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Consulting, Litigation, & Expert Witness

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

This is my last "From the Chairman" article. My term as chairman expires after the CPCU Society's Annual Meeting and Seminars in Atlanta. As you know, **Daniel C. Free, J.D., CPCU, ARM,** will be replacing me, and **Jean E. Lucey, CPCU,** will be replacing Dan as editor of *CLEWS*. Dan is a veteran member of the CLEW governing committee, and Jean is the chief librarian of the Insurance Library Association of Boston, the world's largest insurance library.

I'm sure you will agree that Dan has done an admirable job as editor for the last three years, and I have every confidence he will do the same as chairman. Jean's qualifications as editor are exemplary. All of us who use the Boston library as a research source have been more than satisfied. She's an excellent writer and should also do a great job as editor of *CLEWS*.

In order to help with the transition of committee leadership, I have agreed to serve for three more years as a committee member, and then it's sayonara. In my 43 years as a CPCU, I have never worked with a more enjoyable and competent group of CPCUs as this committee represents. I will not necessarily miss handing the chairmanship over to Dan, but I know I'll miss this committee in three years.

I look forward to seeing as many of you as I can at the CPCU Society's Annual Meeting and Seminars in Atlanta. ■

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Editor's Corner

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*.

This will be my final contribution as editor of your newsletter. I will be assuming the role of chairman of the CLEW Section following the CPCU Society's Annual Meeting and Seminars in Atlanta. My sincerest hope is that you have gotten to take something positive away from the issues we have put together during my tenure—perhaps some useful information, a good idea, a networking contact, or maybe even a joke that you can tell in polite company.

■ ***My sincerest hope is that you have gotten to take something positive away from the issues we have put together during my tenure.***

In this issue, we have a follow-up article from **Scott Simmonds, CPCU, ARM**, to his contribution in our last issue. This piece, entitled "Build a Great Web Site" touches upon something we've all thought about for some time. These days, it is not just a matter of whether your firm has a web site—it's how effectively it attracts potential clients. Our soon-to-be immediate past chairman, **Donn P. McVeigh, CPCU, ARM,** has included an article entitled "Agent and Broker E&O." Replacing me as editor will be **Jean E. Lucey, CPCU, ARM,** chief librarian of the Insurance Library Association of Boston. I read all of the section newsletters cover to cover, and they are all very good. But think about this—who could possibly be better qualified to serve as your editor than Jean? On her behalf, I put this before you: If Donn has time to write an article with all of the other duties he has undertaken as our capable chairman, surely you have time to send us your contribution.

As with many other members of our Society, I have been deeply saddened at our loss of **Charlie Shaddox, J.D., CPCU**. Charlie had served on the CLEW Section Committee for several years and only recently left us to help the Senior Resource Section. I got to know Charlie quite well over the years. We had a lot more in common than most might think, as lawyers, CPCUs, amateur chefs, and especially as committed outdoorsmen. The forests, brush, lakes, rivers, and marshes won't be the same without Charlie out in the middle of them. The wild game and fish may breathe a collective sigh of relief, but Charlie's compassion for protecting species, populations, flocks, and fisheries means that they, too, have lost a good man. Please take a moment to read the memorial piece devoted to our friend and colleague. ■

In Memoriam: Charles R. Shaddox, J.D., CPCU

by Donn P. McVeigh, CPCU, ARM

It is with a deep heart that I write this article. **Charles R. Shaddox, J.D., CPCU,** passed away on June 3, 2005, after suffering a massive heart attack while visiting relatives and friends in his hometown of Harrison, Arkansas. Charlie was a dear friend and colleague. We go back to 1987 when Charlie first involved me as an expert witness in a Texas case.

