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The Chairman's Corner

by James D. Klauke, CPCU, AIC, RPA

On the wall of my room when I was in rehab was a picture of the space shuttle blasting off, autographed by every astronaut now at NASA. On the top of the picture it says, "We found that nothing is impossible." That should be our motto.

—Christopher Reeve

I am proud to announce that the Claims Section has again achieved the Gold Award for sections, in the Circle of Excellence program of the CPCU Society. The Claims Section conducted two symposia on arson and mold this past year, and section members put on 13 other seminars across the country. Member Dave Mandt, CPCU, of SAFECO, created the Mold Mania seminar on CD, which has been widely distributed by the Society. We were one of only two sections that produced five newsletters. Finally, our *CQ* editor proposed a chapter liaison program, which is now operational in 10 chapters. There were many other accomplishments in each of the program's 13 goals. It is a pleasure to work with such professionals who make up the Claims Section Committee. Please see the article on page 2 written by committee member Darnell Pettengill, J.D., CPCU, "Year in Review—How the Claims Section Won the Gold."

Since I last wrote in the *CQ*, the Claims Section prepared for the 59th Annual Meeting and Seminars, put on two seminars, and had our annual claims lunch with the new designees and other claim professionals who attended the Annual Meeting. Our annual committee meeting was held on the Saturday before the Annual Meeting began, and we spent the day developing the section's plans for the upcoming year.

One of our plans for the next Annual Meeting in Los Angeles is to present a two-hour seminar in each time slot available for a total of six claims seminars. We plan to make this Annual Meeting special for claims professionals across the country so they will come back to the Annual Meeting for the best education experience of the year. Most years the attendance at the Annual Meetings is predominantly new designees, committee members, and a few returning CPCUs. We are looking to bring back the claim CPCUs to this Annual Meeting and will have all seminars qualified for continuing education credits for all states, and organizations like the RPA.

Our current lineup involves seminars on fraud, bad (good) faith, auto claims, workers compensation, liens and subrogation, and fire versus boiler. There will be more than one program for each discipline of claims professional. We will provide details in future *CQ* issues as your Claims Section Committee develops the programs. If any of the section members would like to get involved in the planning or presentation process please contact me. There are six separate groups planning for the seminars.

At the 59th Annual Meeting and Seminars in New Orleans, the Claims Section put on two back-to-back seminars on the same subject. The subject is on a lot of insurance minds today—terrorism (Terrorism, Sabotage, Negligence—Are You Prepared to Handle the Next Major Catastrophic Event?). It started off with a news broadcast presentation of an event similar to the terrorist attack on New York. As more bits of news came out it became unclear whether it was truly a terrorist attack or just plain negligence.

Bob Krywiak, CIP, CFEI, FCIAA, an executive general adjuster for Crawford Adjusters Canada, highlighted the first seminar by discussing the issues that become important with the investigation of major catastrophe events. Gregory Hopp, J.D., of Cozen & O'Connor, discussed coverage issues. The third speaker was Peter W. Ulrich of RMS International, who discussed terrorism profiling from a reinsurance perspective.

I led off the second session and discussed the issues faced by an adjuster in the catastrophic event environment. I was followed by Jonathan Held, a New York contractor, who discussed rebuilding the catastrophe. Jack Damico, CPA, followed him and discussed business interruption issues that are different with catastrophic events.

In addition to Annual Meeting and regional seminars, we are moving forward with the chapter liaison program and have 10 chapter liaison representatives in place. We are still looking for more claims people who would like to get involved. If you have an interest in any of our many programs please contact me or any of the other committee members. We will get you involved. You will find our names and contact information on the Claims Section web site.

We still want to hear from each of you. Please write or e-mail me with questions, criticism, or constructive suggestions on how we can jointly make the Claims Section worth the extra cost of membership. And remember, every suggestion or idea is given serious consideration. Your committee works hard to make the section a success. The section will be enhanced with your input. We look forward to hearing from you. ■

Year in Review—
How the Claims Section Won the Gold

by Darnell W. Pettengill, J.D., CPCU

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Congratulations Claims Section members on being golden for the second consecutive year! That's the assessment of the section leadership that reviewed all section Circle of Excellence applications for 2002-2003. This recognition stems from section members completing activities that accomplish the following goals: Goal #1—To make the CPCU designation the most widely recognized, valued, highly respected professional designation in the property and casualty insurance industry; and Goal #2—To provide all Society members access to a continually increasing number of programs and services that position them for success.

In reviewing the applications, the committee sought to balance the quantity and quality of the activities completed. While a certain minimum number of activities qualify a section to receive Bronze status, Silver and Gold reflect not only quantity, but more importantly quality. Here's a sampling of the activities that earned us the gold.

Conduct a symposium—"How To Put The Heat On The Arsonists" seminar in Indianapolis, IN on 10/2/02 with 120 attendees. Co-sponsored by American Re, Farm Bureau Insurance of Indiana, and the CPCU Society's Central Indiana and Northern Indiana Chapters.

Conduct a workshop—"Excess Verdicts: Between a Rock and a Hard Place" by Eric Sieber, CPCU, at the Pacific Claims Executive Association Meeting, 10/1/02.

"Mediation and Arbitration—New Ideas for Old Claims," a one-hour and 15 minute presentation by James Klauke, CPCU, and Lola Hogan, CPCU, at the 2003 PRIMA Conference, 5/19-21/03 in Reno, NV.

CIRCLE OF EXCELLENCE
RECOGNITION PROGRAM

Employer outreach—Dave Mandt, CPCU, an assistant vice president claims with SAFECO, put together a seminar in 2002 entitled "Mold Mania." He had the foresight to have the public relations staff of SAFECO videotape the seminar. The CPCU Society was given that material and subsequently produced a CD that was sold at the 2002 Annual Meeting and Seminars in Orlando, and was highly popular. Dave was informed in November 2002 by CPCU Society Immediate Past President John Reynolds, CPCU, that a major insurer was going to license the Mold Mania CD-ROM for up to 1,000 of its employee users. Dave's foresight not only allowed the initial presentation to be preserved and marketed generally by the CPCU Society, but also serves as a great example of employer outreach.

Publish newsletters—Five issues of *Claims Quarterly* were published between 7/02 and 6/03. These issues are of very high quality. Articles are originals, not reprints. Each issue is quite lengthy. A number of the articles were written by committee members. In addition, committee members have written a number of articles for other publications including: "Preserve the Evidence" by Brian Marx, CPCU, for the 9/02 issue of *Claims Magazine*, "Workers Compensation Third Party Investigation: A Practical Approach" by Brian Marx for the 1/03 issue of *Claims Magazine*, "12 Factors to Effectively Negotiate Workers Compensation Subrogation Liens" by Brian Marx in the 3/03 issue of *Claims Magazine*.

Local chapter outreach—Marcia Sweeney, CPCU, our *CQ* editor, proposed a program to designate a Claims Section Liaison from within each CPCU chapter. The purpose is to promote high visibility of the Claims Section by encouraging local involvement of Claims Section members. The following CPCU Chapters have Claims Section Liaisons: Connecticut Chapter—Johanne Upton, CPCU, director of claims at Acadia Ins. Co. in Farmington, CT; Atlanta Chapter—Tony Nix, CPCU, State Farm in Fayetteville, GA; Sacramento Valley Chapter—Jonathan Stein, attorney-at-law; Colorado Chapter—Carol Riggs, State Farm in Denver, CO; Chicago-Northwest Suburban Chapter—William Brauer, claims director of GE RE, Barrington, IL and Laura Shklair, Kemper Ins. Cos., Long Grove, IL; Detroit Chapter—Kathleen Robison, CPCU, vice president of claims for Daimler/Chrysler Ins. Co. in Detroit, MI; and Long Island Chapter—Ralph Riemensperger, CPCU, retired from Swiss Re. This program will undoubtedly continue to grow and make the Claims Section even more visible at the local chapter level.

Help us continue our success in 2003-2004. Submit your involvement in activities that accomplish the above goals to Jim Franz, CPCU, Farm Bureau Mutual of Indiana, 7217 Engle Road, Fort Wayne, Indiana 46804-2228, (W) 260-432-8744, (Fax) 260-432-8817 or e-mail jim.franz@infarmbureau.com. To view the complete 2002-2003 Claims Section submission, visit the Claims section page of the CPCU Society web site at www.cpcusociety.org. ■

Congress Seeks to Fix the Class-Action Crisis: The Class Action Fairness Act of 2003

by Kelly Cambre Bogart, J.D., and Kevin R. Derham, J.D.

