPCC) issued a report stating: (1) "warming of the climate system is unequivocal"; and (2) it was very likely that human activity since 1750 has overloaded the atmosphere with carbon dioxide—which in turn has resulted in the retention of solar heat.

In 1750, atmospheric levels of CO_2 were 280 parts per million (ppm), by 1960 CO_2 levels had risen to 330 ppm, and now CO_2 levels are 380 ppm (which is higher than at any time in the last 650,000 years). To make matters worse, the IPCC has predicted that atmospheric carbon dioxide levels could reach 450 to 550 ppm by 2050. Correspondingly, 11 of the 12 warmest years in history have occurred since 1995. Thus, the debate is no longer whether global warming is occurring, but whether we are headed toward some sort of abrupt and cataclysmic change to our environment.

How Will Global Warming Impact the Insurance Industry?

The U.S. Environmental Protection Agency's web site states: "[w]hile the effects of climate change will impact every segment of the business community, the insurance industry is especially at risk." At an April 19, 2007, international conference on Climate Change Regulations and Policy, the insurance industry was referred to as the "the big canary in the coal mine"—because insurers will be the first to feel the impact of an increase in the frequency and/or severity of natural disasters.

While it is rarely possible to conclude that any particular weather-related loss is the result of global warming, there has been an alarming increase in both the number and extent of catastrophe (CAT) claims. According to the EPA, "there were four times as many natural catastrophes in the 1990s as there were three decades ago." Seven of the 10 most expensive hurricanes in U.S. history (Katrina, Charlie, Rita, Wilma, Jeanne, Ivan, and Frances) occurred during the 14-month period between August 2004 and October 2005. The 2004 and 2005 hurricane seasons resulted in $75 billion in insurance payments, and CAT losses during that period equated to 12 percent of overall property insurance premium—which is more than three times the historical average.

One of the most alarming aspects of global warming is rising sea levels. An April 6, 2007, IPCC report stated, with "medium confidence," that "sea-level rise and human development are together contributing to . . . coastal flooding in many areas." In Florida, sea levels have risen six to eight inches over the last 100 years because of melting Arctic ice, and an accelerated upsurge is predicted because even a one-degree increase in temperature would result in massive melting of the Greenland ice cap. While there are no reliable models to predict how an anticipated two to three degree temperature increase would affect the ice caps, there is a growing view that low-lying coastal cities like Miami may be in grave risk before the end of the century.[1]

While most of the focus to date has been on coastal areas, the effects of global warming will be universal. Tim Wagner, the director of the Nebraska Department of Insurance, recently offered the following assessment: "After New Orleans, it's becoming clearer that we are

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Global Warming and You: What Every Insurance Professional Should Know About Climate Change

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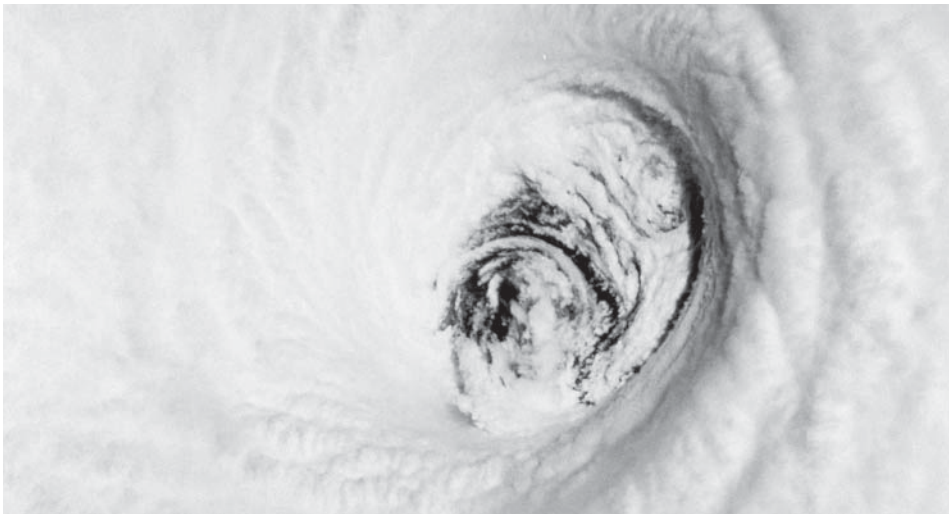

experiencing more frequent and more powerful weather events that pose huge challenges for the insurance industry. . . . [but] this is both a coastal issue and a heartland issue . . . we're seeing all kinds of extreme weather in the Great Plains, including drought, tornadoes, brushfires and severe hailstorms."

How Can the Insurance Industry Most Effectively Respond to Climate Change?