Much of the information contained in this article is attributable to **Joeseph A. Wilkerson, CPCU, CIC,** a long and close friend of Charlie's; a special thanks also to **Linda McDonald, Esq.,** and **Steve Walraven, Esq.,** of Charlie's law firm. Charlie was only 68 when he passed. He was born in Harrison on April 17, 1937, on a 57-acre farm of modest means. As a child, he milked cows by hand, grew apples, and raised hogs. He worked his way through college at the University of Arkansas, earning a B.A. degree in 1960. He started in the insurance business selling life insurance, and then went to work for Northwestern Mutual, a large property and casualty insurance company as a special agent. Special agents were sometimes called "field men." They were a combination marketing representative, field underwriter, field adjuster, coverage consultant, building appraiser, and whatever else it ethically took to service his employer's network of independent insurance agents. I should know, because I was one too.

While still working for the insurance company, he entered Southern Methodist University's law school, and, upon being transferred to San Antonio, TX, by his employer, obtained his J.D. at St. Mary's University's law school in 1966. He obtained his CPCU designation a year earlier in 1965.

Shortly after obtaining his law degree, he went to work for Groce, Hebdon, Fahey, and Smith (which later became Groce, Locke, and Hebdon), San Antonio's most prestigious law firm at the time. Soon, he became the "second seat briefcase carrier" lawyer for the firm's outstanding insurance defense trial attorney. Within a year, Charlie was trying "slip and fall" cases as lead defense attorney. Wilkerson, at that time, manager of the Claims Department of Employers Casualty Company, tells me that he became aware of Charlie's many talents. Wilkerson assigned many cases to Charlie. Wilkerson says more and more cases were assigned to Charlie because he knew that Charlie strongly believed in his role as an attorney was to try lawsuits rather than taking a lot of depositions and other discovery pursuits and then recommend settlement the week before trial. Wilkerson adds that, because of Charlie's insurance background, that he had more experience than many lawyers, in negotiating settlements of claims in litigation. Many adjusters, he felt, settled more cases in a week than a young trial lawyer would in a year, and he didn't remember any courses in law school teaching students how to settle lawsuits. Charlie's reputation as a winner grew with the plaintiff's bar so much so that many serious cases were settled early before serious defense costs were incurred.

Charlie later took the law firm's best trial lawyers with him to form what is now known as Shaddox, Compere, Walraven & Good, which became a very successful law firm. Wilkerson tells me that Charlie tried 27 lawsuits for Allstate in one year. He was active in many professional associations and societies, including the State Bar of Texas, San Antonio Bar Association, CPCU Society, International Association of Insurance Counsel, Texas Association of Defense Council, Defense Research Institute, and the American Board of Trial Advocates. We, of course, best know him through his activities with the CPCU Society. Charlie was very active with the CPCU Society's Alamo Chapter, and very active nationally with the Society. He participated in many national symposia and seminars sponsored by CLEW, including the series of mock trials held each year at the CPCU Society's Annual Meeting and Seminars. He was a charter member of the CLEW Section Committee, and remained with that committee until last October, when he transferred to the Society's Senior Resource Section Committee.

But Charlie was also a renaissance man. He was an avid hunter, fisherman, and also a renown creative chef. Several years ago, he gave me a copy of his cookbook on wild game titled *Sunday's Game*. This book is now in its second printing. He supported the arts, and was an honored member of the Poetry Society of Texas and participated in monthly poetry round robins. His love of music put him on familiar ground at the opera or at Flores Country Store. Much of this information was contributed by, and with thanks to, Joe Wilkerson.

Charlie's southern drawl (he attributed it to his Arkansas upbringing) could be disarming to those who did not know Charlie well, particularly attorney adversaries. He had a keen and razor-sharp mind, a great sense of humor, an ever-present sense of ethical conduct, and a kind and gentle soul. We love Charlie and will miss him a great deal. ■

Dividing It Up

by Concetta A. Silvaggio and Kevin M. Ward

Insurers can benefit from legislation amending the practice of joint and several liability, but in some cases they need to ask about plaintiffs' previous settlements.