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Kevin R. Derham, J.D., is an associate at Duplass, Zwain, Bourgeois and Morton. Derham practices in all areas of insurance defense, product liability, environmental, toxic tort and construction litigation, generally in the context of mass tort claims or class actions. Derham can be contacted at kderham@duplass.com

Imagine receiving an unsolicited letter from a lawyer that says that your mortgage company has been holding more money in your escrow account than needed as a cushion. Although the amount of money may not be significant, the lawyer promises that he can get that money back for you now rather than your having to wait until you pay off your mortgage, and you have to do nothing but wait for the check. On the other hand, if you would like to reject his offer to become part of this class-action lawsuit, you must fill out some paperwork and send it to him. The fine print explains many details, including the attorney's fees. Rather than bother with the small print, you throw away the letter and figure you will get a check sometime in the not-so-near future.

After a period of time passes, you receive a bill for about $150 for the attorney's fees that were in the fine print of that letter that you have long forgotten. After remembering that the letter said the attorney was receiving one-third of the reward, you quickly calculate that you should be owed around $450. After a few phone calls in an effort to find your check, you are informed that you have been credited $2.19 on your mortgage statement, and you do owe the attorney's fees based on the fine print that you threw away. This story seems quite unfair, but it actually happened due to the currently permitted structure of lawsuits known as class actions.

Introduction

The class-action vehicle, designed to provide an effective tool to compensate large groups of citizens injured by the same event, has fallen victim to abusive practices over the past decade, such as that detailed above. This abuse has raised the question as to how to bring these claims under control and prevent them from further evolution. Once believed to be an efficient procedural mechanism, the class action has progressed (or digressed) into a means for spinning worthless claims into extremely lucrative awards for plaintiff attorneys—often doing little or nothing for the actual plaintiffs themselves. Such has become the trend that plaintiffs are frequently known simply to be awarded discount coupons while class counsel are awarded multi-million dollar attorney fee rewards, oftentimes at a net financial loss to the actual plaintiffs who may be called upon to satisfy such awards. Innocent companies, often forced by an extortionist application of the class-action vehicle, can be and have been destroyed by the notoriety, embarrassment, and large amounts of money that must be spent to defend such actions. Class-action lawyers reap the greatest rewards through carefully pleading their claim so as to remain in a sympathetic and favorable state forum as federal jurisdiction is generally foreclosed by effective class-action complaints.

The Class Action Fairness Act of 2003 sought to eliminate these and other concerns inherent in the class-action trends that have developed.[1] Under current law, the two general means of obtaining a federal forum for a class action require there to be either a federal or constitutional law at issue (federal question jurisdiction) or that every plaintiff be a citizen of a state different from that of every defendant and each plaintiff's claim be worth more than $75,000 (diversity jurisdiction). The Act proposed a means whereby class actions satisfying a new "minimal diversity" requirement along with other factors could be filed in or removed to federal district court.

The House version of the bill (HR 1115) passed by a 253 to 170 vote; the Senate version of the bill (S. 274) passed out of the Senate Judiciary Committee 12 to 7 before heading to the Senate floor. The Senate bill, believed to be the most probable version proposed for enactment, needed 60 votes to avoid filibuster[2] and move through the House. While the two bills were very similar, the Senate bill

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required a higher dollar amount in controversy ($5,000,000 as opposed to the House bill's $2,000,000) and was not retroactive (the House bill would apply to presently pending class actions as well). The following provides an overview of what spawned the legislation, pertinent provisions (procedural and substantive) therein and arguments for and against the measures that have been advanced by interest groups.

■ *While the class-action procedure is recognized as an important and valuable mechanism in our legal system, Congress has recognized that such claims have often succumbed to unfair, unprincipled, and inefficient practices.*

The Findings of Congress

The impetus for the legislation revolves around several findings of Congress that are set forth in the opening section of the proposed legislation. While the class-action procedure is recognized as an important and valuable mechanism in our legal system, Congress has recognized that such claims have often succumbed to unfair, unprincipled, and inefficient practices. Of particular concern are abuses that have taken place over the past decade, which, according to Congress, have resulted in harm to both class members with legitimate claims and defendants that have acted responsibly, adverse effects on interstate commerce, and undermined the public's respect for the judicial system. Specifically targeted, and not without appreciable opposition, are the lawyers steering such abusive practices. What the legislation proposed to address are the large fees received by plaintiff attorneys while class members are often left with coupons or monetary rewards of little or no value, unjust rewards to certain plaintiffs at the expense of other class members, and the publication of confusing notices that prevent potential members from asserting meritorious claims. Finally, legislators have recognized that the current federal rules permit the use of artful pleading by lawyers to avoid federal forums such that businesses are forced to defend interstate class actions in local jurisdictions where the lawyers, not claimants, are most likely to receive the benefits. The result is often that less scrutiny will be given to the merits of the case and defendants are effectively forced into settlement so as to avoid the very real possibility of unfair litigation and huge judgments that could destabilize their companies.

Pertinent Provisions

Recognizing the foregoing, Congress proposed legislation to assure fairer outcomes and outlaw certain practices that have become prevalent in interstate class actions. The legislation would amend the current rules governing federal class actions and federal jurisdiction, attempting to create a comprehensive framework by which class actions may be filed in or removed to federal court. In so doing, the legislation provided both procedural and substantive rights, seeking to protect both plaintiffs and defendants in a class action.

Procedural Rights

Procedurally, the legislation proposes to amend 28 U.S.C.A. §§ 1332, 1453 (added) and 1292, governing federal jurisdiction, removal, and appeals respectively. Under the proposed measure, a "class action" is (1) one filed in federal court under existing Federal Rules of Civil Procedure 23 or (2) any action removed to federal court that was originally filed pursuant to the state's procedural rule authorizing class actions. Thus, the definition of "class action" remains unchanged in the eyes of the federal judiciary; however, under the bill, (many more actions are subject to the federal judiciary's consideration).

Proposed amendments to 28 U.S.C.A. § 1332 provide the operative language of the bill and would give federal district courts original jurisdiction over any civil class action in which the aggregate amount in controversy is in excess of $5,000,000 and any member of the plaintiff class is a citizen of a state different from any defendant. This "minimal diversity" provision is subject to exceptions. Critical exceptions would afford the district court discretion to decline to exercise jurisdiction, pursuant to a consideration of several factors, where greater than one-third but less than two-thirds of the proposed plaintiffs and the primary defendants are citizens of the state in which the action was originally filed. The factors the court must consider involve whether the claim concerns matters of national or interstate interest, whether the claims will be governed by laws other than the state in which the action was filed, whether the action filed in state court was pled in such a way so as to avoid federal jurisdiction, whether the number of plaintiffs who were citizens of the state in which the action was filed is substantially larger than plaintiffs who were citizens of other states, and whether other similar actions have been filed ("parallel actions"). Federal jurisdiction would be foreclosed where the number of plaintiffs is less than

100 or more than two-thirds of the plaintiffs and the primary defendants are citizens of or the claims asserted would be primarily governed by the laws of the state in which the action was originally filed.

In conjunction with the foregoing, the bill also provides for the removal of actions filed in state court that satisfies the above criteria. Removal of class actions to federal court would be guided by the addition of 28 U.S.C.A. § 1453, which allows for removal to federal district court such actions without regard to whether any defendant is a citizen of the state in which the action was originally brought (an element which previously would have precluded removal), by any defendant without the consent of all defendants (previously, all defendants had to consent) and by any plaintiff who is not named or a class representative without the consent of all members.

> *The grant of certification often pressures defendants to settle, without regard to the validity or merits of the case.*

Finally, the bill provides that an order of the district court granting or denying class certification is immediately appealable. This section is significant, as certification has often been dispositive of the action. The grant of certification often pressures defendants to settle, without regard to the validity or merits of the case. The denial of certification will oftentimes lead to the abandonment of the plaintiffs' claims as the cost of pursuing numerous individual actions is generally prohibitive given what are frequently small individual rewards. In this vein, 28 U.S.C.A. § 1292 is amended to provide for same and, moreover, to stay all discovery during the pendency of the appeal, unless specific discovery is shown to be necessary upon motion of a party to preserve evidence or prevent undue prejudice. While the House version called for the bill to apply to any action commenced on or after its enactment date as well as all actions filed before such date but where a class-action order is entered after such date, the Senate version applied the bill only to class actions filed after its enactment date without retroactivity.