Scientists broadly characterize responses to global warming into two main categories: mitigation and adaptation. Mitigation involves attempts to reduce greenhouse emissions through conservation, alternative energy usage, and underground carbon storage. The reality, however, is that while mitigation efforts are imperative, they are unlikely to eliminate the problem. By the end of 2007, China will surpass the United States as the nation with the highest level of carbon dioxide emissions. For the present and foreseeable future, China's first priority will be the elimination of poverty, and, thus, it has consistently refused efforts to reduce or capture its emissions. Moreover, because CO_2 remains in the atmosphere for decades, and because the oceans retain heat for centuries, temperatures would continue to rise even if we could curtail the global production of greenhouse gases.

Adaptation involves the response of individuals, businesses, and communities to cope with the inevitable consequences of climate change. Examples of adaptation range from the conventional construction of levies to the futuristic "seeding" of clouds with chemicals to produce rain when and where it is needed.

Insurance professionals will be called upon to employ strategies that include both adaptation and mitigation measures. Three common examples of adaptation are pricing adjustments, risk sharing with insureds (e.g., increased windstorm deductibles), and cancellation. In February 2006, Allstate announced plans to stop offering property coverage in several counties along the Chesapeake Bay. Many property insurers have ceased writing business in Louisiana and Florida, and those still issuing policies have raised rates significantly. Another example of adaptation involves a proposed National Catastrophic Fund, which would aid insurers in the event of major climatic disasters—similar in certain respects to both the Terrorism Reinsurance Act of 2002 and the National Flood Insurance Program.

In addition to adaptive measures, the insurance industry is in a unique position to mitigate climate change. The EPA has asked insurers to address global warming by: (1) educating policyholders about the financial risks associated with climate change; (2) supporting stricter building codes to minimize the impact of severe weather; and (3) promoting energy efficiency and renewables to cut greenhouse gases. And indeed, despite its unfairly maligned reputation, the insurance industry has been a leader in combating CO_2 emissions. Travelers offers a 10 percent auto insurance discount to the owners of hybrid cars. Firemans's Fund not only reduces premiums for environmentally friendly buildings, but also encourages its insureds to use "green" products to repair losses. In April 2007, AIG became the twelfth company, and the first insurer, to join the United States Climate Action Partnership (USCAP)—which supports a number of immediate mitigation measures including a nationwide limit on carbon dioxide omissions. Swiss Re has invested substantially in solar technology. And, the Risk and Insurance Management Society (RIMS) has entered into an agreement with the EPA to research and educate its members on mitigation and adaptation strategies.

In sum, climate change will be one of the great challenges of our time, and the insurance industry will be among the sectors most fundamentally impacted. While the prospects of global warming still present more questions than solutions, companies that take the lead in evaluating and addressing climate impact are likely to enjoy a significant competitive advantage in the years to come. ■

Endnote

1. See e.g., Brian Handwerk, *National Geographic News,* November 9, 2004.

P.S., Your Cat Is Dead *(Yeah, But What Is It Worth?)*

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

George M. Wallace, J.D., CPCU, is a partner in the small Pasadena, California law firm Wallace & Schwartz. His practice concentrates on property and casualty insurance coverage issues. He received his juris doctor degree from the University of California, Los Angeles, School of Law. He practiced with several insurance defense law firms in the Los Angeles area until 1995, when he and his partner established their current firm. He is admitted to practice before all California state courts, all four California districts of the United States District Court, and the Ninth Circuit United States Court of Appeals.

Wallace served as president of the CPCU Society's San Gabriel Chapter, and is currently vice president of the Los Angeles Chapter. He was awarded the Rie R. Sharp Memorial Award (Insurance Person of the Year) by the Los Angeles-area chapters in 2000.

Wallace speaks and writes regularly on legal and insurance topics, and teaches CPCU 530 (The Legal Environment of Insurance) for the Insurance Educational Association. He maintains two online weblogs (blogs): the California law-oriented site Declarations & Exclusions (http://declarationsandexclusions.typepad.com/weblog/); and the more personal A Fool in the Forest (http://declarationsandexclusions.typepad.com/foolblog/), which received a 2005 Blawg Review Award.

The recent spate of injuries and deaths of cats and dogs caused by contaminated pet foods has re-stimulated interest in the appropriate measure of damages for the loss of non-human animals. Non-human they may be, but pets are more and more frequently treated and perceived as the four-footed equivalent of members of the family. As unhappy pet owners confront their losses, those who turn for comfort to their lawyers are likely surprised to learn that, in most states, Fluffy, Kitty, Spot, Bongo, or Hieronymus is regarded in the law as . . . just another item of personal property, to be valued by the same measures as a washing machine, a potted plant, a VCR, or a lava lamp.