- **Concetta A. Silvaggio** is a partner with Willman & Arnold. Her practice concentrates on civil litigation where she most frequently represents businesses and insurance carriers. Since a significant part of her case load involves personal injury claims, she has developed a close relationship with medical experts throughout the nation and often coordinates the efforts of counsel representing various defendants in toxic exposure cases. When cases involving multiple defendants proceed to trial, she invariably assumes the role of lead counsel. Her practice also includes representation of companies involved in hazardous waste site litigation, and she has extensive experience in products liability, negligence, breach of contract, and employment discrimination.

- **Kevin M. Ward** is an associate with Willman & Arnold. He specializes in providing counsel and litigation expertise in the fields of product liability defense and toxic tort litigation. Ward has been asked to speak and has published written materials in areas such as Tort Reform and Dram Shop liability.

Supported by the Bush administration, tort reform is on the move. Efforts already under way have resulted in a trend away from insurers facing joint and several liability and toward several liability, in which financial responsibility is apportioned according to the blame assigned to each party by judge or jury. While this is clearly good news for insurance companies, insurers, and their lawyers must be as vigilant and strategic as ever if they are to benefit fully from the most recent rounds of lawsuit reform.

Nowhere is vigilance more crucial than in cases where at least one of the liable parties has entered into bankruptcy either before or after settling with a plaintiff for damages.

Historically, juries have returned massive toxic tort judgments in favor of plaintiffs. Under joint and several liability, even if a company was deemed only 1 percent at fault for a plaintiff's injuries, that company could be held fully responsible for massive awards that may have had very little to do with their own wrongdoing. In case after case, these "jackpot" awards exhausted companies' insurance policies, plunging some into bankruptcy. The inability of a defendant, such as one who has declared bankruptcy, to pay its proportionate share of the judgment historically fell on the shoulders of the other defendants that still had insurance coverage.

Insurance companies have long protested such awards, arguing that companies should pay their fair share of an award and nothing more. Their protests are finally being heard: lawsuit reform legislation such as Pennsylvania's Fair Share Act of 2002 has begun to change the legal landscape, amending prior practices of using joint and several liability. For example, that act provides that defendants determined to be less than 60 percent at fault are liable solely for damages proportionate to their percentage of fault, and not for any portion of harm done by any other entity. Pennsylvania law also allows for defendants to ask for dismissal of frivolous lawsuits, and gives judges discretion to fine those who file such suits or even require those who file a frivolous lawsuit to pay all of the defendant's legal fees.

States Follow Suit

Pennsylvania is not alone in its move away from joint and several liability. Other states have enacted similar legislation to either limit or eliminate joint and several liability entirely. Currently, 39 states have some form of modified joint and several liability.

Application of joint and several liability varies by state. Some have a complete bar of joint and several liability, some prevent the application of joint and several liability to noneconomic damages, and others preclude its application to a defendant that does not satisfy the threshold of responsibility needed to trigger its application.

For instance, New York provides for several liability only for noneconomic loss such as pain and suffering if the defendant is less than 50 percent at fault. California provides for apportioned noneconomic damages on a percentage share, and any company may be apportioned a percentage of fault, whether it settled with the plaintiffs, was never sued before by the plaintiff, or has since declared bankruptcy.

Some states, such as Ohio and Wisconsin, require the defendant to be found at least 50 percent responsible in order for joint and several liability to apply. Ohio also allows defendants to reduce their share of liability by assigning liability to companies not party to the lawsuit, including those that have since declared bankruptcy. Similarly, Florida provides for several liability only among defendants deemed to have less responsibility for injuries than the plaintiff, and noneconomic damages are awarded only on a several basis.

Texas permits the court to mold the plaintiff's award proportionally by the amount of fault that the jury assigns to settled parties and the plaintiff, and defendants may designate and make claims against other responsible third parties, including bankrupt companies. Kentucky and Indiana provide for apportioned liability among defendants based on a percentage of fault basis; they

also allow for juries to consider the fault of companies that had previously settled with the plaintiff.

Still other states, including Utah, North Dakota, Mississippi, and Michigan, provide for several liability only, where each party is only responsible for his or her portion of the blame.