Substantive Rights

Appreciating that the self-interest of lawyers filing class actions often surmounts that of the class members and that class members often fail to receive just compensation, the bill also provides a "Consumer Class Action Bill of Rights" by adding 28 U.S.C.A. §§ 1712 – 1716. Therein, the bill established several safeguards. First, it calls for the courts to scrutinize and approve proposed settlements under which class members would receive coupons or non-cash awards. Second, the bill requires the court to approve any settlement whereby any class member is forced to pay sums to class counsel (i.e. where attorney's fee outweigh net rewards) resulting in a net loss to the class member. Third, courts would be prohibited from approving any settlement that pays greater sums to some class members solely on the basis that those members are located in closer proximity to the court in which the action is filed.

Fourth, the bill precludes courts from allowing any settlement awarding greater shares to class representatives (often called "bounties") than that awarded to other members (although representatives are permitted reimbursement for reasonable time and costs expended in filling their obligations as class representative). Fifth, notice of settlement information must be set out in "plain English" (the Senate version set forth proposed formats and requirements). Finally, the bill requires reporting on all federal class action settlements.

Pros and Cons Regarding the Proposed Legislation

Pros

Insurance, business, and industry interests have widely supported the legislation and applauded what it attempts to establish. These interests see the legislation as curbing extortion, putting escalating overhead costs and consumer prices in check, and preserving the foundations upon which many businesses rest (many of which had crumbled or had been shaken by forced or ongoing class-action settlements in multiple states). Indeed, it is estimated by some counsel that class action filing in state courts has, over the past 10 years, increased by 300 to 1,000 percent, with some notorious jurisdictions, called "magnets," seeing increases of 4,000 percent in the last five years. (GOP Committee Central, 6/13/03 Report on HR 1115; and Class Action Fairness Coalition – HR 1115). With such increases, some have calculated that litigation expenses have actually resulted in a 2 percent tax on consumer prices. (Citizens for a Sound Economy, 6/12/03).

As Congress has recognized, class actions often force settlements due solely to the cost, distraction, and/or potential embarrassment that they can bring, regardless of the merit of such claims. These costs are generally passed on in the form of higher consumer prices, increased insurance premiums, diminished retirement plan returns, and diminished investment in and restraints on innovation (GOP Committee Central, 6/13/03 Report on HR 115). Other promising features of the bill were that it would prevent venue shopping by trial lawyers that was achieved through careful and deliberate pleading in the hopes of obtaining sympathetic or favorable forums (i.e. naming one non-diverse party that bears no liability simply to preclude removal). In addition, the legislation would help relieve defendants from defending against similar cases being tried in multiple states simultaneously, generally yielding widely divergent and inconsistent results.

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Aside from consumer and financial concerns, the bill also prevents inequities and inconsistencies inherent in many interstate class actions. Specifically, the bill is directed at avoiding the problems inherent when a state court attempts to apply the laws of another state to its own citizens. Also, in a similar light, the bill relieves state courts from the problem of applying and enforcing its own or other laws and judgments over citizens of different states. Indeed, many class actions have resulted in state courts deciding out-of-state residents' claims against out-of-state companies under other states' laws.

Cons

Trial lawyers and consumer interests/protection groups have not sat by idly. The legislation calendar has been particular troubling to these groups as Congress has also been drafting and deliberating on other significant tort reform measures in the arenas of asbestos and medical malpractice litigation. The driving force behind the opposition to the Class Action Fairness Act is the concern that the bill unfairly helps corporate defendants by taking away the legal rights of families and giving them to industry (The Hill 4/23/03). For instance, plaintiffs' lawyers fear that the bill deprives a citizen the right of bringing suit on state law claims in his or her own state if the principal defendant is a citizen of a different state, even if the defendant had a substantial presence in the plaintiff's home state and the harm was suffered in that state (Senator Patrick Leahy Statement—4/10/03).

Another concern is that the legislation allows removal of important environmental class actions premised upon state environmental laws, thus denying state courts the opportunity to interpret and apply their own environmental protection regulations and hindering plaintiffs from pursuing significant environmental claims (Senator Patrick Leahy Statement—4/10/03). Given the enlargement of the federal jurisdiction, others have expressed concern that the bill will overload an already saturated federal docket—though such concerns have not provided much influential statistical support.

The bill's provision for an immediate appeal of a class certification order has also been subjected to criticism. One problem cited by interest groups is that such allowance will add significant delays to ongoing litigation as federal appellate processes often take in excess of one year. Another problem alluded to by those skeptical of corporate integrity is that a discovery stay attendant to the appeal process will allow corporate defendants ample time to destroy or hide evidence. Finally, critics argue that the bill permits the federal judiciary to impermissibly, and unconstitutionally, intrude on the autonomy of state courts and state law (Public Citizen—"Federal Class Action Legislation: A Wolf in Sheep's Clothing").

Conclusion

While the House has already debated the pros and cons and passed its version of the Class Action Fairness Act, Senate advocates of S. 274 will have to wait another day to pass the legislation. On October 22, 2003, Senate proponents failed to muster the needed 60 votes to procedurally move the bill to the Senate floor for consideration. The vote was 59 senators voting to move the bill forward and 39 voting against. Falling one vote short makes it likely that the proponents of the Class Action Fairness Act of 2003 will bring the matter up for reconsideration sometime in the near future. Senate leadership has, in fact, vowed to submit the matter again. However, there is little legislative time remaining this year, and it appears proponents will have to wait for passage of the Class Action Fairness Act of 2004. ■

Endnotes

1. As is detailed in this article, the Act did not receive sufficient support to make it to the Senate floor this session, but Senate leadership will present the bill again next session.
2. The filibuster tactic is designed to blockade a bill from being heard and considered by the full Senate or House.

Editor's note: The authors would like to thank Louis O. Oubre and Peter R. Tafaro of Duplass, Zwain, Bourgeois and Morton for their contributions to this article.

Absolute Pollution Exclusion: The Battle Over "Discharge"

Life After Belt Painting *and* Mackinnon

by Randy J. Maniloff, CPCU

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Maniloff handles a wide variety of insurance coverage matters in both the litigation and non-litigation arenas, including environmental property damage, toxic tort bodily injury/asbestos, construction defect, mold, general liability (products and premises), professional liability, director's and officer's liability, media liability, public official's liability, homeowners, first-party property, health care—including managed care and community associations.

Prior to joining Christie, Pabarue in 1997, Maniloff spent four years as in-house counsel for Professional Travel Insurance Company, Limited, an insurer based in Gibraltar, conducting business primarily in the United Kingdom.

The views expressed herein are solely those of the author and are not necessarily those of his firm or its clients.

Editor's note: For a further look at the issues raised in this article, see the following additional articles published by Maniloff: "Absolute Pollution Exclusion—The Summer Blockbusters; What do they mean for mold?," *Columns Mold,* October 2003, and "Absolute Pollution Exclusion: Drano and the Litigation Clog—Five Reasons Why There is No End in Sight to the Litigation," *Mealey's Litigation Report: Insurance,* June 24, 2003. Both are posted at www.cpmy.com.

As readers of this publication are well-aware, litigation surrounding the absolute pollution exclusion has reached "shock and awe" proportions. A combined federal and state search on Lexis for "'pollution exclusion' w/o absolute or total," undertaken at the time of this writing, produced 393 hits. And scores more cases are out there.

Not long ago, the Alabama Supreme Court addressed the absolute pollution exclusion in *Porterfield v Audubon Indemnity Company*.[1] The court had the following cogent observation about the enormous body of case law addressing the pollution exclusion:

> Our review and analysis of the entire body of existing precedent reveals that there exists not just a split of authority, but an absolute fragmentation of authority. Cases may be found for and against every issue any litigant has ever raised, and often the cases reaching the same conclusion as to a particular issue do so on the basis of differing, and sometimes inconsistent, rationales.[2]

A tremendous amount of absolute pollution exclusion litigation has been devoted to the question "what constitutes a 'pollutant?'" In addition, many courts have examined whether the absolute pollution exclusion, in the context of "non-traditional" environmental pollution, is capable of two meanings, rendering it ambiguous. And in some cases, these two issues are inter-related. However, a review of even a small sample of absolute pollution exclusion cases makes clear that there is much more to the litigation than these issues alone.

For example, in addition to these fundamental arguments, courts have also been required to address whether the absolute pollution exclusion applies: (1) to claims involving completed operations;[3] (2) when the asserted pollutant is being used for its intended purposes;[4] (3) when the nature of the insured's business involves the polluting operation;[5] (4) when challenged on the basis of its drafting history;[6] (5) if the alleged cause of the injury or damage is *negligence*, and not pollution;[7] (6) to claims for "personal injury" (trespass/nuisance);[8] (7) if the insured reasonably expected coverage;[9] and (8) when it is asserted that a "discharge" is lacking.[10] And the list could go on.