The traditional common-law measure of damages for injury to or destruction of personal property, at least when that injury or destruction results from negligence or other non-willful conduct, is limited to the cost of repairing or replacing the property or the property's market value immediately prior to the injury, whichever value is less. Unless the unfortunate cat or dog is an exotic breeding animal or a proven show champion, the odds are that most animals' monetary value as determined by traditional rules is relatively modest. The tainted pet food cases, however, have revitalized an already active movement seeking to revisit that measure of damages, and to require courts to acknowledge the intangible emotional bonds that may exist between pet owners and their furry companions. A recent *Wall Street Journal* article (Sara Schaefer Munoz, "How Much Is Your Dog's Life Worth?" WSJ, April 26, 2007, at p. D1) sums up the current legal ferment:

> Lawyers, animal-rights activists, and pet owners are arguing that most state laws dealing with pets are outmoded and fail to consider that pets play the role of companions in today's society. They say pet owners whose animal is injured or killed should receive compensation not only for veterinarian bills and a replacement animal—but for emotional distress as well. While legal experts say big payouts for emotional damages are unlikely in the pet food cases, the lawsuits and large numbers of pets affected could accelerate a growing trend to give pets more recognition under the law.

Courts in a small minority of states—among them are Florida, Hawaii, Idaho, possibly Vermont, and to some extent Alaska—recognize expansive measures of damages for negligent loss of animals, but the majority rule is clearly to the contrary. If there is to be a major shift to award compensation for emotional distress, loss of companionship, and the like, it will most likely come from state legislatures. Only one state, Tennessee, has ever passed legislation permitting recovery of non-economic damages for the loss of a dog or cat. The "Tennessee T-Bo Act"—named for the deceased dog of the senator who introduced it—permits recovery of non-economic damages by a pet owner for the loss

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P.S., Your Cat Is Dead *(Yeah, But What Is It Worth?)*

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of a pet, but is subject to numerous restrictions that limit its practical impact: damages are limited to $4,000, the loss must occur when the animal is at home or under the owner's direct control, the statute is applicable only in specified parts of the state, and no liability will lie against non-profit, governments, or veterinarians. Other states have seen legislation introduced over the years, and more is rumored to be in preparation, but no other similar statute has yet emerged from a legislature to become law.

For those interested in monitoring this or other animal-related legal issues, the web site of the Animal Legal and Historical Center of the Michigan State University College of Law, at www.animallaw.info, is an invaluable and comprehensive source of information on all aspects of animals and the law. The Center recently published a jurisdiction-by-jurisdiction overview of the current state of the law: Marcella S. Rouskas, "Determining the Value of Companion Animals in Wrongful Harm or Death Claims: A Survey of U.S. Decisions and an Argument for the Authorization to Recover for Loss of Companionship in Such Cases" (2007) http://www.animallaw.info/articles/ddus50statesurvey_companion_animals.htm. ■

Questions Agents Should Ask Themselves and Insurers Before Agreeing to and Planning of a Transfer of Business

by John T. Gilleland Jr., CPCU, API, AIS, AU

■ **John T. Gilleland Jr., CPCU, API, AIS, AU,** is the general manager of Appco Finance Corp. He has been employed as an underwriting manager, production underwriter, desk underwriter, and trainer.

Book rolls (a.k.a. transfers of business, TOBs) often start out with excitement and anticipation of greater profits; however, many end with disappointment as agency personnel and insureds learn the details and implications of moving insureds from old, familiar companies to new, unfamiliar companies. Answering these questions and preparing a formal TOB agreement with an action plan for doing the work necessary to maintain the book of business will prevent the usual loss of 30 percent to 40 percent of an agency's business. Answers to these questions should be used to form a formal TOB agreement and create an action plan for agency and insurer personnel.

1. What types of policy forms are being used by our current insurance companies? What types of policy forms are offered by the new company? Do the forms and endorsements compare well? If not, what is being lost and what is being gained? Is it all monoline or are some policies package policies? What new coverages are being offered? What services are expected by the insured, and will they be received?

2. What market segments do we serve now? Will the new company be very compatible with our market segments? What new market segments will we be able to serve?

3. Will our entire book of policies be rolled over without front-line underwriting? Or will we be applying the new company's new business or renewal underwriting guidelines? Or will we use our present insurers' guidelines? Who can tell us specifically what our new business and renewal underwriting guidelines are to be for this rollover as we convert the policies from our current insurers to the new insurer(s)?

   a. Are we waiving any of the new insurer(s) application's underwriting questions or requirements for the roll over (i.e. whether or not a previous insurer paid for a loss that is listed on the roll-over application, amounts paid for not-at-fault accidents)?

   b. Who handles communicating this roll-over agreement's details to the marketing department, so its computer systems' reports are generated properly?