Previous Settlements

The recent *Larry Slayton v Gould Pumps Inc.*, which was argued by the law firm Willman and Arnold before the Allegheny County Court of Common Pleas and allows the percentage of fault of even bankrupted companies to be taken into account when proportion of blame is being assigned, may have implications for other states. Until recently, plaintiffs successfully argued that they did not have to disclose previous settlements with bankrupted parties because the bankruptcy code protects them from being pursued for damages. Attorneys are now successfully arguing that, without knowledge of previous settlements, it is impossible for juries and judges to fairly apportion liability to defendants. The purpose of the Fair Share Act, defense attorneys argued, is to ensure that a jury receives a complete presentation of the fault of all entities relevant to the cause of action so that the jury may make a determination as to the responsibility of each. To preclude a jury from considering evidence of an entity's fault would frustrate the purpose of the Act.

In October 2004, Judge Gene Strassburger agreed with defense counsel and ruled that the Fair Share Act does not prevent juries and judges from taking into consideration a plaintiff's earlier settlements reached with now-bankrupt entities. As a result of Slayton, defendants' lawyers may present the identity of the previously settled parties to a judge or jury so that responsibility may be fairly apportioned to those companies. Judges and juries may then review the facts surrounding the bankrupt companies' liability, list the bankrupt companies on the verdict slip, and then apportion blame to them. Defendants may not pursue a bankrupt entity for its share of the judgment, but instead, they may use the information to lessen their own percentage of fault accordingly.

In addition, Congress is considering an Asbestos Trust Fund as a way to limit liability, but even with a pro-business Republican majority in place, it will not be initiated without a significant and possibly protracted legal fight. Insurers, particularly those that find initiatives such as the Asbestos Trust Fund too costly, may wish to encourage their state legislatures to follow Pennsylvania's lead as a way to limit liability, particularly given Judge Strassburger's ruling to apportion blame even to bankrupt parties.

Whatever the political climate, tort reform is unlikely to be a cut-and-dry affair. Cases such as *Slayton* put defense attorneys in the unusual position of "making the case" against other defendants, even bankrupted defendants, to show that those defendants own a significant portion of blame. While juries are still unpredictable, the door is now open to achieving settlements that more fairly apportion blame, and thereby lessen the financial burden on companies and their insurers. ■

Author's Note:

Recently, the Constitutionality of the manner in which the Fair Share Act was enacted was called into question in two Pennsylvania cases, *Hicks v Dana Corp.* (Pa. Ct. Comm. Pleas) and *DeWeese v Weaver* (Pa. Commw. Ct.). These cases are currently on appeal with the Pennsylvania Supreme Court and are expected to be heard later this year. In an attempt to correct the perceived procedural defects in the Act's passage, the Pennsylvania Legislature has reintroduced a bill which, if passed, would reinstate the Fair Share Act. Due to the rulings in *Hicks*, and *DeWeese*, the method used by Pennsylvania Courts in apportioning liability is in question, and the lower courts have not made any decision as to the application of the Fair Share Act as a result of the Constitutionality issue.

Agent & Broker E&O

by Donn P. McVeigh, CPCU, ARM

I have been involved in a lot of agent/broker E&O cases as a litigation consultant/expert witness—both as a plaintiff and defense witness—and I have seen a number of errors and/or omissions recur a number of times. If you are an agent or broker, the following remarks are meant for you. The subject areas in which these recommendations are made represent the most common areas involved in my experience as a litigation consultant.

These recommendations represent best practice and are over and above custom and practice of the average insurance agent or broker in the United States.

Document Retention

Don't be so rigorous in purging your files. While this may require additional archival file space, it is worth it in the long run. The document retention requirements in your state's insurance code are not adequate. Following just the insurance code requirements in a lawsuit that extends beyond these requirements will not protect you. Maintain your records as long as you possibly can. These records should include:

- copies of policies or daily reports
- copies of binders or cover notes
- all pertinent correspondence to and from your clients and carriers
- facsimile logs
- telephone and interview conversation notes
- loss histories

This list is not intended to be exhaustive, but it should be a good start. Do the best you can.