Even more remarkable than the amount of litigation to date concerning the absolute pollution exclusion is that there is every reason to believe that it will continue at its current clip, not to mention, likely become even more complex and dimensional. Thanks to such factors as (1) limitless factual scenarios in which the exclusion arises; (2) the willingness of courts to cite out-of-state opinions in reaching decisions; (3) variations in policy language; and (4) huge financial consequences riding on the outcome, absolute pollution exclusion decisions are sure to continue to leach from the nation's courthouses. Individually, each of these factors—in any insurance coverage situation—is likely to be associated with an increase in litigation frequency. When it comes to the absolute pollution exclusion, all four are in play.

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Absolute Pollution Exclusion: The Battle Over "Discharge"

Life After Belt Painting *and* Mackinnon

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Future cases are sure to involve one or more of the usual arguments. However, litigation surrounding the absolute pollution exclusion also appears poised to experience a renewed focus on the "discharge, dispersal, release, or escape" aspect of the exclusion. Such terms have played an important historic role in absolute pollution exclusion litigation. And they're not finished yet.

> *. . . litigation surrounding the absolute pollution exclusion also appears poised to experience a renewed focus on the "discharge, dispersal, release, or escape" aspect of the exclusion.*

In *Porterfield v Audubon Indemnity Company*, the Alabama Supreme Court, answering a certified question from the Middle District of Alabama, examined whether the absolute pollution exclusion bars coverage for claims for physical and mental injury allegedly suffered by children, as a result of allegedly inhaling and ingesting lead contained in paint, blinds, water, pipes, and soil on premises under the control of the insured. Following a lengthy review of the history of pollution exclusion case law, both in Alabama and nationally, the *Porterfield* court held that the exclusion was inapplicable, notwithstanding the court's conclusion that lead paint qualifies as a "pollutant." The *Porterfield* court stated:

> [I]n the specific context of the separation of particles of lead paint from the interior surfaces of a residential apartment, the terms "discharge," "dispersal," "release," or "escape" are reasonably susceptible to two or more constructions [and] there is reasonable doubt or confusion as to their meaning.[11]

In reaching its decision, *Porterfield* followed to the letter the 2001 decision from the Pennsylvania Supreme Court in *Lititz Mutual*, *supra*, which also involved lead paint. In *Lititz Mutual*, the Pennsylvania Supreme Court, like the *Porterfield* court, held that lead paint is unambiguously a "pollutant," citing its hazards as a cause of lead poisoning. However, notwithstanding the backdrop of its 1999 decision in *Madison Construction Co. v Harleysville Insurance Company*,[12] that the absolute pollution exclusion is "unambiguous," even in the context of "non-traditional" environmental pollution—the Supreme Court in *Lititz Mutual* declined to enforce the absolute pollution exclusion. The *Lititz Mutual* court held that the continual, imperceptible, and inevitable deterioration of paint that has been applied to the interior surface of a residence is not a discharge ("a flowing or issuing out"), a release ("the act or an instance of liberating or freeing"), or an escape ("an act or instance of escaping").[13]

In *Madison Construction*, the court, after defining the terms, "discharge," "dispersal," "seepage," "migration," "release," and "escape," concluded that "Common to all of these terms is, obviously, the element of movement. The listing of numerous similar terms such as 'discharge' and 'dispersal,' preceded by the phrase 'actual, alleged or threatened,' indicates an intent to comprehend *all such types and degrees of movement*."[14] Nonetheless, the *Lititz Mutual* court concluded that it was *now* necessary to assess "the specific form of movement in question."[15]

While it has become a cliché, it is no less true that hard cases make bad law, as Justice Holmes noted 99 years ago.[16] Without a doubt, absolute pollution exclusion cases involving lead paint are not easy and certainly have their share of "hydraulic pressure" to satisfy "immediate interests," as Justice Holmes observed in his now legendary quote. After all, cases that uphold the absolute pollution exclusion in the context of lead paint likely serve to deny compensation to young children that have been seriously harmed, at the hands of penny-pinching landlords, whose personal assets are likely safely protected behind a corporate veil.

The *Lititz Mutual* and *Porterfield* courts, in their zeal to find coverage for a sympathetic situation, have put out the welcome mat to highly technical arguments surrounding the interpretation of the "discharge, dispersal, release, or escape" aspect of the absolute pollution exclusion. While the invitation extends to both sides, it will be especially useful for policyholders confronting binding case law that the absolute pollution exclusion is clear and unambiguous, and applies to situations involving non-traditional environmental pollution.

As the saying goes, when the law is not on your side, argue the facts. *Lititz Mutual* invites policyholders (and insurers) to do just that, by retaining experts to attempt to establish that the bodily injury or property damage at issue in underlying litigation, even if indisputably caused by a "pollutant," was not (or was) caused by a "discharge, dispersal, release, or escape" of such pollutant.

Case in point. In *Mistick, Inc., et al. v Northwestern National Casualty Company*,[17] an insurer argued that, notwithstanding the Pennsylvania Supreme Court's decision in *Lititz Mutual*, its residential lead paint case compelled a different result. The insurer argued that its exclusion included the terms "seepage" and "migration," which were not at issue in *Lititz Mutual*. The Pennsylvania Superior Court disagreed, but followed the *Lititz Mutual* court's example and undertook a painstaking analysis of the movement contemplated by these terms.

While *Lititz Mutual* and *Porterfield* are not the first courts to use a narrow interpretation of the "discharge, dispersal, release, or escape" aspect of the absolute pollution exclusion to avoid its application, it would be easy to look at these decisions and conclude that their applicability is limited in scope—lead paint. However, two recent high-profile decisions have made it abundantly clear that debates concerning satisfaction of the "discharge, dispersal, release, or escape" aspect of the absolute pollution exclusion are not likely to be so limited.

It probably doesn't happen too often that the New York Court of Appeals and the California Supreme Court—arguably the two most influential state courts in the country—hand down decisions six weeks apart, involving similar facts and the same issue, reaching the same conclusion for the same reasons, and both in unanimous fashion. Such was the case not long ago.

On July 1, 2003, the New York Court of Appeals issued *Belt Painting Corp. v TIG Insurance Company*.[18] On August 14, 2003, the California Supreme Court handed down its decision in *Mackinnon, et al. v Truck Insurance Exchange*.[19] At issue was the absolute pollution exclusion.

In *Belt Painting Corp. v TIG Insurance Company*, the New York Court of Appeals addressed the applicability of the absolute pollution exclusion to an underlying action seeking damages for bodily injury as a result of the inhalation of paint or solvent fumes in an office building where the insured was performing painting and stripping work. In its trademark succinct fashion, the court concluded that the exclusion was ambiguous and affirmed the order of the Appellate Division, granting summary judgment to the insured. After setting out a brief history of the absolute pollution exclusion and some of the arguments at the heart of the protracted litigation surrounding its interpretation, the court provided four independent rationales for its decision.

> ■ *. . . the* Belt Painting *court concluded that the terms "discharge, dispersal, seepage, migration, release, or escape," as used in the exclusion, are terms of art in environmental law used with reference to damage or injury caused by disposal or containment of hazardous waste.*

First, the *Belt Painting* court concluded that the terms "discharge, dispersal, seepage, migration, release, or escape," as used in the exclusion, are terms of art in environmental law used with reference to damage or injury caused by disposal or containment of hazardous waste. Second, the court noted that, under the insurer's interpretation, any "chemical" or "material to be recycled" that could "irritate" person or property would be a "pollutant." This, the court concluded, proves too much and would infinitely enlarge the scope of the term "pollutants."

The *Belt Painting* court was also not persuaded that the absence of the language "into or upon the land, the atmosphere or any water course or body of water" in the absolute pollution exclusion (such terms having been removed from the "sudden and accidental" pollution exclusion) eliminates or overcomes the environmental implications of the terms "discharge, dispersal, seepage, migration, release, or escape."

Finally, and most significantly, the *Belt Painting* court stated that, even if paint or solvent fumes are within the definition of "pollutant," the underlying injury was not caused by the "discharge, dispersal, seepage, migration, release, or escape" of the fumes. The court stated, "It can not be said that this language unambiguously applies to ordinary paint or solvent fumes that drifted a short distance from the area of the insured's intended use and allegedly caused inhalation injuries to a bystander."[20]

In *Mackinnon, et al. v Truck Insurance Exchange*, the California Supreme Court addressed the applicability of the absolute pollution exclusion under the following tragic circumstances. A landlord, at a tenant's request, hired an exterminator to eradicate yellow jackets in an apartment building. The tenant that requested the exterminator died—allegedly from pesticide exposure. The decedent's parents brought an action seeking damages for wrongful death. The landlord sought coverage from its CGL insurer. The insurer denied coverage on the basis of the absolute pollution exclusion.