4. If rating tiers are used, will the book be rolled over to comparably priced rating tiers? If underwriting tiers are used, will the book be rolled over to comparable eligibility tiers?

5. How will each risk's information get transferred from the agency to the new insurer(s)?

   a. Do the agency's files have enough information to satisfy the new insurer's underwriting requirements? What's the earliest we can see how a random sampling of files would be transferred and what the results will be?

   b. Who will read the agency's files, interpret the information, and decide what coverages/endorsements are needed from the new insurer(s)?

   c. How are we to allow for the extra time it takes for special forms to be sent, completed, and returned for states requiring countersigning (i.e. UM/UIM acceptance or rejection must be completed before issuance of the policy in some states)?

6. When will the policies start renewing from old paper to new paper?

   a. When is the earliest we can get started? We try to process renewals __ days before their effective dates; therefore we have already missed the __(varies day to day)__ date.

   b. What can we do for the insurer(s) to compensate for any loss of time if the information gets to an insurer late?

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Questions Agents Should Ask Themselves and Insurers Before Agreeing to and Planning of a Transfer of Business

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7. Are both the agency and insurer customer service departments fully staffed? How is work distributed, in other words: who handles which parts of the alphabet or do they use another system?

8. How will the transition progress? When and how will insureds be informed of the transition from the current company to the new insurer(s)?

9. At what frequency will the policies be rolled over to the new insurer? Agency and insurer managers need to budget team members' time so as to handle the extra work. How many applications will need to be created on the first day and during the first month the insurer(s) begin servicing our book? Who will be expected to create those applications? Can the insurer's programmers (IT department) prepare a way for our agency management system to be copied and pasted into the insurer's database and then have policy renewals generated for our policyholders so no one has to fill out any paper or computer-based applications?

10. Will waiving of signatures be okay for the rollover policies? Are our policies based in states that will recognize these as renewals and permit waiving of signatures on renewals?

11. Who will make sure our agency system can and will receive downloads containing the newly issued policy information from the new insurer(s)?

12. Will a new agency or policy number prefix code be issued for the policies rolling over?

13. Will a worksheet be created to track the receiving, processing, etc. of applications so we can measure our progress and make sure none are missed? For how long should this be tracked?

14. When can a TOB agreement be drafted by the insurer for the agency's owner and manager(s) to consider? When can a list of actions be created showing who will do which actions? ■

Q&A with Donald S. Malecki, CPCU

by Donald S. Malecki, CPCU

Donald S. Malecki, CPCU, is a principal at Malecki Deimling Nielander & Associates L.L.C., based in Erlanger, KY. During his 45-year career, he has worked as a broker, consultant, archivist-historian, teacher, underwriter, and insurance company claims consultant; and as publisher of *Malecki on Insurance,* a highly regarded monthly newsletter.

We are having a difficult time trying to differentiate between Delay In Completion Coverage, written in conjunction with Course of Construction policies, and Force Majeure coverage. Some descriptions of both coverages make them appear as though they are one in the same. What is your opinion?

Delay In Completion Coverage is a type of "soft-cost" coverage, because it is intended to cover construction-related losses that are consequential in nature. The criterion of this coverage, however, commonly is direct physical loss or damage to covered property from a covered cause of loss. This soft-cost coverage is generally requested when a delay in the construction project can cause serious financial loss. Examples include delay in occupancy and rentals, and lack of revenue to pay for the owner's debt obligations.

Delay In Completion Coverage is not standard, meaning that coverage may vary with those insurers that are willing to write it. Generally, these forms do not pay for any delay in completion brought about by, for example, the enforcement of any law or ordinance regulating construction or repair; interference by strikers or other persons; or change orders that create major shifts in costs compared to the original plans of construction.

What is needed to the extent otherwise available and affordable for these types of exposures is Force Majeure coverage. This, too, is a non-standard form that, in fact, needs to be tailored to fit the needs of project owners or contractors.

While these policies have been known to cover delay from strikers and other labor disputes, changes in laws after policy inception that affect construction, and loss beyond the control of insureds, the ultimate coverage will depend on some very stringent underwriting and high deductibles. Some of these forms also can be written so as to apply on a difference in conditions basis over a Delay In Completion form.

The fact that both Delay In Completion and Force Majeure forms have similar purposes may be the reason for the conclusion that they are one in the same. Closer observation, however, will reveal that Force Majeure coverage is necessary when the Delay In Completion form is not broad enough to cover the exposures that could give rise to loss. ■

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