Policy Review

Carefully review the policy when received from the insurer before delivering it to your client. In addition to looking for typographical errors, make sure it comports with the application or renewal instructions. All too often, an extension or coverage modification is requested on the application and not included on the policy. Never take for granted that because something is requested on the application that it is included on the policy prepared by the insurer—even if the same underwriter has complied with similar requests in the past. Underwriters can make mistakes too. If the underwriter has not made a mistake, it is possible that underwriting guidelines (or underwriters) have changed and you have not been informed.

Sublimits

Sublimits are often indicated on both property and liability policies. With property policies, they can occur with contingent business interruption, property in transit, earthquake or flood coverage, and many, many more. With liability insurance, they can occur with non-owned auto, uninsured or underinsured auto, employment practices liability, and many, many more. These sublimits should be conspicuously displayed on the declaration page(s), but, even if they are, point them out in writing to your client.

Exclusions

It may be impractical to highlight all of the exclusions, but the "major" ones should be identified in writing. If just the major exclusions are identified, be sure to add something in your cover or transmittal letter about reviewing the policy for a thorough understanding of all the exclusions and the scope of coverage.

Additional Coverages

If you recommend additional coverages, such as employment practice liability, business interruption insurance, etc., be sure to confirm in writing those coverages not wanted by the applicant. In most jurisdictions, if not all, agents and brokers are not required to suggest coverage not requested by the applicant—but, if asked, an appropriate response is required.

Applications

Most ACORD applications provide for an applicant's signature line. This is necessary because of potential material misrepresentation or concealment by the applicant. This is a serious matter. Have the applicant review the completed application (if you have filled it out) and sign in the appropriate place. Don't just send him or her the signature page. This is in the best interests of the policyholder, underwriter, and the agent or broker.

Duplicating Previous Coverage

In writing a new account, many agents and brokers are asked to duplicate existing coverage placed by the previous agent or broker. In doing this, many agents or brokers structure the new program based only on the expiring policy. This is dangerous! In doing so, the possible errors and omissions of the previous agent or broker are perpetuated. Treat any new account as having no insurance history with regard to designing coverage and limits. Only look at the expiring policy last as a check.

Conclusions

If one lesson is to be learned from these examples, it is document, document, document. When an uncovered loss occurs, many policyholders will claim that the appropriate coverage was requested of the agent or broker. Without proper documentation, the agent or broker is in for a long, costly, and frustrating litigation process. ■

Build a Great Web Site

by Scott Simmonds, CPCU, ARM

■ **Scott Simmonds, CPCU, ARM,** is an insurance consultant. He and his firm, Insurance Consultants of Maine, never accept fees or commissions from insurance companies or agencies. He does not sell insurance. Simmonds can be reached at scott@icofmaine.com or (207) 284-0085.

His web site is www.endwimpyinsurance.com.

If you do not have a great web site, you are not serious about growing your consulting practice.

The marketing of my business depends on my web site. Prospects visit it. People searching for consulting services find me because of it. I send people to my site who are looking for more information. Visitors sign up for my monthly newsletter. It is a key component to marketing my company.

Rule number one. As in all things, your web site must meet your clients' expectations. When your client or prospect visits your site, he or she must be comfortable with the form, layout, function, and navigation of the site. It must be professional. Otherwise, why would anyone think you were a professional?

We have all had the experience of visiting a site that was clearly designed and built by the owner of the site (or his or her kid). The colors are off, the navigation seems clunky. It just doesn't feel right. Clients expect that you will have a professional web site, not something that you slapped together using a $49.95 software package. I bet you don't buy your business clothes from a discount department store. Why would you get your web site from one?

Think about your own web surfing habits. What components do you like in a site? List sites you prefer. Look at the web pages of local attorneys and accountants. Look at bank web sites. Get a feel for what appears professional and what seems to miss the mark.

Find out who designed the sites you like. Sometimes you'll find the information at the bottom of the home page. If not, e-mail the webmaster. He or she is usually happy to refer business.