In general, the *Mackinnon* court determined that the insurer's "broad interpretation of the pollution exclusion leads to absurd results and ignores the familiar connotations of the words used in the exclusion." The court concluded that, because "discharge, dispersal, release, or escape" are environmental terms of art and because the pollution exclusion was adopted to address the enormous potential liability resulting from anti-pollution laws enacted between 1966 and 1980, the absolute pollution exclusion is limited to "environmental pollution."

The *Mackinnon* court also chose to take the "no discharge" route to arrive at its decision. The court concluded that the spraying or application of pesticides in and around an apartment building does

Continued on page 10

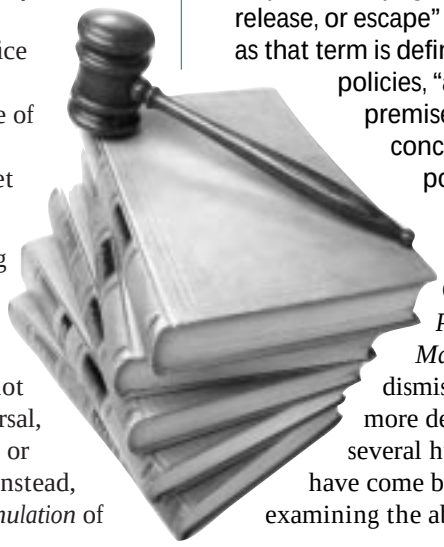
Absolute Pollution Exclusion: The Battle Over "Discharge"

Life After Belt Painting *and* Mackinnon

Continued from page 9

not satisfy the "discharge, dispersal, release, or escape" element of the absolute pollution exclusion. The court took an interesting approach to get there, noting that examination of dictionary definitions, although useful, do not necessarily yield the "ordinary and popular" sense of the word if it disregards the policy's context. To avoid this problem, the *Mackinnon* court turned to the nation's media to examine how they used the terms "disperse" and "discharge" with respect to pesticides. After examining articles from the *Chicago Sun-Times*, *Los Angeles Times*, *San Diego Union-Tribune*, *San Francisco Chronicle* and, my personal favorite, a radio broadcast of "All Things Considered," the *Mackinnon* court concluded that the terms "discharge" and "dispersal" did not apply to pesticides being normally applied. (Advice to non-California counsel—the next time you cite a radio broadcast in a brief, even NPR, be sure to include a blank check. It will make it easier for the court to collect the sanction.)

The question surrounding satisfaction of the "discharge" element in the absolute pollution exclusion came up in a September 16, 2003, decision from the United States District Court for the Northern District of Texas. In *Hamm, et al. v Allstate Insurance Company, et al.*,[21] the court addressed the applicability of the absolute pollution exclusion to a claim for bodily injury allegedly caused by exposure to fumes in an office building. The fumes were generated during the course of work being performed in a bathroom, located a few feet from the plaintiffs' office.



The insured and underlying plaintiffs argued that the pollution exclusion did not apply because the underlying complaint did not allege the "discharge, dispersal, seepage, migration, release, or escape of pollutants," but, instead, complained about an *accumulation* of pollutants in and the failure to properly ventilate the office building. The *Hamm* court was egged on, but did not bite:

> Although Intervenors' petition couches their claim as seeking redress for injuries caused by an accumulation of pollutants and the failure to properly ventilate the office building, their injuries resulted in the first place from the fact that the toluene fumes moved from the bathroom to their office. Certainly, permitting the fumes to accumulate inside the building and failing to adequately ventilate the building might have exacerbated Intervenors' injuries. It is clear from Intervenors' petition, however, that their injuries were caused by their exposure, while in their fifth-floor office, to fumes from chemicals applied in the fifth-floor bathroom during a remodeling project. The only way those fumes could have affected Intervenors in their office is if the fumes first were either discharged, dispersed, or released from the bathroom or escaped, seeped, or migrated from the bathroom into Intervenors' office. Although Intervenors have attempted to artfully plead their claim so as to invoke coverage under the policies, because their injuries arose from the "discharge, dispersal, seepage, migration, release, or escape" of a "pollutant," as that term is defined under the policies, "at . . . [the] premises," the Court concludes that the pollution exclusions bar coverage.[22]

On one hand, *Belt Painting* and *Mackinnon* could be dismissed as just two more decisions in a mix of several hundred others that have come before them, examining the absolute pollution exclusion. However, these decisions are unlikely to be so diluted. To the contrary, coming as a one-two punch from unanimous high courts of New York and California, it is doubtful that *Belt Painting* and *Mackinnon* will go unnoticed by future courts facing the absolute pollution exclusion in the context of non-traditional environmental pollution. Indeed, even courts that have previously ruled in the opposite manner on the exclusion may view *Belt Painting* and *Mackinnon* as cases justifying another look—especially since, when it comes to the absolute pollution exclusion, courts have generally not shown a hesitancy to examine out of state cases. It would not come as a surprise to this coverage attorney if *Belt Painting* and *Mackinnon* served as the catalyst for the insurance industry's consideration of a new version of the pollution exclusion.

> ■ *. . . it is doubtful that* Belt Painting *and* Mackinnon *will go unnoticed by future courts facing the absolute pollution exclusion in the context of non-traditional environmental pollution.*

Where *Belt Painting* and *Mackinnon* are likely to have the greatest impact is the "discharge, dispersal, release, or escape" aspect of the exclusion. Compared to applying the argument in the context of lead paint in a residential setting, *Belt Painting* and *Mackinnon* have now taken the "no discharge" argument a giant leap farther, applying it in the context of fumes that admittedly traveled and pesticides that were *admittedly sprayed*. Courts that are faced with a substance that is undeniably a "pollutant," yet still want to find coverage, are likely to examine the "no discharge" rationale as a potential basis for doing so. ■

Endnotes

1. 2002 Ala. LEXIS 331.
2. *Porterfield* at 33.
3. See *Kimber Petroleum Corporation v Travelers Indemnity Company, et al.,* 689 A. 2d 747 (N.J. Super. App. Div. 1997).
4. See *West American Insurance v Tufco Flooring,* 409 S.E. 2d 692 (N.C. App. 1991), review denied 420 S.E. 2d 826 (N.C. 1992).
5. See *American States Insurance Company v Kiger,* 662 N.E. 2d 945 (Ind. 1996).
6. See *American States Insurance Company v Koloms,* 687 N.E. 2d 72 (Ill. 1997).
7. See *Matcon Diamond, Inc. v Penn National Insurance Company,* 815 A. 2d 1109 (Pa. Super. 2003).
8. See *Kitsap County v Allstate Insurance Company,* 964 P. 2d 1173 (Wash. 1998).
9. See *The Cincinnati Insurance Company v Becker Warehouse, Inc., et al.,* 635 N.W. 2d 112 (Neb. 2001).
10. *Lititz Mutual Insurance Co. v Steely,* 785 A. 2d 985 (Pa. 2001).
11. *Porterfield* at 50.
12. 735 A. 2d 100 (Pa. 1999).
13. *Lititz Mutual* at 982.
14. *Madison Construction* at 108 (italics added).
15. *Lititz Mutual* at 981.
16. *Northern Securities Company v United States,* 193 U.S. 197, 400-01 (1904).
17. 806 A. 2d 39 (Pa. Super. 2002).
18. 2003 N.Y. LEXIS 1745
19. 2003 Cal. LEXIS 5692
20. Id. at 14.
21. Reprinted in *Mealey's Litigation Report: Insurance,* October 7, 2003, section B.
22. Id. at B-3.

Claims Section Committee Member Profiles

by Brian M. Philbin, CPCU, CLU, ChFC

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Bob joined the Claims Section Committee in March 2003 and immediately got involved on the planning and development of a seminar, which will be presented by the Claims Section at the 2004 Annual Meeting and Seminars in Los Angeles.

Bob has 29 years of experience in the claim business in the State of Ohio, which includes a memorable event: the starting of a claim department for Victoria Fire & Casualty Company in 1986, in greater Cleveland.

Bob received his CPCU in 1997, and has since enrolled in and completed the Society's National Leadership Institute in May 2002. He has also completed another NLI course and qualified for the NLI diploma plaque.

Currently Bob works at Westfield Group as a claims specialist in northeast Ohio and is responsible for complex casualty and uninsured motorists claims.

Bob is also very active in his chapter and is on the Board of Directors for the CPCU Society's Akron-Canton Chapter. He is also a member of Akron Claims Association.

In the community, Bob speaks at local high school economics classes regarding insurance and social responsibility. He is happily married, has three children, and in his free time he is an avid angler especially for Northern Pike. ■

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Brian received his CPCU designation in 1995 and has been recently appointed to the committee. Brian's focus centers upon insurance fraud, currently sitting on the Anti-Fraud Committee with Nationwide Insurance, and with material damage trends and challenges. Brian joined the claims committee this year and looks forward to working with the committee and local chapters on these and other claims issues facing the insurance industry.

Brian received his M.B.A. from the Ohio State University in 1998. He has enjoyed a broad range of experience with Nationwide Insurance in the P&C company with roles in sales, product/underwriting, and claims. He has been with Nationwide for 15 years.

Brian has recently been promoted to state claims officer charged with all functional claims operations in Alabama, Georgia, and South Carolina. He and his wife will be moving to the Alpharetta, Georgia area soon. They have two daughters who are attending college in Ohio. ■

Statistics and Observations on the Colorado Blizzard of 2003

by Matthew T. Blackmer, P.E.

Matthew T. Blackmer, P.E., holds a bachelor of science in civil engineering, and a master of science in civil engineering with emphasis on structural engineering. Blackmer possesses extensive knowledge in structural and civil engineering, lending to his efficiency in the analyses of structural failures, and is experienced in all aspects of structural investigations including fire damage, flood damage, expansive soils, construction defects, and repair recommendations. Blackmer's investigations and inspections range from construction defects, concrete and foundation design/installation, and steeply dipping bedrock issues. He has considerable project experience in working with insurance companies, lawyers, homeowners, management companies, and homeowner associations. Additionally, Blackmer is actively affiliated with various professional engineering, and construction/concrete organizations. You may contact him at mblackmer@callpie.com or (303) 552-0177.

On the morning of March 18, 2003, snow began falling at the rate of one-half inch per hour and at times, over an inch per hour. Overnight, as much as 18 inches fell in some areas near the foothills. By Wednesday morning March 19, 2003, most of the roads in the Denver Metro area were no longer passable, and many businesses began shutting down for lack of employees. Most of the neighborhoods were not plowed because the plows could not get through snow higher than the plow blade. Most residents in the city and outlying neighborhoods could not get out of their streets until Saturday March 22, 2003. In some areas as much as five-feet of snow accumulated, not including drifting. The official snow level in downtown Denver was 32 inches.

Colorado sustained the highest insured loss for the first quarter of 2003 in the United States with property and casualty insurers according to *Claims Magazine*. At $315 million, the majority of these losses were a result of a record-breaking snowstorm that hit the Denver, Colorado metropolitan area beginning March 18, 2003. This storm caused extensive structural damage to buildings.

The majority of commercial and residential structural roof collapses observed and analyzed by Professional Investigative Engineers (PIE) failed as a result of insufficient design and/or insufficient construction. Tom Meyers, plans analyst with the City and County of Broomfield and the current president of the Colorado Chapter of the International Code Council, said the failure mechanisms they have seen as a result of snow loads include, "missing structural components and damaged structural components." PIE found that upon structural analysis, many roofs in Denver County, on paper, failed between 10 to 20 pounds per square foot (psf). Today Denver requires between 25 to 30 psf, depending on the category.

A large percentage of the residential failures observed were related to "rafter"-type structures. Many older homes are constructed with rafter-type systems in lieu of pre-engineered wood truss systems or post-and-beam construction. With a rafter-type system, the rafters rely on the exterior walls to be sufficiently rigid. As the roof structure is loaded, the rafters compress the ridge board at the top and exert outward pressure on the bearing walls. Based on our observations, these rafter-type roofs typically failed when the bottoms of the rafters were not adequately tied together by means of collar ties, or the bearing walls were not sufficiently rigid. When a rafter-type roof fails, the roof "flattens out" and the bearing walls of the home displace outward causing significant damage to the roof members and the bearing walls of the home.

In addition to the rafter-type roof failures, some failures were also observed in residential structures with post-and-beam construction. PIE observed failures in both beams and roof joists where either drifting loads exceeded the strength of the members or where the structural members were undersized even for the basic design snow load as required by most of the building departments in the Denver Metro area.

A large amount of additional claims have occurred due to excessive deflection and cosmetic damage in the structures. Many residential structures were subject to large deflection and "serviceability failures," including drywall cracking, sagging roof members, bowed bearing walls, and racked doors. In these cases, a serviceability failure has occurred, which is more difficult to assess than a catastrophic collapse.

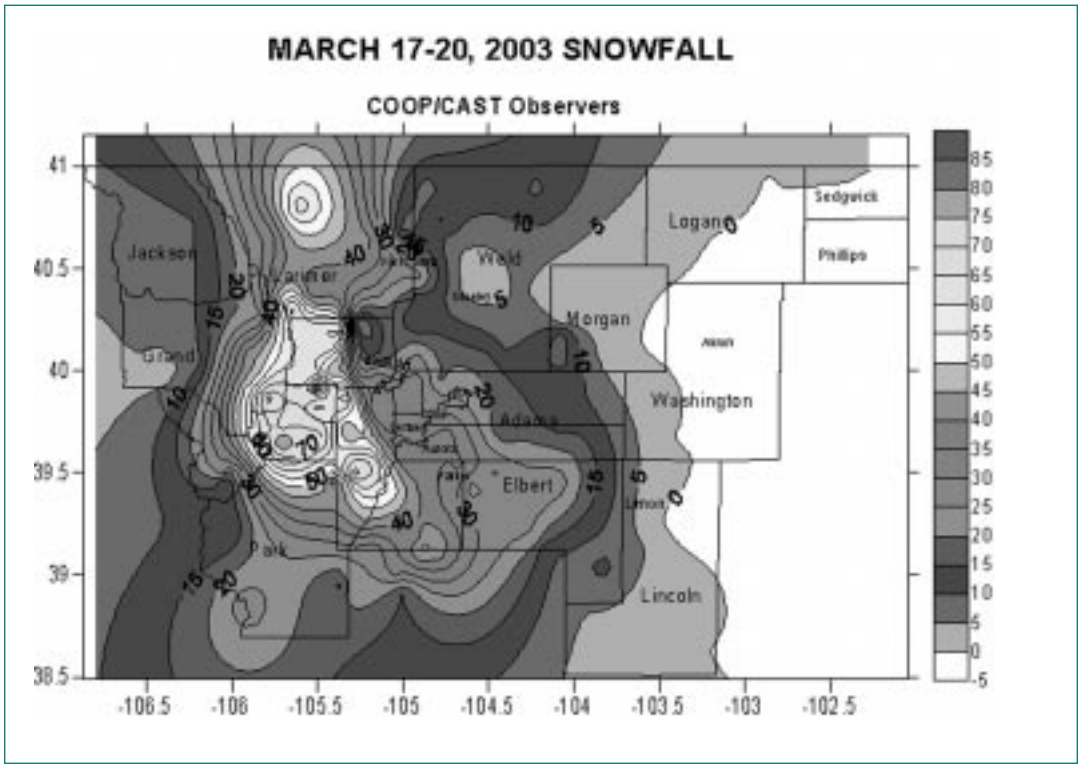
Jefferson County requires that building design consider "drifting and unbalanced snow loads." Jefferson County's Basic Snow Load table can be accessed at: http://206.247.49.21/ext/dpt/public_works/building/200irc.htm. In addition to Jefferson County, any building department that has adopted the Uniform Building Code as its governing code requires that drifting and unbalanced snow loads be considered. Many of the structures PIE inspected did not take these conditions into consideration. During this event we observed drifting snow, typically on north slopes, commonly in the 4 to 6 foot range and reported as high as 8 to 10 feet on one roof collapse we investigated in Windsor, Colorado. According to TheDenverChannel.com this snow was "very wet: about 8 inches

equaled an inch in precipitation, as compared with the usual 11 inches," meteorologists said. According to the *Rocky Mountain News*, there was as much as 1.2 inches of water in 6 inches of snow. A cubic foot of water is equivalent to 62.4 pounds. Thus, in a foot thickness of snow (2.4 inches of water), the weight was as much as 12.5 pounds per square foot on the structure. If 3 feet of snow accumulated on the structure, the weight was nearly 37.5 pounds per square foot.

It is our firm's opinion there is likely a large number of roofs that have been damaged during this event that are yet undiscovered and will be seen over the next few years, or could fail during a future less significant event. Many of the rafter-type structures may have flattened out, and some of the structural members may have cracked as a result of the snowstorm. Many homeowners or building owners may not have fully inspected their structures for damage, which could cause future problems.