Here are some other thoughts on web sites:

- Read Seth Godin's book, *Big Red Fez*. It includes great ideas on what makes a site work.
- What is it that you want visitors to do when they are on your site? Sign up for your newsletter? E-mail you? Read your bio? Help your visitors by showing them what you want them to do.
- Stay away from flash. I mean both things that are flashy and the programming tool, Flash, that puts videos and fancy graphics up when a site first opens. Your site must be easy to navigate. Flash used when your site first opens just gets in the way of easy navigation.
- Your site should be 100 percent professional. Prospects will judge you based on the kind of site you have.
- Make sure the navigation is simple to understand. Nothing hidden or mysterious. Make visitors feel at home. Links should be clear. Each page must have a way to get back to your home page. No dead-end pages.
- Go to www.godaddy.com or www.netsol.com to find out what site names are available. Many "insurance" names are taken. Get creative. Your site name should be a ".com" if at all possible. It should also be easy to remember and spell.
- Your contact information should be on every page. You want it to be easy to find you and easy to contact you.
- Don't let your designer talk you into fancy designs. You want a site that will get you business, not one that will win awards. The only award that matters is the prize in your checkbook when you get a new client.
- Most of your prospects will come to you because of your networking activities. Positioning your site to be top ranked in Google is of limited value. That being said, you don't want to be invisible. Your web designer can help you with the basics. You don't have to spend big bucks on search engine optimization based on keywords like "insurance" and "insurance advice" though. You want people to find you when they are looking for you. Focus on optimization on your company name and your name. Go to Google and type in "Scott Simmonds insurance." My listings take up four pages. Also optimize to have your site come up for "insurance consultant Nevada," or whatever your state or city is.
- Once you get a web domain name, your web designer should help you find a hosting company (the computer where your web pages reside waiting for a visitor). The hosting company will also help with e-mail accounts. Hosting shouldn't be expensive. I pay $60 a year for the site and full e-mail services—I think the first year was $30.
- Back up your web site regularly. Even if your hosting company does backups, the ultimate responsibility is always with you to manage the risk of corruption, hacking, and system failure.

The blessing and curse of the Internet is that a web site is never done. Tweak, jiggle, improve, and refine constantly. ■

Personal Risk Management: Using ICE to Save Your . . . Skin

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

ICE was good to Wayne Gretsky. And, it appeared, ICE was good to Dean Martin. When you mention ICE to a risk manager, he or she will think of the negatives: slip-n-falls, motor vehicle accidents, and lost productivity. But ICE can save your life.

Understand that we are not talking about frozen water here. Instead, we are talking about the acronym, ICE, which stands for "In Case of Emergency."

I first heard about ICE shortly after the London subway bombings, where it apparently came in really handy. If you are incapacitated, unconscious, or otherwise incapable of communicating, a first responder may be able to identify you by the documents on you, such as a driver's license or passport. However, think about how little information those things really provide. Ask any EMT—if you are still alive, every second counts. This is where ICE and your cell phone may provide the key to saving your life.

Almost everyone has a cell phone these days. Think of someone who is close enough to you to be able to provide vital assistance to a first responder if you cannot do it yourself. Enter that person's phone number into your directory under the name ICE. A first responder can toggle through your directory until he or she reaches ICE and call that number for vital medical information that may make all of the difference.

For those who want to take it to the next level, you can enter a blank before the letters ICE ("_____ICE"), which will make that number appear first in your directory. The first responser will not even need to toggle through your phone book. If you have more than one number, you can enter "_____ ICE 1," "_____ ICE 2," and so on.

Everyone at our house has a cell phone. We have all programmed in at least one ICE number at the top of our directories. I have told my colleagues, and my kids have told their friends. This is useful information that you should feel free to pass along to your family and friends as well.

Of course, you should not forego keeping some vital information in your billfold, or purse. Your cell phone can be lost, broken, wet (which ruins it for good) or simply have a dead battery. However, it takes only seconds to program an ICE number into your phone—the very seconds you may need when it counts. As even the most grizzled risk manager would doubtless agree, this is one time when ICE is nice. ■

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