Tom Meyers said that "snow loading and eccentric drifting" relevant to building codes have been under review prior to this event and are now more likely to be a priority to code officials and the Colorado Chapter ICC. PIE believes there is strong potential for code revisions because of the large number of failures from the March 2003 snowstorm. Several building officials do not believe code revisions are needed, but believe that good plan review, proper field inspection, and code enforcement are the keys to preventing future failures. There are even some code officials that are proponents of a reduction in the snow loads in the Denver Metro area.

Although there were typical injuries and even deaths as a result of a storm of this magnitude (i.e. heart attacks and vehicle accidents) what we found amazing was there were no deaths caused by the approximately 100 flat-roof collapses. Our firm investigated commercial buildings that experienced catastrophic roof collapses, and had they been occupied, the fatalities would have been numerous. The lack of fatalities and relatively few injuries can be attributed to businesses closing as the snow accumulated and people taking refuge in their homes. In most cases, employees just could not get out of their street to get to work. Events of this nature pull communities together. All across the front range and plains of Colorado, people pulled together to unbury cars, dig out driveways and streets, shovel snow off of roofs, and in emergencies providing transportation on snowmobiles. ■



■ *Above is a graphical representation of the snowfall accumulation during the week of March 17, 2003, as recorded by the National Weather Service (Source: National Weather Service).*

Are You Professionally Obsolete?

by Donna J. Popow, J.D., CPCU, AIC

Donna J. Popow, J.D., CPCU, AIC, is the director of curriculum and intellectual property manager for AICPCU/IIA. She can be reached at (610) 644-2100, ext. 7556 or by e-mail at popow@cpcuiia.org.

According to H.G. Kaufman in his book on obsolescence and professional career development, obsolescence is the degree to which professionals lack up-to-date knowledge or skills necessary to maintain effective performance in either their current or future work roles.[1]

Everyone suffers from professional obsolescence in some area. No professional can keep up to date on every aspect of their job. If we spent all of the time needed, which is estimated at about 20 percent of our working time, we wouldn't get any real work done.[2]

Professional obsolescence will hit each and every one of us at some point. Age, gender, education, and performance rating have no effect on professional obsolescence.[3] We are all susceptible to it. In 1972, S.S. Dubin, writing for the *American Psychologist*, described the half-life of a professional's competence as the time after completion of professional training when, because of new developments, practicing professionals have become roughly half as competent as they were upon graduation to meet the demands of their profession.[4]

We have a professional and ethical obligation to avoid professional obsolescence. The CPCU Code of Ethics requires that we continually maintain and improve our professional knowledge, skills, and competence. Continuing education is one of the primary ways to meet this obligation.

To meet this ethical obligation, each one of us must examine our own areas of competence. Ask yourself if you are able to handle each claim assigned to you. Are your professional skills and resources sufficient to do so? Are you a professional?

Many different authors have described the characteristics of a professional. They include such things as:

- high ethical standards
- increased competence in problem solving
- capacity to use complex knowledge
- independence
- formal training such as AIC or CPCU
- self-enhancement or self-improvement
- scholarship
- integrity
- enthusiasm

A professional is someone who conforms to the technical and ethical standards of a profession. Professionalism is a word used to denote the qualities that characterize a professional. Above all, professionalism is an attitude.[5] Regardless of what profession you are in, when your professionalism is being discussed, it connotes a pride in your work, a commitment to quality, a dedication to the interests of the client, and a sincere desire to help.[6] I can't think of a more fitting description of a professional adjuster.

However, the term professional is not one that you get to give yourself.[7] It is a term conferred upon you by your clients and associates. There is a distinct link between high professional standards and consumer confidence. Consumer confidence or client satisfaction is one of the most important values of professionalism. If your clients are satisfied, your business and your reputation will grow.

Professionalism can give you a competitive advantage, whether you are

Attendees of the CPCU Society's 59th Annual Meeting and Seminars took advantage of the numerous educational offerings and could have earned up to 16 CE credits.

trying to win a new client or are asking for a promotion. An IIA survey found that 75 percent of the respondents said that designations were important in positively affecting promotion, and 66 percent said it was somewhat to very important in hiring.[8]

Continuing education is a building block of professionalism. It can positively impact employee retention. It has been found that companies who support career development by including it in performance reviews experience a 1 to 3.5 percent lower turnover rate than companies who do not.[9]

Professionalism also contributes to personal growth. By expanding your knowledge base, you not only perform your current job assignment more accurately and efficiently, you begin to position yourself for your next career move.

There are costs associated with continuing education. It costs money to provide courses, travel to seminars, and lose productive work days. Rather than focus on these costs, instead focus on the cost of professional obsolescence. You lose productivity if you aren't aware of the latest technology and case law developments. Or you can be subject to a bad-faith judgment.

■ *. . . if you don't carefully plan your continuing education, you lose time and money.*

And, if you don't carefully plan your continuing education, you lose time and money. All too often, we have suffered at the hands of an instructor who had been coerced into giving a lecture on a topic with which he or she was not entirely familiar, because the timing and location of the class were convenient and enabled us to put in enough hours of attendance to meet a CE requirement.

That is not productive continuing education and it is certainly not evidence of professionalism.

The benefits of education belong to the individual, regardless of who pays for the course. Therefore, take personal responsibility for your job improvement and career improvement.

Here are some suggestions on how to get the most value from your CE dollar and hour. Begin by viewing CE as your own personal research and development.[10] Focus on what will benefit your career, not just your current position. Link your learning objective to your business objectives. Do a self-assessment of the skills your clients or customers will need you to have in the next five years. Those skills that your customers will need are where you should put your CE dollar and hour. Put these two assessments in writing. Keep them with your business plan or your personal file. Every time you participate in CE, put a copy of the course curriculum in the file. At the end of the year, review this file. Did you meet your CE objectives? Do you need to reassess your objectives based on changes in the marketplace?

Your CE goals can be as focused as learning a new line of coverage to as broad as learning project management or presentation skills. Remember this is your personal research and development. It will be a continuous process, throughout your working life, so it should be broad-based and structured.

Before you sign up for another CE course, there is one other assessment that you need to do. Determine what your learning style is. Go to www.engr.ncsu.edu/learningstyles/ilsweb.html.

Take the test. It takes about five minutes. You will get results immediately. Scroll down to the bottom of the page and click on the link for the description of learning styles. Once you have some insight into your learning style, you can make better CE selections.

I also think that our work environment dictates what type of CE we should look for. Our learning must be integrated into our work. Our work regularly resents us with choices between different courses of action and ethical dilemmas. Textbooks and case histories are fine for our formal education or credentialing, but they may not be the best source of CE for adjusters. It may be more meaningful for you, depending upon your CE objectives, to find courses and workshops that use your work experience as a starting point for the participants to engage in analysis and discussion.

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Are You Professionally Obsolete?

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Here is my challenge to you. When you go back to your office figure out the number of hours you spend at work. Then figure out how many of those hours are billable. By billable, I mean how many hours in a day you spend actually adjusting claims, as opposed to doing administrative work. Take the non-billable hours figure and cut it in half. One-half of that time will be used for administrative work. The other half of the non-billable time is the time you will invest in CE. Notice I said invest. Because if you invest this non-billable time carefully, it will redefine your client relationship, give you new skills, and determine your future.[11]

Now, many adjusters will say that they do not have the time for continuing education, but they really do. So let me give you an example. A typical accountant spends 2,640 hours per year at work. He or she will normally bill out 1,200 of those hours. That leaves 1,400 non-billable hours.[12] Surveys show that most of that time is not used productively.

By carefully mapping out your CE objectives, you can put the 700 hours of CE time into producing concrete results.

My goal here was to make you all a little uneasy. None of us wants to be professionally obsolete. So take stock of your skills. Assess the needs of your clients. Create a plan for growth that links your learning objectives to your business plan. Determine your learning style. Then get the most value for your CE dollar and hour by taking CE courses that support your objectives and match your style.

Continuing education is not a luxury. It is a necessity. ■

Endnotes

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Technical Writing: "Don't Let It Be Your Nemesis"

by Brian N. Marx, CPCU

Brian N. Marx, CPCU, currently serves as vice president and newsletter editor of the CPCU Society's New Jersey Chapter, and serves the Society at the national level as a member of the Claims Section Committee. He is a noted subrogation speaker, and has authored several subrogation-related articles that were published in *Claims Magazine* and in the Claims Section's quarterly newsletter, *CQ.* Marx has 15 years of experience in the claims industry, received his bachelor's degree in economics from Cook College, Rutgers University, and his master's degree from Rutgers.

Expressing your thoughts on paper can be a daunting task, even for those writers who are familiar with the topic. The art of communicating the written word in a clear, logical, and cohesive manner can be intimidating, as well as mentally challenging. That's why the focus of this article is not about writing style or grammar, but rather a suggested method that can help ease the anxiety and break the psychological barriers you may have about writing a technical article.

Why is this kind of writing so difficult?

- One plausible explanation is the lack of time to sit down and patiently draft your thoughts and ideas on paper.
- Another probable, and perhaps more accurate, reason is the lack of practice.

No matter what the reason, this article will:

- Offer suggestions to assist those who would like to write technical articles.
- Help future authors develop a method for writing technical articles.
- Identify the benefits one can reap from sharing his or her ideas with the insurance community.

I will set three ground rules before discussing a simple methodology for technical writing:

Rule #1: You do not have to be a grammarian to be a good technical writer. Each writer has his or her own technique and style of writing.

Rule #2: Intuition, creativity, and motivation are three things you need to get started.

Rule #3: To be effective, each article should contain the following four characteristics: creativity, clarity, cohesiveness, and consequentiality. I call these the four Cs of writing.

Creativity means the article's content is original (i.e. one's own work), has insight, and the reader says, "Gee, I did not realize that relation existed" or "I didn't know it could be analyzed or done that way."

Clarity means that anyone who is only slightly familiar with the topic can understand the message or purpose being conveyed by the author.

Cohesiveness means that the article is focused and the ideas are tied together and presented in a logical manner. Cohesiveness greatly supports clarity.

Consequentiality means the article has significance to the industry, practical application to the readers' job performance, or personal application outside of work. Writing about an emerging issue, how a recent landmark case affects a line of insurance, or methods on how to save money in claim handling are good examples of consequential topics.

The following five sections are the stages of developing, drafting, and putting the finishing touches on an article. These are presented in the order in which I prefer to do them. However, the order really depends on the technique and preference you choose.

1. Selecting a topic: As mentioned, the topic should be one of interest and significance to the insurance industry as a whole or a large segment of it. Audiences usually identify with

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Technical Writing: "Don't Let It Be Your Nemesis"

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recent and emerging topics, since these subjects have an immediate effect on them. The topic should be one you're both interested in and knowledgeable about. Sharing your unique, on-the-job experiences and lessons learned from them add tremendous value to a piece of writing.

2. Selecting a title: A title should be eloquent, eye-catching, and accurately convey the meaning of the article in a short, concise manner. The length and content of the title are important, since the title is the first thing potential readers come in contact with. If the title is not interesting, the article, even if well written, may never get read. All that time and effort wasted!

3. Writing the introducing paragraph and conclusion: These two segments of the article are written before the main body of the article, because it forces the author to focus on the message he or she is going to convey to his or her readers. The introduction briefly, but concisely and effectively, articulates what the article is going to be about (expanding on the meaning of the title), its purpose, and what the reader can expect to glean from it. Like the title, it must peak the readers' interest so that they will continue to the main body of the article. The conclusion summarizes and integrates the salient points into the meaning and purpose of the article.

4. Writing the main body: The best way to tackle the main body of a paper is to write an outline on the major points you want to make and how each is going to prove or reinforce the main theme. Before including an argument or idea, make sure it does not introduce a new idea or concept that could potentially cause your article to lose cohesiveness or, even worse, your audience to become confused and lose interest. Once you have provided enough different ideas, perspectives, examples, or arguments, each as concisely as possible to support your main theme, stop! Too often authors, in an effort to impress their readers, try to include every last copious detail about the topic in their writing. This is counterproductive, ineffective, and usually causes the reader to lose interest. Good authors will say just enough to maintain and, hopefully pique, the readers' interest, provide them with enough information about the subject, and, if they wish, how and where they can procure additional information.

5. Polishing up the article: Even though the main components of the article are now complete, this does not mean that the article is finished. You should always wait at least a few days before scrutinizing the article. It should be reviewed by examining each of the following aspects separately: typographical and grammatical accuracy, technical accuracy, and to make sure it accurately and effectively conveys its meaning and purpose. In other words, does it say what you want it to say and meet the four "Cs?" One method of accomplishing the latter aspect is to have a peer (preferably one who is knowledgeable about the subject and painfully honest) review the article.

Writing technical articles can be a very rewarding experience and provides the following benefits to the writer:

- Enhances confidence: Once an author demonstrates that he is able to effectively articulate his ideas on paper, he can be considered a resource to others. In doing so, he creates a forum for himself, develops a reputation as an expert, and establishes a rapport between himself and his peers.
- Enhances knowledge about the subject matter: Additional ideas, relationships, and the application of concepts already known to the writer can come to mind when she puts her ideas on paper. Simply knowing a topic, working with it on the job, or explaining it to others are a lot different than putting it down on paper in an understandable and informative format.
- Creates networking opportunities: You never know who may be reading your article. Readers may contact you for additional insight, to advise of an upcoming event where you may be able to present this or related subject matter, about an employment opportunity or, if self-employed, about a potential marketing opportunity or assignment.
- Documents your knowledge: Publications add prestige to any curriculum vitae—there's no doubt about it. Writing is a very powerful tool. And, most clients, employers, and prospective employers admire those who get their work published. Your portfolio of writings demonstrates and even legitimizes to others the purview and scope of your knowledge, as well as manifests a seal of approval from those organizations that published your work.
- Provides a sense of accomplishment: Let's face it, writing is a skill as much as it is an art. And, it is not easy. A good writing technique takes a long time to develop and requires a lot of practice. It feels great when you are satisfied with your work and others compliment you on a job well done.

Before closing, I would like to make two very important comments to all those who are considering writing an article or who write less due to the amount of time and effort to complete one. First, don't try to say too much in one article. If you have a comprehensive topic that you want to cover like a blanket, divide it up and advise the reader of the sequels. It will keep your readers interested and create additional marketing opportunities for you, either in the labor market or to prospective clients. Second, give credit where credit is due. If you are using another author's words or ideas, remember to properly footnote the references so that you avoid any potential allegations of plagiarism.

In closing, I would like to say that the more you write, the easier and more enjoyable it will get. The Claims Section invites its members to submit articles for consideration to be published in the *CQ*. The committee will gladly assist you on any topic you wish to write on so that you to can reap the rewards mentioned. So . . . good luck and keep those ideas and articles coming. Our phone and fax lines, web site, and e-mail addresses are open and waiting to hear from you. ■

Claims Section Committee Needs Your Opinion

by Brian N. Marx, CPCU

As part of the Claims Section mission statement, the Claims Section Committee continuously explores ways to deliver value to the services we provide to our members. Testimony to our commitment, dedication, and ability to deliver value was recognized by the Society. At the Annual Meeting and Seminars in New Orleans, the Claims Section was awarded the coveted gold award in the Sections Circle of Excellence. Further affirmation of our ability to attract and retain members, the Claims Section boasts the largest membership of all the interest sections. Jim Franz, CPCU, the immediate past chairman, said it best at the most recent Claims Section Committee meeting in New Orleans, "People want to be associated with a winner."

In order to maintain a high level of quality service and expand our membership, the Claims Section Committee must constantly keep its finger on the pulse of our members and prospective members. We can not do it alone. We need feedback and input from our members on what their needs are. Surveys are one method in which the committee can solicit and, hopefully, extrapolate and procure information and ideas from the claims community. Participation, feedback, and an open line of communication are crucial to enabling the committee to do its job and maintain our reputation as a trendsetter for the interest sections.

As all claims professionals realize, the political and legal environment that shape the landscape in which we must handle claims is dynamic and continuously evolving. There is an oasis of knowledge in the claims community and we need to disseminate it in the most effective and efficient fashion for the benefit of the claims industry. With this in mind, the Claims Section Committee strives not only to galvanize its members to further their education, but also to keep them abreast of emerging issues, so that everyone can stay at the educational cutting edge of whatever line of insurance they handle.

In short, our objective is to be able to provide a definitive answer to one of the most popular questions asked by interest section members in general, "What am I getting for my $30 section membership fee?" The Claims Section Committee realizes that the members, or their sponsoring employers, are entitled to a definitive answer to this question. That said, we urge our members to respond to the upcoming survey and provide us with some "straight talk" on how the Claims Section is responding to your needs as a section member. We will then correlate the feedback information and report back in the next *CQ*.

Thanks again for making us number one!

Look for the survey on the claims web site, on the Special Interest Sections tab, on the CPCU Society's web site at www.cpcusociety.org. ■

What's in this Issue of *CQ*?

Mark Your Calendar!

2004 CPCU Society Educational Events

April 22-23	National Leadership Institute Tampa, FL
October 23-26	60th Annual Meeting and Seminars Los Angeles, CA

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